# Industrial Court

## Statutory Recognition

## Guidance for the Parties


***March 2009***

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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, as regards trade union recognition, are contained in The Employment Relations (Northern Ireland) Order 1999 as amended by the Employment Relations Order 2004, available from the Stationery Office. You may wish to refer to it and also seek legal advice.

1.2 In addition, you may wish to refer to:

- the Code of Practice on Access to Workers During Recognition and Derecognition Ballots, available from the Department for Employment and Learning (www.delni.gov.uk) and the Court;

- the Trade Union Recognition (Method of Collective Bargaining) (Northern Ireland) Order 2001, also available from 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 processes and copies of its decisions and related Court judgements; and

- the Industrial Court's Application Form and Explanatory Notes available from the Industrial Court, the Application Form can also be downloaded from our website.

**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.**

1.3 Under Schedule 1A to the Trade Union and Labour Relations (Northern Ireland) Order 1995 (enacted in the Employment Relations (Northern Ireland) Order 1999 and amended in the Employment Relations (Northern Ireland) Order 2004) trade unions may apply to the Industrial Court for the legal right to be recognised by an employer for collective bargaining over pay, hours and holidays, in respect of a group of workers in a particular "bargaining unit". The Schedule also deals with certain other statutory procedures (see Annex 3), and, under Section 7 of the Employment Relations (Northern Ireland) Order 1999, the determination by the Industrial Court of a method of collective bargaining following statutory recognition would create a requirement, amongst others, for the union to be consulted about training arrangements.

1.4 Unions can, of course, continue to agree arrangements with employers on a voluntary basis for trade union recognition ("non-statutory recognition"). There is also scope if a recognition request has been made under Schedule 1A for the union and employer to reach agreement and then withdraw from the statutory process. Although the Schedule calls this voluntary recognition we use the term 'semi-voluntary recognition' to distinguish it from cases where no request has been made at all under Schedule 1A. If, following such a request, the parties do not agree to 'semi-voluntary recognition', an application to the Industrial Court may eventually result in 'statutory recognition'.

# The Industrial Court

2.1 The Industrial Court (the Court) is a Tribunal Non-Departmental Public Body with statutory powers. The Chairman is Mr Eugene O'Loan and the Deputy 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 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.

## 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.

2.3 Once the Court has accepted an application for recognition of a particular bargaining unit, no other application can be accepted from that union in respect of that bargaining unit, or one that is substantially the same, for three years. The statutory recognition process is set out more fully at Annex 2.

2.4 There are also statutory procedures for de-recognition, changes to the bargaining unit and specifying a method of bargaining where the parties have reached a semi-voluntary agreement. These are summarised in Annex 3.

# 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. Applications for statutory recognition may be made to the Court if a direct request to the employer does not result in recognition.

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 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. Both parties will be informed of the names of the Panel Members.

3.4 A Court official will be appointed to act as Case Manager for the application. The Case Manager will contact both 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 both parties understand the implications of the legislation, as well as resolve difficulties. However, the impartiality of the Court cannot be compromised in this process. Either 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 take a problem-solving approach and to help the parties, where possible, reach voluntary agreements outside the statutory process. Both 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 composition of the bargaining unit and the number of union members) on which the Panel may as a matter of routine make enquiries of one party or the other, 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 who wish 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 resolve underlying problems and reach agreement, some contact between the Court and the parties will be of an informal nature. However, the Court also has to take formal decisions based on information before it, so there is a mix of informal and formal processes. Where necessary, the Court will make it clear to the parties, when they are discussing matters in confidence and when the discussion is part of a formal process.

3.7 Whilst not all decision points will arise in every case, the key Court decision points are:

- whether to accept the application (in all cases);
- what the bargaining unit should be;
- if the bargaining unit agreed or decided upon is different from that in the original application, whether the application is valid within the new bargaining unit;
- whether a ballot is needed, and how it is to be conducted; and
- what the method of conducting collective bargaining should be.

## Application Form

3.8 The application form is available from the Court or can be downloaded from our web-site, together with Explanatory Notes on the information required from unions making applications. Applicants should complete the form in as much detail as possible, but in the knowledge that it and any supporting documentation must be copied to the employer. It would therefore not normally contain names or addresses of individuals. **The definition of the bargaining unit in the application form must mirror the description as set out in the union's formal request to the employer unless a different bargaining unit has been agreed between the parties.**

**If, following the union's initial formal request, but before the application is made, negotiations between the parties have not resulted in an agreed bargaining unit but have resulted in the union modifying its proposed bargaining unit, the union (if it wishes this modified bargaining unit to be the subject of the application) must make a further formal request to the employer specifying the modified description in the request.**

**It is also essential that the description of the bargaining unit in the application is sufficiently clear for the Court, and the employer, to be able to identify readily which posts are covered by the bargaining unit and which are not.** Consideration should given to the inclusion/exclusion of casual workers, temporary workers, contract workers, management grades etc. Information about the number of workers in the bargaining unit who belong to the union making the application is also sought, together with information (in any form) that the majority of workers in the bargaining unit is likely to favour recognition; 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 employer. The Court appreciates that in some circumstances, the union may have difficulty in providing a precise definition of the workers falling in its proposed bargaining unit (eg it may not use the exact job titles or work group identification as used by the employer, or may include posts that no longer exist, or may be unaware of or inadvertently overlook posts obviously falling within the scope of the bargaining unit). The

Court will take a common sense approach about allowing some clarification during the application process. However this will only be done where it does not materially alter the bargaining unit the union was attempting to define.

