

C02/2020



**Command Paper for regulations to provide for
the recognition of Trade Unions.**

**Presented by
the Chief Minister.**

by Command of Her Majesty

18th June 2020

Comments on this Command Paper should be:

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- (b) delivered to:

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Any comments received later than **noon on Thursday, 16th July 2020** may not be taken into account for the purposes of the consultation.

Contents

- 1. Draft Regulations;**
- 2. Explanatory Memorandum.**

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EMPLOYMENT ACT

EMPLOYMENT (TRADE UNION RECOGNITION) REGULATIONS 2020

ARRANGEMENT OF REGULATIONS

Regulation

1. Title.
2. Commencement.
3. Interpretation.
4. Recognition.
5. Order for statutory recognition.
6. Secret ballot.
7. Collective agreements.
8. Revocation or variation of recognition.
9. Termination of collective agreement.
10. Bargaining unit and disclosure of information.
11. Application submissions and hearings.
12. Right to be accompanied.
13. Facility time.
14. Anti-discrimination.
15. Prohibited list.
16. Offences by body corporate.

EMPLOYMENT ACT

EMPLOYMENT (TRADE UNION RECOGNITION) REGULATIONS 2020

In exercise of the powers conferred upon him by section 86(1)(h) of the Employment Act and all other enabling powers the Minister with responsibility for employment has made the following Regulations.

Title.

1. These Regulations may be cited as the Employment (Trade Union Recognition) Regulations 2020.

Commencement.

2. These Regulations come into operation on the day appointed by the Minister by notice in the Gazette and different days may be appointed for different purposes.

Interpretation.

3. In these Regulations—

“ACAS” means the Advisory, Conciliation and Arbitration Service;

“bargaining agent” means any trade union having negotiating rights to bargain collectively on behalf of the employees in a bargaining unit;

“bargaining unit” means a group of employees with a clear and identifiable community of interests who are represented by a trade union for collective bargaining purposes;

“collective agreement” means any agreement or arrangement made by or on behalf of a trade union and employer or employers’ association relating to collective bargaining which lays down the bargaining procedure between both parties;

“collective bargaining” means any negotiations relating to or connected with specific matters arising daily at the workplace, affecting particular sections of the workforce, to periodic negotiations on terms and conditions of employment affecting the whole workforce;

“confirmation of receipt” means the period 5 working days after any application is received under these Regulations, during which the Director of Employment will have to contact both parties;

“discrimination” means treating a person less favourably than another on grounds of trade union membership or activities;

“Minister” means the Minister with responsibility for Employment;

“prohibited list” is a list which-

- (a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions; and
- (b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of employees;

“recognition” in relation to a trade union, means the recognition of the trade union by an employer for the purpose of collective bargaining; and

“trade union representative” means –

- (a) an officer of the union or of a branch or section of the trade union; or
- (b) a person elected or appointed in accordance with the regulations of the trade union to be a representative of its members or of some of them, and includes a person so elected or appointed who is an employee of the same employer as the members or one or more of the members whom the officer is to represent.

Recognition.

4.(1) If a trade union wants to negotiate with an employer on behalf of a bargaining unit, it must be-

- (a) registered; and
- (b) recognised by that employer.

(2) A certificate of registration issued pursuant to section 6(iv) of the Trade Union and Trade Disputes Act is conclusive evidence that the trade union is registered.

(3) A trade union may apply in writing to an employer for recognition as a bargaining agent.

(4) An application pursuant to subregulation (3) must be accompanied by-

- (a) a copy of the trade union's certificate of registration;
- (b) a copy of the agreement between or among the trade unions in the case of a group of trade unions acting jointly; and
- (c) the number of members that the trade union has in the bargaining unit.

(5) An employer must within 10 working days of receipt of the application inform the trade union in writing whether it-

- (a) recognises the trade union as a bargaining agent; or
- (b) refuses to recognise the trade union as a bargaining agent and state the reasons thereof.

(6) Pursuant to subregulation (5)-

- (a) if the employer accepts the request for recognition, the parties must decide on a bargaining procedure; or
- (b) if the employer rejects the request for recognition, but-
 - (i) agrees to negotiate further, a further 20 working days will be provided to negotiate; or
 - (ii) does not agree to negotiate further, the trade union may apply to the Director of Employment for statutory recognition pursuant to regulation 4.

Order for statutory recognition.

5.(1) Where an employer refuses to grant recognition to a trade union pursuant to regulation 4, the trade union may apply to the Director of Employment for a statutory recognition order directing the employer to recognise the trade union.

