

*The Employment Relations Act became law on 27 July 1999.*

*By shifting the balance of legal rights at the workplace, the Act is the most significant legislative advance for working people and their trade unions in more than two decades. This leaflet is intended to summarise the main provisions of the Act on trade unions and individual rights. There are separate Thompsons' leaflets on recognition and family friendly rights.*

#### **EMPLOYMENT RELATIONS ACT 1999**

Most of the provisions of the Act are now in force. There are some exceptions. There are also some provisions which give the government power to make regulations, where the regulations have not yet been made.

*Where provisions have been brought into force, this is highlighted in the following text.*

## **TRADE UNIONS AND INDIVIDUAL RIGHTS**

### **Detriment and trade union membership**

(Section 2 and Schedule 2)

***IN FORCE: 25 October 1999***

Trade union members will now be protected against “being subjected to any detriment” to penalise them for trade union membership or activities, instead of protection against “action short of dismissal taken against him as an individual”. The legislation now gives workers protection against an employer's deliberate failure to act, for example by withholding benefits which are available to non-trade unionists.

### **Detriment and collective bargaining**

(Section 17)

The government will have the power to make regulations to protect workers against dismissal or detriment for refusing to enter into personal contracts and thus give up the benefits of collective bargaining. This is directed at the effect of the amendments introduced by the Conservatives after the Wilson and Palmer case in the Appeal Court, but the government has decided not to repeal those amendments. This will restrict the effectiveness of any regulations.

A Conservative amendment which the government accepted has greatly undermined the protection any regulations can give. The amendment says that paying extra pay or a bonus to those who give up collective bargaining does not amount to a detriment for those who refuse to give up their rights. The only restriction to the amendment is that the contract of employment must not inhibit the workers from being a union member and the extra pay or bonus must relate to services provided under the contract. These provisions mean that if regulations are passed, they may make matters worse for trade union members.

The government has not yet set a date for consultation on any regulations on this issue.

### **Detriment and recognition**

(Section 6 and schedule 1 paragraphs 156 - 165)

***IN FORCE – 6 June 2000***

Workers are now protected against dismissal or detriment for campaigning or voting for or against recognition under the new trade union recognition procedure. The contract of employment cannot override these rights, but the protection is confined to cases where the worker did not act unreasonably.

The legislation gives workers a right to make an emergency application for interim relief if dismissed on those grounds, adopting the same procedure as for dismissals on trade union grounds. Workers are also given protection against selection for redundancy on recognition grounds.

### **Blacklists**

(Section 3)

***IN FORCE – Power to make Regulations –  
25 October 1999***

The Act grants the power to make regulations to prohibit the compilation of lists of trade union members and activists for use by employers and employment agencies to discriminate against workers in recruitment or other treatment. This is intended to outlaw so-called “blacklists” of the type previously operated by the Economic League.

The sanctions may include criminal penalties or remedies for trade union members in the courts or tribunals.

The government has not yet set a date for consultation on any regulations on this issue.

## **TRADE UNIONS, MEMBERS AND INDUSTRIAL ACTION**

### **Support of Ballot**

(Schedule 3)

#### ***IN FORCE – 18 September 2000***

Industrial action will not be treated as having the support of a ballot if a member is induced to take part in the action, but has not been given the opportunity to vote in the ballot (and the union ought reasonably to have known that the member would be induced to take part).

Small accidental failures to comply with the requirements to ballot all members who are to take part in the action, and the requirements relating to postal voting arrangements, will not invalidate the ballot. This is provided that no “missed” members are actually called upon to take part in the action. (Similar provisions apply in respect of small accidental failures to comply with the requirements relating to the balloting of seamen).

### **Notices relating to industrial action**

#### ***IN FORCE – 18 September 2000***

The obligation on unions to provide employers with the names of individuals to be balloted or called upon to take part in industrial action is removed. A union will now be obliged to provide “such information in the union’s possession as would help the employer to make plans and bring information to the attention of” those employees to be balloted.

This expressly does not require the union to provide names of individuals, but does require information on the number, category or workplace of the employees concerned where this information is in the union’s possession. There have already been two Court of Appeal cases on this new requirement.

