

EMPLOYMENT RELATIONS (NORTHERN IRELAND) ORDER 2004

S.I. 2004 3078

EXPLANATORY MEMORANDUM

INTRODUCTION

1. The Employment Relations (Northern Ireland) Order 2004 (“the Order”) was made on 17 November 2004.
2. This Explanatory Memorandum has been prepared by the Department for Employment and Learning (“the Department”) in order to assist the reader in understanding the Order. It does not form part of the Order.

BACKGROUND AND POLICY OBJECTIVES

3. In July 2002, the Secretary of State for Trade and Industry announced a review of the Employment Relations Act 1999 (“the 1999 Act”): the Northern Ireland counterpart being the Employment Relations (Northern Ireland) Order 1999 (“the 1999 Order”). In line with commitments made in the White Paper “Fairness at Work” (1998), the Government reviewed the operation of the statutory procedures for the recognition and derecognition of trade unions by employers. The review also looked at the operation of the other provisions of the 1999 Act and in Northern Ireland, the 1999 Order.

The 1999 Order:

- introduced a new statutory procedure for the recognition and derecognition of trade unions by employers;
- prevented employers from subjecting an individual to detriment, by any act or any deliberate failure to act, on the grounds of trade union membership, and introduced a power to make regulations prohibiting blacklisting on grounds of union membership;
- made changes to the law on industrial action (ballot and notice requirements and the right for dismissed strikers to complain of unfair dismissal);
- introduced new rights and changes in family-related employment rights;
- introduced new rights for workers to be accompanied in certain disciplinary and grievance hearings;
- made other changes to individual employment rights.
- The review concluded that the 1999 Act and Order were generally working well, but that some changes were required to improve and streamline procedures. The Employment Relations (Northern Ireland) Order 2004 implements the findings of the review in Northern Ireland, following their implementation in GB by the Employment Relations Act 2004.

CONSULTATION

4. A public consultation on the findings of the review opened in March 2003, and closed in June 2003. The consultation document was published on the Departmental website

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and copies were issued to 300 interested parties including all NI political parties, Assembly Members, trade unions and employer representative bodies. Eight responses were received. All respondents were in support of the broad thrust of proposals. A copy of the consultation document, covering letter and summary of the responses is available on the following web address www.delni.gov.uk/consultdebate/

COMMENTARY ON ARTICLES

5. The Order contains 30 Articles and three Schedules. Articles 1 and 2 are introductory provisions. Articles 3 to 30 form the main body of the Order and are described below. Schedule 1 contains extensive amendments to Schedule 1A to the 1995 Order. Schedule 2 contains other amendments and Schedule 3 lists provisions to be repealed. In this Memorandum:-

- “the 1996 Order” means the Employment Rights (Northern Ireland) Order 1996 (NI 16);
- “the 1992 Order” means the Industrial Relations (Northern Ireland) Order 1992 (NI 5);
- “the 1995 Order” means the Trade Union and Labour Relations (Northern Ireland) Order 1995 (NI 12).

Part II: Union Recognition

Amendment of Schedule 1A to the 1995 Order

Article 3 amends Schedule 1A to the 1995 Order as set out in Schedule 1.

Information required by Labour Relations Agency (LRA) for ballots and ascertaining union membership

Article 4 inserts a new paragraph 84AA in the 1992 Order. The new paragraph has the effect that where the LRA is exercising its function to give assistance for the purpose of bringing about the settlement of a trade dispute, and the dispute is a recognition dispute, the parties to the dispute may jointly request the LRA to hold a ballot of the workers involved or to ascertain their union membership. It provides the LRA with the power to request and receive information about the workers involved in the dispute to assist it to comply with the parties’ request for a ballot.

Part III: Law Relating to Industrial Action

Information about employees to be balloted on industrial action

Article 5 amends Article 105 of the 1995 Order, which specifies the information required to be contained in a notice from a trade union to an employer that the trade union intends to hold a ballot (notice of ballot). It simplifies the requirements of Article 105 by making changes to the information the union is required to supply.

Entitlement to vote in ballot on industrial action

Article 6 clarifies that the members to whom the union must accord an entitlement to vote in an industrial action ballot are all the members it is reasonable for the union to believe will be induced by it to take part in the action. This puts beyond doubt that the union does not have to give such an entitlement to members who might take part in industrial action even though not induced to do so by the union.

