



Scotland Office

SUNDAY WORKING IN SCOTLAND
A CONSULTATION

December 2002

SUNDAY WORKING IN SCOTLAND: CONSULTATION PAPER

Introduction

- 1 This paper sets out for comment a number of proposals aimed at extending to Scotland legislative provisions governing Sunday working for relevant shop and betting workers as provided in the Employment Rights Act 1996.

Background

- 2 Sunday trading and working in Scotland had not been governed by modern statutory provisions before either the Sunday Trading Act 1994 or the Employment Rights Act 1996. The possibility of Sunday trading and working was therefore open to most shops in Scotland, subject to any local licensing requirements - particularly in the case of betting shops. Although the 1996 Act extended to Scotland, the provisions relating to shop workers and betting workers were restricted solely to England and Wales.
- 3 At the time of the 1996 Act, representatives of large retail outlets and relevant trade unions drew up a voluntary arrangement. This was intended to provide the same degree of protection for relevant workers in Scotland on a non-statutory basis as would apply to their corresponding workers in England and Wales under the 1996 Act.

Current position

- 4 Generally speaking, the voluntary arrangement in respect of shop and betting workers in Scotland has operated well but could be open to manipulation. The Government has had increasing concerns about the capacity of the non-statutory approach to guarantee equality of treatment as between relevant shop workers in Scotland compared to the rest of the country. Precise terms and conditions of employment are governed by contracts. However companies in Scotland are basically in the position of being able to require Sunday working and by the same token, workers have no automatic rights to opt out of Sunday working for religious, family or any other reasons, bringing the risk of discrimination against Scottish workers.
- 5 There has been some evidence that the voluntary arrangement may be under pressure which makes it hard for management and workers alike to reach agreements that protect individuals from compulsory Sunday working. There may be many who are perfectly willing to be rostered for work on Sundays and at weekends and management are obviously free to adjust contracts with individuals for that purpose.
- 6 On the other hand, where relevant workers in Scotland would prefer not to work on Sundays, employers are under no legal obligation to respect that wish. The sole exception will be where the relevant contract provided a guarantee to the employee that an employee would not ever be required to work on a Sunday. Employers must always act reasonably under the terms of general dismissal legislation. Nonetheless they would be within their rights in certain circumstances to dismiss any employee if they judged that resistance to Sunday working was having an adverse effect on the company or business and there was not otherwise any inhibition upon working

arrangements reflected in an existing contract. This power is not available to employers in England and Wales.

- 7 There is a clear risk therefore the Scottish workers could be discriminated against in a way that would not be legally possible in the rest of the country.

Government Proposals

- 8 Ministers have considered carefully representations received in specific instances where employees have lost their jobs basically on a refusal to be rostered for Sunday working. There is some evidence therefore that the voluntary arrangement may no longer afford adequate protection for individuals, as it does not have the force of law. Moreover, it may also be subject to local interpretation and variation in a way that gives individuals more or less protection depending on where they happen to live or work.
- 9 For that reason the Secretary of State for Scotland, in consultation with the Secretary of State for Department of Trade & Industry, has decided to launch this consultation exercise to seek views on the case for extending the current legal provisions in the 1996 Act to Scotland. Work is currently underway on a Regulatory Impact Assessment (RIA) together with a competition assessment and further details will be available in the course of January 2003.
- 10 The rest of this consultation paper is directed towards the issues arising from any proposal to extend to Scotland the relevant provisions in the 1996 Act. Your views are sought on including Scotland within the regulatory regime, the specific arrangements regarding opt out and the transitional provisions for those currently holding contracts that may include working on a Sunday.

Background and existing law

- 11 There has always been some limit in England and Wales on the businesses that are allowed to open on Sunday. Matters of businesses trading on Sundays and employees working or not working on Sundays have been linked since 1994.
- 12 The Sunday Trading Act of 1994 focussed a prohibition on the opening of large shops except where exemptions applied. A large shop was defined as having a floor area of over 280 square metres. The effect of the 1994 Act, taking account of the repeal of earlier legislation was to permit the Sunday opening of shops with floor areas less than 280 square metres. Various exemptions applied in terms of the 1994 Act so that certain large shops were allowed to open on Sundays such as pharmacies or those in airports, railways, motorway service areas, as well as those that had served a notice on their local authority specifying their opening hours. The 1994 Act set up a corresponding framework, which was consolidated in the 1996 Act, for the protection of shop workers not wishing to work on a Sunday.
- 13 The 1996 Employment Rights Act sets out general provisions making it unfair to dismiss shop and betting workers for opting out of working on a Sunday in accordance with the provisions. It provided also for new contracts of employment and transitional arrangements for those employed before the 1994 Act came into force.

