

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

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

Information and Consultation: Great Britain

289. *Section 42* enables the Secretary of State to make regulations regarding the right of employees, or their representatives, to be informed and consulted by their employer in relation to matters prescribed in the regulations. The regulations to be made under this power will implement the EC Directive on Information and Consultation (Directive 2002/14/EC) which establishes a general framework for informing and consulting employees in the European Community (“the Directive”).
290. The Directive was agreed on 11 March 2002 and Member States are required to implement it by 23 March 2005. Article 1 of the Directive states that its purpose is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in the European Community. The practical arrangements are left to Member States to determine. 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 7 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, and the Government’s response are available on the DTI website at www.dti.gov.uk/er/consultation).
291. 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 section provides a general power to make regulations.
292. *Section 42(2)* provides that regulations made under this section must make provision as to the employers to whom they apply. *Paragraph (a)* of section 42(2) provides that these provisions may stipulate that the regulations apply to the employer’s undertaking by reference to factors that include the number of employees employed in the undertaking; *paragraph (b)* provides that the regulations may stipulate the method by which the number of employees in the undertaking is to be calculated; and *paragraph (c)* has the effect that the regulations may apply to undertakings of different sizes from different dates.
293. Article 3 of the Directive provides that Member States have the option of applying the implementing legislation to “undertakings” employing at least 50 employees or “establishments” employing at least 20 employees (“undertakings” and “establishments” are both defined in Article 2). In either case, it is for the Member State

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

concerned to determine the method for calculating the number of employees employed. The draft regulations apply to undertakings of 50 or more employees.

294. Article 10 of the Directive contains transitional provisions which allow certain Member States to implement the Directive in stages until 23 March 2008 depending on the number of employees employed in the undertaking or establishment. The DTI intends to take advantage of this derogation and 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.
295. *Section 42(4)(a)* makes provision for the regulations to provide that employment tribunals will have jurisdiction to resolve disputes arising out of them and to confer jurisdictions on the Employment Appeal Tribunal; it is intended that this power will be used in relation to the protection of individual rights under the regulations.
296. *Section 42(4)(b)* enables the Secretary of State to confer functions on the Central Arbitration Committee and it is intended that this will be used to allow the CAC to resolve disputes under the more general provisions of the regulations. Paragraph (c) of subsection (4) provides that the regulations may require or authorise the holding of ballots and paragraph (d) provides that they may make amendments to, or apply similar provisions to, those in (1) the Employment Rights Act 1996 (in particular Part 5 which relates to protection from suffering detriment in employment; Part 10 which relates to unfair dismissal; and Part 13 which relates to particular types of employment), (2) the Employment Tribunals Act 1996 (which confers jurisdictions on employment tribunals and the Employment Appeal Tribunal), and (3) the 1992 Act.
297. *Section 42(5)* is a general power for the Secretary of State to make whatever additional provisions may be necessary to implement the requirements of the Directive and deal with related matters.
298. *Subsections (7) and (8)* provide that the regulations to are to be made by a statutory instrument that is subject to the affirmative resolution procedure.