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Trade Union and Labour Relations (Consolidation) Act 1992

1992 CHAPTER 52

PART V

INDUSTRIAL ACTION

Loss of unfair dismissal protection

237 Dismissal of those taking part in unofficial industrial action.

(1) An employee has no right to complain of unfair dismissal if at the time of dismissal he was taking part in an unofficial strike or other unofficial industrial action.

[^{F1}(1A) Subsection (1) does not apply to the dismissal of the employee if it is shown that the reason (or, if more than one, the principal reason) for the dismissal or, in a redundancy case, for selecting the employee for dismissal was one of those specified in [^{F2}or under —.

(a) section 99, 100, 101A(d), 103 or 103A of the Employment Rights Act 1996 (dismissal in family, health and safety, working time, employee representative and protected disclosure cases),

(b) section 104 of that Act in its application in relation to time off under section 57A of that Act (dependants);]] [^{F3}; and a reference to a specified reason for dismissal includes a reference to specified circumstances of dismissal]

(2) A strike or other industrial action is unofficial in relation to an employee unless—

(a) he is a member of a trade union and the action is authorised or endorsed by that union, or

(b) he is not a member of a trade union but there are among those taking part in the industrial action members of a trade union by which the action has been authorised or endorsed.

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Provided that, a strike or other industrial action shall not be regarded as unofficial if none of those taking part in it are members of a trade union.

- (3) The provisions of section 20(2) apply for the purpose of determining whether industrial action is to be taken to have been authorised or endorsed by a trade union.
- (4) The question whether industrial action is to be so taken in any case shall be determined by reference to the facts as at the time of dismissal.

Provided that, where an act is repudiated as mentioned in section 21, industrial action shall not thereby be treated as unofficial before the end of the next working day after the day on which the repudiation takes place.

- (5) In this section the “time of dismissal” means—
 - (a) where the employee’s contract of employment is terminated by notice, when the notice is given,
 - (b) where the employee’s contract of employment is terminated without notice, when the termination takes effect, and
 - (c) where the employee is employed under a contract for a fixed term which expires without being renewed under the same contract, when that term expires;

and a “working day” means any day which is not a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday under the ^{M1}Banking and Financial Dealings Act 1971.

- (6) For the purposes of this section membership of a trade union for purposes unconnected with the employment in question shall be disregarded; but an employee who was a member of a trade union when he began to take part in industrial action shall continue to be treated as a member for the purpose of determining whether that action is unofficial in relation to him or another notwithstanding that he may in fact have ceased to be a member.

Textual Amendments

- F1** S. 237(1A) inserted (10.6.1994) by 1993 c. 19, s. 49(2), **Sch. 8 para. 76**; S.I. 1994/1365, art. 2, **Sch.** (with art. 3(1))
- F2** Words in s. 237(1A) and s. 237(1A)(a)(b) substituted for words in s. 237(1A) (15.12.1999) by 1999 c. 26, s. 9, **Sch. 4 Pt. III paras. 1, 2(a)**; S.I. 1999/2830; art. 2(2), Sch. 1 Pt. II (with Sch. 3 paras. 10, 11)
- F3** Words in s. 237(1A) inserted (15.12.1999) by 1999 c. 26, s. 1, 2(b); S.I. 1999/2830, art. 2(2), **Sch. 1 Pt. II** (with paras. 10, 11)

Marginal Citations

- M1** 1971 c. 80.

238 Dismissals in connection with other industrial action.

- (1) This section applies in relation to an employee who has a right to complain of unfair dismissal (the “complainant”) and who claims to have been unfairly dismissed, where at the date of the dismissal—
 - (a) the employer was conducting or instituting a lock-out, or
 - (b) the complainant was taking part in a strike or other industrial action.

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(2) In such a case an [F⁴employment tribunal] shall not determine whether the dismissal was fair or unfair unless it is shown—

- (a) that one or more relevant employees of the same employer have not been dismissed, or
- (b) that a relevant employee has before the expiry of the period of three months beginning with the date of his dismissal been offered re-engagement and that the complainant has not been offered re-engagement.

[F⁵F⁶(2A) Subsection (2) does not apply to the dismissal of the employee if it is shown that the reason (or, if more than one, the principal reason) for the dismissal or, in a redundancy case, for selecting the employee for dismissal was one of those specified in [F⁷or under —.

- (a) section 99, 100, 101A(d) or 103 of the Employment Rights Act 1996 (dismissal in family, health and safety, working time and employee representative cases),
- (b) section 104 of that Act in its application in relation to time off under section 57A of that Act (dependants);]] [F⁸; and a reference to a specified reason for dismissal includes a reference to specified circumstances of dismissal]

[F⁵(2B) Subsection (2) does not apply in relation to an employee who is regarded as unfairly dismissed by virtue of section 238A below.]

(3) For this purpose “relevant employees” means—

- (a) in relation to a lock-out, employees who were directly interested in the dispute in contemplation or furtherance of which the lock-out occurred, and
- (b) in relation to a strike or other industrial action, those employees at the establishment of the employer at or from which the complainant works who at the date of his dismissal were taking part in the action.