When betting on Sundays was legalised, the Betting, Gaming and Lotteries Act 1963 was amended to include protections for betting workers identical to those in the 1994 Act for shop workers. Although the deregulation of betting extended to Scotland, the protection of betting workers did not.

- 14 An extract of the relevant sections of the 1996 Act is reproduced at Annex A.
- 15 In terms of the 1996 Act a shop worker or betting worker can opt out of Sunday working by giving her/his employer written notice that he/she does not want to, or objects to work on a Sunday. The opting out means that a contract obliging a shop worker or betting worker to work on a Sunday or obliging the employer to provide the worker with shop work or betting work on Sunday is unenforceable.
- 16 Section 101 of the 1996 Act makes provision for dismissal to be deemed as unfair dismissal in relation to Sunday trading where certain conditions are met. This means:
- The employee must be a protected or opted out shop worker or betting worker;
 - The reason or principal reason of several reasons, for the dismissal must be that he/she refused or proposed to refuse to work on Sundays or on a particular Sunday;
- 17 The scope of Section 101 is therefore quite wide. It can encompass dismissal because of planned Sunday working even if it relates to only one occasion. Dismissal for giving or proposing to give an opt out notice is also covered.

Current position in Scotland

- 18 The 1996 Act applies to Scotland but the provisions relating to shop workers and betting workers are expressly excluded. The general right not to be dismissed unfairly remains in position for workers in Scotland or elsewhere. The qualifying period necessary to claim unfair dismissal is one year; the English and Welsh exceptions creating a deemed unfair dismissal in Section 101 do not apply. A Scottish shop worker or betting worker must therefore go through the procedure set out in the Act to show his/her dismissal was unfair.
- 19 Basically, in Scotland an employment tribunal faced with a case of a worker appealing against dismissal on grounds of refusing to work on Sunday, would be required to consider the case on its merits, and the circumstances and reasonableness of the grounds cited by the employer in making the dismissal.
- 20 The voluntary arrangement (see paragraphs 3 - 5 above) was the principal means whereby employer interests recognised the unfairness that could arise to relevant shop workers in Scotland because of their exclusion from the full range of legal protections afforded by the 1996 legislation.

Proposals for Scotland

- 21 Because of concerns about the possibility of deterioration in the voluntary arrangement arrangements, the Government is minded to seek to extend the relevant

sections of Part 4 of the 1996 Act so that Scottish shop workers and betting workers are as protected as their counterparts in England and Wales.

Application to Scotland

- 22 It is proposed to extend certain provisions of Part IV of the 1996 Act to persons in Scotland who would otherwise fall into the definition of shop worker or betting worker in the relevant Sections (232 or 233) of the 1996 Act. This can be achieved by amending those sections in the following way:
- (a) In Section 232(2) shop work includes work in or about a shop in Scotland.
 - (b) in the definition of "catering business" in Section 232(7) the reference to intoxicating liquor in paragraph (a) should be defined by reference to that expression as used in the Licensing (Scotland) Act 1976.
 - (c) in Section 233(2)(a) betting work should include work at a track in Scotland and work in a licensed betting shop in Scotland.

Opting out of Sunday Work

- 23 The provisions of Section 36 of the 1996 Act are broadly concerned with "protected" shop workers and betting workers who were not employed to work only on a Sunday. The Section covers also those workers with contracts of employment under which they are not and may not be required to work on a Sunday.
- 24 It is intended that Section 36 should extend to Scotland so far as a person mentioned in sub-section (3) is concerned as it applies to persons who may have a contract whenever entered into under which they cannot be required to work on a Sunday. Sections 37(2) and (3) relate to employees protected under s.36(3) and will need to be extended to Scotland also in this respect.
- 25 In all other respects the provisions of Section 36, 37, 38 and 39 dealing with aspects of "protected" workers' position are not relevant and would not require extension to Scotland.
- 26 Section 40 of the 1996 Act sets out the rights of shop workers and betting workers to opt out of Sunday working. It is proposed that the whole of the section should be extended to Scotland.
- 27 It applies to any worker who under his contract of employment:
- is or may be required to work on Sunday (whether or not as a result of previously giving an opting in notice).
 - is not employed to work only on Sunday.
- 28 The provisions of Section 41 of the 1996 Act define what is an opted-out shop worker or betting worker and these provisions should extend to Scotland.

