

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

Part 5: the Certification Officer

Sections 48 and 49

334. The Certification Officer (“CO”) is an independent statutory officer established under the Employment Protection Act 1975. His functions (prior to the 1999 Act) included:
- maintaining lists of trade unions’ and employers’ associations;
 - the auditing of accounts;
 - annual returns;
 - financial affairs;
 - overseeing the political funds of trade unions;
 - ensuring observance of statutory requirements governing mergers between trade unions;
 - certifying the independence of trade unions;
 - determining complaints concerning trade union elections.
335. The 1999 Act enlarged the CO’s role, most significantly by giving him the power to determine certain complaints from trade union members on alleged breaches of trade union law or trade union rules. The enlargement of the CO’s role means that he can effectively serve as an alternative to courts as a means of resolving disputes. The law does however place some requirements on complainants to use internal procedures before going to the CO.
336. The 1999 Act also gave the CO the power to refuse to hear complaints made by individuals whom the courts or the EAT had categorised as “vexatious litigants”.
337. *Section 48* provides the CO with a new power to strike out weak, vexatious or misconceived cases while *section 49* widens the power of the Employment Appeal Tribunal (EAT), on application from the Attorney General or the Lord Advocate, to place “restriction of proceedings” orders on vexatious litigants by enabling the EAT to take into account complaints made to the CO; the section also extends the effect of such orders to proceedings before the CO.

Striking out by Certification Officer of applications or complaints

338. *Section 48* inserts new section 256ZA into the 1992 Act.
339. Subsection (1) of new section 256ZA provides that any part of an application or complaint to the Certification Officer can be struck out at any stage in the proceedings.

The power relates both to the nature of the complaint/application itself, and to the way in which the applicant (or representative) has conducted the proceedings.

340. Subsection (3) of the new section provides that the CO may strike out a case on his own initiative or on the application of the union member or trade union concerned. Subsections (4) and (5) of the new section require the CO to notify the party against whom he proposes to make a striking out order, allowing the party to challenge the proposed order (but not if the party has already had an opportunity to do so orally).
341. Subsection (6) of the new section relates to the CO's general power to regulate his own procedure. It clarifies that the CO will still be entitled to make further provisions about the striking out of proceedings.

Restriction of proceedings orders: proceedings before the Certification Officer

342. *Section 49(1) to (7)* amend section 33 of the Employment Tribunals Act 1996 ("the 1996 Act"). Section 33 of the 1996 Act sets out the circumstances in which the EAT may make a "restriction of proceedings" order. Such an order prevents vexatious litigants, in the main, from instituting further proceedings before employment tribunals or the EAT, without the permission of the EAT.
343. *Subsections (1) to (7)* insert references to the CO into the current provisions of section 33 of the 1996 Act. This permits the EAT to take into account vexatious proceedings and behaviour before the CO (as well as before employment tribunals and the EAT) when deciding whether to make a restriction of proceedings order. It also has the effect that person subject to a restriction of proceedings order is prevented from bringing proceedings before the CO without the leave of the EAT.

Amalgamations: approval; listing and certification

344. Under the 1992 Act, the CO may grant a listed trade union a certificate of independence. Where two (or more) unions merge to become one newly amalgamated union, the amalgamating unions cease to exist as separate trade unions. They are removed from the list of trade unions held by the CO, and their certificates of independence (if they had one) are cancelled. The newly formed union would then be required to apply for listing and a new certificate.
345. *Section 50* provides that on the amalgamation of two or more listed unions in accordance with Part I Chapter VII of the 1992 Act, the amalgamated union will automatically be listed by the CO, subject to the provision of specified information. Where all the amalgamating unions held a certificate of independence, a certificate of independence will automatically be issued to the new union.
346. *Subsection (1)* amends section 98 of the 1992 Act by replacing the existing subsection (2). The new subsection sets out the requirements to be satisfied before an instrument of amalgamation can be approved by the CO. The instrument must comply with the requirements of any regulations in force under the Chapter. Further, the name of the new union must not be one already listed; this requirement is based on the requirement in section 3 of the 1992 Act which prohibits a union from being listed with such a name. However, the CO can approve an instrument of amalgamation where the name of the new union is the same as that of one of the amalgamating unions.
347. *Subsection (2)* inserts new sections after section 101 of the 1992 Act. New section 101A provides that where the amalgamating unions are already listed when the CO registers their instrument of amalgamation, then he must enter the name of the newly amalgamated union on the list of trade unions. He must also remove the old names. The change to the list will have effect from the date of amalgamation. New sections 101A(3) and (4) provide for the automatic issue of a certificate of independence to the amalgamated union, where both or all of the original unions had such a certificate in force at the time of the amalgamation.

348. New section 101B(1) and (2) provide that once a newly amalgamated union is registered and listed by the CO, it must send him the information set out in subsection (1) and the applicable fee. Under subsection (3) both must be sent within 6 weeks (or longer if the CO directs) from the date on which the instrument takes effect. If the union fails to comply with these requirements the CO must remove it from the list of trade unions. *Section 50(3)* applies the new provisions in 101A and 101B to unincorporated employers' associations, and amends cross references.

Restriction of grounds of appeal from Certification Officer

349. *Section 51* amends sections 9 and 126 of the 1992 Act.
350. *Section 9* provides that where an organisation of workers is aggrieved by the refusal of the Certification Officer to enter its name on the list of trade unions (or a decision to remove it), or to issue it with a certificate of independence, it may appeal to the Employment Appeal Tribunal. Section 126 similarly provides for an appeal by an organisation of employers against the CO's decision not to enter its name on the list of employers' associations (or a decision to remove it).
351. As the sections stood before amendment there was a right of appeal on questions of both fact and law. In both cases, therefore, the EAT was effectively permitted to substitute its decision for that of the CO.
352. *Section 51(1) and (2)* amend sections 9 and 126 respectively, to limit appeals to points of law only, thereby bringing the sections in line with other parts of the Act providing for appeals from the CO. These amendments mean that it is no longer necessary to require the EAT to direct the CO to issue or withdraw a certificate or list a union or employers' association or remove it from the list. Therefore, sections 9(3) and 126(2) are repealed (by section 51(1)(b) and (2)(b)).