

EMPLOYMENT RELATIONS ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

CAC, ACAS, Commissioners and Certification Officer

Sections 24 and 25: Central Arbitration Committee

233. The Central Arbitration Committee (CAC) is an independent public body established by the Employment Protection Act 1975. Its constitution is laid down in sections 259-265 of the 1992 Act. The CAC's functions are currently to determine statutory claims from trade unions relating to the disclosure of information for collective bargaining purposes and to provide voluntary arbitration in trade disputes between employers and trade unions. In the three years from 1995 to 1997, the CAC received seventy applications to exercise its functions concerning the disclosure of information for collective bargaining purposes and no requests to arbitrate in trade disputes. The CAC currently has three Deputy Chairmen and eight panel members, representing employer and employee organisations. A new Chairman is expected to be appointed later this year.
234. **Section 1** and Schedule 1 to the Act confer new functions on the CAC to administer the statutory trade union recognition and derecognition scheme and determine cases brought under it. The purpose of sections 24 and 25 is to revise some of the statutory provisions relating to the CAC to enable it to carry out these new functions. Section 24 amends the procedures for the appointment of members to the CAC and section 25 provides for amendments to the proceedings of the CAC.

Section 24: CAC: members

235. The appointment of CAC members is covered by section 260 of the 1992 Act. Section 24 contains new provisions to replace the first three subsections of section 260. It gives the Secretary of State the power to appoint all members of the CAC and enables him to appoint one of them as chairman and one or more of them as deputy chairmen. In carrying out these functions, the Secretary of State must consult ACAS, and may consult others as he sees fit. Currently, ACAS nominates all members of the Committee, apart from the chairman.
236. The section also provides that all the persons appointed to the Committee must be experienced in industrial relations and that the Secretary of State must ensure that among the CAC's membership there are both individuals experienced as representatives of employers and as representatives of workers.

Section 25: CAC: proceedings

237. The section sets out the way in which the CAC is to organise its proceedings when carrying out its functions under the recognition and derecognition scheme. It does this by inserting additional provisions into section 263 of the 1992 Act. It leaves unaffected the way in which the CAC organises proceedings in relation to its two current functions.

Section 26: ACAS: General duty

238. The Advisory, Conciliation and Arbitration Service (ACAS) was established under the Employment Protection Act 1975. It is an executive non-departmental public body with about 700 staff. ACAS provides conciliation in collective trade disputes and most categories of dispute about individual employment rights. The Service appoints mediators and arbitrators to make recommendations to resolve disputes. It also provides advice and information in a wide range of ways to improve industrial relations and help prevent disputes from arising.
239. ACAS's general duty is found in section 209 of the 1992 Act as last amended by the Trade Union Reform and Employment Rights Act 1993. Section 26 amends section 209 by removing the particular requirement on ACAS to give priority to its work on dispute resolution leaving it to read: "It is the general duty of ACAS to promote the improvement of industrial relations".

Section 27: ACAS: Reports

240. **Section 27** changes the reporting arrangements of ACAS and the CAC. *Subsection (1)* amends section 253(1) of the 1992 Act changing the period covered by ACAS's annual report from a calendar year to a financial year. This change means that the periods covered by ACAS's annual report and its accounts will be the same. *Subsection (2)* makes the corresponding change to section 265(1) of the 1992 Act to ensure that the periods covered by the CAC's report and financial accounts will coincide. A similar provision is made in respect of the annual reports of the Certification Officer in Schedule 6, which is dealt with later in this commentary.

Section 28: Abolition of Commissioners

241. *Subsection (1)* abolishes two public offices: the Commissioner for the Rights of Trade Union Members (CRTUM) and the Commissioner for Protection Against Unlawful Industrial Action (CPAUIA). The CRTUM was established under the Employment Act 1988 and his main function is to provide material assistance to any trade union member who is taking, or contemplating taking, certain legal proceedings against his union or against an official of his union. The CPAUIA was established under the Trade Union Reform and Employment Rights Act 1993 and his main function is to provide material assistance to any individual who is taking, or contemplating taking, legal proceedings against a trade union whose unlawful organisation of industrial action deprives or is likely to deprive the individual of goods and services. For both bodies, assistance usually takes the form of paying for legal advice or meeting legal costs. Both Commissioners are independent of Government and cannot be directed by Ministers to assist, or not to assist, any particular application. The legal provisions establishing both offices have been incorporated into the 1992 Act.
242. Both Commissioners are part-time appointments currently held by the same individual. Since his inception, the CRTUM has assisted, on average, ten applications a year and the CPAUIA has assisted one application to date.
243. *Subsection (2)* repeals the sections of the 1992 Act which set out the duties of the CRTUM and the CPAUIA and which set out administrative provisions by which they operate. *Subsection (3)* removes the reference to the CRTUM from the standard form of words which is required to be included in the financial position statement which trade unions are required to provide to their members each year under section 32A of the 1992 Act.

