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20 June 2003

Clerk to Panel on
Administration of Justice
and Legal Services
(Attn: Mrs Percy Ma)
Legislative Council Secretariat
3/F, Citibank Tower
3 Garden Road
HONG KONG

Dear Mrs Ma,

AJLS Panel

At the meeting of the Panel on 20 June the Administration undertook to provide copies of three pieces of UK legislation which made provision for tribunal hearings to take place in the absence of an applicant and his representative and ancillary matters. For the sake of brevity I enclose only the relevant provisions of –

- (a) the Employment Relations Act 1999
(see Schedule 8 paragraphs 3(5) and (7) in particular)
- (b) the Race Relations (Amendment) Act 2000
(see section 8 (New section 67A(1)(a) and (2))
- (c) the Regulation of Investigatory Powers Act 2000
(see section 69(4) and (6) in particular)

I have included the explanatory notes in relation to the first two items of legislation as they may assist understanding of the provisions. I was not able to obtain such a note for the third item.

Yours faithfully,

(James O'Neil)
Deputy Solicitor General
(Constitutional)

c.c. Clerk to Bills Committee on
National Security (Legislative
Provisions) Bill
(Attn: Mr Raymond Lam)

Encl.

#68164



Employment Relations Act 1999

1999 Chapter c.26

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Employment Relations Act 1999

1999 Chapter c.26 - *continued*

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SCHEDULE 8

NATIONAL SECURITY

1. The following shall be substituted for section 193 of the Employment Rights Act 1996 (national security)-

"National security. 193. Part IVA and section 47B of this Act do not apply in relation to employment for the purposes of-

- (a) the Security Service,
- (b) the Secret Intelligence Service, or
- (c) the Government Communications Headquarters."

2. Section 4(7) of the Employment Tribunals Act 1996 (composition of tribunal: national security) shall cease to have effect.

3. The following shall be substituted for section 10 of that Act (national security, &c.)-

"National security. 10. - (1) If on a complaint under-

- (a) section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (detriment: trade union membership), or
- (b) section 111 of the Employment Rights Act 1996 (unfair dismissal),

it is shown that the action complained of was taken for the purpose of safeguarding national security, the employment tribunal shall dismiss the complaint.

(2) Employment tribunal procedure regulations may make provision about the composition of the tribunal (including provision disapplying or modifying section 4) for the purposes of proceedings in relation to which-

- (a) a direction is given under subsection (3), or
- (b) an order is made under subsection (4).

(3) A direction may be given under this subsection by

a Minister of the Crown if-

(a) it relates to particular Crown employment proceedings, and

(b) the Minister considers it expedient in the interests of national security.

(4) An order may be made under this subsection by the President or a Regional Chairman in relation to particular proceedings if he considers it expedient in the interests of national security.

(5) Employment tribunal procedure regulations may make provision enabling a Minister of the Crown, if he considers it expedient in the interests of national security-

(a) to direct a tribunal to sit in private for all or part of particular Crown employment proceedings;

(b) to direct a tribunal to exclude the applicant from all or part of particular Crown employment proceedings;

(c) to direct a tribunal to exclude the applicant's representatives from all or part of particular Crown employment proceedings;

(d) to direct a tribunal to take steps to conceal the identity of a particular witness in particular Crown employment proceedings;

(e) to direct a tribunal to take steps to keep secret all or part of the reasons for its decision in particular Crown employment proceedings.

(6) Employment tribunal procedure regulations may enable a tribunal, if it considers it expedient in the interests of national security, to do anything of a kind which a tribunal can be required to do by direction under subsection (5)(a) to (e).

(7) In relation to cases where a person has been excluded by virtue of subsection (5)(b) or (c) or (6), employment tribunal procedure regulations may make provision-

(a) for the appointment by the Attorney General, or by the Advocate General for Scotland, of a person to represent the interests of the applicant;

(b) about the publication and registration of reasons for the tribunal's decision;

(c) permitting an excluded person to make a statement to the tribunal before the commencement of the proceedings, or the part of the proceedings, from which he is excluded.

(8) Proceedings are Crown employment proceedings for the purposes of this section if the employment to which the complaint relates-

- (a) is Crown employment, or
- (b) is connected with the performance of functions on behalf of the Crown.

(9) The reference in subsection (4) to the President or a Regional Chairman is to a person appointed in accordance with regulations under section 1(1) as-

- (a) a Regional Chairman,
- (b) President of the Employment Tribunals (England and Wales), or
- (c) President of the Employment Tribunals (Scotland).