3.8A When an application has been lodged with the Court the Secretariat will send notification of receipt to both the union and the employer. The employer will be asked to complete an employer response form with questions that are designed to elicit information and evidence germane to the admissibility criteria of Schedule 1A. This response form allied to the union's 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 (see A2.5 below). The responses given by an employer may raise additional issues not relevant at the 'acceptance' stage, such as the employer's view of what constitutes the appropriate bargaining unit. Such issues, where not immediately relevant to the decision on whether to accept an application, will if the application is accepted, be taken into account at the appropriate stage of the procedure.

## Confidentiality

3.9 Under paragraph 34 of the Schedule an application to the Court is not valid unless the union gives to the employer "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 employer. Therefore both the union's application papers and the employer's comments on them will be copied to the other party. 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. 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. The Court may, in any event, receive confidential information which is available to the Case Manager but not to the Panel Members. 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 both 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 both parties so to enable it to be checked and/or challenged at a

[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. 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 Assistant Information Commissioner's Office (tel 028 9051 1270) www.ico.gov.uk*

hearing. The Court will always warn the parties concerned before disclosing any information previously given in confidence.

3.11 If either 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 are 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 information in the form of written submissions prior to the hearing. If either party intends to rely upon case law, etc at hearing they should supply five copies of same along with their submissions. New information 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 information 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 discretion of the Chairman of the Panel. Information is not given under oath.

3.13 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.

3.14 Prior to any hearing the parties will be supplied with a copy of the statistical result of any relevant membership check report conducted by the Case Manager and given the opportunity to comment on it prior to any decision being taken by the Court.

3.15 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

3.16 Decisions, declarations, and determinations of the Court will be publicly available, but will not normally be publicised by means of a Press Notice unless the application raises issues of public interest. Where decisions of the Court are publicised, by means of a press notice the parties will be informed first. All decisions are made in the name of the Court. 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

3.17 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 either 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 and seek their views prior to deciding whether or not to grant an extension; and

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.

3.18 Extensions may also be granted at the joint request of both parties (where (a) – (d) above 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.

3.19 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 (see Annex 2, Stage 7), the costs are divided between the parties on a 50/50 basis.

# 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: | Alan Scott |
| Senior Case Manager: | Paul Lyons |
| Case Manager: | Maria Cummins |
| 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, Alan Scott, 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).

**Annex 1**

# Role of Industrial Court Case Manager

As the main aim of the legislation is to encourage voluntary agreements a Court official (Senior Case Manager or Case Manager) is available to advise employers, trade unions and other interested parties on any aspect of the legislation and the implications of statutory recognition. However, once an application has been lodged with the Court, the Case Manager can only advise the parties involved on the statutory process.

A Case Manager will be allocated to each application for statutory recognition and is responsible for processing the case through all its stages. S/he will make initial contact with both the trade union and employer, and carry out the necessary fact finding on the admissibility and validity tests, and pass the findings to the Panel.

The Case Manager supports the Panel allocated to the application throughout the process and acts as the point of contact for both parties. Any fact-finding about the application or necessary background information will be undertaken by the Case Manager. The parties may be asked to provide information to the Case Manager within relatively short time-scales in order to comply with the legislation. The Case Manager is responsible for comprehensively briefing the Court on all aspects of the application required to enable the Panel to make an informed decision.

The Case Manager will be responsible for initial discussions with the parties regarding the bargaining unit and, if there is a change in the bargaining unit from that originally proposed, the Case Manager will undertake the appropriate checks to enable the Court to re-apply the necessary validity tests. S/he will also advise the Court on the level of union membership in the bargaining unit, investigate any petitions from union members not wishing the union to conduct collective bargaining on their behalf, and will act as the point of contact with the Qualified Independent Person (QIP) in the event of a ballot. Where the Court receives a request to try to help the parties agree a method of bargaining, the Case Manager will make the initial contact with the parties and ascertain the position reached and problem encountered.

All written communications with parties will be prepared by the Case Manager on behalf of the Chairman of the Panel. The Case Manager will also provide a brief for the Panel Member(s) acting as mediators between the parties (i.e. in trying to help the parties reach agreement on the bargaining unit or on a method of bargaining). S/he will also prepare a summary of the case for hearings and draft a decision paper for approval by the Panel.

Prior to Panel meetings/hearings the Case Manager will collate all relevant information and prepare a comprehensive factual report highlighting the relevant legislation. During Panel meetings/hearings the Case Manager will orally brief the Court and be available to clarify any outstanding issues.

Once the Court has decided to hold a ballot, the Case Manager plays a pivotal role in this process. The Case Manager and possibly the Chairman will have already conducted a site visit to inform the Panel as to which form of ballot is best suited.

