Industrial Court

Statutory Derecognition

Guidance for the Parties

July 2007

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Introduction

1.1 This booklet provides practical guidance but should not be relied upon as a statement of the law. The provisions relating to the rights and obligations of trade unions and employers are contained in The Employment Relations (Northern Ireland) Order 1999 (SI 2004 No. 2790), as amended by the Employment Relations (Northern Ireland) Order 2004 (SI 2004 No. 3078), available from the Stationery Office or from their web-site (www.opsi.gov.uk). You may wish to refer to it and also seek legal advice. This Guide will evolve in the light of experience. **Guidance for the Parties is updated regularly on the Industrial Court website. You should check the website to ensure you have the most up to date copy.**

1.2 In addition, you may wish to refer to:

- the Code of Practice on Access and Unfair Practices during Ballots for Recognition and Derecognition, available from the Department for Employment and Learning (website www.delni.gov.uk) and the Court;

- the Industrial Court's web-site (www.industrialcourt.gov.uk) will give
- basic information on the Industrial Court, its members, its role, the statutory recognition and derecognition processes; decisions of the Court and

the Industrial Court's Application Forms for Parts IV and V of the Schedule and the notes on each form.

The Industrial Court

2.1 The Industrial Court (the Court) is a Tribunal Non-Departmental Public Body with statutory powers. The Acting Chairman is Mr Barry Fitzpatrick. Under the Employment Relations (Northern Ireland) Order 1999, it has been given statutory responsibility to adjudicate in disputes over trade union recognition. It also has powers in relation to the Information and Consultation Regulations, European Works Councils, the European Company Statute and The European Co-operative Society (Involvement of Employees) Regulations 2006 and it determines claims from trade unions on the disclosure of information for collective bargaining purposes. It can also provide voluntary arbitration on a reference from the Labour Relations Agency (LRA). The Court's approach is flexible and seeks to be problem-solving, in line with its general duty under paragraph 171 of the Schedule to 'have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace'. The Court's role with regard to trade union recognition presently forms the vast majority of its work. This guide only covers the statutory recognition provisions introduced by the Employment Relations (Northern Ireland) Order 1999 (amended by the Employment Relations (Northern Ireland) Order 2004) and, in particular, Statutory Derecognition under Parts IV and V of Schedule 1A. More general advice on *Statutory Recognition, Guidance for the Parties*, is also available on the Court's website.

Statutory Recognition

2.2 The statutory recognition provisions of the Order provide that, in certain circumstances, a trade union may apply to the Court for a declaration that it should be recognised to conduct collective bargaining regarding pay, hours and holidays on behalf of workers employed by an employer in a particular bargaining unit. The basic principle is that recognition is granted if a majority of the workers in the bargaining unit wish it, provided that the application meets the statutory criteria (for example, applications cannot be accepted where the employer employs a total of less than 21 workers). The Court may declare the union to be recognised without a ballot if more than 50% of the workers in the bargaining unit are members of the union. If, alternatively, the Court calls for a ballot, having taken industrial relations issues into account, recognition will be granted if a majority of those voting, and at least 40% of the workers in the bargaining unit, vote in favour. Following a declaration of recognition, either party can ask the Court to try to help the parties agree a bargaining method. If the parties cannot agree, the Court specifies a method. A method specified by the Court is legally enforceable unless the parties agree otherwise.

Industrial Court Proceedings

3.1 The Court will be impartial in its application of the provisions of the legislation. The procedures will be as user-friendly as possible for both employers and trade unions.

3.2 On receipt, applications will be allocated to a Case Manager who will first check that the application is properly made in line with the statute and may return incomplete applications to unions, or in some situations under Part IV or V, to an employer or a worker, for resubmission. The existence of each application will be made public on the Court's web-site **(www.industrialcourt.gov.uk).**

3.3 A Panel of three Court members will be convened to deal with each application. The Panel will consist of the Chairman or Deputy Chairman, one Member with experience as a representative of employers and one Member with experience as a representative of workers. While the composition of the Panel will normally remain the same throughout an application, it may be necessary to change the membership in the event of the unavailability of one of the members. Changes to the Panel will only be made after one of the stages in the statutory process, and not during a stage unless exceptional circumstances prevail. All parties will be informed of the names of the Panel members, and of any changes in the composition of the Panel.

3.4 A Court official will be appointed to act as Case Manager for the application. The Case Manager will contact all parties when an application is received, and will be the main point of parties' contact, making enquiries of the parties on the instructions of the Panel. The Case Manager will ensure that correspondence and documents are cross copied between the parties and the Panel as appropriate. The Case Managers will do all they can to explain the statutory procedures and help parties understand the implications of the legislation, as well as resolve difficulties. However, the impartiality of the Court cannot be compromised in this process. Any party can contact the Case Manager with queries concerning the application and the statutory procedure; the Case Manager can quickly liaise with the Panel where necessary. Should the Case Manager be out of the office for any reason, another Court official will handle the case in his/her absence.

3.5 The Court's approach will be as flexible as possible, given that the processes are laid down in legislation and are quite formal in nature. The Court will try to help parties, where possible, reach voluntary agreements outside the statutory process. The parties are free to contact the Case Manager at any time to discuss any aspect of the statutory process. The Court will expect the parties to co-operate in providing any relevant information. The Court is enabled to make its decisions by the submissions and evidence put before it by the parties. Whilst there are some matters (e.g. the number of union members) on which the Panel may as a matter of routine make enquiries of one party or another, it will be for the parties to take the initiative in developing their submissions and marshalling their evidence in preparation for each decision point. The onus is on the party that wishes to have an issue considered to raise it formally with the Court. Nevertheless it is for the Court to make determinations in the matter before it and it may request further information from the parties to better inform its deliberations.

3.6 Since the Court has a duty to help the parties to resolve underlying problems and reach agreement, some contacts between the Court and the parties will be of an informal nature. However the Court also has to take formal decisions based on evidence available to the parties, so there is a mix of informal and formal processes. Where necessary, the Case Manager and Panel members will make it clear to the parties when they are discussing matters informally and when the discussion is part of a formal process.

Application Form

3.7 Application forms are available from the Court, together with notes on the information required from employers, unions or workers making applications. Applicants should complete the forms in as much detail as possible, but in the knowledge that it and any supporting documentation sent with it must be copied to the other party/parties. It would therefore not normally contain names or addresses of individuals other than the applicant. It is however essential that the description of the Court's recognition declaration and the bargaining arrangements are sufficiently clear for the Court, and the other party/parties, to be able to identify readily which bargaining arrangements are the subject of the application. Information about the number of workers in the bargaining unit that are known to favour an end of the bargaining arrangements should, where relevant, be included together with evidence (in any form) that the majority of workers in the bargaining unit would be likely to favour an end of the bargaining arrangements or, again where relevant, that fewer than half the workers in the bargaining unit are members of the union. If a petition has been used, and will be relied on as evidence, then this should be referred to but should only be attached to the application form if it is intended to be shared in full with the Panel and the other party/parties.

3.8 When an application has been lodged with the Court the Secretariat will send notification of receipt to both the other party/parties. The employer, union and/or worker will be asked to complete a questionnaire for the Court with questions that are designed to elicit information and evidence germane to the admissibility criteria of Schedule 1A. This questionnaire allied to the application form and supporting documents will inform the Panel of any issues that are disputed and enable it to make focused further enquiries before deciding whether to accept the application (5.8, 7.3, 8.4 and 10.3 below).

Confidentiality

3.9 Under paragraphs 101, 108, 112 and 129 of the Schedule an application to the Court is not valid unless the applicant gives to the employer and/or union "a copy of the application and any documents supporting it." For the avoidance of doubt, the Court's understanding of this provision is that the application and *any documents submitted as part of, or at the same time as*, the application documentation must be copied to the other party/parties. Therefore both the application papers and the other party's/parties' comments on them will be copied to all concerned. Names and addresses of individuals, if supplied as part of the application documentation (i.e. at the same time as the application) must be supplied to the other party/parties. If it is desired that names and addresses should not be disclosed, they should not be supplied to the Court without seeking prior clarification from the Court. The Court may in certain circumstances be able to receive such information or relevant parts of it on the basis of confidentiality: this will normally be achieved by an agreement between the parties that they will each supply information to the Case Manager on the basis that such information supplied by one party is not disclosed to the other/s. The Court has the power to require certain information to be

supplied to the Case Manager by the parties and to draw an adverse inference if such information is not supplied.[1]

3.10 There may be informal communications and discussions in pursuit of the Court's duty to help the parties reach a voluntary agreement, and the parties can give the Panel or Case Manager information on a confidential basis during that period. Where appropriate, the Panel or the Case Manager will explain to the parties in advance the consequences of discussing matters with the Court. However, this confidentiality is qualified: If the confidential information concerns the key facts that are relevant to the Court's decision, in the interest of fairness, the Court may later be obliged to make that information available to the parties so as to enable it to be checked and/or challenged at a hearing. The Court will always warn the parties concerned in advance that this may occur and inform the party concerned before disclosing any information previously given in confidence.