Section 29 and Schedule 6: The Certification Officer

244. The Certification Officer (CO) is an independent statutory officer established under the Employment Protection Act 1975. His current functions include:

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(c.26) which received Royal Assent on 27 July 1999*

- maintaining lists of trade unions and employers' associations and ensuring that both types of body comply with statutory requirements concerning their membership and accounting records;
- the auditing of accounts;
- annual returns;
- financial affairs;
- political funds; and
- procedures for amalgamations and transfers of engagements.

He also determines whether unions meet the statutory test of independence and deals with complaints by union members concerning alleged breaches by unions of their statutory duties to elect senior officers. In certain of these areas, he has powers to issue declarations or make orders requiring unions to remedy any failure to comply with their statutory obligations.

245. *Section 29* gives effect to Schedule 6, which amends the statutory powers of the Certification Officer, as set out in the 1992 Act. The overall effect is to widen the scope for trade union members to make complaints to the CO of alleged breaches of trade union law or trade union rules, thereby enlarging the CO's role as an alternative to the courts as a means to resolve disputes. It achieves this by giving the CO order-making powers in areas of trade union law where he makes only declarations at present, and by extending his powers to make declarations and orders into areas where he has no competence to hear complaints and issue such orders at present. The CO's powers in respect of employers' associations remain unchanged.
246. *Paragraphs 2-5* of the Schedule amend the powers conferred upon the CO and the court by sections 24, 24A, 25 and 26 of the 1992 Act. Section 24 places requirements on unions to compile and maintain a register of the names and addresses of their members. Section 24A requires unions to place a duty of confidentiality on the scrutineers and independent persons they appoint to oversee an election, political fund or merger ballots. This duty requires scrutineers and independent persons not to disclose the names or addresses of members on union registers, except under certain specified circumstances. Sections 25 and 26 specify how individuals can seek a remedy from the CO or the courts respectively for alleged breaches of these requirements.
247. *Paragraph 2* amends section 24 by repealing provisions which allow a complainant to make an application to the court after he has made an application on the same matter to the CO. This closes off a route whereby an applicant could make two parallel applications to the CO and to the court. *Paragraph 3* has the same effect in relation to cases brought to the CO under section 24A.
248. *Paragraph 4* amends section 25 by:
- requiring the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;
 - requiring the CO to make an enforcement order (unless he considers it inappropriate to do so) on the union to remedy a declared failure to comply with the law on membership records and/or to abstain from acts which might lead to a future recurrence of same kind of failure;
 - enabling the CO's enforcement order to be enforced in the same way as an order of the court;
 - enabling any member of the union who was a member at the time of the declared failure to apply to the court to force the union to comply with the CO's order;

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- enabling the CO's declaration to be relied upon as if it were a declaration of the court;
 - preventing parallel proceedings by an applicant to the CO after he has applied to the courts; and
 - requiring the CO, when hearing complaints, to take account of the outcome of such cases as are brought to his attention where the court has already heard a complaint by a different person relating to the same alleged failure by the union.
249. *Paragraph 5* amends section 26 by:
- preventing parallel proceedings by an applicant to the court after he has already applied to the CO;
 - repealing the reference to the conduct of parallel proceedings in subsection (2); and
 - requiring the court, when hearing complaints, to take account of the outcome of such cases as are brought to the court's attention where the CO has already heard a complaint by a different person relating to the same alleged failure by the union.
250. *Paragraph 6* amends section 31 of the 1992 Act, which specifies the remedy available to a union member if a union fails to provide him with access to the union's accounting records as required in section 30 of that Act. The amendments:
- give powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time;
 - require the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;
 - give powers to the CO to issue orders, as appropriate, to ensure the applicant can inspect the records in the company of an accountant and to obtain copies of records;
 - specify that the CO's orders may be enforced in the same way as a court order;
 - specify that the CO shall determine cases within six months, as far as practicable; and
 - prevent the applicant from taking parallel proceedings regarding the same complaint to both the court or the CO.
251. *Paragraph 7* amends section 45C of the 1992 Act, which provides a remedy for a trade union member who alleges that his union has failed to comply with its duty under section 45B to ensure that disqualified individuals do not hold certain senior positions in the union if they have been convicted of certain offences relating to the financial affairs of the union. The disqualification period is for five or ten years, depending on the nature of the offence. Currently, the CO can hear complaints and issue declarations but cannot issue orders. The amendments:
- give powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time;
 - give powers to the CO to issue orders, as appropriate, imposing requirements on the union to remedy a declared failure;
 - require the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;