Associated duties for the Case Manager during the balloting process include:

- Seeking views of parties on preferences for type of ballot, timing etc; Obtaining quotes from QIPs;

- Arranging the appointment of the QIP-detailing time-scales, type of ballot, etc;

- liaising with the employer to compile list of names and addresses of individuals in the bargaining unit and forwarding to QIP;

- writing to all members of the bargaining unit giving the Case Manager's contact details and explaining the procedure;

- dealing with requests for postal ballots, where applicable;

- during the ballot itself the Case Managers will act as independent scrutineers and also be on-site to deal with any problems/queries which may arise; and

- the Case Manager may also be present at the 'count', will inform the Chairman and the Panel of the result and subsequently inform the parties.

In addition to the Case Manager, the Court will be supported by the Secretary, who will determine Panel Members' availability and liaise with the Chairman over the appointment of Panel Members.

The Case Managers and secretariat are supported by an administrative team. This team is responsible for finance, web-site maintenance and administrative tasks associated with the applications e.g. issuing papers, travel arrangements, booking accommodation for Panel meetings/hearings.

**Annex 2**

***The following should be read in conjunction with Industrial Court's methods and Decision points for Industrial Court Panel at the beginning of this guidance and also in conjunction with Schedule 1A to the Trade Union and Labour Relations (Northern Ireland) Order 1995.***

# Applications for Statutory Recognition Under Schedule 1A, Part I

## Stage 1 - Request to Employer

A2.1 Before an independent union (or unions) can apply to the Court, it must make a request, in writing, to the employer concerned for recognition for collective bargaining purposes. The request must clearly identify the union (or unions) and the bargaining unit, and it must state that the request is made under Schedule 1A. Unions are advised to send the request to the employer by special delivery post or some other method by which receipt of the request by the employer can be verified. The employer has **10 working days** in which to respond, starting with the day after it receives the request for recognition. If the employer rejects the request, or fails to respond in this timescale, the union can apply to the Court. If the employer agrees to the request, then the union is recognised for collective bargaining. If, following the union's request to the employer, a voluntary agreement cannot be reached and the union wishes to make a formal application to the Court, application forms are available from the Court. In addition, there needs to be clarity about which workers are included in the bargaining unit (see 3.8 above). This is because, if at a later stage in the process, a ballot is held, both parties need to be quite clear as to which workers are entitled to receive a ballot paper. **In making an application to the Court, the bargaining unit must be described in identical terms as that in the request to the employer.**

## <u>Stage 2</u> – Negotiation Between Union and Employer

A2.2 If having received the request for recognition, the employer informs the union within 10 working days (starting with the day after it receives the request) that it does not accept the request, but is willing to negotiate there is an additional period of **20 working days** for negotiation (or longer if the parties so agree). The additional 20 working days start on the day after the first 10 day period ends. If no agreement is reached at the end of that period, the union can apply to the Court. It may also apply to the Court if the parties have agreed a bargaining unit but have not agreed that the union should be recognised in respect of that bargaining unit. However if the employer proposes, within 10 working days starting with the day after it informs the union of its willingness to negotiate, that the LRA be requested to assist and the union either rejects this proposal or fails to respond to it within 10 working days (starting with the day after that on which the proposal is made) the union cannot apply to the Court.

## <u>Stage 3</u> - Application to the Industrial Court; Admissibility and Validity Tests

A2.3 The Chairman appoints a Panel of three Court members to consider the application (see para 3.3 above) and make any decisions required under Schedule 1A (see 3.7 above).

A2.4 Before the Court can formally accept an application, it must apply a number of admissibility and validity tests. These are listed below.

- **Is the application in the proper form (paragraph 33 of Schedule 1A)?** The Court has prepared application forms, available from the Court, telephone: 028 9025 7599 (or visit our website www.industrialcourt.gov.uk)

- **Has a copy of the application and notice of it been received by employer (paragraph 34)?** The Court cannot accept any application unless the union has copied it to the employer, together with any supporting documents. **Unions should send documentation by recorded delivery to ensure and verify its arrival. It is open to the employer to challenge the union's application on grounds set out in Schedule 1A to the Order.**

- **Does the union have a certificate of independence from the Certification Office (paragraph 6)?** Applications are not valid unless the union (or unions) are independent.

- **Does the employer employ at least 21 workers (paragraph 7)?** If the employer, together with any associated employer(s), employs fewer than 21 workers, the statutory recognition procedure does not apply. This limitation applies to all workers employed, not just those in the bargaining unit. 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.

  Workers must ordinarily be employed in Northern Ireland. Therefore workers ordinarily employed in Great Britain or the Republic of Ireland are excluded from this calculation. The timescale within which this test is applied is the day on which the letter of request is received or a 13 week period preceding that date.

