

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

Part 6: Miscellaneous

Additional case in which election for president of union not required

353. *Section 52* amends section 46 of the 1992 Act, which sets out election requirements for certain positions in trade unions. Under section 46 as it is at present, every person holding the position of:
- President (or equivalent) – subsection (2)(c);
 - General Secretary (or equivalent) – subsection (2)(d); or
 - member of the executive - subsection (2)(a) and (b);
- must be elected to that position by virtue of a postal vote of all the union members.
354. However, there are a number of circumstances where this requirement does not apply. This section adds another exemption, applying only to the position of president.
355. *Subsection (3)* of the section inserts a new subsection (4A) to section 46 providing that Chapter 4 (elections for certain positions) of Part 1 the 1992 Act does not apply to the position of president if:
- the holder of the position was elected or appointed to it in accordance with the rules of the union;
 - at the time of his election or appointment as president he had already been elected, in accordance with the Act, to some other position for which an election is required by section 46;
 - it is less than five years since he was last elected to that other position or he was elected to it in accordance with the Act after his election or appointment as president; and
 - ever since his election or appointment as president he has held another position for which election is required by section 46, having been elected to in accordance with the Act.
356. The practical effect of new subsection (4A) is that a union will be allowed to elect or appoint a president (provided it is in accordance with their rule-book to do so), so long as the president already holds the position of General Secretary or is a member of the executive and has been properly elected to that position by a postal vote of all the union's members in accordance with the Act. It therefore removes the need for a second election.
357. The other subsections of the section make minor and consequential amendments to section 46 that are desirable because of the insertion of new subsection (4A), and do not change the substance of the law.

Removal of rule preventing appointment of body corporate as auditor

358. **Section 53** amends sections 34, 36 and 37 of the 1992 Act. These sections concern the appointment and rights of trade union auditors. By virtue of section 131(1) of the 1992 Act the amendments also apply to the appointment and rights of auditors of unincorporated employers' associations.
359. **Subsection (1)** amends section 34. Section 34 provides the eligibility criteria for the appointment of an auditor of a trade union. As the section stood before amendment, subsection (5)(c) had the effect that a "body corporate" (e.g. a limited company) was not permitted to act as a trade union auditor. Subsection (1) of the section repeals subsection (5)(c) of section 34, with the result that a body corporate is permitted to act as a trade union auditor.
360. **Subsection (2) and (3)** insert new subsections (1A) and (5) into section 36 which relates to the duty of the auditor of a trade union to make a report to the union on the audited accounts. Taken together the new subsections have the effect that where the auditor is a body corporate or partnership the report is to be signed in its name by an individual authorised to sign on its behalf.
361. **Subsection (4)** inserts a new subsection (4) into section 37 (rights of auditors). Under section 37(3) trade union auditors have a right to attend and be heard at general meetings of the union. New subsection (4) has the effect that where the auditor is a body corporate or partnership these rights are exercisable by an individual authorised by it to act as its representative at the meeting.

Means of voting in ballots and elections

362. **Section 54** - Unions are required under the 1992 Act to hold ballots or elections:
- for certain major positions within the union (sections 46 to 61);
 - to approve a political resolution for the purpose of enabling the union to spend money on political objects (sections 73 to 78);
 - when amalgamating with or transferring its engagements to another union (sections 100 to 100E);
 - when proposing to organise industrial action (sections 226 to 234);

Currently, the provisions governing the above ballots and elections require the method of voting to be by post. The 1992 Act also governs recognition and derecognition ballots under Schedule A1.

363. The general effect of the power contained in **section 54** is to allow the Secretary of State, by order subject to the affirmative resolution procedure, to widen the means of voting that are to be available in ballots and elections conducted under the provisions of the 1992 Act. The order has to specify what means of voting are available in principle in relation to a description of the ballot or election.
364. An order under this section may also identify "a responsible person" to determine, in relation to a particular ballot or election of that description, the voting means that must or may be used (these are permitted to be different for different voters in order to take account of the varying circumstances that may apply in relation to different groups of voters). The order must contain factors to be taken into account and criteria to be applied by the responsible person in making this determination. In specifying these the Secretary of State is under a duty to have regard to the need for ballots to meet a required standard such that there is an opportunity to vote, the votes cast are secret and the risk of unfairness or malpractice is minimised. Since the requirements in relation to ballots under Schedule A1 to the 1992 Act are less stringent in relation to these matters than the requirements in relation to other ballots under the Act, it is possible that a responsible

person will be able to permit a method to be used in Schedule A1 ballots which he could not permit to be used in other ballots.

