HOUSE OF LORDS
Library Note

Employment Bill [HL]
(HL Bill 13 of 2007–08)

The Employment Bill was announced in July 2007 in the Government's draft legislative programme. The Bill amends and repeals existing legislation on employment dispute resolution procedures, the national minimum wage, employment agencies, and trade union membership. It addresses issues arising from the Gibbons review of dispute resolution procedures and a number of consultation exercises carried out by the Government. This Library Note considers some of the key provisions of the Bill within the context of the Gibbons review and the Government's consultation papers.

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1. Introduction

The Employment Bill [HL] (HL Bill 13) was presented to the House of Lords on 6th December 2007, and is scheduled for a second reading debate on 7th January 2007.

The Bill was announced in July 2007 in *The Governance of Britain—The Government's Draft Legislative Programme* (Cm 7175). In this draft legislative programme, the Government stated that the purpose of the Bill would be to "simplify, clarify and build a stronger enforcement regime for key aspects of employment law" (page 39).

The Bill is based upon a number of consultation exercises. In March 2006, the Department of Trade and Industry, whose functions in this area were transferred to the Department for Business, Enterprise and Regulatory Reform (BERR), created on 28th June 2007, published an employment law policy statement for Parliament, *Success at Work—Protecting Vulnerable Workers, Supporting Good Employers*, in which they agreed to review the potential to reduce the number of cases going to employment tribunals, as well as the Employment Act 2002 (Dispute Resolution) Regulations 2004, SI 2004/752 (page 39). The Dispute Resolution Regulations set out a number of steps the employer and employee must follow in cases of statutory dismissal and disciplinary and grievance procedures.

After the initial stages of the review had been completed, the Government came to the conclusion that a more wide ranging assessment of the way in which employment disputes are resolved was necessary. The Government therefore announced, in December 2006, an expanded review of the options for simplifying and improving all aspects of employment dispute resolution (HL *Hansard*, 7th December 2006, col 139WS). In March 2007, the chair of the review, Michael Gibbons, reported his findings in *Better Dispute Resolution—A Review of Employment Dispute Resolution in Great Britain*, and the Government launched a consultation in the same month titled *Success at Work—Resolving Disputes in the Workplace*.

The proposals made in the Gibbons review, and on which the Government consulted, would, if taken forward, have a significant impact upon the law relating to procedural fairness in unfair dismissal cases, and the DTI therefore launched a second consultation titled *Consultation on Resolving Disputes in the Workplace—Supplementary Review* (May 2007).

Following on from other objectives set out in the March 2006 policy statement for Parliament, *Success at Work*, the Government launched a consultation in May 2007 titled *National Minimum Wage and Employment Agency Standards Enforcement*. The consultation focused on measures to promote compliance and improve fairness. Responses to the consultation were published by BERR in December 2007. A further consultation on the national minimum wage was issued in June 2007 as *National Minimum Wage and Voluntary Workers*. This second consultation sought views on the experiences of the voluntary sector with National Minimum Wage Act 1998, the exemption of participants in the Framework for Youth Volunteering, and on the policy for excluding Cadet Force adult volunteers from qualifying for the national minimum wage. A response to this consultation was published in November 2007 by BERR.

A further consultation, *ECHR Judgment in Aslef* v *UK—Implications for Trade Union Law*, was published in May 2007. This consultation came about as a result of a case, in which it was held that the United Kingdom's law on the scope of trade unions to expel

individuals on the grounds of party political membership was incompatible with the European Convention on Human Rights. A response to this consultation was published in November 2007 by BERR.

The Employment Bill contains provisions relating to many of the areas covered by these consultations, and consists of 21 clauses and one Schedule. The *Explanatory Notes* to the Bill provide the following overview:

> Clauses 1–7 make certain changes to the law relating to dispute resolution in the workplace. In particular, they repeal the existing statutory dispute resolution procedures and related provisions about procedural unfairness in dismissal cases (clauses 1 and 2). They also: confer on employment tribunals discretionary powers to amend awards if parties have failed to comply with a relevant statutory code (clause 3); make changes to the law relating to conciliation by the Advisory, Conciliation and Arbitration Service (clauses 5 and 6); amend tribunals' powers by which they may reach a determination without a hearing (clause 4); and allow tribunals to award compensation for financial loss in certain types of monetary claim (clause 7).
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> Clauses 8–12 make changes to the enforcement of the national minimum wage by: introducing a new method of calculating arrears (clause 8); replacing the current enforcement and penalty notices with a single notice of underpayment which will include a civil penalty against employers who have not complied with national minimum wage requirements (clause 9); increasing the civil enforcement powers available to officers enforcing the NMW (clause 10); making offences under National Minimum Wage Act 1998 each way offences (capable of being tried in a Crown court - with a potentially unlimited fine - or a Magistrates' court) (clause 11); and increasing the criminal investigative powers available to officers enforcing the NMW (clause 12).
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> Clause 13 clarifies that Cadet Force adult volunteers do not qualify for the NMW.
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> Clauses 14–15 amend the employment agency standards enforcement regime by making offences under Employment Agencies Act 1973 each way offences and conferring additional inspection powers on the Employment Agency Standards Inspectorate. Clause 16 enables partners to be prosecuted where offences have been committed by partnerships in Scotland and any of the partners are culpable.
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> Clause 17 amends trade union membership law to ensure UK compliance with the ruling of the European Court of Human Rights on *Aslef* v *UK*. The amendments enable trade unions to apply membership rules which prohibit individuals who belong or who have belonged to a particular political party from membership of the trade union.
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> Clauses 18–21 deal with general details of the Bill.
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> (Employment Bill [HL] (HL Bill 13), Explanatory Notes, paragraph 5)

The Bill amends existing Acts, which mainly apply to England, Wales and Scotland, although the National Minimum Wage Act 1998 also extends to Northern Ireland. It does not legislate in devolved matters (see further the Employment Bill, *Explanatory Notes*, paragraphs 9 to 12).