3.11 If a party wishes to discuss any information informally with confidentiality guaranteed, they can contact the Labour Relations Agency (LRA) about this, whether or not the LRA is already involved. Anything said to the LRA in confidence will not be passed to the Court and, therefore could not be taken into account in any decision.

Hearings

3.12 Hearings are not always necessary and some decisions may be taken by the Panel on the papers after giving each party the opportunity to make submissions or if it appears to the Panel that there is no material dispute. If it appears that a hearing will be necessary, the Chairman of the Panel may hold a preliminary meeting in order to set out procedures and identify the issues disputed. The parties will be asked to submit and exchange evidence in the form of written submissions prior to the hearing. New evidence will only be admitted at hearings for good reasons and at the discretion of the Panel and, where it is admitted, parties can request that the Panel allows some additional time, such as a short adjournment, to consider the new evidence. The parties will be asked to inform the Court in advance of the names of the speakers and witnesses proposed for the hearing. Speakers should be persons who are capable of representing the positions of the parties and who can contribute appropriately to the evidence required to assist the Panel's considerations at the particular stage in the statutory procedure. The parties may appoint representatives but there is no requirement to use lawyers. Hearings will generally be held in public, although it is open to the Court to hold a hearing (or part of a hearing) in private, for example if the Court considers there are areas of particular confidentiality or that it is necessary in order to reach a satisfactory settlement. The Court intends to hold hearings in as informal a way as is consistent with clarity and fairness. Each party will be asked to comment on and amplify its written statement and to comment on the other's evidence and to answer questions put by the Court. The Court may also pose its own questions to either party at any stage in the proceedings. Representative speakers and witnesses may be cross-questioned through the Chairman where factual issues are in dispute, at the

[1] *In any processing or disclosure of names or other personal information to the Court in connection with applications for statutory recognition, unions and employers should note the power under paragraph 170A of Schedule 1A and the requirements of the Data Protection Act 1998 (see also pages 17, 18, 21, 22 & 26)***.** *Any names or personal information which is provided to the Case Manager on this basis will not be passed on to any third party or used for any other purpose but may be accessed by the individuals themselves in compliance with the Data Protection Act. For further information on the Data Protection Act, consult the Information Commissioner's Office (tel 028 9051 1270) www.ico.gov.uk*

discretion of the Chairman of the Panel. Information is not normally given under oath. In particular cases the Panel may determine that stricter standards of evidence are required, or that more formality in proceedings is appropriate. Parties will be advised if this is the case in good time prior to the hearing.

3.13 The Court is required to meet relatively short deadlines set by statute, and hearings, if they are necessary, will normally be arranged as quickly as possible in order to meet these deadlines. Wherever possible, hearing dates will be arranged taking account of the convenience of the parties but there are occasions where it is necessary for the Court to impose a hearing date in order to comply with its statutory obligations. Where a hearing date is imposed, the Court will give as much notice to the parties as is possible in light of the statutory requirements. The Court expects that hearings will normally be completed in a half day or in a day, and the procedures adopted at the hearings will be based on that expectation. While the Court is based in Belfast, hearings may be arranged at other locations more convenient to the parties. The decision on location will rest with the Court. Details of forthcoming hearings are listed on the Industrial Court website.

Court Decisions

3.14 Decisions, declarations, and determinations of the Court will be publicly available, but will not normally be publicised by means of a Press Notice. Where decisions of the Court are publicised the parties will be informed first. All decisions are made in the name of the Court rather that that of the individual Panel members. Decisions of the Court will, after being notified to the parties, be posted on the Court's web-site **(www.industrialcourt.gov.uk)**. Decisions concerning the processing of an application (eg. to conduct a membership check, or to hold a Hearing, or to grant an extension) may be communicated to the Parties by way of a letter signed by the Case Manager. However, the decision itself will always be made by the Court.

Extensions

3.15 At most stages of the statutory process, the time limits may be extended by the Panel as long as it gives the parties notice of the extension and states the reason for the extension. Where one of the parties requests an extension to a statutory time limit, the Panel will follow these principles:

a) the Panel will take into account the views of the party making the request, the reason for the request and any relevant circumstances in which the request is made;
b) the Panel will seek to avoid giving an unfair advantage to any party;
c) the Panel will aim to keep such extensions to a minimum;
d) the Panel will take all reasonable steps to consult the other party (or parties) and seek their views prior to reaching a decision; and
e) the Case Manager will inform the parties in writing of the Panel's decision with regard to the extension, together with the reason for the extension (if any) and its duration.

3.16 Extensions may also be granted at the joint request of both parties (where (a), (b) and (c) will not apply). In addition, the Panel may grant an extension at its own instigation where, for example, it needs more information or to conduct a membership check or arrange a hearing. In such cases, the parties will be informed of the reason for the extension and its duration.

3.17 The Court does not charge for carrying out its statutory functions (and there is no scope for the Court to pay the expenses of either party). However, where a ballot is held the costs are divided between the employer and the union on a 50/50 basis unless the Court upholds a complaint that a party has used an unfair practice (see 11.11) and decided that a fresh ballot should be held. In these circumstances the Court can apportion the costs of the fresh ballot as it so decides. This may be extended to include an applicant worker or workers in relation to an application under paragraph 112 (see Section 3 and Section 5).

Contact Details for the Industrial Court

Address: The Industrial Court
Room 203
Adelaide House
39/49 Adelaide Street
Belfast
BT2 8FD

Tel: 028 9025 7599 (9.00am-5.00pm – Monday to Friday)
Fax: 028 9025 7555
E-mail: enquiries@industrialcourt.gov.uk
Web-site: www.industrialcourt.gov.uk

Contact names:

Secretary:	Lynne Taylor
Senior Case Manager:	Marie Turner
Case Manager:	Brenda Slowey
Head of Administration:	Paul Cassidy
Administration Support:	Alan Finlay

User Satisfaction

If you are asked for your views on any aspect of our service, we would appreciate your co-operation. But if you have comments, whether of satisfaction, complaint or suggestion, please do not wait to be asked. If you are dissatisfied with any aspect of our service or have any comments to make please let us know. If you cannot resolve the problem with the person who dealt with you originally, please ask to speak to the Secretary, who will investigate the issue. If you wish to complain or make any comments, please write to the Secretary, Miss Lynne Taylor, at the above address.

In the event of any complaint, we hope that you will let us try to put things right. But if necessary you can write to your MLA who can tell you how to have your complaint referred to the Parliamentary Commissioner for Administration (The Ombudsman).

Part IV & V of Schedule 1A – The Statutory Derecognition Provisions

4.1 This guide is intended as an overview of the main provisions of Parts IV and V of Schedule 1A to the Trade Union and Labour Relations (Northern Ireland) Order 1995, the derecognition provisions. The guidance is designed to assist employers, unions and workers to understand the provisions of Parts IV & V of the Schedule. It should not be taken as an authoritative statement of the law. Only Panels drawn from the Industrial Court can reach decisions under the Schedule, only the courts can properly determine the precise meanings of legislation. Throughout this guide, references to 'union' should be read as references to 'unions' in the plural where the Court has declared more than one union recognised by the employer.

Derecognition Provisions Under Schedule 1A

4.2 Parts IV and V of Schedule 1A set out four different ways in which bargaining arrangements (see 4.5) that are in place as the result of the Court's declaration of recognition (see 4.4) can be brought to an end after the relevant date has passed (see 4.3). The four routes are:-

- An employer can issue a notice that the bargaining arrangements will cease on a particular date where it believes that it, taken with any associated employer or employers, now employs an average of fewer than 21 workers in any period of thirteen weeks which ends on or after the relevant date (Part IV of the Schedule, see **Section 1** below);

- An application to the Court by an employer for a derecognition ballot where it believes that there is no longer majority support for the bargaining arrangements (Part IV of the Schedule, see **Section 2** below);

- An application by a worker, or workers, for a derecognition ballot where they believe that there is no longer majority support for the bargaining arrangements (Part IV of the Schedule, see **Section 3** below);

- An application by an employer for a derecognition ballot where recognition without a ballot had originally been declared and it believes that union membership has subsequently reduced to 'fewer than half' the workers in the bargaining unit (Part V of the Schedule, see **Section 4** below).

Thus three of the routes, were an application to be accepted, lead to a derecognition ballot. The first option (fewer than 21 workers), if challenged by the Union, would require the Court to reach a decision on the facts; no ballot is held.

