

*These notes refer to the Employment Bill [HL]
as introduced in the House of Lords on 6th December 2007 [HL Bill 13]*

EMPLOYMENT BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Employment Bill [HL] as introduced in the House of Lords on 6th December 2007. They have been prepared by the Department for Business, Enterprise and Regulatory Reform in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

SUMMARY

3. The purposes of the Employment Bill are summarised in the following paragraphs. They are diverse, repealing and amending existing legislation in the field of employment and trade union law.

4. In these notes the following abbreviations are used:

Abbreviation	Description
AIP1	Article 1 of the First Protocol (of the European Convention on Human Rights)
Acas	The Advisory, Conciliation and Arbitration Service
AMW	Agricultural Minimum Wage

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CFAVs	Cadet Force Adult Volunteers
EA 2002	The Employment Act 2002
EAA 1973	The Employment Agencies Act 1973
ECHR	European Convention on Human Rights
ERA 1996	The Employment Rights Act 1996
ETA 1996	The Employment Tribunals Act 1996
HMRC	HM Revenue & Customs
NMW	National Minimum Wage
NMWA 1998	The National Minimum Wage Act 1998
Statutory procedures	Statutory workplace dispute resolution procedures
TCEA 2007	The Tribunals, Courts and Enforcement Act 2007
TULRCA 1992	The Trade Union and Labour Relations (Consolidation) Act 1992

5. The Bill is comprised of 21 clauses and is divided as follows:

- Clauses 1-7 make certain changes to the law relating to dispute resolution in the workplace. In particular, they repeal the existing statutory dispute resolution procedures and related provisions about procedural unfairness in dismissal cases (clauses 1 and 2). They also: confer on employment tribunals discretionary powers to amend awards if parties have failed to comply with a relevant statutory code (clause 3); make changes to the law relating to conciliation by Acas (clauses 5 and 6); amend tribunals' powers by which they may reach a determination without a hearing (clause 4); and allow tribunals to award compensation for financial loss in certain types of monetary claim (clause 7).
- Clauses 8-12 make changes to the enforcement of the national minimum wage by: introducing a new method of calculating arrears (clause 8); replacing the current enforcement and penalty notices with a single notice of underpayment which will

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include a civil penalty against employers who have not complied with NMW requirements (clause 9); increasing the civil enforcement powers available to officers enforcing the NMW (clause 10); making offences under NMWA 1998 each way offences (capable of being tried in a Crown court – with a potentially unlimited fine – or a Magistrates’ court) (clause 11); and increasing the criminal investigative powers available to officers enforcing the NMW (clause 12).

- Clause 13 clarifies that CFAVs do not qualify for the NMW.
- Clauses 14-15 amend the employment agency standards enforcement regime by making offences under EAA 1973 each way offences and conferring additional inspection powers on the Employment Agency Standards Inspectorate. Clause 16 enables partners to be prosecuted where offences have been committed by partnerships in Scotland and any of the partners are culpable.
- Clause 17 amends trade union membership law to ensure UK compliance with the ruling of the European Court of Human Rights on *Aslef v UK*¹. The amendments enable trade unions to apply membership rules which prohibit individuals who belong or who have belonged to a particular political party from membership of the trade union.
- Clauses 18-21 deal with general details of the Bill.

BACKGROUND

6. The Employment Bill was included in the draft legislative programme announced by the Prime Minister on 11th July 2007.

7. Several different consultation documents were issued on the matters included in the Bill. These were:

- Clauses 1–7: “Resolving Disputes in the Workplace”² (21st March – 20th June 2007);
- Clauses 8-12 and 14-15: “National Minimum Wage and Employment Agency Standards Enforcement”³ (16th May – 8th August 2007);
- Clause 13: “National Minimum Wage and Voluntary Workers”⁴ (12th June – 4th September 2007);

¹ (Application no: 11002/05)

² <http://www.dti.gov.uk/consultations/page38508.html>

³ <http://www.dti.gov.uk/consultations/page39461.html>

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- Clause 17: “European Court of Human Rights Judgment in *Aslef v UK* – Implications for Trade Union Law”⁵ (16th May – 8th August 2007).
8. Government responses to these consultations were published on the following dates:
- Dispute resolution – not published at date of introduction
 - National Minimum Wage and Employment Agency Standards Enforcement – 6th December 2007
 - National Minimum Wage and Voluntary Workers – 27th November 2007
 - Trade union membership – 28th November 2007

TERRITORIAL EXTENT

9. The Bill consists of textual amendments to existing Acts. On the whole, the Acts in question extend to England and Wales and Scotland. But NMWA 1998, which is amended in clauses 8 to 13, also extends to Northern Ireland.

Scotland

10. The Bill does not legislate in devolved matters. Therefore, no Legislative Consent Motion is being sought for Scotland. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments which relate to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought.

Wales

11. The Bill does not legislate in relation to matters which are devolved in Wales. No provisions apply solely to Wales.

Northern Ireland

12. The Bill does not legislate in transferred matters. Therefore, no Legislative Consent Motion is being sought for Northern Ireland. If there are amendments which relate to

⁴ <http://www.dti.gov.uk/consultations/page39871.html>

⁵ <http://www.dti.gov.uk/consultations/page39463.html>

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transferred matters, the consent of the Northern Ireland Assembly will be sought. Clauses 8 – 13, which amend NMWA 1998, extend to Northern Ireland.

COMMENTARY ON CLAUSES

Dispute resolution

Clause 1: Repeal of the statutory dispute resolution procedures

13. EA 2002 provides, in sections 29 to 33 and Schedules 2 to 4, for statutory workplace dispute resolution procedures (referred to in these notes as “the statutory procedures”).