On the introduction of the Bill, Pat McFadden, Minister of State, Department for Business, Enterprise and Regulatory Reform, said:

> The National Minimum Wage was a key right this Government introduced to ensure workers were paid fairly. These changes would make sure everyone who is caught not paying their workers will be punished with the potential for unlimited fines.
>
> No business should be allowed to get away with unfairly undercutting legitimate operators by exploiting workers.
>
> Our proposed changes to dispute resolution, responding to the Gibbon's review, would ease burdens for business and employees by abolishing rigid, statutory processes for dispute resolution, while also ensuring there is no discrimination in employee's rights.
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> (BERR, 'Government Publishes Employment Bill', *News Release*: 2007/123: 7th December 2007)

In addition to the *Explanatory Notes*, Impact Assessments have been issued by BERR on the provisions relating to national minimum wage enforcement, Cadet Force adult volunteers, employment agency standards enforcement, and on the proposed amendments to trade union law. This Library Note focuses on the background discussions to key provisions of the Bill relating to dispute resolution (clauses 1 to 6), the national minimum wage (clauses 8, 9 and 11), and trade union membership (clause 17).

2. Dispute Resolution

The current statutory procedures for resolving disputes in the workplace are set out in sections 29 to 33 and Schedules 2 to 4 of the Employment Act 2002, and in the Employment Act 2002 (Dispute Resolution) Regulations 2004, SI 2004/752. The law is based upon the Government's policy on resolving disputes in the workplace set out in the consultation paper *Route to Resolution—Improving Dispute Resolution in Britain* published by the Department of Trade and Industry[*] in 2001. The consultation paper proposed three guiding principles for dispute resolution: access to justice; fair and efficient tribunals; and a modern, user-friendly public service. The new statutory procedure, which came into force on 1st October 2004, was designed to resolve disputes at an early stage before the matter was referred to an employment tribunal. The reason for the change in the law was the perception that the previous mechanisms led to disputes being referred to employment tribunals before attempts had been made to resolve them in the workplace. The new statutory dispute resolution procedures introduced a mandatory process comprised of three steps: a letter notifying the other party of the issues; a meeting between the parties; and an appeal. If either party fails to comply with the three steps, the employment tribunal must increase or decrease any award.

2.1 The Gibbons Review

In March 2006, the Government published a policy statement for Parliament, S*uccess at Work—Protecting Vulnerable Workers, Supporting Good Employers*, in which they announced a review of the scope to reduce the number of cases going to employment tribunals, and stated that this review would encompass the Dispute Resolution Regulations (page 39). Following initial discussions during 2006, the Government came to the conclusion that a full review of the dispute resolution procedures was necessary (*HL Hansard*, 7th December 2006, col 139WS), and appointed Michael Gibbons, a member of the Better Regulation Commission, acting in a personal capacity, to conduct it. The Gibbons review reported in March 2007 in *Better Dispute Resolution—A Review of Employment Dispute Resolution in Great Britain*. The Gibbons review dealt with a number of topics, including the legal mechanisms of the current dispute resolution system, research on the usage of the current system, and the alternative dispute resolution services provided through Acas (the Advisory, Conciliation and Arbitration Service).

The review found that although the current system had brought more clarity in relation to the steps that need to be followed where disciplinary or grievance issues arose, the procedures involved a high administrative burden both for employers and employees, and had unintended negative consequences which outweighed the benefits. The unintended consequences included the need to use formal mechanisms in situations where in the past the dispute would have been resolved informally. The complexity of the procedures, and the penalties for failing to observe the procedures, resulted in employers and employees seeking external advice at an earlier stage than in the past. Furthermore, the review found that the use of formal procedures in cases where other courses of action could be more appropriate, created an atmosphere in which both sides

[*] The functions of the Department of Trade and Industry in the area under discussion were transferred to the Department for Business, Enterprise and Regulatory Reform (BERR), created on 28th June 2007. Throughout this Note, the name of Department will be used that existed at the time of the publication of the relevant document.

became defensive and were more likely to consider going to an employment tribunal. In relation to small employers, the need for written paperwork could be counter-productive and could actually make the dispute worse, rather than better. In relation to employment tribunals, Gibbons found that they were considered costly and complex, and that as a result vulnerable employees could be deterred from using them.

In order to solve the problems found, Michael Gibbons recommended:

Support employers and employees to resolve more disputes in the workplace

1. Repeal the statutory dispute resolution procedures set out in the Dispute Resolution Regulations.
2. Produce clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace, for employers and employees.
3. Ensure there are incentives to comply with the new guidelines, by maintaining and expanding employment tribunals' discretion to take into account reasonableness of behaviour and procedure when making awards and cost orders.
4. Challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, e.g. through greater use of in-house mediation, early neutral evaluation, and provisions in contracts of employment.