(2) A trade union may make an application for statutory recognition, as long as it has fulfilled the following basic requirements-

- (a) the trade union must have already made a formal request for recognition to the employer, which must-
 - (i) be in writing;
 - (ii) identify the trade union and the bargaining unit; and
 - (iii) state that the request is made pursuant to these Regulations;
- (b) the employer must employ a minimum of 7 employees or at least average 7 employees in the 13 weeks ending with the day on which the request was received; and
- (c) the trade union must have at least 10 percent membership of the bargaining unit.

(3) For the purposes of calculating the average number of employees under subregulation (2)(b), an employee shall be deemed to have been employed for the whole of any week in which they were employed.

(4) On an application made under subregulation (1), the Director of Employment must-

- (a) where it is satisfied that a trade union has the support of at least 25 percent of employees in the bargaining unit, issue an order that the trade union be granted recognition to undertake collective bargaining; or
- (b) where it appears that the trade union has less than 25 percent support, organise and supervise a secret ballot in the bargaining unit pursuant to regulation 5.

(5) The Director of Employment must determine an application for statutory recognition-

- (a) within 30 working days of the confirmation of receipt of the application; or
- (b) in exceptional circumstances, extend the period for a further 30 working days.

(6) Where the Director of Employment makes an order granting statutory recognition, the order must-

- (a) specify the employer and the trade union to which it relates;
- (b) specify the bargaining unit;
- (c) declare that the trade union must be recognised as a bargaining agent; and
- (d) require the trade union and the employer concerned to meet at specified intervals or at such time and on such occasions as the circumstances may reasonably require, for the purposes of collective bargaining.

(7) When determining an application for statutory recognition, the Director of Employment must consider-

- (a) the need for the bargaining unit to be compatible with effective management;
- (b) the views of the employer and the trade union; and
- (c) the desirability of avoiding small fragmented bargaining units within an undertaking.

(8) An application to the Director of Employment will not be admissible if-

- (a) the Director of Employment is satisfied that there is already in force a collective agreement under which a trade union is recognised as entitled to conduct collective bargaining on behalf of any employees falling within the relevant bargaining unit;
- (b) within the last 3 years the Director of Employment has already received a previous application from the trade union covering the same or substantially the same bargaining unit; or
- (c) members of the trade union constitute less than 10 percent of the employees constituting the relevant bargaining unit.

(9) An employer that fails to recognise a trade union that has been granted statutory recognition by the Director of Employment is guilty of an offence and is liable on summary conviction, to imprisonment for 9 months or a fine not exceeding level 4 on the standard scale, or to both

Secret ballot.

6.(1) Notwithstanding any finding that at least 25 percent of employees in the bargaining unit are members of the trade union, the Director of Employment has to call a secret ballot if-

- (a) the Director of Employment is satisfied that a secret ballot must be held in the interests of good industrial relations;

- (b) the Director of Employment has evidence, which it considers credible, from at least 25 percent of employees in the bargaining unit that they do not want the trade union to conduct collective bargaining on their behalf; or
- (c) membership evidence regarding the circumstances in which employees joined the trade union or length of membership leads to doubts whether there are a significant number of trade union members in the bargaining unit.

(2) If the Director of Employment decides to hold a secret ballot it must give notice to all parties involved-

- (a) that it intends to arrange the secret ballot in which the employees constituting the bargaining unit are asked whether they want the trade union to conduct collective bargaining on their behalf;
- (b) of the name of the person appointed to conduct the secret ballot and the date of appointment;
- (c) of the period within which the secret ballot must be conducted; and
- (d) whether the secret ballot is to be conducted by post or at a workplace.

(3) The secret ballot must be conducted by a qualified independent person appointed by the Director of Employment.

(4) Pursuant to subregulation (3) a person is a qualified independent person if there are no grounds for believing either that the person will carry out any conferred functions in relation to the secret ballot otherwise than competently and that the person's independence in relation to the secret ballot might reasonably be called into question.

(5) The secret ballot must be conducted within-

- (a) the period of 20 working days starting with the day after that on which the qualified independent person is appointed; or
- (b) such longer period (so starting) as the Director of Employment may decide.

(6) The secret ballot must be conducted-

- (a) at a workplace decided by the Director of Employment;
- (b) by post; or
- (c) by a combination of the methods described in subparagraphs (a) and (b).

(7) The gross costs of the secret ballot must be divided equally between the employer and the trade union.

(8) If the Director of Employment is satisfied that the employer has failed to comply with the holding of the secret ballot, a declaration stating that the trade union is recognised as entitled to conduct collective bargaining on behalf of the bargaining unit may be issued.

