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The *Employment Relations Bill*

Bill 7 of 2003-04

The *Employment Relations Bill* was presented to Parliament on 2 December 2003. It follows a review and consultation exercise on the *Employment Relations Act 1999* and forms part of the programme of reform begun by the 1998 White Paper *Fairness at Work*. Most of the Bill's provisions change existing legislation such as the *Trade Union and Labour Relations (Consolidation) Act 1992* and cover a wide range of topics in the areas of individual employment rights, trade unions and industrial action law. Various adjustments are made to procedures governing the recognition of trade unions for collective bargaining, the administration of trade unions and the powers of the Certification Officer. The Bill opens the way for regulations to be made implementing the European Directive on Information and Consultation as well as the extension of employment rights to atypical workers such as clergy. It also strengthens and extends the law relating to unfair dismissal in cases involving strike action or rights to flexible working patterns, which were introduced by the *Employment Relations Act 1999*. There are also small changes relating to enforcement of the national minimum wage.

Vincent Keter

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Summary of main points

The DTI have prepared explanatory notes to the Bill and created a web page with useful information and links to key documents.[1] Further explanation and background can be found in the government's response to the review of the *Employment Relations Act 1999* (the 1999 Act) which summarises the arguments behind the various provisions and the government's conclusions on these.[2] This paper will summarise the effects of the various clauses in the Bill. However, in general, the precise manner in which the various objects of the Bill are achieved in the statutory drafting will not be covered, since these are dealt with fully in the explanatory notes which accompany the Bill.[3] Since some of the provisions in the Bill have a long history and legislative evolution, this paper concentrates on providing details to fill in this background, notwithstanding that many of the changes appear at first sight to be minor or technical changes.

The centrepiece of the 1999 Act was the establishment of a statutory procedure for the recognition and derecognition of trade unions for collective bargaining. The function of these procedures is to allow the widest scope for voluntary agreement between unions and employers at the same time as providing a comprehensive process to fall back on when agreement is not forthcoming. Statutory recognition of a trade union allows the union to negotiate collective agreements on behalf of a group of workers called "the bargaining unit" in respect of pay, hours and holidays. The system is administered by the Central Arbitration Committee (CAC) which has the power to grant recognition and to determine various matters to allow collective bargaining to take place. Part One of the Bill makes a number of adjustments to the statutory recognition procedure contained in Schedule A1 of the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA).

Part Two of the Bill relates to the law of industrial action. The 1999 Act made changes to the procedures for conducting ballots and for issuing notices of such ballots and notices of industrial action to employers. The further changes in the Bill are aimed at clarifying the requirements for ballots and notices in light of a number of court decisions which exposed uncertainties in the current provisions. There is also a strengthening of the unfair dismissal protection for striking workers in cases where they are locked out. This has arisen in part out of the Friction Dynamics dispute, where a number of striking workers were sacked after a lock out.

Part Three of the Bill relates to the rights of trade union members, workers and employees and makes changes to the law following the European Court of Human Rights judgement in the *Wilson and Palmer* cases which found that UK trade union law was incompatible with

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1 DTI page with general information about the Bill: http://www.dti.gov.uk/er/erbill_2003.htm

2 Government response to the review: http://www.dti.gov.uk/er/era_rev99_govresp.pdf

3 *Employment Relations Bill Explanatory Notes*, 2nd December 2003, http://www.publications.parliament.uk/pa/cm200304/cmbills/007/en/04007x--.htm

Article 11 of the convention (freedom of association). The right to be accompanied at disciplinary or grievance hearings is further clarified by specifying the extent of the companion's rights.

A minor change is made to the order making power in section 23 of the 1999 Act. Section 23 has potentially far reaching implications for "atypical workers" such as clergy and other "office" holders because it allows the Secretary of State to extend various employment rights to them. This amendment would make it simpler and therefore easier for such an order to be made and could lead to the government proceeding with the various proposals which have been under consultation with regard to the employment rights of clergy.

The rights to flexible working introduced by the 1999 Act are protected by unfair dismissal provisions. The Bill extends this protection in flexible working cases by applying it in redundancy cases and rolling away some of the general limitations on unfair dismissal claims contained in TULRCA and the *Employment Rights Act 1996*. Powers are given to the Secretary of State to implement the European directive which places a number of requirements on employers to inform and consult with employees in specified circumstances.[4]

Part Four of the Bill makes minor changes to the enforcement procedures relating to the National Minimum Wage. Workers and employers will be allowed to have information obtained from each other by enforcement officers. It will be possible to issue enforcement notices in respect of more than one worker. The *Agricultural Wages Act 1948* will be amended to allow for a wider range of government staff to become agricultural wages officers and to oblige them to be ready to produce identification and proof of their authority.

Part five of the Bill deals with proceedings before the Certification Officer, who performs various functions in relation to trade unions, such as certifying their independence. The Certification Officer will be able strike out weak, vexatious or misconceived proceedings. The Employment Appeal Tribunal (EAT) will be able to take account of vexatious proceedings before the Certification Officer when taking action against vexatious litigants.

Part six makes minor changes to assist the administration of trade unions with regard to the appointment of the union's president and the appointment of corporate bodies as auditors. The Bill creates an order making power to allow for a wider range of voting methods.

The Bill applies in Great Britain and in Clause 44, contains provision allowing for an order in council to make the same changes to the law in Northern Ireland.

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4 *EC Directive on Information and Consultation* (2002/14/EC)

CONTENTS

I Employment Relations Act 1999

A. The Act

The *Employment Relations Bill 1998/99* was published on 28 January 1999. It sought to implement many of the Labour Government's proposals for trade union and employment protection reform outlined in the White Paper, *Fairness at Work,* which was published in May 1998. The resulting *Employment Relations Act 1999* (the 1999 Act) achieved the following:

- Introduced statutory procedures for **trade union recognition** in firms with more than 20 employees where a majority of the relevant workforce wanted it. The relevant sections were brought into force on 6 June 2000.[5] These provisions were seen as the centrepiece of the Act.

- Reformed the law on **maternity leave**. The Act established the new structure but most of the details were contained in the *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312. Ordinary maternity leave, available to all women, regardless of length of service, was extended from 14 to 18 weeks to align it with Statutory Maternity Pay. The qualifying period for additional maternity leave (lasting for up to 29 weeks after the birth of the baby) was reduced from two years to one year. The changes applied to women whose expected week of childbirth was 30 April 2000 or later.

- Introduced a right to three months' unpaid **parental leave** to be taken before the child's fifth birthday. The Act introduced the right but most of the details were contained in the *Maternity and Parental Leave etc Regulations 1999,* SI 1999/3312. It implemented the *EC Parental Leave Directive* and came into force on 15 December 1999. This followed on from the UK signing the Social Chapter at the Amsterdam Summit of 16 and 17 June 1997.

- Introduced a right to a reasonable amount of unpaid **time off** to care **for dependants** in an emergency. This, too, was required by the *EC Parental Leave Directive*, came into force on 15 December 1999.

- Gave employees the right to be accompanied by a **trade union representative** or fellow employee during disciplinary and serious grievance procedures. At the same time, under separate statutory powers, ACAS issued a revised *Code of Practice on Disciplinary and Grievance Procedures* which came into force on 4 September 2000.

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[5] *Employment Relations Act 1999 (Commencement No 6 and Transitional Provisions) Order 2000.* SI 2000/1338

- Protected people **taking part in lawful industrial action against dismissal** during the first eight weeks of a strike. The relevant provisions were brought into force on 24 April 2000.[6]

- Made it unlawful to discriminate by omission on grounds of **trade union membership**, non-membership or activity from 25 October 1999.[7]

- Provided for regulations to prohibit **blacklisting** of trade unionists. As at the time of writing (December 2003) the regulations have not yet been made, although a consultation with draft regulations was published in February 2003.[8]

- Amended the law on **strike ballots** so that, for example, trade unions are not required to give the names of all workers they are balloting to employers; and the validity of a strike ballot can be extended for a further four weeks by agreement between union and employer. A revised *Code of Practice on Industrial Action Ballots and Notice to Employers* was approved by the House of Commons on 18 July 2000 and by the House of Lords on 14 July 2000. It came into effect on 18 September 2000.

- Abolished the **Commissioners for the Rights of Trade Union Members** and **Protection against Unlawful Industrial Action** from 25 October 1999.[9]

- Outlawed discrimination against **part-time workers.** The Act required the Secretary of State to make Regulations and gave him the power to issue a Code of Practice. The *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000,* SI 2000/551 gave part-time workers the right not to receive less favourable treatment than comparable full-time workers, unless this was justified on objective grounds. They implemented the *EC Part-time Workers Directive* and came into effect on 1 July 2000.

- Raised the limit on **compensation for unfair dismissal** from £12,000 to £50,000 from 25 October 1999.[10] The limit has subsequently been raised in line with inflation under the index-linking provisions of the Act. The current limit is £53,500[11] which will increase to £55,000 from 1 February 2004.[12]

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6 *Employment Relations Act 1999 (Commencement No 5 and Transitional Provision) Order 2000.* SI 2000/875

7 *Employment Relations Act 1999 (Commencement No 2 and Transitional and Saving Provisions)Order 1999.* SI 1999/2830

8 *Draft Regulations to Prohibit the Blacklisting of Trade Unionists* http://www.dti.gov.uk/er/black.pdf

9 *Employment Relations Act 1999 (Commencement No 2 and Transitional and Saving Provisions)Order 1999.* SI 1999/2830

10 *Employment Relations Act 1999 (Commencement No 2 and Transitional and Saving Provisions) Order 1999.* SI 1999/2830

11 *Employment Rights (Increase of Limits) Order 2002,* SI 2002/2927

- Index-linked the limits used in calculating various **employment protection payments**. The previous statutory provision had only required annual review. Statutory provision, made in the Act, was brought into force on 17 December 1999.[13] The limits were increased from 1 February 2000, and then again each February since then. For example, the limit on a week's pay used in calculating redundancy payments has increased each year from £220 a week in 2000 to the current figure of £260 a week.[14]

B. Review of the 1999 Act

In July 2002 the government announced that it would conduct a review of the 1999 Act to continue the process of advancing the commitments set out in the 1998 White Paper *Fairness at Work*. On 11 March 2003, the government published a consultation document as part of this review.[15] This concluded that the Act had been a "resounding success", but nevertheless proposed some limited changes:

On **statutory union recognition procedures**, it sought views on possible minor changes concerned with top up recognition, CAC checks on union membership, ACAS's role in non-statutory recognition, definition of union membership, petitions, disclosure of information to unions, time limits, detriment and dismissal, union access, determining of bargaining units, CAC ballots, core issues for collective bargaining, change of employer identity, and associated employers.

On **discrimination on grounds of trade union membership or non-membership**, it proposed to comply with the ruling of the European Court of Human Rights in July 2002 in the *Wilson and Palmer* cases by repealing section 146(3) of the *Trade Union and Labour Relations (Consolidation) Act 1992* (the so-called "Ullswater Amendment"); establishing a clear positive right for union members to use their union's services; amending the law to specify that entering individualised contracts would not constitute unlawful discrimination against those union members not offered them, provided there is no pre-condition in the contract to relinquish union representation; and repealing section 17 of the *Employment Relation Act 1999*.

On **industrial action ballots and notices**, it proposed to simplify the law on notices and to extend the ability of Courts to disregard small accidental failures to follow the rules in the conduct and organisation of ballots.

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12 *Employment Rights (Increase of Limits) Order 2003*, SI 2003/3038

13 *Employment Relations Act 1999 (Commencement No 3 and Transitional Provision) Order 1999*, SI 1999/3374

14 *The Employment Rights (Increase of Limits) (No. 2) Order, SI 2002/2927*. This raised the limit on a week's pay for redundancy calculations from £250 to £260 from 1 February 2003. *Employment Rights (Increase of Limits) Order 2003*, SI 2003/3038 will increase this again from 1 February 2004 to £270.

15 The consultation document is available at: http://www.dti.gov.uk/er/erareview.htm

On the **dismissal of striking workers**, it suggested that lock-out days should not count towards the eight-week period during which strikers are protected from dismissal.

On the **right to be accompanied at disciplinary and grievance hearings**, it proposed to clarify the law setting out the circumstances in which the companion is allowed to address the hearing.

On the **Certification Officer's powers**, it proposed to give him additional powers to dispose of weaker cases more efficiently.

Following recommendations by the Better Regulation Task Force, it proposed to remove various burdensome restrictions on **trade union elections and ballots.** Amongst other things, it suggested that the Secretary of State should be given the power to change the balloting method by order. This could, for example, allow electronic voting.

The government promised to "come forward with legislation during the life of this Parliament to implement the Review's recommendations".[16]

On 2 December 2003, the government published its response to the public consultation.[17] This summarised the 71 contributions received from unions, employer groups and others and set out the final conclusions and findings of the Review. Published at the same time as the Bill, this document provides an in depth account of the reasoning and arguments which lie behind the Bill's clauses.