14. The statutory procedures came into force in October 2004 and introduced mandatory “three step processes” to be followed in the workplace to handle disciplinary and dismissal matters raised by an employer, and grievances raised by an employee. These processes each require written notification of the issue to the other side, a meeting between the two sides and (if appropriate) an appeal. Additionally, where the employer or the employee respectively fails to use the minimum statutory procedures, section 31 of EA 2002 requires a tribunal to increase or decrease any award.

15. When the procedures were introduced, the Government undertook to review their operation and impact after two years. The independent Gibbons Review [*“A Review of Employment Dispute Resolution in Great Britain”*, DTI March 2007 URN 07/755] concluded that the statutory procedures, whilst right in principle, have as a result of their mandatory nature led to unforeseen consequences. In particular, they have tended to lead to disputes becoming formalised, and lawyers getting involved, at an earlier stage than had previously been the case. Following a full public consultation [*“Resolving Disputes in the Workplace”*, DTI March 2007 URN 07/734], the Government has decided to repeal the statutory procedures.

16. Clause 1 therefore repeals sections 29 to 33 and Schedules 2 to 4 to EA 2002, thus removing the statutory procedures in their entirety.

Clause 2: Repeal of the provisions relating to procedural fairness in unfair dismissal

17. Prior to 2004, the handling of breaches of procedure in unfair dismissal cases was based on case law, and in particular the House of Lords judgment in *Polkey v A E Dayton Services Ltd* [1988] AC 344, which provided that a dismissal could be unfair purely on procedural grounds, but that in those circumstances the tribunal should reduce or eliminate the compensation payable (other than the basic award) to reflect the likelihood (if any) that the dismissal would have gone ahead anyway if the correct procedures had been followed. At the same time as the statutory procedures were introduced in 2004, a new section 98A was

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inserted into ERA 1996. This section provides that a dismissal where an employer does not complete the statutory procedures is automatically unfair. It also provides that a tribunal may disregard any failure by the employer to comply with other (e.g. workplace based) procedures in respect of the dismissal, if following such other procedures would have had no effect on the decision to dismiss.

18. Following the public consultation, the Government has decided to repeal section 98A of ERA 1996 in its entirety, so as to revert to the situation which applied previously based on the *Polkey* line of cases.

Clause 3: Effect of failure to comply with statutory codes of practice

19. As noted in paragraph 14, section 31 of EA 2002 requires a tribunal to increase or decrease any award where an employer or employee fails to follow the statutory procedures. Section 31 of EA 2002 is repealed by clause 1 of this Bill and clause 3 provides for an alternative mechanism to encourage compliance with a relevant statutory code on disciplinary, dismissal and grievance procedures issued under the power described below.

20. Under Part IV, chapter 3 of TULRCA 1992, the Secretary of State and Acas may issue Codes of Practice subject to Parliamentary approval (“statutory codes”). Section 207 of TULRCA 1992 provides that a statutory code, although not legally binding, is admissible in evidence and can be taken into account by the employment tribunal.

21. In order to provide an incentive to follow recommended practice, clause 3 contains provisions giving employment tribunals the discretion to vary awards for unreasonable failure to comply with any relevant statutory code, or provision within a statutory code, relating to workplace dispute resolution, by introducing a new section 207A and Schedule A2 to TULRCA 1992. The relevant statutory code in almost all cases will be the Acas Code of Practice on disciplinary and grievance procedures, which Acas is substantially revising for reissue at the time the Bill comes into force.

22. Subsection (2) of the new section 207A provides that the employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the relevant statutory code.

23. Subsection (3) of the new section 207A provides that the employment tribunal may, if it considers it just and equitable, decrease any award to an employee by no more than 25% if it appears to the tribunal that the employee has unreasonably failed to comply with the relevant statutory code.

24. Subsection (5) of new section 207A provides that, where an award is adjusted under new section 207A and also under section 38 of EA 2002 (which provides that awards for

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claims under specified jurisdictions must be adjusted where it transpires during those proceedings that the employer has failed to give the statutory statement of employment particulars) the adjustment under new section 207A is to be made first.

25. New Schedule A2 lists the jurisdictions covered by this clause. Together, the listed jurisdictions cover the overwhelming majority of tribunal claims. Subsection (6) of the new section 207A confers power on the Secretary of State to add or remove jurisdictions from the list.

Clause 4: Determination of proceedings without hearing

26. Section 7(3A) of ETA 1996, provides that employment tribunals can be authorised to decide cases without any hearing. Although this wide power was inserted into ETA 1996 in 2002, it has not been used. All cases in the employment tribunal are currently decided at a hearing before a full tribunal panel or a chairman sitting alone.

27. A new fast track procedure for settling monetary disputes in certain limited jurisdictions, on the basis of documentation submitted to the tribunal and without the need for tribunal hearings, will be introduced into the employment tribunal system. Cases within this fast track system will be decided without a hearing, provided that both parties agree. The introduction of the fast track system does not in general require primary legislation.

28. However, clause 4 inserts a new ETA 1996 section 7(3AA) to specify that employment tribunal procedure regulations providing for determination of cases without a hearing must also ensure either that all parties to the proceedings consent to the process or are given the opportunity to request a hearing instead of a decision based on documentation.

Clause 5: Conciliation before institution of proceedings

29. Clause 5 introduces amendments to section 18 of ETA 1996, which provides for the circumstances in which Acas is obliged, or has the power, to offer conciliation.

