

**UNION MEMBERSHIP**

Rights of members and non-  
members

2006

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## INTRODUCTION

Employment law gives employees and other categories of worker certain basic protections against being penalised because they are, or are not, members of a trade union or for other reasons relating to union membership such as taking part in union activities at an appropriate time.

Closed shop practices or arrangements cannot be enforced against employees or prospective employees.

Individuals also have the right not to be excluded or expelled from a trade union. Union members whose subscriptions are paid by direct deduction from their pay (through the check off) have particular legal protection applying to these check off arrangements.

This document describes these protections and what an individual can do if his rights are infringed. It also describes a series of related provisions which prohibit requirements about union membership or union recognition from being included in commercial contracts, and which remove immunity from certain industrial action taken against non-union businesses.

In the parts of the document describing the following:

- **the right not to be refused employment on grounds of trade union membership or non-membership;**
- **the right not to belong to a trade union;**
- **the right to belong to a trade union;**
- **the right to make use of trade union services;**
- **the right not to be offered certain inducements to disapply collective agreements;**
- **the right not to be excluded or expelled from a trade union;**
- **industrial action to promote closed shop practices or against non-union firms;**

the term "trade union" has each of the following meanings:

- any trade union;
- a particular trade union;
- one of a number of particular trade unions;
- any branch or section of a trade union;
- a particular branch or section of a trade union; and

- one of a number of particular branches or sections of a trade union.

This means, for example, that the right not to be dismissed for not belonging to a trade union includes the right not to be dismissed for not belonging to a particular branch or section of a trade union.

It will be helpful to read this document with the employment legislation document *Unfairly dismissed?* and *Individual rights of employees*. A guide for employers and employees.

This document provides **general guidance only**. Authoritative interpretations of the law can only be given by the courts.

For simplicity, the masculine pronoun is used throughout. The contents, however, apply equally to men and women.

Throughout this booklet, the terms “employees” and “other workers” are used, because some rights apply to all “employees” whilst other rights apply to the broader group of “workers”. The term “employees” refers to persons who have entered into, or work under, a contract of employment. The term “workers” refers to persons who are either “employees” or who work under any other contract whereby they undertake to do or perform personally any work or services for another party to the contract who is not a professional client of theirs. “Workers” therefore usually include agency workers who are not otherwise classified as employees, but exclude most self-employed people.

## ACCESS TO EMPLOYMENT

### **Refusal on grounds of trade union membership or non-membership**

No individual is obliged to accept a requirement to join a trade union or to remain a member of a trade union, or to cease to be or not become a member, in order to obtain employment. All individuals have the following rights:

- not to be refused employment or any of the services of an employment agency because they are not members of a trade union, or will not agree to become or remain members;
- not to be refused employment or any of the services of an employment agency because they are members of a trade union, or will not agree to cease being members;
- not to be refused employment because they will not agree to make a payment (for example to a union or charity) in lieu of union membership or to allow a prospective employer to deduct a sum of money from their wages or salary to make such a payment.

It is unlawful for an employer to refuse employment, or for an employment agency to refuse its services, in contravention of any of these rights.

### **What types of employment are covered?**

Employment referred to in the *Access to employment* part of this document means employment under a contract of service or apprenticeship. It does not include self-employment under a contract for services. However, self-employed people are protected against the union membership requirements described in the *Protection for businesses* part of this document.

### ***Refusal of employment***

#### **What is meant by refusal of employment?**

A person will be regarded as having been refused the employment he is seeking if the prospective employer or an agent acting on the employer's behalf:

- refuses or deliberately omits to deal with his application or enquiry; **or**
- causes him to withdraw or stop pursuing his application or enquiry (for example by making threats or discouraging remarks); **or**
- refuses or deliberately omits to offer him employment of the kind he is seeking; **or**
- makes him an offer of employment of the kind he is seeking but on terms (for example, the rate of pay) which no reasonable employer who wished to fill the vacancy would offer, and which is not accepted; **or**

- makes him an offer of employment of the kind he is seeking but withdraws it or causes him not to accept it (for example by making threats or discouraging remarks).

Where a person is offered employment subject to any of the requirements listed below and he does not accept the offer because he does not satisfy the requirement, or is unwilling to comply with it, he will be regarded as having been unlawfully refused employment for that reason. The requirements are that:

- he is, or should remain, a member of a trade union;
- he should take steps to become a member of a trade union;
- he is not, or should not become, a member of a trade union;
- he should take steps to cease to be a member of a trade union;
- he should make payments or suffer deductions in lieu of union membership.

### **Job advertisements specifying union membership requirements**

Where a job advertisement appears specifying any of the union membership or non-membership requirements listed above, a person who does not satisfy the requirements, or is unwilling to comply with them, and who applies for and is refused the job will be presumed to have been refused it unlawfully.

“Advertisement” means every form of advertisement or notice, whether to the public or not. It could, for example, be an advertisement in a newspaper or periodical, or a notice posted in or outside a factory.

### **Recruitment through trade unions**

Where there is an arrangement or practice under which an employer recruits only people who have been supplied (i.e. put forward or approved) by a trade union from amongst its membership, a person who is not a member of the trade union concerned and who is refused the employment because he has not been supplied by the union will be regarded as having been refused employment because he is not a union member.

### **Appointment or election to an office in a trade union**

It is not unlawful for a trade union to refuse to consider non-members for appointment or election to a position as a paid official. If the union considers non-members for such a position, however, it is not permitted to require the successful candidate to join the union.

### ***Refusal of the services of an employment agency***

#### **What is meant by an employment agency?**

Employment agency means any person or organisation who provides services, whether for profit or not, for the purpose of finding employment for workers or supplying employers with workers. A trade union is not regarded

as an employment agency if it provides services only to its own members to assist them in finding employment. However, if a trade union provides such services to non-members it will be regarded as an employment agency.

### **What is meant by refusal of the services of an employment agency?**

A person who seeks to make use of a service of an employment agency will be regarded as having been refused that service if the agency:

- refuses or deliberately omits to make the service available to him; **or**
- causes him not to make use of the service, or to stop making use of it (for example by making threats or discouraging remarks); **or**
- does not provide the service to him on the same terms as it provides the service to other people.

Where a person is offered a service of an employment agency subject to any of the requirements listed below and he does not accept the offer because he does not satisfy the requirement, or is unwilling to comply with it, he will be regarded as having been unlawfully refused the service for that reason. The requirements are that:

- he is, or should remain, a member of a trade union;
- he should take steps to become a member of a trade union;
- he is not, or should not become, a member of a trade union;
- he should take steps to cease to be a member of a trade union.

### **Employment agency advertisements specifying trade union membership requirements**

Where an advertisement appears in relation to the services of an employment agency specifying any of the union membership or non-membership requirements listed above, a person who does not satisfy the requirements, or is unwilling to comply with them, and who seeks to make use of and is refused the services will be presumed to have been refused them unlawfully.

("Advertisement" means every form of advertisement or notice, whether to the public or not. It could, for example, be a list of job vacancies supplied by an employment agency to people who have registered with the agency.)