Actively assist employers and employees to resolve disputes that have not been resolved in the workplace

5. Introduce a new, simple process to settle monetary disputes on issues such as wages, redundancy and holiday pay, without the need for tribunal hearings.
6. Increase the quality of advice to potential claimants and respondents, through an adequately resourced helpline and the internet, including as to the realities of tribunal claims and the potential benefits of alternative dispute resolution to achieve more satisfactory and speedier outcomes.
7. Redesign the employment tribunal application process, so that potential claimants access it through the helpline and receive advice on alternatives when doing so.
8. Offer a free early dispute resolution service, including where appropriate mediation, before a tribunal claim is lodged for those disputes likely to benefit from it. The Government should pilot this approach.
9. Offer incentives to use early resolution techniques by giving employment tribunals discretion, to take into account the parties' efforts to settle the dispute, when making awards and cost orders.
10. Abolish the fixed periods within which Acas must conciliate.

Make the employment tribunal system simpler and cheaper for users and government

11. Simplify employment law, recognising that its complexity creates uncertainty and costs for employers and employees.
12. Simplify the employment tribunal claim and response forms, removing requirements for unnecessary and legalistic detail, eliminating the 'tickbox' approach to specifying claims and encouraging claimants to give a succinct statement or estimate of loss.
13. Unify the time limits on employment tribunal claims and the grounds for extension of those limits; this should simplify claim pre-acceptance procedures.
14. Give employment tribunals enhanced powers to simplify the management of so-called 'multiple-claimant' cases where many claimants are pursuing the same dispute with the same employer.

15. Encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system, and to increase user confidence in it.
16. Review the circumstances in which it is appropriate for employment tribunal chairs to sit alone, in order to ensure that lay members are used in a way that adds most value.
17. Consider whether the employment tribunals have appropriate powers to deal with weak and vexatious claims and whether the tribunals use them consistently.

(Michael Gibbons, *Better Dispute Resolution—A Review of Employment Dispute Resolution in Great Britain* (March 2007), DTI, pages 10–11)

In March 2007, the Government issued a consultation paper on the findings of the Gibbons review: the Government sought views on possible measures which would allow workplace disputes to be resolved as early as possible, on the repeal of the statutory dispute resolution procedures, on better help and guidance, and on improving the way in which employment tribunals operate. As a result of the initial responses received, the DTI launched a second consultation, titled *Consultation on Resolving Disputes in the Workplace—Supplementary Review* (May 2007). The Government was seeking views on how to proceed, because the solutions proposed by the Gibbons review would, if taken forward, have a significant impact upon the law relating to procedural fairness in unfair dismissal cases. No summaries of the views received on these two consultations have been issued to date.

2.2 Resolving More Disputes in the Workplace

Although the purpose of the current dispute resolution procedures was to allow an early resolution of disputes and provide clear steps to be followed in order to resolve disputes, the procedures have had, according to the Government's consultation paper on the Gibbons review, a number of unintended negative consequences including an increase in the number of disputes reaching a formal stage, an increased use of external advice, and greater concentration on processes rather than outcome. The Government therefore proposed to repeal the statutory dispute resolution procedures. This would mean that employers and employees would have the flexibility to choose how they resolved disputes. The Government sought views on whether they should provide guidelines on good practice for resolving disputes, building upon the guidelines already issued by Acas.

The Gibbons review recommended that a mechanism should be built into the system to encourage parties to follow good practice guidelines by expanding the discretion of employment tribunals to take into account the reasonableness of behaviour and procedures when making awards. This could be done either through cost orders or modifications to compensation. The Government stated in their consultation that the guidelines would be statutory, and employment tribunals would therefore have to take into account whether they had been followed or not, and sought views on methods for penalising parties who made inadequate attempts to resolve their disputes prior to any action before an employment tribunal.

The Employment Bill gives effect to these proposals. The repeal of the statutory dispute resolution procedures is provided for by clause 1. An incentive for parties to follow any statutory codes issued by the Secretary of State and Acas is contained in clause 3. This

is done by giving employment tribunals a discretion to vary awards where the failure to comply with any relevant statutory code relating to workplace dispute resolution is seen as unreasonable.

2.3 Beyond the Workplace

The Gibbons review recommended that where a dispute could not be resolved in the workplace, immediate, well informed help should be available externally to deal with the dispute in the most cost effective way. In their consultation paper, the Government said that they believed "employees and employers should be more aware of [the] …employment dispute resolution system and how best to use it to resolve their problems successfully" (DTI, *Success at Work—Resolving Disputes in the Workplace* (March 2007), paragraph 3.1). The Government proposed, in their consultation paper, a number of ways in which cases could be handled differently. A new advice service on dispute resolution was suggested, which would include an enhanced telephone and internet helpline. Advice would be available before and during the dispute resolution process, and before an employment tribunal claim is made. The service would consist of impartial advice on the various ways in which disputes could be resolved and on employment tribunals. The advice service would direct certain cases to a new process for straightforward claims and would encourage appropriate cases to seek early mediation. The Government estimated, in their consultation paper, that at least ten percent of claims processed by employment tribunals involve straightforward matters, such as deductions from wages and redundancy pay. Such cases could be settled without the need for an employment tribunal hearing, enabling vulnerable workers who find it difficult to enforce their rights to claim money owed to them, as well as enabling employers to defend unfounded claims quickly and inexpensively. In relation to mediation, the advice service would encourage parties to use a new pre-claim Acas service building upon the current post-claim service (which would still be available). The pre-claim service would be free to users, and would offer a "new opportunity to resolve disputes quickly, reducing overall costs for all users and the government" (paragraph 3.6). Furthermore, a time limit is currently placed on Acas' duty to offer to conciliate employment tribunal claims. The Government proposed to remove the fixed conciliation periods, thereby enabling Acas to conciliate in employment tribunals throughout the proceedings until the tribunal delivers a judgment.