Nothing in section 237 (dismissal of those taking part in unofficial industrial action) affects the question who are relevant employees for the purposes of this section.

(4) An offer of re-engagement means an offer (made either by the original employer or by a successor of that employer or an associated employer) to re-engage an employee, either in the job which he held immediately before the date of dismissal or in a different job which would be reasonably suitable in his case.

(5) In this section “date of dismissal” means—

- (a) where the employee’s contract of employment was terminated by notice, the date on which the employer’s notice was given, and
- (b) in any other case, the effective date of termination.

Textual Amendments

- F4** Words in s. 238(2) substituted (1.8.1998) by 1998 c. 8, s. 1(2)(a) (with s. 16(2)); S.I. 1998/1658, art. 2(1), **Sch. 1**
- F5** S. 238(2B) inserted (24.4.2000) by 1999 c. 26, s. 16, **Sch. 5 para. 2**; S.I. 2000/875, art. 3
- F6** S. 238(2A) inserted (10.6.1994) by 1993 c. 19, s. 49(2), **Sch. 8 para. 77**; S.I. 1994/1365, art. 2, **Sch.** (with art. 3(1))
- F7** Words in S. 238(2A) substituted (15.12.1999) by 1999 c. 26, s. 9, **Sch. 4 Pt III para. 3**; S.I. 1999/2830, art. 2(1)(2), **Sch. 1 Pt. II** (with Sch. 3 para. 10, 11)

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F8 Words in s. 238(2A) inserted (15.12.1999) by 1999 c. 26, s. 9, **Sch. 4 Pt. III para. 3**; S.I. 1999/2830, art. 2(2), **Sch. 1 Pt. II** (with **Sch. 3 paras. 10, 11**)

[^{F9}238A Participation in official industrial action.

- (1) For the purposes of this section an employee takes protected industrial action if he commits an act which, or a series of acts each of which, he is induced to commit by an act which by virtue of section 219 is not actionable in tort.
- (2) An employee who is dismissed shall be regarded for the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) as unfairly dismissed if—
 - (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee took protected industrial action, and
 - (b) subsection (3), (4) or (5) applies to the dismissal.
- (3) This subsection applies to a dismissal if it takes place within the period of eight weeks beginning with the day on which the employee started to take protected industrial action.
- (4) This subsection applies to a dismissal if—
 - (a) it takes place after the end of that period, and
 - (b) the employee had stopped taking protected industrial action before the end of that period.
- (5) This subsection applies to a dismissal if—
 - (a) it takes place after the end of that period,
 - (b) the employee had not stopped taking protected industrial action before the end of that period, and
 - (c) the employer had not taken such procedural steps as would have been reasonable for the purposes of resolving the dispute to which the protected industrial action relates.
- (6) In determining whether an employer has taken those steps regard shall be had, in particular, to—
 - (a) whether the employer or a union had complied with procedures established by any applicable collective or other agreement;
 - (b) whether the employer or a union offered or agreed to commence or resume negotiations after the start of the protected industrial action;
 - (c) whether the employer or a union unreasonably refused, after the start of the protected industrial action, a request that conciliation services be used;
 - (d) whether the employer or a union unreasonably refused, after the start of the protected industrial action, a request that mediation services be used in relation to procedures to be adopted for the purposes of resolving the dispute.
- (7) In determining whether an employer has taken those steps no regard shall be had to the merits of the dispute.
- (8) For the purposes of this section no account shall be taken of the repudiation of any act by a trade union as mentioned in section 21 in relation to anything which occurs before the end of the next working day (within the meaning of section 237) after the day on which the repudiation takes place.]

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Textual Amendments

F9 S. 238A inserted (24.4.2000) by 1999 c. 26, s. 16, **Sch. 5 para. 3**; S.I. 2000/875, **art. 3**

VALID FROM 06/04/2005

[^{F10}238B Conciliation and mediation: supplementary provisions

- (1) The matters referred to in subsection (6)(e) of section 238A are those specified in subsections (2) to (5); and references in this section to “the service provider” are to any person who provided a service mentioned in subsection (6)(c) or (d) of that section.
- (2) The first matter is: whether, at meetings arranged by the service provider, the employer or, as the case may be, a union was represented by an appropriate person.
- (3) The second matter is: whether the employer or a union, so far as requested to do so, co-operated in the making of arrangements for meetings to be held with the service provider.
- (4) The third matter is: whether the employer or a union fulfilled any commitment given by it during the provision of the service to take particular action.
- (5) The fourth matter is: whether, at meetings arranged by the service provider between the parties making use of the service, the representatives of the employer or a union answered any reasonable question put to them concerning the matter subject to conciliation or mediation.
- (6) For the purposes of subsection (2) an “appropriate person” is—
 - (a) in relation to the employer—
 - (i) a person with the authority to settle the matter subject to conciliation or mediation on behalf of the employer, or
 - (ii) a person authorised by a person of that type to make recommendations to him with regard to the settlement of that matter, and
 - (b) in relation to a union, a person who is responsible for handling on the union’s behalf the matter subject to conciliation or mediation.
- (7) For the purposes of subsection (4) regard may be had to any timetable which was agreed for the taking of the action in question or, if no timetable was agreed, to how long it was before the action was taken.
- (8) In any proceedings in which regard must be had to the matters referred to in section 238A(6)(e)—
 - (a) notes taken by or on behalf of the service provider shall not be admissible in evidence;
 - (b) the service provider must refuse to give evidence as to anything communicated to him in connection with the performance of his functions as a conciliator or mediator if, in his opinion, to give the evidence would involve his making a damaging disclosure; and

