
STATUTORY INSTRUMENTS

2004 No. 3078

The Employment Relations (Northern Ireland) Order 2004

PART IV

RIGHTS OF TRADE UNION MEMBERS, WORKERS AND EMPLOYEES

Detriments and inducements in respect of membership etc. of independent trade union

Extension of protection against detriment for union membership etc.

12.—(1) Article 73 of the Employment Rights Order (action short of dismissal on grounds related to union membership or activities) is amended in accordance with paragraphs (2) to (5).

(2) For “An employee” in each of paragraphs (1) and (3), and “an employee” in each of paragraphs (2) and (4), substitute “A worker” and “a worker” respectively.

(3) In paragraph (2)—

(a) for “employee's” substitute “worker's”; and

(b) after “contract of employment” insert “(or other contract personally to do work or perform services)”.

(4) In paragraph (3), for “his contract of employment” substitute “a contract of employment”.

(5) For paragraph (6) substitute—

“(6) This Article does not apply where—

(a) the worker is an employee; and

(b) the detriment in question amounts to dismissal.

(7) In this Chapter—

“worker” means an individual who works, or normally works as mentioned in paragraphs (a) to (c) of the definition of “worker” in Article 2(2) of the 1995 Order; and

“employer” means—

(a) in relation to a worker, the person for whom he works;

(b) in relation to a former worker, the person for whom he worked.”.

(6) In the heading to Article 73 of the Employment Rights Order, and in the Chapter heading immediately preceding it, for “Action short of dismissal” substitute “Detriment”.

(7) In Article 74(1) of the Employment Rights Order, for “An employee” substitute “A worker or former worker”.

(8) In Article 247 of the Employment Rights Order after paragraph (2) insert—

“(2A) The remedy of a person for infringement of the right conferred on him by Article 73 is by way of a complaint under Article 74 and not otherwise.”.

Detriment for use of union services or refusal of inducement

13.—(1) Article 73 of the Employment Rights Order (action short of dismissal on grounds related to union membership or activities) is also amended in accordance with paragraphs (2) to (6).

(2) In paragraph (1), omit “or” at the end of sub-paragraph (b) and after that sub-paragraph insert—

“(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or”.

(3) In paragraph (2)—

(a) for “(1)(b)” substitute “(1)”; and

(b) in sub-paragraph (b), after “the activities of a trade union” insert “or (as the case may be) make use of trade union services”.

(4) After paragraph (2) insert—

“(2A) In this Article—

(a) “trade union services” means services made available to the worker by an independent trade union by virtue of his membership of the union, and

(b) references to a worker’s “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) If an independent trade union of which a worker is a member raises a matter on his behalf (with or without his consent), penalising the worker for that is to be treated as penalising him as mentioned in paragraph (1)(ba).

(2C) A worker also has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place because of the worker’s failure to accept an offer made in contravention of Article 77A or 77B.

(2D) For the purposes of paragraph (2C), not conferring a benefit that, if the offer had been accepted by the worker, would have been conferred on him under the resulting agreement shall be taken to be subjecting him to a detriment as an individual (and to be a deliberate failure to act).”

(5) In paragraph (5) (references to being etc. a member of a union to include being etc. a member of a branch or section) omit “; and references to taking part in the activities of a trade union shall be similarly construed”.

(6) After that paragraph insert—

“(5A) References in this Chapter—

(a) to taking part in the activities of a trade union, and

(b) to services made available by a trade union by virtue of membership of the union, shall be construed in accordance with paragraph (5).”

(7) In Article 75 of the Employment Rights Order (consideration of complaint under Article 74), omit paragraphs (3) to (5).

(8) Omit Article 19 of the [Employment Relations \(Northern Ireland\) Order 1999 \(NI 9\)](#) (which is superseded by this Article and Article 15).

Inducements relating to union membership or activities

14.—(1) After Article 77 of the Employment Rights Order insert—

“CHAPTER III
INDUCEMENTS

Inducements relating to union membership or activities

77A.—(1) A worker has the right not to have an offer made to him by his employer for the sole or main purpose of inducing the worker—

- (a) not to be or seek to become a member of an independent trade union,
- (b) not to take part, at an appropriate time, in the activities of an independent trade union,
- (c) not to make use, at an appropriate time, of trade union services, or
- (d) to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In paragraph (1) “an appropriate time” means—

- (a) a time outside the worker’s working hours, or
- (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services.

(3) In paragraph (2) “working hours”, in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

(4) In paragraphs (1) and (2)—

- (a) “trade union services” means services made available to the worker by an independent trade union by virtue of his membership of the union, and
- (b) references to a worker’s “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(5) A worker or former worker may present a complaint to an industrial tribunal on the ground that his employer has made him an offer in contravention of this Article.

Inducements relating to collective bargaining

77B.—(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if—

- (a) acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and
- (b) the employer’s sole or main purpose in making the offers is to achieve that result.

(2) The prohibited result is that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.

(3) It is immaterial for the purposes of paragraph (1) whether the offers are made to the workers simultaneously.

(4) Having terms of employment determined by collective agreement shall not be regarded for the purposes of Article 77A (or Article 73 or 136) as making use of a trade union service.