- 29 The provisions of Section 42 are concerned with an explanatory statement and apply when a person becomes a worker to whom Section 40 applies. The Section imposes a requirement on the employer to give a written statement in a prescribed form and this should also be extended to Scotland.
- 30 Section 43 of the 1996 Act regulates contractual arrangements relating to Sunday work where the worker gives an opting out notice. It renders provisions of a contract of employment unenforceable to the extent that it requires Sunday working and these provisions should be extended to Scotland.
- 31 Section 45 of the Act confers protection on protected or opted out shop workers or betting workers so that they have a right not to be subject to any detriment short of dismissal by any act or omission of their employers on the ground that the employee refused to work on a Sunday or a particular Sunday. There are exceptions and circumstances for the failure to pay remuneration or provide a benefit in respect of a Sunday flows from the fact that the employee has not done the work. It may apply similarly where the employer offers to pay a sum to any one or more employees who are protected workers or betting workers if they agree to work on Sunday or a particular Sunday. The provisions of Section 45 should be extended to Scotland in their entirety.
- 32 Where a protected or opted out shop worker or betting worker is dismissed, Section 101 of the 1996 Act provides that he should be regarded for the purposes of the Act as unfairly dismissed if the reason for dismissal is that he refused to do shop work or betting work on Sunday. This would apply in Scotland.

Overall position

- 33 Taken together these individual proposals would constitute for Scotland a package of measures designed to permit relevant shop and betting workers to opt out of Sunday working, to be protected from dismissal or other detriment on grounds of Sunday working alone and to afford remedies where employers take action that appears to be in conflict with the regulatory provisions.

Transitional arrangements

- 34 It is intended that the provisions would apply to shop workers and betting workers in Scotland whether or not they are employed under a contract of employment which was entered into before or after the date of commencement of the new legislation.

Issues for comment

- 35 Your comments are invited on any of the proposals set out in this paper, including the basic proposition that the relevant provisions of the 1996 Act should be extended to Scotland. However, in framing your response you may find it useful to give views specifically on the following points:
- Does the proposed scheme represent an appropriate package of protection for relevant workers in Scotland?
 - Should any aspects of these proposals be re-examined and if so, why?

- Where a "protected" worker decides to opt out of the scheme, should any change in his or her position involving reversion to protected status be subject to a 3-month re-admission period?
- Do you agree with the terms of the transitional arrangements set out at paragraph 34 above?
- If you are an employer, can you assess the resource implications of making changes to the employment patterns of your workforce to allow opt out from Sunday working?
- Is there a case for a stronger voluntary code or a code of practice, or would you prefer to see a change in the law on Sunday working in Scotland?
- If you are an employer, would there be recruitment pressures if volunteers or casual staff were the main sources for Sunday working? If so, can these be quantified?
- If you are operating under a voluntary arrangement which allows opt-out from Sunday working, does this permit employees to cite religious, family or other personal reasons as grounds for opting out? If so, please state which reasons are permitted.

Responses

- 36 Responses should be sent by 14 March 2003 to Ms Anne Armstrong, Scotland Office, 1st Floor, Meridian Court, 5 Cadogan Street, Glasgow, G2 6AT.
E-mail sundayworking.consultation@scotland.gsi.gov.uk.
An electronic copy of this consultation document can be obtained from our web page www.scottishsecretary.gov.uk
- 37 Where it is otherwise not indicated, it would be helpful if respondents could indicate whether they are employers, employees or from representative organisations dealing with employers or employees.
- 38 The Scotland Office may make responses to this consultation document publicly available. Please ensure that your response is marked clearly if you wish it to remain confidential. Confidential responses will be included in any statistical summary of any comments received or views expressed.

Scotland Office
December 2002

Exerts from Employment Rights Act 1996 (Chapter 18)

Part IV - SUNDAY WORKING FOR SHOP AND BETTING WORKERS

Protected shop workers and betting workers.

36. - (1) Subject to subsection (5), a shop worker or betting worker is to be regarded as "protected" for the purposes of any provision of this Act if (and only if) subsection (2) or (3) applies to him.

(2) This subsection applies to a shop worker or betting worker if-

(a) on the day before the relevant commencement date he was employed as a shop worker or a betting worker but not to work only on Sunday,

(b) he has been continuously employed during the period beginning with that day and ending with the day which, in relation to the provision concerned, is the appropriate date, and

(c) throughout that period, or throughout every part of it during which his relations with his employer were governed by a contract of employment, he was a shop worker or a betting worker.

