These notes refer to the Employment Relations Act 2004 (c.24) which received Royal Assent on 16 September 2004

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

Part Two: Industrial Action Law

Ballots and Notices

135. Sections 226 to 235 of the 1992 Act contain provisions relating to industrial action ballots and the ballot and industrial action notices that unions are required to give to employers. The Government introduced a number of changes to the provisions, including sections 226A and 234A dealing with notices, in the 1999 Act.

136. A trade union that organises industrial action would, in the absence of statutory provision to the contrary, be liable under the common law for the civil wrong of inducing a breach of contract. However, the 1992 Act protects unions from the legal liability that would otherwise result if certain conditions are satisfied. One of these is that before inducing its members to take part in industrial action, the union must have held a properly conducted secret ballot of the members it is likely to induce to take part. Other conditions are that the union must give the employers concerned advance notice in writing of the ballot and of the industrial action. Generally, the "ballot notice" has to describe which employees the union believes will be entitled to vote in the ballot, and the "industrial action notice" has to describe which employees the union intends to induce to take part in the industrial action.

137. The review of the 1999 Act and consultation process found that, following the amendments, these provisions of the 1992 Act were generally working well. However, the judgment in the case of *National Union of Rail, Maritime and Transport Workers v London Underground Limited* [2001] IRLR 228 highlighted a difficulty with the way in which information required to be given in ballot and industrial action notices should be presented. Further, the case of *National Union of Rail, Maritime and Transport Workers v Midland Mainline Ltd* [2001] IRLR 813 revealed that there was a lack of clarity as to the union members to whom the union was required to give an entitlement to vote in an industrial action ballot. Sections 22, 23 and 25 address these matters.

Information about employees to be balloted on industrial action

138. ***Section 22*** amends section 226A of the 1992 Act, which specifies the information required to be contained in a "ballot notice".

139. Section 226A currently requires a union conducting an industrial action ballot to provide each employer the union reasonably believes to employ members who will be entitled to vote with a notice stating that it intends to hold a ballot and the starting date of the ballot. As the section is at present, the notice is also required to contain information in the union's possession that would help the employer to make plans and bring information to the attention of the employees the union intends to ballot, and has to include information, if the union has it, as to the number of employees involved, their category of work and workplace. The notice must be received by the employer at least 7 days before the starting date of the ballot.

140. Additionally, the union has to ensure that each employer concerned receives a sample voting paper at least 3 days before the starting date of the ballot.

141. *Section 22* simplifies the requirements of section 226A by making changes to the information the union is required to supply. The changes make it desirable, in the interests of clarity, to restructure the provisions of the section and the section therefore does so.

142. *Subsection (2)* contains an amendment that is consequential on section 226A(2F), which is inserted by subsection (4). The new subsection (2F) relates to the requirement to provide an employer concerned with a sample voting paper and makes no substantive legal change to the requirement.

143. *Subsection (3)* replaces the current subsection (2)(c) of section 226A. New subsection (2)(c)(i) has the effect that the information unions are required to include in the notice must contain the lists and figures mentioned, respectively, in new subsections (2A) and (2B) inserted into section 226A by subsection (4), and an explanation of how the figures were arrived at. New subsection (2)(c)(ii) provides that where some or all of the affected employees are employees from whose wages the employer makes deductions representing payments to the union, then the notices must contain either the lists, figures and explanation mentioned in subsection (2)(c)(i) or the information mentioned in new subsection (2C). The intention is to reduce the uncertainty currently present in section 226A by making the information that the union must supply specific and removing the need for the union to determine what information has to be given by reference to what would help the employer to make plans and bring information to the attention of those to be balloted. The provisions also allow unions to meet their obligations under section 226A by referring in the notice to union members who pay their union subscription through deductions from pay (a practice known as “check-off”).

144. *Subsection (4)* adds new subsections (2A) to (2I) to section 226A. New subsections (2A) and (2B), taken with the new subsection (2)(c), change the information required to be given by the current subsections (2)(c) and (3A) of section 226A.

145. The effect of new subsection (2A) is that the notice must contain a list of the categories to which the “employees concerned” (that is to say, the employees of the employer who the union reasonably believes will be entitled to vote in the ballot) belong and a list of the workplaces at which they work.

146. The effect of new subsection (2B) is that the notice must contain figures showing the total number of the employees concerned, the number of them in each category in the list of categories given in accordance with the new section (2A), and the number of them that work at each workplace in the list of workplaces given in accordance with the new subsection (2A).

147. New subsection (2C) contains the requirements that must be met if the notice, as permitted by subsection (2)(c)(ii), provides information in relation to employees from whose wages the employer makes deductions representing payments to the union. The effect is that the information so provided must enable the employer readily to deduce the total number of the employees concerned, the categories of employee to which the employees concerned belong and the number of them in each of those categories, and the workplaces at which the employees concerned work and the number of them who work at each of these workplaces.