Inducement of members not accorded entitlement to vote

Article 7 amends Article 115B of the 1995 Order and inserts a new provision into Article 29 of that Order. 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, it will not lose its protections against legal action because it induces them to take part in the action. Article 7(2) inserts a new paragraph into Article 29 of the 1995 Order. The effect of the new paragraph is to include Article 115A in the list of requirements, contravention of which gives union members the right to take legal action.

Information about employees to be contained in notice of industrial action

Article 8 amends Article 118 of the 1995 Order, which specifies the information required to be contained in a notice of industrial action. Article 118 currently requires a union to provide each employer whom 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. As the Article stands at present, the notice must 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 must also 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. Article 8 simplifies the requirements of Article 118 by making changes to the information the union is required to supply. The intention is to reduce the uncertainty currently present in Article 118 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 to help the employer to make plans and bring information to the attention of the employees the union intends to induce. The provisions also allow for unions to meet their obligations by referring in the notice to union members who pay their union subscription by "check-off" (a method of paying union subscriptions directly from wages).

Protections for striking employees

Article 9 amends the protections for striking employees in Article 144A of the 1996 Order by changing the length and scope of the period during which employees are protected from dismissal for taking lawfully organised industrial action. It extends the period from 8 to 12 weeks and provides for days on which the employees are locked out by the employer to be disregarded when determining the length of the period. Under the provisions of this Article 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.

Date of dismissal

Article 10 amends Article 144A of the 1996 Order by substituting "the date of the dismissal is" for the words "it takes place" (referring to when the dismissal takes place) at each place where they occur in the Article, and then defining the expression "the date of dismissal" in the same way as it is defined for the purposes of Article 144(7). The effect is to ensure that where Article 144A 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

Article 11 introduces 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.

Part IV: Rights of Trade Union Members, Workers and Employees

Extension of protection against detriment for union membership etc.

Article 12 Article 73 of the 1996 Order (action short of dismissal on grounds related to union membership or activities) currently confers rights not to be subjected to detriment on these grounds only on employees, that is to say, individuals who are working under a contract of employment or, where the employment has ceased, were doing so. The effect of Article 12 is to extend the rights conferred by Article 73 to "workers" as defined in Article 2(2) of the 1995 Order, and former workers.

Detriment for use of union services or refusal of inducement

Article 13 The general effect of Article 73 as it was before the amendments made by the Order, is that an employee has the right not to have action taken against him by his employer that subjects

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him to any detriment where the purpose of the action is to prevent or deter membership of an independent trade union, compel membership of any trade union or prevent or deter the taking part in the activities of an independent trade union at an appropriate time. Article 13 amends Article 73 of the 1996 Order to add to the grounds on which “workers”, as defined, have the right not to be subjected to any detrimental action. The new grounds are making use of trade union services at an appropriate time and refusing an offer made in contravention of Articles 77A and 77B (see below).

Inducements relating to union membership or activities

Article 14 inserts new Articles 77A to 77F into the 1996 Order.

New Article 77A gives a worker the right not to have an offer made to him by his employer where the employer’s sole or main purpose is to induce the worker to do or not do certain things relating to trade union membership and the use of trade union services.

New Article 77B gives a new right to a worker who is a member of an independent trade union seeking recognition from, or already recognised by, the employer not to have an offer made to him by the employer where similar offers are made to other workers and the sole or main purpose in making the offers is to secure that the terms of the workers will not, or will no longer, be determined by a collective agreement negotiated with the union.

New Article 77C sets out the time limit for bringing industrial tribunal proceedings for contravention of the rights in new Articles 77A and 77B.

New Article 77D contains provisions as to how complaints under new Articles 77A and 77B are to be considered by an industrial tribunal.

New Article 77E contains the remedies that apply where an industrial tribunal finds that there has been a contravention of one of the new rights given by Articles 77A and 77B.

New Article 77F contains interpretative and other supplementary provisions eg it provides that references to “being or becoming a member of a trade union” include references to being or becoming a member of a particular branch or section of that union or of one of a number of particular branches or sections of the union.