II Recognition of Unions for Collective Bargaining

A. Background

1. Recognition procedures

By virtue of section 1 of the 1999 Act, a trade union has been able to apply to the Central Arbitration Committee (CAC) for a declaration giving it the right to recognition for the purpose of carrying out collective bargaining on behalf of a group of workers in a bargaining unit.[18]

The provisions do not apply where the employer employs less than 21 workers. This is known as the 'small firms threshold'.

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16 DTI, *Review of the Employment Relations Act 1999: consultation document*, March 2003, Foreword by Patricia Hewitt, http://www.dti.gov.uk/er/erareview.htm#Foreword

17 *Review of the Employment Relations Act 1999: Government response to the public consultation*, 3 December 2003, http://www.dti.gov.uk/er/era_rev99_govresp.pdf

18 CAC website: http://www.cac.gov.uk/

The procedures for union recognition are set out in a fairly long and detailed statutory schedule (Schedule A1 - paragraphs 1 to 172).[19] This Schedule is divided into parts I to VI, which are summarised as follows in the Bill's explanatory notes:[20]

> **Part I** of Schedule A1 provides that in certain circumstances a trade union (or trade unions) may make an application to the Central Arbitration Committee (CAC) for a declaration that it should be recognised for the purpose of conducting collective bargaining on behalf of a group or groups of workers employed by an employer in a particular bargaining unit.
>
> **Part II** of the Schedule provides that where a voluntary agreement for recognition is made between the parties, after a request for recognition has been made under the Schedule, the employer has to maintain that agreement for three years unless the union ends it before that time. This is known as semi-voluntary recognition. If, following the conclusion of an agreement for recognition, the parties are unable to agree a bargaining procedure, an application may be made to the CAC for it to determine one. Part II is designed to afford protection to unions which withdraw from the statutory process to agree a voluntary deal, and therefore to encourage the voluntary settlement of claims.
>
> **Part III** sets out a procedure to be followed by the parties and the CAC where a union has been recognised through the statutory procedures and, as a result of a change in the employer's business, either the union or the employer believes the bargaining unit has changed or has ceased to exist.
>
> **Parts IV and V** of the Schedule provide that where recognition results from an earlier declaration by the CAC, it may in certain circumstances, on application from the employer or workers in the bargaining unit, declare a union to be derecognised.
>
> **Part VI** provides for workers to be able to invoke the statutory derecognition procedure where an employer has voluntarily recognised a union which does not have a certificate of independence.

Most of the changes made by Part 1 of the Bill relate to the first part of Schedule A1 which governs the process of gaining recognition and agreeing a method for collective bargaining.[21] The procedure is designed to support voluntary agreement between unions and employers, with the CAC resolving any failure to agree by providing assistance or authoritative direction. The stages in this process are as follows:[22]

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19 Part I of Schedule A1 of *TULRCA 1992* inserted by *1999 Act*. The provisions came into force on 6 June 2000. Most of the changes made by Part 1 of the Bill relate to this schedule.

20 *Employment Relations Bill Explanatory Notes,* 2 December 2003, http://www.publications.parliament.uk/pa/cm200304/cmbills/007/en/04007x--.htm

21 *TULRCA 1992* Sch A1, Part I, paragraphs 1-51

22 See summary, pp 5-6 *Employment Relations Bill Explanatory Notes*, 2nd December 2003

a. Trade union writes to the employer seeking recognition

If agreement is reached between the union and the employer the statutory recognition procedure is regarded as closed. The parties can have the agreement recognised by the CAC.

b. Application by trade union to the CAC

In the absence of agreement the union may apply to the CAC which will decide whether to accept the application. There are requirements for at least 10% of the workers in the proposed bargaining unit to be members of the union(s), and for the CAC to be satisfied that a majority of the workers in the bargaining unit would be likely to favour recognition.

c. Agreement or determination of a bargaining unit

If the union's application is accepted, the parties have a period to agree the appropriate bargaining unit if they have not already done so, otherwise it will fall to the CAC to determine. If this turns out to be different from the bargaining unit originally proposed by the union then the acceptance requirements (which include the 10% union membership and 'majority likely' tests) must be applied afresh.

d. Determining whether to award recognition or to hold a ballot

When the bargaining unit is determined, the CAC must make a declaration awarding automatic recognition if it is satisfied that a majority of the workers in the bargaining unit are union members, unless it decides that a ballot should be held for any of the reasons in paragraph 22(4) of the Schedule (in the interests of good industrial relations or because workers may oppose the recognition).

e. Recognition ballot

A ballot is conducted by a Qualified Independent Person. The employer must allow the union(s) to communicate with the workers in the bargaining unit during the balloting period. A statutory code of practice applies.[23] The employer must also supply the CAC with the names and addresses of the workers in the bargaining unit. Prior to this stage the unions have no formal right of access to the workers in the bargaining unit.

f. Method of collective bargaining

Following a CAC declaration of recognition, the parties have a period to agree on the method for conducting their collective bargaining, otherwise the CAC can be called in to assist or to specify a bargaining method in the absence of an agreement.

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[23] *Code of Practice: Access to Workers during Recognition and Derecognition Ballots*, 6 June 2000

The consequences of statutory recognition are:[24]

- The union and the employer may conduct negotiations on the method for conducting collective bargaining

- The parties may apply to the CAC for assistance in reaching an agreement on method, with the possible involvement of ACAS

- If the union and employer cannot reach agreement, the CAC must lay down a method for the conduct of collective bargaining between them which will take effect as a legally enforceable contract made between the union and the employer. This can be varied by agreement between the parties.

- If the parties reach agreement, but the agreement is subsequently not observed, either side may apply to the CAC, who will help the parties try to reach another agreement otherwise the CAC must lay down a method for the conduct of collective bargaining between them.

- Where the CAC imposes a method for the conduct of collective bargaining on the parties, and the parties have not varied it, the union has the right to be informed and consulted over training matters. Failure to do so could result in a tribunal awarding compensation to the workers in the bargaining unit.

- Unions which are granted a declaration of statutory recognition have the same information and consultation rights as other recognised unions. These rights include the right to be consulted over certain redundancies and transfers of undertakings and the right to receive information for the purposes of collective bargaining.

2. Review findings

The final findings of the review reported that there was general agreement that the recognition procedure set out in the 1999 Act had worked well.[25] A recent TUC survey reported that there had been a 32% reduction in cases being taken to employment tribunals by a trade union in the period 2000 to 2002. The survey put this down to the effectiveness of collective bargaining in reducing the need for litigation.[26] At the same time most respondents in the consultation wanted some amendments to be made to the procedure. Responses covered the following areas:

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[24] *Trade Union Recognition and Derecognition*: http://www.cac.gov.uk/Publications/pubstore/recog2.htm

[25] *Government Response to the Review of the Employment Relations Act 1999*: http://www.dti.gov.uk/er/era_rev99_govresp.pdf

[26] TUC survey "Focus on Employment Tribunals-trade unions trends survey 03/03" May 2003

a. The Small Firms Threshold[27]

Unions called for the threshold of 21 workers to be abolished. Employer groups pointed to the heavy administrative burden and costs this would place on small firms. The conclusion was that the threshold should be retained.

b. The 10% Membership and 'Majority Likely' Requirements[28]

The admissibility tests for accepting a union application for recognition will remain. However the government accepted the unions' argument that without formal access at an earlier stage, evidence of worker support is difficult to compile.[29]

c. Automatic Recognition[30]

Current arrangements which allow the CAC to recognise a union without holding a ballot where they are satisfied that the majority of the workers are members of the union, or to order a ballot despite majority membership, are to remain, despite the CBI claim that unions lost more ballots than they won when more than 45 – 50% of workers were union members. The government said the claim was not supported on a proper interpretation of the figures which in fact govern cases where CAC had ordered a ballot. This was seen more as proof of the proper exercise of the CAC discretion.

d. The 40% of the Bargaining Unit Ballot Threshold[31]

In the ballot the union must achieve a majority as well as at least 40% of those entitled to vote. Despite union arguments that this requirement should be abolished because the 40% threshold does not compare with political elections (where voter turnout is currently low), the government decided that the threshold was needed to preserve the credibility of the recognition procedure.

e. Determination of Bargaining Unit[32]

The government decided to carry forward its proposals set out in the consultation document to clarify the basis of determination by the CAC of the appropriate bargaining unit. The proposal is that the employer's evidence shall be taken into account when the CAC is deciding whether to accept the union's proposed bargaining unit. This issue had been the subject of judicial review proceedings. The Court of Appeal came to the conclusion that the CAC was not obliged to take on a comparative exercise in order to weigh up the union's proposed bargaining unit for collective bargaining purposes against

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27 *TULRCA 1992* Schedule A1, paragraph 7
28 *TULRCA 1992* Schedule A1, paragraphs 13, 36(1)
29 See Bill, clause 5
30 *TULRCA 1992* Schedule A1, paragraph 22
31 *TULRCA 1992* Schedule A1, paragraph 29(3)
32 *TULRCA 1992* Schedule A1, paragraphs 11(2), 12(2), 18 & 19

that of an employer.[33] The government's proposals preserve, in the recognition procedure, the balance struck by the Court of Appeal judgement.[34]

f. Small and Fragmented Bargaining Units[35]

Paragraph 18(4) of Schedule A1 sets out a number of matters which the CAC should consider, in relation to the general requirement that bargaining units should be compatible with effective management. One of these is the desirability of avoiding small fragmented bargaining units. The government concluded that this provision was working well and proposed no change.

g. Treatment of Associated Employers

In the consultation the government proposed to allow bargaining units to be formed of workers from two or more associated companies. However these proposals were dropped in the light of opposition from both unions and employer groups on the basis that the benefits were outweighed by increased legal complexity.

h. Changes during the CAC Process[36]

Part III of Schedule A1 deals with cases where significant changes occur which mean that the bargaining unit is no longer appropriate. Unions argued for removal of this part. No change is proposed.

i. Ballots[37]

The government proposed allowing voting to take place by post or other means. This was generally supported, although employer groups were opposed to the use of employer IT systems for e-voting.

j. Access Rights

The government proposed that unions should be given earlier access to the bargaining unit by post via a third party from the point the union's application is accepted. Currently, formal physical access is only allowed after recognition has been granted, although the postal access via the independent third party exists during CAC ordered ballots. Unions asked for more than the government proposed, some employer groups argued for less and the government stuck to its original proposal.[38]

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33 *R v. Central Arbitration Committee ex parte Kwik-fit (GB)Ltd*. (2002) IRLR 395; (2000) ICR 1212
34 See Bill, clauses 1-4
35 *TULRCA 1992* Schedule A1, paragraph 18(4)
36 *TULRCA 1992* Schedule A1, Part III
37 *TULRCA 1992* Schedule A1, paragraphs 25 & 117
38 See Bill, clause 5

k. Definition of Collective Bargaining[39]

Paragraph 3(3) of Schedule A1 sets the core topics for collective bargaining as pay, hours and holidays. The government proposed to make amendments clarifying that 'pay' does not included pensions for the purposes of the schedule. Pensions, training and equality emerged as other potential core topics which could be included in the statutory procedure. Parties are free to cover such issues in voluntary collective bargaining agreements. However the government did not conclude that these areas should become core topics in collective bargaining under the statutory procedure.

l. 'Top-up' Recognition

The government proposed that unions should have access to the statutory procedure if they had existing voluntary agreements in place for a bargaining unit which covered none, or only, some of the core topics. Both unions and employers supported the proposal, so the government confirmed it would go ahead with these proposals.

m. Membership Checks and Other Information Issues

The government put forward various proposals with regard to information issues in the schedule concerning the assessment of union membership levels and the disclosure of information to the CAC and ACAS. These received widespread support. Accordingly the government proposed to give the CAC and ACAS the ability to request information for ballots and checks.

The government rejected calls for a legal definition of union membership and calls for the CAC determination of membership levels to conclude at the point of acceptance for the remainder of the procedure.

The proposal that employers should disclose information to unions to assist the process of agreeing the bargaining unit was confirmed.

n. Timescales

After consultation the government decided to take forward its proposals to allow the CAC greater flexibility in extending or reducing timescales in the procedure.

o. Detriment and Dismissal

While the government agreed that intimidatory behaviour during recognition procedures was a real problem and was reprehensible, it was not convinced that new behavioural rules should be added to the statutory procedure.

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39 *TULRCA 1992* Schedule A1, paragraph 3(3)

p. Change of Employer Identity

The government proposed that where an employer's identity changes, the new employer should be treated as if it were the original employer. The proposals were well supported. The government decided that the best way to effect this proposal would be to create an order making power to provide in regulations for awards or applications to be reassigned to successor employers with the aim of achieving continuity of treatment for the workers.

q. Change of Union Identity

In cases where a union amalgamated with another union, the government proposed that recognition or application could proceed in the name of the newly merged union. This met with agreement and the government has decided that the best way to achieve this would be by creating an order making power to provide for these matters in regulations.

r. Miscellaneous Issues

Various other technical changes and a wider scope for the Secretary of State to make changes to the procedure by order are also being proposed.

B. The Bill (clauses 1 to 16)

1. The bargaining unit[40]

Clauses 1 to 4 of the Bill make changes to the provisions which relate to the determination of the bargaining unit.

