

EMPLOYMENT RELATIONS ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Trade unions

Section 2 and Schedule 2: Detriment related to trade union membership

120. Existing law protects employees against positive acts to prevent or deter trade union membership, non-membership or activities but not against omissions on the same grounds. In other words, if an employer takes action which gives a benefit to non union members but omits to confer the same benefit to union members, the omission does not constitute action short of dismissal on grounds related to trade union membership under section 146 of the 1992 Act. This aspect of the law was brought to light in the cases *Associated Newspapers v Wilson* and *Associated British Ports v Palmer [HL 1995] ICR 406*, where the House of Lords held that the word “action” in section 146 did not extend to omissions to act.
121. *Section 2* gives effect to Schedule 2, which amends section 146 so as to prohibit this form of detriment by omission and makes consequential amendments to other related sections of the 1992 Act; section 147 on the time limit for applications to be made to employment tribunals; section 148 on the consideration of a complaint by tribunals; section 149 on the remedies which tribunals can award; and section 150 on awards against third parties.
122. *Paragraph 2* of Schedule 2 replaces references in sections 146(1), (3) and (4) of the 1992 Act to action short of dismissal on grounds related to trade union membership, non-membership or activities with references to a right not to be subjected to any detriment as an individual by an act or deliberate failure to act on the part of the employer for one of the prohibited purposes. Section 146(5), which sets out the ground on which an employee may present a complaint to an employment tribunal as action taken against him, is amended accordingly. Similarly, *paragraphs 3 to 6* make consequential amendments to sections 147, 148, 149 and 150 of the 1992 Act, which deal respectively with the time limits for bringing complaints before an employment tribunal, the criteria to be applied by the tribunal in determining the purpose of an employer’s action, the remedies available in the event that the tribunal find a complaint is well-founded and proceedings against third parties.