30. Section 18(3) of ETA 1996 applies to conciliation in situations where a person claims he could bring tribunal proceedings, but has not yet done so. It provides that where either the person who might bring proceedings, or the employer against whom proceedings might be brought, has requested conciliation, the Acas conciliation officer has a duty to attempt to conciliate a solution to the dispute (where both parties have made the request), or (if only one party has made the request) to do so where he considers there is a reasonable prospect of success. *Subsection (2)* amends section 18(3) to replace this obligation with a discretionary power to conciliate in a pre-tribunal dispute without requiring the Acas officer to justify the reasons for his decision whether or not to offer conciliation. The intention of the amendment is to enable Acas to prioritise cases where demand for conciliation exceeds resources

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available for conciliation and to relieve Acas of the obligation to offer conciliation in pre-tribunal disputes where there is no prospect of success.

31. Section 18(5) of ETA 1996 provides that, where a person claims that an unfair dismissal complaint under section 111 of ERA 1996 could be, but has not yet been, made, the Acas officer must act as if that claim had been made and, as provided for in section 18(4) of ERA 1996, as part of the conciliation exercise, attempt to secure reinstatement or reengagement (or additional compensation in lieu of such) for the dismissed employee. *Subsection (3)* repeals that duty and substitutes a discretionary power to seek such reinstatement or reengagement in pre-tribunal disputes.

Clause 6: Removal of fixed periods for conciliation

32. Section 18(2A) of ETA 1996 requires that, where employment tribunal rules provide for the postponement of employment tribunal hearings for a fixed period, to allow an opportunity for conciliation and settlement, Acas's duty to conciliate continues during that postponement but then becomes a discretionary power.

33. Section 19(2) of ETA 1996 requires additionally that, where employment tribunal rules provide as set out in section 18(2A), those rules must also provide that the parties be notified of the possibility that conciliation services may be withdrawn after expiry of the postponement.

34. The Gibbons Review of the statutory procedures, confirmed by the responses to the government consultation, concluded that disputes were not generally being settled earlier, despite the parties' knowledge that after the expiry of the fixed conciliation period Acas would not be required to offer assistance in reaching a settlement.

35. Clause 6 repeals section 18(2A) and 19(2) of ETA 1996, with the effect that Acas's duty to conciliate in employment tribunal cases subsists throughout the proceedings until the tribunal delivers a judgment.

Clause 7: Compensation for financial loss

36. Clause 7 amends ERA 1996 so as to give employment tribunals the power to order employers to compensate workers for any financial loss sustained as a result of unlawful deduction from wages or payments made to the employer in contravention of sections 15 and 21(1) of ERA 1996, or non-payment of redundancy awards.

Unlawful deduction from or unauthorised payment of wages

37. Sections 13(1) and 15(1) of ERA 1996 provide that an employer may not make unauthorised deductions from a worker's wages and sections 18(1) and 21(1) of ERA 1996

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provide for limits to authorised deductions. Where any of these provisions are contravened, a worker has a right to remedy by way of complaint to an employment tribunal under section 23(1) of ERA 1996.

38. Section 24 of ERA 1996 provides that, where an employment tribunal finds a complaint made under section 23(1) to be well founded, it will make a declaration to that effect and order the employer to pay or as the case may be repay the worker the amount of the deduction or payment.

39. The remedies available in sections 23 and 24 of ERA 1996 do not, however, extend to compensation for losses arising out of the non-payment or unauthorised deduction or payment, for example additional bank charges or interest charges. It is possible for a separate claim for such losses to be made by workers who are no longer employed by the defaulting employer, but only in the county court as part of an action for breach of contract by means of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994⁶ or its equivalent in Scotland⁷.

40. Clause 7 inserts a new provision into ERA 1996 (new section 24(2)) so as to empower employment tribunals to order an employer to make, in addition to the payment (or repayment) of the amount of the unauthorised deduction or payment, a compensatory payment to reflect any financial loss suffered by the worker as a result of the employer's default. The tribunal would calculate any such amount so as to be appropriate in all the circumstances. This is intended to enable workers to be fully compensated for their losses, and simplify the process of recovery for those whose employment relationship has ended by removing the need to make a separate county court claim.

Non-payment of redundancy payments

41. ERA 1996 section 163 provides that any questions relating to the right of an employee to a redundancy payment or the amount of the redundancy payment shall be referred to and determined by an employment tribunal.

42. Clause 7 introduces a new subsection (5) to section 163 of ERA 1996 which provides that, where an employment tribunal determines that an employee has a right to a redundancy payment, the tribunal can order that an additional payment be made to compensate the worker for any financial loss attributable to the non-payment of the redundancy payment.

⁶ (SI 1994/1623)

⁷ (SI 1994/1624)

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National Minimum Wage

43. Under NMWA 1998, all qualifying workers are entitled to be paid at least the rate of the NMW, as set by regulations made by the Secretary of State. Section 13 allows the Secretary of State to appoint officers for the purposes of NMWA 1998, including its enforcement provisions. The Secretary of State has appointed HMRC to enforce the NMW.

44. Over and above the NMW, there are minimum wage rates for agricultural workers. The relevant legislation is: for England and Wales, the Agricultural Wages Act 1948; for Scotland, the Agricultural Wages (Scotland) Act 1949; and for Northern Ireland, the Agricultural Wages (Regulation) (Northern Ireland) Order 1977. This legislation provides that the enforcement mechanisms in NMWA 1998 apply to the enforcement of the AMW under the respective statutes listed. Agricultural wages are devolved matters in respect of Scotland and Northern Ireland.