Previously, where a union ended authorisation for industrial action, and then subsequently re-

authorised the action, it had to give a fresh notice of industrial action to relevant employers before the action could resume. That requirement is now disapplied where the union and the employer agree that industrial action will cease to be authorised from a certain date, but that it will again be re-authorised with effect from a date set out in the agreement, provided that the action is actually re-authorised.

### **Voting Paper**

#### ***IN FORCE – 18 September 2000***

There has been some confusion after the decision of the Court of Appeal in *Connex South Eastern Ltd -v- RMT*, where an overtime ban was found to amount to strike action, rather than action short of strike. That decision is reversed: an overtime ban and a call-out ban will constitute action short of strike.

As a result of changes to the law relating to the dismissal of striking workers (see below), the following additional words must be inserted on the voting paper after the warning about being in breach of contract: “However, if you are dismissed for taking part in a strike or other industrial action which is called officially, and is otherwise legal, the dismissal will be unfair if it takes place fewer than eight weeks after you started taking part in the action, and depending on the circumstances, may be unfair if it takes place later”.

### **Industrial action ballots: period of effectiveness**

#### ***IN FORCE – 18 September 2000***

The Conservative legislation required unions to commence industrial action within four weeks of the close of a ballot for the union to retain protection against legal action by the employer. It will now be possible for this period to be extended to eight weeks by agreement between the union and the employer. In a multi-employer dispute, each employer would be treated separately.

## Separate Workplace Ballots

### *IN FORCE – 18 September 2000*

It has often been all but impossible to untangle the complex requirements of separate workplace ballots. This has led to enormous confusion for unions and employers alike. The circumstances in which separate workplace ballots are required are to be simplified.

As previously, the separate workplace ballot provisions do not apply if the union reasonably believes that all members entitled to vote have the same workplace.

“Workplace” is defined as either the premises at or from which the worker works (in the case of a worker working at or from a single set of premises); or the premises with which the worker’s employment has the closest connection.

There are three circumstances in which separate workplace ballots will not be required, even if workers entitled to vote in the ballot do not all have a common workplace.

- First, no separate workplace ballots are required where there is at least one member of the union who is “affected” by the dispute at the workplace of each member entitled to vote.

Union members are “affected” by a dispute if:

- They are directly affected by decisions relating to terms and conditions or physical working conditions, to engagement or non-engagement or termination or suspension of employment or duties of employment, or to allocation of work or duties.
- They are directly affected by matters of discipline.
- Their membership is in dispute.
- They are officials of the union who would use any negotiating machinery which is the subject of the dispute.

- Secondly, a single ballot may be held in relation to a dispute where the workers have one or a number of common occupations, regardless of whether or not they are employed by one or a number of employers.

- Thirdly, a single ballot may be held where entitlement to vote is restricted to all the members of the union employed by a particular employer (or employers).

## Industrial action and unfair dismissal

(Section 16 and Schedule 5)

### *IN FORCE – 24 April 2000*

Workers who are dismissed whilst taking part in lawful industrial action are currently denied legal redress unless not all of them are dismissed or there is selective re-engagement within three months.

Under the new law, it is automatically unfair to dismiss an employee for taking part in industrial action in certain circumstances. This protection will apply:

- Where the dismissal takes place within the first eight weeks of the action.
- Where the employee stopped taking action within eight weeks (even if the dismissal took place after eight weeks).
- Where the employer has not taken reasonable procedural steps for the purpose of resolving the dispute.

In deciding whether an employer has taken reasonable procedural steps to resolve the dispute the following will be taken into account:

- Whether the employer or a union has complied with any collective or other agreement.
- Whether the employer or a union has offered or agreed to take part in negotiations after the start of the action.
- Whether the employer or a union has unreasonably refused, after the start of the action,

a request for conciliation.

- Whether the employer or a union, after the start of the action, has unreasonably refused a request that mediation be used to resolve the dispute. No account is to be taken of the merits of the dispute.

Where a worker is unfairly dismissed under the new provisions, no order for reinstatement or re-engagement can be made until after all employees have ceased taking part in lawful industrial action relating to the dispute.

These rights only apply where the industrial action is lawful and protected by a ballot which complies with the existing legislation. Where action is repudiated by the union, the protection for the workers is lost if they carry on with the action for more than one further day.

## **TRAINING**

### **Information and consultation on training**

(Section 5)

***IN FORCE – 6 June 2000***

The government has decided not to include training within the ambit of statutory recognition.