Confidential information.

10A. - (1) Employment tribunal procedure regulations may enable an employment tribunal to sit in private for the purpose of hearing evidence from any person which in the opinion of the tribunal is likely to consist of-

- (a) information which he could not disclose without contravening a prohibition imposed by or by virtue of any enactment,
- (b) information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person, or
- (c) information the disclosure of which would, for reasons other than its effect on negotiations with respect to any of the matters mentioned in section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992, cause substantial injury to any undertaking of his or in which he works.

(2) The reference in subsection (1)(c) to any undertaking of a person or in which he works shall be construed-

Commissioners of Inland Revenue to an officer acting for the purposes of any of the agricultural wages legislation.

(2) In this section-

"revenue official" means an officer of the Commissioners of Inland Revenue appointed under section 4 of the Inland Revenue Regulation Act 1890 (appointment of collectors, officers and other persons), and

"the agricultural wages legislation" has the same meaning as in section 16 of the National Minimum Wage Act 1998 (agricultural wages officers).

Dismissal of school staff.

40. - (1) In paragraph 27(3)(b) of Schedule 16 to the School Standards and Framework Act 1998 (dismissal of staff: representations and appeal) for "for a period of two years or more (within the meaning of the Employment Rights Act 1996)" there shall be substituted ", within the meaning of the Employment Rights Act 1996, for a period at least as long as the period for the time being specified in section 108(1) of that Act (unfair dismissal: qualifying period)".

(2) In paragraph 24(4)(b) of Schedule 17 to the School Standards and Framework Act 1998 (dismissal of staff: representations and appeal) for "for a period of two years or more (within the meaning of the Employment Rights Act 1996)" there shall be substituted ", within the meaning of the Employment Rights Act 1996, for a period at least as long as the period for the time being specified in section 108(1) of that Act (unfair dismissal: qualifying period)".

National security.

41. Schedule 8 shall have effect.

General

Orders and regulations.

42. - (1) Any power to make an order or regulations under this Act shall be exercised by statutory instrument.

(2) No order or regulations shall be made under section 3, 17, 19 or 23 unless a draft has been laid before, and approved by resolution of, each House of Parliament.

Finance.

43. There shall be paid out of money provided by Parliament-

(a) any increase attributable to this Act in the sums so payable under any other enactment;

(b) any other expenditure of the Secretary of State under this Act.

Repeals.

44. The provisions mentioned in Schedule 9 are repealed (or



Explanatory Notes to Employment Relations Act 1999

1999 Chapter 26

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Section 41 and Schedule 8: National security

313. Crown servants (including staff of the security and intelligence agencies) may be excluded by Ministers of the Crown from certain rights conferred by employment legislation on grounds of national security. *Section 41* gives effect to Schedule 8, which will remove some of these powers, allowing - in particular - staff of the security and intelligence agencies to present complaints about breaches of employment legislation to employment tribunals in as similar a way as possible to other employees.

314. *Paragraph 1* amends section 193 of the 1996 Act removing the power of Ministers to exclude certain persons in Crown employment from many of the rights under that Act (with the exception of those rights created by the Public Interest Disclosure Act 1998).

315. *Paragraph 2* repeals section 4(7) of 1996 Act which provides that a Minister of the Crown may direct that the proceedings of an employment tribunal must be heard and determined by the Employment Tribunal President alone.

316. *Paragraph 3* substitutes a new section 10 into the Employment Tribunals Act 1996. The new section retains the national security defence to unfair dismissal complaints and complaints under section 146 of the 1992 Act. However, it removes the power of Ministers to conclusively certify that an act was done on grounds of national security. It also puts in place new safeguards to protect the interests of national security. Employment tribunal procedure regulations may enable Ministers of the Crown to direct, in the interests of national security, that Crown employment proceedings are heard by specially constituted tribunals. Ministers may direct that special procedures (as provided in the regulations) should apply, for example, excluding an applicant or his representative from all or part of proceedings, concealing the identity of a witness, or keeping secret all or parts of the reasons for a decision. Employment tribunals will also generally be able to order that these arrangements apply in cases involving national security where a direction has not been made by a Minister. The procedure regulations may make provision, where an applicant and his representative are excluded, for appointing a special advocate to represent the applicant's interests and for the applicant or his representative to make a statement of his case before they are excluded.

317. New section 10A re-enacts the present section 10(2) and (3) of the Employment Tribunals Act 1996, which allow the tribunal to sit in private in certain circumstances.