Clause 8: Arrears payable in cases of non-compliance

45. Clause 8 amends section 17 of NMWA 1998. The aim of this clause is to provide for increased remuneration, above that currently provided for, where arrears of the NMW have been outstanding over a period of time, to take account of the length of time that arrears have been owing.

46. *Subsections (1) to (5)* together amend section 17 NMWA 1998 so that the arrears to which a worker is entitled under that section are the higher of either: the arrears calculated in accordance with section 17(2); or the arrears calculated in accordance with the methodology set out in section 17(4). The formula in section 17(4) divides the amount of the underpayment (A) by the NMW rate applicable at the time of the underpayment (R1). The amount of the underpayment is thereby converted into a notional period of unpaid time. This notional period is then multiplied by the NMW rate applicable at the time the arrears are determined (R2). If the NMW rate at the time the arrears are determined is higher than the NMW rate in force at the time the worker was underpaid, the worker is entitled to a greater amount which takes account of the length of time he remained unremunerated.

47. Section 17(5) provides that where a worker is paid the full arrears he is entitled to in relation to a pay reference period, he has no further entitlement to arrears in relation to that pay reference period. Section 17(6) provides that where a worker is paid part of the arrears owed under section 17, his entitlement to arrears calculated under either section 17(2) or 17(4) (whichever is greater) shall be reduced by that sum.

48. *Subsection (6)* consequentially amends the formula above for the purposes of its application to the Agricultural Wages Act 1948 to give effect to the provisions as regards that Act.

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49. *Subsection (7)* provides that none of the amendments to section 17 shall have effect in respect of the Agricultural Wages (Regulations) (Northern Ireland) Order 1977 and the Agricultural Wages (Scotland) Act 1949. This is because, as noted above, agricultural wages are not matters which are reserved by the respective devolution settlements.

50. *Subsection (8)* provides that the new section 17 and its method of calculating arrears shall have effect notwithstanding that the worker's entitlement arose before the commencement date, where a worker has not received full additional remuneration before clause 8 comes into force.

Clause 9: Notices of underpayment

51. Sections 19 to 22F of NMWA 1998 contain provisions concerning the issuing of enforcement notices and penalty notices. At present, if an officer believes that a worker or workers have not been paid the national minimum wage by an employer, the officer may issue an enforcement notice requiring that the arrears be paid. If the employer fails to comply in full with the enforcement notice within 28 days of its service, the officer has the power to take further action by bringing a case against the employer through the courts or tribunals and/or issuing a penalty notice. A penalty notice imposes a financial penalty on the employer, related to the period of his failure to comply with the enforcement notice. An employer can appeal an enforcement notice and/or a penalty notice to an employment tribunal (in Northern Ireland, to an industrial tribunal).

52. *Subsection (1)* of clause 9 inserts new sections 19 to 19H into NMWA 1998 to replace the existing enforcement and penalty notices with a new single notice of underpayment.

Notices of underpayment: arrears

53. New section 19 provides that where an officer is of the opinion that an employer has not paid a worker the national minimum wage, or has not fully repaid any arrears which the worker is entitled to under section 17, the officer may serve a notice of underpayment requiring the employer to pay arrears to the worker or workers named in the notice (subsections (1) and (2)). The notice may require employers to pay arrears relating to periods occurring before the coming into force of new section 19, but arrears relating to periods more than six years before the date of service of the notice may not be included in the notice (subsections (6) and (7)).

Notices of underpayment: financial penalty

54. New section 19A provides that the notice of underpayment must require the employer to pay a financial penalty to the Secretary of State within 28 days of service of the notice (subsection (1)). The penalty is set at 50% of the total underpayment of the national minimum wage (subsection (2)), although underpayments occurring in periods before the

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commencement of the provision will not be taken into account when calculating the penalty (subsection (3)). The minimum penalty is £100 and the maximum penalty is £5,000 (subsections (4) and (5)). The Secretary of State has the power to change, by regulations, the percentage used to set the penalty, the minimum and the maximum penalty (subsection (6)). If the employer complies with the notice within 14 days of its service, the financial penalty is reduced by 50% (subsection (8)). The financial penalty shall be paid into the Consolidated Fund (subsection (9)).

Suspension of financial penalty

55. New section 19B allows for the notice of underpayment to contain a provision suspending the requirement to pay a penalty where proceedings have been instituted, or may be instituted against an employer in respect of a criminal offence under section 31. Where a notice contains such a provision, an officer may serve a notice on an employer terminating the suspension where criminal proceedings have either concluded or will not be instituted (subsection (4)). Where an employer has been convicted of an offence under section 31, an officer must serve a notice on the employer withdrawing the financial penalty (subsection (6)).

Notices of underpayment: appeals

56. New section 19C provides that an employer may appeal to an employment tribunal (an industrial tribunal in Northern Ireland) against a notice of underpayment. An employer may successfully appeal on one or more of three main grounds (subsection (1)). The first is that, at the date set out in the notice, no arrears were owing to any worker(s) named in the notice - i.e. that the employer was compliant with the Act (subsection (4)). If the employment tribunal allows an appeal under this ground it must rescind the notice (subsection (7)). The second is that any requirement in the notice to pay a sum to a worker was incorrect; either because no sum was due to that particular worker or that the sum specified in the notice was incorrect (subsection (5)). The third is that the amount of the penalty specified in the notice is incorrect (subsection (6)). If the employment tribunal allows an appeal under either the second or third ground it must rectify the notice, in which case the notice has effect as rectified by the tribunal (subsection (8)).

Non-compliance with notice of underpayment: recovery of arrears

57. New section 19D reproduces the current provisions in section 20 of NMWA 1998 which give officers the power to take civil action to recover arrears on behalf of a worker or workers.

