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

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

Part Three: Rights of Trade Union Members, Workers and Employees

Flexible working

279. ***Section 41*** amends the law to extend to those taking advantage of the statutory provisions about flexible working certain exemptions to standard qualifying conditions for unfair dismissal. It also ensures that the flexible working provision inserted into the Employment Rights Act 1996 ("the ERA 1996 Act") is correctly cross-referred to in other parts of legislation.

280. Section 104C of the ERA 1996 Act provides that where an employee is dismissed, and the reason (or the main reason) is that the employee made or proposed to make a flexible working application, exercised or proposed to exercise a right under section 80G, brought proceedings against the employer under section 80H, or alleged the existence of any circumstance giving grounds for bringing such proceedings, he will be regarded as having been unfairly dismissed.

281. Section 237 of the 1992 Act provides that an employee dismissed while taking part in unofficial industrial action has no right to complain of unfair dismissal. Section 238 of the 1992 Act has the general effect that an employee dismissed while taking part in official industrial action or involved in a lock-out only has a right to claim unfair dismissal if some of the other employees taking part or involved are not dismissed or (where all are dismissed) if he is not offered re-engagement and some of the others are.

282. *Subsections (1) and (2)* of section 41 add section 104C to the list of exemptions to these provisions. Accordingly an employee dismissed for a reason connected with a flexible working application can complain of unfair dismissal despite being involved in official or unofficial industrial action.

283. *Subsection (4)* inserts a new subsection (7BA) into section 105 of the ERA 1996 Act. It ensures that where an employee is selected for redundancy and the reason or principle reason for his selection was one of those specified in section 104C this will be treated as an unfair dismissal.

284. *Subsection (5)* adds section 104C to the list, contained in section 108(3) of the 1996 Act, of exemptions to the requirement for one year's qualifying service before being able to bring a claim for unfair dismissal. To qualify for the right to request flexible working, an employee need only have 26 weeks' continuous employment (in addition to other qualifying factors). This subsection ensures that the protection against unfair dismissal contained in section 104C applies to all employees qualified to request flexible working.

285. *Subsection (6)* adds section 104C to the list, contained in section 109(2) of the 1996 Act, of exemptions to the rule that an employee who has reached the "normal retiring age", or otherwise the age of 65, may no longer bring a claim of unfair dismissal. This

subsection ensures that the protection against unfair dismissal contained in section 104C applies to employees regardless of their age.

286. In 2002, two provisions were inserted after section 47C in Part 5 of the Employment Rights Act 1996 by primary legislation: the first by the Tax Credits Act 2002 and the second by the Employment Act 2002. The provision inserted by the Tax Credits Act became 47D, and after a correction to the numbering, the flexible working provision was inserted by the Employment Act 2002 as 47E.

287. However the change in the numbering of the flexible working provision was not reflected in a series of consequential amendments listed in Schedule 7 of the 2002 Act. The result is that sections of the 1996 Act incorrectly refer to section 47D (inserted by the Tax Credits Act, and not section 47E (flexible working)).

288. *Subsections (3), (7) and (8)* ensure that references to section 47E of the 1996 Act replace the incorrect reference to section 47D in sections 48, 194,195 and 199 of the same Act.