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CODE OF PRACTICE:

ACCESS AND UNFAIR PRACTICES DURING RECOGNITION AND DERECOGNITION BALLOTS



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CODE OF PRACTICE: ACCESS AND UNFAIR PRACTICES DURING RECOGNITION AND DERECOGNITION BALLOTS

This Code of Practice is issued under the power conferred on the Department for Employment and Learning (“the Department”) by Article 95(1) of the Industrial Relations (Northern Ireland) Order 1992. It was laid before the Northern Ireland Assembly, in accordance with Article 95(4) of the Industrial Relations (Northern Ireland) Order 1992, by the Department on 16th March 2006. It comes into operation, by Order of the Department, on 19th March 2006.

PREAMBLE

This Code revises the Code of Practice on Access to Workers during Recognition and Derecognition Ballots, which came into effect on 17 June 2001. It also contains practical guidance on unfair practices during recognition and derecognition ballots, for which the law provides a separate power for the Department for Employment and Learning to issue a Code of Practice. These two Codes on access and unfair practices are therefore combined within this single document. For simplicity and ease of reference, the text refers to there being just one Code of Practice dealing with both topics.

This Code supersedes the Code of Practice on Access to Workers during Recognition and Derecognition Ballots, which came into operation on 17 June 2001. Pursuant to Article 95(6) of the Industrial Relations (Northern Ireland) Order 1992, that Code shall cease to have effect on the date on which this Code of Practice comes into operation.

The legal framework within which this Code will operate is explained in its text.

While every effort has been made to ensure that explanations included in the Code are accurate, only the courts can give authoritative interpretations of the law.

The Code's provisions apply equally to men and to women, but for simplicity the masculine pronoun is used throughout.

Unless the text specifies otherwise,

- (i) the term "union" should be read to mean "unions" in cases where two or more unions are seeking to be jointly recognised;
- (ii) the term "workplace" should be read to mean "workplaces" in cases where a recognition application covers more than one workplace; and
- (iii) the term “working day” should be read to mean any day other than a Saturday or a Sunday, Christmas Day, or a day which is a bank holiday.

Passages in this Code which appear in italics are extracts from, or re-statements of, provisions in primary legislation.

SECTION A

INTRODUCTION

Background

- 1 Schedule 1A to the Trade Union and Labour Relations (Northern Ireland) Order 1995, inserted by Article 3 of and Schedule 1 to the Employment Relations (Northern Ireland) Order 1999 and subsequently amended by the Employment Relations (Northern Ireland) Order 2004, sets out the statutory procedure for the recognition and derecognition of trade unions for the purpose of collective bargaining.

Recognition

- 2 Where an employer and a trade union fail to reach agreement on recognition voluntarily, the legislation provides for the union to apply to the Industrial Court ("the Court") to decide whether it should be recognised for collective bargaining purposes. In certain cases, the Court may award recognition, or dismiss the application, without a ballot. In other cases, the Court will be obliged to hold a secret ballot of members of the bargaining unit to determine the issue. If a ballot takes place, the Court will decide whether it should be held at the workplace, by post, or, if special factors make it appropriate, by a combination of the two methods. The ballot must be conducted by a qualified independent person appointed by the Court.
- 3 Schedule 1A places various duties and obligations on parties during the period of a recognition ballot including the following:
 - (a) Paragraph 26(2) of Schedule 1A places a duty on the employer to *co-operate generally, in connection with the ballot, with the union and the independent person appointed to conduct the ballot;*
 - (b) Paragraph 26(3) of Schedule 1A places a duty on the employer to give a union applying for recognition *such access to the workers constituting the bargaining unit as is reasonable to enable the union to inform the workers of the object of the ballot and to seek their support and their opinions on the issues involved;*
 - (c) Paragraph 26(4A) of Schedule 1A places a duty on the employer to *refrain from making any offer to any or all of the workers constituting the bargaining unit which (i) has or is likely to have the effect of inducing any or all of them not to attend a relevant meeting between the union and the workers constituting the bargaining unit and (ii) is not reasonable in the circumstances.* A "relevant meeting" is defined as a meeting arranged in accordance with the duty to provide reasonable access to which the employer has agreed, or is required, to permit the worker to attend;

(d) Paragraph 26(4B) of Schedule 1A places a duty on the employer to refrain from taking or threatening to take any action against a worker solely or mainly on the grounds that he attended or took part in any relevant meeting between the union and the workers in the bargaining unit, or on the grounds that he indicated his intention to attend or take part in such a meeting. The definition of a “relevant meeting” is the same as at (c);

(e) Paragraph 27A(1) of Schedule 1A places an obligation on both the employer and the union to refrain from using an unfair practice with a view to influencing the result of a recognition ballot. The unfair practices are defined by paragraph 27A(2) of Schedule 1A.

- 4 Article 95(1) of the Industrial Relations (Northern Ireland) Order 1992 gives a general power to the Department to issue Codes of Practice containing practical guidance for the purpose of promoting the improvement of industrial relations. Paragraphs 26(8) and 26(9) of Schedule 1A specify that this general power includes the particular power to issue a Code of Practice giving practical guidance about reasonable access during recognition ballots and about the employer’s duty to refrain from making offers to workers not to attend access meetings. In addition, paragraph 27A(5) of Schedule 1A specifies that the general power includes the particular power to issue a Code of Practice about unfair practices for the purposes of paragraph 27A.

Derecognition

- 5 The Court can also call a derecognition ballot in cases where an employer, or his workers, are seeking to end recognition arrangements with a union. In general, the duties and obligations on the parties are the same in both recognition and derecognition ballots. Paragraph 118(3) of Schedule 1A contains identical wording to paragraph 26(3) of Schedule 1A, placing a duty on the employer to give the recognised union reasonable access to the workers comprising the bargaining unit where the Court is holding a ballot on derecognition. Similarly, paragraph 118(4A) places a duty on the employer to refrain from making offers to workers not to attend access meetings. Paragraph 119A(1) requires both the employer, the union and, in cases where workers are applying to derecognise the union, those workers to refrain from using an unfair practice during the period of a derecognition ballot. Paragraphs 118(8) and 119(9) and paragraph 119A(5) contain similar provisions to paragraphs 26(8), 26(9) and 27A(5) enabling the Department to issue a Code of Practice giving practical guidance about reasonable access and unfair practices during derecognition ballots.
- 6 For simplicity, most examples and explanations in this Code relate to the case where the union is seeking recognition. However, the guidance contained in this Code applies equally to cases where the ballot is about recognition or derecognition.