Clause 1 makes a very minor adjustment to the statute's wording in order to clarify the paragraphs under which unions may make an application to the CAC where the employer refuses or fails to respond to a request for recognition or where negotiations with the employer fail. The amendment clarifies that the CAC is not obliged to take on a comparative exercise in order to weigh up the union's proposed bargaining unit for collective bargaining purposes against that of an employer.

Clause 2 provides a power for the CAC to reduce the 20-day negotiation period for the parties to agree a bargaining unit. This would cover those occasions where the parties both acknowledge that they will not be able to reach agreement.

Clause 3 places a duty on the employer to supply information to the union to assist with the process of agreeing a bargaining unit. This is to increase the chances of an agreement being reached since in this way a shared picture of the workforce can be achieved.

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[40] See *TULRCA 1992* Schedule A1, paragraphs 11(2), 12(2), 18 & 19

Clause 4 follows the Court of Appeal decision in *R v. Central Arbitration Committee ex parte Kwik-fit (GB)Ltd*.[41] It clarifies the way in which the CAC will determine the appropriate bargaining unit where the parties have failed to reach agreement.[42] The CAC must first consider the bargaining unit proposed by the union. If the CAC does not accept the union's proposed unit, it must decide a unit which is appropriate. The CAC has 10 days (or an extended period) to do this. The views of the employer must be considered and the CAC, in deciding whether the union's proposed bargaining unit is appropriate, must take into account any view the employer expresses about an alternative unit. Where an employer fails the duty in Clause 3 to provide information for agreeing the bargaining unit, the union may request that the CAC determines the bargaining unit before the 20 day period has elapsed to prevent unnecessary delay.

2. Communication between union and workers[43]

Clauses 5 and 10 relate to the access rights unions have to communicate with workers in the course of the recognition procedure and the independent person appointed to mediate the communication or conduct a ballot. At present, a union may only formally communicate with workers during the period of a CAC ordered ballot.

Clause 5 allows the union to communicate with the workers in the bargaining unit from the point when the CAC accepts the union's application. This communication takes place via a suitable independent person appointed by the CAC. The employer must also provide the names and home addresses of all the relevant workers and must update this information when changes occur. On the same lines as paragraph 28 of Schedule A1 (concerning the independent person in recognition ballots), provision is made as to the payment of the independent person's fees and costs and the ways in which these can be enforced.

Clause 10 gives unions and employers the ability to appeal against the costs demands of the independent person under provisions in Clause 5 or under paragraph 28 of Schedule A1 (in respect of conducting a ballot). The appeal is made to an employment tribunal within four weeks of receiving the demand. The tribunal will decide whether the amount demanded is too high or a particular party's share is too great and make the necessary adjustments.

3. Recognition ballots[44]

Clauses 6, 7 and 12 make various changes to the procedure in cases where the CAC decides to ballot workers on whether they want the union to be recognised to conduct collective bargaining on their behalf. The Bill also introduces a procedure for appealing

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41 (2002) IRLR 395; (2000) ICR 1212
42 Replaces *TULRCA 1992* Schedule A1, paragraph 19
43 See *TULRCA 1992* Schedule A1, paragraphs 19 & 20
44 See *TULRCA 1992* Schedule A1, paragraphs 22(3), 23(2), 24, 25 & 117

against the costs demand of the qualified independent person who is appointed to conduct the ballot (see explanation of Clause 10 above).

Clause 6 makes a small change to the relevant procedure where the CAC gives notice that within a fixed time period it intends to arrange a secret ballot of the workers in the bargaining unit. The clause gives the CAC the ability to extend the notification period on the request of both parties to give the parties more time to try to reach a voluntary agreement on recognition.

Clause 7 amends the provision whereby the ballot is to be conducted, wholly or in part, via post with the various safeguards and relevant matters governing the decision to allow postal voting in a ballot. The CAC may now order that the ballot be conducted primarily at the workplace, but make special arrangements for individuals to vote by post, if for some reason they cannot attend. This will not be regarded as a combination of both kinds of ballot and so will not fall under the various restrictions relevant to combination ballots.

Clause 12 gives the Secretary of State the power to make regulations to govern the kind of information, in addition to the names and home addresses of workers, which the employer will be required to give the CAC to enable it to conduct a ballot, or to allow information to be sent by the union. This will open the way for regulations to be made to enable electronic voting, by allowing the CAC to ask for other kinds of addresses (such as email addresses).

4. Pay, hours and holidays[45]

Clauses 8 and 15 make minor changes to provisions dealing with the "core bargaining" topics set in Paragraph 3(3) of Schedule A1, which are pay, hours and holidays. These topics constitute a definition of collective bargaining for the purposes of statutory recognition. Of course, other topics are frequently the subject of collective bargaining by voluntary agreement between the parties, but it is only in relation to pay, hours and holidays that the compulsive force of the statutory scheme can be brought to bear.

Clause 8 simply clarifies that a union may apply in respect of a pre-existing agreement when one or more of the core bargaining topics are not included in that agreement. The explanatory notes to the Bill set out the points that have been taken on this which have made clarification necessary:

> There has been some confusion over the meaning of these paragraphs in the 1992 Act. It has been contended that they imply that the CAC may only accept an application in these circumstances where the existing agreement covers none of pay, hours or holidays. An alternative view is that an application would be

[45] See *TULRCA 1992* Schedule A1, paragraphs 3(3), 35 & 44

admissible if the collective agreement already in force covered one or more (but not all) of pay, hours and holidays.

Clause 15 clarifies that 'pay' does not include anything related to pensions for the purposes of statutory recognition. However, the Secretary of State will have the power to make regulations (subject to Parliamentary approval) adding pensions to the core bargaining topics and may also order that this cover existing as well as future awards of recognition.

5. Notice to end bargaining[46]

Under the current procedure a threshold of 21 workers applies, below which statutory recognition is not granted. The procedures are complex and can be costly. The idea behind the threshold is to avoid placing excessive burdens on smaller firms. The threshold is assessed at the time the union applies for recognition, but after three years have passed the employer may also terminate the recognition (known as 'derecognition') if the employer's average workforce drops below 21 workers in a given 13 week period.

Clause 9 removes a procedural anomaly in the derecognition procedure, whereby unions can be prevented from being heard in opposing a derecognition notice if the employer has served or the union has opposed a similar notice within the previous three years.

Clause 9(4) adds a further provision preventing an employer from applying for derecognition for three years after a failed attempt to derecognise a union. The way this is achieved in the rewording of the provisions also makes it clear that the moratorium applies only in cases where the employer's application was in the correct form (as set out in schedule A1, paragraph 99(3)). In other words the moratorium would not apply if the employer's application for derecognition only failed because it was not in the correct form.

6. Powers to make secondary legislation[47]

In addition to clause 12 outlined above, clauses 11 and 13 give the Secretary of State further powers to make provisions in regulations subject to parliamentary approval which support the functioning of the recognition procedure.

Clause 11 extends the limited powers the Secretary of State has to make an order amending paragraphs of Schedule A1. This is currently only possible on the CAC's notification in respect of paragraphs 22 and 87 of Schedule A1 (governing automatic recognition). The Secretary of State will be given a general power to amend any provision of Schedule A1, whether or not the CAC requests an amendment or draws the Secretary of State's attention to any unsatisfactory effects a particular provision may have.

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46 See *TULRCA 1992* Schedule A1, paragraphs 99, 101, 103, 106, 107, 112 & 128

47 See *TULRCA 1992* Schedule A1, paragraph 166

Clause 13 allows the Secretary of State to make regulations governing circumstances affecting the statutory recognition procedure where unions amalgamate or there is a transfer of business from one employer to another.

7. CAC and ACAS powers to request information

Clauses 14 and 16 introduce new provisions to assist the CAC and ACAS in their respective roles, by giving them powers to request information from employers, workers or unions.

Clause 14 gives information gathering powers to the CAC to help inform its decisions under the Schedule and specifies the kind of information the CAC might request. It also outlines the way in which the information is to be handled by the CAC and that it can draw inferences from any failure to provide information.

Clause 16 provides that where ACAS is involved in the settlement of a trade dispute, and the dispute is about recognition, the parties may jointly request ACAS to hold a ballot of the workers involved or to ascertain their union membership. The request may be withdrawn by either party at any time. ACAS can then request information to enable it to hold such a ballot or ascertain union membership.

III Industrial Action

A. Background

There is no specific statutory provision giving an employer the right to dismiss employees who go on strike. Nor is there a statutory "right to strike". The common law position is that an individual who goes on strike is almost invariably in breach of his contract of employment, and, therefore, liable to dismissal under contract law.

Statute law first entered the equation in 1971 when the *Industrial Relations Act 1971* introduced a right to take a claim for unfair dismissal to an industrial tribunal. Section 26 of that Act excluded strikers from the right to claim unfair dismissal unless they could show that their employer had been selective in his dismissal or re-engagement of those on strike, and that those dismissed or not re-engaged had been selected because of their union membership or activities. Some modifications were made by the *Employment Protection Act 1975*, but the general principle that dismissal of strikers was only unfair if it was selective was retained. The *Employment Act 1990* made it possible for employers to dismiss unofficial strikers selectively without giving them a right to claim unfair dismissal.

The current provisions have been consolidated in sections 237 and 238 of the *Trade Union and Labour Relations (Consolidation) Act 1992* [TULRCA]. Section 237 removes altogether the right to claim unfair dismissal at an industrial tribunal from employees dismissed while on *un*official strike.

Section 238 of TULRCA further removes unfair dismissal rights from employees dismissed while on *official* strike unless their employer selectively dismisses strikers or selectively re-engages them within three months of the last dismissal. The 1999 Act reversed this, but only in the first eight weeks of industrial action, so that dismissal would be automatically unfair if the reason was that the employee was involved in a strike during the protected period. This is commonly known as the eight week rule (see below).

There have been a number of high profile cases - like those at Timex and Magnet - where employers did dismiss whole workforces and bring in replacement labour when faced with a strike.[48]

Trade unions that organise a strike will almost certainly commit a "tort" or "civil wrong" such as inducement of breach of contract or interference in performance of the terms of a contract. The remedies for torts are primarily damages and injunctions. Insofar as there is any "right to strike" in British law, it has been conferred by Acts of Parliament which granted trade unions and trade union officials immunity from liability for these torts. There is therefore a freedom to strike in cases for which immunity is granted rather than any individual or collective right to strike.

The Conservative trade union legislation severely reduced the scope of these immunities. Amongst other things, it removed immunity from secondary action and political strikes, and introduced complex procedural requirements involving secret postal ballots and seven-day strike notice which had to be complied with if immunity was to be preserved. It is only strikes for which a trade union has immunity that are "lawful".

B. The Bill (clauses 17 to 22)

1. Ballots and notices[49]

The provisions on ballots and notices are contained in *TULRCA 1992* sections 226 to 235. The 1999 Act introduced a number of changes, among them sections 226A and 234A which deal with notices which unions must give employers. For the union to be protected from the liability for inducement to breach of contract they must conduct a secret ballot of those they are likely to induce to take part in a strike. They must also give the employer notice of both the ballot and the strike. The "ballot notice" must describe which employees the union believes will be entitled to vote in the ballot, and the "industrial action notice" must describe which employees the union intends to induce to take part in the industrial action.

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[48] See, eg, *People Management*, 2 April 1998, "Poles apart" for an account of the Magnet dispute and *Guardian*, 3 March 1993, "Timex jobs fight turns clock back to 1980s"

[49] See *TULRCA 1992* sections 62, 226 to 235

Whilst the review of the 1999 Act found that the amended provisions were working well, various court judgements have since highlighted uncertainties which the Bill seeks to address. These involve issues of presentation in the case of notices and a lack of clarity about which union members the union is required to give an entitlement to vote in an industrial action ballot.

Clause 17 tightens up the language of the statute and simplifies the requirements of information which should be contained in the ballot notice. The current requirements are couched in relative terms (e.g. information which would 'help the employer make plans' etc.). The clause aims to specify more clearly what information unions are required to give. This formulation is currently contained in *TULRCA 1992* section 226A (2)(c) and was amended by the 1999 Act to remove difficulties which had been highlighted by the courts.[50] However, when the new formulation was again tested in the courts, it still appeared capable of resulting in substantial legal dispute.[51] The formulation in the Bill requires unions to give a more definite account of the workers concerned, but also introduces a provision that this should be as accurate as reasonably practicable in the light of the information in the possession of the union. The names of individual employees will not be required.

Clause 18 resolves another issue highlighted by court judgements, regarding which union members must given an entitlement to vote in an industrial action ballot.[52] The clause puts it beyond doubt that the union does not have to give such an entitlement to members who *might* take part in industrial action even though the union does not induce them to do so.