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Non-compliance with notice of underpayment: recovery of penalty

58. New section 19E reproduces the provision currently in section 21(5) of NMWA 1998.

Withdrawal of notice of underpayment

59. New section 19F allows an officer to withdraw a notice of underpayment by serving notice of withdrawal on the employer (subsection (1)). Where a notice is withdrawn and no replacement notice is issued, any penalty which the employer has already paid in accordance with the withdrawn notice must be repaid with interest (subsections (2)(a) and (4)). Any appeal against the withdrawn notice will be dismissed and an officer may not start subsequent proceedings to recover arrears on behalf of the worker(s) on the basis of the withdrawn notice, although any proceedings started before the notice was withdrawn may be continued (subsections (2)(b), (c) and (d)).

Replacement of notice of underpayment

60. New section 19G allows an officer to issue a replacement notice at the same time that a notice is withdrawn (subsection (1)). The replacement notice cannot include workers who were not contained in the withdrawn notice (subsection (2)). Contravention of this requirement is a ground for appeal by an employer against the notice (subsection (3)). The replacement notice may include arrears incurred after service of the withdrawn notice but before service of the replacement notice (subsection (4)). When a replacement notice is issued, the six years limitation period for including arrears in new section 19(7) is calculated from the date of service of the first notice rather than the date of service of the replacement notice (subsection (5)). The replacement notice must set out the material differences from the withdrawn notice (subsection (6)). An officer will only be able to issue one replacement notice (subsection (8)).

Effect of replacement notice of underpayment

61. New section 19H sets out the effects of issuing a replacement notice. Where a replacement notice is issued, any appeal against the withdrawn notice continues to have effect as if it were against the replacement notice. If an employer appeals against the replacement notice he must withdraw any appeal against the withdrawn notice (subsection (2)). An officer may not start subsequent proceedings to recover arrears on behalf of the worker(s) on the basis of the withdrawn notice but any proceedings started before the notice was withdrawn may be continued (subsection (3)). Any sums already paid by the employer as a penalty in relation to the withdrawn notice is taken into account when assessing compliance with the penalty contained in the replacement notice (subsection (4)(a)). If the penalty which has already been paid by the employer is greater than the penalty in the replacement notice, the balance must be repaid to the employer with interest (subsections (4)(b) and (5)).

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62. *Subsection (2)* contains a transitional provision in respect of the amendments contained in new section 19E(a) to NMWA 1998. The section in NMWA 1998 which section 19E replaces has been prospectively amended by TCEA 2007, the relevant provisions of which are not yet in force. This transitional provision allows the current wording to operate until the relevant provisions of TCEA 2007 come into force, upon which time the new wording as provided by TCEA 2007 will operate.

63. *Subsection (3)* amends section 51 of NMWA 1998 to provide that regulations under new section 19A(6) are subject to the affirmative resolution procedure.

64. *Subsection (4)* consequentially amends section 4(3)(cd) of ETA 1996, so that the provision that a Chairman alone shall hear an appeal against an enforcement or a penalty notice under section 19 and 22 of NMWA 1998 respectively, is applied instead to an appeal against a notice of underpayment.

65. Section 44 of the Commissioners for Revenue and Customs Act 2005 provides that the Commissioners shall pay money received in the exercise of their functions into the Consolidated Fund, subject to certain exceptions. One exception, in subsection (2)(f), relates to penalties under section 21 NMWA 1998. *Subsection (5)* repeals subsection (2)(f) to allow the Commissioners for Revenue and Customs to pay financial penalties obtained under new section 19A into the Consolidated Fund.

66. *Subsection (6)* provides for consequential amendments to the Agricultural Wages Act 1948.

67. *Subsection (7)* provides that the amendments in clause 9 do not have effect in relation to the enforcement of the AMW in Scotland and Northern Ireland.

Clause 10: Powers of officers to take copies of records

68. Clause 10 provides that officers have the power to remove records required to be kept or preserved under NMWA 1998 in order to take copies of those records.

69. *Subsection (2)* enables an officer to copy a complete record without having first to determine whether all of the record is material.

70. *Subsection (3)* provides that, where records are produced, an officer has the power to remove them for the purpose of making copies. Where an officer removes records for this purpose, they must be returned as soon as reasonably practicable.

71. *Subsection (4)* provides that the amendments in clause 10 do not have effect in relation to the AMW in Scotland and Northern Ireland.

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Clause 11: Penalties for offences

72. *Subsection (1)* of clause 11 provides that offences under section 31 of NMWA 1998 may be triable as indictable offences. At present, these offences are only triable as summary offences; in future they will be triable either way. *Subsection (2)* contains consequential repeals.

73. *Subsection (3)* provides that the amendments in clause 11 do not have effect in relation to the AMW in Scotland and Northern Ireland.

Clause 12: Powers to investigate criminal offences

74. Clause 12 applies investigation powers, and their accompanying safeguards, to investigations by HMRC of criminal offences under NMWA 1998.

75. *Subsection (1)* applies provisions of the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence (Northern Ireland) Order 1989 to investigations conducted by HMRC in relation to criminal offences under section 31 of NMWA 1998. These provisions will allow HMRC officers, for example, to apply for production orders and search warrants or to arrest a person suspected of committing an offence, in the same circumstances as these powers would be used in investigating other offences for which HMRC is the responsible investigating body.

76. *Subsection (2)* applies HMRC's normal Scottish criminal investigation powers to investigations of NMW criminal offences in Scotland.