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- specify that the CO's orders may be enforced in the same way as a court order;
 - enable the CO's declaration to be relied upon as if it were a declaration of the court;
 - prevent the applicant from taking parallel proceedings regarding the same complaint to both the court or the CO; and
 - ensure that, where the court has heard a case relating to a particular alleged failure, the CO must take the court's judgements and decisions into account when hearing an application by a different person in relation to the same alleged failure. They also ensure that the court must take into account the decisions and observations of the CO in the reverse situation where the CO first heard a case.
252. *Paragraph 8* inserts a new section 45D into the 1992 Act which provides that the parties to a case considered by the CO under sections 25, 31 or 45C of Chapter III of the 1992 Act can appeal to the Employment Appeal Tribunal (EAT) against the CO's decision in that case. The appeal relates to questions of law only, and not to questions of fact. The effect of the change is to make the EAT the body to which appeals can be made against CO decisions in cases relating to a union's duties to maintain accurate membership records; to give access to its accounting records; and to ensure that disqualified individuals do not hold certain senior positions in the union.
253. *Paragraphs 9-12* amend powers assigned to the CO and the court under sections 54, 55 and 56 of the 1992 Act to hear complaints about alleged failures by unions to comply with the law on elections for certain senior positions in unions. The law on elections is contained in Chapter IV of the 1992 Act and covers, among other things, elections to a union's principal executive committee and to the positions of general secretary and president where such post holders can vote at meetings of a principal executive committee. Currently, the CO can hear complaints and issue declarations but cannot issue orders.
254. *Paragraph 9* amends section 54 by repealing the provision that the making of an application to the CO does not prevent an individual making an application to the court in relation to the same matter.
255. *Paragraph 10* amends section 55 by:
- requiring the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;
 - requiring the CO to make an enforcement order (unless he considers it inappropriate to do so) on the union to remedy a declared failure to comply with the law on elections and/or to abstain from acts which might lead to a future recurrence of the same kind of failure. The CO's order may also require the union to re-run the election under conditions which the CO is empowered to stipulate;
 - enabling the CO's enforcement order to be enforced in the same way as an order of the court;
 - enabling any member of the union who was a member at the time the order was made or any candidate in the election in question to apply to the courts to force the union to comply with the CO's order;
 - enabling the CO's declaration to be relied upon as if it were a declaration of the court;
 - preventing parallel proceedings by an applicant to the CO after he has applied to the court; and
 - requiring the CO, when hearing complaints, to take account of the outcome of such cases as are brought to his attention where the court has already heard a complaint by a different person relating to the same alleged failure by the union.