Many of these proposals are taken forward through the Employment Bill. A new fast track procedure for settling monetary disputes in certain limited jurisdictions on the basis of documentation only, and without the need for an employment tribunal hearing, is introduced by clause 4. Clause 5 provides for conciliation before proceedings are brought before an employment tribunal; and clause 6 deals with the removal of fixed periods for conciliation, thereby enabling conciliation throughout the proceedings until a judgment is delivered by an employment tribunal.

3. National Minimum Wage

The Government conducted two consultation exercises on the national minimum wage. The first, published in May 2007 by the Department of Trade and Industry[†] as *National Minimum Wage and Employment Agency Standards Enforcement*, examined how to ensure that workers who receive the national minimum wage do not lose out in real terms where they are owed arrears as a result of underpayment. The consultation also looked at the penalty and enforcement regimes under the national minimum wage legislation. A summary of responses to the consultation was published by the Government in December 2007 as *National Minimum Wage and Employment Agency Standards Enforcement—Government Response to Public Consultation*. The second consultation, *National Minimum Wage and Voluntary Workers*, was issued in June 2007, and looked at the way in which the national minimum wage operates in the voluntary sector, at the legal underpinning in relation to the national minimum wage for the National Framework for Youth Volunteering, and at the proposals to exclude the Ministry of Defence's Cadet Force adult volunteers from qualifying for the national minimum wage. Responses to this second consultation were published in December 2007 as *National Minimum Wage and Voluntary Workers—Government Response to Consultation*. The outcome of the second consultation is only relevant to the Employment Bill as regards to the Cadet Force adult volunteers: clause 13 explicitly proposes to exclude such volunteers from qualifying for the national minimum wage. This Note does not consider the second consultation further, but looks in greater detail at three of the key areas resulting from the first consultation exercise: arrears, penalties and criminal prosecution.

3.1 Arrears

Under the National Minimum Wage Act 1998, almost all workers in the United Kingdom are entitled to a minimum wage at a rate set by Regulations made by the Secretary of State. Similar provision is made for agriculture workers in England and Wales under the Agricultural Wages Act 1948. In their consultation document, the Government sought views on whether the method for calculating arrears should be altered in order to take into account the loss of purchasing power suffered by workers as a result of underpayment. The current legislation does not take any loss in real terms into account, and calculates underpayment as the difference between the pay received by a worker and the national minimum wage rate that applied at the time they should have been paid. The Low Pay Commission has raised concerns over this method of calculating arrears in so far as workers can still be worse off in real terms, and has urged the Government to remedy the situation. The Government, in their consultation document, proposed four options: (a) take no action; (b) interest on arrears; (c) charging all arrears at the current rate of the national minimum wage; or (d) charging standard arrears plus an adjustment.

Under option A, arrears would be calculated as they are now, i.e. as the difference between the remuneration received by the worker and the national minimum wage rate applying at the time the worker should have been paid (National Minimum Wage Act 1998 section 17(2)). In their consultation document, the Government argued that "calculating arrears which stretch back over a number of national minimum wage rates is

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not always simple, but it is nonetheless a straightforward concept for employers and workers to understand… However, under the present calculation, arrears may have lost purchasing power since they were incurred, placing the worker at a disadvantaged compared to one who was correctly paid at the outset" (DTI, *National Minimum Wage and Employment Agency Standards Enforcement—Consultation Document* (May 2007), paragraph 12). The Government goes on to argue that where arrears stretch back a long way, the worker will lose out to a greater extent than where the arrears are more recent, and that "taking no action does not address this" (paragraph 13).

Option B would involve calculating interest on arrears, either as compound or as simple interest. However, in the consultation document the Government went on to explain that calculating compound interest is complicated and may not meet the requirements of a straightforward system that allowed all parties to understand the amount due. While precedent for using simple rather than compound interest could be found in discrimination cases, accurately reflecting the loss through simple interest required a more complex calculation that is again difficult to understand. In addition, interest on national minimum wage arrears would be taxable, and unlike arrears of pay would not be collected through the PAYE system, thereby creating complexities for workers involved. The Government concluded that "this makes interest less attractive as a way of remedying the disadvantage underpaid workers face" (paragraph 18).

Charging arrears at the current rate was option C. Increases in the national minimum wage rate are recommended by the Low Pay Commission, who make their recommendation on the basis of an assessment of the economic circumstances at the time. Since their introduction, previous rates of national minimum wage have always been lower than current rate, although this may not necessarily be the case in the future. In the consultation document, the Government explained the advantage of option C: "using the current rate for all arrears would mean that all arrears restored to workers would accurately reflect what the appropriate national minimum is considered to be in today's economic circumstances. There is, however, no guarantee of how the NMW rate may have changed since the underpayment happened" (paragraph 22). They went on to outline a disadvantage of option C: "under the current trend, workers who had been underpaid at old rates would benefit. Workers who were underpaid within the current NMW rate would not see any increase, as the NMW rate they were underpaid under is still considered to be the appropriate rate of NMW given the evidence and economic circumstances" (paragraph 23). The key advantage of option C, according to the Government, is that it is simple and easy for employers and workers to understand, and creates an incentive for employers to resolve underpayment swiftly, before any rate change.