Clause 13: Cadet Force Adult Volunteers

77. Clause 13 explicitly excludes CFAVs from qualifying for the NMW.

78. A CFAV is a member of the Cadet Forces who is assisting in the delivery of the Ministry of Defence sponsored cadet force programme. The clause does not apply to those performing work for the Cadet Forces in the course of Crown employment, including employment by a Reserve Forces and Cadet Association set up under the Reserve Forces Act 1996. It does not affect any entitlement CFAVs may have to the NMW outside of their voluntary activities as a CFAV.

79. The Cadet Forces comprise of the Combined Cadet Force, Sea Cadet Corps, Army Cadet Force and Air Training Corps. Each is a separate national youth organisation supported by its own charity.

80. The Cadet Forces do not form part of the Armed Forces or the Reserve Forces, although some CFAVs may be serving members of the Armed Forces or the Reserve Forces.

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Employment agencies

Clause 14: Penalties for offences under the Employment Agencies Act 1973

81. Currently all offences under EAA 1973 are summary only offences and therefore triable only in the magistrates' court. Clause 14 provides that certain offences committed under EAA 1973 shall be triable either on indictment in the Crown Court or summarily by the magistrates' court. The effect of this clause is to increase the penalty available to the court where the offence results in conviction on indictment. Where the offences are tried in the Crown Court there is no limit on the fine that can be imposed.

82. This clause also amends the maximum fine that can be imposed by a magistrates' court on conviction from a fine not exceeding level 5 on the standard scale to a fine not exceeding "the statutory maximum". At present, the statutory maximum fine is £5,000 in England, Wales and Scotland but from 10th December 2007 it will be increased to £10,000 for offences tried in Scotland, but will remain at £5,000 in England and Wales.

83. The offences that will become triable either way under this clause are:

- failure to comply with a prohibition order under section 3B of EAA 1973;
- contravention of or failure to comply with any regulations made under EAA 1973. Currently the regulations made under EAA 1973 are contained in the Conduct of Employment Agencies and Employment Businesses Regulations 2003⁸; and
- requesting or receiving (either directly or indirectly) a fee for providing work-finding services under section 6 of EAA 1973 (except where this is permitted under Conduct of Employment Agencies and Employment Businesses Regulations 2003).

Clause 15: Enforcement powers for inspection under the Employment Agencies Act 1973

84. Clause 15 strengthens the powers of inspection for inspectors appointed under section 9 of EAA 1973.

85. *Subsection (2)* extends the powers of inspection available under section 9(1)(b) to enable an inspector of the Employment Agency Standards Inspectorate specifically to request financial records and documents that are held on the inspected premises which he may reasonably require to inspect to ensure compliance with EAA 1973. This is in addition to the

⁸ (SI 2003/3319)

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as introduced in the House of Lords on 6th December 2007 [HL Bill 13]*

power already contained in EAA 1973 permitting an inspector to inspect any records or documents kept as required by EAA 1973 or the Conduct of Employment Agencies and Employment Businesses Regulations 2003.

86. *Subsection (4)* substitutes a new power. Currently under section 9(1A) of EAA 1973 an inspector may require any person on the inspected premises to inform him where a record, document or information is kept and to make arrangements, where reasonably practicable, for that record, document or information to be inspected or furnished to the inspector at the premises. This power is replaced by a new power enabling an inspector by notice in writing to require the person carrying on the employment agency or employment business to furnish him with a record, document or information at such time and place as the inspector may specify.

87. The effect of this amendment is to place the requirement to furnish the required record, document or information on the person carrying on the employment agency or employment business rather than on the person present on the premises at the time of the inspection (who may not have access to the record or document or sufficient knowledge to supply the information). Enabling the inspector to specify the place at which the person carrying on the business must furnish the record, document or information will mean that the inspector will not need to revisit the inspected premises but can inspect the record, document or information at a convenient place of his choice.

88. *Subsection (5)* inserts two new powers into section 9 of EAA 1973 by inserting new subsections (1AA), (1AB) and (1AC). Where a person carrying on an employment agency or employment business fails to furnish the inspector with a record, document or information specified in a written notice, and where the inspector has reasonable cause to believe that the record, document or information is kept by a person concerned with, or formerly concerned with, the carrying on of the employment agency or employment business an inspector may by notice in writing require that person to furnish the record, document or information at such time and place as he may specify.

89. Additionally, where the record, document or information is kept by a bank (as defined by the Financial Services and Markets Act 2000) an inspector may by notice in writing require the bank to furnish the record, document or information at such time and place as he may specify.

90. *Subsection (6)* taken together with *subsection (3)* replaces the power to take copies of records and documents inspected pursuant to EAA 1973 with a power to take copies of records and documents inspected pursuant to EAA 1973 and copies of financial records and financial documents inspected in order to ascertain whether the provisions of EAA 1973 have been complied with. This wider power reflects the wider range of records and documents that an inspector may inspect. Under this wider power an inspector may remove any record or document from the premises where it is inspected in order to take a copy of it but it must be returned as soon as is reasonably practical. This will enable an inspector to take away a record

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or document for the purpose of taking a copy before returning it rather than, as is currently the case, relying on copying facilities at the business premises.

91. *Subsection (8)* creates the offence of obstructing an inspector in the exercise of his powers under section 9 or of contravening a requirement under section 9. A person guilty of the offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale. This subsection amends section 9(3) and extends the offence to the new powers granted by clause 15.

Clause 16: Offences by partnerships in Scotland under the Employment Agencies Act 1973

92. Clause 16 provides that where an offence under EAA 1973 is committed by a partnership in Scotland, and where it is proved that the offence concerned has been committed with the consent or connivance of a partner, or is attributable to the neglect of a partner, then the partner as well as the partnership shall be guilty of the offence and prosecuted.