The Concept of the Relevant Date

4.3 The provisions of Parts IV and V of the Schedule cannot be used until the expiry of the three year period that starts with the day of the Court's declaration of recognition. This is referred to in the Schedule as the 'relevant date'. No application, and no employer's notice, under Parts IV and V can be accepted as admissible, or valid in the case of an employer's notice, unless it is made on or after the relevant date.

The Court's Declaration of Recognition and the Meaning of 'Bargaining Arrangements'

4.4 Part I of Schedule 1A to the Trade Union and Labour Relations (Northern Ireland) Order 1995 sets out the procedure whereby a Union may apply to the Court for a declaration that it is recognised by an employer for collective bargaining on the issues of pay, hours and holidays in respect of a group of workers within a bargaining unit (see The Court's 'Statutory Recognition – Guidance for the Parties' available on the Court's website). Part III of the Schedule sets out the procedures whereby either the union or the employer (see Guide to Part III of the Schedule) can apply to the Court where they believe that the original bargaining unit has ceased to exist or that some change affecting the original bargaining unit makes that unit no longer appropriate. Applications made under Part III may lead to the Court issuing a declaration that the union is recognised by the employer in respect of a new bargaining unit. The Court's declarations of recognition under Parts I and III of the Schedule can be made in the following circumstances;

a) where the union has a majority of the workers in the bargaining unit as its members and the Court did not decide that any of the statutory requirements for a ballot was fulfilled;

b) where the union wins a recognition ballot;

c) where the union is declared recognised because the employer failed to comply with a Court order to remedy a failure (under paragraph 27 of the Schedule).

4.5 After any declaration of recognition given under Part I of the Schedule, the Court may be asked to specify a method of conducting collective bargaining where such a method cannot be agreed between the employer and the union. Any declaration of recognition under Part III of the Schedule will import with it the method of collective bargaining that related to the original bargaining unit (with any modifications considered necessary by the Court). For the purposes of Parts IV & V of the Schedule, the declaration of recognition and the method of collective bargaining (either a voluntarily agreed method or a method specified by the Court) are jointly referred to as the 'bargaining arrangements'.

Section 1 – Part IV of the Schedule

EMPLOYER EMPLOYS FEWER THAN 21 WORKERS

5.1 One of the validity provisions under Part 1 of the Schedule which must be satisfied before a Part 1 recognition application can be accepted is that the employer, taken with any associated employer, must employ at least 21 workers. This provision relates to the entire workforce as opposed to the number of workers who are within a particular bargaining unit. Thus any declaration of recognition made by the Court will have been issued in respect of an employer employing 21 or more workers on the date the employer receives the request for recognition. As this validity test has to be met as a pre-condition of an application for recognition, there is a specific mechanism available under paragraphs 99 to 103 which enables employers who later employ fewer than 21 workers to reverse the statutory machinery and bring the bargaining arrangements to an end as the 21 worker requirement is no longer met. This provision is subject once again to there having been a Court declaration of recognition, there being a method of collective bargaining and the relevant three year period expiring. Of course, employers who believe they employ fewer than 21 workers are free to continue the bargaining arrangements voluntarily irrespective of this provision.

Employer Gives Notice to the Union

5.2 In accordance with paragraph 99 of the Schedule, if an employer believes that it, taken with any associated employer[1], employs an average of fewer than 21 workers in any period of 13 weeks, and wants the bargaining arrangements to cease to have effect, then it must give the recognised union a 'notice' which complies with the requirements set out below. A copy of the notice must be given to the Court.

- The notice must identify the bargaining arrangements;
- The notice must specify the period of 13 weeks in question;
- The notice must state the date on which it is given;
- The notice must be given to the union before the end of the 5th working day starting with the day after the last day of the specified period of 13 weeks;
- The notice must state that the employer, taken with any associated employer[1] or employers, employed an average of fewer than 21 workers in the specified 13 week period;

[1] *Paragraph 172(3) of the Schedule provides that the definition in Article 4 of the Employment Rights (NI) Order 1996 applies, namely "Two employers will be treated as associated if one is a company of which the other (directly or indirectly) has control, or both are companies of which a third person (directly or indirectly) has control."*

- The notice must state that the bargaining arrangements are to cease to have effect on a specific date. The date must be stated in the notice and must fall after the end of the period of 35 working days; day 1 being the working day following that on which the notice is given.

- However, the notice would be deemed invalid if, within the past three years:

    - the Court has accepted a relevant application under paragraph 106, 107, 112 or 128; or

    - an earlier notice had been made and the Court decided that it complied with paragraph 99(3); and

    - the relevant application or previous notice related to the same bargaining unit.

  'Relevant applications' are those made to, and accepted by, the Court:-

    - by the employer under paragraphs 106, 107 or 128 (applications for a secret ballot on derecognition - see Sections 2 & 4); or

    - by a worker, or workers, under paragraph 112 (application for a secret ballot on derecognition - see Section 3)

5.3 Paragraph 99 of the Schedule refers to the number of workers employed in a 'period of 13 weeks'. The Court views a 'period of 13 weeks' as a consecutive period as opposed to separate weeks over a longer period being totted up and having a cumulative effect. In determining the numbers of workers, part-time workers count as whole numbers. Temporary workers are counted if they are directly employed by the employer. Those employed by agencies generally do not count. The period of 13 weeks must end on or after the relevant date.

The Court's Decision on Validity of the Employer's Notice

5.4 On receipt of a copy of the employer's notice the Chairman of the Court will appoint a Panel of three Court members to consider the validity of the notice. Within the period of 10 working days starting with the day after that on which the Court receives the notice, or a longer period, the reasons for which must be notified to the parties, the Panel will decide whether the notice complies with paragraph 99(3) of the Schedule (see 5.2 above). If the Panel decides that the employer's notice does not comply with the requirements under paragraph 99(3) then the parties will be given notice of this decision and the employer's notice will be treated as if it had not been given. The bargaining arrangements would therefore not cease on the date specified by the employer and would remain in force.

5.5 If the Panel decides that the employer's notice does comply with paragraph 99(3) of the Schedule (see 5.2 above) then the parties will be given notice of this decision. The bargaining arrangements will then cease to have effect on the date specified in the employer's notice *unless* the union makes an application to the Court, within the specified time limit, under paragraph 101 of the Schedule. The union must make its application to the Court within the period of 10 working days starting with the day after that on which the notice is given.

Union's Application to the Court

5.6 If the Court's decision is that the employer's notice does comply with paragraph 99(3) the union may make an application to the Court for a decision on whether the period of 13 weeks that was specified in the employer's notice ends on or after the relevant date *and* whether the statement that the employer, taken with any associated employer or employers, employed an average of fewer than 21 workers in that period is correct. The union's application *must* be made within 10 working days starting with the day after that on which notice is given (see 5.5). If this time limit is not observed the application cannot be accepted by the Court.

5.7 Before the Court can accept the Union's application it must, within the acceptance period, apply the admissibility tests to the application in accordance with paragraph 101 of the Schedule. The acceptance period is 10 working days starting with the day after that on which the Court receives the application. This period can be extended by the Court if the reasons are notified to the parties. The admissibility tests are listed below.

- ***Is the application in the proper form and supported by such documents as the Court may have specified*** *(paragraph 101(2)* ***of Schedule 1A)?*** The Court has prepared an application form, available either by contacting the Secretariat office (028 9025 7599) or from the Court website. There are currently no specified supporting documents required by the Court.

- ***Has the union given the employer notice of the application, a copy of the application and any documents supporting it (paragraph 101(3))?*** The application will not be admissible unless the union has notified the employer of the application and additionally given the employer a copy of the application together with any documents supporting it. Unions may wish to send documentation by recorded delivery or special delivery to provide evidence of its receipt.

The Court is required to give notice to the parties when it receives an application from the union under **paragraph 101** of the Schedule.

How the Court Decides Whether the Union's Application Can Be Accepted as Admissible

5.8 Some preliminary work to enable the Panel to determine whether the tests have been satisfied will be carried out by the Case Manager (and other Court staff), who will report the findings to the Panel as appropriate. On receipt of the application, the Case Manager will seek confirmation from the employer at the earliest opportunity that the employer has received notice of the application along with a copy of the application form and any supporting documents. The Panel will make the decision on whether the union's application meets the admissibility tests of paragraph 101 on the basis of the evidence before it. In reaching this decision the Court must consider any evidence which it has been given by the employer or the union. Where there is conflicting evidence, the Panel may call a hearing to determine the issue.

5.9 If the Court decides that the union's application fails the admissibility tests then it must not accept the application and notice of this decision will be given to the parties. The

bargaining arrangements will then cease to have effect on the date that was specified in the employer's notice to the union issued in accordance with paragraph 99(3) (see note 5.2 above).

5.10 If the Court decides that the union's application meets the admissibility tests under paragraph 101 then the application must be accepted and notice of this decision will be given to the parties.

