These notes refer to the Enterprise and Regulatory Reform Act 2013 (c.24) which received Royal Assent on 25 April 2013

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Employment

Unfair Dismissal
Summary and Background

79. Employees who have a qualifying period of service of two years, or one year if service commenced before 6 April 2012, are eligible to file a claim if they believe they have been unfairly dismissed (section 94 of the Employment Rights Act 1996 ("ERA 1996")). Section 108(3) of the ERA 1996 lists types of claims for dismissal in which the requirement for an employee to have a qualifying period of employment does not apply; dismissals on the grounds of political opinion or affiliation are not included in that list.

80. The limit on the compensatory award for unfair dismissal has been subject to various changes since the introduction of the right to claim unfair dismissal in 1971. Most recently, the limit was subject to a 'one-off' increase from £12,000 to £50,000 in 1999. The limit has subsequently been linked to a formula that has meant that it has increased slightly in excess of Retail Price Index inflation and is currently £74,200.

81. Where an employer and employee are discussing ending the employment relationship under the terms of a settlement agreement, they can currently have these discussions on a confidential basis if the 'without prejudice' principle applies. The principle of without prejudice developed through case law and prevents written or oral statements which are made in a genuine attempt to settle an existing dispute from being submitted as evidence in court. If the without prejudice principle does apply, it means that a settlement offer and anything said during settlement negotiations cannot be submitted as evidence in a subsequent employment tribunal claim.

82. The without prejudice principle will not apply where there is no formal dispute between the employer and employee. So it will often not apply to a settlement offer, or negotiations about the offer, taking place before the employment relationship has ended. In such cases, the offer or negotiations can be submitted as evidence in a subsequent tribunal claim. The purpose of section 14 is to provide a means for employers and employees to discuss settlement before any dispute has actually arisen, with certainty that the offer and any discussions about it cannot be used as evidence against them in a subsequent unfair dismissal claim.

Section 13: Dismissal for political opinions: no qualifying period of employment

83. This section inserts a new subsection into section 108 of the ERA 1996. The effect of the new subsection is that the two year qualification period for employment will not apply where the reason (or principal reason) for dismissal is the employee's political opinions or affiliation. Dismissal for political opinions or affiliation will not, however, be an

automatically unfair dismissal; where such proceedings are lodged with an employment tribunal, the tribunal will still need to go on to consider reasonableness (section 98(4) of the ERA 1996).

Section 14: Confidentiality of negotiations before termination of employment

84. This section inserts a new section 111A into the ERA 1996. The aim is to facilitate the use of settlement agreements as a means of ending the employment relationship.

85. Subsection (1) of section 111A provides that an offer to terminate the employment relationship on agreed terms is not admissible as evidence in any subsequent unfair dismissal case. This applies to offers made by either the employer or employee. It applies to the offer itself and also to the content of any negotiations about the offer (see subsection (2)).

86. Subsection (3) of section 111A provides that the confidentiality provided by *subsection (1)* does not apply in cases where the employee claims to have been dismissed for an automatically unfair reason. The automatically unfair reasons for dismissal are set out in existing primary and secondary legislation and a number of the reasons are listed in sections 98B to 105 of the ERA 1996.

87. Subsection (4) of section 111A provides that where the employer or employee behaved improperly in making or negotiating the offer the tribunal may consider this as evidence in an unfair dismissal claim. This is intended to mirror the test of 'unambiguous impropriety' which has been established in case law as an exception to the common law principle of without prejudice. It is also expected that a statutory Code of Practice will be issued by ACAS giving guidance as what amounts to improper behaviour in this context.

88. Subsection (5) of section 111A provides that the offer of settlement is not admissible as evidence when the tribunal turns to deciding whether to award costs or expenses at the end of a case (costs are known in Scotland as expenses), unless the party which made the offer stated otherwise when doing so. So it will still be possible to make a settlement offer on the basis that it will be admissible when determining costs or expenses in any subsequent claim.

Section 15: Power by order to increase or decrease limit of compensatory award

89. This section confers a power on the Secretary of State to amend section 124 of the ERA 1996 to increase or decrease the limit of the compensatory award for unfair dismissal. Any new limit must be a set amount (*subsection (2)(a)*), or the lower of a set amount and a certain number of weeks' pay (*subsection (2)(b)*). Different amounts can be specified under subsection (2)(a) or (b)(i) for different kinds of employer; for example there could be a lower amount for small businesses. The power is subject to certain constraints and the affirmative resolution of Parliament.

90. The effect of *subsections (2), (4) and (5)* is that the limit cannot be decreased to less than the lower of median annual earnings (defined in *subsection (9)*) and the individual's annual earnings; and it cannot be increased to more than three times median annual earnings. The figure for median annual earnings will be taken from the Office of National Statistics' Annual Survey of Hours and Earnings publication; the Office of National Statistics is the executive office of the Statistics Board.

91. *Subsection (10)* amends section 34 of the Employment Relations Act 1999 ("ERe1A 1999") (the automatic indexation provision) to prevent section 124(1) of the ERA 1996 having to be amended twice in the same year.