General purpose of the Code

- 7 This Code covers two related issues: the union's access to workers during the period of recognition or derecognition ballots and the avoidance of unfair practices when campaigning during that period. As regards the first topic of **access**, this Code gives practical guidance about the issues which arise when an employer receives a request by a union to be granted access to his workers at their workplace and/or during their working time. Of course, the union does not need the employer's consent or assistance to arrange access outside the workplace and outside working hours, for example, when hiring a public hall to hold a meeting or when using local newspapers and media to put across its case. The Code does not therefore deal with the issues that arise when arranging such access, though those parts of the Code which concern the conduct of parties when campaigning are relevant. This Code deals with the specific circumstances of access during the period of recognition or derecognition ballots. It does not provide guidance on access at other times.

- 8 Access can take many and varied forms depending largely on the type of workplace involved and the characteristics of the balloted workforce. The overall aim is to ensure that the union can reach the workers involved, but local circumstances will need to be taken into account when deciding what form the access should take. Each case should be looked at on the facts. This Code therefore aims to help the employer and the union arrive at agreed arrangements for access, which can take full account of the circumstances of each individual case.

- 9 The second purpose of this Code is to help parties avoid committing **unfair practices**. Recognition and derecognition ballots usually occur because the employer and the union cannot agree the way ahead. In some cases a party will wish to communicate its views to the workers concerned through active campaigning once the Court has informed them that a ballot will be held. This Code aims to encourage reasonable and responsible behaviour by both the employer and the union when undertaking campaigning activity in this period. A failure to follow the Code's guidance on responsible behaviour may not necessarily mean that an unfair practice has occurred. However, responsible campaigning should help ensure that acrimony between the parties is avoided and individual workers are not exposed to intimidation, threat or other unfair practices when deciding which way to cast their vote. As regards the treatment of individuals, both parties should note that the law provides protections against dismissal or detriment for workers who campaign either for or against recognition. The Code does not cover campaigning activity which occurs before the Court decides that a ballot should be held. However, parties are still advised to act responsibly when undertaking early campaigning and they may benefit by drawing on the guidance provided by this Code.

- 10 In order for a ballot to take place, the union must have satisfied the Court that at least 10% of the proposed bargaining unit are already members of the union, and that a majority of the workers in the proposed bargaining unit would be likely to favour recognition. There is therefore a good chance that recognition will be granted to the union, and that a working relationship between the parties will have to be sustained after the ballot. This longer term perspective should encourage both the employer and the union to behave responsibly and in a co-operative spirit during the balloting period.

Structure of the Code

- 11 This Code deals mainly with issues concerning access and unfair practices. These are distinct, though related, matters and all sections of the Code should therefore be read in conjunction. Sections B – D contain guidance on access, whilst Section E provides guidance on conduct to avoid committing an unfair practice. Finally, Section F provides guidance on the resolution of any disputes which might arise about the arrangement of access to the union or to the conduct of either the employer or the union when campaigning during the balloting period.

Legal status of the Code

- 12 *Under paragraphs 27 and 119 of Schedule 1A to the Trade Union and Labour Relations (Northern Ireland) Order 1995, the Court may order employers who are breaching their duty to allow reasonable access to take specified, reasonable steps to do so, and can award recognition without a ballot, or can refuse to award derecognition where applied for by the employer, if an employer fails to abide by its orders to remedy a breach. Paragraphs 27C - 27F of Schedule 1A provide a number of actions which the Court may take when it concludes that a party has committed an unfair practice during a recognition or derecognition ballot. For example, the Court may order a further ballot and it may order a party to take specified actions to help remedy the effects of the unfair practice. In addition, the Court may award recognition or derecognition (or dismiss an application for recognition or derecognition) where an unfair practice has involved the use of violence or the dismissal of a union official, or where the Court has found that a party has committed a second unfair practice or failed to comply with a remedial order.*
- 13 *This Code itself imposes no legal obligations and failure to observe it does not in itself render anyone liable to proceedings. But Article 90(16) of the Industrial Relations (Northern Ireland) Order 1992 provides that any provisions of this Code are to be admissible in evidence and are to be taken into account in proceedings before any court, tribunal or the Industrial Court where they consider them relevant.*

SECTION B

PREPARING FOR ACCESS

When should preparations for access begin?

- 14 Preparations for access should begin as soon as possible. The Court is required to give notice to the employer and the union that it intends to arrange for the holding of a ballot. There then follows a period of ten working days before the Court proceeds with arrangements for the ballot. The parties should make full use of this notification period to prepare for access. The union should request an early meeting with the employer in this period to discuss access arrangements. The employer should agree to arrange the meeting on an early date and at a mutually convenient time. The employer and the union should ensure that the individual or individuals representing them at the meeting are expressly authorised by them to take all relevant decisions regarding access, or are authorised to make recommendations directly to those who take such decisions.

Joint applications by two or more unions

- 15 Where there is a joint application for recognition by two or more unions acting together, the unions should act jointly in preparing and implementing the access arrangements. Therefore, unless the employer and the unions agree otherwise, the unions should have common access arrangements. The amount of time needed for access would normally be the same for single or joint applications.

Establishing an access agreement

- 16 It would be reasonable for the employer to want to give his prior permission before allowing a full time union official to enter his workplace and talk to his workers. In particular, the employer may have security and health and safety issues to consider. The parties should discuss practical arrangements for the union's activities at the workplace, in advance of the period of access actually beginning.

- 17 Consideration should be given to establishing an agreement, preferably in written form, on access arrangements. Such an agreement could include:
- the union's programme for where, when and how it will access the workers on site and/or during their working time; and
 - a mechanism for resolving disagreements, if any arise, about implementing the agreed programme of access.

When discussions about access arrangements are taking place, parties should also seek to reach understandings about the standards of conduct expected of those individuals who campaign on their behalf (see Paragraph 52 for more guidance on this point).

- 18 In seeking to reach an agreement, the union should put its proposals, preferably in writing, for accessing the workers to the employer. The employer should not dismiss the proposals unless he considers the union's requirements to be unreasonable in the circumstances. If the employer rejects the proposals, he should offer alternative arrangements, preferably in writing, to the union at the earliest opportunity, preferably within three working days of receiving the union's initial proposals. In the course of this dialogue the union will need to reveal its plans for on-site access.

