



# Employment Relations Act 2004

## 2004 CHAPTER 24

### PART 3

#### RIGHTS OF TRADE UNION MEMBERS, WORKERS AND EMPLOYEES

##### *Inducements and detriments in respect of membership etc. of independent trade union*

#### **29 Inducements relating to union membership or activities**

After section 145 of the 1992 Act insert—

##### *“Inducements*

#### **145A Inducements relating to union membership or activities**

- (1) A worker has the right not to have an offer made to him by his employer for the sole or main purpose of inducing the worker—
  - (a) not to be or seek to become a member of an independent trade union,
  - (b) not to take part, at an appropriate time, in the activities of an independent trade union,
  - (c) not to make use, at an appropriate time, of trade union services, or
  - (d) to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.
- (2) In subsection (1) “an appropriate time” means—
  - (a) a time outside the worker’s working hours, or
  - (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services.

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- (3) In subsection (2) “working hours”, in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.
- (4) In subsections (1) and (2)—
  - (a) “trade union services” means services made available to the worker by an independent trade union by virtue of his membership of the union, and
  - (b) references to a worker’s “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.
- (5) A worker or former worker may present a complaint to an employment tribunal on the ground that his employer has made him an offer in contravention of this section.

#### **145B Inducements relating to collective bargaining**

- (1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if—
  - (a) acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and
  - (b) the employer’s sole or main purpose in making the offers is to achieve that result.
- (2) The prohibited result is that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.
- (3) It is immaterial for the purposes of subsection (1) whether the offers are made to the workers simultaneously.
- (4) Having terms of employment determined by collective agreement shall not be regarded for the purposes of section 145A (or section 146 or 152) as making use of a trade union service.
- (5) A worker or former worker may present a complaint to an employment tribunal on the ground that his employer has made him an offer in contravention of this section.

#### **145C Time limit for proceedings**

An employment tribunal shall not consider a complaint under section 145A or 145B unless it is presented—

- (a) before the end of the period of three months beginning with the date when the offer was made or, where the offer is part of a series of similar offers to the complainant, the date when the last of them was made, 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 it considers reasonable.

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### **145D Consideration of complaint**

- (1) On a complaint under section 145A it shall be for the employer to show what was his sole or main purpose in making the offer.
- (2) On a complaint under section 145B it shall be for the employer to show what was his sole or main purpose in making the offers.
- (3) On a complaint under section 145A or 145B, in determining any question whether the employer made the offer (or offers) or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.
- (4) In determining whether an employer's sole or main purpose in making offers was the purpose mentioned in section 145B(1), the matters taken into account must include any evidence—
  - (a) that when the offers were made the employer had recently changed or sought to change, or did not wish to use, arrangements agreed with the union for collective bargaining,
  - (b) that when the offers were made the employer did not wish to enter into arrangements proposed by the union for collective bargaining, or
  - (c) that the offers were made only to particular workers, and were made with the sole or main purpose of rewarding those particular workers for their high level of performance or of retaining them because of their special value to the employer.

### **145E Remedies**

- (1) Subsections (2) and (3) apply where the employment tribunal finds that a complaint under section 145A or 145B is well-founded.
- (2) The tribunal—
  - (a) shall make a declaration to that effect, and
  - (b) shall make an award to be paid by the employer to the complainant in respect of the offer complained of.
- (3) The amount of the award shall be £2,500 (subject to any adjustment of the award that may fall to be made under Part 3 of the Employment Act 2002).
- (4) Where an offer made in contravention of section 145A or 145B is accepted—
  - (a) if the acceptance results in the worker's agreeing to vary his terms of employment, the employer cannot enforce the agreement to vary, or recover any sum paid or other asset transferred by him under the agreement to vary;
  - (b) if as a result of the acceptance the worker's terms of employment are varied, nothing in section 145A or 145B makes the variation unenforceable by either party.
- (5) Nothing in this section or sections 145A and 145B prejudices any right conferred by section 146 or 149.

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- (6) In ascertaining any amount of compensation under section 149, no reduction shall be made on the ground—
- (a) that the complainant caused or contributed to his loss, or to the act or failure complained of, by accepting or not accepting an offer made in contravention of section 145A or 145B, or
  - (b) that the complainant has received or is entitled to an award under this section.

### **145F Interpretation and other supplementary provisions**

- (1) References in sections 145A to 145E to being or becoming a member of a trade union include references—
- (a) to being or becoming a member of a particular branch or section of that union, and
  - (b) to being or becoming a member of one of a number of particular branches or sections of that union.
- (2) References in those sections—
- (a) to taking part in the activities of a trade union, and
  - (b) to services made available by a trade union by virtue of membership of the union,
- shall be construed in accordance with subsection (1).
- (3) In sections 145A to 145E—
- “worker” means an individual who works, or normally works, as mentioned in paragraphs (a) to (c) of section 296(1), and
- “employer” means—
- (a) in relation to a worker, the person for whom he works;
  - (b) in relation to a former worker, the person for whom he worked.
- (4) The remedy of a person for infringement of the right conferred on him by section 145A or 145B is by way of a complaint to an employment tribunal in accordance with this Part, and not otherwise.”