## **Making a complaint**

Individuals who think that their rights as described in the Access to employment part of this document have been infringed can complain to an employment tribunal that they have been unlawfully refused employment or a service or an employment agency.

### **Who can complain of unlawful refusal of employment?**

Virtually all individuals can complain to an employment tribunal if they think that they have been unlawfully refused employment or a service of an employment agency because of their membership or non-membership of a trade union. Those who cannot complain include people who are seeking self-employed work only, or employment in the police or armed forces or as a share fisherman. More details are to be found in **Appendix 3**.

A complaint to an employment tribunal must be made by the person who has been refused employment or a service of an employment agency.

### **Making an application**

An application to an employment tribunal may be made as soon as an individual has been refused employment or a service of an employment agency. The application should be received within three months of the date of the refusal or the date on which an offer of employment is withdrawn. In any case where an offer of employment is made but not accepted, the application should be received within three months of the date on which the offer was made.

Where the conduct of an employer or employment agency causes a person to withdraw or stop pursuing his job application or enquiry, or not to make use of an employment agency service, or to stop making use of it, the application should be received within three months of the date of that conduct.

In the following circumstances an application should be received within three months of the date of the end of the period in which it was reasonable to expect the employer or employment agency to act:

- where an employer deliberately omits to offer employment or to deal with an application or enquiry; or
- where an employment agency deliberately omits to make a service available.

Where an employment agency fails to provide a person with the same service, on the same terms, as is provided to other people, the application should be received within three months of the date or last date on which the inferior service was provided.

If an application is received after the end of the relevant three-month period, the tribunal will consider the complaint only if it thinks that it was not reasonably practicable for the individual to have complained earlier.

Anyone who wishes to complain to a tribunal may obtain an application form ET 1 (E/W) or ET 1 (Scot) which is included in the explanatory leaflet *Making a claim to an employment tribunal* available from Jobcentre Plus offices, Citizens Advice Bureaux, from the DTI Publications Orderline on 0845 015 0010, or from the Employment Tribunals Service website.

### **Conciliation**

When a complaint of unlawful refusal of employment or a service of an employment agency is made to a tribunal, a copy of the application form is sent to the Advisory, Conciliation and Arbitration Service (Acas). Acas conciliators will attempt to assist the parties to reach a voluntary settlement without the need for a tribunal hearing if the parties concerned ask them to do so or if they think that there is a reasonable chance of success. Conciliators can also become involved before a formal complaint has been made to a tribunal at the request of any of the parties concerned. However, it is important to remember that the time limit for applying to an employment tribunal is not extended just because conciliation discussions are taking place.

### **Tribunal hearing**

If a settlement is not reached or the application is not withdrawn, the individual's complaint of unlawful refusal of employment or a service of an employment agency will normally be heard by an employment tribunal. The tribunal will then decide whether there has been an unlawful refusal.

### **Joinder**

*Complaint against an employer and an employment agency.*

A person having a right of complaint against a prospective employer and against an employment agency arising out of the same situation may choose to present a complaint against either of them or against them both. If a complaint is brought against only one of them, either the party against whom the complaint is made or the complainant can ask the tribunal to join <sup>1</sup> the other as a party to the proceedings. Such a request will be granted by the tribunal if it is made before the hearing begins, but may be refused if it is not made until after the hearing has started. A request for joinder cannot be made after the tribunal has decided whether or not the complaint was well-founded.

If a complaint has been brought against both the employer and the employment agency or if joinder has been granted and the tribunal finds the complaint to be well-founded as against both the employer and the agency, it can order any compensation which it may award to be paid either by the employment agency or by the employer, or to be divided between them in such manner as the tribunal may consider just and equitable in the circumstances.

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<sup>1</sup> In Scotland, "sist".

*Pressure exerted by a trade union or other person.*

Where the prospective employer or employment agency against whom a complaint is made claims that they were induced to act unlawfully by pressure which a trade union or other person exerted upon them by threatening or organising industrial action, they can request the employment tribunal to join the trade union or other person as a party to the proceedings. The person making the complaint can also request that a trade union or other person be joined as a party to the proceedings if he believes that they induced the employer or employment agency by these means to act unlawfully. Such a request, made either by the party against whom the complaint is made or by the complainant, will be granted by the tribunal if it is made before the hearing begins, but may be refused if it is not made until after the hearing has started. A request for joinder cannot be made after the tribunal has decided whether or not the complaint was well-founded.

Where a trade union or other person has been joined to the proceedings and the tribunal finds the complaint to be well-founded, it will also consider whether pressure was exerted on the prospective employer or employment agency as alleged. If the tribunal finds that such pressure was exerted, it can order the trade union or other person to pay some or all of any compensation it may award.

**Remedies for unlawful refusal of employment or a service of an employment agency**

If a tribunal finds that an individual has been unlawfully refused employment or a service of an employment agency because of his membership or non-membership of a trade union, it will make a declaration to that effect and may:

- award the complainant compensation to be paid by the prospective employer or employment agency (but see [Joinder](#)); **and/or**
- recommend that the prospective employer or employment agency takes action to remedy the adverse effect of their unlawful refusal on the complainant. (A tribunal might, for example, recommend that an employer should consider the complainant for a job vacancy but it cannot order the employer to do so).

**Compensation**

The tribunal will assess and award compensation on the same basis as damages for breach of statutory duty, and this may include compensation for injury to feelings. In cases where a party against whom a complaint is upheld fails without reasonable justification to comply with a recommendation to take action, the tribunal may increase its award of compensation, or make such an award if it has not already done so. The amount of compensation payable, including any additional compensation awarded for failure to comply with a recommendation, will be subject to an upper limit. The limit is varied annually in line with the retail prices index. (For details of current limits on payments, see Limits on payments and awards - Guidance.

## **Appeals**

Any party to the proceedings may appeal against the decision of an employment tribunal on a complaint of unreasonable refusal of employment or a service of an employment agency, **on a point of law only**, to the Employment Appeal Tribunal. Anyone who wishes to complain to a tribunal may obtain an application form ET 1 (E/W) or ET 1 (Scot) which is included in the explanatory leaflet Making a claim to an employment tribunal available from Jobcentre Plus offices, Citizens Advice Bureaux, from the DTI Publications Orderline on 0845 015 0010, or from the Employment Tribunals Service website.

## **RIGHTS DURING EMPLOYMENT**

### **Non-membership of a trade union**

#### *Right not to belong to a trade union*

No person is obliged to join, or remain a member of, a trade union.

All employees have the right:

- not to be dismissed, or chosen for redundancy, for not belonging to a trade union or for refusing to join one;
- not to be dismissed, or chosen for redundancy, for failing to accept an offer made by their employer with the sole or main purpose of inducing them to be or become a trade union member.

*In addition,*

all **employees and other workers** have the right:

- not to be subjected to a detriment by their employer for not being or refusing to become a trade union member;
- not to be made an offer by their employer where the sole or main purpose of the employer is to induce them to be, or to become, a trade union member; and
- not to be subjected to a detriment for failing to accept such an offer.

