



# Employment Relations Act 2004

## 2004 CHAPTER 24

### PART 3

#### RIGHTS OF TRADE UNION MEMBERS, WORKERS AND EMPLOYEES

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

#### **35 Disapplication of qualifying period and upper age limit for unfair dismissal**

For section 154 of the 1992 Act substitute—

##### **“154 Disapplication of qualifying period and upper age limit for unfair dismissal**

Sections 108(1) and 109(1) of the Employment Rights Act 1996 (qualifying period and upper age limit for unfair dismissal protection) do not apply to a dismissal which by virtue of section 152 or 153 is regarded as unfair for the purposes of Part 10 of that Act.”

##### **Commencement Information**

**II** [S. 35](#) in force at 6.4.2005 by [S.I. 2005/872](#), [art. 4](#), [Sch.](#) (with [art. 12](#))

#### **36 National security: powers of employment tribunals**

For subsection (6) of section 10 of the Employment Tribunals Act 1996 (c. 17) (procedure regulations in relation to cases involving issues of national security) substitute—

“(6) Employment 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 subsection (5), employment tribunal procedure regulations may enable a

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Minister of the Crown to direct a tribunal to do in relation to particular Crown employment proceedings.”

**Commencement Information**

**I2** S. 36 in force at 31.12.2004 by S.I. 2004/3342, art. 4(a)

**37 Role of companion at disciplinary or grievance hearing**

(1) For subsection (2) of section 10 of the Employment Relations Act 1999 (c. 26) duty of employers to permit workers to be accompanied at disciplinary and grievance hearings) substitute—

“(2A) Where this section 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 subsection (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) Subsection (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 subsection 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 section 11(1) of that Act (complaint to employment tribunal), for “10(2)” substitute “ 10(2A), (2B) ”.

(3) In section 12 of that Act (right not to be subjected to a detriment or dismissal)—

- (a) in subsections (1)(a) and (3)(a) for “10(2)” substitute “ 10(2A), (2B) ”; and
- (b) after subsection (6) add—

“(7) References in this section 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 section 10(2A) or (2B).”

**Commencement Information**

**I3** S. 37 in force at 1.10.2004 by S.I. 2004/2566, art. 3(a) (with art. 8)

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### **38 Extension of jurisdiction of Employment Appeal Tribunal**

In section 21(1) of the Employment Tribunals Act 1996 (c. 17) (proceedings from which appeal lies to Employment Appeal Tribunal), for paragraphs (ff) and (g) substitute—

- “(g) this Act,
- (ga) the National Minimum Wage Act 1998,
- (gb) the Employment Relations Act 1999.”

#### **Commencement Information**

**I4** S. 38 in force at 1.10.2004 by S.I. 2004/2566, art. 3(a)

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

(1) Section 23 of the Employment Relations Act 1999 (c. 26) (power to confer on individuals of a specified description rights conferred by certain enactments) is amended as follows.

(2) In subsection (5) (ways in which that power may be exercised) omit the words from “, whether” to the end.

(3) After that subsection insert—

“(5A) The ways in which an order under this section may make provision include, in particular—

- (a) amending any enactment;
- (b) excluding or applying (whether with or without amendment) any enactment.

(5B) In subsection (5A) “enactment” includes an enactment comprised in subordinate legislation made under an Act.”

#### **Commencement Information**

**I5** S. 39 in force at 31.12.2004 by S.I. 2004/3342, art. 4(a)

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

(1) In Part 5 of the Employment Rights Act 1996 (c. 18) (protection from suffering detriment in employment), before section 44 (but after the cross-heading immediately preceding that section) insert—

#### **“43M Jury service**

(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 Act 1974, the Coroners Act 1988, the Court of Session Act 1988 or the Criminal Procedure (Scotland) Act 1995 to attend for service as a juror, or

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- (b) has been absent from work because he attended at any place in pursuance of being so summoned.
- (2) This section does not apply where the detriment in question amounts to dismissal within the meaning of Part 10.
- (3) For the purposes of this section, 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 subsection (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 subsection (1)(a).”
- (2) In section 48(1) of that Act (application to employment tribunal), after “section” insert “43M, ”.
- (3) After section 98A of that Act insert—

**“98B Jury service**

- (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 Act 1974, the Coroners Act 1988, the Court of Session Act 1988 or the Criminal Procedure (Scotland) Act 1995 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) Subsection (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 the appropriate officer for excusal from or a deferral of the obligation to attend in pursuance of being so summoned, and
  - (d) that the refusal or failure was not reasonable.
- (3) In paragraph (c) of subsection (2) “the appropriate officer” means—
  - (a) in the case of a person who has been summoned under the Juries Act 1974, the officer designated for the purposes of section 8, 9 or, as the case may be, 9A of that Act;
  - (b) in the case of a person who has been summoned under the Coroners Act 1988, a person who is the appropriate officer for the purposes of any rules made under subsection (1) of section 32 of that Act by virtue of subsection (2) of that section;
  - (c) in the case of a person who has been summoned under the Court of Session Act 1988, either—