Clause 19 clarifies the amendments made by the 1999 Act which gave a dispensation for minor slips or accidental failures in the conduct of industrial action ballots where these were unlikely to have a substantial effect on the outcome of the ballot. A minor clarification on the scope of this allowance was elaborated by the courts.[53] The House of Lords found that the relaxation of the rules for accidental omissions applied (albeit indirectly) to circumstances where the union induces workers to strike who had not been given entitlement by the union to vote in the ballot. Clause 19 amends the wording of the statute to settle this clarification. At the same time the clause also clarifies that union members have the right to take legal action against their unions if they have not been given entitlement to vote in a strike ballot and are then subsequently called upon to participate in the strike.[54]

Clause 20 relates to industrial action notices and what information about employees they should contain. The changes are similar to those outlined above in relation to clause 17

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50 See *Blackpool & Fylde College v NATFHE* [1994] IRLR 227,CA

51 *National Union of Rail, Maritime and Transport Workers v London Underground Ltd* [2001] IRLR 228

52 See *National Union of Rail, Maritime and Transport Workers v Midland Mainline Ltd* [2001] IRLR 813

53 *P v National Association of Schoolmasters/Union of Women Teachers* [2003] 2 All ER 8

54 See *TULRCA 1992* section 62(2)

and have the general aim of making the statute clearer by providing objective tests and specifying clearly what information (including lists and figures) the union must supply to the employer about the workers the union plans to call out on strike (referred to as "affected employees"). The clause also sets out how far the union must go to obtain the information which must be contained in the notice.

2. The eight week rule

Section 16 and Schedule 5, paras 1,3 of the *Employment Relations Act 1999* inserted a new section 238A into the *Trade Union and Labour Relations (Consolidation) Act 1992.* It came into force on 24 April 2000 and provides a regime of protection from unfair dismissal for workers taking part in official industrial action. The eight week rule is embedded in these provisions. The section extends the underlying law on unfair dismissal contained in the *Employment Rights Act 1996.* It outlines a set of circumstances which, if proven, categorically render a dismissal unfair.

The first requirement (s*ubsection(2)(a)*) is that the reason for dismissal must be that the employee took industrial action which is protected by the section. This must be coupled with one of the following circumstances; either:

- The dismissal takes place within an eight week period beginning with the first day industrial action begins (s*ubsection (3)*).

- The dismissal takes place after the end of the eight week period and the employee had stopped taking action before the eight weeks was over (s*ubsection (4)*).

- The dismissal takes place after the end of the eight week period; and the industrial action continued past eight weeks; and the employer did not take reasonable procedural steps to resolve the dispute (s*ubsection (5)*). Examples are given in *subsection 6(a) to (d).*

The easiest to prove of the above three circumstances where an employee is protected is clearly the eight week rule in subsection 3. Nevertheless, subsection 4 grants indefinite protection if the industrial action ends within the eight weeks. If the industrial action continues past eight weeks the protection falls subject to a condition that the employer failed to take necessary procedural steps to resolve the dispute.

3. Friction Dynamics and opposition to the eight week rule

The case which brought the eight week rule into the foreground of political attention was the Friction Dynamics dispute. It has been argued that this was a case where the provisions allowed an employer to simply wait eight weeks and then dismiss employees because they were taking industrial action.

The Friction Dynamics dispute received a fair amount of media attention, mainly in the *Liverpool Daily Post*. There were a number of strands, but the principal concern related to the dismissal of 86 striking workers in April 2001.

The strike lasted one week. When the workers returned they found that they were locked out. Soon after eight weeks had passed they were given an ultimatum and then dismissed on 29 June 2001. The factory gates were picketed from that time, until 19 December 2003 when the picket ended after 965 days of dispute.[55]

An employment tribunal decision in October 2002 found unfair dismissal on the grounds that no real attempt had been made by the company to resolve the dispute. The company appealed to the Employment Appeals Tribunal. This appeal was withdrawn when the company went into liquidation in August 2003. According to T&G union representative, Tom Jones, £2.5 million is owed in compensation under the tribunal's decision.

In terms of the eight week rule it is possible to make out a number of issues raised by the Friction Dynamics case. In particular there is an apparent ability on the part of the employer to evade some of the provisions of section 238A by locking out the workforce:

- The employer can lock the workers out, hire temporary labour, and then dismiss the workers as soon as eight weeks have passed, thereby evading the provisions of subsection (3) which, as explained above, provides that dismissal of a striking worker within the eight weeks is to be taken as being unfair.

- By locking the workers out, and consequently perpetuating the dispute, the employer might be able to evade the provisions of subsection (4) which grants indefinite protection if the strike comes to an end before the end of the eight week period.

- Subsection (5) would still require that the employer take the necessary procedural steps to allow resolution of the dispute. However, in practical terms this is a much lower hurdle for the employer to jump and does not require anything more than a willingness on the part of the employer to engage in a process of negotiation.

- In such a negotiation the employee might be left in an unequal position, having been locked out, losing their income and having potentially lost the protection of subsections (3) and (4).

The following EDM was tabled by Hywel Williams MP on 27 June 2001:[56]

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[55] BBC News, 20 November 2003: http://news.bbc.co.uk/1/hi/wales/3223044.stm

[56] EDM40 of 2001-02 "Dispute at Friction Dynamics Caernarfon" 27 June 2001.

> That this House deplores the attitude and behaviour of the employer in the dispute at Friction Dynamics Caernarfon, in demanding without negotiation that the workers accept a change in their working conditions and take a cut of 15 per cent. in their pay, which already had been frozen for four years; rejects the employers negative attitude to discussions with the workers' representatives held under the auspices of ACAS and their most recent move to dismiss those workers involved in this legitimate dispute; applauds the workers' reasonable attitude and their determination to pursue a just settlement; and calls on the employers to withdraw the dismissal notices and enter in meaningful negotiations forthwith.

Opposition to the eight week rule came from the T&G union who announced in August 2003 that they would call for the its abolition:

> At this year's TUC Congress the T&G will be pushing the trade union movement to support their call for an end to the iniquitous eight-week rule, in the employment rights debate on the first day of conference (Monday 8th September).[57]

Plaid Cymru have also called for the abolition of the eight week rule and in November 2003 took up the case in a debate in the Welsh Assembly.[58]

4. New protection for employees during industrial action

Clause 21 changes the scope of the eight week rule so that any period of time when workers are locked out will be disregarded in determining the length of the period. This is formulated in terms of a "basic period" of eight weeks to which is added an "extension period" amounting to one day for every day the worker was locked out (during either the basic period or any extension period). This means that the period of protection could be extended indefinitely if the workers remain locked out.

In the case of the Friction Dynamics dispute this would have prevented the company from locking the workers out, engaging temporary staff to cover the work and then dismissing the workforce soon after the eight week period had run.

Clause 22 has the effect of ensuring that where section 238A applies in relation to a dismissal where the employer gives notice, the dismissal is treated as occurring when the notice is given and not when the period of notice expires. This would prevent an employer trying to circumvent the lockout provisions by giving notice of dismissal during the eight week period, which effectively terminates employment after the period expires.

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57 T&G News Release PR03/275, *Sir Bill Morris condemns government over Friction Dynamex*, 29 August 2003.

58 Ieuan Wyn Jones, AM for Ynys Mon quoted in *Liverpool Daily Post* 15 November 2003, p.19

IV Rights of Trade Union Members

A. Background

1. Discrimination against trade union members

Discrimination against employees on the grounds of trade union membership (or non-membership) is prohibited under the TULRCA. However, in certain circumstances, the law permits employers to offer financial incentives to employees to give up the right to use the services of a trade union for collective bargaining purposes. A decision of the European Court of Human Rights in July 2002 has called the legality of this provision into question (see below: *Wilson and Palmer*).[59]

Under the TULRCA, it is unlawful to refuse a person employment "because he is, or is not, a member of a trade union".[60] It is also unlawful to take action short of dismissal against an employee on "grounds related to union membership or activities"[61] or to dismiss an employee on "grounds related to union membership or activities".[62] The fact that it is not unlawful to refuse someone employment on the grounds of involvement in trade union activities has, in the past, protected the activities of organisations like the Economic League which maintained a "blacklist" of union activists. Draft regulations under the 1999 Act to tackle blacklisting were published in February 2003.[63]

TULRCA also permits action short of dismissal against trade union members if the employer's purpose in taking such action was "to further a change in his relationship with all or any class of his employees".[64] This provision, known as the "Ullswater amendment", was introduced by the Conservative Government in 1993 following a Court of Appeal ruling in *Wilson and Palmer* that restricting pay rises to people who transferred from collective bargaining to personal contracts discriminated against trade union members. Eventually, the House of Lords ruled that such discrimination was discrimination by "omission" rather than by "action" and was therefore permissible. In 1999, the Labour Government amended TULRCA to outlaw discrimination by omission, but did not repeal the Ullswater amendment.

Wilson and Palmer pursued their cases to the European Court of Human Rights, which, on 2 July 2002, ruled that "by permitting employers to use financial incentives to induce

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59 *Wilson & the National Union of Journalists, Palmer, Wyeth & the National Union of Rail, Maritime & Transport Workers, Doolan & others v United Kingdom* [2002] IRLR 568 (*Wilson and Palmer*) See summary of the judgment: http://www.echr.coe.int/Eng/Press/2002/july/WilsonandOthersjudepress.htm

60 section 137

61 section 146

62 section 152

63 Available via DTI website: http://www.dti.gov.uk/er/black.pdf

64 section 148(3)

employees to surrender important union rights" UK law was in breach of Article 11 of the European Convention on Human Rights (freedom of assembly and association).

2. Wilson and Palmer

Terence Palmer worked in a manual engineering grade for Associated British Ports (ABP) in Southampton. He was also a member of the National Union of Rail, Maritime and Transport Workers (RMT) which was recognised by ABP for the purposes of collective bargaining. In February 1991, ABP offered its manual grades personal contracts, under which pay and conditions were individually determined, in place of the process of collective bargaining. Workers who accepted the offer were granted significantly higher pay increases than those who decided to stay with collective bargaining. Mr Palmer refused the personal contract and was, therefore, paid less than his colleagues. He complained to an industrial tribunal that ABP had discriminated against him as an individual on grounds of his trade union membership contrary to section 146(1)(a) of TULRCA. At the time, section 146 (1) provided:

> **146 Action short of dismissal on grounds related to union membership or activities**
>
> (1) An employee has the right not to have action short of dismissal taken against him as an individual by his employer [for the purpose of—
>
> (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
>
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, or
>
> (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

The industrial tribunal upheld Mr Palmer's claim. The Employment Appeal Tribunal (EAT) overturned the industrial tribunal ruling; but the Court of Appeal reversed the EAT ruling and supported Mr Palmer.

The Court of Appeal cited the case of *Discount Tobacco and Confectionary Ltd v Armitage* [1990 IRLR 15] in which Mrs Armitage, a union member, was dismissed after she consulted a union official about the terms of her employment contract and the official wrote a letter to her employer on her behalf. In this case, the EAT found that the union official's activities were an important "incident of union membership" and that there was no "genuine distinction between membership of a union on the one hand and making use of the essential services of the union, on the other". The Court of Appeal, in the Palmer case, endorsed this ruling as "unquestionably correct". ABP could not, therefore, argue that they were not penalising union membership merely the use of its negotiating services.

The Wilson case was similar. Dave Wilson was employed by Associated Newspapers as a journalist on the *Daily Mail* and was, in fact, the father of the NUJ chapel. The NUJ was recognised for collective bargaining but, in 1989, Associated Newspapers decided to derecognise it from 1990. The company offered new personal contracts and a company handbook which stated that, while journalists were free to join a union, they could not take part in its activities during working hours. People who accepted the new contract by 1 April 1990 were given a 4.5% pay rise; but those who - like Mr Wilson - refused, were not. An industrial tribunal upheld Mr Wilson's complaint of unlawful discrimination under s.146 (1) (a) of TULRCA. The EAT overturned it but the Court of Appeal, again, reversed the EAT decision and supported Mr Wilson. The Court said that there was nothing wrong with derecognising trade unions but offering individuals sweeteners to give up the right to representation did amount to unlawful discrimination against those who did not take up the offer.[65]

3. The Ullswater amendment

The government acted with what many considered unseemly haste to "clarify" the law so that similar cases would not be decided in the same way. An amendment – the "Ullswater amendment" - to the *Trade Union Reform and Employment Rights Bill 1992/3* (TURERA) introduced in the Lords after Committee and Report stages had been completed, provided that where an employer's "purpose" (in discriminating against trade union members) is to change his relationship with a group of employees (eg, by altering collective bargaining arrangements), this purpose and not the incidental purpose of deterring trade union membership, shall be paramount.[66] The Ullswater amendment is now contained in section 148 (3) of TULRCA. This (after further amendment by the *Employment Relations Act 1999*) now reads:

> **148 Consideration of complaint**
>
> (1) On a complaint under section 146 it shall be for the employer to show the purpose for which [he acted or failed to act].
>
> (2) In determining any question whether [the employer acted or failed to act, or the purpose for which he did so], no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.
>
> [(3) In determining what was the purpose for which [the employer acted or failed to act] in a case where—

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[65] 1.*Wilson v Associated Newspapers Ltd* 2. *Palmer and another v Associated British Ports* IRLR [1993] 336 CA

[66] HL Deb 24 May 1993, cc 21-67 and HC Deb 15 June 1993, cc 738-832

(a) there is evidence that the employer's purpose was to further a change in his relationship with all or any class of his employees, and

(b) there is also evidence that his purpose was one falling within section 146,

the tribunal shall regard the purpose mentioned in paragraph (a) (and not the purpose mentioned in paragraph (b)) as the purpose for which the employer [acted or failed to act, unless it considers that no reasonable employer would act or fail to act in the way concerned] having regard to the purpose mentioned in paragraph (a).