365. *Subsection (1)* provides that the Secretary of State may make provision, in relation to any description of ballot or election authorised or required by the 1992 Act, that any ballot or election or ballot of that description is to be conducted by one or more “permissible means” specified in the order as determined by “the responsible person”.
366. *Subsection (2)* provides that a “permissible means” is a means of voting that the order provides is permissible for a specified description of ballot or election and *subsection (3)* provides that “the responsible person” is a person specified, or of a description specified, in the order.
367. *Subsection (4)* enables an order made under this section, (a) to include provision about the determinations by the responsible person as to what means are to be used or allowed in a particular ballot, including requirements that he is to take specified factors into account or apply specified criteria, (b) to allow different means of voting to be chosen by the responsible person in different circumstances, and (c) to allow the responsible person to permit some or all of the voters to have a choice of means by which they may vote.
368. *Subsection (5)* has the effect that the “means” that an order made under the power in the section may specify as being “permissible means” must always include (or consist of) postal voting.
369. *Subsection (7)* provides that an order made under this section may modify the provisions of the 1992 Act, exclude or apply (with or without modifications) the provisions of the Act and make provision, in relation to a ballot or election conducted by a specified means, that is similar to any provision of the Act.
370. *Subsection (10)* prohibits the making of an order providing that a means is permissible for a description of ballot or election unless the Secretary of State considers that a ballot or election of that description conducted by that means could, if particular conditions were satisfied, meet the “required standard” specified in subsection (12) of this section, and that in relation to any ballot or election of that description the responsible person will not be permitted to allow the use of the means unless he has taken specified factors into account or applied certain criteria.
371. *Subsection (11)* provides that in specifying factors in the order that the responsible person is to take into account or criteria he is to apply, the Secretary of State must have regard to the need for ballots and elections to meet the “required standard” specified in subsection (12).
372. *Subsection (12)* provides that for the purposes of subsections (10) and (11) of the section, a ballot or election meets “the required standard” if it is such that those entitled to vote have an opportunity to do so, votes cast are secret and the risk of unfairness or malpractice is minimised.
373. *Subsections (6), (8), (9) and (13)* contain ancillary and procedural provisions.

Provision of money for trade union modernisation

374. *Section 55* provides a legal basis for the Secretary of State to spend money to modernise trade unions. In a Parliamentary written statement on 10 February 2004, the Minister for Employment Relations, Consumers and the Post Office explained the Government’s objectives in assisting unions to modernise through the creation of a Union Modernisation Fund. The Minister gave examples of the types of projects which could be supported by the Fund. He indicated that the Government would consult in the autumn of 2004 on the draft rules and procedures of the fund, with a view to commencing the scheme during the 2005/06 financial year.

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

375. *Subsection (1)* of section 55 inserts new section 116A into the 1992 Act.

New section 116A

376. Subsection (1) of new section 116A defines the five purposes for which the Secretary of State may give money to a trade union.
377. Subsection (2) has the effect that, subject to the exception provided by *subsection (2)* of section 55, a trade union must be independent to receive money from the Secretary of State. Section 5 of the 1992 Act provides the definition of an independent trade union and section 6 of that Act provides for unions to apply to the Certification Officer for a certificate of independence.
378. Subsection (3) gives the power to the Secretary of State to determine the way the assistance is to be provided and terms attached to the disbursement of the support.
379. Subsection (4) prohibits any money provided to a trade union under section 116A from being added to that union's political fund. (Provisions relating to trade union political funds can be found at Part I, Chapter VI of the 1992 Act).
380. Subsection (5) provides that the Secretary of State is entitled to recover any amount added to a trade union's political fund in contravention of the prohibition at subsection (4), and must take such steps as are reasonably practicable in order to do so.
381. Subsection (6) provides that any amount recovered under subsection (5) must be recovered from the political fund.
382. Subsection (7) makes clear that the provision at subsection (5) does not prevent the terms on which money is provided to trade unions under that section from also including other sanctions to be applied against any union which contravenes the prohibition on adding monies to its political fund.
383. *Subsection (2)* of section 55 amends section 118 of the 1992 Act to provide that federations of trade unions do not need to have a certificate of independence to qualify for support under new section 116A.