### **Right not to make payments in lieu of union membership**

**Employees** have the right:

- not to be dismissed for refusing to make a payment (for example, to a union or a charity) in lieu of union membership or for objecting to their employer deducting a sum of money from their wages or salary to make such a payment; and

**employees and other workers** have the right:

- not to have other action taken by their employer to compel them to make such a payment. The deduction by their employer of a sum of money from their wages or salary counts as action to compel them to make such a payment.

## Trade union membership, activities and related matters

### Right to belong to a trade union

Some individuals may wish to belong to a trade union and they enjoy certain protections where they do so.

All employees have the right:-

- not to be dismissed, or selected for redundancy, for being a member of an independent trade union<sup>2</sup> or for proposing to become a member; and
- not to be dismissed, or selected for redundancy, for failing to accept an offer made by their employer with the sole or main purpose of inducing them not to be or become a trade union member.

In addition, all **employees and other workers** have the right:

- not to be subjected to a detriment by their employer to prevent or deter them from belonging to an independent trade union or from seeking to become a member, or to penalise them for so doing;
- not to be made an offer by their employer where the sole or main purpose of the offer is to induce them not to be, or seek to become, a member; and
- not to be subjected to a detriment for failing to accept such an offer.

### Right to take part in trade union activities

Individuals have protection relating to their trade union activities.

All **employees** have the following rights relating to their trade union activities:

- not to be dismissed, or chosen for redundancy, for taking part, or proposing to take part, in the activities of an independent trade union at an appropriate time;
- not to be dismissed, or chosen for redundancy, because they failed to accept an offer made by their employer with the sole or main purpose of inducing them not to take part in the activities of an independent trade union at an appropriate time.

In addition, all **employees and other workers** have the right:

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<sup>2</sup> Broadly, a union is independent so long as it is not under the control of an employer. More detailed guidance is in Appendix 1.

- not to be subjected to a detriment by their employer to prevent or deter them from taking part in trade union activities at an appropriate time, or to penalise them for doing so;
- not to be made an offer by their employer where the sole or main purpose of the employer is to induce them not to take part in an independent trade union's activities at an appropriate time; and
- not to be subjected to a detriment for failing to accept such an offer.

### **What are union activities?**

The kinds of union activity in which an employee may take part are not set out in law. However, union activities involving an employee acting on behalf of the union, for instance as a shop steward representing a union that is recognised for collective bargaining purposes, would be covered, as would activities connected with the election or appointment of union officials.

### **Right to make use of union services**

All employees have the following rights relating to the use they make of their union's services:

- not to be dismissed, or chosen for redundancy, for making use, or proposing to make use, of the services of an independent trade union at an appropriate time; and
- not to be dismissed, or chosen for redundancy, because they failed to accept an offer made by their employer with the sole or main purpose of inducing them not to use the services of an independent trade union at an appropriate time.

In addition, all employees and other workers have the right:

- not to be subjected to a detriment by their employer to prevent or deter them from using their union's services at an appropriate time or to penalise them for doing so;
- not to be made an offer by their employer where the sole or main purpose is to induce them not to make use of an independent trade union's services at an appropriate time; and
- not to be subjected to a detriment by their employer for failing to accept such an offer.

### **What are "trade union services"?**

These are services made available to an employee or other worker by virtue of his membership of an independent trade union. They include the union agreeing to raising a matter on behalf of the employee or other worker by, say, writing to the employer about a grievance. "Trade union services" do not include having a member's terms and conditions determined by collective agreement.

### **What is an “the appropriate time” for the union member to take part in union activities or to make use of his union’s services?**

This is time which is either:

- outside the member's working hours - this could cover activities which take place or services which are used when the person is on the employer's premises but not actually required to be working, for example, lunch breaks; or
- a time within the member’s working hours at which the employer has agreed that the employee may take part in trade union activities or (as the case may be) use the trade union’s services.

Rights to reasonable time off for trade union duties and activities also exist where an employer recognises a union for collective bargaining (see Individual rights of employees: a guide for employers and employees and the Acas Code of Practice Time off for trade union duties and activities).

### **Rights regarding inducements to disapply collective agreements**

Many, but not all, members of trade unions have their pay and other terms and conditions of employment set by collective agreement negotiated by their union and their employer. There are rights for union members to ensure that the employer does not interfere between the union member and his union in certain matters related to collective bargaining.

An **employee or other worker** who is a member of an independent trade union **seeking recognition** by his employer for collective bargaining purposes has the right:

- not to have an offer made to him by his employer in circumstances where the employer’s sole or main purpose in making the offer is to achieve the result that, if it and like offers to other workers are accepted, all or part of those workers’ terms and conditions will not be determined by collective agreement negotiated by or on behalf of the trade union.

An **employee or other worker** who is a member of an independent trade union which is **recognised** by his employer for collective bargaining purposes has the right:

- not to have an offer made to him by his employer in circumstances where the employer’s sole or main purpose is to achieve the result that, if it and like offers to other workers are accepted, all or any of those workers’ terms and conditions will no longer be determined by a collective agreement negotiated by or on behalf of the trade union.

In addition, an **employee** has the right:

- not to be dismissed, or chosen for redundancy, by his employer on the grounds that he has failed to accept any such offer; and

an **employee or other worker** has the right:

- not to be subjected to a detriment for failing to accept any such offer.

## Right not to be excluded or expelled from a trade union

Any individual who wishes to join or remain a member of a trade union has the right to do so. The union may only exclude or expel him from membership for one of a limited number of permitted reasons, which are set out in law.

These permitted reasons allow a union to exclude or expel someone because its rules restrict membership to those who are:

- employed in a specified trade, industry or profession;
- of a particular occupational description; or
- in possession of specified trade, industrial or professional qualifications or work experience.

They also allow a union to exclude or expel someone because:

- he is not eligible for membership because of the particular geographical area in which the union operates;
- the union is a staff association and the individual is not employed by a relevant employer; or
- his conduct is unacceptable.

A union may specifically not exclude or expel someone for conduct which consists of:

- current or former membership of a trade union;
- current or former employment; or
- conduct for which disciplinary action taken by his union would be regarded as unjustifiable in law <sup>3</sup>.

The law refers to these three categories of conduct as “excluded conduct”, and it is always unlawful for a union to exclude or expel an individual on the grounds of such conduct, even where such conduct was a minor reason among several reasons for the union’s decision to exclude or expel.

In addition, it may be unlawful for a union to expel or exclude an individual for a fourth category of conduct called “protected conduct”. “Protected conduct” is defined as current or former membership of a political party. However, the

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<sup>3</sup> See Unjustifiable discipline by a trade union - Guidance.

law makes clear that the political activities by a person do not constitute “protected conduct”.

### **How is “protected conduct” treated by the law?**

It is unlawful for a union to exclude or expel a person wholly or mainly on the grounds of that person’s protected conduct i.e. his membership or former membership of a political party. However, it is lawful to expel or exclude where protected conduct was a minor reason for the union’s decision and the other reason or reasons were lawful grounds for the union’s decision. So, assuming no other factors are involved, it is lawful for a union to exclude or expel a person mainly because of his political activities even though his membership of a political party was a subsidiary reason.

