

EMPLOYMENT ACT (NORTHERN IRELAND) 2010

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Employment Act (Northern Ireland) 2010 which received Royal Assent on 2 August 2010. They have been prepared by the Department for Employment and Learning (“the Department”) in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by the Assembly.
2. The notes need to be read in conjunction with the Act. They do not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section or Schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. The Department is responsible for regulation of the private recruitment sector in Northern Ireland under the Employment (Miscellaneous Provisions) (NI) Order 1981 and the Conduct of Employment Agencies and Employment Businesses Regulations (NI) 2005. The Department was granted powers to enter and inspect Northern Ireland-based employment agencies and employment businesses in 2006, and currently employs two employment agency inspectors to routinely inspect employment agencies and investigate complaints. If an employment agency does not comply with the law, the Department can prosecute the agency in a Magistrates’ Court, or apply to an industrial tribunal to prohibit an individual from operating, or being concerned with the operation of, an employment agency for up to ten years. There is a need, however, to enhance the Department’s powers of investigation and prosecution of very serious offences under employment agency law.
4. Existing provision relating to the Industrial Court’s appointments process is enshrined in primary legislation and is too restrictive, in that even a minor modification would require an appropriate legislative vehicle to enact and could only be achieved over a lengthy timescale. In addition, there is currently no power to remove or suspend members of the Court. More flexible regulation-making powers in relation to Industrial Court appointments are introduced via this Act.
5. Article 92(4) of the Industrial Relations (NI) Order 1992 contains a restriction which prohibits legal representation within seven of the Industrial Court’s eight jurisdictions. The original intention of the restriction was to limit the formality of the Court and encourage consensus-building in relation to the Court’s role in arbitrating in trade

disputes and resolving complaints about the disclosure of information for the purposes of collective bargaining. Subsequently, however, the Department received legal advice that failure to allow legal representation could lead to a challenge under Article 6 of the European Convention on Human Rights (Right to a fair trial). Consequently, this Act amends Article 92(4) to enable those parties that so choose to engage legal representation, with the exception of one jurisdiction which is related to the provision of voluntary arbitration in relation to industrial disputes.

CONSULTATION

6. In June 2008 the Department sought views on policy proposals to enhance its powers regarding employment agency enforcement and to extend legal representation in relation to Industrial Court jurisdictions. Consultation ran for 17 weeks and closed on 30 September 2008. Responses to the public consultation were presented to the Assembly Committee for Employment and Learning on 26 November 2008. The Committee responded on 11 December 2008 that it was content with the proposals as now contained in the Act.
7. The Department received 13 responses to the consultation on employment agency enforcement, 8 of which contained substantive comments. All substantive respondents were fully in support of the broad thrust of the proposals contained in the consultation document.
8. Industrial Court provisions, relating to new regulation-making powers and the removal of the restriction that requires the Department to provide the Court case manager, were previously consulted upon as part of the Public Authorities Reform Order from 24 January to 20 April 2007. Three responses were received, with the Industrial Court welcoming the provision of regulation-making powers. The change to consultation rights in relation to the appointment of the Certification Officer is as a result of discussions between the Department and the Labour Relations Agency (LRA) on the need for clarification on this matter.

OPTIONS CONSIDERED

9. In the employment agency enforcement consultation, the Department recommended allowing serious breaches of employment agency law to be triable either in the Magistrates' Court (as at present) or in the Crown Court, thereby allowing for unlimited fines; and providing the Department with a power to compel agencies or third parties such as banks to provide financial information about an agency for investigation purposes. These proposals were welcomed by respondents to the consultation. The only other option was to do nothing. The Department considers that existing penalties in the Magistrates' Court are ineffective when compared to the money that can be made by unscrupulous employment agencies. With regard to investigation powers, the Department is receiving a number of complaints which require investigation (including a number with a financial aspect) and considers it sensible to have the necessary provisions in place to help ensure adequate investigation of complaints.