148. New subsection (2D) contains a new requirement that the lists and figures the union supplies are to be as accurate as reasonably practicable in the light of the information in the possession of the union.

149. New subsection (2E) has the effect that for this purpose information is regarded as being in the possession of the union only if it is held, for union purposes, in a document (including an electronic document) and is in the possession or under the control of a union officer or an employee of the union. The effect is that information held only by

branch officials or other lay representatives of the union is not in the union's possession for the purpose of subsection (2D).

150. New subsection (2G) repeats the substance of the current subsection (3A)(b) of section 226A by ensuring that the section does not require the notice to name the employees concerned.

151. New subsection (2H) defines the term "employees concerned" to mean those employees who the union reasonably believes will be entitled to vote in the ballot.

152. New subsection (2I) defines the term "workplace" in relation to an employee, so making section 226A more precise.

153. *Subsection (5)* omits the current subsections of section 226A that are superseded by the section, while *subsection (6)* makes a change to a reference in section 226A(5) that is consequential on the insertion of new subsections (2A) to (2I).

Entitlement to vote in ballot on industrial action

154. ***Section 23*** amends section 227(1) of the 1992 Act. The amendment clarifies that the members to whom the union must accord an entitlement to vote in an industrial action ballot are all those it is reasonable for the union to believe will be induced by it to take part in the action. This resolves the issue that arose in the *Midland Mainline* case (see above at paragraph 137) by putting it beyond doubt that the union does not have to give such an entitlement to members who might take part even though not induced to do so by the union.

Inducement of members not accorded entitlement to vote

155. ***Section 24***amends section 232B of the 1992 Act and inserts a new provision into section 62 of that Act.

156. The organisation of an industrial action ballot can be complicated and can sometimes involve many thousands of people. Under the 1992 Act as it stood before the changes made by the 1999 Act, the whole ballot could be invalidated if a union committed minor errors in determining who was eligible to vote, or failed to send ballot papers to *all* those required to be given an entitlement to vote.

157. The 1999 Act inserted section 232B, which provides that such errors are to be disregarded as long as they are accidental and on a scale unlikely to affect the outcome of the ballot. The 1999 Act also inserted section 232A, which defines the circumstances in which a union that induces members to take industrial action who should have been given an entitlement to vote but were not, loses its protection against legal liability. The dispensation for accidental failures in section 232B does not presently refer expressly to the purpose of section 232A but in *P (a minor) v National Association of Schoolmasters/ Union of Women Teachers* [2003] 2 AC 663, the House of Lords nevertheless held on the facts of the case that it did apply indirectly.

158. *Section 24(1)(a)* amends section 232B to ensure, in the interests of clarity, that where a union's failure to comply with the requirements of the 1992 Act is currently covered by the dispensation for accidental failures, and that failure would otherwise result in a failure to comply with section 232A, the latter failure is also to be disregarded. The main effect is that where a union accidentally fails to ballot an insignificant number of those it intends to induce to take part in industrial action, the union will not lose its protections against legal action because it induces them to take part in the action. The amendment confirms the judgment of the House of Lords in *P v NASUWT* (see above at paragraph 157) by making the position clear on the face of the legislation.

159. *Section 24(1)(b)* corrects a drafting error in section 232B. Section 230(2B) has the effect that where merchant seamen are entitled to vote in an industrial action ballot and are on a ship or outside Great Britain, special arrangements for enabling them to

vote apply. Section 232B should have referred to section 230(2B) but refers instead to section 230(2A). The error was identified in *P v NASUWT*.

160. *Section 24(2)* inserts a new paragraph into section 62(2) of the 1992 Act. Section 62 of the 1992 Act gives union members a right to take legal action against their union if they are likely to be or have been induced to take part in industrial action and certain of the balloting requirements contained in sections 226 to 234 of the 1992 Act have been contravened. The effect of the new subsection is to include section 232A in the list of requirements contravention of which gives union members the right to take such legal action.

Information about employees to be contained in notice of industrial action

161. ***Section 25*** amends section 234A of the 1992 Act, which specifies the information required to be contained in an "industrial action notice".

162. Section 234A currently requires a union to provide each employer the union reasonably believes to employ members who will be induced to take part in the proposed industrial action with a notice. The notice must state whether the action is intended to be continuous or discontinuous and give, in the first case, the date on which it is intended to start and, in the second, the dates on which it is intended to take place.

163. As the section is at present, the notice is also required to contain information in the union's possession that would help the employer to make plans and bring information to the attention of the employees the union intends to induce and has to include information, if the union has it, as to the number of employees involved, their category of work and workplace. The notice must be received by the employer at least 7 days before the first date on which the industrial action is intended to take place.