[(4) Where the tribunal determines that—

(a) the complainant has been subjected to a detriment by an act or deliberate failure to act by his employer, and

(b) the act or failure took place in consequence of a previous act or deliberate failure to act by the employer,

paragraph (a) of subsection (3) is satisfied if the purpose mentioned in that paragraph was the purpose of the previous act or failure.]

(5) In subsection (3) "class", in relation to an employer and his employees, means those employed at a particular place of work, those employees of a particular grade, category or description or those of a particular grade, category or description employed at a particular place of work.]

The House of Lords, in its judicial capacity, eventually overturned the Court of Appeal decision in any case. Their argument revolved around the definition of the word "action" in section 146. They said that not paying an increase to an employee was not an "action" taken by an employer but an "omission".[67]

4. The 1999 Act

In its White Paper, *Fairness at Work,* published in May 1998, the Labour Government announced that it would reverse the House of Lords decision in *Wilson and Palmer*. Few respondents to the White Paper opposed the reversal of *Wilson and Palmer*. However, the CBI and other employers' organisations thought it important that employers should still be able to agree more favourable terms with individuals than those agreed by collective bargaining without this amounting to discrimination against trade unionists. The TUC, however, highlighted the absence of any proposals to repeal the Ullswater amendment.

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[67] *Times* Law Report, 31 March 1995, "Selective pay freeze lawful"

The proposal to outlaw blacklisting of trade union members was broadly welcomed. The TUC went further and argued that section 137 of TULRCA (discrimination in recruitment) should be extended to cover trade union activities as well as membership and that discrimination on grounds of previous trade union membership or activity should be specifically outlawed.

Section 2 and schedule 2 of the *Employment Relations Act 1999* amended TULRCA to outlaw discrimination against trade unionists by omission as well as action.

The *Employment Relations Bill 1998/99* also contained a clause giving the Secretary of State the power to make regulations subject to the affirmative resolution procedure to protect workers from detriment and dismissal arising from a refusal to enter into an individual contract which would replace a collective agreement which would otherwise apply.[68] Business organisations argued that this did not fulfil a pledge given in Peter Mandelson's letter of 17 December 1998 to the CBI and the TUC in which he announced his decisions on the consultations on the *Fairness at Work* white paper. This said

> The Bill will safeguard the right of employers and employees to reach individual contracts even where a union is recognised for the bargaining unit in which the employees work. These individual contracts can contain terms which differ from the terms of any collective agreement. However, we will give similar protection to employees from being forced into signing individual contracts where collective agreements exist.

The Conservatives introduced an amendment at Committee stage in the Lords which was designed to make it clear that individual contracts allowing higher rates of pay than those contained in the collective agreement would not constitute a detriment to those who did not receive them. [69]

Lord McIntosh, for the government, argued that a government amendment at Report would meet the Opposition's concerns.[70] Despite these reassurances, the Opposition pressed the matter to a vote, which they won by 98 votes to 78.[71] The government overturned this Lords amendment in the Commons by 312 votes to 109.[72]

The Lords did not insist on the amendment but proposed another in lieu. The government accepted this.[73] The Commons also accepted this Lords amendment in lieu at the very last stage of the Bill's passage through Parliament.[74]

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[68] The clause was originally clause 16 in the Bill when introduced in the House of Commons in January 1999, Bill 36, 1998/99, but was clause 15 when the Bill arrived in the House of Lords, HL Bill 48, 1998/99, April 1999

[69] Baroness Miller of Hendon, HL Deb 16 June 1999, cc 356-357

[70] Lord McIntosh of Haringey, HL Deb 16 June 1999, cc 358-359

[71] HL Deb 16 June 1999, cc 360-361

[72] HC Deb 21 July 1999, cc 1261 - 1274

[73] HL Deb 26 July 1999, cc 1363-1365

These provisions can now be found in section 17 of the *Employment Relations Act 1999*, and reads:

> **Collective agreements: detriment and dismissal**
>
> 17. - (1) The Secretary of State may make regulations about cases where a worker-
>
> (a) is subjected to detriment by his employer, or
>
> (b) is dismissed,
>
> on the grounds that he refuses to enter into a contract which includes terms which differ from the terms of a collective agreement which applies to him.
>
> (2) The regulations may-
>
> (a) make provision which applies only in specified classes of case;
>
> (b) make different provision for different circumstances;
>
> (c) include supplementary, incidental and transitional provision.
>
> (3) In this section-
>
> "collective agreement" has the meaning given by section 178(1) of the Trade Union and Labour Relations (Consolidation) Act 1992; and "employer" and "worker" have the same meaning as in section 296 of that Act.
>
> (4) The payment of higher wages or higher rates of pay or overtime or the payment of any signing on or other bonuses or the provision of other benefits having a monetary value to other workers employed by the same employer shall not constitute a detriment to any worker not receiving the same or similar payments or benefits within the meaning of subsection (1)(a) of this section so long as-
>
> (a) there is no inhibition in the contract of employment of the worker receiving the same from being the member of any trade union, and
>
> (b) the said payments of higher wages or rates of pay or overtime or bonuses or the provision of other benefits are in accordance with the terms of a contract of employment and reasonably relate to services provided by the worker under that contract

The Explanatory Notes on this section of the Act explain:

> **Section 17: Collective agreements: detriment and dismissal**
>
> 210. This section provides powers for the Secretary of State to make regulations subject to the affirmative resolution procedure to protect workers from detriment and dismissal arising from a refusal to enter into a individual contract which includes terms different from those in a collective agreement which would otherwise apply. *Subsection (4)* limits what is to be taken as constituting a

[74] HC Deb 26 July 1999, cc 85-87

> detriment for the purposes of this section. The government intends to consult on draft regulations before they are made.

No regulations were ever made under this section.

5. European Court of Human Rights Judgment

Following the House of Lords judgment in the *Wilson and Palmer* case in 1995, the two unions involved took the case to the European Court of Human Rights. They alleged that UK law at the time failed to secure their members' rights under Article 11 of the European Convention on Human Rights regarding freedom of assembly and association. On 2 July 2002, the ECHR ruled that UK law did violate Article 11. The full judgment is available on the ECHR website,[75] but the conclusion was:

> 48. Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of criticism by Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association (see paragraphs 32-33 and 37 above). It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant unions and the individual applicants.[76]

Although the 1999 Act effectively reversed the final House of Lords decision in *Wilson and Palmer*, regarding discrimination by omission, it is possible that the Ullswater amendment is still open to the criticism contained in this judgment.

The government's response to the review of the 1999 Act, which was published on 2 December 2003, at the same time as the Bill, explains the current proposals in the Bill to repeal section 17 and the Ullswater amendment (section 148) and make provisions prohibiting inducements which have the main purpose of pressing workers to forego union rights:

> 3.9 In response to the consultation the government reaffirms its view that the ECtHR judgment requires some important changes to trade union law, especially the law outlawing discrimination on grounds of trade union membership and activities. Though the incidents which gave rise to the *Wilson and Palmer* cases are less prevalent in today's improved climate of employment relations, it would be wrong to leave the law as it is. That would mean the law was unclear, as

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75 http://www.echr.coe.int/eng/Judgments.htm

76 ECHR, *Case of Wilson & the Nnational Union of Journalists, Palmer, Wyeth & the National Union of Rail, Maritime & Transport Workers, Doolan & Others v the United Kingdom*, 2 July 2002, Judgment, para 48

tribunals and courts tried to reinterpret its meaning in the light of the ECtHR judgment. Moreover, the government intends that as a matter of principle trade union law should comply with the European Convention. The government does, however, reject arguments that the judgment's discussion of the 'right to be heard' requires any changes to the statutory recognition procedure, the right to be accompanied or industrial action law. The current law provides adequate means for unions to communicate and interact with employers on behalf of their members. The judgment makes clear that the European Court does not consider that the Convention requires any particular treatment of trade unions by employers. The government also considers that the judgment's passing references to the interests of the union do not require any overhaul of the law to enable unions to sue employers where their members have been discriminated against. The overriding focus of the Convention concerns the rights of individual people, not the entitlements of the organisations to which they belong.

3.10 In the light of this assessment, the government confirms its intention to repeal the **Ullswater Amendment and section 17 of the 1999 Act**.

3.11 The government also confirms its intention to provide union members with **rights to use the services of their union**. The government intends to achieve this mainly by amending sections 146 and 152 of the 1992 Act which currently provide the core protections against anti-union discrimination by detriment or dismissal. The amendments would provide similar protections to individuals who are penalised for using their union's services. The protection should also explicitly cover the circumstance where, arising out of a member's use of a union's services, the union makes a representation on behalf of that member. The definition of 'union services' would focus on those services received by union members as individuals, and should therefore exclude collective bargaining. The government accepts the argument that there must be a limitation on the use of a union's services during working time to avoid workplace disruption and considers that this limit should be on the same lines as the existing limitation on engaging in union activities during working time.

3.12 The government also confirms that the **law should explicitly prohibit inducements or bribes** being made to trade union members to forego union rights. Those were the particular employer behaviours that gave rise to the *Wilson and Palmer* cases, and they should be made unlawful. The government intends to make it unlawful for an employer to make an offer to an individual with the **main** purpose of inducing that person to relinquish rights to belong (or not to belong) to a union, rights to engage in trade union activities or the proposed right to use union services. In addition, offers should be made unlawful whose **main** purpose is to induce a group of workers, who belong to a recognised union, to accept that their terms of employment should be determined outside collectively agreed procedures. The result is that it would be unlawful for an employer to offer an inducement to the union members in such a group to have their terms of employment determined outside the framework set by any existing collective bargaining arrangements. This limits the scope of employers to offer individualised contracts. To avoid inflexibility however, the law should allow employers to make offers where the sole or main purpose of the inducement is unconnected with the aim of undermining or narrowing the collective bargaining

> arrangements. In particular, the law should give room for employers and individuals to enter individualised contracts designed to reward or retain key workers.
>
> 3.13 To comply with the ECtHR judgment the government also considers that **certain trade union rights** (not to suffer a detriment or be offered unlawful inducements) **should apply to workers** and not just to employees.

B. The Bill (clauses 23 to 28)

1. Inducements

Clause 23 introduces a new set of provisions prohibiting inducements which have the sole or main purpose of persuading workers to relinquish union rights or rights secured in collective agreements. The worker's union related rights are set out and defined:

(a) to be or seek to become a member of an independent trade union,
(b) to take part in the activities of an independent trade union at "an appropriate time",
(c) to make use of the services of a trade union at "an appropriate time", and
(d) to be or become a member of any trade union.

"Trade union services" are defined for the first time here as services made available to a worker by an independent trade union by virtue of his membership of the union and include "consenting to the raising of a matter on his behalf by an independent trade union of which he is a member".

"Appropriate time" is defined in the existing section 146 of the 1992 Act as a time when the worker takes part in the activities or makes use of the services (a) outside the worker's working hours, or (b) during them at a time when, in accordance with arrangements agreed with the employer or consent given by the employer, it is permissible for him to do so.[77]

The clause sets out the £2,500 remedy which an employment tribunal can award if a worker's right not to have a prohibited offer made to them is breached. Application to an employment tribunal must be made within the usual three months of the offer being made (or last offer in a series of offers being made). The clause also spells out that a claim can be brought concurrently under both these provisions and the other sections prohibiting detriment because of trade union membership (sections 146 and 149 – see below).

The clause spells out that any change in the worker's terms of employment brought about by the worker accepting the inducement will be enforceable by either the worker or the employer notwithstanding that there might have been a breach of the new provisions.

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[77] *TULRCA 1992* section 146(2)

However, an employer will not be able to enforce any agreement they have obtained to a change in the worker's terms at some time in the future or recover any money or assets that constituted the inducement.

References to trade unions are to be interpreted to include references to a branch or section of that union.

2. Detriments

Section 146 of the 1992 Act concerns action short of dismissal on grounds related to union membership or activities. The section gives employees a right not to be subject to any detriment for any reason relating to their membership of a trade union.

Clause 24 widens the scope of section 146 of the Act. Section 146 currently confers rights only on "employees", defined as those working under a contract of employment. The clause extends the rights to "workers" who may not fall within the definition of "employee".

Clause 25 extends section 146 and protects workers against any detriment which they may suffer as a result of refusing an offer contrary to the provisions set out in clause 23 relating to inducements. The grounds and definitions relating to the worker making use of "trade union services" at an "appropriate time" which appear in clause 23 are repeated and applied here to create a new area of possible detriment:

> 146(1)(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so.

Clause 25 also repeals section 17 of the *Employment Relations Act 1999* which was never brought into force (see above pp. 34/35).