## **30 Extension of protection against detriment for union membership etc.**

- (1) Section 146 of the 1992 Act (action short of dismissal on grounds related to union membership or activities) is amended in accordance with subsections (2) to (6).
- (2) For “An employee” in each of subsections (1) and (3), and “an employee” in each of subsections (2) and (4), substitute “A worker” and “a worker” respectively.
- (3) In subsection (2)—
  - (a) for “employee’s” substitute “worker’s”; and
  - (b) after “contract of employment” insert “(or other contract personally to do work or perform services)”.
- (4) In subsection (3), for “his contract of employment” substitute “a contract of employment”.
- (5) In subsection (5), for “An employee” substitute “A worker or former worker”.

- (6) For subsection (6) substitute—
- “(5A) This section does not apply where—
- (a) the worker is an employee; and
  - (b) the detriment in question amounts to dismissal.”
- (7) In the sidenote to section 146 of the 1992 Act, and in the cross-heading immediately preceding it, for “Action short of dismissal” substitute “Detriment”.
- (8) In section 151 of the 1992 Act (interpretation of sections 146 to 150 and supplementary provision), after subsection (1A) (which is inserted by section 31) insert—
- “(1B) In sections 146 to 150—
- “worker” means an individual who works, or normally works, as mentioned in paragraphs (a) to (c) of section 296(1), and
  - “employer” means—
- (a) in relation to a worker, the person for whom he works;
  - (b) in relation to a former worker, the person for whom he worked.”
- (9) In subsection (2) of that section, for “an employee” substitute “a person”.
- (10) In the sidenote to section 152 of the 1992 Act, and in the cross-heading immediately preceding it, after “Dismissal” insert “of employee”.

### **31 Detriment for use of union services or refusal of inducement**

- (1) Section 146 of the 1992 Act (action short of dismissal on grounds related to union membership or activities) is also amended in accordance with subsections (2) to (4).
- (2) In subsection (1), omit “or” at the end of paragraph (b) and after that paragraph insert—
- “(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or”.
- (3) In subsection (2)—
- (a) for “(1)(b)” substitute “(1)”; and
  - (b) in paragraph (b), after “the activities of a trade union” insert “or (as the case may be) make use of trade union services”.
- (4) After subsection (2) insert—
- “(2A) In this section—
- (a) “trade union services” means services made available to the worker by an independent trade union by virtue of his membership of the union, and
  - (b) references to a worker’s “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.
- (2B) If an independent trade union of which a worker is a member raises a matter on his behalf (with or without his consent), penalising the worker for that is to be treated as penalising him as mentioned in subsection (1)(ba).
- (2C) A worker also has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the

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act or failure takes place because of the worker's failure to accept an offer made in contravention of section 145A or 145B.

(2D) For the purposes of subsection (2C), not conferring a benefit that, if the offer had been accepted by the worker, would have been conferred on him under the resulting agreement shall be taken to be subjecting him to a detriment as an individual (and to be a deliberate failure to act)."

(5) In section 148 of the 1992 Act (consideration of complaint under section 146), omit subsections (3) to (5).

(6) In section 151 of the 1992 Act, in subsection (1) (references in sections 146 to 150 to being etc. a member of a union to include being etc. a member of a branch or section) omit “; and references to taking part in the activities of a trade union shall be similarly construed”.

(7) After that subsection insert—

“(1A) References in those sections—

- (a) to taking part in the activities of a trade union, and
- (b) to services made available by a trade union by virtue of membership of the union,

shall be construed in accordance with subsection (1).”

(8) Omit section 17 of the Employment Relations Act 1999 (c. 26) (which is superseded by this section and section 32).

## **32 Dismissal for use of union services or refusal of inducement**

(1) Section 152 of the 1992 Act (dismissal on grounds related to union membership or activities) is amended as follows.

(2) In subsection (1), omit “or” at the end of each of paragraphs (a) and (b) and after paragraph (b) insert—

- “(ba) had made use, or proposed to make use, of trade union services at an appropriate time,
- (bb) had failed to accept an offer made in contravention of section 145A or 145B, or”.

(3) In subsection (2)—

- (a) for “(1)(b)” substitute “(1)”; and
- (b) in paragraph (b), after “the activities of a trade union” insert “or (as the case may be) make use of trade union services”.

(4) After subsection (2) insert—

“(2A) In this section—

- (a) “trade union services” means services made available to the employee by an independent trade union by virtue of his membership of the union, and
- (b) references to an employee's “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

- (2B) Where the reason or one of the reasons for the dismissal was that an independent trade union (with or without the employee’s consent) raised a matter on behalf of the employee as one of its members, the reason shall be treated as falling within subsection (1)(ba).”
- (5) In subsection (4) (references to being etc. a member of a union to include being etc. a member of a branch or section) omit “; and references to taking part in the activities of a trade union shall be similarly construed”.
- (6) After that subsection add—
- “(5) References in this section—
- (a) to taking part in the activities of a trade union, and
  - (b) to services made available by a trade union by virtue of membership of the union,
- shall be construed in accordance with subsection (4).”