- 19 It is reasonable for the union to request information from the employer to help it formulate and refine its access proposals. In particular, the employer should disclose to the union information about his typical methods of communicating with his workforce and provide such other practical information as may be needed, for example, about workplace premises or patterns of work. Where relevant to the union in framing its plans, the employer should also disclose information about his own plans to put across his views, directly or indirectly, to the workers about the recognition (or derecognition) of the union. The employer should not, however, disclose to the union the names or addresses (postal or e-mail) of the workers who will be balloted, unless the workers concerned have authorised the disclosure.

Amending the access agreement

- 20 Every effort should be made to ensure access agreements are faithfully implemented. To avoid misunderstanding on the ground, the employer should seek to draw the attention of relevant managers to the agreement and the commitments to release workers to attend access meetings. Likewise, the union should take steps to ensure that the relevant union officials and representatives are made aware of the agreed arrangements. However, in some cases, the agreement may need to be changed if circumstances alter. For example, a union official selected to enter the workplace may be unexpectedly called away by his union on other urgent business. Likewise, the employer might wish to re-arrange an event if the selected meeting-room is unexpectedly and unavoidably needed for other important business purposes. If such circumstances arise, the union, or the employer if his situation changes, should notify the other party at the earliest opportunity that a change will need to be made to the agreed access arrangements, and offer alternative suggestions, preferably in writing. The other party should generally accept the alternative arrangements, if they are of an equivalent nature to those already agreed.

Resolving differences about agreeing access arrangements

- 21 Where the employer and the union fail to agree access arrangements voluntarily, either party, acting separately or together, may ask the Labour Relations Agency (LRA) to conciliate. Given the limited time available, the LRA will respond to the conciliation request as soon as possible, and preferably within one working day of receiving the request. Both parties should give all reasonable assistance to the LRA to enable it to help the parties overcome their difficulties through conciliation.

- 22 Every effort should be made to resolve any procedural difficulties remaining, but, ultimately, where it remains deadlocked, the Court may be asked to assist. The Court could, in appropriate circumstances, consider delaying the arrangement of the ballot for a limited period to give extra time for the parties to settle their differences. However, where no agreement is forthcoming, the Court may be asked to adjudicate and to make an order.

SECTION C

ACCESS IN OPERATION

What is the access period?

- 23 *Following the notification period, and providing it does not receive a contrary request from the trade union, the Court will be required to arrange the holding of the ballot. As soon as is reasonably practicable, the Court must inform the parties of the fact that it is arranging the ballot, the name of the qualified independent person appointed to conduct the ballot, and the period within which the ballot must be conducted. The ballot must be held within 20 working days from the day after the appointment of the independent person, or longer if the Court should so decide.*
- 24 The period of access will begin as soon as the parties have been informed of the arrangements for the ballot as in paragraph 23 above. The Court will endeavour to inform both parties as soon as the independent person has been appointed. This may be achieved by a telephone call to both parties, followed by a letter of confirmation.
- 25 If the ballot is to be conducted by post, the period of access will come to an end on the closing date of the balloting period. If the ballot is to be conducted at the workplace, access will continue until the ballot has closed. However, where the ballot is to be conducted at the workplace, and where the union has already had adequate access opportunities, both the employer and the union should largely confine their activities during the actual hours of balloting to the encouragement of workers to vote. They should reduce or cease other campaigning activity at this time. For example, both the employer and the union should avoid scheduling large meetings at such times. This should ensure that the ballot is conducted in a calm and orderly fashion, with minimum disruption to the normal functioning of the workplace.

Who may be granted access?

- 26 The access agreement should specify who should be given access to the workers who will be balloted. Employers should be prepared to give access to:
- (a) individual union members employed by the employer, who are nominated by the union as the lead representative of their members at workplaces where the bargaining unit is situated;
 - (b) individual union members employed by the employer, who are nominated by the union as the lead representative of their members at other workplaces in the employer's business, provided that it is practicable for them to attend events at workplaces where the bargaining unit is situated. The costs of travelling from other workplaces should be met by the individuals or the union; and

(c) "full-time" union officials. (That is, individuals employed by the union, who are officials of the union within the meaning of the Article 2(2) of the Trade Union and Labour Relations (Northern Ireland) Order 1995).

The number of union representatives entitled to gain access should be proportionate to the scale and nature of the activities or events organised within the agreed access programme.

Where will the access take place?

- 27 Where practicable in the circumstances, a union should be granted access to the workers at their actual workplace. However, each case will depend largely on the type of workplace concerned, and the union will need to take account of the wide variety of circumstances and operational requirements that are likely to be involved. In particular, consideration will need to be given to the employer's responsibility for health and safety and security issues. In other words, access arrangements should reflect local circumstances and each case should be examined on the facts.
- 28 Where they are suitable for the purpose, the employer's typical methods of communicating with his workforce should be used as a benchmark for determining how the union should communicate with members of the same workforce during the access period. If the employer follows the custom and practice of holding large workforce meetings in, for example, a meeting room or a canteen, then the employer should make the same facilities available to the union. However, in cases where the workplace is more confined, and it is therefore the employer's custom and practice to hold only small meetings at the workplace, then the union will also be limited to holding similar small meetings at that workplace. In exceptional circumstances, due to the nature of the business or severe space limitations, access may need to be restricted to meetings away from the workplace premises, and the union will need to consider finding facilities off-site at its own expense unless it agrees otherwise with the employer. In these circumstances, the employer should give all reasonable assistance to the union in notifying the workers in advance of where and when such off-site events are to take place. Where such exceptional circumstances exist, it would normally be expected that the employer would not hold similar events at the workplace.

When will the access take place?

- 29 The union should ensure that disruption to the business is minimised, especially for small businesses which might find it more difficult to organise cover for absent workers. The union's access to the workers should usually take place during normal working hours but at times which minimise any possible disruption to the activities of the employer. This will ensure that the union is able to communicate with as large a number of the workers as possible. Again, the arrangements should reflect the circumstances of each individual case. Consideration should be given to holding events, particularly those involving a large proportion of the workers in the bargaining unit, during rest periods or towards the end of a shift. In deciding the timing of meetings and other events, the union and the employer should be guided by the employer's custom and practice when communicating with his workforce. If, due to exceptional circumstances, access must be arranged away from the workplace, it might be practicable to arrange events in work time if they are held nearby, within easy walking distance. Otherwise, off-site events should normally occur outside work time.