The Court Accepts the Union's Application as Admissible

5.11 If the union's application is accepted as admissible by the Court then both the union and the employer must be given the opportunity to submit their views and any substantiating evidence on the two questions:

- Whether the period of 13 weeks specified in the employer's notice to the union ends on or after the relevant date (see note 4.3 above); and

- Whether the employer's statement that it, taken with any associated employer or employers, employed an average of fewer than 21 workers in the specified period of 13 weeks is correct.

5.12 The Court must then decide the two questions in the decision period specified under paragraph 103(4). The decision period is the period of 10 working days starting with the day after that on which the Court gave notice of acceptance of the union's application. Once again the Court may extend this period if it gives notice to the parties specifying the reasons for the extension. The Panel will try to avoid the need for extensions in order to help the application progress as expeditiously as possible.

Court Decision and Consequences

5.13 If the Court decides that the 13 week period given in the employer's notice does not end on or after the relevant date **or** decides that the employer's statement that in that period it, taken with any associated employers (see footnote on page 12), employed fewer than 21 workers is incorrect, then the employer's notice issued under paragraph 99 shall be treated as not having been given. (However, the notice would still be treated as an earlier notice for the purposes of paragraph 99A(1)) if the employer serves a subsequent notice on the union (see 5.2). The notice would also be treated as having been given for the purposes of paragraphs 109(1), 113(1) and 130(1), that is, it would render as inadmissible any subsequent application by the employer under paragraph 104 (see 7.1) or paragraph 127 (see 10.1) and render as inadmissible any subsequent application by a worker under paragraph 112 (see 8.2).

5.14 If the Court decides that the 13 week period given in the employer's notice does end on or after the relevant date **and** that the employer's statement that in that period it, taken with any associated employers, employed fewer than 21 workers are both correct, then the bargaining arrangements will cease to have effect on the 'termination date'. The termination date will be the later of the date that was specified in the employer's notice to the union and the day after the last day of the 'decision period' (see 5.12).

Section 2 –
Part IV of the Schedule

EMPLOYER WANTS TO END THE BARGAINING ARRANGEMENTS ON THE GROUNDS THAT THE ARRANGEMENTS NO LONGER HAVE THE SUPPORT OF THE BARGAINING UNIT

6.1 An employer can, at any time, make a request to the union to agree to end the bargaining arrangements. The union can refuse to end the arrangement. However, after the 3 year period has expired (see 4.3), the employer, having had a request to end the bargaining arrangements declined by the union, can apply to the Court and request that a secret ballot is ordered to decide whether the bargaining arrangements should be ended. The Court will only hold a ballot where it is satisfied that the evidence shows that it is likely that the bargaining arrangements are no longer supported by the majority of the workers in the bargaining unit.

6.2 The Panel will apply a number of validity and admissibility provisions to any such application made by an employer.

Employer's Request to the Union (Before Application to the Court)

6.3 To be valid, the employer's request (to end the bargaining arrangements) must

- be in writing;
- be received by the union;
- identify the bargaining arrangements, and
- state that the request is made under Schedule 1A.

6.4 Once the union receives the employer's request there then begins a period of 10 working days within which the response of the union will direct what step can next be taken. The period of 10 working days begins with the day following the union's receipt of the written request. If, before the end of the period, the union agrees to end the bargaining arrangement then the matter ends there and no application to the Court will be necessary.

6.5 If, before the end of the 'first period' of 10 working days, the union either fails to respond to the employer's request or informs the employer that it does not accept the request (and does not indicate a willingness to negotiate) then the employer may apply to the Court for the holding of a secret ballot to decide whether the bargaining arrangements should be ended.

6.6 If, before the end of the first period, the union informs the employer that it does not accept the request but is willing to negotiate then a 'second period' of 20 working days (starting with the working day immediately following the end of the 'first period') is permitted by the Schedule in which the parties can negotiate with a view to agreeing to end the bargaining arrangements. During this second period the parties may request the assistance of the Labour Relations Agency in their negotiations*****. The parties can agree to extend the 'second period' beyond 20 working days as often as they wish provided both parties agree to the extension. If no final agreement is reached between the parties before the end of the second period then the employer may apply to the Court for the holding of a secret ballot to decide whether the bargaining arrangements should be ended.

*****Note – The Schedule makes clear that where a union informs an employer that it is willing to negotiate, the employer *cannot* subsequently apply to the Court if it either rejects or fails to accept any proposal from the union that the Labour Relations Agency be requested to assist in conducting the negotiations within 10 working days starting with the day after that on which the union makes the proposal. This condition applies to any such proposal made by the union in the period of 10 working days starting with the day after it informs the employer of its willingness to negotiate.

Application to the Court; Admissibility and Validity Provisions

7.1 The Court is unable to accept an application without first applying a number of provisions from Schedule 1A. These provisions determine whether the application is admissible and whether it is valid.

- **Is the application in the proper form *(paragraph 108 of the Schedule)*?** An application from an employer, after either the 'first' or 'second' period, must be made on the form specified by the Court and must be supported by any documents specified by the Court. The Court has prepared an application form, available either from the Secretariat office (020 9025 7599) or from the Court website.

- **Has the employer given notice of the application and a copy of the completed application form, along with any documents supporting it, to the union *(paragraph 108 of the Schedule)*?** The Court cannot accept an application unless the employer has given notice of the application to the union (though not specified in the Schedule we would recommend that such notice be in writing) and a copy of the application and any documents supporting it. Employers may opt to send such notice and application copies to unions by some recorded delivery system to provide evidence of its receipt.

- **Do at least 10% of the workers in bargaining unit favour an end to the bargaining arrangements (paragraph 110 of the Schedule)?** The Court cannot accept an application unless it is satisfied that at least 10% of the workers in the bargaining unit favour an end to the bargaining arrangement. The Panel will consider the evidence put forward by the employer to establish this level of support for an end to the bargaining arrangements. The form of the evidence is not specified but it is envisaged that signatures to petitions, letters of support and workplace surveys may play a part. The value and weight to be attached to particular forms of evidence is likely to vary, depending, for example, on the circumstances in which the evidence was obtained, when it was obtained, the wording of the petition and other variable factors considered relevant by the

Court. If the union queries the level of support claimed by an employer, then the Case Manager may, where asked to do so by the Panel, conduct an independent check of, for example, signatories to petitions to establish any duplication, any signatures from workers outside of the bargaining unit, contradictory statements, etc.

The check can take a number of forms. Where it is intended to rely on a petition, pledge cards or some other form of signed statements as evidence of support, it will be helpful if the parties make clear the period within which the signatures were given, for example, by the inclusion of a column indicating the date of signature. If this information does not appear on the petition/pledge statement, then the party submitting the evidence may be asked to provide written verification of the date or dates.

Since signatures on petitions cannot be challenged by any party, it may be necessary for the Court to verify signatures if it is of the opinion that there is any doubt over the legitimacy of signatures on the petition. It would be advisable, for example, for a worker signing a petition to set out his or her name in block capitals alongside the signature.

If confidentiality is not required or where, more usually, the parties agree in advance to provide lists on the basis of confidentiality, the check can take the form of a direct comparison of lists. In these circumstances the Case Manager would produce a numerical report of the results of the comparison for the Panel (the names themselves will not be given to the Panel) and the parties will be asked to comment on the report and the admissibility test (see below).

- **Is the majority of workers in the bargaining unit likely to favour an end of the bargaining arrangements *(paragraph 110 of the Schedule)*?** The Court cannot accept an application unless it decides that a majority of the workers in the bargaining unit *would be likely to favour* an end of the bargaining arrangements. Again, the evidence provided by either party on this question can take any form. The difference between this provision and the 10% provision is that the 10% provision requires the Court to assess the current wishes of a group of workers whereas this provision requires the Court to assess, from the available evidence, whether, if a ballot were held, a majority of the workers would be likely to favour an end to the bargaining arrangements. The guidance on value and weight of evidence, Case Manager's checks for example, on verification of signatures on petitions and confidentiality in the preceding paragraph is similarly relevant here. The Court must give reasons for the decision it reaches on this issue.

  The Court's consideration of the admissibility tests under **paragraph 110** will be based on the best evidence available. If the Court considers it necessary, it can require a party to provide information to the Case Manager to enable a confidential check to be conducted. If the Court considers these steps necessary it will specify to the parties what information it requires and the date by which it is to be supplied. Such requirement may include information as to the nature and number of employees in a bargaining unit and the likelihood that a majority of the workers favour the end of collective bargaining on their behalf.

Once the required information has been received the Case Manager will compile a report and a copy of the report will be given to the Panel and the parties. If either party fails to supply the information required by the Court then the report must mention that failure and the Court can draw an inference against the party who has so failed.