164. *Section 25* simplifies the requirements of section 234A by making changes to the information the union is required to supply. The changes, which are similar to those made by section 22 in relation to the requirement to give employers a ballot notice, make it desirable, in the interests of clarity, to restructure the provisions of the section and the section therefore does so.

165. *Subsection (2)* replaces the current subsection (3)(a) of section 234A. New subsection (3)(a)(i) has the effect that the information unions are required to include in the notice must contain the lists and figures mentioned respectively in new subsections (3A) and (3B) inserted into section 234A by subsection (3). It also provides that the notice must contain an explanation of how the figures are arrived at. New subsection (3)(a)(ii) provides that where some or all of the affected employees are employees from whose wages the employer makes deductions representing payments to the union, then the notices must contain either the lists, figures and explanation mentioned in subsection (3)(a)(i) or the information mentioned in new subsection (3C). The intention is to reduce the uncertainty currently present in section 234A by making the information that the union must supply specific and removing the need for the union to determine what information has to be given by reference to what would help the employer to make plans and bring information to the attention of those the union intends to induce to take part in the industrial action. The provisions also allow for unions to meet their obligations under section 234A by referring in the notice to union members through deductions from pay (a practice known as "check-off").

166. *Subsection (3)* adds new subsections (3A) to (3F) to section 234A. New subsections (3A) and (3B), taken with the new subsection (2)(a), change the information required to be given by the current subsections (3)(a) and (5A) of section 234A. The effect of new subsection (3A) is that the notice must contain a list of the categories to which the "affected employees" (that is to say, the employees of the employer who the union reasonably believes will be induced to take part in the industrial action) belong and a list of the workplaces at which they work. The effect of new subsection (3B) is that the notice must contain figures showing the total number of the affected employees, the

number of them in each category in the list of categories given in accordance with the new subsection (3A), and the number of them that work at each workplace in the list of workplaces given in accordance with that subsection.

167. New subsection (3C) contains the requirements that must be met if the notice, as permitted by subsection (3)(c)(ii), refers to affected employees that are employees from whose wages the employer makes deductions representing payments to the union, as permitted in subsection (3)(a)(ii). The effect is that the information provided in this way must enable the employer readily to deduce the total number of the affected employees, the categories of employee to which the affected employees belong and the number of the affected employees in each of those categories, and the workplaces at which the affected employees work and the number of them who work at each of these workplaces.

168. New subsection (3D) contains a new requirement that the lists and figures the union supplies are to be as accurate as reasonably practicable in the light of the information in the possession of the union.

169. New subsection (3E) has the effect that for this purpose information is regarded as being in the possession of the union only if it is held, for union purposes, in a document (including an electronic document) and is in the possession or under the control of a union officer or an employee of the union. The effect is that information held only by branch officials or other lay representatives of the union is not in the union's possession for the purpose of subsection (3C).

170. New subsection (3F) repeats the substance of the current subsection (5A)(b) of section 234A and ensures that the section does not require the notice to name the affected employees.

171. *Subsection (4)* amends subsection (5) of section 234A. This subsection defines which employees are covered in principle by the notice and sets out the circumstances in which their inducement by the union to take part in industrial action is covered by the notice. At present the employees covered are the "affected employees" but this term relies on the reasonable belief of the union as to those who will be induced and its use in subsection (5) therefore leads to an imprecise result. Subsection (4) has the effect that the employees covered will be those falling within a category and employed at a workplace specified in the notice. This test is clear and objective.

172. *Subsection (5)* substitutes for the present subsection (5A) of section 234A new subsections (5B), (5C) and (5D).

173. New subsection (5B) defines a "notified category of employee" and a "notified workplace" for the purpose of the notice. A notified category of employee means a category of employee that is listed in the notice or, where the notice contains the information mentioned in subsection (3C), a category of employee that the employer can readily deduce from the notice is a category of employee to which some or all of the affected employees belong, at the time the employer receives the notice. A notified workplace means a workplace that is listed in the notice or, where the notice contains the information mentioned in subsection (3C), a workplace that the employer can readily deduce from the notice is the workplace at which some or all of the affected employees work, at the time the employer receives the notice.

174. New subsection (5C) defines the term "affected employees" to mean those employees who the union reasonably believes will be induced to take part in the industrial action.

175. New subsection (5D) defines the term "workplace" in relation to an employee, so making section 234A more precise.

176. *Subsection (6)* contains a consequential amendment to a reference in section 234A(8).