The frequency and duration of union activities

- 30 The parties will need to establish agreed limits on the duration and frequency of the union's activities during the access period. Subject to the circumstances discussed in paragraphs 27 - 29, the employer should allow the union to hold one meeting of at least 30 minutes in duration for every 10 days of the access period, or part thereof, which all workers or a substantial proportion of them are given the opportunity to attend. In circumstances where the employer or others organise similar large-scale meetings in work time against the recognition application (or in favour of derecognition), then it would be reasonable for the union to hold additional meetings, if necessary, to ensure that in total it has the **same** number of large-scale meetings as the employer and his supporters.
- 31 Where they would be appropriate having regard to all the circumstances, union "surgeries" could be organised at the workplace during working hours at which each worker would have the opportunity, if they wish, to meet a union representative for fifteen minutes on an individual basis or in small groups of two or three. The circumstances would include whether there was a demand from the workforce for surgeries, whether the surgeries could be arranged off-site as effectively, whether the holding of surgeries would lead to an unacceptable increase in tension at the workplace and whether the employer, line managers or others use similar one-to-one or small meetings to put across the employer's case. The union should organise surgeries in a systematic way, ensuring that workers attend surgeries at pre-determined times, thereby avoiding delays before workers are seen and ensuring that they promptly return to their work stations afterwards. Wherever practicable, the union should seek to arrange surgeries during periods of down-time such as rest or meal breaks. Where surgeries do not take place, the minimum time allowed for each larger scale meeting should be 45 minutes.

- 32 An employer should ensure that workers who attend a meeting or a surgery organised by the union with his agreement during work time, should be paid, in full, for the duration of their absence from work. The employer will not be expected to pay the worker if the meeting or surgery takes place when the worker would not otherwise have been at work, and would not have been receiving payment from the employer.
- 33 Where the union wishes one of the employer's workers within the meaning of paragraphs 26(a) and 26(b) to conduct a surgery, the employer should normally give time off with pay to the worker concerned. The worker should ensure that he provides the employer with as much notice as possible, giving details about the timing and location of the surgery. Exceptionally, it may be reasonable for the employer to refuse time off. This will apply if unavoidable situations arise where there is no adequate cover for the worker's absence from the workplace and the production process, or the provision of a service, cannot otherwise be maintained. Before refusing permission, the employer should discuss the matter with the union and the worker to explore alternative arrangements.

What about written communication?

- 34 The union may want to display written material at the place of work. Employers, where practicable, should provide a notice board for the union's use. This notice board should be in a prominent location in the workplace and the union should be able to display material, including references to off-site meetings, without interference from the employer. Often, an existing notice-board could be used for this purpose. The union should also be able to place additional material near to the notice-board including, for example, copies of explanatory leaflets, which the workers may read or take away with them. If there are no union representatives within the meaning of paragraphs 26(a) and 26(b), present at the workplace, the employer should allow access to a full time official of the union to display the material.
- 35 The union may also wish to make use of its web-site pages on the internet for campaigning purposes. An employer should allow his workers access to the union's material in the same way that he explicitly, or tacitly, allows his workers to down-load information in connection with activities not directly related to the performance of their job. If an employer generally disallows all such internet use, he should consider giving permission to one of his workers nominated by the union to down-load the material, and it would be this person's responsibility to disseminate it more widely among other workers.

36 A nominated union representative employed by the employer may also want to make use of internal electronic communication, such as electronic mail or intranets, for campaigning purposes. For example, he may want to remind workers of forthcoming union meetings or surgeries. The employer should allow the representative to make reasonable use of these systems if the employer explicitly, or tacitly, allows his workers to use them for matters which are not directly related to the performance of their job. In cases where such use is disallowed, it would still be reasonable for the representative to use them, if the employer uses such forms of communication to send to the workers information against the union's case. When sending messages in this capacity, the representative should make it clear that the advice comes from the union and not the employer.

What about small businesses?

37 Access arrangements for small businesses need not necessarily create difficulties. For example, it may be easier to arrange for a smaller number of workers to meet together. On the other hand, there may be difficulties providing cover for workers in smaller organisations, or in finding accommodation for meetings. In such cases, the employer and the union should try to reach an understanding about how access arrangements can be organised to ensure minimum disruption. Agreements may need to be flexible to accommodate any particular needs of the employer.

Arrangements for non-typical workers

38 Many, or sometimes most, workers in a bargaining unit may not work full time in a standard Monday-Friday working week. Others might rarely visit the employer's premises. The employer should bear in mind the difficulties faced by unions in communicating with:

- shift workers;
- part-time workers;
- homeworkers;
- a dispersed or peripatetic workforce;
- those on maternity or parental leave;
- those on sick leave.

39 The employer should be receptive to a union's suggestions for securing reasonable access to such "non-typical workers", and allow them, where practicable, to achieve a broadly equivalent level of access to those workers as to typical workers. It would be reasonable for the union to organise its meetings or surgery arrangements on a more flexible basis to cover shift workers or part-time workers. An employer should agree to the maximum flexibility of arrangements, where reasonable in the circumstances. This would not extend to an employer being obliged to meet the travel costs of his workers attending meetings arranged by the union.

40 In addition, the union will be able to make use of the independent person to distribute information to home addresses via the postal service. This will ensure that literature will be received by any workers who are not likely to attend the workplace during the access period, for example those on maternity or sick leave. The Court will supply the name, address and telephone number of the independent person to both the union and the employer.

What about joint employer/union activities?

- 41 There may be scope for the union and the employer to undertake joint activities where they both put across their respective views about recognition or derecognition in a non-confrontational way. Such joint activities can be an efficient method of providing information, minimising business disruption and costs. For example, the parties may wish to consider:
- the arrangement of joint meetings with each party allocated a period of thirty minutes to address the workers; and
 - the use of a joint notice-board where an equal amount of space is devoted to the employer and the union.

SECTION D

OTHER ACCESS ISSUES

Observing an access agreement

- 42 Both parties should ensure they keep to agreements about access arrangements. For example, if the parties agree to hold a meeting lasting 30 minutes in duration, every effort should be made to ensure that the meeting does not over-run its allocated time. Likewise, neither party should remove, or tamper with, material placed on a notice board by the other party, unless they are obliged to do so for legal reasons.