### **What are “political activities”?**

These are not specified in the law but they would include standing for election as a member of a political party, canvassing on behalf of a political party or leafleting on behalf of a political party.

In some circumstances, an individual who is expelled from a union may have the right to make a complaint of unlawful expulsion and of unjustifiable discipline. In that case, he has the right to make two separate complaints but if one is declared to be well-founded he may not proceed with the other. In addition to the rights described here, individual union members may also be able to complain to the High Court under the common law if their trade union takes action against them which is contrary to the union’s own rules or to natural justice. Natural justice covers, for example, the right to a fair hearing.

### **Payment of union subscriptions through the check off**

Some trade union members pay their union subscriptions by deduction from their wages; the payment is passed directly to their union by their employer. These arrangements are known as the check off.

Where check off arrangements exist, the employer may lawfully make deductions only where the worker has given his written consent and has not subsequently withdrawn that consent.

More information about the law in this area, including the arrangements for extending existing consents, is provided in the employment legislation document The payment of union subscriptions through the check off.

What must a worker do to withdraw his consent to the check off? The worker must write to his employer notifying him that he no longer wishes to have check off deductions made. He must allow the employer reasonable time to stop the deductions.

## Making a complaint

Individuals - whatever their age, length of service or hours of work - who think that any of their rights as set out in the Rights during employment part of this document have been infringed can complain to an employment tribunal.

If employees have been dismissed (including cases where they have been dismissed on grounds of redundancy), then their complaint is one of **unfair dismissal**.

If employees or other workers consider that union subscriptions have been wrongly deducted from their wages through the check off, then their complaint is one of **unlawful deduction of union subscriptions**.

If employees or other workers consider that they have been subjected to a detriment by an act, or deliberate failure to act, by their employer for the unlawful reasons set out above then their complaint is one of detriment.

If employees or other workers consider that their employer has made an unlawful inducement relating to trade union membership, activities, services or collective bargaining, as described in this booklet, then their complaint is one of **unlawful inducement**.

If they consider that they have been unlawfully excluded or expelled from a trade union, then their complaint is one of **unlawful exclusion or expulsion** and is against the union.

Many of the tribunal procedures are the same whichever of these complaints the applicant brings. But some procedures vary depending on which complaint is brought. The remedies which the tribunal can provide if it upholds a complaint also vary, depending on the complaint made. The following paragraphs set out in turn the procedures and remedies for each of these complaints

## Unfair dismissal

### What is unfair dismissal?

Dismissal is normally the ending of an employee's employment by an employer with or without notice. However, the term 'dismissal' can also cover other situations such as the employee's resignation in certain circumstances. Appendix 2 gives further guidance.

### Who can complain?

Virtually all employees including former employees - whatever their age, length of service or hours of work - can complain to an employment tribunal if they think that they have been unfairly dismissed because of their non-membership of a union or because of their trade union membership or activities or because of their use of union services or their failure to accept an unlawful inducement. Those who cannot complain are, broadly, the self-employed, people employed in the police or armed forces, and share fishermen. More details are to be found in Appendix 3.

A complaint to an employment tribunal must be made by the person whose rights have been infringed. However, if that person dies, a personal representative of the deceased may make an application to a tribunal or continue any proceedings already started.

### Making an application

An application to an employment tribunal may be made as soon as the employer has given notice of dismissal. The application should be received within three months of the employee's 'effective date of termination'. This is normally the date when notice of dismissal expires, if a dismissal is with notice, or the date when employment ended if no notice was given. This time limit will be extended for a further three months where the employee has reasonable grounds for believing that a dismissal or disciplinary procedure (statutory or otherwise) is still in progress at the point where the normal time limit would have expired.

If an application is received after these time limits, the tribunal will consider the complaint only if it thinks that it was not reasonably practicable for the employee to have complained earlier.

Anyone who wishes to complain to a tribunal may obtain an application form ET 1 (E/W) or ET 1 (Scot) which is included in the explanatory leaflet *Making a claim to an employment tribunal* available from Jobcentre Plus offices, Citizens Advice Bureaux, from the DTI Publications Orderline on 0845 015 0010, or from the Employment Tribunals Service website.

### Interim relief

Employees who complain to an employment tribunal that they have been unfairly dismissed by their employer on the grounds that any of their rights set out in this booklet regarding trade union membership or non-membership,

trade union activities, trade union services or failures to accept unlawful inducement have been infringed<sup>4</sup> can ask the tribunal for an order for interim relief. This is an order requiring the employer to re-instate the employee and treat him in all respects as if he had not been dismissed or to re-engage him in another job on terms and conditions at least as favourable as those which he would have enjoyed if he had not been dismissed until the tribunal has given a decision on the unfair dismissal complaint or there has been a settlement of it. An order for re-instatement or re-engagement will only be made if both the employer and employee agree. Where the employer is unwilling to agree to either order or where the employee reasonably refuses to agree to accept an offer of re-engagement the tribunal is required to make an order for the continuation of the contract of employment for the purposes of pay and benefits and the determination of length of service. Orders for interim relief are made only where the tribunal considers it likely that it will uphold the employee's unfair dismissal complaint at a full hearing.

An application for interim relief must be made to an employment tribunal **not later than seven days** after the effective date of termination of the employee's employment. Where the employee is complaining that dismissal was because of trade union membership, taking part in union activities, use of union services or for refusing to accept an unlawful inducement, the employee must also present a signed certificate from an official of the trade union concerned supporting the complaint. Appendix 4 explains in greater detail how to apply for an order of interim relief.

### **Conciliation**

When an unfair dismissal complaint is made to a tribunal, a copy of the application form is sent to the Advisory, Conciliation and Arbitration Service (Acas). Acas conciliators will attempt to assist the parties to reach a voluntary settlement without the need for a tribunal hearing if the parties concerned ask them to do so or if they think that there is a reasonable chance of success. Conciliators can also become involved before a formal complaint has been made to a tribunal at the request of any of the parties concerned. However, it is important to remember that the time limit for applying to an employment tribunal is not extended just because conciliation discussions are taking place.

### **Voluntary procedures**

An employer or a union may have procedures for settling complaints made by employees or members. These sometimes involve third parties as final stage. Where such procedures exist individuals may wish to make use of them and, as explained above, the time limit for applying to an employment tribunal will be extended because such procedures are used.

In addition, it is unfair to dismiss an employee who is under the normal age limit and has completed more than one year's continuous service without

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<sup>4</sup> With the exception of the right not to be chosen for redundancy on the grounds of: (i) membership or non-membership of a union, or (ii) participation in union activities at an appropriate time.

following statutory dismissal and disciplinary procedures if those procedures apply and if the failure to follow them was wholly or mainly the fault of the employer. The statutory procedures do not apply to all dismissals, for example industrial action dismissals or constructive dismissals.

### **Tribunal hearing**

If a settlement is not reached or the application is not withdrawn, the employee's complaint of unfair dismissal will normally be heard by an employment tribunal. The tribunal will then decide whether the dismissal has infringed the right of the employee not to be dismissed. If it finds the dismissal to have infringed these rights it will find the dismissal to have been unfair.