318. Where a tribunal has been directed to conceal the identity of a witness or to keep secret all or part of the reasons for its decisions, new section 10B makes it an offence to publish anything likely to lead to the identification of the witness or the secret part of the reasons for its decision and sets out the penalty for such an offence.

319. *Paragraph 4* provides that section 28(5) of the Employment Tribunals Act 1996 (which provides that a Minister of the Crown may direct that proceedings be heard and determined by the Employment Appeal Tribunal President alone) shall

cease to have effect. *Paragraph 5* provides (in a way similar to the provision made for employment tribunals), that a Minister of the Crown may direct that appeals in national security cases be heard by a specially constituted Appeal Tribunal and that special procedures are to be used, and for the appointment of a special advocate to represent the interests of an excluded person.

320. *Paragraphs 6 and 7* remove the power of Ministers to issue certificates which are conclusive as to the fact that an act was done on grounds of national security for the purposes of the Race Relations Act 1976 and the Disability Discrimination Act 1995 respectively.

General



Race Relations (Amendment) Act 2000

2000 Chapter 34

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Race Relations (Amendment) Act 2000

2000 Chapter 34

ARRANGEMENT OF SECTIONS

*Further extension of 1976 Act to police and
other public authorities*

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SCHEDULES

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Prepared 5 December 2000

*National
security*National
security.

7. - (1) In section 42 of the 1976 Act (exclusion for acts safeguarding national security), at the end there is added "if the doing of the act was justified by that purpose".

(2) Section 69(2)(b) of that Act (provision for national security certificates) is omitted.

National
security:
procedure.

8. After section 67 of the 1976 Act there is inserted-

"National
security:
procedure.

67A. - (1) Rules may make provision for enabling a court in which relevant proceedings have been brought, where it considers it expedient in the interests of national security-

(a) to exclude from all or part of the proceedings-

(i) the claimant;

(ii) the claimant's representatives; or

(iii) the assessors (if any) appointed by virtue of section 67 (4);

(b) to permit a claimant or representative who has been excluded to make a statement to the court before the commencement of the proceedings, or the part of the proceedings, from which he is excluded;

(c) to take steps to keep secret all or part of the reasons for its decision in the proceedings.

(2) The Attorney General or, in Scotland, the Advocate General for Scotland, may appoint a person to represent the interests of a claimant in, or in any part of, any proceedings from which the claimant and his representatives are excluded by virtue of subsection (1).

(3) A person appointed under subsection (2)-

(a) if appointed for the purposes of proceedings in England and Wales, must have a general qualification (within the meaning of section 71 of the Courts and Legal Services Act 1990); and

(b) if appointed for the purposes of proceedings in Scotland, must be-

(i) an advocate; or

(ii) a solicitor who has by virtue of section 25A of the Solicitors (Scotland) Act 1980 rights of audience in the Court of Session or the High Court of Justiciary.

(4) A person appointed under subsection (2) shall not be responsible to the person whose interests he is appointed to represent.

(5) In this section-

"relevant proceedings" means proceedings brought under this Act-

(a) in England and Wales, in a designated county court; or

(b) in Scotland, in a sheriff court; and

"rules" has the same meaning as in section 65."



Explanatory Notes to Race Relations (Amendment) Act 2000

2000 Chapter 34

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SECTION 8: NATIONAL SECURITY PROCEDURE

66. Section 8 of the 2000 Act **inserts a new section 67A** into the 1976 Act which makes provision for courts to adopt certain special procedures when dealing with cases under the Act that raise national security issues.

67. **Section 67A(1)** provides that **rules may be made** enabling a court, where it considers it expedient for national security reasons, to:

- exclude the claimant, and/or his representative(s), and/or court assessors, from all or part of proceedings;
- allow an excluded claimant or representative to make a statement to the court; and
- take steps to keep the reasons for its decision secret.

68. **Section 67A(2) to (4)** also provide that, where a claimant and his representatives have been so excluded from proceedings, the Attorney General or, in Scotland, the Advocate General for Scotland, **may appoint a person suitably qualified** to represent the interests of a claimant. It provides that this person shall not be responsible to the claimant. These provisions are based on similar provisions in section 6 of the Special Appeals Commission Act 1997.



Regulation of Investigatory Powers Act 2000

2000 Chapter 23

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Regulation of Investigatory Powers Act 2000

2000 Chapter 23

authorisation under
section 22 or Part II of
this Act or under Part
III of the Police Act
1997;

(l) every person who holds or has held any office, rank or position with a public authority for whose benefit any such authorisation has been or may be given;

(m) every person to whom a notice under section 49 has been given; and

(n) every person who is or has been employed for the purposes of any business of a person falling within paragraph (e), (f), (h) or (m).