Arrears would be calculated in the same way as they are at present under option D, and an uplift would then be applied based on the amount that the worker had been underpaid. The adjustment would be prescribed by legislation, and could either be a fixed percentage of arrears or could operate as a band of arrears into which the underpayment falls. The advantage of this option, according to the consultation document, is that both methods of uplift would allow the parties to quickly and simply work out the amount due. The disadvantage of this option is that it does not reflect the amount of time the money has been owed, and thereby may not accurately reflect the loss of purchasing power.

In their response to the public consultation, published in December 2007, the Government provided a breakdown of the number of respondents favouring each option:

> Of the 33 respondents to the consultation, 27 commented on fair arrears. Of these, only one respondent favoured either option A (take no action) or option D

(adjusted arrears). Option B (interest on arrears) was supported by nine respondents, whilst 15 favoured option C (arrears at the current rate).

(BERR, *National Minimum Wage and Employment Agency Standards Enforcement—Government Response to Public Consultation* (December 2007), paragraph 2.4)

The consultation response goes on to list some of the respondents who favour paying arrears at the current rate, including "business representatives (the CBI, British Retail Consortium and British Chambers of Commerce) more business representatives (Confederation of Small Businesses and four other private businesses) and a number of unions (the TUC, UNISON and RMT)" (paragraph 2.6). The Government concluded that this option would best achieve the policy aims of ensuring that arrears reflected any loss in purchasing power, and that the mechanism used was clear, straightforward and uniform. This method of repaying arrears at the current rate would also apply to the agricultural minimum wage.

Finally, in their response to the consultation, the Government explained that the calculation of arrears at the current rate needed to be retrospective, as without retrospection, "fair arrears would apply only in respect of pay reference periods after commencement. This would mean that workers would be unable to obtain any benefits and fair arrears until at least a year after the new legislation comes into effect, and then only if the current rate is higher than the rate during which the arrears accrued" (paragraph 2.14).

The outcome of this part of the consultation is given effect by clause 8 of the Employment Bill, which deals with arrears payable in cases of non-compliance.

3.2 National Minimum Wage Penalties and Prosecution

In the consultation paper, the Government set out their position in relation to national minimum wage penalties: "The government is committed to simple, effective NMW enforcement which supports workers and businesses by deterring non-compliant employers from underpaying their workers, eradicating the unfair competitive advantage that underpayment can bring" (DTI, *National Minimum Wage and Employment Agency Standards Enforcement—Consultation Document* (May 2007), page 16). Under the current law, employers can repay the money they owe to workers without attracting a penalty notice: "because of this, 95% of the non-compliant employers we identify do not pay a penalty" (paragraph 34). In the consultation document, the Government set out why they are looking at penalties now: "nearly a decade on from the NMW Act, it is timely to consider whether we have the right deterrent, or whether there is more we could do to change the behaviour of non-compliant employers" (paragraph 34). In addition, the Government stated that they wanted to take the opportunity to "to simplify and clarify the existing penalty regime to create an easily understood deterrent which makes clear that underpayment is unacceptable, and what the consequences of underpayment will be" (paragraph 36). The consultation document describes the current system as follows: "the LPC have previously noted that most employers who do not pay the minimum wage and have enforcement action taken against them are no worse off than if they had paid the minimum wage at the outset. This is because, under our current regime, it is non-compliance with an enforcement notice, rather than underpayment itself, which is penalised. We want to replace our current penalty with a penalty for underpayment" (paragraph 42). The Government proposed five possible options for a penalty: (a) take

no action; (b) fixed penalty per employer; (c) fixed penalty per worker; (d) penalty which is a multiplier of arrears; or (e) banded fixed penalty.

Under the current system 95 percent of employers are able to settle their arrears, according to the consultation document, without attracting a penalty. Where an employer has not settled the arrears during the course of the investigation, an enforcement notice is issued, and if the employer does not comply with the enforcement notice a penalty notice is issued. The penalty calculation is complex, and does not have "the simple, up-front deterrent effect of an automatic penalty for underpayment" (paragraph 67).

Under option B, a fixed penalty, the penalty would be the same regardless of how many workers were underpaid or the amount of underpayment, as all breaches would attract the same penalty. In their consultation document, the Government pointed out that "it may be felt that this lacks apportionality", but that "such a penalty is simple to publicise and understand" (paragraphs 70–71). Introducing a fixed penalty per worker under option C would mean that although the penalty was not in proportion to the size of the employer, it would be in proportion to the number of workers who had suffered arrears. However, it was not "in proportion to the amount of underpayment, so the penalty for 10 workers who were underpaid by £5.00 each may be greater than the penalty for underpaying 1 worker by £500" (paragraph 74). Furthermore, the disadvantage of this option was that it would be necessary to establish the number of workers who had been underpaid, which would require additional operational effort on the part of enforcement teams.

