

## **EMPLOYMENT ACT 2002**

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### **EXPLANATORY NOTES**

#### **COMMENTARY ON SECTIONS**

#### **Part 4: Miscellaneous and General**

#### **Miscellaneous**

#### ***Section 43: Union Learning Representatives***

97. Union learning representatives (ULRs) are a new type of lay union representative, whose main function is to advise union members about their training, educational and developmental needs. There are currently around 3,000 ULRs in existence. Their advice is usually provided direct to union members at their place of work, sometimes through face-to-face meetings with individuals.
98. Under section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the “1992 Act”), officials of an independent trade union which is recognised by their employer for collective bargaining purposes are permitted reasonable time off during working hours to carry out certain trade union duties or to undergo training relevant to carrying out their trade union duties. An employer who permits officials to take such time off must pay them for the time off taken in accordance with section 169 of the 1992 Act. The definition of an “independent union” is provided in section 5 of the 1992 Act.
99. Section 170 of the 1992 Act provides for employees to take reasonable time off during working hours to take part in the activities of their union. This right applies only where the employees belong to an independent union which is recognised by their employer and they form part of the bargaining unit for which the union is recognised. Employers are not required to pay their employees when they permit them to take this time off.
100. Employees may present a claim to an employment tribunal where their employer has failed to provide time off in accordance with sections 168, 169 or 170. Under section 172 of the 1992 Act, the employment tribunal may award compensation to employees where it finds that their complaints are well-founded. Under section 199(2) (a) and (2)(b) of the 1992 Act, the Advisory, Conciliation and Arbitration Service (ACAS) has a duty to provide practical guidance on the time off for trade union duties and activities to be permitted by an employer. In consequence, ACAS has produced a Code of Practice entitled “Time Off for Trade Union Duties and Activities: ACAS code of practice 3”. Where relevant, this Code must be taken into account by employment tribunals when determining complaints.
101. There is no current legislation, which specifically governs the activities of ULRs. ULRs do not fall within the definition of the term “official” used in section 168. It is also unclear whether accessing the services of a ULR falls within the definition of “trade union activities” used in section 170. This means that trade union members have no clear statutory entitlement for time off to undertake the duties of a ULR, to be trained as a ULR or to access the services of a ULR. In effect, it is entirely or largely a voluntary matter whether employers permit ULRs to function at their workplaces and, where they

*These notes refer to the Employment Act 2002  
(c.22) which received Royal Assent on 8 July 2002*

do permit them to function, it is a matter for the employer to decide what time off, if any, is allowed.

102. The section amends the 1992 Act and provides paid time off rights to ULRs to carry out their functions and undergo training which are broadly equivalent to the current rights enjoyed by trade union officials under section 168. The section amends section 170 to make it clear that the right to unpaid time off under that section applies to union members accessing the services of a ULR. The section also gives powers to ACAS and the Secretary of State to issue a Code of Practice providing practical guidance on the application of these entitlements to reasonable time off.
103. Subsections (2) And Paragraphs 18, 19 and 20 of Schedule 6
- Subsection (2) inserts a new section 168A into the 1992 Act which specifies the rights to time off for ULRs. This new section has a similar structure to the existing s168 and, in some places, common wording is used.
104. New Section 168A
- Subsection (1) of new section 168A sets out the general requirement for an employer to allow time off to a ULR. It limits the requirement to ULRs who are members of an independent union recognised by that employer for collective bargaining purposes.
  - Subsection (2) defines the activities of a ULR for which time off must be allowed. Together with *subsection (10)*, it limits the time off requirement to activities undertaken on behalf of fellow employees who are members of the ULR's union and for whom the ULR has the function of acting as a ULR. These employees are categorised as "qualifying members of the trade union". ULRs are therefore not entitled to time off to provide similar services on behalf of non-union members or members of other unions.
  - Subsection (3) states that in order for an employee to be entitled to time off, the union must have first notified the employer in writing that the employee is a ULR and has met the training condition.
  - Subsection (4) defines the training condition. It requires the employee to be sufficiently trained to carry out his duties either at the time he begins functioning as a ULR or within 6 months of that date. In the latter case, the union must notify the employer in writing or by other means when the employee has received the required training within the six month period. This arrangement allows an insufficiently trained person to function as a ULR for what amounts in effect to a maximum six month probationary period until he receives the required training. If, however, the person does not receive the required training within the six month period, his entitlement to time off ends.
  - Subsection (5) prevents the union avoiding this consequence by the device of issuing further notices to the employer, which would in effect establish a new six month probationary period.
  - Subsection (6) provides for any relevant Code of Practice issued by ACAS or the Secretary of State to be taken into account in determining what constitutes sufficient training.
  - Subsection (7) provides ULRs with a right to time off for training relevant to their functions.
  - Subsection (8) restricts a ULR's time off to that which is reasonable in the circumstances, having regard to any relevant Code of Practice issued by ACAS or the Secretary of State. This therefore enables employers to deny a ULR's request for time off where they have good grounds for doing so, provided they act in accordance with any relevant Code.

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- Subsection (9) defines that complaints about alleged breaches of a ULR's time off rights are to be determined by employment tribunals. Paragraph 18 of Schedule 6 has the effect (by amendment of section 171 of the 1992 Act) that such complaints must be made within three months of the failure occurring or at an appropriate later date where the employment tribunal is satisfied that a complaint could not have been made within 3 months. Paragraph 19 of Schedule 6 has the effect (by amendment of section 172 of the 1992 Act) that an employment tribunal may make a declaration and award compensation where the employer failed to permit paid time off in accordance with the new section 168A. Paragraph 21 of Schedule 6 has the effect (by amendment of section 18(1)(b) of the Employment Tribunals Act 1996) of providing for ACAS conciliation in any complaints to employment tribunals under this new jurisdiction.
- Subsection (11) provides that a person is a ULR of a trade union for the purposes of the new section if he is appointed or elected as such in accordance with its rules.
- *Subsection (3)* has the effect (by amendment of section 169 of the 1992 Act) of providing for ULRs to be paid for time off taken in accordance with the new section 168A.
- *Subsections (4) and (5)* provide for certain union members to have reasonable time off without pay to access the services of any ULR whose function is to carry out ULR activities in relation to them. This right only applies where the ULR is himself entitled to time off under new section 168A to provide services to such members. It achieves this by amending section 170 of the 1992 Act. This right is enforceable via the employment tribunals.
- *Subsection (6) and Paragraph 20 of Schedule 6* - Section 173 of the 1992 Act currently contains interpretative and supplementary provisions relating to the rights to time off for trade union duties and activities. *Paragraph 20 of Schedule 6* applies the same provisions to new section 168A. *Subsection (6)* inserts new subsections into s173 which make provision for the Secretary of State to amend Section 168A by a statutory instrument under the affirmative resolution procedure changing the purposes for which ULRs are entitled to take time off.
- *Subsection (7)* enables ACAS and the Secretary of State to issue Codes of Practice containing practical guidance on the application of the new statutory entitlements relating to ULRs. ACAS could provide such guidance by amending its current Code of Practice on time off for trade union duties and activities. *Subsection (8)* ensures any draft ACAS Code in this area is approved by each House of Parliament by the affirmative resolution procedures.
- *Paragraph 30 of Schedule 6* amends Section 104 of the Employment Rights Act 1996 to make the dismissal of an employee unfair if the reason for it was that he brought proceedings to enforce a right to time off under the new section 168A or alleged that his employer had infringed such a right.