These notes refer to the Employment Relations Act 1999 (c.26) which received Royal Assent on 27 July 1999

EMPLOYMENT RELATIONS ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Trade unions

Section 4 and Schedule 3: Ballots and Notices

128. Sections 226 to 235 of the 1992 Act specify the law relating to industrial action ballots and notices. These provisions are complex. The Government invited suggestions in *Fairness at Work* to clarify and simplify the law in this area. A large number of responses to this invitation were received, especially from trade unions and legal bodies. *Section 4* gives effect to Schedule 3, which draws on some of these suggestions and amends the law in the following areas.

Informing employers of the ballot result

129. Section 231A of the 1992 Act requires unions to inform employers about the result of an industrial action ballot which involves their employees. In cases where a union ballots its members employed by different employers, the union must supply the information to each of the employers concerned. Under existing law, a failure to inform some, but not all, of the employers can make it unlawful for the union to induce any of its balloted members to take action. *Paragraph 2(3)* of Schedule 3 makes it lawful in these circumstances for a union to call on its members to take action where they are employed by an employer who was informed of the result. It will remain unlawful, however, for a union to induce its members to take action if their employer was not informed of the result.

Notices to employers of industrial action ballots and the taking of industrial action

130. If a trade union decides to call on its members to take or continue industrial action, it has no immunity from legal liability unless it holds a properly conducted secret ballot in advance of the proposed action. Unions are required under the 1992 Act to give to the employers concerned advance notice in writing both of the ballot and of any official industrial action which may result. The ballot notice must describe, so that their employer can readily ascertain them, the employees who it is reasonable for the union to believe will be entitled to vote. Likewise, the notice of official industrial action must describe, so that their employer can readily ascertain them, the employees the union intends should take part in the action. The current law has been interpreted by the courts (most notably, in the case *Blackpool and the Fylde College v National Association of Teachers in Further and Higher Education [1994] ICR, 648 Court of Appeal and 982 House of Lords*) as requiring the union in certain circumstances to give to the employer the names of those employees which it is balloting or calling upon to take industrial action.

131. *Paragraph 3* amends the provisions of the 1992 Act which provide for a notice to be issued in advance of the ballot. It amends section 226A(2) to redefine the purpose for

which the notice is required as being to enable the employer to make plans to deal with the consequences of any industrial action and to provide information to those employees who are being balloted. Sub-paragraph (3) inserts a new section 226A(3A) which sets out the type of information which is to be included in the notice in order to satisfy the new section 226A(2). It has the effect that a union is required to provide only information in its possession and that it is not required to name the employees concerned.

132. *Paragraphs 11(1) to 11(3)* amend section 234A of the 1992 Act, which provides for a notice to be issued in advance of official industrial action, in similar terms.

Requirement to send sample voting papers to employers

133. Section 226A(1) of the 1992 Act provides that a union proposing to conduct an industrial action ballot must ensure that a sample voting paper is received by every person who it is reasonable for the union to believe will be the employer of a person or persons who will be entitled to vote in the ballot. The sample voting paper must be received not later than the third day before the opening of the ballot. Section 226A(3) has the effect that where more than one employer is involved and different forms of voting paper are used, samples of all the different forms of the voting paper must be sent to every employer.

134. *Paragraph 3(3)* inserts a new section 226A(3B) amending the requirement on unions so that they must ensure only that each employer receives the sample voting paper (or papers, where more than one form exists) which are to be sent to persons employed by that employer. In other words, unions are no longer required to ensure that an employer receives sample forms which are to be sent only to the employees of other employers.

Inducing members to take industrial action

135. Section 227(1) of the 1992 Act provides that entitlement to vote in an industrial action ballot must be accorded equally to all union members who it is reasonable at the time of the ballot for the union to believe will be induced to take part in the industrial action. No other members are entitled to vote. Section 227(2) provides that these requirements are not satisfied if “any person” who was a member at the time of the ballot and who was denied an entitlement to vote is subsequently induced by the union to take part in the action.

136. The effect of these provisions is that unions are free to induce new members who joined the union after the ballot to take industrial action. However, they cannot induce any members to take action if they were members at the time of the ballot but were denied an entitlement to vote. This includes cases where members changed their job after the ballot and became employed within the group of workers which the union is proposing should take industrial action.

137. *Paragraph 4* repeals section 227(2). *Paragraph 8* inserts a new section 232A into the 1992 Act which defines circumstances where a union which induces a member to take industrial action who was denied an entitlement to vote in the ballot loses its protection from liability in tort. The effect of the new section is to maintain that protection for unions which induce members to take action where they were not balloted, unless it was reasonable at the time of the ballot for the union to believe that those members would be induced to take part. This will enable unions to induce members who changed job after the ballot to take action. *Paragraph 2(2)* makes a consequential change to section 226 of the 1992 Act, which defines the circumstances where industrial action can be regarded as having the support of a ballot.

Separate Workplace Ballots

138. Section 228 of the 1992 Act defines the circumstances where unions can hold an aggregate ballot across two or more separate workplaces. *Paragraph 5* replaces this section with new sections 228 and 228A.

139. New section 228 requires a union, when balloting its members at two or more workplaces, to hold separate ballots at each workplace unless one or more of the following circumstances (listed in new section 228A) obtain, in which case the union may hold an aggregate ballot if it wishes:

- new section 228A(2) provides for an aggregate ballot to take place at those workplaces where at least one of a union's members is affected by the dispute. (New subsection (5) specifies which members of a union can be categorised as being "affected by a dispute" by reference to the definition of a "trade dispute" in section 244 of the 1992 Act.) ;
- new section 228A(3) provides for an aggregate ballot to take place where a union reasonably believes that it is balloting all its members in a particular occupational category (or categories) who are employed by one or more of the employers with whom the union is in dispute; and
- new section 228A(4) provides for an aggregate ballot to take place where a union reasonably believes that it is balloting all its members who are employed by one or more of the employers with whom the union is in dispute.