Privacy of meetings

- 43 Employers should respect the privacy of access meetings. *Paragraph 26(4D) of Schedule 1A to the Trade Union and Labour Relations (Northern Ireland) Order 1995 therefore provides that the employer or any representative of his must not attend an access meeting unless invited to do so. Likewise, the employer should not use the union's unwillingness to allow him or his representative to attend as a reason to refuse an access meeting unless it is reasonable to do so. The employer must not record or otherwise be informed of the proceedings of a meeting unless it is reasonable for him to do so.*
- 44 Supervisors or managers may attend an access meeting, even though they may be seen as representatives of the employer, provided they have been invited to attend by the union. In general, it should be expected that such workers would be invited by the union to attend access meetings where they fall within the bargaining unit and are therefore entitled to vote. However, there may be circumstances – for example, where the attendance of supervisors would deter other workers from expressing their opinions, or where managers are campaigning on behalf of the employer – where it is reasonable for the union not to invite them. In such circumstances, consideration should be given to arranging separate access meetings for the supervisors and managers concerned. In situations where they are not invited to attend meetings with other workers, supervisors or other managers should not insist on attending simply because they are part of the bargaining unit. To avoid uncertainty and the disruption of meetings, the union should consider in advance whether it wishes to exclude such individuals from meetings, taking steps where possible to inform the individuals concerned before the meeting occurs. The union should avoid issuing generalised or loosely drafted invitations to attend access meetings, if its intention is to prevent certain individuals from attending.

- 45 In small workplaces or in workplaces with no dedicated meeting rooms, it may be difficult to find suitable accommodation on site which can be set aside for the exclusive use of the union to hold a meeting. Achieving privacy in such circumstances may be difficult, but solutions might be found by holding meetings during lunch breaks or at other times when business would not be significantly affected if managers or other work colleagues were required to vacate the premises or meeting area in question. In extreme cases, for example where continuous working is necessary, privacy may be achieved only by holding meetings away from the workplace.
- 46 Many employers have security cameras or other recording equipment permanently positioned on site to monitor or record workplace activity. Most are installed for reasons of security, health and safety or quality control. Where such equipment is used, and could record meetings, the employer should inform the union accordingly unless key security considerations prevent such disclosure. The employer and the union should then discuss ways to ensure the privacy of meetings. It may be possible, for example, to turn off the equipment in question for the short period of meetings. Alternatively, the employer may wish to ensure that any transmissions from the surveillance equipment during the period of the meeting are not viewed live or recorded. The scope for such measures may be limited in rare cases where security or health and safety may be significantly and unavoidably jeopardised as a result.
- 47 The employer should not eavesdrop on access meetings or pressurise any of those attending to disclose what occurred at them. Generally, the employer should not seek to question attendees about the proceedings of meetings but, in exceptional cases of, for example, alleged harassment or damage to property, there may be a need for the employer to investigate the conduct of meetings. However, it must be recognised that information often circulates quite widely within workplaces and the employer may therefore learn what took place even though he took no specific steps to discover what had occurred. In some cases, individual workers may disclose without prompting what took place at meetings in their ordinary exchanges with line managers or other work colleagues.

Behaving responsibly

- 48 Both parties should endeavour to ensure that, wherever possible, potentially acrimonious situations are avoided. For access arrangements to work satisfactorily, the employer and the union should behave responsibly, and give due consideration to the requirements of the other party throughout the access period. For example, neither the union nor the employer should seek to disrupt or interfere with meetings being held by the other party. So, if the union is holding a meeting, the employer should avoid the scheduling of other conflicting meetings or events which would draw workers away from the union's meeting. Unless special factors apply, the employer should not offer inducements to workers not to attend access meetings. For example, where an access meeting is held towards the end of the working day, the employer should not tell workers that they could go home early if they do not attend the union's meeting. However, unforeseen events may arise - an urgent order, for example - where the employer may need to require workers not to attend an access meeting, paying them overtime, or some other additional payment or fringe benefit, for any extra work involved. The offer of additional pay for extra work in such circumstances is reasonable. Where such exceptional events occur, the employer should explain the position to the union, preferably in writing, as soon as practicable, and offer, again, preferably in writing, alternative but comparable access arrangements for the workers involved.
- 49 Where it is practicable to hold meetings or surgeries at the workplace, the employer should provide appropriate accommodation, fit for the purpose, which should include adequate heating and lighting, and arrangements to ensure that the meeting is held in private. In turn, the union should ensure that business costs and business disruption are minimised. Unions should be aware of the needs of the employer to maintain the production process, to maintain a level of service, and to ensure safety and security at all times.

SECTION E

RESPONSIBLE CAMPAIGNING AND UNFAIR PRACTICES

50 This Section of the Code provides guidance on those standards of behaviour which are likely to prevent undue influence or other unfair practices from occurring. In places, it also refers to behaviour which, if pursued, may constitute an unfair practice. However, given the range of possible behaviours involved, it is unrealistic for the Code to identify every circumstance which might give rise to undue influence or other unfair practice. In any event, as Section F discusses, it is the task of the Court to judge whether an unfair practice has been committed, basing its judgement on the particular facts of a case.

Responsible campaigning

51 Recognition and derecognition ballots concern important, and sometimes complex, issues. It may help those workers entitled to vote in these ballots to receive information from the employer and the union setting out their views on the implications of recognition and non-recognition. Parties are not required to undertake any campaigning activity during this period. Indeed, a party might choose to desist from campaigning altogether because it wishes to avoid unnecessary acrimony or because it sees an advantage in employment relations terms in leaving the issues to the workers to decide. This Code should not therefore be read as discouraging such behaviour. That said, there will be other cases where parties will wish to campaign and such activity can benefit the balloting process in helping the workers make informed decisions. But active campaigning needs to be responsible or it can lead to the use of unfair practices which distort the balloting process, increase workplace friction and can sour employment relations.

52 Campaigning can expose sharp divisions of opinion, and ill-judged activity can damage trust and long term employment relations. Parties should therefore discuss with each other at an early stage how they would wish campaigning to be undertaken. This discussion could take place at the same time the parties seek to reach access agreements. There are advantages in parties exchanging information about their approach to campaigning, indicating for example those persons or organisations which are likely to undertake the activity on their behalf. Recognising this fact, prior discussion should focus in particular on the standards of conduct expected of campaigners to minimise the risk of intimidation occurring. One way to structure such joint discussions might be for the parties to discuss how they think the guidance in this section of the Code could best be applied to their particular situation. Where they agree standards of conduct, parties should take steps to ensure that those who campaign on their behalf are fully aware of them.