10. A further issue was not included in the consultation but was raised by consultees. This related to effective information-sharing between enforcement agencies. As a result of the consultation, and also following a recommendation in the report published by the GB Vulnerable Workers forum, it has been decided to include in the Act a provision to allow for the lawful exchange of inspection information between the Department's employment agency inspectors and HM Revenue and Customs National Minimum Wage compliance officers. Again, the only alternative at present is to do nothing. The Department considers that some agency workers on low wages are potentially vulnerable to abuse and a power to exchange information with HM Revenue and Customs would enable investigation of unscrupulous employers to proceed more efficiently and quickly.
11. The Industrial Relations (NI) Order 1992 did not permit parties appearing before the Industrial Court to be legally represented in seven of the eight Court jurisdictions. The Department received legal advice that this may breach Article 6 of the Human Rights Act; i.e. the right to a fair trial. This Act extends legal representation to all but one Industrial Court jurisdiction. This reflects the view of the Industrial Court that this jurisdiction, which provides for voluntary arbitration, by its nature, would not benefit from legal representation. The only other option considered was to leave the legislation as is, but this approach would be contrary to legal advice received.

OVERVIEW

12. The Employment Act contains provisions in the following areas:
 - Amendment to the Employment (Miscellaneous Provisions) (NI) Order 1981 to enhance the Department's powers to investigate and prosecute serious offences by unscrupulous employment agencies.
 - Amendments to the National Minimum Wage Act 1998 and the Employment (Miscellaneous Provisions) (NI) Order 1981 to permit the sharing of inspection information between the Department's employment agency inspectors and HM Revenue and Customs' National Minimum Wage compliance officers.
 - Amendment to the Industrial Relations (NI) Order 1992 to provide greater flexibility by replacing the arrangements for Industrial Court appointments with equivalent subordinate legislation provisions and to remove the restriction that the Court's secretariat functions may only be fulfilled by staff from the Department.
 - Amendment to Article 92(4) of the Industrial Relations (NI) Order 1992 to extend legal representation to all but one of the jurisdictions of the Industrial Court.
 - Amendments to Articles 56 and 198 of the Employment Rights (NI) Order 1996 to provide powers for industrial tribunals to compensate workers (the definition of which includes employees) for financial loss resulting from unlawful deductions from wages and employees from the non-payment of statutory redundancy awards.

*These Notes refer to the Employment Act (Northern Ireland) 2010 (c.12)
which received Royal Assent on 2 August 2010*

- Amendments to section 1 of the Employment and Training Act (NI)1950 and Article 4 (1) of the Employment and Training (Amendment) (NI) Order 1988 to ensure that people taking part in Departmental employment and training programmes and receiving payments in connection with their participation will have those payments treated as a Training Allowance and not as employed income.
- Amendments to the Industrial Relations (NI) Order 1992 to provide for the Department to consult the LRA about the arrangements for appointing the Certification Officer.
- Amendments to the Industrial Relations (NI) Order 1992, Schedule 4, paragraph 2 and the Industrial Training (NI) Order 1984, Schedule 2, paragraph 2 (2) to clarify legislation in relation to the consultation process on appointments to the LRA and CITB-ConstructionSkills Northern Ireland.
- Amendment to Article 92 of the Industrial Relations (NI) Order 1992 to amend incorrect references to the Arbitration Act.
- Amendment to Articles 67M and 103B of the Employment Rights (NI) Order 1996 to amend incorrect references to jury service legislation.
- Repeal of Article 16 of the Employment Relations (NI) Order 2004. These provisions were introduced by the 2004 Employment Relations Order, but were not commenced, and are no longer required.

13. The Act has 9 sections and 2 Schedules.

COMMENTARY ON SECTIONS

Section 1: Employment agencies: mode of trial and penalties for certain offences

Section 1 amends the Employment (Miscellaneous Provisions) (NI) Order 1981 to provide for offences under employment agency legislation to be triable either in a Magistrates' Court or the Crown Court. At present, the maximum fine that can be awarded by a Magistrates' Court can be no greater than level five on the standard scale (currently £5,000). Agencies that act unlawfully can make much more than this amount. Allowing more serious cases to be tried in the Crown Court will provide for the potential for unlimited fines to be awarded against such agencies.

Section 2: Employment agencies: powers of enforcement

Section 2 amends the Employment (Miscellaneous Provisions) (NI) Order 1981 to provide the Department with powers to compel agencies and third parties, such as banks, to provide the Department with financial information about an agency for investigation purposes. Limits will be placed on the circumstances in which this power can be used and it will only be available where an agency is suspected of serious offences under employment agency legislation and is asked for, but does not provide, the necessary financial information. This

power can only be used following authorisation by a senior officer of the Department (at least Director-level).

Section 3: Membership of the Industrial Court

Section 3 makes amendments to the Industrial Relations (NI) Order 1992 to replace current arrangements for Industrial Court appointments with equivalent subordinate legislation provisions which will provide greater flexibility in making appointments.