A fixed multiplier was proposed as option D. The penalty would be calculated by applying a multiplier to the amount of arrears outstanding. The advantage of this option would be that the penalty would be in proportion to the arrears. However, it would not take into account the number of workers underpaid: "a large amount of arrears could be spread across many workers, or just suffered in total by one worker" (paragraph 78). The consultation document notes that this option "necessitates an exact calculation of arrears and may be an incentive for the employer to argue that arrears are less" (paragraph 79).

Under option E, the fixed penalty would be determined by the band the total level of arrears fell into. The Government stated, in the consultation document, that the advantage of this option would be that it is "in proportion to the amount of arrears underpaid regardless of how many workers have been underpaid", and that it could act as a clearer deterrent because "employers will know upfront that if they underpay by a certain range, the resulting penalty will be a fixed amount" (paragraph 82–83).

In their response to the consultation, the Government provided a breakdown of responses to these options:

> Of the 33 respondents to the consultation, 29 commented on penalties. Of these, only 1 respondent favoured option B (fixed penalty per employer) and 2 respondents favoured option A (take no action). Option E (banded fixed penalty) was favoured by 4 respondents, whilst 5 supported option C (fixed penalty per worker) and 10 favoured option D (multiple of arrears).
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> (BERR, *National Minimum Wage and Employment Agency Standards Enforcement—Government Response to Public Consultation* (December 2007), paragraph 3.4)

The Government concluded that the penalty should be based upon option D, a multiple of arrears. Respondents favouring this option included the Low Pay Commission, the CBI, the British Retail Consortium, the British Chambers of Commerce, and the Forum of Private Business. The Government thought that "taking this approach would act as an effective deterrent on non-compliance as the penalty would reflect the total extent of underpayment" (paragraph 3.8).

The Government went on to state that their consideration of whether the civil penalty should escalate and what its upper limit should be, had been influenced by article 6 of the European Convention on Human Rights, and that they had balanced the relationship between the civil penalty and the criminal prosecution regime for national minimum wage offences. They concluded that:

- The multiplier for the penalty should be 0.5 (i.e. a penalty that is half the amount of arrears);
- The penalty should be reduced by one half if the employer reimburses their worker(s) quickly;
- The penalty should not be increased if the employer fails to reimburse their worker(s) by the date specified by the enforcement body;
- There should be a minimum penalty threshold of £100, i.e. applying to amounts of underpayment less than £200; and
- There should be an upper civil penalty ceiling of £5,000.

(paragraph 3.12)

A number of respondents thought that a lower limit to the penalty was necessary in order to ensure that the penalty remained meaningful even where the amount of underpayment was small. The Government thought that an upper limit was necessary to ensure that the penalty was not too large or a disproportionate means of achieving compliance with the national minimum wage. They argued:

> Based on statistics for arrears discovered by HMRC in 2005/06, only 3% of cases of non-compliance would have incurred a penalty above this maximum as they involved arrears of more than £10,000 (and the multiplier for the penalty is 0.5). Although a number of respondents were concerned that a maximum penalty of £5,000 would be an insufficient deterrent and an inadequate penalty in the most serious cases of non-compliance, we believe that such a deterrent is more effectively provided by strengthening of the criminal prosecution regime for NMW offences.
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> (paragraph 3.14)

In developing the civil penalty regime, the Government, according to their response to the public consultation, took into account the relationship between the civil penalty regime and the criminal prosecution regime for national minimum wage offences, as well as the views expressed by a number of respondents that the £5,000 limit on civil penalties was "an inadequate penalty for the most serious offences" (paragraph 3.17). The Government explained:

> At present, offences under the NMW Act (such as refusal to pay the NMW or obstructing a compliance officer) are triable only in a magistrates' court and the maximum fine available is £5,000. We consider that this is insufficient to provide an appropriate deterrent in the most serious cases. We have therefore concluded that the offences should be triable either way, that is, as either

summary offences in a magistrates' court or as indictable offences in a crown court. In the latter case, the court would have the power to impose an effectively unlimited penalty as well as, for example, disqualification of a director.

(paragraph 3.18)

Clauses 9 and 11 of the Employment Bill on notices of underpayment and penalties for offences, are based on this consultation process.

4. Trade Union Membership

In February 2007, the European Court of Human Rights issued a judgment in the case of *Associated Society of Locomotive Engineers and Firemen (Aslef)* v *United Kingdom* (Application 11002/05; [2007] All ER (D) 348 (Feb)). The Court held that the UK's law relating to the expulsion of members from a trade union for membership of a political party was incompatible with article 11 of the European Convention on Human Rights.

The relevant law in the UK is contained in section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992. This provision was amended by the Employment Relations Act 2004 as a result of a number of complaints made against trade unions in 2002 and 2003 over decisions to exclude or expel members who belonged to the British National Party or similar political organisations. Under the current law, an individual can be excluded or expelled from a trade union, *inter alia*, where the exclusion or expulsion is entirely attributable to his conduct, and the conduct to which it is wholly or mainly attributable is not protected conduct (section 174(2)(d) (as substituted and amended) of the Trade Union and Labour Relations (Consolidation) Act 1992). For these purposes, "protected conduct" is conduct which consists in the individual being or ceasing to be, or having been or ceased to be, a member of a political party (section 174(4a) (as added)). However, conduct which consists of activities undertaken by an individual as a member of a political party is not "protected conduct" (section 174(4b) (as added)).