What are unfair practices?

- 53 *Parties must refrain from using an unfair practice during recognition or derecognition ballots. A party uses an unfair practice if, with a view to influencing the result of the ballot, the party:*
- (a) offers to pay money or give money's worth to a worker entitled to vote in a ballot in return for the worker's agreement to vote in a particular way or to abstain from voting;*
 - (b) makes an "outcome-specific" offer to a worker entitled to vote in a ballot. (An "outcome-specific" offer is an offer to pay money or give money's worth which is conditional on the issuing by the Court of a declaration that the union is entitled to be recognised or is not entitled to be recognised, and such an offer is not conditional on anything which is done or occurs as a result of the declaration in question). Thus an offer by either a union (or an employer) to pay each worker £100, provided the ballot does (or does not) result in recognition would be categorised as an unfair practice. In contrast, an undertaking by a union to secure an increase of £1,000 in the annual pay of workers through the collective bargaining process following a vote for recognition would not be captured because the offer clearly depends on other circumstances – in this case, the negotiation of a collective agreement – which is contingent on recognition being awarded;*
 - (c) coerces or attempts to coerce a worker entitled to vote in a ballot to disclose whether he intends to vote or abstain from voting in the ballot, or how he intends to vote, or how he has voted, in the ballot;*
 - (d) dismisses or threatens to dismiss a worker;*
 - (e) takes or threatens to take disciplinary action against a worker;*
 - (f) subjects or threatens to subject a worker to any other detriment by, for example, threatening to give a worker a lower performance mark or a worse promotional assessment if he supports recognition or non-recognition; or*
 - (g) uses or attempts to use undue influence on a worker entitled to vote in a ballot¹.*
- 54 The legislation refers to the term "money's worth" when defining an unfair offer to a worker. The term covers the making of non-cash offers to workers. Such non-cash offers usually involve the provision of goods and services, for which workers would otherwise need to pay if they procured the goods or services for themselves. Most fringe benefits, for example, a better company car, subsidised health insurance or free legal services, would normally fall into this category. In addition, offers to provide additional paid holiday or other paid leave are likely to constitute "money's worth". Of course, providing such "money worth" for permissible reasons – for example, as a normal inducement to join a union or as a typical bonus for meeting a work target – would not be categorised as an unfair practice.

¹ See paragraphs 27A(2) and 119A(2) of Schedule 1A to the Trade Union and Labour Relations (Northern Ireland) Order 1995.

- 55 Unfair practices can involve the taking of disciplinary action against workers, where such disciplinary action has the purpose of influencing the result of the ballot. The period of ballots is relatively short and this lessens the scope for disciplinary matters to arise. However, it is worth noting that this unfair practice is not limited just to disciplinary action taken against workers entitled to vote in a ballot. It is possible that an unfair practice could be committed if, for example, disciplinary action were taken against a union activist involved in the union's campaign who was not entitled to vote in the ballot. Equally, the employer is not prevented from taking any disciplinary action just because a ballot is occurring. There may be sound grounds for the employer to discipline a worker, which are totally unconnected with the ballot. Likewise, it is possible that a worker's campaigning activity, for example, the use of threatening behaviour against other workers or the unauthorised use of work time for campaigning, may itself give rise to disciplinary action which would not constitute an unfair practice. When contemplating disciplinary action, the employer should in addition take note of the guidance *provided in the LRA Code of Practice on Disciplinary and Grievance Procedures*, especially its advice on the disciplining of union officials.
- 56 The statutory list of unfair practices highlights actions to bribe, pressurise or exert other undue influence on workers to vote in particular ways or not to vote at all. Such conduct, especially the exertion of undue influence, can take many forms. At one extreme, undue influence may take the obvious form of actual or threatened physical violence against workers. It may also take other, and more subtle, forms of behaviour to influence the outcome of the ballot. For example, the introduction of higher pay or better conditions in the ballot period may constitute undue influence if the ballot period is not the normal time for reviewing pay or if there is not some other pressing reason unconnected with the ballot for raising pay.

Who should campaign?

- 57 Transparency is an important feature of normal campaigning activity and reduces the risk that a worker might be unduly influenced through subterfuge or misrepresentation. So, those authorised by the employer or a union to campaign on their behalf should take steps to inform the workers involved that they are so authorised and are therefore acting under instruction or at the behest of the party involved. Where there is reason to believe that workers do not understand their role, supervisors and line managers who undertake such work on behalf of the employer should therefore state that they are acting in that capacity when communicating campaign messages to the workforce. In similar circumstances, union members who act as officials of the union or who are otherwise authorised to represent the union in its campaigning work should also explain their role when speaking to other workers in their capacity as campaigners.

- 58 Sometimes, a party might employ or hire a paid consultant to assist its campaigning work. Such consultants are therefore acting as agents of the party involved. If their behaviour constitutes an unfair practice, then the party who hired their services is also committing an unfair practice where the party expressly or by implication authorised the behaviour. A failure by a party to repudiate and correct misconduct by a consultant can be taken as implying that such conduct is authorised. Parties should therefore monitor the activities of the consultants they hire. Where outside consultants are used by either party, and undertake active campaigning by speaking to the workforce, then they should inform the workers that they have been hired by that party. They should also take steps to inform the workers accurately about the general purpose of their engagement. Whilst there is no need to divulge commercial confidences or to detail the precise contractual remit, if a consultant has been hired to advance the case of the union or the employer in the campaign then that essential fact should be divulged to the workforce when the consultant is communicating with them. It follows that consultants should not present themselves as independent or impartial third parties when undertaking their campaigning work.
- 59 The employer and the union are usually responsible for the actions of those whom they authorise or hire to campaign on their behalf. They should therefore take steps to brief their representatives or agents accordingly in advance of undertaking such activity. The briefing should not be limited to just the messages or information which the union or employer wish to convey. It should also provide clear advice to representatives or agents on the behavioural standards expected of them and the need to avoid actions which could constitute an unfair practice.
- 60 The employer and the union should also dissociate themselves from material containing personal attacks or allegations which is circulated on an anonymous basis. The party whose case appears to be favoured by the anonymous material should usually repudiate it, informing all workers in the bargaining unit accordingly.