- **Is there a competing application (paragraphs 14 and 38)?** The Court cannot adjudicate between competing applications which relate to the same or overlapping bargaining units. If one of the unions making an application has at least 10% membership in the bargaining unit, the Court will only consider that application, and reject all others. If more than one application has 10% union membership, the Court cannot accept any of them, and must reject them all. Please note that, in this context, bargaining units which have just one worker in common count as overlapping. Competing applications have to be considered at a number of stages in the process, up to and including the point where the bargaining unit is settled and the validity tests re-applied as necessary.

- **Is there an existing recognition agreement (paragraph 35)?** The Court cannot accept an application if there is an existing agreement in force under which a union is entitled to conduct collective bargaining on behalf of any workers in the bargaining unit. For this purpose, the existing agreement can be with any trade union, including the applicant union, whether or not it has a certificate of independence, and can be a voluntary or statutory agreement. Equally, an existing collective agreement does not need to cover hours, pay or holidays (subject to (b) below). The existing agreement only needs to cover one worker in the bargaining unit to make the application inadmissible. There are two exceptions to the rule about existing agreements.

  a) If the union recognised is a non-independent union that was de-recognised in the preceding three years, then an application from an independent union can be accepted. Without this provision an employer attempting to avoid statutory recognition could simply re-recognise a non-independent union (or staff association) as soon as it was de-recognised following an application (under part VI of the Schedule) from an independent union or a worker, therefore barring the independent union indefinitely.

  b) If there is an agreement with the same union as is making the application, and that agreement does not cover all of the following: pay, hours and holidays, then the application can still be accepted.

- **Is there at least 10% union membership (paragraph 36)?** The Court cannot accept an application unless at least 10% of the workers in the proposed bargaining unit belong to the union making the application. The Court must therefore be satisfied that at least 10% of the workers in the proposed bargaining

unit are members of the union. Where the employer provides conflicting information to challenge the union's membership figures, there may be an independent check by a Case Manager, or a third party,[2] on the level of union membership in the bargaining unit (see also stage 6 below). The check can take a number of forms; it could be a direct comparison of lists[3] (where the decision would be based on the Case Manager's numerical report of the check; the names themselves will not be given to the Panel) or a full membership check involving interviews of individuals at the employer or union premises. The parties will be asked to consent to any such check and informed of the results before any decision is taken.

- **Is the majority of workers likely to favour recognition (paragraph 36)?** The Court cannot accept an application unless a majority of the workers in the bargaining unit would be likely to favour recognition. The parties can provide evidence as to whether or not the majority are likely to be in favour in any form available. A possible example would be a petition from workers. If confidentiality is required the parties must agree in advance to the evidence being provided on the basis of confidentiality. The value and weight to be attached to various forms of evidence may vary, depending, for example, on the circumstances in which that evidence has been obtained, when it was obtained and the wording of the petition that may be submitted (see below).

  The Court's consideration of the admissibility tests under paragraph 36 will be based on the best evidence available. If the Court considers it necessary, it can require an employer to provide to a Case Manager, information concerning the workers in a bargaining unit and the likelihood of a majority of those workers being in favour of the applicant union conducting collective bargaining on their behalf. The Court can also, where it considers it necessary, require a union to provide to the Case Manager information concerning the union members in a bargaining unit and the likelihood of a majority of those workers being in favour of the applicant union conducting collective bargaining on their behalf. 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 as to the membership, subscriptions and rules of a union. The Case Manager may also require more information from either or both sides on the job titles of employees covered in the bargaining unit.

  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.

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[2] *A membership check carried out by a third party would need to be paid for by the party requesting it.*

[3] *The employer would be expected to provide the names of workers in the bargaining unit along with a unique identifier as specified by the Case Manager. The union would need to provide names of union members in the bargaining unit along with a unique identifier as specified by the Case Manager.*

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).

Please note that any membership check or petition/survey is based on a point in time – parties may be asked to provide up-to-date lists at different stages of the statutory process.

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, to the employer and to the union. If either of the employer or the union 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.

- **If the application is made by more than one union, can they show they will co-operate with each other (paragraph 37)?** If an application is made by more than one union, then the unions concerned must show that they will co-operate with each other to achieve stable collective bargaining arrangements. The unions must also show that they will conduct single table bargaining arrangements if the employer wishes.

- **Has there been a previous application in the last three years (paragraphs 39, 40 and 41)?** The Court cannot accept an application if a previous application from the same union covering the same or substantially the same bargaining unit has been accepted by the Court within the last three years. It is for the Court to decide if one group of workers is substantially the same as another. Similarly the Court cannot accept an application within three years of that union failing to achieve recognition following a ballot, or within three years of the union being de-recognised following a ballot.