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256. *Paragraph 11* amends section 56 by:
- preventing parallel proceedings by an applicant in the court after he has applied to the CO; and
 - requiring the court, when hearing complaints, to take account of the outcome of such cases as are brought to its attention where the CO has already heard a complaint by a different person relating to the same alleged failure by the union.
257. *Paragraph 12* adds a new section 56A to the 1992 Act which provides that the parties to a case considered by the CO under section 55 can appeal to the EAT against the CO's decision in that case. The appeal relates to questions of law only, and not to questions of fact.
258. *Paragraph 13* gives new powers to the CO to hear complaints by a union member relating to the use of his union's funds for certain political objects where the union does not have a political fund. Section 71 of the 1992 Act makes it unlawful for a union to spend money from its general fund on the political objects set out in section 72. Such expenditure may be financed only from a properly established political fund. Paragraph 13 inserts a new section 72A into the 1992 Act which:
- gives powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time;
 - gives powers to the CO to make or refuse declarations relating to the alleged breach, giving reasons for his decision in writing. If he makes a declaration, the CO must specify which provisions of section 71 have been breached and which sums of money were involved. When considering complaints, the CO may make such enquiries as he thinks fit and he may make written observations about the cases;
 - requires the CO, where he is satisfied the union has or will take steps to remedy its failure to comply with the law, to specify in the declaration the steps taken by a union;
 - gives powers to the CO to issue orders, as appropriate, imposing requirements on the union to remedy the breach;
 - requires the CO to give an opportunity to both the applicant and the trade union to be heard;
 - enables any member of the union who was a member at the time when the CO's order was made to apply to the court to force the union to comply with the CO's order;
 - provides that the CO's orders may be enforced in the same way as a court order;
 - enables the CO's declaration to be relied upon as if it were a declaration of the court;
 - provides that the CO shall determine cases within six months, as far as practicable; and
 - prevents parallel proceedings by an applicant to the CO after he has applied to the court, and vice versa.
259. *Paragraphs 14 and 15* extend the CO's powers under sections 79 and 80 of the 1992 Act when hearing complaints about an alleged failure by a union to comply with the rules relating to political fund ballots. The law requires such ballots in order to establish a political fund. Once a fund is established, further ballots on its retention must be held, at least every ten years. Unions must first seek the approval of the CO for the rules under which it proposes to conduct the ballot. The CO can already make or refuse to make

declarations for alleged failures to comply with these approved rules when holding or planning to hold ballots.

260. *Paragraph 14* amends section 79 by repealing the provision that the making of an application to the CO does not prevent an individual making an application to the court in relation to the same matter.
261. *Paragraph 15* amends section 80 by:
- requiring the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;
 - requiring the CO to make an enforcement order on the union to remedy a declared failure to comply with the law on political fund ballots elections and/or to abstain from acts which might lead to a future recurrence of the same kind of failure, unless the CO considers such an order to be inappropriate. The CO's order may also require the union to re-run a ballot;
 - enabling the CO's enforcement order to be enforced in the same way as an order of the court;
 - enabling any member of the union who was a member at the time of the order was made or any candidate in the election in question to apply to the court to force the union to comply with the CO's order;
 - enabling the CO's declaration to be relied upon as if it were a declaration of the court;
 - preventing parallel proceedings by an applicant to the CO after he has applied to the court; and
 - requiring the CO, when hearing complaints, to take account of the outcome of such cases as are brought to his attention where the court has already heard a complaint by a different person relating to the same alleged failure by the union.
262. *Paragraph 16* amends section 81, which deals with the entitlement to apply to the courts for declarations relating to failures by unions to comply with political ballot rules. The amendment prevents applications to the court by a person who has already made an application to the CO about the same alleged failure. It also requires the court, when hearing complaints, to take account of the outcome of such cases as are brought to its attention where the CO has already heard a complaint by a different person relating to the same alleged failure by the union.
263. *Paragraph 17* amends section 82, which gives powers to the CO to determine complaints by union members about alleged breaches of statute relating to the political funds of unions. The amendments give powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time.
264. *Paragraph 18* deals with the powers of the CO to hear complaints by union members that unions are in breach of their statute or rules in connection with gaining their members' approval for union amalgamations or transfers of undertakings. The statutory requirements in respect of these union mergers are set out in sections 99 to 103E of the 1992 Act. Section 103 of the 1992 Act gives the CO powers to hear and to make declarations and orders about complaints in this area. Paragraph 18 amends these powers by:
- giving powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time;