Dismissal for use of union services or refusal of inducement

Article 15 amends Article 136 of the 1996 Order (dismissal on grounds related to union membership or activities), the general effect of which is to make it automatically unfair to dismiss an employee if the reason or principal reason for dismissal is membership of an independent trade union, non-membership of any trade union or taking part in the activities of an independent trade union at an appropriate time. **Article 15** amends Article 136 to add making use of union services or refusing an offer made in contravention of Articles 77A and 77B to the reasons that make the dismissal of an employee automatically unfair.

Expulsion from trade union attributable to conduct

Article 16 amends Article 38 of the 1995 Order and changes the provisions in Article 40 of the 1995 Order which contain the remedies for breaching the rights contained in Article 38. It has three effects: first, that a union is free to expel where the expulsion is wholly attributable to conduct, and the conduct is neither “excluded conduct” nor “protected conduct”; secondly, that a union is free to expel where the expulsion is to some extent, but not wholly or mainly, attributable to “protected conduct”; and thirdly that a union may not expel where the expulsion is to any extent attributable to “excluded conduct”. It follows that expulsions are unlawful where “excluded conduct” is the sole, main or subsidiary reason for the union’s decision, and where “protected conduct” is the sole or main reason. Excluded conduct and protected conduct are defined in this Article.

National security: powers of industrial tribunals

Article 17 replaces paragraph (6) of Article 12 of the Industrial Tribunals (Northern Ireland) Order 1996 (NI.18) (national security) to clarify that the power conferred by paragraph (5) applies to any proceedings where a national security issue is at stake and not just Crown employment proceedings. This power provides for tribunals to invoke special hearing arrangements where national security issues arise whether or not an application is made to them to do so.

Right to be accompanied

Article 18 makes amendments to legislation relating to a worker's "right to be accompanied" at disciplinary and grievance hearings. It clarifies the role of the companion at such hearings by amending Article 12 of the 1999 Order. It provides that the companion will now be able to address the hearing to (i) put the worker's case; (ii) sum up that case; and (iii) respond on the worker's behalf to any view expressed at the hearing.

Ways in which provisions conferring rights on individuals may be made

Article 19 makes a technical amendment to Article 24 of the 1999 Order. Article 24 gives the Department power by order to confer employment rights on individuals who do not have the rights by means of provisions that amend the legislation conferring the rights. The new article extends the Department's power to confer these rights by use of free-standing provisions.

Protection of employees in respect of jury service

Article 20 amends the law to protect employees, irrespective of length of service or age, who are dismissed, or otherwise detrimentally treated, because they serve on juries or are summoned to do so.

Flexible working

Article 21 amends the law to extend to those taking advantage of statutory provisions about flexible working, certain exemptions to standard qualifying conditions for claims for unfair dismissal. These exemptions include upper age limit and participation in industrial action.

Part V: the Certification Officer

Striking out applications or complaints by Certification Officer (CO)

Article 22 provides the CO with a new power to strike out weak, vexatious or misconceived cases.

Amalgamations: approval; listing and certification

Article 23 provides that on the amalgamation of two or more listed unions 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.

Restriction of grounds of appeal from Certification Officer

Article 24 provides that where an organisation is aggrieved by the refusal of the CO to enter its name on a relevant list (or by his decision to remove it from that list) it may appeal to the High Court. It similarly provides for an appeal to the High Court by a trade union against a decision of the CO not to issue a certificate of independence or a decision of his to withdraw such a certificate.

Part Vi: Miscellaneous

Enforcement officers for the agricultural wages legislation

Article 25 As well as continuing to allow for the appointment of officials from the Department of Agriculture and Rural Development, this article permits officials from other government departments, bodies or ministries to act as agricultural wages officers. It also provides that agricultural wages officers must be able to produce a formal document showing that they have the authority to act as officers.

Additional case in which election for president of union not required

Article 26 The effect of this Article is that a union will be allowed to elect or appoint a person as president (provided it is in accordance with their rule-book to do so), so long as the person 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 1995 Order. It therefore removes the need for a second election.

Body corporate acting as auditor of trade union or employees association

Article 27 removes the restriction preventing incorporated bodies from acting as auditors to trade unions.

Means of voting in ballots and elections

Article 28 The general effect of the power contained in Article 28 is to allow the Department, by order subject to affirmative resolution, to widen the means of voting that are to be available in ballots and elections conducted under the provisions of the 1995 Order. The order has to specify what means of voting are available in relation to any description of ballot or election.