Clause 26 relates to dismissal on the grounds of union membership or activities.[78] In line with clauses 23 – 25 above the prohibited grounds of dismissal are extended to making use of trade union services at an appropriate time or failing to accept an inducement falling within the provisions in clause 23. As with the preceding provisions, references to trade union are to be interpreted to include references to a branch or section of that union.

3. The right to be accompanied at hearings

The 1999 Act introduced a right for workers to be accompanied at the employer's internal disciplinary and grievance proceedings by a trade union representative or another worker. This right included a protection for a worker from any detriment or dismissal if they

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[78] *TULRCA 1992* section 152

relied on the right. The role of the companion is to address the hearing and confer with the worker.

In May 2000 ACAS used its statutory powers to publish a revised *Code of Practice on Disciplinary and Grievance Proceedings*.[79] This code gives guidance on best practice and has no legal force, but tribunals can take account of any failure to follow its measures.

The *Employment Act 2002* and the *Draft Employment Act (Dispute Resolution) Regulations* under that Act, introduced a new focus on the resolution of employment disputes within internal procedures so that recourse to employment tribunals should come to be seen as a last resort.[80]

Clause 27 redrafts the provisions of the 1999 Act in relation to the right to be accompanied at hearings. The role of the companion is clarified and their right to address the hearing is specified as being, subject to the worker's consent

(i) to put the worker's case;
(ii) to sum up that case;
(iii) to respond on the worker's behalf to any view expressed at the hearing.

The companion does not have the right to answer questions on the worker's behalf or use the powers in a way which prevents the employer or any other person from making their contribution to the hearing.

Where a worker attends a hearing as a companion of another worker clause 27 introduces a protection from detriment or dismissal as a result of either accompanying the worker or attempting to address the hearing.

Clause 28 corrects an oversight in the 1999 Act. It ensures that the Employment Appeal Tribunal has jurisdiction to hear appeals against employment tribunal decisions in relation to the right to be accompanied.

V Employment Rights

A. Section 23 Orders: Clergy and Atypical Workers

1. Section 23

Section 23 of the *Employment Relations Act 1999* gives the Secretary of State the power to make an order extending certain employment rights (e.g. the right to claim unfair

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79 http://www.acas.org.uk/publications/pdf/CP01.pdf

80 Draft regulations are annexed to the consultation document about the regulations: http://www.dti.gov.uk/er/individual/dis_res_consdoc.htm

dismissal or a redundancy payment) to some groups who are currently excluded because they are not legally classed as employees (e.g. some office holders, such as some clergy, some agency workers and some casual workers).

On 11 July 2002, the DTI published a *Discussion document on employment status in relation to statutory employment rights***.** The review looks at the arguments for and against extending employment protection in this way. Responses were requested by 11 December 2002.[81]

The possible extension of employment rights to the clergy has attracted particular attention. The Archbishop's Council made a submission to the DTI on 6 December 2002 which set out a summary of the current position of clergy and the arrangements under which they can be removed. The Archbishop's Council has acknowledged that there are shortcomings in the position of clergy and has set up a working group to look into the details. It met for the first time on 17 January 2003.

Section 23 states:

> (1) This section applies to any right conferred on an individual against an employer (however defined) under or by virtue of any of the following-
>
> (a) the Trade Union and Labour Relations (Consolidation) Act 1992;
> (b) the Employment Rights Act 1996;
> (c) this Act;
> (d) any instrument made under section 2(2) of the European Communities Act 1972.
>
> (2) The Secretary of State may by order make provision which has the effect of conferring any such right on individuals who are of a specified description.
>
> (3) The reference in subsection (2) to individuals includes a reference to individuals expressly excluded from exercising the right.
>
> (4) An order under this section may-
>
> (a) provide that individuals are to be treated as parties to workers' contracts or contracts of employment;
> (b) make provision as to who are to be regarded as the employers of individuals;
> (c) make provision which has the effect of modifying the operation of any right as conferred on individuals by the order;
> (d) include such consequential, incidental or supplementary provisions as the Secretary of State thinks fit

[81] Available at: http://www.dti.gov.uk/er/individual/statusdiscuss.pdf

> (5) An order under this section may make provision in such way as the Secretary of State thinks fit, whether by amending Acts or instruments or otherwise.
>
> (6) Section 209(7) of the Employment Rights Act 1996 (which is superseded by this section) shall be omitted.
>
> (7) Any order made or having effect as if made under section 209(7), so far as effective immediately before the commencement of this section, shall have effect as if made under this section.

The Explanatory Notes on the *Employment Relations Act 1999* explain how the government intends to use this power:

> Section 23: Power to confer rights on individuals
>
> 229. The employment rights legislation has developed piecemeal over a period of many years. While some aspects - such as the right not to have unauthorised deductions made from wages - extend to a relatively broad description of workers, most are currently restricted to employees as narrowly defined, ie to workers engaged under a contract of employment. Whether or not a worker is engaged under such a contract is not always an easy question to answer, however. This is because it is a common law question of mixed fact and law which in the event of a dispute can be definitively determined only by a court or tribunal. No single factor is conclusive; all relevant circumstances must be taken into account.
>
> 230. The government considers it desirable to clarify the coverage of the legislation and to reflect better the considerable diversity of working relationships in the modern labour market. Currently, significant numbers of economically active individuals - including for example many home workers and agency workers - are either uncertain whether they qualify or else clearly fail to qualify, for most if not all employment rights. Some work providers offer jobs on the basis of contracts under which the workers, although acting in a capacity closely analogous to that of employees and not genuinely in business on their own account, are technically self-employed or of indeterminate status according to the established common law criteria, and are thus effectively deprived of the rights in question.
>
> 231. Certain descriptions of individuals are explicitly excluded from exercising some or all of the rights, although not on a consistent basis, and others - such as members of the clergy - are incapable of qualifying owing to the nature of their appointment.
>
> 232. *Section 23(2)* gives the Secretary of State the power, by order subject to the affirmative resolution procedure (under section 42), to extend to individuals who do not at present enjoy them employment rights under the 1992 and 1996 Acts, this Act and any instrument made under section 2(2) of the European Communities Act 1972. The government envisages using this new power to ensure that all workers other than the genuinely self-employed enjoy the minimum standards of protection that the legislation is intended to provide, and

> that none are excluded simply because of technicalities relating to the type of contract or other arrangement under which they are engaged.

When the clause (then clause 21) was debated in Committee, the Opposition moved an amendment which would have limited the possibility of extension to "workers". Michael Wills, the Government Minister responding, made it clear that they would not wish to exclude office holders, such as the clergy.

He also made it clear that there would be extensive public consultation on any proposals to use the power and that any regulations made under the clause would be subject to the affirmative procedure. [82]

Section 23 was brought into force on 25 October 1999. Although consultations on the use of this power were originally expected during 2000,[83] the government only issued a discussion document in July 2002.[84] The discussion document summarised the current position of office-holders and the clergy as follows:

> **Office holders**
>
> 76. Office holders are often found not to be employees when applying the common law tests, but they are liable for Schedule E tax and Class 1 National Insurance Contributions by legislation (i.e. they are taxed as employees). The distinction between officeholders and employees lies in the fact that while an employee's rights and duties are defined by an employment contract, the rights and duties of an office holder are defined by the office held and exist independently of the person who fills it. With office holders, there is usually no intention to create legal relations. Examples of some office holders include the clergy, police officers, company directors, prison officers, trade union officers, club secretaries, registration officers, and trustees. The position of registration officers is complex. They are appointed to a registration post by the local authority, which is also responsible for their pay and accommodation. However, they answer to the Registrar General for the performance of their registration duties and he or she has the sole power of dismissal.
>
> 77. In some cases, an office holder can be held to be an employee as well as an office holder; this is determined by applying the usual criteria for deciding whether an individual has a contract of employment according to the facts of the case.[85] Police officers are specifically covered by certain employment rights, along with other categories of working person who might not be employees (in particular crown servants, House of Commons and House of Lords staff).

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82 SC Deb (E), 2 March 1999, cc 237-238

83 DTI website, http://www.dti.gov.uk/IR/fawfaq.htm at January 2000

84 DTI, *Discussion document on employment status in relation to statutory employment rights*, July 2002, available on the DTI website at: http://www.dti.gov.uk/er/individual/statusdiscuss.pdf

85 *102 Social Club & Institute Ltd v Bickerton* [1977] ICR 911

2. Current position of clergy

At present, most clergy are not covered by employment protection legislation because they do not have contracts of employment. The courts have ruled that they serve God and their congregations but have no terrestrial employer. Employment law, in general, does not apply to ministers of religion as they are usually classified as "office-holders", rather than "employees" or "workers". Most of the rights under the *Employment Rights Act 1996,* including the rights to claim unfair dismissal, redundancy pay and maternity - and now parental – leave are conferred on "employees". An "employee" is defined as:

> an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.[86]

A "contract of employment" is defined as:

> a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing.[87]

Other employment rights, including those to the National Minimum Wage, four weeks' paid annual leave and limits on working hours are conferred on "workers". A "worker" is defined as:

> an individual who has entered into or works under (or, where the employment has ceased, worked under) -
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.[88]

There has been considerable case law on the precise legal status of ministers of religion. *Harvey on Industrial Relations and Employment Law* says:[89]

> A clergyman is frequently regarded as an officeholder (*Parker v Orr (1996*) 1 ITR 488). Sometimes the reason given is that his Master is not amenable to the jurisdiction of the earthly courts; or more prosaically that the spiritual nature of

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86 *Employment Rights Act 1996*, section 230 (1)

87 *Employment Rights Act 1996*, section 230 (2)

88 *Employment Rights Act 1996*, section 230 (3). The *National Minimum Wage Act 1998* and the *Working Time Regulations 1998* use the same definition

89 Para A [175]

> his job is inconsistent with a contract of service. Also, it is submitted, the role of the priest or minister of whatever denomination, acting as such, necessarily involves such a degree of independent judgment and discretion that his relationship with his church or Church authorities cannot be a contract of service.

Harvey goes on to give examples of cases where ministers, such as a stipendiary lay reader, have been found to be "servants" rather than "officeholders", so there will be cases in which those who work for the Church are covered by employment legislation.[90]

In *Diocese of Southwark v Coker* [1998] CA, Lord Justice Staughton held that:

> A minister of religion serves God and his congregation but does not serve an employer. There is no contract that he will serve a terrestrial employer in the performance of his duties.

In this case, the Rev Alex Coker was removed from his home and post at St Philip's Church, Cheam, in May 1994 by the Bishop of Croydon. No reasons were given for his dismissal. He took his case to an industrial tribunal claiming his dismissal was unfair and racially motivated but the tribunal ruled it had no power to hear the case. This ruling was upheld by both the Employment Appeal Tribunal and the Court of Appeal.

Generally, the courts have established that the relationship between the church authorities and ministers of religion is not a contractual one at all.[91] This is not only in relation to the Church of England but also other religions. This means in effect that ministers of religion are unable to seek redress through the legal system in the event of any dispute over their treatment by the church authorities. Members of the clergy may be employees of hospitals, prisons or other organisations in respect of work for these organisations as chaplains.[92]

The reply to a PQ illustrates some of the difficulties, which might be encountered in giving clergy formal employment contracts:

Employment Contracts (Clergy)

> **Mr. Ben Chapman**: To ask the hon. Member for Middlesbrough (Mr. Bell), representing the Church Commissioners, what plans the Church Commissioners have to issue formal employment contracts for clergy. [93275]

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90 paras A [176] - [177]

91 *President of the Methodist Conference v Parfitt* [1984] ICR 176

92 DTI, *Discussion document on employment status in relation to statutory employment rights*, July 2002, available on the DTI website at: http://www.dti.gov.uk/er/individual/statusdiscuss.pdf

> **Mr. Stuart Bell**: The Archbishops' Council has set up a staff group to explore what can and should be done to give the clergy the rights they could and should expect.
>
> The great majority of clergy are office holders without contracts of employment. For National Insurance purposes only, they are deemed to be employees of the Church Commissioners.
>
> Giving clergy formal employment contracts would raise questions about the current arrangements over patronage, parochial appointments practices, selection for ordination training and clergy discipline, and would require complex and protracted legislation with great problems in defining the employer.

3. Union campaign

The Manufacturing, Science and Finance Union (MSF), now part of Amicus, has a 1,500-strong clergy and Church workers section. It is campaigning for employment rights to be extended to the clergy and has met staff of the Archbishops' Council to discuss this and related issues.[93] In a pamphlet published in 1998, the MSF said:

> Unlike their counterparts in Denmark, Germany, Holland and several other European countries, British clergy are unable to seek redress of grievances or disputes by recourse to the Employment Tribunals that others can use as remedies for a variety of forms of unfairness.
>
> Of course, we acknowledge that it would be undesirable for the churches to be regularly appearing in the tribunals, not least because the news media would tend to home in on such cases with the fascination they currently show for any dispute involving clergy and the church authorities. However, large numbers of cases would be unlikely even if clergy had the same rights that other workers have in secular employment. But being a minister of religion is not only a way of life and a calling, it is a job – an occupation or profession – and a means of livelihood.
>
> Whilst those who enter the ministry do not expect the rich pickings of some other professions, they deserve basic fairness in the work they do no less than others elsewhere.[94]

B. The Bill (clause 29)

Clause 29 makes a technical amendment to section 23 of the 1999 Act. As the words of the section stand, the order is only allowed to achieve these results by means of provisions that amend the legislation conferring the right, and not by means of a provision simply saying that the right applies to the individuals in question (a free-standing provision).