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- (i) the clerk of court issuing the citation to attend for jury service;  
or
      - (ii) the clerk of the court before which the person is cited to attend for jury service;
    - (d) in the case of a person who has been summoned under the Criminal Procedure (Scotland) Act 1995, either—
      - (i) the clerk of court issuing the citation to attend for jury service;  
or
      - (ii) the clerk of the court before which the person has been cited to attend for jury service;
- and references in that paragraph to a refusal or failure to apply include references to a refusal or failure to give a notice under section 1(2)(b) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.”
- (4) In section 105 of that Act (redundancy), for subsection (1)(c) substitute—
    - “(c) it is shown that any of subsections (2A) to (7F) applies.”
  - (5) In that section, before subsection (3) insert—
    - “(2A) This subsection 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 subsection (1) of section 98B (unless the case is one to which subsection (2) of that section applies).”
  - (6) In section 108(3) of that Act (exceptions to one year qualifying period of continuous employment for claims of unfair dismissal), before paragraph (b) insert—
    - “(aa) subsection (1) of section 98B (read with subsection (2) of that section) applies.”
  - (7) In section 109(2) of that Act (exceptions to upper age limit for claims of unfair dismissal), before paragraph (b) insert—
    - “(aa) subsection (1) of section 98B (read with subsection (2) of that section) applies.”
  - (8) In section 237(1A)(a) of the 1992 Act (cases where employee may complain of unfair dismissal despite participation in unofficial industrial action)—
    - (a) after “section” insert “ 98B, ”; and
    - (b) after “(dismissal in” insert “ jury service, ”.
  - (9) In section 238(2A)(a) of the 1992 Act (cases where employment tribunal to determine whether dismissal of an employee is unfair despite limitation in subsection (2) of that section)—
    - (a) after “section” insert “ 98B, ”; and
    - (b) after “(dismissal in” insert “ jury service, ”.

#### Commencement Information

**I6** S. 40 in force at 6.4.2005 by S.I. 2005/872, art. 4, Sch. (with art. 13)

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## 41 Flexible working

- (1) In section 237(1A)(a) of the 1992 Act (cases where employee may complain of unfair dismissal despite participation in unofficial industrial action)—
  - (a) for “or 103A” substitute “ , 103A or 104C ”; and
  - (b) for “and protected disclosure” substitute “ , protected disclosure and flexible working ”.
- (2) In section 238(2A)(a) of that Act (cases where employment tribunal to determine whether dismissal of an employee is unfair despite limitation in subsection (2) of that section)—
  - (a) for “or 103” substitute “ , 103 or 104C ”; and
  - (b) for “and employee representative” substitute “ , employee representative and flexible working ”.
- (3) In section 48(1) of the Employment Rights Act 1996 (c. 18) (complaints to employment tribunals), for “47D” substitute “ 47E ”.
- (4) After subsection (7B) of section 105 of that Act (redundancy) insert—
 

“(7BA) This subsection 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 section 104C.”
- (5) In section 108(3) of that Act (exceptions to one year qualifying period of continuous employment for claims for unfair dismissal), after paragraph (gh) insert—
 

“(gi) section 104C applies.”
- (6) In section 109(2) of that Act (exceptions to upper age limit for claims for unfair dismissal), after paragraph (gh) insert—
 

“(gi) section 104C applies.”
- (7) In sections 194(2) and 195(2) of that Act (provisions of the Act which have effect in relation to employment as a member of the staff of the House of Lords or the House of Commons), in paragraph (c) for “and 47D” substitute “ , 47D and 47E ”.
- (8) In section 199(2) of that Act (provisions of the Act not applicable to share fishermen) for “47D” substitute “ 47E ”.

### Commencement Information

**I7** S. 41 in force at 6.4.2005 by S.I. 2005/872, art. 4, Sch. (with art. 13)

## 42 Information and consultation: Great Britain

- (1) The Secretary of State may make regulations for the purpose of conferring on employees of an employer to whom the regulations apply, or on representatives of those employees, rights—
  - (a) to be informed by the employer about prescribed matters;
  - (b) to be consulted by the employer about prescribed matters.
- (2) Regulations made under subsection (1) must make provision as to the employers to whom the regulations apply which may include provision—