(8) In this section "relevant Commissioner" means the Interception of Communications Commissioner, the Intelligence Services Commissioner, the Investigatory Powers Commissioner for Northern Ireland or any Surveillance Commissioner or Assistant Surveillance Commissioner.

Tribunal rules.

69. - (1) The Secretary of State may make rules regulating-

(a) the exercise by the Tribunal of the jurisdiction conferred on them by or under section 65; and

(b) any matters preliminary or incidental to, or arising out of, the hearing or consideration of any proceedings, complaint or reference brought before or made to the Tribunal.

(2) Without prejudice to the generality of subsection (1), rules under this section may-

(a) enable the jurisdiction of the Tribunal to be exercised at any place in the United Kingdom by any two or more members of the Tribunal designated for the purpose by the President of the Tribunal;

(b) enable different members of the Tribunal to carry out functions in relation to different complaints at the same time;

(c) prescribe the form and manner in which proceedings are to be brought before the Tribunal or a complaint or reference is to be made to the Tribunal;

(d) require persons bringing proceedings or making complaints or references to take such preliminary steps, and to make such disclosures, as may be specified in the rules for the purpose of facilitating a determination of whether-

(i) the bringing of the proceedings, or

(ii) the making of the complaint or reference,

is frivolous or vexatious;

(e) make provision about the determination of any question as to whether a person by whom-

(i) any proceedings have been brought before the Tribunal, or

(ii) any complaint or reference has been made to the Tribunal,

is a person with a right to bring those proceedings or make that complaint or reference;

(f) prescribe the forms of hearing or consideration to be adopted by the Tribunal in relation to particular proceedings, complaints or references (including a form that requires any proceedings brought before the Tribunal to be disposed of as if they were a complaint or reference made to the Tribunal);

(g) prescribe the practice and procedure to be followed on, or in connection with, the hearing or consideration of any proceedings, complaint or reference (including, where applicable, the mode and burden of proof and the admissibility of evidence);

(h) prescribe orders that may be made by the Tribunal under section 67(6) or (7);

(i) require information about any determination, award, order or other decision made by the Tribunal in relation to any proceedings, complaint or reference to be provided (in addition to any statement under section 68(4)) to the person who brought the proceedings or made the complaint or reference, or to the person representing his interests.

(3) Rules under this section in relation to the hearing or consideration of any matter by the Tribunal may provide-

(a) for a person who has brought any proceedings before or made any complaint or reference to the Tribunal to have the right to be legally represented;

(b) for the manner in which the interests of a person who has brought any proceedings before or made any complaint or reference to the Tribunal are otherwise to be represented;

(c) for the appointment in accordance with the rules, by such person as may be determined in accordance with the rules, of a person to represent those interests in the case of any proceedings, complaint or reference.

(4) The power to make rules under this section includes power to make rules-

(a) enabling or requiring the Tribunal to hear or consider any proceedings, complaint or reference without the person who brought the proceedings or made the complaint or reference having been given full particulars of the reasons for any

conduct which is the subject of the proceedings, complaint or reference;

(b) enabling or requiring the Tribunal to take any steps in exercise of their jurisdiction in the absence of any person (including the person bringing the proceedings or making the complaint or reference and any legal representative of his);

(c) enabling or requiring the Tribunal to give a summary of any evidence taken in his absence to the person by whom the proceedings were brought or, as the case may be, to the person who made the complaint or reference;

(d) enabling or requiring the Tribunal to exercise their jurisdiction, and to exercise and perform the powers and duties conferred or imposed on them (including, in particular, in relation to the giving of reasons), in such manner provided for in the rules as prevents or limits the disclosure of particular matters.

(5) Rules under this section may also include provision-

(a) enabling powers or duties of the Tribunal that relate to matters preliminary or incidental to the hearing or consideration of any proceedings, complaint or reference to be exercised or performed by a single member of the Tribunal; and

(b) conferring on the Tribunal such ancillary powers as the Secretary of State thinks necessary for the purposes of, or in connection with, the exercise of the Tribunal's jurisdiction, or the exercise or performance of any power or duty conferred or imposed on them.

(6) In making rules under this section the Secretary of State shall have regard, in particular, to-

(a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and

(b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.

(7) Rules under this section may make provision by the application, with or without modification, of the provision from time to time contained in specified rules of court.