Prior to the amendment of section 174 by the Employment Relations Act 2004, no explicit distinction was made between political party membership and political party activities, nor did the law include membership of a political party in the definition of conduct for which it was lawful for a trade union to expel or exclude a member. In other words, prior to the amendment of the Trade Union and Labour Relations (Conduct) Act 1992 by the Employment Relations Act 2004, the ability of a trade union to expel or exclude a person on the basis of politics was less clear and more restrictive.

4.1 *Aslef* v *UK*

The applicant, Aslef, is an independent trade union that represents train drivers working on the UK's railways. The union has approximately 18,000 members, and although most train drivers are members of the union, the railway companies do not operate a closed shop, and workers are free to join Aslef, any other union, or no union at all. Aslef has stated its aims to include to "assist in the furtherance of the labour movement generally towards a socialist society" and to "promote and develop and enact positive policies in regard to equality of treatment in our industries and Aslef regardless of sex, sexual orientation, marital status, religion, creed, colour, race or ethnic origin". At their annual assembly of delegates in 1978, Aslef resolved to campaign against and "expose the obnoxious policies of political parties such as the National Front".

In February 2002, Mr Lee, a member of the British National Party, previously known as the National Front, applied to be a member of Aslef and was accepted. In April 2002, Mr Lee stood as a BNP candidate in local elections. On 17th April 2002, an Aslef union officer sent a report to the union's general secretary concerning Mr Lee. The report included the information that Mr Lee was a BNP activist, had handed out anti-Islamic leaflets dressed as a priest, and that in the 1998 local elections he had stood as a BNP candidate. In addition, the report contained a copy of an article written by Mr Lee for the BNP magazine *Spearhead*, and a fax from Bexley Council for Racial Equality stating that Mr Lee had harassed anti-Nazi league pamphleteers. On 19th April 2002, the executive

committee of Aslef voted unanimously to expel Mr Lee on the basis that his membership of the BNP was incompatible with membership of Aslef, that he was likely to bring the union into disrepute, and that he was against the aims of the union.

Mr Lee brought a successful action before an employment tribunal against the union under the pre-2004 legislation. Aslef appealed the decision, and the employment appeal tribunal quashed the decision and remitted it to a second employment tribunal, on the basis that a union could expel a member on grounds of his conduct, but not because he was a member of a political party. The second employment tribunal upheld Mr Lee's complaint, and found that his expulsion was based primarily on his membership of the BNP. In breach of its own rules, Aslef re-admitted Mr Lee.

4.2 The ECHR Judgment

In March 2005, Aslef lodged an application with the European Court of Human Rights based on article 11 of the European Convention on Human Rights. They claimed that they had been prevented from expelling one of their members for his membership of the BNP, a political party which advocated views incompatible with their own. Under article 11 paragraph 1, everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. Article 11 paragraph 2 provides that no restrictions may be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection or morals or the protection of the rights and freedoms of others. Although the employment tribunals and the employment appeal tribunal judged Mr Lee's case on the basis of the pre-2004 law, the European Court of Human Rights considered both the pre and post-2004 law.

The Court commented that in the same way as employees should be free to join or not to join a trade union without sanction or disincentive, a trade union should be equally free to choose its members. Article 11 could not be interpreted as imposing an obligation on associations or organisations to admit whoever wished to join. In particular, where associations espoused particular values or ideals it would run counter to the very effectiveness of the freedom of association if they could not control membership.

The key question, according to the Court, was the extent to which the State could intervene to protect a member against measures taken by a trade union. The Court accepted that section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 interfered with Aslef's freedom of association, and that this interference was lawful to protect the rights of individuals to exercise their political rights and freedoms without undue hindrance. On the question of whether the State had struck the right balance between the rights of Mr Lee and Aslef, the Court was not persuaded the expulsion impinged in any significant way on Mr Lee's exercise of freedom of expression or his lawful political activities. Nor did the Court see that Mr Lee had suffered any particular detriment as a result of expulsion, particularly as union membership was not necessary for him to carry out his employment.

The Court also took account of the historical role of unions to act as a safeguard for workers against employers, and sympathised with the idea that all workers should be able to join a trade union. However, Aslef represented all workers in the collective bargaining process, and there was nothing to suggest that Mr Lee was at any risk from not being a member of the union. More important was, in the balance, Aslef's right to choose its members. Historically, trade unions in the United Kingdom and Europe had

been affiliated with the left, and they were not bodies primarily devoted to politically neutral aspects of the wellbeing of their members, but often held strong views on social and political issues. The Court did not see that there was any hint in the domestic proceedings that the union had erred in its assessment of the clash between Aslef's and Mr Lee's ideals. Nor was there any indication that the union had a public role which might require it to take on any member to fulfil a wider purpose.

4.3 The Government Consultation

The Government had argued that Mr Lee could have been expelled for conduct not related to his membership of the BNP, but the Court thought that the union's objection to Mr Lee was based primarily on his membership of the BNP, and that it was not reasonable to expect the union to have used a pretext to expel him. Therefore, in the absence of any identifiable hardships or any abusive or unreasonable conduct, the Court concluded that the balance had not been properly struck, and that there had been a violation of article 11.