93. This reflects a difference between English and Scottish law. Under Scottish law a partnership is a separate legal entity, distinct from the partners who make up the partnership. This is not the case under English law.

94. Clause 16 therefore enables any partners who have consented to or connived at the offence, or whose neglect has caused the offence, to be prosecuted as well as the partnership.

95. No provision was made in EAA 1973 for Scottish partnerships as until the late 1980s specific provision tended not to be made in legislation for offences committed by Scottish partnerships as it was considered that none was necessary.

Trade union membership

Clause 17: Exclusion or expulsion from trade union for membership of political party

96. Section 174 of TULRCA 1992 provides a right for individuals not to be excluded or expelled from membership of a trade union, unless the exclusion or expulsion is for a reason specified by the section. Section 174(2)(d) makes it unlawful for a trade union to expel or exclude a person on the sole or main grounds of "protected conduct" by that person. Sections 174(4A) and 174(4B) define "protected conduct" as membership or former membership of a political party. Section 176 of TULRCA 1992 provides remedies where the employment tribunal finds that a trade union has breached this right. Clause 17 amends sections 174 and 176 in response to the judgment made on 27th February 2007 by the European Court of Human Rights in the case of *Aslef v UK* (Application no.11002/05).

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97. *Subsection (2)* of clause 17 amends section 174 of TULRCA 1992 by removing all reference to "protected conduct". The effect is to enable trade unions to apply membership rules which prohibit individuals who belong or who have belonged to a particular political party from membership of the trade union. In the *Aslef v UK* case, the trade union had a policy to prohibit members of the British National Party from belonging to its union. An Employment Tribunal upheld a complaint under section 174 by a union member who was expelled for being a member of the British National Party. The union then complained to the European Court of Human Rights, which found that, in being prevented from expelling a member on grounds of political party membership, the union's Convention right of association had been infringed.

98. *Subsection (3)* of clause 17 amends section 176 of TULRCA 1992 by removing those parts of the section which provide specific remedies for an exclusion or an expulsion on the grounds of "protected conduct".

General

Clause 18: Repeals

99. The repeals Schedule lists those repeals which are explicitly mentioned in the clauses. It also contains some consequential repeals, in particular, of legislation which inserts provisions which are themselves being repealed. The extent of the repeals is described at relevant points of the main commentary.

Clause 20: Commencement

100. Clause 20 provides for the commencement of different provisions at different times. Clauses 10 and 13 relating to the NMW (powers of officers to take copies of records and CFAVs) and clause 17 relating to trade union membership will come into force two months after Royal Assent. Clauses 1 to 7 relating to dispute resolution and clauses 8, 9, 11 and 12 relating to the NMW (arrears payable in cases of non-compliance, notices of underpayment, penalties for offences and powers to investigate criminal offences) will come into force on such a date as the Secretary of State may by order appoint. Clauses 14 to 16 relating to employment agencies will come into force on 1st October 2008 unless the Bill is not passed until after that date, in which case they will come into force on 6th April 2009.

EFFECTS OF THE BILL ON PUBLIC EXPENDITURE AND PUBLIC SERVICE MANPOWER

101. The Bill should have no significant effects on central government expenditure or public service manpower. Further non-legislative reforms are being made to workplace dispute resolution, involving changes to the provision on advice and conciliation services.

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SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

102. Impact Assessments on enforcement of the NMW and Employment Agency Standards, CFAVs and trade union membership have been published and take account of the major costs and benefits of the proposed legislation in those specific policy areas. We do not consider that any significant costs are thereby imposed on business. The provisions on enforcement of the NMW and Employment Agency Standards do not change the requirements for compliance with the relevant legislation. Compliant employers and agencies will therefore not incur additional costs. The provisions on CFAVs enable the Cadet Forces to continue to operate in their current form and only affect the Cadet Forces and the Ministry of Defence. The provisions on trade union membership will impact on unions and their members and will have no significant effect on business. A further Impact Assessment setting out the costs and benefits of the Dispute Resolution provisions will be published in due course alongside the Government's response to consultation on that issue. The Impact Assessments can be accessed on the Department for Business, Enterprise and Regulatory Reform's website:

<http://www.berr.gov.uk/employment/employment-legislation/employment-bill/index.html>

EUROPEAN CONVENTION ON HUMAN RIGHTS

103. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the ECHR (as defined by section 1 of that Act). The Minister of State for Trade and Investment, Lord Jones of Birmingham has made the following statement:

“In my view the provisions of the Employment Bill [HL] are compatible with the Convention rights.”

104. Clause 4 provides for changes to sections 7(3A) and 7(3AA) of ETA 1996 to prepare for the introduction of a fast track procedure for determining certain employment tribunal proceedings without an oral hearing (see paragraphs 26 to 28). The Government considers that this clause is likely to engage and be compatible with Article 6 ECHR because the parties will have an opportunity to request an oral hearing. Moreover, rights under this Article, including the right to a hearing, can generally be waived unless there is compulsion.

105. Clause 5 makes changes to section 18 of ETA 1996, which sets out the duties and powers of Acas to conciliate through its conciliation officers in employment disputes. This clause replaces Acas's duty to conciliate in certain circumstances with a wide discretionary power (see paragraphs 29 to 31). The Government considers that Article 6 is unlikely to be engaged because the exercise of this power would not amount to a determination of a dispute over recognised rights. However, even if this Article is engaged, the Government considers that this clause is likely to comply with its civil limb. This is because of the availability of

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judicial review, which would provide an appropriate safeguard in this type of situation in ensuring compliance with Article 6.