- **Has there been a previous application for an end to the bargaining arrangements in the last three years *(paragraph 109 of the Schedule)*?** The Court cannot accept an application if a previous 'relevant application' was made or a notice under paragraph 99(2) was given within the period of 3 years prior to the date of the application under paragraph 106 or 107 and the Court accepted the 'relevant application' or decided that the notice complied with paragraph 99(3) and the application or notice related to the same bargaining unit.

'Relevant applications' are those made to, and accepted by, the Court:-

- by the employer under paragraphs 106, 107 or 128 (applications for a secret ballot on derecognition - see Sections 2 & 4); or

- by a worker, or workers, under paragraph 112 (application for a secret ballot on derecognition - see Section 3)

7.2 The Court is required to give notice to the parties when it receives an application from an employer under either paragraph 106 or 107 of the Schedule.

How the Court Decides Whether an Application Can Be Accepted

7.3 Starting with the day after that on which it receives the application, the Court has 10 working days in which to decide the following questions:-

- whether the employer's request is valid (see 6.3 above),

- whether the application is made in accordance with paragraph 106 or 107 of the Schedule (see 6.5 – 6.6 above); and

- whether the application is admissible within the terms of paragraphs 108 to 110 of the Schedule (see 7.1 above).

7.4 The Panel can extend the period in which the decision must be made provided they inform the parties and give reasons for the extension. To minimise delays, some preliminary work will be carried out by the Case Manager, and other Court staff where necessary, to assist the Panel in reaching a decision expeditiously. The Court staff will report any findings to the Panel; they will not take decisions under the Schedule. Such decisions are a matter for the Panel. On receipt of an application the Court will, as well as giving notice of receipt to the parties, ensure that the union is asked to comment on the relevant provisions of the Schedule in relation to the particular application and whether it can be accepted. The Panel will reach a decision on the basis of any evidence placed before it by the parties and its own enquiries and may, where it considers it appropriate, convene a hearing. Both parties would be invited to attend the hearing and present evidence to the Panel.

The Court's Decision on Whether to Accept the Application

7.5 If the Court decides that:-

- the employer's request under paragraph 104 of the Schedule is not valid; or
- the application is not made in accordance with paragraph 106 or 107 of the Schedule; **or**
- is not admissible within the terms of paragraphs 108 to 110 of the Schedule.

it must **NOT** accept the application; it must give notice of this decision to the parties and must take no further steps with the application under Part IV of the Schedule.

7.6 However, if the Court decides that:-

- the employer's request under paragraph 104 of the Schedule is valid; **and**
- the application is made in accordance with paragraph 106 or 107 of the Schedule; **and**
- is admissible within the terms of paragraphs 108 to 110 of the Schedule.

it must accept the application. It must give notice of this acceptance decision to the parties and it must arrange for the holding of a secret ballot in which the workers constituting the bargaining unit are asked whether the bargaining arrangements should be ended.

Holding a Ballot

7.7 See Section 5 on page 29 for the provisions relating to the conduct of a ballot.

Result of Ballot

7.8 In order for bargaining arrangements to be ended as the result of a ballot, a majority of those voting, and at least 40% of the workers in the bargaining unit, must vote in favour of an end to those arrangements. After the ballot the Court will either declare that the bargaining arrangements are to cease to have effect on a specified date or the Court will 'refuse' the application. Following a declaration that the bargaining arrangements are to cease to have effect the Court cannot accept any applications for statutory recognition from the union concerned in respect of that bargaining unit or one substantially the same if the application is made within the period of three years starting with the day after that on which the declaration is issued. Once the qualified independent person (QIP) has submitted a written report of the ballot result to the Court it must be considered by the Panel. The Case Manager will only be permitted to inform the parties of the ballot result once authorised to do so by the Panel. In normal circumstances this will be within 48 hours of completion of the balloting period.

Section 3 – Part IV of the Schedule

WORKER (OR WORKERS) WANTS TO END THE BARGAINING ARRANGEMENTS ON THE GROUNDS THAT THE ARRANGEMENTS NO LONGER HAVE THE SUPPORT OF THE BARGAINING UNIT

8.1 Paragraphs 112 to 121 of Part IV of the Schedule set out the procedures through which a worker or workers can apply to the Court to end bargaining arrangements that are in place as a result of a declaration of recognition made by the Court (a declaration can have been made as the result of a recognition ballot, without a ballot or as the result of a change affecting the bargaining unit). Applications can only be made after the 3 year period has passed. There is no requirement for a worker or workers to first make a request of the employer or the union to voluntarily agree to end the bargaining arrangements. Throughout this section, references to 'applicant worker' should be read as references to 'applicant workers' in the plural where the application is brought by more than one worker.

Application to the Court; Admissibility Provisions

8.2 The Panel will apply a number of validity and admissibility provisions to an application made by a worker.

- **Is the application in the proper form *(paragraph 112 of the Schedule)*?** An application from a worker must be made on the form specified by the Court and must be supported by any documents specified by the Court. The Court has prepared an application form, available either by contacting the Secretariat office (028 9025 7599) or from the Court website.

- **Has the worker given notice of the application and a copy of the completed application form, along with any documents supporting it, to both the employer and the union *(paragraph 112 of the Schedule)*?** The Court cannot accept an application unless the worker has given notice of the application to both the employer and the union (though not specified in the schedule we would recommend that such notice be in writing) and a copy of the application and any documents supporting it. A worker may opt to send such notice and application copies to the employer and union by some recorded delivery system to provide evidence of its receipt.

- **Do at least 10% of the workers in bargaining unit favour an end to the bargaining arrangements *(paragraph 114 of the Schedule)*?** The Court cannot accept an application unless it is satisfied that at least 10% of the workers in the bargaining unit favour an end to the bargaining arrangements. The Panel will consider the evidence put forward by the worker to establish this level of support for an end to the bargaining arrangements. The form of the evidence is not specified but it is envisaged that signatures to petitions, letters of

support and workplace surveys may play a part. The value and weight to be attached to particular forms of evidence is likely to vary, depending, for example, on the circumstances in which the evidence was obtained, when it was obtained, the wording of the petition and other variable factors considered relevant by the Court. If the employer or the union queries the level of support claimed by a worker, then the Case Manager may, where asked to do so by the Panel, conduct an independent check of, for example, signatories to petitions to establish any duplication, any signatures from workers outside of the bargaining unit, contradictory statements, etc.

The check can take a number of forms. Where it is intended to rely on a petition, pledge cards or some other form of signed statements as evidence of support, it will be helpful if the parties make clear the period within which the signatures were given, for example, by the inclusion of a column indicating the date of signature. If this information does not appear on the petition/pledge statement, then the party submitting the evidence may be asked to provide written verification of the date or dates.

Since signatures on petitions cannot be challenged by any party, it may be necessary for the Court to verify signatures if it is of the opinion that there is any doubt over the legitimacy of signatures on the petition. It would be advisable, for example, for a worker signing a petition to set out his or her name in block capitals alongside the signature.

If confidentiality is not required or where, more usually, the parties agree in advance to provide lists on the basis of confidentiality, the check can take the form of a direct comparison of lists. In these circumstances the Case Manager would produce a numerical report of the results of the comparison for the Panel (the names themselves will not be given to the Panel) and the parties will be asked to comment on the report and the admissibility test (see below).

- **Is the majority of workers in the bargaining unit likely to favour an end of the bargaining arrangements *(paragraph 114 of the Schedule)*?** The Court cannot accept an application unless it decides that a majority of the workers in the bargaining unit *would be likely to favour* an end of the bargaining arrangements. Again, the evidence provided on this question can take any form. The difference between this provision and the 10% provision is that the 10% provision requires the Court to assess the current wishes of a group of workers whereas this provision requires the Court to assess, from the available evidence, whether, if a ballot were held, a majority of the workers would be likely to favour an end to the bargaining arrangements. The guidance on value and weight of evidence, Case Manager's checks and confidentiality in the preceding paragraph is similarly relevant here. The Court must give reasons for the decision it reaches on this issue.

  The Court's consideration of the admissibility tests under paragraph 114 will be based on the best evidence available. If the Court considers it necessary, it can require a party to provide information to the Case Manager to enable a confidential check to be conducted. If the Court considers these steps necessary it will specify to the parties what information it requires and the date by which it is to be supplied. Such requirement may include information as to the nature and number of employees in a bargaining unit and the likelihood that

a majority of the workers favour the conduct of collective bargaining on their behalf or an end of the bargaining arrangements.

Once the required information has been received the Case Manager will compile a report and a copy of the report will be given to the Panel, the employer, the union and the applicant worker. If the employer, the union, or the applicant worker fails to supply the information required by the Court then the report must mention that failure and the Court can draw an inference against the party who has so failed.