## How the Industrial Court Decides Whether an Application can be Accepted

A2.5 The Court has **ten working days** in which to determine whether an application can be accepted. The Court can extend the period if they inform the parties, giving reasons for an extension. The Court will try to avoid the need for extensions in order to help the application progress as expeditiously as possible. Preliminary enquiries to gather comments and evidence to assist the Panel's consideration of whether the tests have been satisfied will be made as a matter of procedure by the Case Manager (and other Court staff). Subject to any confidentiality relating to lists of names, the Case Manager will pass all correspondence and other documents to the Panel as soon as reasonably practicable. On receipt of an application, the Case Manager will send to the employer an employer response form regarding the application for return to the

Court within 5 working days. The response form will encourage the employer to put forward any evidence it believes relevant for the acceptance stage. Upon receipt of the completed response form the Case Manager will pass a copy of it to the Panel and to the Union. The Court Panel may decide that further enquiries are necessary and of whom any such enquiries should be made. Whether an application can be accepted is, as with all decisions under Schedule 1A, the sole preserve of the Court Panel and is made on the basis of the evidence before it. Where the Panel considers that it cannot make a decision on the basis of the evidence before it, it will call a hearing to determine the issue. A hearing need not include all of the above tests if some of the information is not challenged.

## Scope for Voluntary Agreement and Withdrawal

A2.6 Having submitted its application form to the Court, a union may, for whatever reason, subsequently decide that it no longer wishes to pursue statutory recognition and can withdraw the application (but see below). Alternatively, a union may reach a semi voluntary agreement with an employer which makes the need for any further consideration by the Court unnecessary. In such circumstances the parties can jointly request that the Court cease its considerations. The Schedule allows for such withdrawals and joint requests but sets limits on when these options can be used.

A2.7 The union can unilaterally withdraw its application from the statutory process at any stage up to either the date that the Court declares it recognised without a ballot or the date that it receives a notice that the Court intends to arrange a ballot.

A2.8 The two parties (union and employer) can enter an agreement for recognition (a 'semi-voluntary agreement' as described in paragraph 1.4 above) and then both give the Court notice that they wish the Court to cease consideration of the application. This can be done at any stage of the process up to the date the Court declares the union recognised or the last day of the ballot notification period; again, whichever is applicable will set the restriction. This process is described briefly at Annex 3. If a semi-voluntary agreement is reached, either party can apply to the Court to specify a method of collective bargaining.

## Consequence of the Industrial Court Accepting an Application

A2.9 The union can withdraw its application without penalty at any time until the Court has accepted it. Once the Court has accepted the application, the union can still withdraw but from that point withdrawal means that the union cannot make another application for statutory recognition in respect of the same or substantially the same bargaining unit for three years (see admissibility tests above referring to paragraphs 39, 40 & 41 of the Schedule).

## Duty on an Employer Where the Application is Accepted by the Industrial Court

A2.10 Where a union's application is accepted by the Court, but the bargaining unit has not been agreed, an employer is under a duty to provide certain information to both the Court and the union within 5 working days, starting with the day after being given notice of the acceptance. The information that must be provided is –

- a list of the categories of worker in the proposed bargaining unit,

- a list of the workplaces at which they work ('workplace' is defined in the Schedule as the set of premises a person works at/from or, where there are no such premises, the premises with which the worker's employment has the closest connection), and

- the number of workers the employer reasonably believes are in each of the categories at each of the workplaces.

The information that the employer provides to the union and the Court must be the same and must be as accurate as is reasonably practicable in light of the information in the employer's possession at the time.

A2.11 This duty obliges the employer to pass information to the union, and to the Court, which may assist the parties' negotiations during the next stage of the statutory procedure. If, within the specified time, the employer fails to supply the required information, or fails to provide it in accordance with the statutory criteria, the union can request that the Court moves straight to its next formal decision (the Court decides the bargaining unit; see stage 4 below). If the Court receives such a request and is – either at the time that the request is made or at some time later in the appropriate period (see A2.21 below) - of the opinion that the employer has failed to comply with this duty, it must take the steps to decide the appropriate bargaining unit described in stage 4 below. The decision period within which those steps must be taken is 10 working days following the date of the union's request though this decision period can be extended where the Court gives a notice with reasons.

## Union Communications with Workers After Acceptance of Application

A2.12 Where an application is accepted by the Court the union has the facility to communicate with workers who are in the proposed or agreed bargaining unit. To do so, the union must apply, in writing, to the Court asking it to appoint a suitable independent person (SIP) to handle these communications. The Court will appoint the SIP as soon as possible after the union's request and will then notify the name, and appointment date, of the appointed person to the parties. This notification will begin the 'initial period' throughout which the union can send information to workers through the SIP.

## The Initial Period

A2.13 The initial period starts with the day the Court notifies the parties of the name and date of appointment of the SIP. The initial period then ends when one of the following occurs-

- the union withdraws the application (see A2.6 to A2.8 above);

- the Court finds the application is invalid (see A2.29 below);

- the union is declared recognised without a ballot (in the circumstances described below at A2.20 & A2.35)

- the Court informs the union of the name of the balloting organisation and the ballot arrangements (see A2.44 below).

It is throughout the initial period that the Union can communicate with the relevant workers through the SIP.

## The Suitable Independent Person

A2.14 The SIP, referred to in the Schedule as 'the appointed person', is appointed by the Court Panel when the union requests it.[4] The SIP will send to any relevant worker information that is provided to it by the union and will charge the union for this service. The Panel selects the SIP from those bodies that meet the criteria specified in paragraph 25(7)(a) of the Schedule for balloting organisations; that they meet the conditions in the Recognition and Derecognition Ballots (Qualified Persons) (Amendment) Order (Northern Ireland) 2004, that they will carry out the SIP functions competently and that their independence in carrying out those functions cannot reasonably be questioned.