### **Joinder**

An employer who faces a complaint of unfair dismissal may have dismissed the employee concerned as a result of pressure, in the form of actual or threatened industrial action, exercised by a union or other person because the employee was not a member of a trade union. If the employer or the employee making the complaint claims this is so, either of them may make a request to the tribunal for the union or other person concerned to be joined<sup>5</sup> (i.e. brought in as a party) to the proceedings. If the tribunal finds the dismissal unfair and the claim of pressure well-founded, it may make any award of compensation wholly or partly against the union or other person concerned instead of or as well as against the employer. A request by either an employer or a dismissed employee for a trade union or other person in unfair dismissal proceedings to be joined in this way will be granted by the tribunal if it is made before the hearing begins but may be refused if it is not made until after the hearing has started.

### **Remedies for unfair dismissal**

If a tribunal upholds a complaint that an employee's dismissal infringed his rights:

- not to belong to a trade union; **or**
- not to make a payment in lieu of membership of a trade union; **or**
- to be or become a member of an independent trade union; **or**
- to take part in the activities of an independent trade union; **or**
- to make use of the services of an independent trade union; **or**
- not to be offered an unlawful inducement; **or**
- not to be chosen for redundancy for one of these reasons;

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<sup>5</sup> In Scotland "sisted".

then it will find the dismissal unfair and explain to the dismissed employee the various remedies which it can award. These are:

*reinstatement:*

- where the employee wishes to have his job back and the tribunal considers this practicable it may make an order requiring the employer to treat the employee in all respects as if he had not been dismissed;

*re-engagement:*

- where a tribunal makes no order for reinstatement it may, if the employee wishes and the tribunal considers it practicable, order that the employer, his successor or an associated employer give the employee employment comparable to that from which he was dismissed or some other suitable employment;

*compensation:*

- where the employee does not wish to be reinstated or re-engaged, or where the tribunal considers this is impracticable, it will award the employee compensation to be paid by the employer (but see Joinder)

## **Compensation**

Where a dismissal is unfair because it infringes one of the rights set out in this booklet, special rates of compensation apply. In these cases compensation will be made up of:

- **a basic award**; the amount of this award depends on the employee's pay, age and length of service. However, where dismissal is unfair because it infringes one of the rights set out in this document, the basic award will normally be subject to a minimum figure. This figure is varied annually in line with the retail prices index.
- where an employee has been dismissed without statutory dismissal and disciplinary procedures having been used (if failure to follow them is wholly or mainly the employer's fault) and the amount of the basic award is less than four weeks' pay, the tribunal will increase it to four weeks' pay unless it considers that this would result in injustice to the employer;
- **a compensatory award**; this award compensates the employee for the actual loss suffered as a result of dismissal in so far as the loss is attributable to action taken by the employer. The amount of the compensatory award will be increased by at least 10% and up to 50%, where the employer has dismissed the worker without completing the statutory dismissal and disciplinary procedure and where the failure to do so was wholly or mainly the employer's fault. Similarly, the compensatory award can be reduced by the same amount where the failure to use the procedure was wholly or mainly the fault of the employee.

- where a tribunal orders the reinstatement or re-engagement of an employee who was dismissed without statutory dismissal and disciplinary procedures having been followed where they should have been, and where failure to follow them was wholly or mainly the employer's fault, it will award four weeks' pay to the employee (unless it considers that this would result in an injustice to the employer). This sum will be deducted from any Additional award of compensation made because the employer has failed to comply with the terms of a reinstatement or re-engagement order;
- **an additional award**; this award is payable only where the employer has not complied with an order from the tribunal for reinstatement or re-engagement. The amount of the additional award will be subject to a minimum and maximum figure. These figures are varied annually in line with the retail prices index.

A tribunal can reduce any of these awards of compensation if, amongst other things:

- the employee's conduct before dismissal justifies a reduction; **or**
- the employee has unreasonably refused an offer of reinstatement from the employer, or has unreasonably prevented the employer from complying with an order for reinstatement or re-engagement.

### **Appeals**

An employer or employee may appeal against the decision of an employment tribunal on a complaint of unfair dismissal on a point of law only Anyone who wishes to complain to a tribunal may obtain an application form ET 1 (E/W) or ET 1 (Scot) which is included in the explanatory leaflet *Making a claim to an employment tribunal* available from Jobcentre Plus offices, Citizens Advice Bureaux, from the DTI Publications Orderline on 0845 015 0010, or from the Employment Tribunals Service website.

*Unlawful deduction of union subscriptions through the check off*

### **Who can complain?**

A trade union member whose union subscriptions are deducted from his wages by his employer may make a complaint to an employment tribunal against his employer if he considers that a deduction has been made without proper authorisation.

### **Making an application**

Complaints of unlawful deduction of union subscriptions must normally be received within three months of the payment of the salary from which the deduction was made. (If the complaint relates to more than one deduction, it must be made within three months of the date of the salary from which the last of the deductions was made).

## **Conciliation and voluntary procedures**

As with a complaint of unfair dismissal, ACAS will often seek to settle the complaint through conciliation, and voluntary procedures may be available (see ['Conciliation' and 'Voluntary procedures'](#)).

## **Remedies for wrongful deduction of union subscriptions through the check off**

Where a tribunal finds that an unlawful check off deduction has been made, it will make a declaration to that effect. It will also order the employer to pay to the individual the whole amount deducted if the deduction was made without proper authorisation. The tribunal will deduct from the amount that it orders the employer to pay any amount already paid to the employee by the employer.

## **Appeals**

An individual or an employer may appeal to the Employment Appeal Tribunal against the decision of an employment tribunal to give, or refuse, a declaration of unlawful deduction of union subscriptions. Such an appeal may only be made on a point of law.

## *Detriment*

### **What is detriment?**

Detriment can arise as a result of either an act or a deliberate decision not to act by an employer. Whether an employee or other worker has suffered a detriment is for a tribunal to decide in any particular case. Detriment would cover for example withholding a pay increase, discrimination in promotion, transfer or training opportunities, or threats of dismissal or redundancy. For a worker who is **not** an employee, detriment may additionally take the form of his dismissal. Acts and failures to act of this kind by an employer will infringe an employee's or other worker's rights only if they have been taken against the person as an individual, or against a number of persons as individuals. If a detriment is to be unlawful, the person must have been subjected to it with the intention of putting pressure on him in respect of non-membership or membership of a union, or for the other unlawful purposes relating to union activities, union services or for failing to accept unlawful inducements which are discussed in this booklet. In addition, the failure to confer a benefit on a person who failed to accept an unlawful inducement which would have been conferred on him had he accepted the offer shall constitute a detriment. For example, if an employer had offered £1,000 to workers with the sole or main purpose of taking those workers out of the scope of a collective agreement, any workers who did not accept that offer and were not therefore paid the £1,000 would thereby have been subjected to a detriment of £1,000,

### **Who can complain?**

Employees and other workers who believe that they have suffered a detriment for reasons described in this booklet can make a complaint to an employment tribunal.

