

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

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

Detriment for use of union services or refusal of inducement

225. *Section 31.* The general effect of section 146 as it was before the amendments made by the Act, is that an employee has the right not to have action taken against him by his employer that subjects him to any detriment where the ground for taking the action 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. Section 31 amends section 146 to add to the grounds on which “workers”, as defined in section 151 (as amended by section 30) have the right not to be subjected to any detrimental action.
226. *Subsection (2)* amends subsection (1) of section 146 and has the effect that a worker has the right not to be subjected to any detriment by an act (including a deliberate failure) done by his employer for the purpose of preventing or deterring him from making use of trade union services at “an appropriate time” or penalising him for doing so.
227. *Subsection (3)* amends subsection (2) of section 146 to extend the meaning of “an appropriate time” already contained in the section to the use of trade union services. The result is that the definition of “an appropriate time” used here is the same as that used in the new section 145A(2) inserted by section 29.
228. *Subsection (4)* inserts new subsections (2A) to (2D) into section 146.
229. New subsection (2A)(a) defines “trade union services” to mean services made available to a worker by an independent trade union by virtue of his membership of the union. Subsection (2A)(b) states that references to a worker’s making use of trade union services include “consenting to the raising of a matter on his behalf by an independent trade union of which he is a member”, so ensuring that a worker consenting to his union raising a matter is regarded as making use of union services.
230. New subsection (2B) has the effect that if an independent trade union raises a matter on behalf a worker who is a member of the union, with or without his consent, penalizing him for that is to be treated as penalising him for making use of union services.
231. New subsection (2C) gives a worker the right not to be subjected to any detriment by an act (including a deliberate failure) done by his employer because of the worker’s failure to accept an offer infringing the worker’s rights under new section 145A or 145B inserted by section 29.
232. New subsection (2D) has the effect that where a worker is not given a benefit that he would have been given had he accepted an offer infringing his rights under section 145A or 145B, the failure by the employer to give him the benefit shall be taken to subject him to a detriment. This ensures that a worker treated in this way can complain to an employment tribunal not only about the making of the offer that infringed his rights

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

but also about the detriment resulting from the failure to give him the benefit contained in the offer.

233. *Subsection (5)* repeals subsections (3) to (5) of section 148 of the 1992 Act (consideration of complaint under 146 of the 1992 Act). Subsections (3) to (5) of the 1992 Act had the effect that where an employee was subjected to a detriment by an act, or deliberate failure to act, by his employer this was not caught by section 146 if the employer's purpose was "to further a change in the relationship with all or any class of his employees". This expression covered the case where an employer made an offer for the purpose of inducing employees to give up a right to have their terms of employment determined under a collective agreement, that is to say the situation that arose in *Wilson and Palmer*, and therefore meant that section 146 did not give any protection to employees in that situation.
234. *Subsections (6) and (7)* replace the part of section 51(1) relating to taking part in the activities of a trade union with a new subsection (1A) of section 151 securing that references in sections 146 to 150 to "taking part in the activities of a trade union" and to "services made available by a trade union by virtue of membership of the union" relate to taking part in the activities of and the services made available by a particular branch or section of the union or one of a number of particular branches or sections. This ensures that the interpretation to be given to these expressions in sections 146 to 150 is consistent with that to be given to them in new sections 145A to 145E (inserted by section 29) by virtue of new section 145F.
235. *Subsection (8)* repeals section 17 of the Employment Relations Act 1999. Section 17 of the 1999 Act provided a power for the Secretary of State to make regulations to protect workers against dismissal and detriment for refusing to enter into an individual contract which includes terms different from those in a collective agreement which would otherwise apply. Section 17 was never commenced and has been superseded by sections 31 and 32.