A2.15 The union bears the costs of the SIP; where there is a joint application for recognition, the unions can decide between themselves how to apportion the costs or can simply pay equal measures of the costs. The SIP will send the union a demand setting out its costs, the costs will include only those that were necessary to handle communications between the union and the relevant workers throughout the 'initial period', a reasonable charge for services and any other costs that the union agrees. Whilst the Schedule charges the Court with the task of appointing the SIP and passing the information on relevant workers to it, it is advisable for the union to clarify with the SIP its full likely charges before commencing communications with the relevant workers so that additional expenditure is minimised; for example a union may wish to carry out its own printing of literature if it can do this more cost effectively. Once the SIP's demand for cost is received, the union is then required to pay the SIP within 15 working days (starting with the day after receipt of the demand). If the demand is not paid then a county court can order that the demand is recoverable under a court order.

A2.16 If 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 either that the amount specified in the demand as being the costs of the appointed person is too great or the share of the 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 SIP is not enforceable.

## Duties on the Employer After Appointment of SIP

A2.17 An employer who is notified of the appointment of a SIP must comply with duties to provide information to the Court that will enable the SIP to fulfill its role (as far as is reasonable to expect the employer to do so). These duties are in addition to the duty to provide the information described in A2.10 above but they will only be triggered where the Court appoints a SIP at the request of the union.

A2.18 These duties are as follows;

[4] A person may act as a SIP if specified in the Recognition and Derecognition Ballots (Qualified Persons) (Amendment) Order (Northern Ireland) 2004 and there are no grounds for believing either that he or she will carry out any functions arising from the appointment other than competently or that his or her independence in relation to those functions might reasonably be called into question.

- to give the Court the names and home addresses of the 'relevant workers'. This must be done within ten working days starting with the day after that on which he or she is informed of the name and date of appointment of the SIP. 'Relevant workers' are either those falling within the proposed bargaining unit or, if a bargaining unit has already been agreed by the parties or decided by the Court, those within that bargaining unit.

- if the employer has given the Court the names of workers within the proposed bargaining unit and a different bargaining unit is then agreed by the parties or decided on by the Court, the employer must give the Court the names and home addresses of those who are now the 'relevant workers', ie. those workers who fall within the different bargaining unit. This must be done within 10 working days starting with the day after that on which the bargaining unit is agreed or the Court's decision is notified to the employer.

- to notify the Court as soon as reasonably practicable of the name and home address of any worker who subsequently joins the bargaining unit after the initial list has been supplied.

- to inform the Court, as soon as reasonably practicable, or any worker who ceases to be a 'relevant worker' because he or she has left the bargaining unit (except where a new complete list is supplied because the definition of the bargaining unit changes).

The Court must pass all information it receives to the SIP as soon as possible. The Court will not pass the information to anyone else.

A2.19 In the event that the employer does not comply with these duties the Court may, if the initial period has not yet ended, order the employer to remedy the failure within a set timescale. Given the seriousness of the available penalty (see A2.20 below), the Panel will spell out the consequences of not complying with an order from the Court when it is made. If the employer does fail to comply with the order the Court, again providing the initial period has not yet ended, will issue a notice to both parties confirming that there has been a failure to comply with the remedial order; this notice will spell out the consequences of the failure to comply with the remedial order.

## Penalty for Non-compliance with an Industrial Court Remedial Order

A2.20 If the Court issues a notice confirming that the employer has failed to comply with the remedial order then it may also issue a declaration that the union is recognised. This will only occur where the Court is also satisfied that;

- the bargaining unit has been agreed by the parties or has been decided by the Court; and

- the agreed or decided bargaining unit has not led to the application being invalid (see A2.29 below); and

- the initial period has not yet ended.

If the Court is not satisfied that these conditions are met then no declaration will be issued until such time as they are met; subject to the employer complying with the order.

## <u>Stage 4</u> – Deciding the Appropriate Bargaining Unit

A2.21 If the two parties have not agreed the bargaining unit before an application is accepted, the Court has a duty, following acceptance, to try to help them reach agreement on what the appropriate bargaining unit is. In trying to help the parties, the Court may suggest the parties seek help from the LRA, the Court may itself mediate between them or, if the parties prefer, they may conduct these negotiations directly. The Court has **20 working days** in which to try to help the parties reach an agreement; the Schedule refers to this as the appropriate period and it starts with the day following the Court giving notice that the application is accepted. The Court can extend the appropriate period beyond the 20 working days if reasons are given to the parties. The 'appropriate period' may also be brought to an end where the Court believes that there is no realistic prospect of agreement being reached before the due end date. If the Court reaches this conclusion then it must notify the parties of the end date and give reasons for its conclusion; the appropriate period then ends with the date of the Court's written notification. If, during the appropriate period, both parties apply to the Court for a declaration that the period will end on an earlier date than scheduled, the Court can specify that the new end date is the one the parties have applied for. The Court may subsequently notify a later end date if it gives reasons for the extension. If the parties agree a bargaining unit before the 20 working day period is over, the Court should move to stage 5 or 6 as appropriate (and therefore not wait until the 20 working days are up). If the parties agree the bargaining unit to be the same as that proposed by the Union but have agreed a different form of wording, both parties must inform the Court that the bargaining unit agreed has not changed from that originally proposed by the Union, although the description has changed. However it is still for the Court to determine whether the agreed bargaining unit coincides with the proposed bargaining unit.