## **Making an application**

An application to a tribunal may be made as soon as the action or failure complained of has occurred. Unless there is evidence to the contrary a failure to act is deemed to occur either when the employer does an act which is inconsistent with the failed act or, if he does not, at the end of the period within which he might reasonably be expected to have done the failed act if he was going to do it.

The application should be received within three months of that date, though this limit can be extended by a further three months to provide additional time for the parties to apply the statutory grievance procedure (see section below on "Statutory dispute resolution procedures"). A tribunal will consider a complaint received later than this only if it thinks that it was not reasonably practicable for the employee or worker to have complained earlier. The method of application is the same as for a complaint of unfair dismissal.

## **Conciliation and voluntary procedures**

As with a complaint of unfair dismissal, Acas may attempt to settle the complaint through conciliation, and voluntary procedures may be available.

## **Statutory dispute resolution procedures**

Employers and employees are generally required to follow a minimum three-stage process to ensure that disputes are discussed at work. The minimum statutory procedures create a framework for dealing with dismissal, disciplinary action and employee grievances, but are not intended to replace any established effective procedures which employers may have in place. The three steps consist of 1. a letter outlining the problem; 2. a meeting between the employer and the employee to discuss the matter; and 3. an opportunity to appeal at a further meeting. In specified types of case, including the detriment jurisdictions described in this booklet, employees who have not been able to resolve a grievance through discussion must have completed the first stage of the procedure (i.e. they must have written to the employer setting out their grievance and allowed some time to pass for the employer to respond) if their case is to be admissible to an employment tribunal. Where the procedures are not followed, and either the employer or the employee is mainly or wholly at fault for their non-use, then any amount the tribunal may award the employee in determining the case shall be increased (if the fault is the employer's) or decreased (if the fault is the employee's), unless the tribunal considers an injustice or inequity would occur as a result. **Further detailed information about the statutory procedures is available on the DTI's web site and this information should be read closely by any employer or employee who considers that he may be a party to a tribunal complaint under these detriment jurisdictions.**

## **Tribunal hearing**

If a complaint of detriment comes before a tribunal, it is for the employee or other worker to show he was subjected to a detriment as a result of an act, or

deliberate failure to act, on the part of his employer. The employer will then have to explain to the tribunal the reason why the act was done or why the failure occurred. The tribunal will then determine whether the employee's or worker's rights have been infringed.

### **Joinder**

Exactly the same right of 'joinder' as in an unfair dismissal case is available to an employer facing a complaint of detriment to the employee or other worker, making the complaint. Joinder is therefore available whether either party claims that the employer did the act (or decided on the failure to act) complained of because of actual or threatened industrial action taken because the employee or worker concerned was not a union member (see Joinder).

### **Remedies**

Where a tribunal upholds an employee's or other worker's complaint of detriment, it will make a declaration to that effect. It may also award such compensation as it considers appropriate having regard to the infringement of the employee's or worker's rights and any consequent loss suffered by the employee, or worker.

The amount of the award will be increased by at least 10% and up to 50%, where the tribunal's proceedings commenced without completion of the statutory grievance procedure and where the failure to do so was wholly or mainly the employer's fault. Similarly, the compensatory award can be reduced by the same amount where the failure to use the procedure was wholly or mainly the fault of the employee. The tribunal is empowered not to make any adjustments, or make adjustments of less than 10%, in exceptional circumstances where the standard variation of 10 – 50% would be unjust or inequitable.

## **Appeals**

An employer or worker may appeal against the decision of an employment tribunal on a complaint of detriment, **on a point of law only**, to the Employment Appeal Tribunal. More detail is in the explanatory booklet, How to apply to an employment tribunal, which can be obtained from local offices of Job Centre Plus.

*Unlawful inducements relating to union membership, union activities, union services or collective bargaining*

### **Who can complain?**

Employees and other workers who believe their employer has made them an offer to accept an unlawful inducement can make a complaint to employment tribunal. Complaints can be made both by those persons who accepted the offer and those who failed to do so, though the remedies differ.

### **Making an application**

An application to a tribunal on these grounds must normally be made before the end of the period of three months beginning with the date when the offer of the inducement was made or where the offer is part of a series of similar offers, the date when the last of them was made. This limit can be extended by a further three months to provide additional time for the parties to apply the statutory grievance procedure (see section below on “Statutory dispute resolution procedures”).

However, an employment tribunal can consider a complaint presented later where it was not reasonably practicable for the complaint to be presented within the normal three months time period.

There is no bar on an employee or other worker making a second complaint to a tribunal concerning detriment. This may especially be the case in circumstances where the employee or other worker concerned has failed to accept an offer.

### **Conciliation and voluntary procedures**

As with a complaint of unfair dismissal, Acas may attempt to settle the complaint through conciliation, and voluntary procedures may be available.

### **Statutory dispute resolution procedures**

Employers and employees are generally required to follow a minimum three-stage process to ensure that disputes are discussed at work. The minimum statutory procedures create a framework for dealing with dismissal, disciplinary action and employee grievances, but are not intended to replace any established effective procedures which employers may have in place. The three steps consist of 1. a letter outlining the problem; 2. a meeting between the employer and the employee to discuss the matter; and 3. an opportunity to appeal at a further meeting. In specified types of case,

including the jurisdictions relating to unlawful inducements described in this booklet, employees who have not been able to resolve a grievance through discussion must have completed the first stage of the procedure (i.e. they must have written to the employer setting out their grievance and allowed some time to pass for the employer to respond) if their case is to be admissible to an employment tribunal. Where the procedures are not followed, and either the employer or the employee is mainly or wholly at fault for their non-use, then any amount the tribunal may award the employee in determining the case may be increased (if the fault is the employer's) or decreased (if the fault is the employee's), unless the tribunal considers an injustice or inequity would occur as a result. Further detailed information about the statutory procedures is available on the DTI's web site and this information should be read closely by any employer or employee who considers that he may be a party to a tribunal complaint under the jurisdictions relating to unlawful inducements.

### **Tribunal Hearing**

If a complaint comes before a tribunal, it is for the employee or other worker to show he has been made the offer by his employer. The employer will then have to show to the tribunal what was his sole or main purpose in making the offer. The tribunal will then determine whether the employee's, or worker's rights, have been infringed. In cases where the offer concerned an inducement relating to collective bargaining, the tribunal will take into account any evidence that:

- the employer had recently changed or sought to change, or not to use, arrangements with the union about collective bargaining;
- the employer did not wish to enter into arrangements proposed by the union for collective bargaining; and
- the offers were made only to particular workers with the sole of main purpose of rewarding those workers for their high level of performance or of retaining them because of their special value to the employer.

### **Remedies**

Where a tribunal upholds an employee's or worker's complaint, the tribunal will make a declaration that an unlawful inducement has been offered.

The tribunal shall also make a fixed award (equal to £2,500 at the time this booklet was published) to be paid by the employer to the employee or worker. This figure is varied annually in line with the retail prices index. However, this award can be subject to a reduction or increase under the provisions of the Employment Act 2002.

