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STATUTORY INSTRUMENTS

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**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).”.

#### *Other rights of workers and employees*

### **Expulsion from trade union attributable to conduct**

**16.**—(1) Article 38 of the 1995 Order (right not to be expelled from trade union) is amended as follows.

(2) In paragraph (2)(d) for “his conduct” substitute “conduct of his (other than excluded conduct) and the conduct to which it is wholly or mainly attributable is not protected conduct”.

(3) For paragraph (4) substitute—

“(4) For the purposes of paragraph (2)(d) “excluded conduct”, in relation to an individual, means—

- (a) conduct which consists in his being or ceasing to be, or having been or ceased to be, a member of another trade union,
- (b) conduct which consists in his being or ceasing to be, or having been or ceased to be, employed by a particular employer or at a particular place, or
- (c) conduct to which Article 32 (conduct for which an individual may not be disciplined by a union) applies or would apply if the references in that Article to the trade union which is relevant for the purposes of that Article were references to any trade union.

(4A) For the purposes of paragraph (2)(d) “protected conduct” is conduct which consists in the individual’s being or ceasing to be, or having been or ceased to be, a member of a political party.”.

(4) In Article 40 of that Order (remedies for infringement of right not to be expelled), after paragraph (1) insert—

“(1A) If a tribunal makes a declaration under paragraph (1) and it appears to the tribunal that the expulsion was mainly attributable to conduct falling within Article 38(4A) it shall make a declaration to that effect.

(1B) If a tribunal makes a declaration under paragraph (1A) and it appears to the tribunal that the other conduct to which the expulsion was attributable consisted wholly or mainly of conduct of the complainant which was contrary to—

- (a) a rule of the union, or
- (b) an objective of the union,

it shall make a declaration to that effect.”

(1C) For the purposes of paragraph (1B), it is immaterial whether the complainant was a member of the union at the time of the conduct contrary to the rule or objective.

(1D) A declaration by virtue of paragraph (1B)(b) shall not be made unless the union shows that, at the time of the conduct of the complainant which was contrary to the objective in question, it was reasonably practicable for that objective to be ascertained—

- (a) if the complainant was not at that time a member of the union, by a member of the general public, and
- (b) if he was at that time a member of the union, by a member of the union.”

(5) In paragraph (3)(a) of that Article, after “declaration” insert “under paragraph (1)”.

(6) In paragraph (6) of that Article the words from “and, in a case” to the end shall cease to have effect.

(7) For paragraph (7) of that Article substitute—

“(7) If on the date on which the application was made the applicant had not been re-admitted to the union, the award shall not be less than £5,900.

(8) Paragraph (7) does not apply in a case where the tribunal which made the declaration under paragraph (1) also made declarations under paragraphs (1A) and (1B).”.

(8) In Articles 38 and 40 of the 1995 Order references to the conduct of an individual include references to conduct which took place before the coming into operation of this Article.

### **National security: powers of industrial tribunals**

**17.** For paragraph (6) of Article 12 of the [Industrial Tribunals \(Northern Ireland\) Order 1996 \(NI 18\)](#) (procedure regulations in relation to cases involving issues of national security) substitute—

“(6) Industrial tribunal procedure regulations may enable a tribunal, if it considers it expedient in the interests of national security, to do in relation to particular proceedings before it anything of a kind which, by virtue of paragraph (5), industrial tribunal procedure regulations may enable the Secretary of State to direct a tribunal to do in relation to particular Crown employment proceedings.”

### *Other rights of workers and employers*

### **Role of companion at disciplinary or grievance hearings**

**18.—**(1) For paragraph (2) of Article 12 of the [Employment Relations \(Northern Ireland\) Order 1999 \(NI 9\)](#) (duty of employers to permit workers to be accompanied at disciplinary and grievance hearings) substitute—

“(2A) Where this Article applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

- (a) is chosen by the worker; and
- (b) is within paragraph (3).

(2B) The employer must permit the worker’s companion to—

- (a) address the hearing in order to do any or all of the following—
  - (i) put the worker’s case;
  - (ii) sum up that case;
  - (iii) respond on the worker’s behalf to any view expressed at the hearing;
- (b) confer with the worker during the hearing.

(2C) Paragraph (2B) does not require the employer to permit the worker’s companion to—

- (a) answer questions on behalf of the worker;
- (b) address the hearing if the worker indicates at it that he does not wish his companion to do so; or
- (c) use the powers conferred by that paragraph in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.”.

(2) In Article 13(1) of that Order (complaint to industrial tribunal), for “12(2)” substitute “12(2A), (2B)”.