(8) Subject to subsection (9), no rules shall be made under this section unless a draft of them has first been laid before Parliament and approved by a resolution of each House.

(9) Subsection (8) does not apply in the case of the rules made on the first occasion on which the Secretary of State exercises his power to make rules under this section.

(10) The rules made on that occasion shall cease to have effect at the end of the period of forty days beginning with the day on which they were made unless, before the end of that period, they have been approved by a resolution of each House of Parliament.

(11) For the purposes of subsection (10)-

(a) the rules' ceasing to have effect shall be without prejudice to anything previously done or to the making of new rules; and

(b) in reckoning the period of forty days no account shall be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

(12) The Secretary of State shall consult the Scottish Ministers before making any rules under this section; and any rules so made shall be laid before the Scottish Parliament.

Abolition of jurisdiction in relation to complaints.

70. - (1) The provisions set out in subsection (2) (which provide for the investigation etc. of certain complaints) shall not apply in relation to any complaint made after the coming into force of this section.

(2) Those provisions are-

(a) section 5 of, and Schedules 1 and 2 to, the Security Service Act 1989 (investigation of complaints about the Security Service made to the Tribunal established under that Act);

(b) section 9 of, and Schedules 1 and 2 to, the Intelligence Services Act 1994 (investigation of complaints about the Secret Intelligence Service or GCHQ made to the Tribunal established under that Act); and

(c) section 102 of, and Schedule 7 to, the Police Act 1997 (investigation of complaints made to the Surveillance Commissioners).

Codes of practice

Issue and revision of codes of practice.

71. - (1) The Secretary of State shall issue one or more codes of practice relating to the exercise and performance of the powers and duties mentioned in subsection (2).

(2) Those powers and duties are those (excluding any power to make subordinate legislation) that are conferred or imposed otherwise than on the Surveillance Commissioners by or under-

(a) Parts I to III of this Act;

(b) section 5 of the Intelligence Services Act 1994 (warrants for interference with property or wireless telegraphy for the purposes of the intelligence services); and

(c) Part III of the Police Act 1997 (authorisation by the police or customs and excise of interference with property or wireless telegraphy).

(3) Before issuing a code of practice under subsection (1), the Secretary of State shall-

(a) prepare and publish a draft of that code; and

(b) consider any representations made to him about the draft;

and the Secretary of State may incorporate in the code finally issued any modifications made by him to the draft after its publication.

(4) The Secretary of State shall lay before both Houses of Parliament every draft code of practice prepared and published by him under this section.

(5) A code of practice issued by the Secretary of State under this section shall not be brought into force except in accordance with an order made by the Secretary of State.

(6) An order under subsection (5) may contain such transitional provisions and savings as appear to the Secretary of State to be necessary or expedient in connection with the bringing into force of the code brought into force by that order.

(7) The Secretary of State may from time to time-

(a) revise the whole or any part of a code issued under this section; and

(b) issue the revised code.

(8) Subsections (3) to (6) shall apply (with appropriate modifications) in relation to the issue of any revised code under this section as they apply in relation to the first issue of such a code.

(9) The Secretary of State shall not make an order containing provision for any of the purposes of this section unless a draft of the order has been laid before Parliament and approved by a resolution

of each House.

Effect of codes of practice.

72. - (1) A person exercising or performing any power or duty in relation to which provision may be made by a code of practice under section 71 shall, in doing so, have regard to the provisions (so far as they are applicable) of every code of practice for the time being in force under that section.

(2) A failure on the part of any person to comply with any provision of a code of practice for the time being in force under section 71 shall not of itself render him liable to any criminal or civil proceedings.

(3) A code of practice in force at any time under section 71 shall be admissible in evidence in any criminal or civil proceedings.

(4) If any provision of a code of practice issued or revised under section 71 appears to-

- (a) the court or tribunal conducting any civil or criminal proceedings,
- (b) the Tribunal,
- (c) a relevant Commissioner carrying out any of his functions under this Act,
- (d) a Surveillance Commissioner carrying out his functions under this Act or the Police Act 1997, or
- (e) any Assistant Surveillance Commissioner carrying out any functions of his under section 63 of this Act,

to be relevant to any question arising in the proceedings, or in connection with the exercise of that jurisdiction or the carrying out of those functions, in relation to a time when it was in force, that provision of the code shall be taken into account in determining that question.

(5) In this section "relevant Commissioner" means the Interception of Communications Commissioner, the Intelligence Services Commissioner or the Investigatory Powers Commissioner for Northern Ireland.

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