A2.22 If agreement cannot be reached between the parties, or the union makes a request in the circumstances described in A2.11 above, then the Court must decide within a period of 10 working days whether the union's proposed bargaining unit is appropriate. The Court can extend this bargaining unit decision period by giving the parties a notice with reasons for the extension. If the Court's decision is that the union's proposed bargaining unit is not appropriate then the Schedule requires it to go on and decide a bargaining unit which *is* appropriate; this decision must also be made in the bargaining unit decision period. In reaching its decision on whether the proposed bargaining unit is appropriate and, where required, in deciding an alternative bargaining unit which is appropriate, the Court has to take into account a number of factors:

- **Need for the unit to be compatible with effective management.**

And the following in so far as they do not conflict with that need

- Views of employer and union.

- Existing national and local bargaining arrangements.
- Desirability of avoiding small, fragmented bargaining units.
- Characteristics of workers in the proposed bargaining unit and any other employees the Court considers relevant.
- Location of workers.

Of these factors, the first in the list takes priority in the sense that other factors can only be taken into account so far as they do not conflict with the need for the bargaining unit to be compatible with effective management. If there is conflicting information on what the bargaining unit should be, the Court may call a hearing to determine the appropriate bargaining unit.

A2.23 When making its decision on whether the union's proposed bargaining unit is appropriate, the Court must take into account any views that the employer has on any other bargaining unit that it considers would be appropriate.

A2.24 Before the Court makes any decision on the bargaining unit it will write to both the employer and the union asking for specific comments on all of the matters listed above. If there is conflicting evidence on whether the proposed bargaining unit is appropriate then the Panel is likely to call a hearing to determine the question.

A2.25 Whether the bargaining unit is agreed between the parties or decided by the Panel there needs to be clarity as to which workers are included in the bargaining unit. This is because, if at a later stage in the process, a ballot is held, both parties need to be quite clear as to which workers are entitled to receive a ballot paper. Since the bargaining unit defined at this stage cannot be modified or re-defined later, the definition must be clearly understood by both parties as well as the Panel. If the bargaining unit is agreed between the parties, the Court should be supplied with a list of all posts, grades, sites etc to be included or excluded. In defining the bargaining unit, it can sometimes be helpful to define it by stating which posts or functions are excluded (eg. All workers except …..) as well as categories of workers to be included. However, there is the danger in this approach whereby workers are unintentionally included in the proposed bargaining unit.

## <u>Stage 5</u> – Changes to the Proposed Bargaining Unit

A2.26 If as a result of changes to the bargaining unit (whether agreed by the parties or decided by the Court), the bargaining unit is different from that in the original application, then the Court has to re-apply validity tests to the new bargaining unit.

A2.27 The tests that need to be re-applied are:

*Is there an existing recognition agreement in respect of any workers covered by the new bargaining unit (paragraph 44 of Schedule 1A)?* The application cannot be valid if there is an existing agreement under which a union is entitled to conduct collective bargaining on behalf of any workers in the new bargaining unit.

For this purpose, the existing agreement can be with any trade union, whether or not it has a certificate of independence, and can be a voluntary or statutory agreement. Equally, an existing collective agreement does not need to cover hours, pay or holidays (subject to (b) below) as long as it covers one or more of the matters specified in section 178 of the Industrial Relations Order 1992. The existing agreement only needs to cover one worker in the new bargaining unit to make the current application invalid. There are two exceptions to the rule about existing agreements.

a) if the union recognised is a non-independent union that was de-recognised in the preceding three years, then an application from an independent union can be accepted as valid. Without this provision an employer attempting to avoid statutory recognition could simply re-recognise a non-independent union (or staff association) as soon as it was de-recognised following an application (under Part VI of Schedule 1A) from a worker, therefore barring the independent union indefinitely.

b) if the existing agreement is with the same union as is making the current application, and the existing agreement does not cover all of the following: pay, hours and holidays, then the application can be accepted as valid.

- *Is there 10% union membership in the new bargaining unit (paragraph 45 of Schedule 1A)? *See below*

- *Is the majority of workers in the new bargaining unit likely to favour recognition (paragraph 45 of Schedule 1A)? *See below*

The Court's consideration of the validity tests under paragraph 45 will be based on the best evidence available. If the Court considers it necessary, it can require an employer to provide, to a Case Manager, information concerning the workers in a bargaining unit and the likelihood of a majority of those workers being in favour of the applicant union conducting collective bargaining on their behalf. The Court can also, where it considers it necessary, require a union to provide to the Case Manager information concerning the union members in a bargaining unit and the likelihood of a majority of those workers being in favour of the applicant union conducting collective bargaining on their behalf. 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 as to the membership, subscriptions and rules of a union. The Case Manager may also require more information from either or both sides on the job titles of employees covered 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, to the employer and to the union. If either of the employer or the union 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.