- **Has there been a previous application for an end to the bargaining arrangements in the last three years *(paragraph 113 of the Schedule)*?** The Court cannot accept an application if a previous 'relevant application' was made or a notice under paragraph 99(2) was given within the period of 3 years prior to the date of the application under paragraph 112 and the Court accepted the 'relevant application' or decided that the notice complied with paragraph 99(3) and the application or notice related to the same bargaining unit.

'Relevant applications' are those made to, and accepted by, the Court:-

- by the employer under paragraphs 106, 107 or 128 (applications for a secret ballot on derecognition - see Sections 2 & 4); or

- by a worker under paragraph 112 (application for a secret ballot on derecognition - see Section 3)

8.3 The Court is required to give notice to the worker, the employer and the union when it receives an application from a worker under paragraph 112 of the Schedule.

How the Court Decides Whether an Application Can Be Accepted

8.4 Starting with the day after that on which it receives the application, the Court has 10 working days in which to decide whether the application is admissible within the terms of paragraphs 112 to 114 of the Schedule (see 8.2). In making this decision the Court must consider any evidence provided to it by the employer, the union or the workers within the bargaining unit. Evidence taken into account by the Panel in reaching a decision under the Schedule, unless that evidence is subject to previously agreed confidentiality such as exists when a membership or petition check is carried out, will be made available to the other parties to the application.

8.5 The Panel can extend the period in which the decision must be made provided they inform the parties and give reasons for the extension. To minimise delays, some preliminary work will be carried out by the Case Manager, and other Court staff where necessary, to assist the Panel in reaching a decision expeditiously. The Court staff will report any findings to the Panel; they will not take decisions under the Schedule. Such decisions are a matter for the Panel. On receipt of an application the Court will, as well as giving notice of receipt to the parties, ensure that the union and employer are asked to comment on the relevant provisions of the Schedule in relation to the particular application and whether it can be accepted. The Panel will reach a decision on the basis of any evidence placed before it by the parties and its own enquiries and may, where it considers it appropriate, convene a hearing. The parties would be invited to attend the hearing and present evidence to the Panel.

The Court's Decision on Whether to Accept the Application

8.6 If the Court decides that the worker's application is not admissible within the terms of paragraphs 112 to 114 of the Schedule then it must NOT accept the application, it must give notice of this decision to the worker, the employer and the union and must take no further steps with the application under Part IV of the Schedule.

8.7 If, however, the Court decides that the worker's application is admissible within the terms of paragraphs 112 to 114 of the Schedule then it must accept the application. The Court must then give notice of this acceptance decision to the worker, the employer and the union.

Consequences of Accepting a Worker's Application

8.8 If the Court accepts a worker's application as admissible it must proceed by helping the employer, the union and the worker negotiate with a view to either reaching an agreement that the employer and the union will end the bargaining arrangements or the worker will withdraw the application.

8.9 The period within which such agreements will be pursued is the 'negotiation period' which will be the period of 20 working days starting with the day after the Court gives notice that the application is accepted. The negotiation period can be extended for a longer period than the 20 working days but the Court can only extend the period with the consent of the worker, the employer and the union.

8.10 If agreement can be reached in the negotiation period that the employer and the union will end the bargaining arrangements or that the worker will withdraw the application, the Court will cease its consideration.

8.11 If no agreement can be reached in the negotiation period then the Court must arrange for the holding of a secret ballot in which the workers in the bargaining unit will be asked whether the bargaining arrangements should be ended.

Holding a Ballot

8.12 See Section 5 on page 29 for the provisions relating to the conduct of a ballot.

Result of Ballot

8.13 In order for bargaining arrangements to be ended as the result of a ballot, a majority of the those voting, and at least 40% of the workers in the bargaining unit must vote in favour of an end to those arrangements. After the ballot the Court will either declare that the bargaining arrangements are to cease to have effect on a specified date or the Court will 'refuse' the application. Following a declaration that the bargaining arrangements are to cease to have effect the Court cannot accept any applications for statutory recognition from the union concerned in respect of that bargaining unit or one substantially the same if the application is made within the period of three years starting with the day after that on which the declaration is issued. Once the qualified independent person has submitted a written report of the ballot result to the Court it must be considered by the Panel. The Case Manager will only be permitted to inform the parties of the ballot result once authorised to do so by the Panel. In normal circumstances this will be within 48 hours of completion of the balloting period.

Section 4 –
Part V of the Schedule

EMPLOYER WANTS TO END THE BARGAINING ARRANGEMENTS ON THE GROUNDS THAT FEWER THAN HALF OF THE WORKERS IN THE BARGAINING UNIT ARE MEMBERS OF THE UNION

9.1 Where a majority of the workers in a bargaining unit are members of the union, the Court may declare that union recognised by the employer without the holding of a ballot. Circumstances may arise where the employer believes the level of union membership has declined to fewer than half the bargaining unit and therefore the grounds for the original declaration are no longer present. In these circumstances an employer can, at any time, request that the union agree to end the bargaining arrangements. The union is free to decline the request. However after the 3 year period has expired, the employer can make this request to the union and if the union declines the request the employer can apply to the Court and request that a secret ballot is ordered to decide whether the bargaining arrangements should be ended.

9.2 The Panel will apply a number of validity and admissibility provisions to any such application made by an employer.

Employer's Request to the Union (Before an Application to the Court)

9.3 To be valid, the employer's request (to end the bargaining arrangements) must

- be in writing;
- be received by the union;
- identify the bargaining arrangements;
- state that the request is made under Schedule 1A; and
- state that fewer than half of the workers constituting the bargaining unit are members of the union.

9.4 Once the union receives the employer's request there then begins a period of 10 working days under the Schedule within which the parties can negotiate with a view to reaching agreement on ending the bargaining arrangements. The period of 10 working days is referred to as the 'negotiation period' and begins with the day following the union's receipt of the written request. The negotiation period can be extended if the parties agree. If, before the end of the negotiation period, the union agrees to end the bargaining arrangements then the matter ends there and no application to the Court will be necessary.

9.5 If no agreement to end the bargaining arrangements is made before the end of the negotiation period, the employer may apply to the Court for the holding of a secret ballot to decide whether the bargaining arrangements should be ended.

Application to the Court; Admissibility and Validity Provisions

10.1 The Court is unable to accept an application without first applying a number of provisions from Schedule 1A. These provisions determine whether the application is admissible and whether it is valid.

- **Is the application in the proper form *(paragraph 129 of the Schedule)*?** An application from an employer must be made on the form specified by the Court and must be supported by any documents specified by the Court. The Court has prepared an application form, available either by contacting the Secretariat office (028 9025 7599) or from the Court website.

- **Has the employer given notice of the application and a copy of the completed application form, along with any documents supporting it, to the union *(paragraph 129 of the Schedule)*?** The Court cannot accept an application unless the employer has given notice of the application to the union (though not specified in the schedule we would recommend that such notice be in writing) and a copy of the application and any documents supporting it. Employers may opt to send such notice and application copies to unions by some recorded delivery system to provide evidence of its receipt.

- **Are fewer than half of the workers constituting the bargaining unit members of the union *(paragraph 131 of the Schedule)*?** The Court cannot accept an application unless it is satisfied that fewer than half of the workers in the bargaining unit are members of the union. In reaching a decision on this issue the Panel will consider the evidence put forward by the employer to establish the level of membership. The form of the evidence is a matter for the employer. If the union produces evidence to contradict the level of membership claimed by the employer, then the Case Manager may, where asked to do so by the Panel, conduct an independent check of membership. The check can take a number of forms. If confidentiality is not required or where, more usually, the parties agree in advance to provide lists on the basis of confidentiality, the check can take the form of a direct comparison of lists.

  The Court's consideration of the admissibility tests under paragraph 131 will be based on the best evidence available. If the Court considers it necessary, it can require a party to provide information to the Case Manager to enable a confidential check to be conducted. If the Court considers these steps necessary it will specify to the parties what information it requires and the date by which it is to be supplied. Such requirement may include information as to the nature and number of employees in a bargaining unit and the number of union members in the bargaining unit.

  Once the required information has been received the Case Manager will compile a report and a copy of the report will be given to the Panel and the parties. If either party fails to supply the information required by the Court then the report must mention that failure and the Court can draw an inference against the party who has so failed.

- **Has there been a previous application for an end to the bargaining arrangements in the last three years *(paragraph 130 of the Schedule)*?** The Court cannot accept an application if a previous 'relevant application' was made or a notice under paragraph 99(2) was given within the period of 3 years prior to the date of the application under paragraph 128 and the Court accepted the 'relevant application' or decided that the notice complied with paragraph 99(3) and the application or notice related to the same bargaining unit.

'Relevant applications' are those made to, and accepted by, the Court:-

- by the employer under paragraphs 106, 107 or 128 (applications for a secret ballot on derecognition - see Sections 2 & 4); or

- by a worker, or workers, under paragraph 112 (application for a secret ballot on derecognition - see Section 3)

10.2 The Court is required to give notice to the parties when it receives an application from an employer under paragraph 128 of the Schedule.