106. Clause 8 makes changes to section 17 of NMWA 1998. This clause changes the basis of a worker's entitlement to arrears of the NMW. Arrears will be the higher of either: the difference between the remuneration received by the worker and the NMW rate which was in force at the time that he should have been paid; or the amount of the underpayment divided by the NMW rate applicable at the time of the underpayment, multiplied by the NMW rate applicable at the time the arrears are determined (see paragraphs 45 to 50). It is probable that clause 8 will be within the ambit of A1P1, to the extent that the legal requirement to pay a minimum wage establishes a minimum which is more than the employer would otherwise have paid, therefore depriving him of his assets. In the Government's view, this interference is likely to be compatible with A1P1 because it is in the public interest, striking a fair balance between the competing interests. The measure is also proportionate, in that there is interference with the employer's possessions only to the extent of taking into account the degree of his non-compliance with the legislation. Clause 8 operates with retrospective effect. However, this does not engage Article 7 ECHR because it does not concern a criminal charge.

107. Clause 9 provides for changes to NMWA 1998, replacing the existing enforcement and penalty notices with a new single notice of underpayment. The notice must require the employer to pay a financial penalty (see paragraphs 51 to 67). The penalty might engage A1P1 rights. The Government considers that it is likely to be compatible because it is in the public interest, striking a fair balance between competing rights primarily in protecting vulnerable workers and as a corollary in ensuring that non-compliant employers do not obtain a competitive advantage over compliant ones. The penalty is directly proportionate to the level of an employer's non-compliance, to the extent that it is calculated by reference to a proportion (set at 50%) of the amount of arrears owed. Furthermore, once calculated, the penalty may be adjusted to be no less than £100 and no more than £5000, in order to ensure that the penalty is meaningful and not excessive. The Government also considers that the financial penalty should be regarded as imposing a civil obligation for the purposes of Article 6. The Government considers that this clause is compatible with Article 6, given that it provides for a right of appeal to an employment tribunal.

108. Clause 10 provides that officers appointed under NMWA 1998 have the power to remove records required to be kept or preserved under that legislation in order to take copies of them (see paragraphs 68 to 71). It is likely that A1P1 rights will be engaged, since this clause will deprive employers of their possessions, albeit temporarily. However, in the Government's view, this clause is justified in the public interest in that the copying away from the premises will be used for the prevention or detection of a crime and for the protection of the rights of others. The power strikes a fair balance between the competing interests, as it is restricted to those records required to be kept or preserved under the legislation, and is limited in duration, as the records must be returned by officers as soon as reasonably practicable.

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109. Clause 11 makes changes to section 31 of NMWA 1998 so that the summary offences will become triable either way. In the Government's view, this clause does not engage any convention rights, as does not have retrospective effect.

110. Clause 12 makes changes to the Finance Act 2007 in order to apply investigation powers, and accompanying safeguards, to investigations by HMRC of criminal offences under NMWA 1998 (see paragraphs 74 to 76). These powers engage Articles 5 and 8. However, the Government considers these powers are compatible with these Articles because the powers are necessary and proportionate for the purpose of deterring and punishing the most serious cases of non-compliance under NMWA 1998. Arrest powers, and subsequent detention, will be in accordance with the Police and Criminal Evidence Act 1984 and its Codes of Practice, ensuring that the various requirements of Article 5 are complied with at all times. The Government considers that the powers to search and require the production of documentation are necessary and proportionate in a democratic society.

111. Clause 14 makes changes to EAA 1973 so that certain summary offences become triable either way. In the Government's view, this clause does not engage any convention rights, as it does not have retrospective effect.

112. Clause 15 makes changes to EAA 1973 in order to strengthen the powers of inspection for inspectors appointed under section 9 of EAA 1973 (see paragraphs 84 to 91). The Government considers that this clause engages and is compatible with Article 8 because the powers serve the legitimate aims of protecting the rights and freedom of others and helping to prevent crime; they are proportionate, since they are limited in scope, and subject to the existing legislative framework, which includes meeting the requirements of the Data Protection Act 1998.

113. A1P1 rights may be engaged in that clause 15 allows records and documents inspected by inspectors under EAA 1973 to be removed in order to be copied (see paragraph 90). However, the Government considers such interference to be justified because of the need to protect the general public and vulnerable workers through the use of this power, which has a light touch and temporary impact on property rights, as these records and documents are circumscribed and must be returned as soon as reasonably practicable.

114. Clause 15 makes changes to the criminal offences under section 9 of EAA 1973. In the Government's view, these criminal offences engage and are compatible with Article 6 rights, since they fall into a category of offences which do not give rise to potential interference with a person's right to silence and right against self-incrimination.

115. The Government has also considered that the new powers of inspection under clause 15 engages Article 6. However, the Government considers them to be compatible with this Article because EAA 1973 does not compel a person to make a statement under compulsion and ensures that evidence regarding statements is admissible in accordance with recognised procedural safeguards.

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116. Clause 17 makes changes to sections 174 and 176 of TULRCA 1992, to give effect to the European Court of Human Rights Judgment, *Aslef v The United Kingdom*. The Government considers that clause 17 complies with this Judgment and is therefore compatible with Articles 10 and 11 of the ECHR.

EMPLOYMENT BILL [HL]

EXPLANATORY NOTES

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[HL Bill 13]*

*Ordered to be Printed,
6th December 2007*

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LONDON: THE STATIONERY OFFICE

Printed in the United Kingdom by
The Stationery Office Limited

£x.00