What are the main forms of campaigning?

- 61 All campaigning involves communication with workers in the bargaining unit. Sometimes, that communication can take the form of face-to-face discussion with a worker or workers. Such encounters can perform useful functions as many workers may feel nervous about asking questions at mass meetings and small scale gatherings may encourage more open debate. Section C therefore refers to the option for unions to access the workforce by holding "surgeries" which individual workers can attend if they wish. That said the employer or the union must take particular care when handling one-to-one meetings or encounters with small groups, because a worker may feel more vulnerable in those situations and undue influence may arise if a worker feels threatened as a result. Workers should not normally be required to attend small meetings organised by either the employer or the union for campaigning purposes, and they should not be threatened with sanctions if they fail to attend. Workers who voluntarily attend should be informed that they are under no obligation to answer any direct questions which are put to them. In particular, they should not be required to disclose the way they have voted or their voting intentions.

- 62 Most small or one-to-one meetings occur at the place of work. But a party might also try to arrange similar encounters outside the workplace to canvass opinion by visiting a worker's home or by ringing a home telephone. When undertaking such activity, unions should note that neither the Court nor the qualified independent person it employs to run the ballot will disclose to the union the names, addresses or telephone numbers of the workers involved. Whereas canvassing at a worker's home may be an acceptable practice, reflecting perhaps restricted access at work, considerable care needs to be taken by the party involved to avoid possible intimidation, however unintended, which could give rise to undue influence. Where practicable, a party should seek and obtain a worker's permission in advance before visiting him at home. In particular, the number of people visiting a worker's home to campaign or canvass, even where prior permission is obtained, should be limited to one or, perhaps, two people. If a worker does not wish to open or continue a discussion with the campaigners, then that wish must be completely respected. A failure to leave a worker's premises on request would almost certainly be seen as an intimidatory practice. Also, if a worker indicates he does not wish to be revisited at home, or rung again by telephone, then that wish should be respected.
- 63 The holding of one or two face-to-face meetings, either on site or off it, may not in itself be perceived as placing unwelcome pressure on the worker involved. Indeed, a worker might request further meetings himself to cover the issues fully or to follow up a discussion. However, the frequency of meetings, or frequent requests to attend meetings, can be perceived as potentially threatening by some workers. There may come a point where persistent approaches to workers will be construed as harassment. Parties must therefore be aware that the intensity of their campaigning activity can give rise to problems.
- 64 Campaigning can also be undertaken by circulating information, by e-mails or by videos and other mediums. There is nothing intrinsically wrong with communication of that nature. Indeed, because such communication does not require the physical presence of the campaigner, they may well be seen as having less potential to threaten the worker. That said, the content of such communications can still intimidate or threaten the voter, and care should therefore be taken to avoid such effects when drafting written communication or producing videos.

How should campaigners put across their message?

- 65 Campaigning is inherently a partisan activity. Each party is therefore unlikely to put across a completely balanced message to the workforce, and some overstatement or exaggeration may well occur. In general, workers will expect such behaviour and can deal with it. Also, by listening to both sides, they will be able to question and evaluate the material presented to them.

- 66 Campaigning should focus on the issues at stake. These will mostly concern the workplace, the performance of the union or the running of the employer's business. Sometimes, it will be legitimate to focus on the work behaviours and previous work histories of key individuals. For example, it may be pertinent to refer to the way a proprietor or a senior manager has responded to workplace grievances in the past or to the way a key union official has handled negotiations elsewhere. But campaigning about the personal lives of senior managers or union leaders usually adds nothing beneficial to the discussion of the issues and should be avoided. Personalised attacks and the denigration of individuals may also harm the long-term health of employment relations.
- 67 Parties, especially the employer, should take particular care if they discuss job losses or the relocation of business activity. Such statements can be seen as directly threatening the livelihoods of the workers involved, and can give rise to undue influence by implicitly threatening to harm the workers concerned. It is a fine line, therefore, to distinguish between fair comment about job prospects and intimidatory behaviour designed primarily to scare the workers to vote against recognition. In general, references to job prospects are more likely to constitute fair comment if they can be clearly linked to the future economic performance of the employer with or without union recognition, and are expressed in measured terms. Unsubstantiated assertions on this particularly sensitive issue should therefore be avoided. So, it might be fair comment to argue that the employer's business may run less successfully if recognition is awarded, and employment may be less secure as a result, because pay levels would rise or work would be organised less flexibly. On the other hand, statements that the employer will make redundancies or relocate simply because a union is recognised should be avoided.
- 68 Part of a party's normal campaigning is to engage with the arguments put forward by others. That can be helpful and can assist workers in understanding the issues at stake. Each party will therefore try to obtain the campaigning literature of the other party to enable them to discuss the points raised. This should not normally present a problem as literature tends to be widely available either on websites, notice boards or elsewhere. Indeed, parties may often find it mutually advantageous to exchange these materials.
- 69 Campaigning meetings should be treated as far as possible as private affairs, and there are legislative requirements covering the privacy of access meetings at work (see paragraphs 43 – 47 in Section D). Meetings or other campaigning activities which occur off-site are generally not covered by the access provisions, but the privacy of those gatherings should be respected. A party should not infiltrate meetings or use other covert methods to monitor another party's campaign. It is also likely to constitute an intimidatory practice for parties to photograph, record or otherwise place workers under surveillance without permission whilst they are undertaking campaigning events off-site, unless such activity takes place at a location (for example, the entrance to a workplace) where surveillance equipment normally operates for other legitimate reasons. Parties should also not penalise workers, or threaten to penalise them, if they attend or take part in those off-site activities.