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93 HC Deb 23 November 1999, c 59W

94 MSF Clergy and Church Workers, *Employment Rights for the Clergy in Modern Britain*, 1998

The new provisions have the effect that an order will be able to extend employment rights either by the use of a free-standing provision or by amending the legislation conferring the right. Whilst this is a minor technical amendment it may have implications in terms of taking forward the various proposals which have been debated with regard to the powers contained in this section.

VI Flexible Working

A. Background

The *Employment Act 2002*, which received the Royal Assent on 8 July 2002, gives the parents of children aged under six or disabled children under eighteen, the right to apply to their employers to work flexibly. This can involve changes to hours, times or place of work. The Act also imposes a duty on employers to consider such requests seriously and in accordance with laid down procedures. These rights and duties came into force on 6 April 2003. The DTI has published a basic summary of the right to apply for flexible working, which is available on their website.[95]

Section 47 of the *Employment Act 2002* amended the *Employment Rights Act 1996* (ERA) to protect employees who exercise their right to request flexible working against detriment or dismissal. Section 104C (inserted by section 47) provides that if the principal reason for dismissal of an employee relates to the fact that he or she wanted to apply for flexible working arrangements, the dismissal will be automatically unfair dismissal.

The normal position is that, under section 108 ERA, an employee cannot claim for unfair dismissal until they have completed a qualifying period of employment. This period is currently one year. However, in most cases where the reason for the dismissal is one which is "automatically unfair" by virtue of various provisions of the ERA, there is an exemption from this qualifying period. These exemptions are set out in section 108(3) ERA. Currently, there is no specific exemption if the dismissal is automatically unfair because it was for a reason related to the employee's application for flexible working. The same is true of section 109 ERA which sets an upper age limit for unfair dismissal claims of normal retirement age or age 65. As is the case with the qualifying period, there are a number of exemptions from this upper age limit. Currently, flexible working is not one of them. This is something the Bill seeks to address.

B. The Bill (clause 30)

Clause 30 increases the protection against unfair dismissal for those who wish to take advantage of the statutory rights to flexible working. As outlined above, section 104C ERA makes a dismissal automatically unfair if the main reason relates to the employee's

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95 http://www.dti.gov.uk/er/individual/flexible-pl516.htm

rights to flexible working. However, under the ERA, there are various ways in which the right to claim compensation for unfair dismissal is limited. The new clause creates exemptions to these limitations in cases where 104C applies.

Thus, there will be no upper age limit on a claim for unfair dismissal in flexible working cases. The qualifying period of one year is reduced to 26 weeks which is identical to the qualifying period for acquiring flexible working rights. The clause also extends unfair dismissal protection in flexible working cases to those where an employee is selected for redundancy, or where they are involved in industrial action and the main reason for the dismissal relates to flexible working rights.

VII Information and Consultation

A. The European Directive

In February 2002, the European Parliament and the Council of Ministers adopted a directive which will require Member States to establish national systems for informing and consulting employees in undertakings with at least 50 employees. *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* came into force on 23 March 2002, and must be implemented by 23 March 2005.[96] Countries which do not already have a "general, permanent and statutory system of information and consultation of employees" (i.e. the UK and Ireland) can limit the directive's application to undertakings with at least 150 employees until 23 March 2007 and to undertakings with at least 100 employees until 23 March 2008.

The European Commission has been trying to introduce Community rules on informing and consulting employees in national undertakings since 1995. The *Medium-term Social Action Programme 1995-97*, published that year, announced that:

> The Commission will initiate consultations with the social partners on the advisability and possible direction of Community action in the field of information and consultation of employees in national undertakings.[97]

Formal consultations with the social partners were launched under the Social Chapter in June 1997.[98] After protracted discussions, UNICE, the employers' organisation, decided not to try to negotiate a framework agreement on this issue and the Commission therefore issued a draft directive in November 1998.[99] By this time, the Labour Government had

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96 Full text: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_080/l_08020020323en00290033.pdf

97 European Commission, *Social Europe 1/95, Medium-term social action programme 1995-97*, para 4.2.4

98 European Commission press release IP/97/483, 4 June 1997, *Information and Consultation of Employees at National Level.* The social partners are UNICE, representing employers, ETUC, representing employees and CEEP, representing public sector employers.

99 COM(1998) 612 final, 11 November 1998,

"signed up" to the Social Chapter so the proposals, which were subject to the Qualified Majority Voting (QMV) procedure, covered the UK as well as the rest of the Community.

The Labour Government opposed the proposals, arguing that information and consultation procedures in firms which did not have branches in other Member States should be a matter for national, not European, legislation. A "blocking minority" consisting of Germany, Denmark, Ireland and the UK held up progress until after the UK General Election on 7 June 2001,[100] but changes made before a meeting of the Employment and Social Policy Council on 11 June 2001 persuaded most of these countries to withdraw their objections.[101] Political agreement on a common position on the directive was reached at this meeting. [102]

Alan Johnson, the Minister for Employment Relations, explained why the government had dropped its resistance to the directive in reply to a PQ on 9 July 2001:

Employees Directive

> **Mr. Gibb:** To ask the Secretary of State for Trade and Industry what assessment she has made of the compatibility of the EU directive establishing a general framework for informing and consulting employees with the protocol on the application of subsidiarity and proportionality of the treaty of Amsterdam; and if she will make a statement. [2514]
>
> **Alan Johnson:** Our view of the Commission's original proposal was that it was too prescriptive and paid insufficient regard to subsidiarity. By contrast, the text agreed by member states at the Employment and Social Affairs Council on 11 June avoids a rigid "one size fits all approach" which would be inappropriate for the UK given our diverse practices in this area. In particular the draft provides that the practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relation practices in individual member states. [103]

1. Provisions of the Directive

Article 1 of the Directive says that its **purpose** is "to establish a general framework setting out minimum requirements for the right to information and consultation of employees within the Community". However, the practical arrangements are to be "defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness".

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http://www.europa.eu.int/eur-lex/en/com/dat/1998/en_598PC0612.html

100 "Blair faces showdown over EU directive on workers' rights", *Financial Times*, 31 May 2001; European Foundation for the Improvement of Living and Working Conditions, *No agreement yet in negotiations on EU consultation Directive*, EIROnline, December 2000, http://www.eiro.eurofound.ie/2000/12/features/eu0012285f.html

101 "Worker information and consultation agreed with strings", *European Report 2600*, 13 June 2001

102 Press release 9397/01 from the Employment and Social Policy Council, 11 June 2001, http://ue.eu.int/newsroom/main.cfm?LANG=1

103 HC Deb 9 July 2001,c 355W

Article 3 describes its **scope.** Member States may choose whether it applies to:

> (a) undertakings employing at least 50 employees in any one Member State, or
>
> (b) establishments employing at least 20 employees in any one Member State.

An undertaking is defined as:

> a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States[104]

An establishment is defined as:

> a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources[105]

Article 4 requires Member States to determine the "practical arrangements for exercising the **right to information and consultation**". Information and consultation must cover:

> (a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
>
> (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;
>
> (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).[106]

Information must be given "at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation".

Consultation must take place:

> (a) while ensuring that the timing, method and content thereof are appropriate;

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[104] Article 2 (a)
[105] Article 2 (b)
[106] Article 4 (2). Article 9 (1) refers to the existing directives on collective redundancies ad acquired rights – see below

> (b) at the relevant level of management and representation, depending on the subject under discussion;
>
> (c) on the basis of information supplied by the employer … and of the opinion which the employees' representatives are entitled to formulate;
>
> (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
>
> (e) with a view to reaching an agreement on decisions within the scope of the employer's powers [over substantial changes in work organisation or in contractual relations].[107]

Article 5 allows for management and labour to negotiate their own **voluntary agreements** on information and consultation rights. These agreements, including any already in force when the directive is implemented, can take the place of the provisions of Article 4.

Article 6 prohibits employee representatives and experts who assist them from revealing any information which "in the legitimate interest of the undertaking or establishment has expressly been provided to them **in confidence**". Employers will not be required to communicate information or undertake consultations if to do so would, "according to objective criteria, … seriously harm the functioning of the undertaking or establishment or would be prejudicial to it".

Article 7 provides for the **protection of employee representatives** carrying out their functions under the directive.

Article 8 contains **enforcement** provisions. Member States must:

> provide for adequate sanctions to be applicable in the event of infringement of this Directive by the employer or the employees' representatives. These sanctions must be effective, proportionate and dissuasive.

Articles 10 and 11 lay down the **timetable** for implementation. In most States, the deadline is 23 March 2005. But in those in which there is "no general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace allowing employees to be represented for that purpose" (UK and Ireland), implementation can be phased:

- Undertakings employing at least 150 employees or establishments employing at least 100 employees must be covered by 23 March 2005.

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[107] Article 4 (4)

- Undertakings employing at least 100 employees or establishments employing at least 50 employees must be covered by 23 March 2007.

- Undertakings employing at least 50 employees or establishments employing at least 20 employees must be covered by 23 March 2008.

The government has committed itself to "consulting fully and widely" on how to implement the directive in this country.[108]

2. Some implications for the UK

A report of a conference organised by the Industrial Relations Service and the Industrial Relations Research Unit at Warwick University opens by saying that "industrial relations in the UK look set to change beyond recognition" as a result of the Directive.[109]

It is estimated that businesses employing around three-quarters of the UK workforce will eventually be covered, but, according to Keith Sissons, emeritus professor of industrial relations at Warwick, only a minority of UK companies "even remotely" begin to match the Directive's requirements. The Workplace Employment Relations Survey conducted in 1998 found that there were Joint Consultative Committees in a quarter of UK workplaces with more than 25 employees, which, Professor Sissons suggests, might equate to one-third of those with 50 or more employees. The decline in union membership and recognition in recent years – which has only very recently been halted – has contributed to the absence of any form of employee representative involvement from perhaps a half of UK workplaces.[110]

Sissons argues that employers may well find it more efficient to establish permanent consultation arrangements than to rely on ad hoc arrangements and that could lead to the establishment of works councils.

Mark Hall, principal research fellow at Warwick, told the conference that the government had considerable leeway in how it implemented the directive. One option might be to use "soft-law techniques such as codes of practice instead of a hard-law approach through legislation". He predicted that the government would choose to apply the directive to undertakings with 50 or more employees rather than establishments with 20 or more employees. He also pointed out that "there was nothing to require a standing works council, nothing to say meetings should be monthly or even annual, and no mention of whether consultation should be before or after decisions were made."[111]

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[108] HC Deb 25January 2002, c 1180W
[109] "Giving employees the right to know", *IRS Employment Review 749*, 15 April 2002
[110] Ibid
[111] Ibid

Not surprisingly, employers' organisations have opposed, and employees' organisations have supported, the directive. When the directive was finally adopted, the CBI issued a statement saying that it was

> deeply disappointed by the agreement of this dossier. Nonetheless, the current text contains some useful flexibilities that will help limit its damaging impact. We will want to make full use of these in the implementation process.[112]

The TUC welcomed the agreement on the joint text which was finally adopted;

> This measure is most welcome. The Information & Consultation Directive potentially opens the door on a whole new era in UK employment relations. The directive will eventually move us forward to a higher skilled and more highly productive workforce. Good employers have nothing to fear from informing and consulting their staff.
>
> There are still improvements which could be made but nothing should distract from the case for involving the workforce actively in decision making. Effective consultation helps to enhance competitive performance because employees who are being consulted are far more likely to support management plans.[113]

3. Existing information and consultation provisions

The directive is designed to complement existing EC legislation covering information and consultation on collective redundancies and transfers of undertakings, as well as more general information and consultation mechanisms in multinational undertakings with branches in more than one Member State.[114] The legislation is:

a. The Acquired Rights Directive 77/187/EEC

This was implemented in the UK by the *Transfer of Undertakings (Protection of Employment) Regulations 1981* (TUPE). Regulation 10 of TUPE provides that employers must consult representatives of employees who are likely to be affected by a proposed transfer. A DTI leaflet, *Employment Rights on the Transfer of an Undertaking*, describes the requirements. [115]

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[112] CBI issue statement on *European proposals on national level information and consultation*, updated 19 April 2002,

[113] TUC press release, 17 December 2001, *TUC welcomes EU committee agreement on information and consultation directive*

[114] Article 9 states that it is "without prejudice" to these directives

[115] http://www.dti.gov.uk/er/individual/tupe-pl699.htm

b. The Collective Redundancies Directive 75/129/EEC,

This is now consolidated in the *Collective Redundancies Directive 98/59/EC.* The UK provisions are in Chapter II of Part IV of the *Trade Union and Labour Relations (Consolidation) Act 1992.* Employers are required to consult appropriate representatives of the workforce when they propose making collective redundancy dismissals. A collective redundancy situation arises where the employer proposes to dismiss as redundant at least twenty employees at one establishment within a ninety day period. A DTI leaflet, *Redundancy Consultation and Notification*, summarises the requirements on information and consultation. [116]

c. The European Works Councils Directive 94/45/EC,

This was extended to the UK by *Directive 97/74/EC,* and implemented in the UK by the *Transnational Information and Consultation of Employees Regulations 1999 SI No 3323.* It covers undertakings or groups of undertakings with at least 1,000 employees located within the European Economic Area (EEA) and at least one establishment employing a minimum of 150 workers in each of two Member States.