Instead, where a union has statutory recognition, the employer must invite the union to send representatives to a meeting. The purpose of the meeting is to consult about the employer's policy on training, plans for training during the next six months and reporting on training since the last meeting. This relates only to training of workers in the bargaining unit.

The meetings must take place every six months. The employer must provide relevant information at least two weeks in advance. The employer must take account of representations made by the union. The remedy for a failure to comply with the obligations is an application by the union to an employment tribunal for a protective award of up to two weeks' pay.

## INDIVIDUAL RIGHTS

### Rights to be accompanied on disciplinary and grievance hearings

(Sections 10 - 15)

#### ***IN FORCE – 4 September 2000***

Workers are given an important new right to be accompanied on disciplinary or grievance hearings. This applies to workers whose employers have disciplinary or grievance procedures which provide for a hearing: employers who do not have procedures are not compelled to adopt them. The right does not apply to employees of the security services or GCHQ.

The right is to be accompanied by a “companion” of the worker’s choice who may be a colleague or a trade union official. The trade union official may either be employed by the union or be a lay official who the union has certified has experience or training in representation at disciplinary or grievance hearings.

The companion is permitted to confer with the worker during the hearing and to address the hearing (but not to answer questions on the worker’s behalf). Rights of time off are given to act as a companion.

The right only applies where the worker “reasonably requests” to be accompanied. The worker is entitled to a postponement of up to five working days so that the companion can attend.

The right on grievance is confined to circumstances where the grievance concerns “the performance of a duty by the employer in relation to a worker”. A disciplinary hearing is one which may lead to a warning or other sanction and is defined in such a way as to include an appeal and probably an investigatory hearing.

There is a new ACAS Code on Discipline and Grievance, revised to deal with the new provisions on the right to be accompanied.

The remedy for a breach is compensation of up to two weeks’ pay. The statutory limit on the week’s pay applies. Workers and those acting as companions are protected against dismissal or detriment for exercising their rights under this section. A worker who is dismissed for this reason has a right to make an emergency application to the Tribunal for interim relief. Workers cannot contract out of their right to be accompanied.

### **Fixed term contracts**

(Section 18)

#### ***IN FORCE - 25 October 1999***

Employees on fixed term contracts will no longer be able to sign away their rights to claim unfair dismissal when the term of their contract expires. If the contract expires and is not renewed they will be able to claim unfair dismissal on the same basis as other workers.

Employers can still require workers to sign away their right to receive a redundancy payment when their contract expires. However, for such an agreement to be valid, there has to be a fixed term contract for a period of two years or more.

If an employee who has a current fixed term contract is dismissed for asserting their rights to the national minimum wage or other statutory rights or because of pregnancy then an unfair dismissal complaint can be pursued.

Only those contracts which were signed, extended or renewed before 25 October 1999 and where the waiver was signed before that date will validly exclude unfair dismissal rights.

## **Extending employment rights**

(Section 23)

### ***IN FORCE – Power to make Regulations – 25 October 1999***

The government has extended employment rights. The National Minimum Wage Act and the Working Time Regulations already extend to “workers”, which is a broader category than employees. This broader category includes casual workers, freelancers and contract workers: indeed, all those who contract to provide their services personally unless they are doing so as a trade or profession to a customer or client. There are also specific provisions protecting agency workers and, in the case of the minimum wage, homeworkers.

This progressive approach is evident in the new Act. The right to be accompanied on discipline and grievance extends to all workers (Sections 10 - 15, see below) and the government has taken the power to make regulations to extend some or all employment rights to the wider category of workers.

There is, as yet, no timetable for any regulations on this issue.

## **Unfair dismissal: qualifying period and compensation**

(Sections 33 - 37)

### ***IN FORCE - 25 October 1999***

The government has already reduced the qualifying period for unfair dismissal protection from two years' continuous service to one year for all dismissals on or after 1 June 1999.

The proposal to remove the cap on unfair dismissal compensation has been dropped, but the maximum compensatory award has been increased from £12,000 to £50,000 for all dismissals on or after 25 October 1999. The maximum limit is removed altogether from dismissals for health and safety activities or whistleblowing.

The limits in the legislation on weeks' pay, basic awards for unfair dismissal, guaranteed payments and right to trade union membership will be automatically increased in line with inflation in future years.