In May 2007, the Department of Trade and Industry[‡] issued a consultation document on the case titled *ECHR Judgment in Aslef* v *UK Case—Implications for Trade Union Law*, in which they stated that they did not intend to appeal the judgment and that they acknowledged the need to amend the relevant UK law to remove the violation of article 11 of the European Convention on Human Rights. However, the Government thought that the "judgment was rooted in the circumstances of this particular case, where there was a stark contrast between the political positions of Mr. Lee and Aslef" (paragraph 4.2). The Government "therefore firmly maintains its position that the other legal restrictions under UK law in this area are necessary in a democratic society and strike a fair balance between the interests of trade unions, their members and their prospective members" (paragraph 4.2). As a result, the Government proposed only to amend the provisions of section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 which deal with political party membership and activities.

The consultation document offered two ways in which this could be done. Under option A, section 174 of the 1992 Act would be "amended to ensure there is no explicit reference to a special category of conduct relating to political party membership or activities" (paragraph 4.3). The Government argued that "this change would in effect position political party membership and activities under the general heading of "conduct" (which was the situation before the Trade Union Reform and Employment Rights Act 1993 was implemented). Where such political party membership or activities were "unacceptable" to the trade union, it would therefore be lawful for the union to expel or exclude on those grounds" (paragraph 4.3). The advantage of option A, according to the consultation document, was that it would simplify the wording of section 174 of 1992 Act, and would give trade unions greater autonomy to decide their membership, although there would be no safeguards against possible abuse. The Government thought that "such safeguards may not be necessary in any event: there is no evidence that trade unions would make use of this greater freedom by expelling members or activists of mainstream political parties" (paragraph 4.4). They went on to argue that "if a trade union acted outside its rules when expelling a member, then that person could seek legal redress by bringing a breach of rule claim before the courts" (paragraph 4.4).

[‡] The functions of the Department of Trade and Industry in the area under discussion were transferred to the Department for Business, Enterprise and Regulatory Reform (BERR), created on 28th June 2007. Throughout this Note, the name of Department will be used that existed at the time of the publication of the relevant document.

Under option B, the Government proposed that the special category of conduct relating to political party membership and activities under section 174 of the 1992 Act should be kept, but that "the rights not to be excluded or expelled for such conduct should be significantly amended" (paragraph 4.3). The provision would be re-worded to "refer to the limited conditions under which it would remain unlawful for the trade union to exclude or expel an individual on the grounds of their political party membership or activities. Those conditions would specify that the union's decision would be unlawful unless the political party membership or activity concerned was incompatible with a rule or objective of the union, and the decision to exclude or expel was taken in accordance with union rules or established procedures" *(*paragraph 4.3). In other words, option B would set out the safeguards against potential abuse: "those safeguards are based on the reasoning of the [European Court of Human Rights] which noted the need for the trade union to avoid arbitrary behaviour and to act transparently in accordance with its rules. Many union rule books now refer to racist, xenophobic or extremist political behaviour as unacceptable to the union… Option B might, however, create grey areas and give scope for legal action to arise about the precise meaning of a union's rules or objectives" (paragraph 4.5).

Thirty-three organisations responded to the consultation, and a summary of responses was published by the Department for Business, Enterprise and Regulatory Reform in November 2007 as *ECHR Judgment in the Aslef* v *UK Case—Implications for Trade Union Law—Government Response to Public Consultation*. Of the responses received, 26 were from trade unions, 5 from lawyers and lawyer's organisations, 1 from employers and 1 from non-departmental public bodies. Consultees were asked, *inter alia*, for their assessment of the judgment in *Aslef* v *UK*, and whether they preferred option A or option B. Nineteen organisations responded to the first question, and the majority of responses from unions indicated that they thought the implications of the judgment were more far reaching than acknowledged in the consultation document. Some respondents commented on those parts of the judgment which considered union autonomy and the freedom of trade unions to determine their own rules and membership requirements.

According to the summary, the TUC, in common with other union respondents, "considered that the Court's judgment asserted the collective rights of the union over the rights of the individuals. In their view, the judgment provided little scope for governments to limit the scope of union autonomy" (paragraph 2.6). Other respondents pointed out that the provisions contained in section 174 of the 1992 Act where enacted prior to legislation outlawing closed shops: "this was significant because the ending of the closed shop meant that individuals who were denied union membership could no longer be discriminated against in employment as a result" (paragraph 2.6). The majority of unions also thought that the judgment required section 174 of the 1992 Act to be entirely repealed, as these provisions "restricted the ability of trade unions to set up their own rules concerning conditions of membership" (paragraph 2.7).

The Government thought that the responses to the consultation on the first question confirmed their view that the judgment required a change to trade union law. However, in the Government's view, it was wrong "to extrapolate the [European Court of Human Right's] judgment and assert… that the entire section is viewed as incompatible with the [European Convention on Human Rights]" (paragraph 2.12). The Government concluded that it was safest to interpret the judgment in *Aslef* v *UK* as only requiring changes to those provisions of section 174 of the 1992 Act that related directly to political party membership and activities, and they therefore do not intend to make any further alterations to the law.

In relation to the second question, the vast majority of respondents favoured option A, amending section 174 of the 1992 Act to remove any explicit reference to a special category of conduct relating to political party membership or activities. Many of the

unions responding to the consultation thought that option A would not be liable to abuse, some pointing out that there was no evidence that unions would attempt to expel or exclude members from mainstream political parties. Some of the legal organisations responding commented on the simplicity of option A. The Government therefore concluded that they would amend the law using option A, which "is a simpler formulation which would be easier to understand and apply in practice" (paragraph 3.8).

The outcome of the consultation on *Aslef* v *UK* is given effect by clause 17 of the Employment Bill.

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