(3) This subsection applies to any shop worker or betting worker whose contract of employment is such that under it he-

(a) is not, and may not be, required to work on Sunday, and

(b) could not be so required even if the provisions of this Part were disregarded.

(4) Where on the day before the relevant commencement date an employee's relations with his employer had ceased to be governed by a contract of employment, he shall be regarded as satisfying subsection (2)(a) if-

(a) that day fell in a week which counts as a period of employment with that employer under section 212(2) or (3) or under regulations under section 219, and

(b) on the last day before the relevant commencement date on which his relations with his employer were governed by a contract of employment, the employee was employed as a shop worker or a betting worker but not to work only on Sunday.

(5) A shop worker is not a protected shop worker, and a betting worker is not a protected betting worker, if-

(a) he has given his employer an opting-in notice on or after the relevant commencement date, and

(b) after giving the notice, he has expressly agreed with his employer to do shop work, or betting work, on Sunday or on a particular Sunday.

(6) In this Act "opting-in notice", in relation to a shop worker or a betting worker, means written notice, signed and dated by the shop worker or betting worker, in which the shop worker or betting worker expressly states that he wishes to work on Sunday or that he does not object to Sunday working.

(7) In this Act "the relevant commencement date" means-

- (a) in relation to a shop worker, 26th August 1994, and
- (b) in relation to a betting worker, 3rd January 1995.

Contractual requirements relating to Sunday work.

37. - (1) Any contract of employment under which a shop worker or betting worker who satisfies section 36(2)(a) was employed on the day before the relevant commencement date is unenforceable to the extent that it-

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday on or after that date, or

(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday on or after that date.

(2) Subject to subsection (3), any agreement entered into after the relevant commencement date between a protected shop worker, or a protected betting worker, and his employer is unenforceable to the extent that it-

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday, or

(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday.

(3) Where, after giving an opting-in notice, a protected shop worker or a protected betting worker expressly agrees with his employer to do shop work or betting work on Sunday or on a particular Sunday (and so ceases to be protected), his contract of employment shall be taken to be varied to the extent necessary to give effect to the terms of the agreement.

(4) The reference in subsection (2) to a protected shop worker, or a protected betting worker, includes a reference to an employee who although not a protected shop worker, or protected betting worker, at the time when the agreement is entered into is a protected shop worker, or protected betting worker, on the day on which she returns to work in accordance with section 79, or in pursuance of an offer made in the circumstances described in section 96(3), after a period of absence from work occasioned wholly or partly by pregnancy or childbirth.

(5) For the purposes of section 36(2)(b), the appropriate date-

(a) in relation to subsections (2) and (3) of this section, is the day on which the agreement is entered into, and

(b) in relation to subsection (4) of this section, is the day on which the employee returns to work.

Contracts with guaranteed hours.

38. - (1) This section applies where-

(a) under the contract of employment under which a shop worker or betting worker who satisfies section 36(2)(a) was employed on the day before the relevant commencement date, the employer is, or may be, required to provide him with shop work, or betting work, for a specified number of hours each week,

(b) under the contract the shop worker or betting worker was, or might have been, required to work on Sunday before that date, and

(c) the shop worker has done shop work, or the betting worker betting work, on Sunday in that employment (whether or not before that day) but has, on or after that date, ceased to do so.

(2) So long as the shop worker remains a protected shop worker, or the betting worker remains a protected betting worker, the contract shall not be regarded as requiring the employer to provide him with shop work, or betting work, on weekdays in excess of the hours normally worked by the shop worker or betting worker on weekdays before he ceased to do shop work, or betting work, on Sunday.

(3) For the purposes of section 36(2)(b), the appropriate date in relation to this section is any time in relation to which the contract is to be enforced.

Reduction of pay etc.

39. - (1) This section applies where-

(a) under the contract of employment under which a shop worker or betting worker who satisfies section 36(2)(a) was employed on the day before the relevant commencement date, the shop worker or betting worker was, or might have been, required to work on Sunday before the relevant commencement date,

(b) the shop worker has done shop work, or the betting worker has done betting work, on Sunday in that employment (whether or not before that date) but has, on or after that date, ceased to do so, and

(c) it is not apparent from the contract what part of the remuneration payable, or of any other benefit accruing, to the shop worker or betting worker was intended to be attributable to shop work, or betting work, on Sunday.

(2) So long as the shop worker remains a protected shop worker, or the betting worker remains a protected betting worker, the contract shall be regarded as enabling the employer to reduce the amount of remuneration paid, or the extent of the other benefit provided, to the shop worker or betting worker in respect of any period by the relevant proportion.