How the Court Decides Whether an Application Can Be Accepted

10.3 Starting with the day after that on which it receives the application, the Court has 10 working days in which to decide the following questions:-

- whether the employer's request is valid (see 9.3 above); and

- whether the application is admissible within the terms of paragraph 129 to 131 of the Schedule (see 10.1 above).

10.4 The Panel can extend the period in which the decision must be made provided they inform the parties and give reasons for the extension. To minimise delays, some preliminary work will be carried out by the Case Manager, and other Court staff where necessary, to assist the Panel in reaching a decision expeditiously. The Court staff will report any findings to the Panel; they will not take decisions under the Schedule. Such decisions are a matter for the Panel. On receipt of an application the Court will, as well as giving notice of receipt to the parties, ensure that the union is asked to comment on the relevant provisions of the Schedule in relation to the particular application and whether it can be accepted. The Panel will reach a decision on the basis of any evidence placed before it by the parties and its own enquiries and may, where it considers it appropriate, convene a hearing. Both parties would be invited to attend the hearing and present evidence to the Panel.

The Court's Decision on Whether to Accept the Application

10.5 If the Court decides that:-

- the employer's request under paragraph 127 of the Schedule is not valid; **or**

- the application is not admissible within the terms of paragraphs 129 to 131 of the Schedule,

it must NOT accept the application; it must give notice of this decision to the parties and must take no further steps with the application under Part V of the Schedule.

10.6 However, if the Court decides that:-

- the employer's request under paragraph 127 of the Schedule is valid; **and**

- the application is admissible within the terms of paragraphs 129 to 131 of the Schedule,

it must accept the application. It must give notice of this acceptance decision to the parties and it must arrange for the holding of a secret ballot in which the workers constituting the bargaining unit are asked whether the bargaining arrangements should be ended.

Holding a Ballot

10.7 See Section 5 on page 29 for the provisions relating to the conduct of a ballot.

Result of Ballot

10.8 In order for bargaining arrangements to be ended as the result of a ballot, a majority of those voting, and at least 40% of the workers in the bargaining unit must vote in favour of an end to those arrangements. After the ballot the Court will either declare that the bargaining arrangements are to cease to have effect on a specified date or the Court will 'refuse' the application. Following a declaration that the bargaining arrangements are to cease to have effect the Court cannot accept any applications for statutory recognition from the union concerned in respect of that bargaining unit or one substantially the same if the application is made within the period of three years starting with the day after that on which the declaration is issued. Once the qualified independent person has submitted a written report of the ballot result to the Court it must be considered by the Panel. The Case Manager will only be permitted to inform the parties of the ballot result once authorised to do so by the Panel. In normal circumstances this will be within 48 hours of completion of the balloting period.

Section 5 – Holding a Ballot under Parts IV and V of the Schedule

11.1 The provisions for the conduct of ballots under Parts IV and V of the Schedule are the same unless otherwise stated. References to "parties" should be read as references to the Employer, the Union and, in the case of an application under paragraph 112, the applicant worker or workers.

11.2 If the Court decides a ballot should be held, it will inform the parties of the impending ballot and seek the parties' views on the form of the ballot. Once the parties have been informed in writing that there will be a ballot the employer and the union should negotiate and agree access arrangements for the union during the ballot period (see 11.7 – 11.9 below), and send a copy of the access agreement to the Case Manager. The Case Manager is likely to be in touch with the employer and the union during the negotiations in case they require assistance or, where necessary, a hearing on access needs to be arranged so that the Panel can determine an access arrangement. **Schedule 1A does not require the employer to reach an access agreement with the worker or workers who have made an application under paragraph 112 for an end to the bargaining arrangements.**

11.3 The Panel appoints a qualified independent person (QIP) to conduct the ballot. The Panel selects the QIP in accordance with the Recognition and Derecognition Ballots (Qualified Persons) Order (Northern Ireland) 2001 and (Amendment) (Northern Ireland) Order 2004. While the QIP conducts the ballot, the Panel has to decide whether the ballot should be a workplace ballot or a postal ballot (or, if special factors apply, a combination of the two). The Panel will decide on the form of ballot depending on the circumstances of the case. It is required to take into account the likelihood of the ballot being affected by unfairness or malpractice if it were conducted at a workplace, together with costs and practicality. It may also take into account any other matters it considers appropriate. These are likely to include the preferences of the parties. The Case Manager may visit the workplace before the decision on the form of ballot is decided to advise the Panel on the physical arrangements.

11.4 Special factors that would justify a combination of a workplace and postal ballot are those arising from the location of workers and the nature of the work, or other factors put to the Panel by the parties. Where a workplace ballot has been ordered and there will be workers who, for reasons relating to them as individuals (such as known sick absence, the taking of annual leave, maternity or paternity leave etc), will not be at work on the day of the ballot, the ballot arrangements may, at the Court's discretion, include provision for those workers to vote by post where a request for such is made far enough in advance of the ballot for this to be practicable

11.5 The ballot must be held within 20 working days of the appointment of the QIP. The Panel can extend this period.

11.6 Once the Court has selected the QIP, the Case Manager will inform the parties of the QIP's name and contact details and the date of the QIP's appointment. The Court letter will confirm that the ballot must now take place, will give details of the ballot timetable and will draw attention to the need to agree access arrangements (if this has not already been achieved) and the opportunity for the union to use the services of the QIP to circulate material to the workers in the bargaining unit (see below). A copy of the QIP's estimate of costs will also be sent to the employer and the union.

11.7 The Schedule states that once the employer has been informed of the ballot details (see previous paragraph) that employer must comply with five duties:

- *to co-operate generally with the union and the QIP in connection with the ballot*

- *to give the union reasonable access to the workers in the bargaining unit to enable it to inform those workers of the object of the ballot and to seek their support and their opinions on the issues involved. (In accordance with the Code of Practice on Access to Workers during Recognition and Derecognition Ballots, prepared for this purpose)*

(What constitutes reasonable access, and the basis on which it should be given, is spelt out in greater detail in the 'Code of Practice on Access and Unfair Practices during Ballots for Trade Union Recognition or Derecognition'. However the Schedule itself specifically provides that employers are taken to have breached this duty if they refuse a request for a meeting between the union and any workers in the bargaining unit without either they or their representative (other than one who has been invited to attend) being present and it is not reasonable in the circumstances for them to do so. The duty is also breached if the employer or a representative of the employer attends such a meeting without an invitation, or the employer seeks to record or otherwise be informed of the proceedings at any such meeting (or refuses to undertake not to seek to do so) unless this is reasonable in the circumstances.)

- *to pass names and addresses of workers in the bargaining unit to the Court. The names and addresses must be given to the Court within the period of 10 working days starting with the day after the employer was informed of the QIP's name and ballot arrangements. After providing this initial list the employer must also pass to the Court details of any workers joining or leaving the bargaining unit. The Case Manager will then pass the names and addresses of workers to the QIP.*

- *to refrain from making any offer to workers, or any individual worker, that induces them, or is likely to induce them, not to attend a relevant meeting between the union and the workers unless it is reasonable in the circumstances (relevant meetings are those that are arranged under the access agreement or arranged as a result of a step ordered by the Court in a remedial order (see 11.10 below))*

- *to refrain from taking or threatening any action against a worker because they attended or took part in a relevant meeting or they indicated their intention to do so.*

11.8 The union can use the QIP to distribute information from the union to the workers in the bargaining unit at their home addresses (providing the union bears the cost of sending the information), but neither the Court nor the QIP can give the information on names and home addresses to the union. Equally neither the Court nor the QIP can pass names of union members to the employer or, in the case of an application under paragraph 112, the applicant worker or workers. If the union wishes the QIP to distribute information to the workers, it must ask the QIP directly. The Court has no role in vetting or approving the content of any communication and cannot adjudicate on such a complaint *unless it falls within the ambit of an unfair practice (paragraphs 11.11–11.13)*. Similarly it is for the union to approach the employer with regard to access arrangements. **There is no provision in the Schedule for the applicant worker or workers who have made an application under paragraph 112 to be given access to the workers in the bargaining unit during the ballot period.** The Panel may suggest to the employer (through the Case Manager) that it would be helpful to display a notice at the workplace about the ballot so that the workers in the bargaining unit are made aware of the arrangements.

11.9 Any complaint that the employer has not complied with any of the five duties must be made known to the Court before the ballot has been held. Complaints regarding the employer's compliance with the duties, or any complaints by the employer about lack of co-operation by the union, should be sent to the Case Manager. As long as the ballot has not already been held the Panel will investigate the complaint, seeking advice from the QIP as appropriate. A hearing or, in some circumstances, a site visit may be needed. The Panel can extend the timetable for the ballot in these circumstances.