(9) Once the secret ballot is held, the qualified independent person, must as soon as reasonably practicable, inform the employer and the trade union of the result of the secret ballot.

(10) If the result of the secret ballot is that the trade union is supported by-

- (a) at least 10 percent of the employees voting; and
- (b) at least 50 percent of the employees constituting the bargaining unit,

the Director of Employment must issue a declaration that the trade union is recognised as entitled to conduct collective bargaining on behalf of the bargaining unit.

(11) If the result is that the trade union does not meet the conditions in subregulation (10), the Director of Employment must issue a declaration that the trade union is not entitled to be recognised.

(12) An employer that fails to recognise a trade union that has been granted statutory recognition after a secret ballot is guilty of an offence and is liable on summary conviction, to imprisonment for 9 months or a fine not exceeding level 4 on the standard scale, or to both

Collective agreements.

7.(1) A collective agreement must be considered an agreement for recognition if-

- (a) the agreement is made between a trade union and an employer in consequence of a request from the trade union for recognition;
- (b) the parties agree a bargaining unit within 10 working days from receipt of the initial request for recognition; and
- (c) under the agreement the trade union is recognised as entitled to conduct collective bargaining on behalf of a group of employees employed by the employer.

(2) A collective agreement must be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement-

- (a) is in writing; and
- (b) contains a provision which states that the parties intend that the agreement must be a legally enforceable contract.

(3) A collective agreement becomes effective on-

- (a) the date specified in the collective agreement; or
- (b) if no date is specified, the date on which the collective agreement is signed.

(4) A trade union may make an application to the Director of Employment to consider whether the agreement meets the conditions to be considered a collective agreement.

(5) Pursuant to subregulation (4) the Director of Employment must issue a declaration to both parties stating whether the agreement is considered a collective agreement.

(6) Where the Director of Employment makes a declaration that the agreement is a collective agreement-

- (a) the parties must then agree a bargaining procedure; or
- (b) if the parties cannot agree a bargaining procedure, the Director of Employment must impose one.

(7) Pursuant to subregulation (6) a bargaining procedure must be drafted in the form of a collective agreement to regulate their relations within 30 working days from the date of the issued declaration.

(8) Either party may initiate negotiations with a view to renewing or revising a collective agreement by giving notice in writing to the other party.

(9) Where either party considers that there has been any form of discrimination or unfair practice during the collective bargaining procedure, the aggrieved party may apply to the Director of Employment for an order directing the other party to cease such action.

(10) The Director of Employment must determine an application under subregulation (9)-

- (a) within 30 working days of the confirmation of receipt of the application; or
- (b) in exceptional circumstances, extend the period for a further 30 working days.

(11) An employer that fails to recognise a trade union contrary to a valid collective agreement is guilty of an offence and is liable on summary conviction, to imprisonment for 9 months or a fine not exceeding level 4 on the standard scale, or to both.

(12) An employer that does not cease a discriminatory or unfair practice under subregulation (9) is guilty of an offence and is liable on summary conviction, to imprisonment for 9 months or a fine not exceeding level 4 on the standard scale, or to both.

Revocation or variation of recognition.

8.(1) The Director of Employment may-

- (a) on an application made by a trade union, make an order to revoke or vary the recognition of another trade union where it is satisfied that there has been a change in representativeness; or
- (b) on an application by an employer, make an order to revoke the recognition of a trade union for any default or failure to comply with any provisions of a collective agreement.

(2) Where an application is made under subregulation (1), the recognition of the trade union will remain in force until the Director of Employment makes an order.

(3) The Director of Employment must determine an application to revoke or vary recognition-

- (a) within 30 working days of confirmation of receipt of the application; or
- (b) in exceptional circumstances, extend the period for a further 30 working days.

(4) A person that acts contrary to a variation agreed by the Director of Employment is guilty of an offence and is liable on summary conviction, to imprisonment for 6 months or a fine not exceeding level 3 on the standard scale, or to both.

Termination of collective agreement.

9.(1) The employer may not terminate a collective agreement before the period of 3 years starting with the day after the date of the agreement.

(2) After the period of time in subregulation (1) has elapsed, the employer may terminate a collective agreement, with or without the consent of the trade union.

(3) The trade union may terminate a collective agreement at any time, with or without the employer's consent.

(4) Any provisions relating to the collective bargaining method will cease to have effect, as from the date that the collective agreement is terminated.

Bargaining unit and disclosure of information.