Either at management's own initiative or at the request of employees, these undertakings must establish a European Works Council (EWC) or another procedure for informing and consulting employees. The statutory fallback EWCs must meet once a year for an information and consultation meeting about:

> the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.[117]

4. Weaknesses of existing provisions

A series of high profile mass redundancies and closures in British companies, announced without any consultation with the workforce, has highlighted the weakness of existing provisions in the UK. These include BMW's surprise decision to sell large parts of the Rover Group in March 2000;[118] General Motors' announcement in December 2000 that it would be ending Vauxhall production in Luton;[119] Ford's announcement in May 2000

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[116] http://www.dti.gov.uk/er/redundancy/consult-pl833.htm

[117] SI 1999/3323, schedule, para 7 (3)

[118] See "Don't bother telling the workers", *Labour Research*, June 2000

[119] TUC press release, 13 December 2000, *TUC urges Blair to drop opposition to information and consultation*

that mass car production would be ending at Dagenham:[120] and Corus' announcement in February 2001 that it planned to reduce its UK workforce by 6,000 over two years.[121]

By way of contrast, when, in April 2001, Marks and Spencer announced that it would be closing its stores in continental Europe, a French court forced it to suspend the French closure plans because of its failure to consult employees in accordance with French law.[122] Another recent case involved the Accident Group, who sacked 3,000 workers by sending them a text message to their mobile phones. The employees succeeded in claiming compensation for the failure to give contractual or statutory notice of the dismissals.[123]

The TUC has described the directive as "potentially the most significant piece of employment legislation ever to be introduced in the UK." The unions have been pursuing the introduction of works councils to allow workers more say in the running of businesses. However the government has rejected this possibility.[124]

The explanatory notes to the Bill provide an account of recent developments:

> The Department of Trade and Industry published a discussion paper, *High Performance Workplaces: The role of employee involvement in a modern economy*, in July 2002. Discussions also took place with the CBI and the TUC on how the requirements of the Directive should be implemented. The CBI and TUC agreed on a framework for implementation and on the basis of that agreement, a consultation document, *High Performance Workplaces: Informing and Consulting Employees*, was issued on 7th July 2003 to seek views from a wider audience on the proposed scheme. Draft regulations were included in the consultation document. (A copy of both documents are available on the DTI website at www.dti.gov.uk/er/consultation).

In the July 2003 consultation document, the government announced that it had held consultations with the TUC and CBI and agreed a framework for implementation of the legislation. The employer must establish information and consultation procedures when 10% of the workforce makes a valid request. If the employees wish to remain anonymous they can make this request via the *Central Arbitration Committee* (CAC) or a Qualified Independent Person. If the employer has a pre-existing agreement on information and consultation and this carries employee approval then that procedure will continue. If no agreement exists, or an existing agreement lacks employee support, then a new one must

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[120] "Ford move renews union pressure for consultation", *Financial Times*, 12 May 2000; and ""Ford pledges £2bn to soften Dagenham blow", *Financial Times*, 13/14 May 2000

[121] Statement by Stephen Byers, Secretary of State for Trade and Industry, HC Deb 1 February 2001, cc 457-458

[122] "French court rebukes M&S", *Financial Times*, 10 April 2001

[123] "Victory for workers sacked by text message", *Daily Telegraph*, 11 December 2003

[124] "Blair rejects union calls for works councils" *Financial Times*, 19 April 2003.

be negotiated. The employer may hold a ballot to ascertain the employee support for the request to negotiate a new agreement.

The parties will be free to negotiate an agreement which best suits their needs and circumstances, in light of government guidance. If there is a failure to conclude a negotiated agreement then the statutory provisions based on Article 4 of the directive apply. This involves the setting up of an I&C committee elected by the employees. The employer then has various duties to inform and consult the employees via the committee. Complaints about any failure on the part of the employer to establish I&C procedures or complaints about the operation of established procedures will be heard by the CAC.

B. The Bill (clause 31)

Clause 31 enables the Secretary of State to make regulations which will implement the EC Directive on Information and Consultation.[125] The clause allows the regulations which come to be made to stipulate thresholds on the number of employees in any undertaking so that the regulations may apply to undertakings of different sizes from different dates. The draft regulations apply to undertakings of 50 or more employees.[126] The reason why primary legislation is seen as necessary is given in the explanatory notes:

> 226. The powers under section 2(2) of the European Communities Act 1972, which are usually used to implement EU Directives are not considered sufficiently wide to cover all aspects of the proposed regulations, so this clause provides a general power to make regulations.

The government intends to take advantage of the transitional derogations allowed by the directive. The proposal is to provide that the regulations will apply initially to undertakings with 150 or more employees from March 2005, to undertakings with between 100 and 149 employees from March 2007 and to undertakings with between 50 and 99 employees from March 2008. Employment tribunals and the Employment Appeals Tribunal will have jurisdiction to hear complaints. There are also powers to make regulations giving the Central Arbitration Committee a role in resolving disputes under the more general provisions of the regulations.

The principal costs implications of the Bill relate to the proposed implementation of the European directive on information and consultation. Costs to employers in respect of information and consultation are assessed at £46 million (annual) and £45 million (one off). A full breakdown of costs and benefits is contained in the Regulatory Impact Assessment and the Explanatory Notes.

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[125] 2002/14/EC

[126] Draft Regulations available at: www.dti.gov.uk/er/consultation

VIII Minimum Wage

A. Background

The *National Minimum Wage Act 1998* introduced a national minimum wage of £3.60 an hour for adults aged 22 and over and £3.00 an hour for young people aged 18-21 on 1 April 1999. The level of the national minimum wage (NMW) has been increased in October of each year on the recommendations of the Low Pay Commission.[127] The functions of the Low Pay Commission in making recommendations to the Secretary of State in setting the rates of the NMW are provided for in the Act. Part of their role is to conduct assessments of the impact any rise would have on business and the economy.

The Act provided the statutory framework and enforcement procedures. The *National Minimum Wage Regulations 1999*, SI 1999/584, contained details of the rate and method of calculation. From 1 October 2003 the rate rose to £4.50 per hour (for the main rate) and £3.80 per hour for the youth rate.[128] The Inland Revenue have been appointed by the Secretary of State to enforce the provisions of the Act on behalf of workers. Enforcement officers are given powers under section 14 of the Act to obtain information and can issue enforcement notices and take action against employers who are in breach of the provisions.

The Agricultural Wages Board for England and Wales is constituted under the *Agricultural Wages Act 1948*. It is an autonomous body with 21 members. Eight representing employers are nominated by the National Farmers' Union, and eight representing Workers are nominated by the Transport and General Workers' Union. There are five Independent Members appointed jointly by the Minister of Agriculture, Fisheries and Food and the Secretary of State for Wales. From the time the Act came into effect the Agricultural Wages Board has not been permitted to set minimum rates of pay for agricultural workers that are below the level of the NMW.

B. The Bill (clauses 32 to 34)

Clauses 32 to 34 amend the *National Minimum Wage Act 1998* and the *Agricultural Wages Act 1948*. They make minor changes designed to improve the operation of the legislation.

Clause 32 changes the current restrictions which apply to the use and supply of information obtained by enforcement officers. The clause allows information about the employer's records relating to the employee to be disclosed to the employee. Similarly, details of the worker's case may be disclosed to the employer.

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[127] http://www.lowpay.gov.uk/

[128] *National Minimum Wage Regulations 1999 (Amendment) Regulations 2003* SI 2003/1923

Clause 33 allows an enforcement notice to be issued for more than one worker where it relates only to compelling future compliance with the provisions and does not refer to payment of arrears of pay due under the Act.

Clause 34 makes changes to the *Agricultural Wages Act 1948* to allow for the appointment of officials from other government departments, bodies or ministries besides only the Department of the Environment, Food and Rural Affairs to act as agricultural wages officers in England and Wales. Provision is also made for such officers to identify themselves as such and produce proof of their authority in certain circumstances.

IX Certification Officer

A. Background

The *Employment Protection Act 1975* established the Certification Officer for Trade Unions and Employers' Associations to determine the independence of trade unions and to take over responsibilities for matters such as the listing of trade unions and the supervision of political funds from the Chief Registrar of Friendly Societies.

The Certification Officer (CO) is currently responsible for:

- maintaining a list of trade unions and employers' associations
- receiving and scrutinising annual returns from trade unions and employers' associations
- determining complaints concerning trade union elections, certain other ballots and breaches of trade union rules
- ensuring observance of statutory requirements governing mergers between trade unions and between employers' associations
- overseeing the political funds and the finances of trade unions and employers associations
- certifying the independence of trade unions. [129]

The 1999 Act enlarged the CO's role. It was this Act which gave him the power to determine certain complaints from members of a trade union on breaches of trade union law or rules. The implication of this was to allow the CO to become an alternative to the courts as a means of resolving disputes. The origin of the proposals contained in the Bill as regards weak or vexatious cases is explained in the 2002-03 Annual Report:

> During the past year comment was made both by the Better Regulation Task Force and some trade unions on my lack of powers relating to the disposal of weak or vexatious cases. The Department of Trade and Industry have included

[129] Certification Officer's website: http://www.certoffice.org/pages/index.cfm?pageID=home

this issue in the consultation document it published in February 2003 arising out of its review of the Employment Relations Act 1999.[130]

B. The Bill (clauses 35 to 38)

1. Proceedings before the Certification Officer

Clauses 35 and 36 make changes to the procedures before the Certification Officer to allow cases to be struck out and for an appeals process.

Clause 35 provides the power for the CO to strike out weak, vexatious or misconceived cases. The ability to strike out can be on the basis of the nature of the complaint or the way in which it is conducted by the party. This builds on the current power to refuse to hear complaints made by individuals whom the courts or the EAT had categorised as "vexatious litigants" by subjecting them to a "restriction of proceedings" order. Such orders are intended to curb repeated misuse of judicial procedures by preventing an individual from bringing proceedings unless they get the permission of the court to do so.

Clause 36 makes changes to the *Employment Tribunals Act 1996* to allow the Employment Appeals Tribunal (EAT) to take account of proceedings before the CO when making restriction of proceedings orders.

2. Certification of amalgamated unions

Clause 37 changes the procedure for certification in cases where two or more unions amalgamate. The current procedure is to cancel certification of the amalgamating unions and then require the newly formed union to apply for a new certificate. The clause would change this so that where all the unions involved held certificates of independence the amalgamated union would automatically acquire certification subject to the provision of specified information and the CO's approval of the instrument of amalgamation. Such approval will be based on the CO's assessment of compliance with any regulation in force under Chapter VII of TULRCA.

Clause 38 introduces restrictions on the grounds of appeal to the EAT from a decision of the Certification Officer in respect of either a trade union or an employer's association. The current position is that appeals may be made on questions of both fact and/or law. This will be restricted to questions of law only.

[130] *Annual Report of the Certification Officer 2002-2003*, page 2

X Trade Unions

A. Elections for Presidency (clause 39)

Clause 39 provides an additional case in which the holding of an election for president of a union is not required. The union will have the option of appointing a president, subject to the union's rule-book, so long as the appointee to president already holds the position of General Secretary or is a member of the executive and has been properly elected to that position by a postal vote of all the union's members in accordance with the Act. The need for a second election is therefore removed.

B. Union Auditors (clause 40)

Clause 40 removes the rule preventing the appointment of a corporate body as the union's auditor. The amendments also apply to the appointment and rights of auditors of unincorporated employers' associations. The rights of auditors to sign documents and attend meetings will be exercisable by individuals appointed by the auditors to be their authorised representative.

C. Union Ballots and Elections (clause 41)

Clause 41 creates a regulation making power to allow the Secretary of State to widen the means of voting available to unions in ballots and elections conducted under various provisions of TULRCA 1992. Currently most ballots and elections are conducted by post. The clause makes it clear that any future provision will not exclude this form of voting. The clause outlines that the regulations will involve the appointment of a "responsible person" whose role will be to:

- Make determinations with regard to specified criteria or factors;
- Determine the means of voting in individual cases to accommodate for voters in different circumstances;
- Give individuals a choice on how they vote.

In each case the voting should meet the "required standard". A ballot or election would meet "the required standard" if:

(a) those entitled to vote have an opportunity to do so;
(b) votes cast are secret;
(c) the risk of unfairness or malpractice is minimised.