(3) In subsection (2) "the relevant proportion" means the proportion which the hours of shop work, or betting work, which (apart from this Part) the shop worker, or betting worker, could have been required to do on Sunday in the period ("the contractual Sunday hours") bears to the

aggregate of those hours and the hours of work actually done by the shop worker, or betting worker, in the period.

(4) Where, under the contract of employment, the hours of work actually done on weekdays in any period would be taken into account in determining the contractual Sunday hours, they shall be taken into account in determining the contractual Sunday hours for the purposes of subsection (3).

(5) For the purposes of section 36(2)(b), the appropriate date in relation to this section is the end of the period in respect of which the remuneration is paid or the benefit accrues.

Opting-out of Sunday work Notice of objection to Sunday working.

40. - (1) A shop worker or betting worker to whom this section applies may at any time give his employer written notice, signed and dated by the shop worker or betting worker, to the effect that he objects to Sunday working.

(2) In this Act "opting-out notice" means a notice given under subsection (1) by a shop worker or betting worker to whom this section applies.

(3) This section applies to any shop worker or betting worker who under his contract of employment-

(a) is or may be required to work on Sunday (whether or not as a result of previously giving an opting-in notice), but

(b) is not employed to work only on Sunday.

Opted-out shop workers and betting workers.

41. - (1) Subject to subsection (2), a shop worker or betting worker is to be regarded as "opted-out" for the purposes of any provision of this Act if (and only if)-

(a) he has given his employer an opting-out notice,

(b) he has been continuously employed during the period beginning with the day on which the notice was given and ending with the day which, in relation to the provision concerned, is the appropriate date, and

(c) throughout that period, or throughout every part of it during which his relations with his employer were governed by a contract of employment, he was a shop worker or a betting worker.

(2) A shop worker is not an opted-out shop worker, and a betting worker is not an opted-out betting worker, if-

(a) after giving the opting-out notice concerned, he has given his employer an opting-in notice, and

(b) after giving the opting-in notice, he has expressly agreed with his employer to do shop work, or betting work, on Sunday or on a particular Sunday.

(3) In this Act "notice period", in relation to an opted-out shop worker or an opted-out betting worker, means, subject to section 42(2), the period of three months beginning with the day on which the opting-out notice concerned was given.

Explanatory statement.

42. - (1) Where a person becomes a shop worker or betting worker to whom section 40 applies, his employer shall, before the end of the period of two months beginning with the day on which that person becomes such a worker, give him a written statement in the prescribed form.

(2) If-

(a) an employer fails to comply with subsection (1) in relation to any shop worker or betting worker, and

(b) the shop worker or betting worker, on giving the employer an opting-out notice, becomes an opted-out shop worker or an opted-out betting worker,

section 41(3) has effect in relation to the shop worker or betting worker with the substitution for "three months" of "one month".

(3) An employer shall not be regarded as failing to comply with subsection (1) in any case where, before the end of the period referred to in that subsection, the shop worker or betting worker has given him an opting-out notice.

(4) Subject to subsection (6), the prescribed form in the case of a shop worker is as follows-

"STATUTORY RIGHTS IN RELATION TO SUNDAY SHOP WORK

You have become employed as a shop worker and are or can be required under your contract of employment to do the Sunday work your contract provides for.

However, if you wish, you can give a notice, as described in the next paragraph, to your employer and you will then have the right not to work in or about a shop on any Sunday on which the shop is open once three months have passed from the date on which you gave the notice.

Your notice must-

be in writing;

be signed and dated by you;

say that you object to Sunday working.

For three months after you give the notice, your employer can still require you to do all the Sunday work your contract provides for. After the three month period has ended, you have the right to complain to an industrial tribunal if, because of your refusal to work on Sundays on which the shop is open, your employer-

dismisses you, or

does something else detrimental to you, for example, failing to promote you.

Once you have the rights described, you can surrender them only by giving your employer a further notice, signed and dated by you, saying that you wish to work on Sunday or that you do not object to Sunday working and then agreeing with your employer to work on Sundays or on a particular Sunday."

(5) Subject to subsection (6), the prescribed form in the case of a betting worker is as follows-

"STATUTORY RIGHTS IN RELATION TO SUNDAY BETTING WORK

You have become employed under a contract of employment under which you are or can be required to do Sunday betting work, that is to say, work-

at a track on a Sunday on which your employer is taking bets at the track, or

in a licensed betting office on a Sunday on which it is open for business.

However, if you wish, you can give a notice, as described in the next paragraph, to your employer and you will then have the right not to do Sunday betting work once three months have passed from the date on which you gave the notice.

