

*These notes refer to the Employment Relations Act 2004  
(c.24) which received Royal Assent on 16 September 2004*

# **EMPLOYMENT RELATIONS ACT 2004**

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## **EXPLANATORY NOTES**

### **COMMENTARY**

#### **Part Two: Industrial Action Law**

##### **Protections for Striking Employees**

###### Previous position

177. *Sections 26 to 28* contain provisions that increase the protections given to employees by section 238A of the 1992 Act. That section, which was inserted by the Employment Relations Act 1999, provides protections to employees if they are dismissed for taking lawfully organised official industrial action (protected industrial action). The section made it unfair to dismiss an employee for this reason (1) during the eight week period following the start of the protected industrial action, (2) after this period where the employee's participation in the action had ceased within the 8-week period, or (3) after this period where the employee's participation had not ceased before the end of the period unless the employer has taken reasonable procedural steps to resolve the dispute with the union. The section lists a number of matters to which regard must be had when determining whether reasonable procedural steps have been taken. These include whether either the employer or the union have refused an offer to use the services of a conciliator or mediator. One tribunal case has been brought under this jurisdiction (*Mr J Davis v Friction Dynamics*). One issue raised by the case, which occurred in controversial circumstances, was how section 238A applied where the employees taking protected industrial action were locked out while taking it. A second issue was whether the employer had engaged fully in the conciliation process or was merely going through the motions to comply with the requirements of the section.