(3) In Article 14 of that Order (right not to be subjected to a detriment or dismissal)—

- (a) in paragraphs (1)(a) and (3)(a) for “12(2)” substitute “12(2A), (2B)”;
- (b) after paragraph (6) add—

“(7) References in this Article to a worker having accompanied or sought to accompany another worker include references to his having exercised or sought to exercise any of the powers conferred by Article 12(2A) or (2B).”.

### **Ways in which provision conferring rights on individuals may be made**

**19.** In Article 24 of the [Employment Relations \(Northern Ireland\) Order 1999 \(NI 9\)](#) (power to confer on individuals of a specified description rights conferred by certain statutory provisions) in paragraph (5) (ways in which that power may be exercised) for the words from “whether” to the end substitute “including, in particular, amending, excluding or applying (with or without amendment) any statutory provision.”.

### **Protection of employees in respect of jury service**

**20.**—(1) In Chapter I of Part VI of the Employment Rights Order (protection from suffering detriment in employment), before Article 68 insert—

#### **“Jury service**

**67M.**—(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the employee—

- (a) has been summoned under the [Juries \(Northern Ireland\) Order 1974 \(NI 6\)](#) or the Coroners (Northern Ireland) Act 1959 (c. 15) to attend for service as a juror, or
- (b) has been absent from work because he attended at any place in pursuance of being so summoned.

(2) This Article does not apply where the detriment in question amounts to dismissal within the meaning of Part XI.

(3) For the purposes of this Article, an employee is not to be regarded as having been subjected to a detriment by a failure to pay remuneration in respect of a relevant period unless under his contract of employment he is entitled to be paid that remuneration.



(4) In paragraph (3) “a relevant period” means any period during which the employee is absent from work because of his attendance at any place in pursuance of being summoned as mentioned in paragraph (1)(a).”.

(2) In Article 71(1) of that Order (application to industrial tribunal), after “Article” insert “67M,”.

(3) After Article 130A of that Order insert—

**“Jury service**

**130B.**—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

- (a) has been summoned under the Juries (Northern Ireland) Order 1974 or the Coroners Act (Northern Ireland) 1959 (c. 15) to attend for service as a juror, or
- (b) has been absent from work because he attended at any place in pursuance of being so summoned.

(2) Paragraph (1) does not apply in relation to an employee who is dismissed if the employer shows—

- (a) that the circumstances were such that the employee’s absence in pursuance of being so summoned was likely to cause substantial injury to the employer’s undertaking,
- (b) that the employer brought those circumstances to the attention of the employee,
- (c) that the employee refused or failed to apply to be excused from attending in pursuance of being so summoned, and
- (d) that the refusal or failure was not reasonable.”

(4) In Article 137 of that Order (redundancy), for paragraph (1)(c) substitute—

“(c) it is shown that any of paragraphs (2A) to (7D) applies.”.

(5) In that Article, before paragraph (3) insert—

“(2A) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in paragraph (1) of Article 130B (unless the case is one to which paragraph (2) of that Article applies).”

(6) In Article 140(3) of that Order (exceptions to one year qualifying period of continuous employment for claims of unfair dismissal), before sub-paragraph (b) insert—

“(aa) paragraph (1) of Article 130B (read with paragraph (2) of that Article) applies,”.

(7) In Article 141(2) of that Order (exceptions to upper age limit for claims of unfair dismissal), before sub-paragraph (b) insert—

“(aa) paragraph (1) of Article 130B (read with paragraph (2) of that Article) applies,”.

(8) In Article 143(2) of that Order (cases where employee may complain of unfair dismissal despite participation in unofficial industrial action) before sub-paragraph (a) insert—

“(aa) paragraph (1) of Article 130B (read with paragraph (2) of that Article) applies,”.

(9) In Article 144(2) of that Order (cases where industrial tribunal to determine whether dismissal of an employee is unfair despite limitation in paragraph (1) of that Article) before sub-paragraph (a) insert—

“(aa) paragraph (1) of Article 130B (read with paragraph (2) of that Article) applies,”.

### **Flexible working**

**21.**—(1) After paragraph (6B) of Article 137 of the Employment Rights Order (unfair dismissal by reason of redundancy) insert—

“(6C) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in Article 135C.”.

(2) In Article 141(2) of that Order (exceptions to upper age limit for claims for unfair dismissal), after sub-paragraph (fg) insert—

“(fh) Article 135C applies.”.

(3) In Article 143(2) of that Order (cases where employee may complain of unfair dismissal despite participation in unofficial industrial action) after sub-paragraph (ccc) insert—

“(d) Article 135C applies.”.

(4) In Article 144(2) of that Order (cases where industrial tribunal to determine whether dismissal of an employee is unfair despite limitation in paragraph (2) of that Article) after sub-paragraph (cc) insert—

“(d) Article 135C applies.”.