The amount of this award will be increased by at least 10% and up to 50%, where the tribunal's proceedings commenced without completion of the

statutory grievance procedure and where the failure to do so was wholly or mainly the employer's fault. Similarly, the compensatory award can be reduced by the same amount where the failure to use the procedure was wholly or mainly the fault of the employee. The tribunal is empowered not to make any adjustments, or make adjustments of less than 10%, in exceptional circumstances where the standard variation of 10 – 50% would be unjust or inequitable.

If an unlawful inducement has been accepted by an employee or other worker, but any consequent agreement by him to vary his terms and conditions has not yet been effected, then the agreement to vary the terms and conditions is not enforceable. Also, in such circumstances, the employer cannot recover any cash paid or other benefits conferred on the employer or worker concerned. However, in cases where the agreed variation of terms and conditions have been effected, then those variations are enforceable.

In cases where an employee or other worker makes a related complaint to the tribunal concerning detriment, and the tribunal upholds that complaint, the tribunal may award compensation for the detriment suffered. In deciding the amount of such compensation, no reduction may be made on the ground that a complainant contributed to his loss by accepting or not accepting an unlawful inducement or that the complainant has received or is entitled to an award on the grounds that an unlawful inducement has been made to him.

## **Appeals**

An employer or worker may appeal against the decision of an employment tribunal on a complaint of detriment, **on a point of law only**, to the Employment Appeal Tribunal. More detail is in the explanatory booklet, How to apply to an employment tribunal, which can be obtained from local offices of Job Centre Plus.

### *Unlawful exclusion or expulsion from a trade union*

#### **Who can complain?**

Anyone who believes that they have been unlawfully excluded or expelled from a trade union may make a complaint to an employment tribunal.

A complaint of unlawful **exclusion** from a trade union may be made to an employment tribunal if an application for membership of a trade union has been rejected or where it has neither been granted nor rejected within a reasonable period of time.

A complaint of unlawful **expulsion** may be made to an employment tribunal if an individual has been expelled, or if membership is deemed to have ceased automatically as a result of the operation of the union's rules.

## **Making an application**

Complaints of unlawful exclusion or expulsion from a trade union must normally be received within six months of the exclusion or expulsion concerned. A tribunal will consider a complaint received after this time only if it decides that the complaint could not reasonably have been made earlier.

## **Conciliation and voluntary procedures**

As with a complaint of unfair dismissal, Acas will often seek to settle the complaint through conciliation, and voluntary procedures may be available (see 'Conciliation' and 'Voluntary procedures').

## **Remedies for unlawful exclusion or expulsion from a trade union**

Where a tribunal finds that an individual has been unlawfully excluded or expelled from a trade union, it will make a declaration to that effect. Additionally, where an employment tribunal makes such a declaration and it appears to the tribunal that the exclusion or expulsion from a trade union was mainly attributable to "protected conduct" (i.e. an individual being or ceasing to be, or having been or ceased to be, a member of a political party) it must make a second declaration to this effect. In cases where this second declaration has been made and where it appears to the tribunal that the other conduct to which the exclusion or expulsion was attributable consisted wholly or mainly of conduct which was contrary to the rules of the union or an objective of the union, the tribunal must make a third declaration to that effect. It does not matter if the complainant was a member of the union at the time of the conduct in question. However, for this third declaration to be made, the union must show that it was reasonably practicable for any relevant objective to be ascertained by a union member (if the complainant was a union member when the conduct occurred) or by a member of the general public (if the complainant was not a member of the union when the conduct occurred).

This may be sufficient remedy in itself, particularly where the trade union concerned admits or readmits the individual concerned into membership as a result of the tribunal's decision. However, the individual may also make an application for compensation, to be paid by the union concerned. Such an application has to be made to an employment tribunal not sooner than four weeks and not later than six months after the tribunal's decision.

Where an application for compensation is made the amount of compensation awarded will be whatever sum the tribunal considers appropriate in order to compensate the individual concerned for the loss which exclusion or expulsion from the union concerned has caused. Any such award will be subject to an upper limit. In some circumstances, the award will be subject to the minimum figure of £6,100. However, this minimum award does **not** apply in those cases involving "protected conduct" where the tribunal makes the third declaration discussed above (i.e. where conduct contrary to a rule or objective of the union was a subsidiary reason for the union's decision to exclude or expel the person). These figures are varied annually in line with the retail prices index.

## **Appeals**

An individual or trade union may appeal to the Employment Appeal Tribunal on a point of law against the decision of an employment tribunal to give, or refuse, a declaration of unlawful exclusion or expulsion, or against the decision of an employment tribunal regarding compensation.

# PROTECTION FOR BUSINESSES

## Union labour only and union recognition requirements in contracts

Companies, local authorities and others are prohibited from imposing on contractors what have become known as **union labour only requirements** and **recognition requirements**. These requirements seek to make it a condition of (i) getting on to a tender list for a contract or (ii) obtaining a contract, that the contractor employs only trade union members or recognises, negotiates or consults with trade unions.

Such requirements - which are void and unlawful - would be for the purpose of preventing:

- non-union businesses obtaining contracts; or
- self-employed individuals who do not belong to a union, or a particular union, obtaining work under a contract for services.

The law:

- declares void union labour only and recognition requirements in contracts;
- makes it a breach of statutory duty to impose such requirements in the drawing up of tender lists and the awarding of contracts;
- removes the legal immunities from the organisation of industrial action to impose or enforce such requirements.

The relevant legal provisions are described in detail below.

## Requirements in commercial contracts

The law declares void any term or condition of a contract for the supply of goods or services which requires that:

- only persons who are (or are not) members of a trade union are to do work for the purposes of the contract; **or**
- the contractor, or prospective contractor, should recognise, negotiate or consult with one or more trade unions or officials of one or more trade unions.

This means that any terms or conditions in such contracts requiring a contractor to use only union <sup>6</sup> members in fulfilling the contract or to recognise negotiate or consult with trade unions or trade union officials, are unenforceable at law.

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<sup>6</sup> These provisions apply equally to requirements that a contractor must use only non-union labour and all references to union labour only requirements in this chapter should be interpreted accordingly.

An individual can be a "contractor". If someone, for example a freelance artist, works (or seeks work) under a contract to supply goods or services rather than a contract "of employment", any requirement in such a contract that he must be a union member will be unenforceable.

If such requirements are included in a contract the contractor is under no legal obligation to comply with them and cannot be sued for breach of contract if he obtains the contract by giving false information about relevant matters. The voiding of 'union labour only' and 'union recognition' clauses does not, however, invalidate the contract itself nor render void its other terms and conditions.

### **Drawing up tender lists and awarding contracts**

It is also a breach of statutory duty - and therefore unlawful - to exclude a person (that is a company or any other association, or an individual) from a tender list or to fail to award him a contract for the supply of goods or services or to take other similar actions on the grounds that:

- anyone (who may be the contractor himself if he is an individual) who is likely to do work for the purposes of the contract is or is not a union member;
- anyone employed or likely to be employed by a company for the purposes of that contract is or is not a union member; or
- the person does not recognise, negotiate or consult with trade unions or trade union officials.

