

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

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

Exclusion or expulsion from trade union attributable to conduct

247. *Section 33* amends section 174 of the 1992 Act and changes the provisions in section 176 of the 1992 Act which contain the remedies for breaching the rights contained in section 174. These amendments make it clear that trade unions are entitled to exclude an individual wholly or mainly for taking part in the activities of a political party, and introduce new compensation arrangements where the tribunal considers that an exclusion or expulsion was attributable mainly to membership of a political party. It leaves the existing law unchanged in other conduct cases.
248. *Subsection (2)* amends section 174(2)(d). It has three effects: firstly, that a union is free to exclude or expel where the exclusion or expulsion is wholly attributable to conduct, and the conduct is neither “excluded conduct” nor “protected conduct”; secondly, that a union is free to exclude or expel where the exclusion or expulsion is to some extent, but not wholly or mainly, attributable to “protected conduct”; and thirdly that a union may not exclude or expel where the exclusion or expulsion is to any extent attributable to “excluded conduct”. It follows that exclusions and 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.
249. “Excluded conduct” and “protected conduct” are defined at *subsection (3)* which inserts a revised subsection (4) and new subsections (4A) and (4B) into section 174 of the 1992 Act. “Excluded conduct” is defined in revised subsection (4). It includes those types of conduct, other than membership of a political party, which are set out in the existing subsection (4) of section 174 and currently fall outside the definition of “conduct”. “Protected conduct” is defined at new subsection (4A) as being or ceasing to be, or having been or ceased to be, a member of a political party. New subsection (4B) qualifies this definition by making it clear that political activities of any kind do not fall within the definition of “protected conduct”.
250. *Subsection (4)* inserts four new subsections into section 176 of the 1992 Act, which concerns the remedies for unlawful exclusions and expulsions.
251. New subsection (1A) of section 176 provides that where a tribunal makes a declaration that a complaint is well-founded under section 174 the tribunal shall make a further declaration in cases where the exclusion or expulsion was mainly attributable to “protected conduct” stating that the exclusion or expulsion was mainly so attributable.
252. New subsection (1B) concerns the circumstances where both of these declarations have been made and provides for the tribunal to make a further declaration. If it appears to the tribunal that the other conduct to which the exclusion or expulsion was attributable consists wholly or mainly of conduct which was contrary to the rules of the union or an objective of the union, then the tribunal is to make a declaration to that effect.

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

253. New subsection (1C) provides that it is immaterial for the purposes of subsection (1B) whether the complainant was a member of the union at the time of the conduct contrary to the rule or objective.
254. New subsection (1D) provides that a declaration by virtue of subsection (1B)(b) shall not be made unless the union shows that it was reasonably practicable for the complainant to have ascertained the objective(s) in question, at the time of the conduct of his that is in question. The subsection also provides that if the complainant was not a member of the union at the time of the conduct then the objective(s) in question must have been reasonably practicable for a member of the public to ascertain and that if the complainant was a member of the union at the time of the conduct then the objective(s) in question must have been reasonably practicable for a union member to ascertain.
255. *Subsection (5)* makes a consequential change to the existing subsection 176(3)(a).
256. *Subsection (6)* inserts two new subsections into subsection (6) of section 176 of the 1992 Act relating to the level of the compensation to be awarded. New subsection (6A) provides that if, on the date the application for compensation was made to the tribunal under section 176, the individual had not been admitted or re-admitted into the union, then the tribunal shall not award less than the current minimum of £5,900 in compensation. New subsection (6B) provides that this minimum does not apply when the tribunal has made the declarations mentioned in both new subsection (1A) and new subsection (1B) of section 176.
257. *Subsection (7)* provides that references in sections 174 and 176 to the conduct of an individual include references to conduct which took place before the coming into force of the section.