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- (a) applying the regulations by reference to factors including the number of employees in the United Kingdom in the employer's undertaking;
  - (b) as to the method by which the number of employees in an employer's undertaking is to be calculated; and
  - (c) applying the regulations to different descriptions of employer with effect from different dates.
- (3) Regulations made under subsection (1) may make provision—
- (a) as to the circumstances in which the rights mentioned in subsection (1) arise and the extent of those rights;
  - (b) for and about the initiation and conduct of negotiations between employers to whom the regulations apply and their employees for the purposes of reaching an agreement satisfying prescribed conditions about the provision of information to the employees, and consultation of them (whether that provision or consultation is to be direct or through representatives);
  - (c) about the representatives the employees may have for the purposes of the regulations and the method by which those representatives are to be selected;
  - (d) as to the resolution of disputes and the enforcement of obligations imposed by the regulations or by an agreement of the kind mentioned in paragraph (b).
- (4) Regulations made under subsection (1) may—
- (a) confer jurisdiction (including exclusive jurisdiction) on employment tribunals and on the Employment Appeal Tribunal;
  - (b) confer functions on the Central Arbitration Committee;
  - (c) require or authorise the holding of ballots;
  - (d) amend, apply with or without modifications, or make provision similar to any provision of the Employment Rights Act 1996 (c. 18) (including, in particular, Parts 5, 10 and 13), the Employment Tribunals Act 1996 (c. 17) or the 1992 Act;
  - (e) include supplemental, incidental, consequential and transitional provision, including provision amending any enactment;
  - (f) make different provision for different cases or circumstances.
- (5) Regulations made under subsection (1) may make any provision which appears to the Secretary of State to be necessary or expedient—
- (a) for the purpose of implementing Directive [2002/14/EC](#) of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community;
  - (b) for the purpose of dealing with any matter arising out of or related to the United Kingdom's obligations under that Directive.
- (6) Nothing in subsections (2) to (5) prejudices the generality of this section.
- (7) Regulations under this section shall be made by statutory instrument.
- (8) No such regulations may be made unless a draft of the regulations has been laid before Parliament and approved by a resolution of each House of Parliament.
- (9) In this section "prescribed" means prescribed by regulations under this section.

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### **43 Information and consultation: Northern Ireland**

- (1) The Department for Employment and Learning may make regulations for the purpose of conferring on employees of an employer to whom the regulations apply, or on representatives of those employees, rights—
  - (a) to be informed by the employer about prescribed matters;
  - (b) to be consulted by the employer about prescribed matters.
- (2) Regulations made under subsection (1) must make provision as to the employers to whom the regulations apply which may include provision—
  - (a) applying the regulations by reference to factors including the number of employees in the United Kingdom in the employer's undertaking;
  - (b) as to the method by which the number of employees in an employer's undertaking is to be calculated; and
  - (c) applying the regulations to different descriptions of employer with effect from different dates.
- (3) Regulations made under subsection (1) may make provision—
  - (a) as to the circumstances in which the rights mentioned in subsection (1) arise and the extent of those rights;
  - (b) for and about the initiation and conduct of negotiations between employers to whom the regulations apply and their employees for the purposes of reaching an agreement satisfying prescribed conditions about the provision of information to the employees, and consultation of them (whether that provision or consultation is to be direct or through representatives);
  - (c) about the representatives the employees may have for the purposes of the regulations and the method by which those representatives are to be selected;
  - (d) as to the resolution of disputes and the enforcement of obligations imposed by the regulations or by an agreement of the kind mentioned in paragraph (b).
- (4) Regulations made under subsection (1) may—
  - (a) confer jurisdiction (including exclusive jurisdiction) on industrial tribunals and on the High Court;
  - (b) confer functions on the Industrial Court;
  - (c) require or authorise the holding of ballots;
  - (d) amend, apply with or without modifications, or make provision similar to any provision of—
    - (i) the Industrial Relations (Northern Ireland) Order 1992 (S.I. 1992/807 (N.I. 5));
    - (ii) the Trade Union and Labour Relations (Northern Ireland) Order 1995 (S.I. 1995/1980 (N.I. 12));
    - (iii) the Employment Rights (Northern Ireland) Order 1996 (S.I. 1996/1919 (N.I. 16))(including, in particular, Parts 6, 11 and 15); or
    - (iv) the Industrial Tribunals (Northern Ireland) Order 1996 (S.I. 1996/1921 (N.I. 18));
  - (e) include supplemental, incidental, consequential and transitional provision, including provision amending any enactment;
  - (f) make different provision for different cases or circumstances.
- (5) Regulations made under subsection (1) may make any provision which appears to the Department for Employment and Learning to be necessary or expedient—



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- (a) for the purpose of implementing Directive [2002/14/EC](#) of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community;
  - (b) for the purpose of dealing with any matter arising out of or related to the United Kingdom’s obligations under that Directive.
- (6) Nothing in subsections (2) to (5) prejudices the generality of this section.
- (7) Power to make regulations under this section is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 (S.I. 1979/1573 (N.I. 12)).
- (8) No regulations under this section may be made unless a draft of the regulations has been laid before and approved by a resolution of the Northern Ireland Assembly.
- (9) In this section—
- “enactment” includes—
    - (a) a provision of an Act;
    - (b) a provision of, or of any instrument made under, Northern Ireland legislation; and
    - (c) a provision of subordinate legislation;
  - “the Industrial Court” means the Industrial Court constituted under Article 91 of the Industrial Relations (Northern Ireland) Order 1992 (S.I. 1992/807 (N.I. 5));
  - “industrial tribunals” has the meaning given by section 42(5) of the Interpretation Act (Northern Ireland) 1954 (c. 33 (N.I.)); and
  - “prescribed” means prescribed by regulations under this section.

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