11.10 If the Panel decides that the employer has failed to perform any of the duties above, it can order the employer to remedy the failure within a set timescale. If the employer fails to remedy the failure and the ballot has not been held, then the Court can refuse the employer's application. If the application is refused under these circumstances then the Court will take steps to cancel the holding of the ballot and if those steps are unsuccessful, and the ballot is nonetheless held it shall have no effect. Given the seriousness of the penalty, in that it will trigger the three year bar on further derecognition applications, the Panel will spell out the consequences of not complying with an order from the Court when the remedial order is made. **In the case of an application brought by a worker or workers under paragraph 112, if such a remedial order is given by the Court it will not be in a position to enforce subsequently that remedial order. Instead, as long as the ballot has not been held, the order may be enforced in the same way as an order of the county court.** The Panel can take into account all relevant circumstances, including the behaviour of the union and, in the case of an application under paragraph 112, the behaviour of the applicant worker or workers, when considering complaints and whether there has been a failure on the part of the employer to comply with any of the five duties.

Unfair Practices

11.11 Each of the parties, once informed by the Court of the name and appointment date of the QIP and the balloting arrangements (see 11.6), must refrain from using any unfair practice. A party can complain to the Court if they believe another party has used an unfair practice and the Court must decide whether the complaint is 'well founded'. A complaint will be well founded if the unfair practice was used and the Court is satisfied that it changed or was likely to change a relevant worker's intention to vote or abstain from voting, intention to vote a particular way or how he or she actually did vote.

11.12 The Department for Employment & Learning's (DEL) *'Code of Practice on Access and Unfair Practices during Ballots for Trade Union Recognition or Derecognition'* recommends steps that can assist good practice for the parties and gives guidance on what activities should be avoided in order to minimise the disruption to ballots that can be caused by complaints to the Court.

11.13 The Schedule lists unfair practices. The following acts by a party are unfair practices if they are used with a view to influencing the result of the ballot:-

- *Offers to pay, with money or to give money's worth, for a relevant worker to vote in a particular way or to abstain;*

- *Offers to pay, with money or to give money's worth, a reward to a relevant worker but only if a specific declaration is achieved following the ballot (the issuing of a declaration that the bargaining arrangements are to cease or the refusal by the Industrial Court of an application under paragraph 106, 107 or 112) – this offer must be "outcome specific" as opposed to being conditional on any developments resulting from the declaration;*

- *The coercion or attempted coercion of relevant workers to discover whether they intend to vote or abstain or how they intend to vote or have voted;*

- *Dismissal, or threats of dismissal, of a worker – note that this is not confined to those workers entitled to vote in the ballot;*

- *Taking or threatening disciplinary action against a worker – again this is not confined to workers entitled to vote in the ballot;*

- *Subjecting, or threatening to subject, a worker to any other detriment – again this is not confined to workers entitled to vote in the ballot; and*

- *Uses or attempts to use undue influence on a relevant worker.*

An unfair practices complaint must be made on or before the first working day after the date of the ballot or, if votes can be cast on more than one day such as in a postal ballot, the last of those days. Where a complaint is made after this period there is no provision in the Schedule for the Court to consider whether one of the parties has used an unfair practice.

11.14 If an unfair practices complaint is made within the specified time, the Court has 10 working days in which to decide whether the complaint is well founded, starting with the day following receipt of the complaint. The Court can extend this period and if it does so it must give reasons to the parties. If at the beginning of this decision period the ballot has not begun, the Court can postpone it by giving a notice to the parties and the QIP; the notice will say when the ballot will begin and the new date must be after the end of the decision period.

11.15 If the Court decides that the complaint is well founded (see 11.11) it will declare this finding and may then do one or both of the following:-

- Issue a remedial order telling the party what steps it must take in order to mitigate the effect of the unfair practice and when to take those steps by; or

- Give notice to the parties that a secret ballot will be held – in effect ordering a new ballot.

The Court may make a remedial order and/or issue a ballot notice either at the same time as it declares the unfair practice has occurred or at any other time before it informs the parties of the ballot result and issues the declaration that the bargaining arrangements are to cease or refuses the application. The Schedule makes clear that the Court can give more than one order under these provisions.

Circumstances In Which The Court Can Abandon A Ballot And Issue A Declaration

11.16 In some circumstances, where there have been serious failures by a party, the Court has the power to cancel a ballot and:

- if the party concerned is the employer, may refuse the employer's application
- if the party concerned is the union, the Court may issue a declaration that the bargaining arrangements are to cease

The Court can consider taking this step in the following circumstances:

a) If the Court declares that an unfair practice complaint is well founded (see 11.11) and that the unfair practice consisted of, or included,

– the use of violence, or

– the dismissal of a union official.

OR

b) The Court has issued an unfair practices remedial order and the party to whom it is issued fails to comply with it;

OR

c) The Court, having issued an unfair practices remedial order to a party, then makes a further declaration (see 11.15) that a complaint that the same party used an unfair practice is well founded.

In the case of an application brought by a worker under paragraph 112, if the circumstances in a) b) or c) above apply, the Court may:

– if the party concerned is the employer, order it to refrain from further campaigning in relation to the ballot
– if the party concerned is a union, issue a declaration that the bargaining arrangements are to cease
– if the party concerned is the applicant worker, refuse the application

If a ballot has been arranged and the Court has:

- issued the employer with a remedial order having found that it has failed in one or more of its five duties, or

- found that the employer has used an unfair practice and issued an appropriate order, or

- ordered the employer to refrain from further campaigning in respect of the ballot

and the ballot has not been held (the original or fresh ballot – see 11.19), the applicant worker or workers and the union are entitled to enforce obedience to the order. The order may be enforced in the same way as an order of the county court.

11.17 The power to cancel the ballot and make these declarations is in addition to the power to issue remedial orders and/or order a new ballot; there is no presumption that the power will therefore need to be used in every instance of repeated failures, this will be a question for the Panel to determine in the circumstances of the individual case.

11.18 Where the Court declares that an unfair practices complaint is well founded and orders a fresh ballot - or where the Court refuses the application or makes a declaration in the circumstances described in 11.16 - the Court will take steps to cancel the 'original' ballot. If that ballot is nonetheless held it will have no effect and any result that is reported by the QIP will not be acted on by the Court or passed on to the parties.

11.19 If the Court orders a fresh ballot in the circumstances described at 11.15 then the following changes to usual ballot procedure will take effect:-

a) the employer only needs to update the information on workers' names and addresses rather than provide them afresh;

b) any remedial order given as a result of a failure to fulfil one of the employer's duties or because of non-compliance by one of the parties with a unfair practice is carried over and must be acted on by the party concerned to the extent that the Court will specify in a notice to the parties – it does not wither away just because the tainted ballot has been abandoned; and

c) the cost of the fresh ballot will be borne by whoever the Court decides, or in whatever proportions the Court decides, it should be.

11.20 Unless the circumstances in 11.19c) apply, the costs of the ballot are shared between the employer and the union on a 50/50 basis even if the ballot was arranged as a result of an application by a worker under paragraph 112. However, should the Court order a fresh ballot in the circumstances described at 11.15, the Court has the power to apportion the costs of the ballot as it so decides. <u>This power to apportion the costs of the ballot extends to include an applicant worker or workers in relation to an application under paragraph 112.</u>

11.21 The Case Manager will send the employer and the union a copy of the estimate of costs that was received from the QIP and will ask that the QIP notify the Court and the employer and the union of any likely changes to that estimate, and the reasons for the changes, as soon as reasonably practicable. In general terms, workplace or combination ballots tend to be more expensive than postal ballots.

11.22 Following the ballot the QIP will send the employer and the union*, subject to any Court decision to the contrary (see 11.19c) and 11.20),* a demand for its costs. The demand will show the gross costs of the ballot and the share of the cost to be paid by the employer and the union. The employer and the union are then required to pay the QIP within 15 working days (starting with the day after the demand is received). If the employer or the union disputes the demand then it can appeal to an Industrial Tribunal

within 4 weeks, starting with the day after receipt of the demand. The Industrial Tribunal will dismiss an appeal unless it is shown that the gross costs of the ballot are too great or the share of the gross cost to be met by the appellant is too great. If the Tribunal allows an appeal then it will also rectify the demand for costs accordingly. While there is an outstanding appeal against the costs, the demand from the QIP is not enforceable. **The above provisions also apply to an applicant worker or workers in relation to an application under paragraph 112 if the Court has determined that an applicant worker or workers should bear a proportion of the costs of the ballot (see 11.20).**

Industrial Court, Room 203, Adelaide House,

39-49 Adelaide Street, Belfast, BT2 8FD.

Telephone: 028 9025 7599, Fax: 028 9025 7555

E Mail: enquiries@industrialcourt.gov.uk

Website: www.industrialcourt.gov.uk