Your notice must-

be in writing;

be signed and dated by you;

say that you object to doing Sunday betting work.

For three months after you give the notice, your employer can still require you to do all the Sunday betting work your contract provides for. After the three month period has ended, you have the right to complain to an industrial tribunal if, because of your refusal to do Sunday betting work, your employer-

dismisses you, or

does something else detrimental to you, for example, failing to promote you.

Once you have the rights described, you can surrender them only by giving your employer a further notice, signed and dated by you, saying that you wish to do Sunday betting work or that you do not object to doing Sunday betting work and then agreeing with your employer to do such work on Sundays or on a particular Sunday."

(6) The Secretary of State may by order amend the prescribed forms set out in subsections (4) and (5).

Contractual requirements relating to Sunday work.

43. - (1) Where a shop worker or betting worker gives his employer an opting-out notice, the contract of employment under which he was employed immediately before he gave that notice becomes unenforceable to the extent that it-

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday after the end of the notice period, or

(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday after the end of that period.

(2) Subject to subsection (3), any agreement entered into between an opted-out shop worker, or an opted-out betting worker, and his employer is unenforceable to the extent that it-

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday after the end of the notice period, or

(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday after the end of that period.

(3) Where, after giving an opting-in notice, an opted-out shop worker or an opted-out betting worker expressly agrees with his employer to do shop work or betting work on Sunday or on a particular Sunday (and so ceases to be opted-out), his contract of employment shall be taken to be varied to the extent necessary to give effect to the terms of the agreement.

(4) The reference in subsection (2) to an opted-out shop worker, or an opted-out betting worker, includes a reference to an employee who although not an opted-out shop worker, or an opted-out betting worker, at the time when the agreement is entered into-

(a) had given her employer an opting-out notice before that time, and

(b) is an opted-out shop worker, or an opted-out betting worker, on the day on which she returns to work in accordance with section 79, or in pursuance of an offer made in the circumstances described in section 96(3), after a period of absence from work occasioned wholly or partly by pregnancy or childbirth.

(5) For the purposes of section 41(1)(b), the appropriate date-

(a) in relation to subsections (2) and (3) of this section, is the day on which the agreement is entered into, and

(b) in relation to subsection (4) of this section, is the day on which the employee returns to work.

Part V - PROTECTION FROM SUFFERING DETRIMENT IN EMPLOYMENT

Rights not to suffer detriment Health and safety cases.

44. - (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that-

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee-

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where-

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so

negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to dismissal (within the meaning of that Part).

Sunday working for shop and betting workers.

45. - (1) An employee who is-

(a) a protected shop worker or an opted-out shop worker, or

(b) a protected betting worker or an opted-out betting worker,

has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee refused (or proposed to refuse) to do shop work, or betting work, on Sunday or on a particular Sunday.

(2) Subsection (1) does not apply to anything done in relation to an opted-out shop worker or an opted-out betting worker on the ground that he refused (or proposed to refuse) to do shop work, or betting work, on any Sunday or Sundays falling before the end of the notice period.

(3) An employee who is a shop worker or a betting worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee gave (or proposed to give) an opting-out notice to his employer.

(4) Subsections (1) and (3) do not apply where the detriment in question amounts to dismissal (within the meaning of Part X).

(5) For the purposes of this section a shop worker or betting worker who does not work on Sunday or on a particular Sunday is not to be regarded as having been subjected to any detriment by-

(a) a failure to pay remuneration in respect of shop work, or betting work, on a Sunday which he has not done,

(b) a failure to provide him with any other benefit, where that failure results from the application (in relation to a Sunday on which the employee has not done shop work, or betting work) of a contractual term under which the extent of that benefit varies according to the number of hours worked by the employee or the remuneration of the employee, or

(c) a failure to provide him with any work, remuneration or other benefit which by virtue of section 38 or 39 the employer is not obliged to provide.

(6) Where an employer offers to pay a sum specified in the offer to any one or more employees-

(a) who are protected shop workers or opted-out shop workers or protected betting workers or opted-out betting workers, or

(b) who under their contracts of employment are not obliged to do shop work, or betting work, on Sunday,

if they agree to do shop work, or betting work, on Sunday or on a particular Sunday subsections (7) and (8) apply.

(7) An employee to whom the offer is not made is not to be regarded for the purposes of this section as having been subjected to any detriment by any failure to make the offer to him or to pay him the sum specified in the offer.

(8) An employee who does not accept the offer is not to be regarded for the purposes of this section as having been subjected to any detriment by any failure to pay him the sum specified in the offer.