Section 4: Legal representation before the Industrial Court

Section 4 amends Article 92(4) of the Industrial Relations (NI) Order 1992 to enable parties before the Industrial Court to engage legal representation with the exception of one jurisdiction which is related to the provision of voluntary arbitration in relation to industrial disputes. Legal advice states that failure to allow legal representation could lead to a challenge under Article 6 of the European Convention on Human Rights (Right to a fair trial). Voluntary arbitration, by its nature, would not benefit from legal representation.

Section 5: Employment agencies and national minimum wage: information

Section 5 amends the National Minimum Wage Act 1998 and the Employment (Miscellaneous Provisions) (NI) Order 1981 to clarify the law relating to information-sharing and allow HM Revenue and Customs National Minimum Wage compliance officers and Department for Employment and Learning employment agency inspectors to legally share and exchange information discovered by them in the course of exercising their powers. The exchange of such information was previously restricted. The removal of this restriction enables, for example, employment agency inspectors to report breaches of the National Minimum Wage Act by employment businesses to HM Revenue and Customs.

Section 6: Compensation for financial loss

Section 6 provides a simplified process for claimants who have suffered direct financial losses as a result of unlawful deductions from wages, including failure to pay the National Minimum Wage, and the non-payment of statutory redundancy awards. Previously, an industrial tribunal could only order an employer to pay or repay the amount arising from the employer's direct liability for breaches of law in this area. The claimant was therefore left to bring a separate action in the civil courts for financial losses incurred over and above the amount owed but which could be attributed to the non-payment or unauthorised deduction; for instance, as a result of charges for unauthorised overdrafts. Section 6 allows an industrial tribunal to make an additional award against the employer to compensate workers (which includes employees) for the full financial loss they have sustained as a result of unlawful deductions from wages and employees for non-payment of redundancy awards.

Section 7: Minor and consequential amendments and repeals

Section 7 provides that the minor and consequential amendments and repeals set out in the Schedules to the Act will have effect.

Section 8: Commencement

Section 8 gives the Department power to bring the membership of the Industrial Court provision of the Act into operation by commencement order. It also provides that the remaining provisions of the Act will come into operation on the day after the Act receives Royal Assent.

Section 9: Short Title

Section 9 cites the title of the Act. This is the title by which the Act will be known.

Schedule 1: Minor and consequential amendments

Schedule 1 provides for a number of minor and consequential amendments including:

- Amendments to Section 1 of the Employment and Training Act 1950 and Article 4 (1) of the Employment and Training (Amendment) (NI) Order 1988 to ensure that people taking part in Departmental employment and training programmes and receiving payments in connection with their participation have those payments treated as a Training Allowance and not as employed income;
- Amendments to the Industrial Relations (NI) Order 1992 to provide for the Department to consult the LRA about the arrangements for appointing the Certification Officer;
- Amendments to the Industrial Relations (NI) Order 1992, Schedule 4, paragraph 2 and the Industrial Training (NI) Order 1984, Schedule 2, paragraph 2 (2) to clarify legislation in relation to the consultation process on appointments to the Labour Relations Agency and the CITB-ConstructionSkills Northern Ireland, respectively;
- Amendment to Article 92 of the Industrial Relations (NI) Order 1992 to amend incorrect references to the Arbitration Act;
- Amendment to Schedule 1A of the Trade Union and Labour Relations (NI) Order 1995 to remove the restriction that the Court's secretariat functions may only be fulfilled by staff from the Department; and
- Amendment to Articles 67M and 103B of the Employment Rights (NI) Order 1996 to amend incorrect references to jury service legislation.

Schedule 2: Repeals

Schedule 2 provides for a number of repeals in relation to the provisions within the Act. It also provides for the repeal of Article 16 of the Employment Relations (NI) Order 2004.

HANSARD REPORTS

14. The following table sets out the dates of the Hansard reports for each stage of the Act's passage through the Assembly.

STAGE	DATE
Introduction to the Assembly	22 June 2009
Second Stage debate	30 June 2009
Committee Stage – consideration of sections 1 to 8 and Schedules 1 and 2	16 September 2009
Committee Stage – evidence from Officials on sections 1 to 8, Schedules 1 and 2 and proposed amendments	23 September 2009
Committee's report on the Act – Report number 20/09/10R	21 October 2009
Consideration Stage in the Assembly	25 May 2010
Further Consideration Stage	7 June 2010
Final Stage	15 June 2010
Royal Assent	2 August 2010

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