10.(1) Within 30 working days of appointment, the trade union must provide the employer with a written list of the elected representatives that will act as spokespersons in representing its interests.

(2) Any subsequent change to the composition of the representatives must also be provided via a written list within 14 working days of amendment.

(3) Where an employer is engaged in collective bargaining with a recognised trade union, both parties must, within a period of 14 working days, provide each other with all necessary information required for the purposes of collective bargaining-

- (a) without which either party would be to a material extent impeded in participating in the meeting; and
- (b) which it would be in accordance with good industrial relations practice to disclose for the purposes of the meeting.

(4) Neither party will be required to disclose information which-

- (a) would be against the interests of national security;
- (b) is prohibited to be released by law or by a court order;

- (c) was provided in confidence or was obtained in consequence of the confidence reposed in it by another person;
- (d) is personal information relating to the privacy of a person, unless the person consents to the disclosure of information;
- (e) would cause substantial injury to the undertaking for reasons other than its effect on collective bargaining; or
- (f) obtained for the purpose of bringing, prosecuting or defending any legal proceedings.

(5) A refusal of a request for information must be provided in written notice along with the reasons for refusal.

(6) Where either party refuses to provide information under this regulation, the other party may apply to the Director of Employment for a disclosure order.

(7) Pursuant to subregulation (6) the Director of Employment must, where it is satisfied that the requested information does not fall within the exceptions of subregulation (4), make a disclosure order requiring that the information be provided.

(8) A disclosure order must –

- (a) be determined within 30 working days of confirmation of receipt of the application; and
- (b) complied with within 14 working days of the date of the order.

(9) Any information provided under this regulation must be used only for the purposes of collective bargaining, unless agreed otherwise by both parties in writing.

(10) A person that fails to obey a disclosure order or contravenes subregulation (9) is guilty of an offence and is liable on summary conviction, to imprisonment for 9 months or a fine not exceeding level 4 on the standard scale, or to both.

(11) If the employer or the trade union believes that the original bargaining unit is no longer an appropriate bargaining unit, either of them may apply to the Director of Employment to make a decision as to what is an appropriate bargaining unit.

(12) An application for an order pursuant to subregulation (11) must be determined within 30 working days of confirmation of receipt of the application.

Application submissions and hearings.

11.(1) When the Director of Employment is considering any application made under these Regulations, the parties will be asked to submit and exchange evidence in the form of written submissions.

(2) All written submissions must be provided within 5 working days from the confirmation of receipt period.

(3) The Director of Employment may take a decision on the written submissions.

(4) Where the Director of Employment considers that a decision cannot be made on the basis of the evidence provided, a hearing will be called to determine the issue.

Right to be accompanied.

12.(1) This regulation applies where an employee-

- (a) is required or invited by his employer to attend a disciplinary or grievance hearing; and
- (b) reasonably requests to be accompanied at the hearing.

(2) The employer must permit the employee to be accompanied at the hearing by a single companion who-

- (a) is chosen by the employee and falls within subregulation (3);
- (b) is to be permitted to address the hearing (but not to answer questions on behalf of the employee), and
- (c) is to be permitted to confer with the employee during the hearing.

(3) Pursuant to subregulation (2) a person must be allowed to accompany an employee if-

- (a) the person is a trade union representative; or
- (b) another of the employer's employees.

(4) If an employee has a right under this regulation to be accompanied at a hearing, but-

- (a) the chosen companion will not be available at the time proposed for the hearing; and
- (b) the employee proposes an alternative time which is reasonable and falls before the end of the period of 5 working days beginning with the first working day after the day proposed by the employer,

the employer must postpone the hearing to the time proposed by the employee.

(5) A person that acts contrary to this regulation is guilty of an offence and is liable on summary conviction, to imprisonment for 9 months or a fine not exceeding level 4 on the standard scale, or to both

Facility Time.

13.(1) Employers must grant trade union representatives reasonable time-off during working hours, without loss of pay, as long as it is for the purpose of-

- (a) carrying out any official trade union duties, concerned with collective bargaining matters;
- (b) undergoing or providing training in aspects of industrial relations; or
- (c) accompanying an employee at a disciplinary or grievance hearing.

(2) Pursuant to subregulation (1) an application for time-off must be made to the employer within a reasonable time and approval by the employer must not be unreasonably withheld.

(3) The amount of time-off which an employee is permitted to take must be reasonable in all the circumstances having regard to any relevant provisions of the Codes of Practice provided by ACAS.

(4) An employee may present a complaint to the Director of Employment on the basis of an employer refusing to give time-off pursuant to subregulation (1).