(9) For the purposes of section 36(2)(b) or 41(1)(b), the appropriate date in relation to this section is the date of the act or failure to act.

(10) For the purposes of subsection (9)-

(a) where an act extends over a period, the "date of the act" means the first day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

Trustees of occupational pension schemes.

46. - (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that, being a trustee of a relevant occupational pension scheme which relates to his employment, the employee performed (or proposed to perform) any functions as such a trustee.

(2) Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to dismissal (within the meaning of that Part).

(3) In this section "relevant occupational pension scheme" means an occupational pension scheme (as defined in section 1 of the Pension Schemes Act 1993) established under a trust.

Employee representatives.

47. - (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that, being-

(a) an employee representative for the purposes of Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancies) or Regulations 10 and 11 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, or

(b) a candidate in an election in which any person elected will, on being elected, be such an employee representative,

he performed (or proposed to perform) any functions or activities as such an employee representative or candidate.

(2) Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to a dismissal (within the meaning of that Part).

Part XIV - OTHER INTERPRETATION PROVISIONS

Employees, workers etc.

230. - (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"-

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;
and "employed" shall be construed accordingly.

Associated employers.

231. For the purposes of this Act any two employers shall be treated as associated if-

(a) one is a company of which the other (directly or indirectly) has control, or

(b) both are companies of which a third person (directly or indirectly) has control;
and "associated employer" shall be construed accordingly.

Shop workers.

232. - (1) In this Act "shop worker" means an employee who, under his contract of employment, is or may be required to do shop work.

(2) In this Act "shop work" means work in or about a shop in England or Wales on a day on which the shop is open for the serving of customers.

(3) Subject to subsection (4), in this Act "shop" includes any premises where any retail trade or business is carried on.

(4) Where premises are used mainly for purposes other than those of retail trade or business and would not (apart from subsection (3)) be regarded as a shop, only such part of the premises as-

(a) is used wholly or mainly for the purposes of retail trade or business, or

(b) is used both for the purposes of retail trade or business and for the purposes of wholesale trade and is used wholly or mainly for those two purposes considered together,

is to be regarded as a shop for the purposes of this Act.

(5) In subsection (4)(b) "wholesale trade" means the sale of goods for use or resale in the course of a business or the hire of goods for use in the course of a business.

(6) In this section "retail trade or business" includes-

(a) the business of a barber or hairdresser,

(b) the business of hiring goods otherwise than for use in the course of a trade or business, and

(c) retail sales by auction,

but does not include catering business or the sale at theatres and places of amusement of programmes, catalogues and similar items.

(7) In subsection (6) "catering business" means-

(a) the sale of meals, refreshments or intoxicating liquor for consumption on the premises on which they are sold, or

(b) the sale of meals or refreshments prepared to order for immediate consumption off the premises;

and in paragraph (a) "intoxicating liquor" has the same meaning as in the Licensing Act 1964.

(8) In this Act-

"notice period", in relation to an opted-out shop worker, has the meaning given by section 41(3),

"opted-out", in relation to a shop worker, shall be construed in accordance with section 41(1) and (2),

"opting-in notice", in relation to a shop worker, has the meaning given by section 36(6),

"opting-out notice", in relation to a shop worker, has the meaning given by section 40(2), and "protected", in relation to a shop worker, shall be construed in accordance with section 36(1) to (5).

Betting workers.

233. - (1) In this Act "betting worker" means an employee who, under his contract of employment, is or may be required to do betting work.

(2) In this Act "betting work" means-

(a) work at a track in England or Wales for a bookmaker on a day on which the bookmaker acts as such at the track, being work which consists of or includes dealing with betting transactions, and

(b) work in a licensed betting office in England or Wales on a day on which the office is open for use for the effecting of betting transactions.

(3) In subsection (2) "betting transactions" includes the collection or payment of winnings on a bet and any transaction in which one or more of the parties is acting as a bookmaker.

(4) In this section "bookmaker" means any person who-

(a) whether on his own account or as servant or agent to any other person, carries on (whether occasionally or regularly) the business of receiving or negotiating bets or conducting pool betting operations, or

(b) by way of business in any manner holds himself out, or permits himself to be held out, as a person who receives or negotiates bets or conducts such operations.

(5) Expressions used in this section and in the Betting, Gaming and Lotteries Act 1963 have the same meaning in this section as in that Act.