The current system of additional and special awards in dismissals of trade union, health and safety, pension trustees or employee representatives is replaced with a single “additional award” of between 26 and 52 weeks' pay.

## **Employment outside Britain**

(Section 32)

### ***IN FORCE - 25 October 1999***

Employees ordinarily working outside Britain are now covered by the laws on collective redundancy consultation and are no longer excluded from employment rights such as claiming unfair dismissal and a written statement of employment particulars.

## **National security**

(Section 41 and Schedule 8)

### ***IN FORCE – 16 July 2001***

In a significant move, workers engaged in jobs involving national security are now covered by statutory employment rights, except rights under the whistleblowing legislation - the Public Interest Disclosure Act. Employment tribunals are still entitled to dismiss claims for unfair dismissal or trade union victimisation where the action against the employee was taken to safeguard national security. Proceedings may be held in private.

## **School staff**

(Section 40)

### ***IN FORCE – 25 October 1999***

The qualifying period for unfair dismissal in the School Standards and Framework Act 1998 is brought into line with the new one year period.

## **Transfers of undertaking**

(Section 38)

### ***IN FORCE – Power to make Regulations – 9 September 1999***

The government gives itself power to go beyond the Acquired Rights Directive and provide that particular transfers or types of transfers are to be treated as covered by TUPE even where the directive would not apply.

This gives the government the power to treat particular public sector transfers as TUPE transfers and to bring forward amendments to the existing TUPE regulations which cover situations which may not fall within the directive and thus end some of the confusion over contracting out.

This provision is already in force and has been used for at least one public sector transfer.

The consultation document on amendments to TUPE is long overdue. It is unlikely the government will introduce the changes in time to comply with the deadline of 17 July 2001 for implementing the amended directive.

## **PART-TIME WORKERS**

### **The Part-Time Workers Directive**

(Sections 19-21)

### ***IN FORCE – 1 July 2000***

The legislation gives the government regulation-making power to implement the EU Directive on Part-Time Work, deriving from the Framework Agreement reached by unions and employers at European level.

The powers enabled the government to ensure that part-time workers are not treated less favourably than persons in full-time employment, including on issues of pay which arguably falls outside the ambit of the directive itself.

The new rights were implemented by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 which came into force on 1 July 2000.



## **OTHER PROVISIONS**

### **National Minimum Wage**

(Sections 22 and 34)

***IN FORCE - 25 October 1999***

The government has added to the categories of persons excluded from entitlement to the National Minimum Wage. Members of religious or charitable committees (excluding independent schools or further education establishments) will not be entitled to the National Minimum Wage.

Tax and National Insurance contributions information obtained by the Inland Revenue can be used for the enforcement of the National Minimum Wage.

### **Central Arbitration Committee**

(Section 24 . 25)

***IN FORCE – 22 February 2000 (section 24)  
and 6 June 2000 (Section 25)***

The CAC has an important role in the new legislation and the Act sets out the new functions, the provisions for nominating members and the way in which proceedings before the CAC will be organised.

### **Provisions relating to ACAS and the CAC**

(Sections 26 - 27)

***IN FORCE – 25 October 1999***

ACAS's general duty is amended to give equal weight to dispute resolution and dispute prevention. The timetable for ACAS and CAC annual reports is brought into line.

## **CROTUM and CPAUIA**

(Section 28)

***IN FORCE – 25 October 1999***

The Commissioner for the Rights of Trade Union Members and the Commissioner for Protection Against Unlawful Industrial Action is abolished, thereby ending a waste of public money.

### **Certification Officer**

(Section 29 and Schedule 6)

***IN FORCE – 25 October 1999***

The Certification Officer is given new powers and people are prevented from issuing court proceedings in parallel with an application to the Certification Officer. The Certification Officer is given powers to deal with vexatious litigants.

### **Partnerships at Work**

(Section 30)

***IN FORCE – 25 October 1999***

The government may make money available for training and other activities to develop partnerships at work

### **Employment Agencies**

(Section 31 and Schedule 7)

***IN FORCE – Power to make Regulations –  
25 October 1999***

The Act amends the Employment Agencies Act 1973, particularly in relation to enforcement.

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## **INDIVIDUAL AND TRADE UNION RIGHTS** Employment Relations Act 1999



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