SECTION F

RESOLVING DISPUTES

Intervention by the Industrial Court

Access

- 70 Disputes may arise between the parties during the access period about the failure to allow reasonable access or to implement access agreements. If these disputes cannot be resolved, the union may ask the Court to decide whether the employer has failed to perform his statutory duties in relation to the ballot.
- 71 *If the Court is satisfied that the employer has failed to perform one or more of his five duties:*
- (a) to co-operate generally with the union and the independent person on the ballot;*
 - (b) to give the union such access to the workers constituting the bargaining unit as is reasonable to inform them of the object of the ballot and to seek their support and opinions;*
 - (c) to provide the Court with the names and home addresses of those workers;*
 - (d) to refrain from making any offer to any or all of the workers constituting the bargaining unit which (i) has or is likely to have the effect of inducing any or all of them not to attend any relevant meeting between the union and the workers constituting the bargaining unit and (ii) is not reasonable in the circumstances; and*
 - (e) to refrain from taking or threatening to take any action against a worker solely or mainly on the grounds that he (i) attended or took part in any relevant meeting between the union and the workers constituting the bargaining unit, or (ii) indicated his intention to attend or take part in such a meeting,*
- and the ballot has not been held, the Court may order the employer to take such steps to remedy the failure as the Court considers reasonable, and within a time that the Court considers reasonable. Where the Court is asked to make an order very shortly before the end of the access period, it may be impracticable for the Court to consider the request and for the employer and the union to remedy any failure in the short time before the ballot is held. In such circumstances, the Court may extend the access period by ordering the ballot to be rescheduled for a later date to ensure that access is achieved.*
- 72 *If the employer fails to comply with the Court's order within the time specified, and the ballot has still not been held, the Court may issue a declaration that the union is recognised, or that the union is not derecognised.*

73 It is the employer's duty to provide reasonable access, and complaints about a failure to provide such access can be made by unions only. However, in deciding whether the employer has complied with his duty to give the union access, the Court may take into account all relevant circumstances. This may include the behaviour of the union. The Court may therefore decide that the employer has complied with the duty in circumstances where, because the union has acted unreasonably, he denies the union access or refuses to implement agreed access arrangements.

Unfair Practices

74 Complaints may also surface that a party has committed an unfair practice during the balloting period. Such complaints may be referred by the employer or the union to the Court to adjudicate though any complaints must be made either before the ballot closes or on the first working day after that. Where time permits it is a good practice for the parties to try to resolve them locally in the first instance.

75 The Court must decide that a complaint is well-founded if the party complained against used an unfair practice and the Court is satisfied that the practice changed or was likely to change, in the case of a worker entitled to vote in a ballot, either (i) his intention to vote or to abstain from voting or (ii) his intention to vote in a particular way or (iii) how he voted.

76 *Where it considers a complaint is well-founded, the Court must issue a declaration to that effect, and it may:*

- *issue a remedial order to the party concerned to take such action as it specifies, and within a timetable it specifies, to mitigate the effect of the unfair practice, and / or*
- *give notice to the parties that it intends to hold a fresh secret ballot (and thereby replace any which may have been contaminated by the unfair practice).*

77 *Where a party either (i) fails to comply with a remedial order or (ii) has committed a second unfair practice in relation to the ballot (or a re-run ballot) or (iii) has committed an unfair practice involving the use of violence or the dismissal of a union official, the Court may take other sanctions against that party. Where that party is the union, the Court may declare that the union is not entitled to be recognised. Where that party is the employer, the Court may declare that the union is entitled to be recognised².*

² *There are other sanctions which apply in the special case where a worker has applied to the Court to derecognise a union.*

Minor disputes

- 78 Some disputes about access may be minor by nature. For example, the employer may be aggrieved that an access meeting has over-run somewhat. Or, a union might have cause to complain if it regards the meeting room provided by the employer as being too small to accommodate everyone in comfort. In such cases, both parties should avoid taking hasty action which might prejudice the implementation of other access arrangements. The union should generally avoid taking minor complaints about access to the Court as a first course of action.
- 79 Instead, the parties should make every effort to resolve the dispute between themselves. They should make full use of any mechanism to resolve such disputes which they may have established in the access agreement, and consider the use of the LRA's conciliation services. It would generally be a good practice if both the employer and the union nominated a person to act as their lead contact if disagreements or questions arose about the implementation of access arrangements.
- 80 The period of access will be limited in duration, given that the balloting period will normally be a maximum of 20 working days, and the parties should therefore ensure that disputes are swiftly resolved. The parties should endeavour to inform each other immediately if a dispute arises, and should seek to resolve any disputes as a matter of priority, preferably within one working day of their occurrence.
- 81 It is also a good practice to follow similar procedures in cases where there are complaints about a person's conduct whilst campaigning. For example, some complaints will be based on a misunderstanding which can be resolved quickly between the parties. And in cases where minor offence has been caused as a result of a careless or unintended remark, then the matter may be simply remedied by the issuing of an apology. Regular and early communication between the parties about the poor behaviour by individual campaigners may also ensure that senior figures on the union and employer sides can prevent repetitions of such behaviour and thereby ensure that unnecessary disputes are avoided.
- 82 It should be noted that a complaint to the Court about an unfair practice is unlikely to succeed if it relates to minor aberrations in conduct because such matters are very unlikely to have influenced voting behaviours or intentions. So, for example, a campaigner's use of strong language or swearing (which, perhaps regrettably, is commonplace inside many workplaces and outside them as well) may not in itself constitute the basis for a well-founded complaint.

The independent person

83 The prime duties of the independent person are to ensure that:

- the names and addresses of the workers comprising the balloting constituency are accurate;
- the ballot is conducted properly and in secret; and
- the Court is promptly informed of the ballot result.

It is not the function of the independent person to adjudicate disputes about access or unfair practices. That is the Court's role. However, the independent person may have wide experience and knowledge of balloting arrangements in different settings. The parties might consider informing the independent person about their problems and draw on his experience to identify possible options to resolve their difficulties.

USEFUL ADDRESSES

Various booklets on trade union legislation and copies of some Codes of Practice are available from the Labour Relations Agency. Some of these are free of charge. In addition explanatory booklets and leaflets are available from the Department for Employment and Learning.

The address of the LRA is:-

Head Office
Labour Relations Agency
2-8 Gordon Street
Belfast
BT1 2LG
Tel No 02890 321442

Regional Office
Labour Relations Agency
1-3 Guildhall Street
Londonderry
BT48 6BJ
Tel No 028 7126 9639

The address of the Department for Employment and Learning is:-

Employment Rights Branch
Adelaide House
39-49 Adelaide Street
Belfast
BT2 8FD
Tel No 02890 257580
Email address: employment.rights@delni.gov.uk

The address of the Industrial Court is:-

Industrial Court
Room 203, Adelaide House
39-49 Adelaide Street
Belfast
BT2 8FD
Tel No 02890 257599

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