Provision of money for trade union modernisation

Article 29 provides a legal basis for the Department to spend money to modernise trade unions.

Amendments and repeals

Article 30 provides for amendments and repeals as outlined in Schedule 2 and Schedule 3. Schedule 1

Amendment of Schedule 1a to the 1995 Order

Schedule 1A to the 1995 Order (inserted by Schedule 1 to the Employment Relations (Northern Ireland) Order 1999) established a statutory procedure for the recognition and derecognition of trade unions for the purposes of collective bargaining on behalf of a particular group of workers.

Determination of appropriate bargaining unit

Paragraphs 1 and 4 clarify how an appropriate bargaining unit is to be determined by the Industrial Court (IC). **Paragraph 2** provides a power for the IC to reduce the 20-day period for the parties to agree a bargaining unit. **Paragraph 3** imposes a duty on the employer to supply information to the union(s) and the IC in relation to workers in the union's proposed bargaining unit.

Union communications with workers after acceptance of application

Paragraph 5 inserts new paragraphs 19C to 19F after paragraph 19B of Schedule 1A (which is inserted by paragraph 4 of this order). At present, a union may only formally communicate with workers during the period within which a ballot ordered by the IC is to be conducted. **Paragraph 5** provides a right for a union to communicate with the workers in the bargaining unit from the point when the IC accepts an application for recognition. This communication takes place via a suitable independent person.

Circumstances in which the IC must arrange a ballot

Paragraph 6 provides greater discretion to the IC when deciding whether a significant number of union members do not want the union to bargain on their behalf by empowering the IC to assess the credibility of the evidence it receives. It also provides the same discretion when the IC is deciding whether to arrange a ballot in respect of a new bargaining unit which has been agreed or determined under Part III of the Schedule, and more than 50% of the workers in that new bargaining unit are members of the union.

Power of the IC to extend notification period

Paragraph 7 amends paragraph 24 of Schedule 1A. Paragraph 24 provides a fixed period in which the union and employer jointly may notify the IC that they do not wish the IC to arrange a ballot. **Paragraph 7** gives the IC the ability to extend the notification period on the request of both parties to give the parties more time to try to reach a voluntary agreement on recognition.

Postal votes for workers absent from ballot at workplace

Paragraph 8 amends paragraphs 25 and 117 of Schedule 1A. Paragraph 25 applies where the IC arranges to hold a ballot on union recognition and provides that the ballot must be conducted, depending on the IC preference, at a workplace, by post or by a combination of these methods. Paragraph 117 mirrors these provisions in the case of ballots on derecognition. **Paragraph 8** amends the provisions of these paragraphs to allow workers who are allotted a vote at the

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workplace to vote by post if they are unable for reasons specific to them to attend their workplace on the day of the ballot.

Additional duties on employers informed of ballots

Paragraph 9 places two new duties on employers who have been informed by the IC under paragraph 25(9) of Schedule 1A that a ballot is required. In addition to the existing three duties, there now is a new fourth duty on the employer to refrain from making an offer to any or all of the workers in the bargaining unit which has the effect, or is likely to have the effect, of inducing any or all of those workers not to attend a relevant meeting between the union(s) and the workers constituting the bargaining unit, unless that offer is reasonable in the circumstances. The new fifth duty on the employer is not to take or threaten to take action against a worker solely or mainly because that worker attended or took part in a relevant meeting or because that worker indicated that he intended to attend or to take part in such a meeting.

Unfair practices in relation to recognition ballots

Paragraph 10 inserts into Schedule 1A new paragraphs 27A to 27F which deal with complaints of unfair practices by either party with a view to influencing the outcome of the ballot and the consequences when a complaint is well-founded.

Application where agreement does not cover pay, hours and holidays

Paragraph 11 clarifies that a union may apply to the IC for recognition when any one or more of the “core bargaining” topics (pay, hours and holidays) are not included in a pre-existing agreement between the employer and workers.

