

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

Part One: Union Recognition

Unfair practices in relation to recognition ballots

76. **Section 10** inserts paragraphs 27A to 27F into Schedule A1 of the 1992 Act.
77. Paragraph 27A requires each of the parties informed by the CAC under paragraph 25(9) that a ballot is to be held must refrain from using any unfair practice. Paragraph 27A(2) provides that a party uses an unfair practice if it does any of the following with a view to influencing the outcome of the ballot:
- offers to pay money or give money's worth to a worker in the bargaining unit in return for that worker agreeing to vote in a particular way or to abstain from voting in the ballot;
 - makes an outcome-specific offer to a voter (see paragraph 27A(3));
 - coerces or attempts to coerce a worker in the bargaining unit to reveal how he intends to vote or did actually vote, or whether he intends to vote at all;
 - dismisses or threatens to dismiss a worker;
 - takes or threatens to take disciplinary action against a worker;
 - subjects or threatens to subject a worker to any other detriment;
 - uses or attempts to use undue influence on a worker in the bargaining unit.
78. Paragraph 27A(3) defines an "outcome specific offer" as an offer to pay money or give money's worth which is contingent on the outcome of the ballot as reflected in a declaration by the CAC that the union is (or is not) entitled to be recognised. However, offers which are contingent on anything which might subsequently occur or be done as a result of the CAC's declaration - say, the outcome of any collective bargaining resulting from a CAC award of recognition - are not categorised as an "outcome specific offer".
79. Paragraph 27A(4) makes it clear that this paragraph does not confer any new rights on a worker but does not affect any other right a worker may have.
80. Paragraph 27A(5) provides that Acas and the Secretary of State may issue Codes of Practice for the purposes of this paragraph in accordance with their powers under sections 199(1) and 203(1)(a) of the 1992 Act respectively.
81. Paragraph 27B provides that a party (a union or an employer who is informed of a ballot by the CAC) may complain to the CAC if it considers that another party has used an unfair practice. The complaint must be made within one working day of the last date on which votes can be cast in the ballot (or within one working day of the ballot if it took place on a single day). The CAC has 10 working days (or such longer period

as the CAC may specify in a notice to the parties containing its reasons for extending the period) in which to decide whether a complaint is well-founded. Under paragraph 27B(4) a complaint is well-founded if the following two conditions are both met:

- the CAC finds that the party complained against did use an unfair practice;
- the CAC is satisfied that the use of that unfair practice changed or was likely to change the voting intentions (in terms of how he would vote or whether he would vote at all) or the voting behaviour (in terms of how he voted or whether he voted at all) of a worker in the bargaining unit.

82. Under paragraph 27B(6) if the ballot has not yet begun when the CAC comes to consider a complaint the CAC may postpone the ballot until a date after the end of the decision period. If it does so, the CAC must inform the parties and the qualified independent person of this by notice.
83. Paragraphs 27C to 27F set out the consequences of a decision by the CAC that a complaint is well-founded. Paragraph 27C(2) requires the CAC in such circumstances to issue a declaration that the complaint is well-founded.
84. Paragraphs 27C(3), 27C(4) and 27C(6) provide a discretionary power for the CAC to issue one or more remedial orders requiring a party to mitigate the effects of the unfair practice. Where a party fails to comply with such an order, the CAC is empowered under paragraph 27D to award recognition (if the party was an employer) or to reject the union's application for recognition (if the party was a union). Paragraph 27D also provides for the CAC to award recognition where an unfair practice committed by an employer involves the use of violence or the dismissal of a union official, or where the CAC makes a second declaration against the employer about a further unfair practice. Similarly, the CAC may reject a union's application if it is responsible for an unfair practice involving violence or the dismissal of a union official, or where it is found to have committed a further unfair practice.
85. Paragraph 27C(3)(b) provides a discretionary power to the CAC to arrange for a further ballot where an unfair practice has occurred. Paragraph 27E (together with an amendment to paragraph 29 made by subsection (2) of this section) provide powers for the CAC to cancel the initial ballot where it is not completed, or to annul a completed initial ballot without disclosing its result. (These powers to cancel or annul the ballot without disclosing the result can also be used where the CAC awards recognition or rejects the union's application under paragraph 27D.) Paragraph 27F provides how the CAC should organise any further ballot and specifies the obligations on the parties in relation to this further ballot. The requirements are mostly the same as applied to the original ballot. The main differences are that (i) after being notified that the CAC intends to hold a further ballot, the parties are given 5 working days to inform the CAC that they do not want a ballot to be held, and (ii) the costs of the ballot do not have to be shared equally by both parties, thereby providing scope for the CAC to require the party which committed the unfair practice to pay all or the majority of the costs.