Protections for Striking Employees
Previous position

177. ***Sections 26 to 28*** contain provisions that increase the protections given to employees by section 238A of the 1992 Act. That section, which was inserted by the Employment Relations Act 1999, provides protections to employees if they are dismissed for taking lawfully organised official industrial action (protected industrial action). The section made it unfair to dismiss an employee for this reason (1) during the eight week period following the start of the protected industrial action, (2) after this period where the employee's participation in the action had ceased within the 8-week period, or (3) after this period where the employee's participation had not ceased before the end of the period unless the employer has taken reasonable procedural steps to resolve the dispute with the union. The section lists a number of matters to which regard must be had when determining whether reasonable procedural steps have been taken. These include whether either the employer or the union have refused an offer to use the services of a conciliator or mediator. One tribunal case has been brought under this jurisdiction (*Mr J Davis v Friction Dynamics*). One issue raised by the case, which occurred in controversial circumstances, was how section 238A applied where the employees taking protected industrial action were locked out while taking it. A second issue was whether the employer had engaged fully in the conciliation process or was merely going through the motions to comply with the requirements of the section.

Dismissal where employees taking protected industrial action locked out

178. ***Section 26*** amends the protections for striking employees in section 238A of the 1992 Act by changing the length and scope of the protected period currently specified in the section. It does this by extending the period from 8 to 12 weeks and by providing for 'locked-out' days to be disregarded when determining the length of the period. As a result of the amendments made by this section, the period will in effect end when 84 days have passed since the start of the action on which no lock-out has occurred. This means, for example, that where a lock-out occurred on two days, the total period of protection becomes 86 days.

179. *Subsection (2)* introduces the term "protected period" into section 238A.

180. *Subsection (3)* inserts four new subsections, (7A) to (7D), into section 238A of the 1992 Act that have the effect of lengthening the period of protection when a lock- out occurs. New subsection (7A) states that the total length of the "protected period" equals the "basic period" plus any "extension period".

181. New subsection (7B) defines the basic period as 12 weeks beginning with the first day of protected industrial action. New subsection (7C) defines the extension period. It means that the total period of protection is extended beyond the basic 12 week period by one day for each day on which the employee was locked out that occurred either within the basic period or within an extension period.

182. New subsection (7D) ensures that the period of protected industrial action can begin even though a lock-out might be in force on that day.

Date of dismissal

183. ***Section 27*** amends section 238A of the 1992 Act by substituting "the date of the dismissal" for the words "it takes place" (referring to when the dismissal takes place) at each place where they occur in the section, and then defining the expression "the date of dismissal" in the same way as it is defined for the purposes of section 238 by section 238(5). The effect is that for the purposes of section 238A "the date of the dismissal" means:

- the date on which the employer's notice was given, where the employee's contract of employment was terminated by notice, and
- in any other case the effective date of termination.

184. The effect is to ensure that where section 238A applies in relation to a dismissal with notice the dismissal is treated as occurring when the notice is given and not when the period of notice expires.

Dismissal after end of protected period

185. ***Section 28(1)*** inserts a new subsection (6)(e) into section 238A of the 1992 Act, introducing new matters to which the tribunal is to have particular regard when assessing whether the employer has taken reasonable procedural steps to resolve the dispute with the union. The duty to have regard to those matters applies where the parties have accepted that the services of a conciliator or mediator will be used. The matters themselves are set out in new section 238B which subsection (2) inserts into the 1992 Act.

New Section 238B

186. Subsections (2) to (5) of new section 238B set out the procedural actions that the employer and the union should take where they have agreed that conciliation or mediation services will be used. The issue of whether the employer and union have taken the actions set out is a matter to which the tribunal is to have particular regard.

187. Subsection (2) sets out the first matter, which is whether the conciliation or mediation meetings have been attended, on behalf of the employer and union, by an "appropriate person". Under subsection (6), an appropriate person is, in the case of the employer, a person who has the authority to settle the matter on behalf of the employer or a person authorised by such a person to make recommendations to him or her with regard to the settlement of the matter. In the case of the union, an "appropriate person" is a person responsible for handling the matter subject to the conciliation or mediation on behalf of the union.

188. Subsection (3) sets out the second matter, which is whether the employer and union have co-operated with the conciliator or mediator in the making of arrangements to set up meetings.

189. Subsection (4) sets out the third matter, which is whether the employer and union carried out any actions that they agreed with the conciliator or mediator to take. An additional requirement in subsection (7) is whether those actions were carried out in a timely manner.

190. Subsection (5) sets out the fourth matter, which is whether the employer and union answered reasonable questions put to them at meetings with all of the parties present. This formulation recognises that there will be occasions when either party should be entitled to refuse to give a response to a question.

191. Subsections (8) and (9) place limitations on the evidence that the conciliator or mediator may be required to give to the tribunal when it is considering the matters referred to in section 238A(6)(e). These provide, among other things, that confidential information passed by either party to the conciliator or mediator ought not be disclosed to the tribunal without the party's consent.