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- enabling the CO's declaration to be relied upon as if it were a declaration of the court;
 - enabling any member of the union who was a member at the time of the order was made to apply to the courts to force the union to comply with the CO's order; and
 - enabling the CO's enforcement order to be enforced in the same way as an order of the courts.
265. *Paragraph 19* adds a new Chapter VIIA to the 1992 Act which establishes an entitlement for trade union members to complain to the CO about certain alleged breaches of the rules of their trade unions. Currently, trade union members can complain to the court about such breaches, and this entitlement will continue. The effect of the paragraph therefore is to establish an alternative to the court as a means for trade union members to seek remedies in relation to certain alleged breaches of union rules. The new Chapter VIIA comprises three new sections: 108A, 108B and 108C.
266. *New section 108A* specifies the circumstances under which a complaint can be made to the CO and gives the CO powers to make declarations after receiving such complaints. New subsection (2) provides that the alleged breach or threatened breach of union rules must relate to certain specified matters if a complaint is to be made to the CO, namely:
- the appointment or election of a person to any office in the union;
 - the removal of a person from an office of the union;
 - disciplinary proceedings by the union against a member of the union;
 - the balloting of union members, other than political fund ballots (new subsection (4)) and industrial action ballots (as defined in new subsection (8));
 - the constitution or proceedings of union executive committees and decision-making meetings (as defined in new subsections (9), (10) and (11)); and
 - any other matter which the Secretary of State specifies by order subject to affirmative resolution procedure (under new subsection (12)).
267. New subsection (3) restricts applicants to members of the union or individuals who were members at the time of the alleged breach or threatened breach. New subsection (4) provides that the CO cannot hear complaints about a breach of rules in respect of the dismissal or disciplining of any employee of the union. (The new section does not affect the entitlement of individuals employed by unions to make applications to employment tribunals alleging unfair dismissal or an infringement of other individual employment rights.)
268. New subsections (5) and (6) set out the timetable within which applications must be made to the CO. In cases where the internal complaints procedure of a union was not used, applications must be made within six months of the date of the alleged breach or threatened breach. In cases where the internal complaints procedure of a union was used within six months of the alleged breach, applications must be made to the CO within six months of the date on which the consideration of the complaint under the procedure ended or twelve months after the procedure was invoked whichever is the sooner.
269. New subsection (13) prevents a subsequent parallel application to the court by someone who has already applied to the CO about the same alleged breach, but does not affect the right to appeal to the court against a decision of the CO. Similarly, new subsection (14) prevents a parallel application being made to the CO by someone who has already applied to the court in respect of the same alleged breach.
270. *New section 108B(1)* empowers the CO to refuse to accept an application unless the applicant satisfies him that all reasonable steps have been taken to use any internal complaint procedures of the union to resolve the dispute.

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271. *New section 108B(2)* gives the CO the power to make, or refuse to make, declarations and requires the CO:
- to give an opportunity to the applicant and the union to be heard;
 - to ensure that, as far as reasonably practicable, he determines cases within six months; and
 - to give reasons for his decisions in writing.
272. *New section 108B(2)* also enables the CO to make such enquiries as he sees fit about a union member's complaint, and under *new section 108B(5)* the CO may ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time.
273. *New sections 108B(3) and 108B(4)* give the CO the power to issue enforcement orders imposing requirements on the union to remedy the breach or withdraw the threat of a breach within a specified time period. Such an order may also require the union to take steps to ensure that the breach does not recur in the future.
274. *New section 108B(6)* provides that the CO's declaration may be relied upon as if it were a declaration of the court and *new section 108B(8)* provides that an order by the CO may be enforced in the same way as a court order. *New section 108B(7)* enables any member of the union who was a member at the time when the CO's order was made to apply to the courts to force the union to comply with the CO's order.
275. *New section 108B(9)* empowers the Secretary of State to make provision for declarations and orders of the CO in orders under the new section 108A(2) adding to the matters in respect of which applications may be made to the CO.
276. *New section 108C* provides that the parties to a case considered by the CO under Chapter VIIA may appeal to the EAT against the CO's decision in that case. The appeal relates to questions of law only, and not to questions of fact.
277. *Paragraphs 20 and 21* of Schedule 6 concern employers' associations. They amend sections 132 and 133 of the 1992 Act, which deal with the use of funds for political purposes and the amalgamation of employers' associations, in order to leave unchanged the current arrangements whereby the CO hears complaints of alleged breaches of statute (which would otherwise be altered by the amendments to the provisions on trade unions, to which they currently cross-refer).
278. *Paragraph 22* amends the procedures which the CO is required to follow, as prescribed in section 256 of the 1992 Act. Its effect is to provide that the CO will normally disclose the name of an applicant or complainant, unless there are good grounds for not doing so. (If an individual had made a complaint to the court, his name would always be revealed to the responding union.) The purpose of the amendment is to ensure that, in most cases, the identity of a complainant will be disclosed to the union, irrespective of whether the complaint had been made to the court or to the CO.
279. *Paragraph 23* adds a new section 256A and a new section 256B to the 1992 Act, which concern the CO's handling of applications and complaints by vexatious litigants
280. In line with the changes made in respect of ACAS and the CAC by section 27, *paragraph 24* provides for the CO's annual report to be made on a financial year rather than calendar year basis.