(5) A worker or former worker may present a complaint to an industrial tribunal on the ground that his employer has made him an offer in contravention of this Article.

Time limit for proceedings

77C. An industrial tribunal shall not consider a complaint under Article 77A or 77B unless it is presented—

- (a) before the end of the period of three months beginning with the date when the offer was made or, where the offer is part of a series of similar offers to the complainant, the date when the last of them was made, or
- (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

Consideration of complaint

77D.—(1) On a complaint under Article 77A it shall be for the employer to show what was his sole or main purpose in making the offer.

(2) On a complaint under Article 77B it shall be for the employer to show what was his sole or main purpose in making the offers.

(3) On a complaint under Article 77A or 77B, in determining any question whether the employer made the offer (or offers) or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

(4) In determining whether an employer's sole or main purpose in making offers was the purpose mentioned in Article 77B(1), the matters taken into account must include any evidence—

- (a) that when the offers were made the employer had recently changed or sought to change, or did not wish to use, arrangements agreed with the union for collective bargaining,
- (b) that when the offers were made the employer did not wish to enter into arrangements proposed by the union for collective bargaining, or
- (c) that the offers were made only to particular workers, and were made with the sole or main purpose of rewarding those particular workers for their high level of performance or of retaining them because of their special value to the employer.

Remedies

77E.—(1) Paragraphs (2) and (3) apply where the industrial tribunal finds that a complaint under Article 77A or 77B is well-founded.

(2) The tribunal—

- (a) shall make a declaration to that effect, and
- (b) shall make an award to be paid by the employer to the complainant in respect of the offer complained of.

(3) The amount of the award shall be £2,500 (subject to any adjustment of the award that may fall to be made under Part IV of the Employment (Northern Ireland) Order 2003).

(4) Where an offer made in contravention of Article 77A or 77B is accepted—

- (a) if the acceptance results in the worker's agreeing to vary his terms of employment, the employer cannot enforce the agreement to vary, or recover any sum paid or other asset transferred by him under the agreement to vary;

- (b) if as a result of the acceptance the worker's terms of employment are varied, nothing in Article 77A or 77B makes the variation unenforceable by either party.
- (5) Nothing in this Article or Articles 77A and 77B prejudices any right conferred by Article 73 or 76.
- (6) In ascertaining any amount of compensation under Article 76, no reduction shall be made on the ground—
 - (a) that the complainant caused or contributed to his loss, or to the act or failure complained of, by accepting or not accepting an offer made in contravention of Article 77A or 77B, or
 - (b) that the complainant has received or is entitled to an award under this Article.

Interpretation and other supplementary provisions

77F.—(1) References in Articles 77A to 77E to being or becoming a member of a trade union include references—

- (a) to being or becoming a member of a particular branch or section of that union, and
- (b) to being or becoming a member of one of a number of particular branches or sections of that union.

(2) References in those Articles—

- (a) to taking part in the activities of a trade union, and
- (b) to services made available by a trade union by virtue of membership of the union,

shall be construed in accordance with paragraph (1).

(3) In Articles 77A to 77—

“worker” means an individual who works, or normally works as mentioned in paragraphs (a) to (c) of the definition of “worker” in Article 2(2) of the 1995 Order; and

“employer” means—

- (a) in relation to a worker, the person for whom he works;
- (b) in relation to a former worker, the person for whom he worked.”.

(2) In Article 247 of the Employment Rights Order after paragraph (2A) insert—

“(2B) The remedy of a person for infringement of the right conferred on him by Article 77A or Article 77B is by way of a complaint under that Article and not otherwise.”.

Dismissal for use of union services or refusal of inducement

15.—(1) Article 136 of the Employment Rights Order (dismissal on grounds related to union membership or activities) is amended as follows.

(2) In paragraph (1), omit “or” at the end of each of sub-paragraphs (a) and (b) and after sub-paragraph (b) insert—

- “(ba) had made use, or proposed to make use, of trade union services at an appropriate time,
- (bb) had failed to accept an offer made in contravention of Article 77A or 77B, or”.

(3) In paragraph (2)—

- (a) for “(1)(b)” substitute “(1)”; and
- (b) in sub-paragraph (b), after “the activities of a trade union” insert “or (as the case may be) make use of trade union services”.

(4) After paragraph (2) insert—

“(2A) In this Article—

- (a) “trade union services” means services made available to the employee by an independent trade union by virtue of his membership of the union, and
- (b) references to an employee’s “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) Where the reason or one of the reasons for the dismissal was that an independent trade union (with or without the employee’s consent) raised a matter on behalf of the employee as one of its members, the reason shall be treated as falling within paragraph (1) (ba).”.

(5) In paragraph (4) (references to being etc. a member of a union to include being etc. a member of a branch or section) omit “; and references to taking part in the activities of a trade union shall be similarly construed”.

(6) After that paragraph add—

“(5) References in this Article—

- (a) to taking part in the activities of a trade union, and
- (b) to services made available by a trade union by virtue of membership of the union, shall be construed in accordance with paragraph (4).”.