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- (c) the service provider may refuse to give evidence as to whether, for the purposes of subsection (5), a particular question was or was not a reasonable one.
- (9) For the purposes of subsection (8)(b) a “damaging disclosure” is —
- (a) a disclosure of information which is commercially sensitive, or
 - (b) a disclosure of information that has not previously been disclosed which relates to a position taken by a party using the conciliation or mediation service on the settlement of the matter subject to conciliation or mediation, to which the person who communicated the information to the service provider has not consented.]

Textual Amendments

F10 S. 238B inserted (6.4.2005) by [Employment Relations Act 2004 \(c. 24\)](#), **ss. 28(2)**, 59(2)-(4); S.I. 2005/872, **art. 4**, Sch. (with **arts. 6-21**)

239 Supplementary provisions relating to unfair dismissal.

- (1) [^{F11}Sections 237 to 238A](loss of unfair dismissal protection in connection with industrial action) shall be construed as one with [^{F12}Part X of the Employment Rights Act 1996] (unfair dismissal) [^{F13}; but sections 108 and 109 of that Act (qualifying period and age limit) shall not apply in relation to section 238A of this Act.].
- (2) In relation to a complaint to which section 238 [^{F14}or 238A] applies, [^{F15}section 111(2)] of that Act (time limit for complaint) does not apply, but an [^{F16}employment tribunal] shall not consider the complaint unless it is presented to the tribunal—
 - (a) before the end of the period of six months beginning with the date of the complainant’s dismissal (as defined by section 238(5)), or
 - (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as the tribunal considers reasonable.
- (3) Where it is shown that the condition referred to in section 238(2)(b) is fulfilled (discriminatory re-engagement), the references in—
 - (a) [^{F17}sections 98 to 106 of the Employment Rights Act 1996], and
 - (b) sections 152 and 153 of this Act,
 to the reason or principal reason for which the complainant was dismissed shall be read as references to the reason or principal reason he has not been offered re-engagement.
- [^{F18}(4) In relation to a complaint under [^{F18}section 111 of the 1996 Act (unfair dismissal: complaint to employment tribunal) that a dismissal was unfair by virtue of section 238A of this Act—
 - (a) no order shall be made under section 113 of the 1996 Act (reinstatement or re-engagement) until after the conclusion of protected industrial action by any employee in relation to the relevant dispute,
 - (b) regulations under section 7 of the Employment Tribunals Act 1996 may make provision about the adjournment and renewal of applications (including provision requiring adjournment in specified circumstances), and

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- (c) regulations under section 9 of that Act may require a pre-hearing review to be carried out in specified circumstances.]

Textual Amendments

- F11** Words in s. 239(1) substituted (24.4.2000) by 1999 c. 26, s. 16, **Sch. 5 para. 4(1)(2)**; S.I. 2000/875, **art. 3**
- F12** Words in s. 239(1) substituted (22.8.1996) by 1996 c. 18, ss. 240, 243, **Sch. 1 para. 56(16)(a)** (with ss. 191-195, 202)
- F13** Words in s. 239(1) added (24.4.2000) by 1999 c. 26, s. 16, **Sch. 5 para. 4(1)(3)**; S.I. 2000/875, **art. 3**
- F14** Words in s. 239(2) inserted (24.4.2000) by 1999 c. 26, s. 16, **Sch. 5 para. 4(1)(4)**; S.I. 2000/875, **art. 3**
- F15** Words in s. 239(2) substituted (22.8.1996) by 1996 c. 18, ss. 240, 243, **Sch. 1 para. 56(16)(b)** (with ss. 191-195, 202)
- F16** Words in s. 239(2) substituted (1.8.1998) by 1998 c. 8, s. 1(2)(a) (with s. 16(2)); S.I. 1998/1658, art. 2(1), **Sch. 1**
- F17** Words in s. 239(3) substituted (22.8.1996) by 1996 c. 18, ss. 240, 243, **Sch. 1 para. 56(16)(c)** (with ss. 191-195, 202)
- F18** S. 239(4) added (24.4.2000) by 1999 c. 26, s. 16, **Sch. 5 para. 4(1)(5)**; S.I. 2000/875, **art. 3**

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