(5) A complaint under subregulation (4) must be considered and a decision provided in writing by the Director of Employment within a period of 30 working days beginning with the day of confirmation of receipt of the complaint.

(6) Where the Director of Employment finds that a complaint made pursuant to this regulation is well-founded-

- (a) a declaration to that effect must be made; and
- (b) an award of compensation to be paid by the employer to the employee may be made.

(7) Pursuant to subregulation (6)(b) the amount of compensation will be such as the Director of Employment considers just and equitable in all the circumstances having regard to the employer's refusal and any loss sustained by the employee.

Anti-discrimination.

14.(1) An employer must not discriminate against, victimise or in any way prejudice-

- (a) a person seeking employment because of past, present or anticipated membership of a trade union;
- (b) an employee that has taken part or will take part in activities of a trade union at an appropriate time;
- (c) an employee that fails or refuses to perform an act that the employee is not lawfully required to do; or
- (d) an employee that discloses any information that the employee is lawfully entitled or required to disclose to another person.

(2) An employer must not dismiss an employee, if the reason for the dismissal is that the employee-

- (a) is a member or proposed member of a trade union;
- (b) has taken part or will take part in activities of a trade union at an appropriate time; or
- (c) is not a member of any trade union or has refused to become or remain a member of a trade union.

(3) In this regulation “appropriate time” means-

- (a) a time outside the employee’s working hours; or
- (b) a time within the employee’s working hours, which had already been agreed with the employer or which the employer consented to giving permission.

(4) An employee may present a complaint to the Director of Employment on the ground that action has been taken that contravenes subregulations (1) and (2).

(5) The Director of Employment must not consider a complaint under this regulation unless it is presented-

- (a) before the end of the period of 3 months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them; or
- (b) where the Director of Employment is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as the Director of Employment considers reasonable.

(6) Where the Director of Employment finds that a complaint under this regulation is well-founded, a declaration to that effect must be made and-

- (a) if the employee has been dismissed, an order for immediate reinstatement made; and
- (b) for any discriminatory action an award of compensation to be paid by the employer to the employee may be made in respect of the act or failure complained of.

(7) Pursuant to subregulation (6) the amount of the compensation awarded must be such as the Director of Employment considers just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the act or failure which infringed his right.

(8) The loss must be taken to include-

- (a) any expenses reasonably incurred by the complainant in consequence of the act or failure complained of; and
- (b) loss of any benefit which the employee might reasonably be expected to have had but for that act or failure.

Prohibited list.

15.(1) No person must compile, use, sell or supply a prohibited list.

(2) A person that contravenes this regulation is guilty of an offence and is liable on summary conviction, to imprisonment for 12 months or a fine not exceeding level 5 on the standard scale, or to both.

(3) Pursuant to subregulation (2) a person will not be guilty of an offence if-

- (a) a person supplies a prohibited list, but-
 - (i) does not know that they were supplying a prohibited list; and
 - (ii) could not reasonably be expected to know that they were supplying a prohibited list.
- (b) a person compiles, uses or supplies a prohibited list, but-
 - (i) in doing so, that person's sole or principle purpose is to make known a contravention of these Regulations or the possibility of such a contravention;
 - (ii) no information in relation to a person whose details are included in the prohibited list is published without the consent of that person; and
 - (iii) in all the circumstances compiling, using or supplying the prohibited list is justifiable in the public interest.
- (c) if a person compiles, uses, sells or supplies a prohibited list, but in doing so that person's sole or principle purpose is to apply a requirement either-
 - (i) that a person may not be considered for appointment to an office or for employment unless that person has experience or knowledge of trade union matters, and in all the circumstances it is reasonable to apply such a requirement;
 - (ii) that a person may not be considered for appointment or election to an office in a trade union unless he is a member of the trade union; or
 - (iii) to meet any requirement under law or any order of court.

Offences by body corporate.

16. Where any offence under these Regulations is committed by a body corporate and is proved-

- (a) to have been committed with the consent or connivance of a director, manager, secretary or other similar officer; or
- (b) to be attributable to any neglect on the part of any such individual,

the individual as well as the body corporate is guilty of the offence and is liable on summary conviction, to imprisonment for 12 months or a fine not exceeding level 5 on the standard scale, or to both.

Explanatory Memorandum

These Regulations provide the framework for the recognition by employers of trade unions for collective bargaining purposes and set out the statutory recognition procedure whereby a trade union may apply to the Director of Employment in the event that an employer refuses to grant recognition.