The **full list** of actions made unlawful by these provisions is as follows:

- deciding not to enter into a contract with a particular person (who could, for example, be seeking freelance or self-employed work under a contract "for services");
- failing to include a person on a list of approved suppliers or a list of those from whose tenders may be invited;
- excluding a person from the group from whom tenders are invited;
- failing to allow a person to submit a tender for a proposed contract;
- terminating a contract for the supply of goods or services.

These provisions are concerned **only** with requirements about union labour and recognition. They do **not** prevent other requirements (for example, as to health and safety matters or terms and conditions of employment) being imposed on contractors, unless they amount to a requirement to use union labour only or to recognise, negotiate or consult with a trade union or trade union official.

### **Who can take legal action?**

Where an unlawful act as described above has taken place, legal proceedings may be taken against those responsible by a person who is:

- not awarded a contract;
- excluded from a tender list;
- not allowed to tender for a contract; **or**
- party to a contract which is terminated.

Anyone taking such legal action must be able to show that he has, for example, been excluded from a tender list or refused a contract "for services", because he (i) is not a union member, or (ii) employs non-union workers, or (iii) does not recognise, negotiate or consult with trade unions or trade union officials.

In the main, the right to take legal action, therefore, rests with those who are directly affected by the unlawful action. But the law also gives a right to take legal proceedings to any other person who may be adversely affected by the breach of statutory duty. This enables anyone else who suffers loss, or is likely to do so, as a result of the breach of duty to take legal action.

### **Legal remedies**

Anyone who suffers loss as a result of a breach of statutory duty, or is likely to do so, has a remedy in the courts. He may be able to seek a declaration from the court that a breach of statutory duty is taking place. If the unlawful act has caused him loss or damage, he may be able to sue for damages.

# Industrial action to promote closed shop practices or against non-union firms

## Closed shop practices

It is unlawful to organise, or threaten, industrial action (i.e. action which results in a breach of, or interference with, the performance of an employment contract) to establish or maintain a union closed shop practice.

Immunity is removed where the reason, **or one of the reasons**, for industrial action is:

- that an employer employs, has employed or might employ a person who is not a member of a trade union; or
- to pressurise an employer into discriminating against somebody on the grounds of non-membership of a trade union.

An employer discriminates against a person who is not a union member if his conduct in relation to people who are or may be employed by him is:

- different according to whether or not the people are or are not members; **and**
- more favourable to those people who are members.

## Non-union firms

In addition, there is no immunity for industrial action which is **either**:

- designed to exert pressure on an employer to persuade him to impose union labour only or recognition requirements on contractors; or
- taken by the employees of one employer and interferes with the supply (whether or not under a contract) of goods or services by a second employer, or can reasonably be expected to have that effect, where the reason, or one of the reasons, for the action is that the second employer does not recognise, negotiate with, or consult trade unions or trade union officials.

## Legal remedies

The effect of removing the legal immunities <sup>7</sup> in these cases is to give to those who are or may be damaged by the unlawful industrial action the right to seek an order against the trade union or individual who is organising it to restrain their unlawful acts, and to sue them for damages.

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<sup>7</sup> See also employment legislation document Industrial action and the law: a guide for employers, their customers and suppliers

## **APPENDIX 1**

### **What is an independent trade union?**

An independent trade union is one which is not under employer domination or control, and which is not liable to interference in any form tending towards such control. Employees do not have to be able to prove that the union to which they belong, or which they want to join, is independent before they can seek a remedy for infringement of their rights.

If the union's independence is questioned, the fact that it holds a certificate of independence issued by the Certification Officer will be proof that it is independent. If the union does not hold such a certificate, the proceedings to consider whether the employee's membership rights have been infringed will have to be delayed until the Certification Officer decides whether or not the union is independent.

## **APPENDIX 2**

### **Dismissal**

Dismissal, for the purpose of the law on unfair dismissal, is defined as the termination of employment by:

- the employer, with or without notice;
- the employee's resignation, with or without notice, where the employee has resigned because the employer by his conduct in breach of the contract of employment has shown an intention not to be bound by the contract;
- the expiry of a fixed-term contract without its renewal.

## APPENDIX 3

*People who cannot complain of unlawful refusal of employment or a service of an employment agency, or of unfair dismissal, if rights in the 'Access to employment' and 'Rights during employment' parts of this document are infringed*

### **Unlawful refusal of employment or a service of an employment agency**

The following people cannot complain to an employment tribunal over a refusal of employment or a service of an employment agency that infringes the rights set out in the *Access to employment* part of this document:

- those who are seeking self-employed work (for example, as independent contractors or freelance agents working under contracts for services);
- those seeking employment as members of the police, the armed forces and certain parts of the security and intelligence services;
- those seeking employment as the master or crew of a fishing vessel in which position they would be paid solely by a share in the profits or gross earnings of the vessel.

### **Unfair dismissal**

The following people cannot complain to an employment tribunal over a dismissal or detriment that infringes the rights set out in the *Rights during employment* part of this document:

- those who are not employees (for example, an independent contractor or freelance agent);
- members of the police, the armed forces and certain parts of the security and intelligence services;
- the master and crew of a fishing vessel who are paid solely by a share in the profits or gross earnings of the vessel.

**Note:** An employee is someone who has entered into, works under or worked under, a contract of employment. A contract of employment is a contract of service, or of apprenticeship. Its terms may be expressed in writing or orally or may be implied.

## APPENDIX 4

### Obtaining an order of interim relief

Employees who wish to apply for an order of interim relief must present an application for an order to an employment tribunal not later than seven days after their effective date of termination. If the complaint is one of unfair dismissal for trade union membership or activities, employees must also present not later than the end of the same period of seven days a written certificate signed by an authorised official of the independent trade union of which they were, or had proposed to become, a member stating that:

- on the date of the dismissal the employee was, or had proposed to become, a member of the union; **and**
- there appear to be reasonable grounds for supposing that the principal reason for the employee's dismissal was the one alleged in his or her complaint.

If on hearing an application for interim relief the employment tribunal considers it likely that it will uphold the employee's complaint at a full hearing, it will announce its findings and ask the employer, if present, whether he is willing, pending the final settlement of the complaint, to reinstate the employee, or if not, to re-engage the employee in another job with seniority, pension rights and other similar rights not less favourable than those which would have been applicable if the employee had not been dismissed.

If:

- the employer is willing to reinstate the employee, the tribunal will make an order to that effect;
- the employer is willing to re-engage the employee in another job and lays down the terms and conditions of the job, the tribunal will ask whether the employee is willing to accept this offer. If the employee is willing to do so, the tribunal will make an order to that effect. If the employee is not prepared to do so and the tribunal thinks the refusal reasonable, the tribunal will make an order for the continuation of the contract of employment;
- the employer fails to attend the tribunal's hearing of an application for an order of interim relief, or is unwilling to reinstate or re-engage the employee, the tribunal will make an order for the continuation of the employee's contract of employment.