Employer’s notice to end bargaining arrangements

Paragraph 12 amends those provisions in Part IV of Schedule 1A which deal with a notice by an employer that he wishes bargaining arrangements which are the result of an earlier declaration of statutory recognition by the IC to cease to have effect. Such notice may be given if the employer believes that he, taken with any associated employer(s), employed an average of fewer than 21 workers in a given 13 week period, and if three years have passed since the IC awarded recognition. Currently if the union has successfully challenged an employer’s notice to end bargaining arrangements or has won a derecognition ballot in the previous three years it cannot challenge a further notice by the employer, thus allowing the union to be derecognised without having an opportunity to put its views to the IC. This paragraph rectifies this anomaly by providing that a previous relevant application does not render an application by the union challenging the further notice inadmissible. The Article also provides that any unsuccessful application or notice to derecognise the union by the employer or a worker (or workers) renders any further such notice or application inadmissible for a period of three years.

Unfair practice in relation to derecognition ballots

Paragraph 13 inserts into Schedule 1A new paragraphs 119A to 119I which concern unfair practices during derecognition ballots. In particular, the provisions: create a duty on the parties to refrain from unfair practices; set out how complaints of unfair practices are to be handled; and provide for the consequences of a decision by the IC that a complaint of unfair practice is well-founded.

Appeals against demands for costs

Paragraph 14 inserts a new paragraph 165A into Schedule 1A. It provides a right of appeal for the union(s) and/or employer against a demand for costs from a qualified independent person for the conduct of a ballot, or from an appointed person for sending information to the relevant workers.

Power to amend Schedule 1A to the 1995 Order

Paragraph 15 amends paragraph 166 of Schedule 1A. At present paragraph 166 contains limited powers for the Department to amend paragraphs 22 and 87 of the Schedule, by order, if the IC informs the Department that either of these paragraphs has an unsatisfactory effect. This paragraph widens the scope of paragraph 166, by giving the Department a general power to amend any provision of the Schedule, if requested to do so by the IC.

Means of communicating with workers

Paragraph 16 inserts a new paragraph 166A in Schedule 1A. Paragraph 166A gives the Department power to make by affirmative resolution an order providing that the employer must give to the IC, in addition to the workers' home addresses, an address of a specified kind, which may include any address or number to which information can be sent by any means.

Unfair practices: power to make provision about periods before notice of ballot

Paragraph 17 inserts a new paragraph 166B into Schedule 1A. This paragraph gives the Department power to make an order prohibiting employers and unions from using specified unfair practices during a specified period. In this context "specified" means specified in an order made under this paragraph.

Power to make provision about effect of amalgamations etc.

Paragraph 18 inserts new paragraphs 169A, 169B and 169C into Schedule 1A. Paragraph 169A gives the Department power to make an order providing for any case where anything has been done under or for the purposes of the Schedule by or in relation to a union and that union amalgamates or transfers all or any of its engagements. Paragraph 169B contains a similar order making power for the Department to provide for groups of workers where the employer is no longer their employer by reason of a business transfer or otherwise. Paragraph 169C provides that an order under new paragraphs 169A or 169B must be approved by a resolution of the Assembly.

Information about union membership and employment in bargaining unit

Paragraph 19 inserts a new paragraph 170A into Schedule 1A. The new paragraph provides a power for the IC to require the employer, the union(s) and applicant workers to give to an IC case manager specified information to help inform its decisions under the Schedule. It also specifies the IC's processes in handling and making use of such information.

"Pay" and other matters subject to collective bargaining

Paragraph 20 inserts a new paragraph 171A into Schedule 1A. An IC declaration of recognition is for collective bargaining on pay, hours and holidays. Paragraph 171A(1) clarifies that for the purposes of the Schedule, the definition of "pay" does not include any matters relating to a worker's membership of an occupational or personal pension scheme, his rights under that scheme, or his employer's contributions to it. Paragraph 171A (2) to (4) permit the Department by order to amend relevant parts of the Schedule to add matters relating to pensions to the core bargaining topics.

Schedule 2 Amendments

Almost all the provisions of this Schedule are consequential upon the Articles of the Order or contain minor amendments that improve the drafting of a provision, remove a superfluous definition, or remove or correct an incorrect cross reference. The paragraphs mentioned below contain more significant changes.

Paragraph 4 inserts into Article 57 of the 1995 Order new paragraphs which improve the procedures for enforcing an order by the Certification Officer requiring a trade union to remedy a breach of its political fund rules.

Paragraph 25 adds the rights contained in new Articles 77A and 77B (inducements relating to union membership, union activities and collective bargaining) to the jurisdictions to which the standard and modified grievance procedures contained in the Employment (Northern Ireland) Order 2003 (No.2902) (N.I.15) apply.