(6) In this Act-

"notice period", in relation to an opted-out betting worker, has the meaning given by section 41(3),

"opted-out", in relation to a betting worker, shall be construed in accordance with section 41(1) and (2),

"opting-in notice", in relation to a betting worker, has the meaning given by section 36(6),

"opting-out notice", in relation to a betting worker, has the meaning given by section 40(2), and

"protected", in relation to a betting worker, shall be construed in accordance with section 36(1) to (5).

Normal working hours.

234. - (1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.

(2) Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.

(3) Where in such a case-

(a) the contract of employment fixes the number, or minimum number, of hours of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and

(b) that number or minimum number of hours exceeds the number of hours without overtime,

the normal working hours are that number or minimum number of hours (and not the number of hours without overtime).

Other definitions.

235. - (1) In this Act, except in so far as the context otherwise requires-

"act" and "action" each includes omission and references to doing an act or taking action shall be construed accordingly,

"basic award of compensation for unfair dismissal" shall be construed in accordance with section 118,

"business" includes a trade or profession and includes any activity carried on by a body of persons (whether corporate or unincorporated),

"childbirth" means the birth of a living child or the birth of a child whether living or dead after twenty-four weeks of pregnancy,

"collective agreement" has the meaning given by section 178(1) and (2) of the Trade Union and Labour Relations (Consolidation) Act 1992,

"conciliation officer" means an officer designated by the Advisory, Conciliation and Arbitration Service under section 211 of that Act,

"dismissal procedures agreement" means an agreement in writing with respect to procedures relating to dismissal made by or on behalf of one or more independent trade unions and one or more employers or employers' associations,

"employers' association" has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992,

"expected week of childbirth" means the week, beginning with midnight between Saturday and Sunday, in which it is expected that childbirth will occur,

"guarantee payment" has the meaning given by section 28,

"independent trade union" means a trade union which-

(a) is not under the domination or control of an employer or a group of employers or of one or more employers' associations, and

(b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatever) tending towards such control,

"job", in relation to an employee, means the nature of the work which he is employed to do in accordance with his contract and the capacity and place in which he is so employed,

"maternity leave period" shall be construed in accordance with sections 72 and 73,

"notified day of return" shall be construed in accordance with section 83,
"position", in relation to an employee, means the following matters taken as a whole-

- (a) his status as an employee,
- (b) the nature of his work, and
- (c) his terms and conditions of employment,

"redundancy payment" has the meaning given by Part XI,

"relevant date" has the meaning given by sections 145 and 153,

"renewal" includes extension, and any reference to renewing a contract or a fixed term shall be construed accordingly,

"statutory provision" means a provision, whether of a general or a special nature, contained in, or in any document made or issued under, any Act, whether of a general or special nature,

"successor", in relation to the employer of an employee, means (subject to subsection (2)) a person who in consequence of a change occurring (whether by virtue of a sale or other disposition or by operation of law) in the ownership of the undertaking, or of the part of the undertaking, for the purposes of which the employee was employed, has become the owner of the undertaking or part,

"trade union" has the meaning given by section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992,

"week"-

(a) in Chapter I of this Part means a week ending with Saturday, and

(b) otherwise, except in section 86, means, in relation to an employee whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other employee, a week ending with Saturday.

(2) The definition of "successor" in subsection (1) has effect (subject to the necessary modifications) in relation to a case where-

(a) the person by whom an undertaking or part of an undertaking is owned immediately before a change is one of the persons by whom (whether as partners, trustees or otherwise) it is owned immediately after the change, or

(b) the persons by whom an undertaking or part of an undertaking is owned immediately before a change (whether as partners, trustees or otherwise) include the persons by whom, or include one or more of the persons by whom, it is owned immediately after the change,

as it has effect where the previous owner and the new owner are wholly different persons.

(3) References in this Act to redundancy, dismissal by reason of redundancy and similar expressions shall be construed in accordance with section 139.

(4) In sections 136(2), 154 and 216(3) and paragraph 14 of Schedule 2 "lock-out" means-

(a) the closing of a place of employment,

(b) the suspension of work, or

(c) the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute,

done with a view to compelling persons employed by the employer, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.

(5) In sections 91(2), 140(2) and (3), 143(1), 144(2) and (3), 154 and 216(1) and (2) and paragraph 14 of Schedule 2 "strike" means-

(a) the cessation of work by a body of employed persons acting in combination, or

(b) a concerted refusal, or a refusal under a common understanding, of any number of employed persons to continue to work for an employer in consequence of a dispute,

done as a means of compelling their employer or any employed person or body of employed persons, or to aid other employees in compelling their employer or any employed person or body of employed persons, to accept or not to accept terms or conditions of or affecting employment.