New section 228(4) provides the definition of a "workplace" for the purposes of these new provisions.

Overtime and call-out bans

140. Section 229(2) of the 1992 Act provides that the voting paper in an industrial action ballot must contain either or both of two questions asking whether the voter is prepared to take part in a "strike" or in "industrial action short of a strike". In some cases, it has been unclear whether overtime bans and call-out bans were strikes or industrial action short of a strike, and court action has ensued. Recent authority has concluded that an overtime ban is strike action. *Paragraph 6(2)* reverses this decision and clarifies the status of call-out bans by defining both these forms of industrial action as "industrial action short of a strike" for the purposes of section 229(2). *Paragraph 6(4)* ensures that the definition of a "strike" as "a concerted stoppage of work", which is given in section 246 of the 1992 Act, does not apply to overtime bans and call-out bans for the purposes of the law on voting papers.

The statement on voting papers

141. Section 229(4) of the 1992 Act requires the following statement to appear on all ballot voting papers: "If you take part in a strike or other industrial action, you may be in breach of your contract of employment". *Paragraph 6(3)* of the Schedule amends this statement by adding words which describe the main features of the new protections against the unfair dismissal of workers taking industrial action contained in Schedule 5 to the Act.

Conduct of Ballot : Merchant Seamen

142. Sections 230(2A) and 230(2B) of the 1992 Act provide for the situation where a union is conducting an industrial action ballot among its members who are merchant seamen. Merchant seamen are often away from home for long periods and it can be difficult for them to participate in a ballot if voting papers are sent to their home addresses. Sections 230(2A) and 230(2B) therefore require the union to ballot such members on board a ship, or at a port where the ship is, as long as the merchant seamen are at sea, or at a foreign port where their ship is, for the entire period of the ballot. *Paragraph 7* replaces

these sections with new sections 230(2A) and 230(2B), which in effect extend these requirements to cater for the case where the merchant seamen are at sea or at a foreign port for just a part of the balloting period. These new provisions require a union, if it is reasonably practicable, to ballot a member on board ship, or at a port where the ship is, if:

- the member will be at sea, or at a foreign port where the ship is, for all or part of the balloting period ; and
- it will be convenient for the member to receive the ballot paper and to vote in this way.

Disregard of certain minor and accidental failures

143. The organisation of an industrial action ballot is often a complicated task and can sometimes involve many thousands of people spread around the country and, occasionally, abroad. However, a whole ballot can be invalidated if a union commits small errors in determining who is eligible to vote or if a union fails to a small extent to send ballot papers to all those entitled to vote and to nobody else. In order to provide greater scope for such errors to be disregarded, provided they are accidental and on a scale which is unlikely to affect the outcome of a ballot, *paragraph 9* introduces a new section 232B into the 1992 Act defining where failures to meet the requirements of section 227(1) (entitlement to vote in a ballot) and parts of section 230 (conduct of a ballot) can be disregarded.

Ballots for industrial action : period of effectiveness

144. Section 233 of the 1992 Act provides that industrial action does not have the support of a ballot unless it is called by a "specified person" and meets certain other conditions. One of these is that action to which the call relates must take place before the ballot ceases to be effective in accordance with section 234 of the 1992 Act. Section 234(1) provides that, in ordinary cases, ballots cease to be effective at the end of the period of four weeks beginning with the date of the ballot. Section 246 of the 1992 Act provides that where votes are cast on more than one day the "date of ballot" is the last of those days.

145. *Paragraph 10* provides for this period to be lengthened by up to a maximum of four more weeks if both the union and the employer agree to an extension. The purpose of the amendment is to avoid circumstances where a union feels obliged to organise industrial action within the four week period before a ballot becomes ineffective, even though the parties consider a settlement might be achieved by further negotiation.

146. Where the ballot has included the workers of two or more employers, the option of agreeing an extension is to operate separately in relation to each employer. So, if a ballot involves the workers of two employers (employer A and employer B) and employer A agrees an extension but employer B does not, the extension would apply only in respect of A's workers and not B's.

147. Subsections (2) to (6) of section 234, which deal with the particular case where a court has lifted an injunction prohibiting a union from calling industrial action, are unaffected.

Suspension of industrial action

148. Section 234A of the 1992 Act provides for a trade union to send a notice to a person's employer informing him that the union intends to call upon all or some of his employees to take industrial action. The notice must be received at least seven days in advance of the commencement of the action. The notice must specify if action is continuous or discontinuous.

149. Subsection 234A(7) deals with the position where continuous industrial action which has been authorised or endorsed by the union ceases to be so authorised or endorsed and

is later authorised and endorsed again. It has the effect that the notice issued before the action ceased to be authorised or endorsed does not usually cover any action pursuant to the later authorisation or endorsement. This arrangement discourages unions from suspending industrial action to negotiate a settlement of the dispute because, if the negotiations fail, action cannot resume promptly because a fresh notice has to be issued at least seven days in advance.

150. *Paragraph 11(5)* inserts a new subsection (7A) into section 234A which defines the circumstances where, following a specified period in which the industrial action has been suspended by joint agreement between the union and the employer, the action can be resumed without the need to issue a fresh notice. The specified period of the suspension can be extended by joint agreement. It does not change the existing exemption whereby a union may resume industrial action which it suspended in order to comply with a court order or undertaking.