- *Is there a competing application including any workers covered by the new bargaining unit (paragraph 46 of Schedule 1A)?* The Court cannot adjudicate between competing applications made by different unions which relate to the

same or overlapping bargaining units. If at least one worker in the new bargaining unit also falls in the bargaining unit of another accepted application and that other application is still under consideration, then the current application will not be valid.

- *Has there been a previous application in respect of the new bargaining unit (paragraphs 47, 48, 49 & 50 of Schedule 1A)?* The application cannot be valid if a previous application from the same union covering the same or substantially the same bargaining unit has been accepted by the Court within the last three years. Similarly the application cannot be valid within three years of the same union failing to achieve recognition following a ballot, or being de-recognised following a ballot of the same or substantially the same bargaining unit. It is for the Court to decide if one group of workers is substantially the same as another.

A2.28 Again, preliminary work on the tests will be carried out by the Case Manager, who will report findings to the Panel as appropriate. If there is conflicting information, the Court may call a hearing. Again the decision period is 10 working days, or longer if reasons are notified to the parties.

## Implications of a Change to the Bargaining Unit

A2.29 The Court has to decide the appropriate bargaining unit, on the basis of the criteria set out above, before the validity tests are re-applied. If, as a result of changes to the bargaining unit (whether agreed by the parties or decided by the Court), the application does not meet the re-applied validity tests, the Court cannot proceed with the application. Rejection at this stage means that, while the union concerned cannot apply for three years in respect of the bargaining unit proposed in the original application (or one substantially the same), the three year bar does not apply to the bargaining unit agreed by the parties or decided by the Court (ie the new bargaining unit that has rendered the application invalid).

## Stage 6 – Testing Union Support

A2.30 Once an application has been accepted, and the bargaining unit settled, the Court has to decide whether to call a ballot on union recognition.

A2.31 The main test is the level of union membership in the bargaining unit. Unless the Court is satisfied that the majority of the workers in the bargaining unit belongs to the union making the application, it has to call a ballot. Where the union argues that it has a majority of the workers in the bargaining unit and the employer provides conflicting information to challenge the union's membership figures, there may be an independent check carried out by a Case Manager on the level of union membership in the bargaining unit on a confidential basis. Again, this check may take a number of forms. It could be a comparison of lists (where the decision would be based on the Case Manager's report of the check, the names will not be given to the Panel) or detailed checks involving visits to employer or union premises – see Stage 3 above (is there at least 10% union membership?)

A2.32 The Court's consideration of whether there is majority union membership in the bargaining unit will be based on the best evidence available. If the Court considers it necessary, it can require an employer to provide, to a Case Manager, information concerning the workers in a bargaining unit. The Court can also, where it considers it necessary, require a union to provide information concerning the union members in a bargaining unit. 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.

A2.33 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, to the employer and to the union. If either of the employer or the union 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.

A2.34 If the majority of the workers in the bargaining unit belongs to the union making the application, the Court issues a declaration of recognition for the union without a ballot, but see below.

The Court has to call a ballot if any of the following conditions apply:

- If the Court is satisfied that a ballot should be held in the interests of good industrial relations.

- If the Court has evidence, which it considers credible, from a significant number of union members in the bargaining unit inform the Court that they do not want the union to conduct collective bargaining on their behalf.

- Membership information regarding the circumstances in which workers joined the union or length of membership leads to doubts whether a significant number of union members in the bargaining unit want the union to conduct collective bargaining on their behalf.

A2.35 While the Panel must consider any information that the parties or union members within the bargaining unit, bring to bear on these conditions, there is no obligation on the Panel to seek such information. The Court may call a hearing to determine whether any of these factors apply. In the event that a hearing was being held on the question of whether the majority of the workers are union members, consideration of these three conditions could be combined with it. If the Court has credible evidence from union members in the bargaining unit indicating that they are opposed to the union being recognised for collective bargaining the Court Panel will consider it. If letters or a petition are sent by union members in the bargaining unit expressing opposition to recognition, these will be considered by the Court. While the Case Manager will copy the text of any letters or petitions to the Panel and the parties, the identity of individuals sending them will not be disclosed by the Case Manager to the Panel or the parties; however the Panel may ask the Case Manager to obtain information from both the employer and the union to assess whether the individuals are workers in the bargaining unit and whether they are union members. This information can be 'required' by the Court in the same way that information can be required for Case Manager checks for earlier purposes such as acceptance, validity and whether there is majority union membership.

A2.36 On the third qualifying condition, membership information includes such issues as whether workers in the bargaining unit joined the union because of union promotion of factors other than collective bargaining. Factors such as workers joining the union because of offers of free membership or reductions in membership fee can be taken into account e.g. where this is in conflict with the union rule book. However the Court needs to look at every case on its merits and cannot make any assumptions regarding the attitude of those who take advantage of free membership to collective bargaining on their behalf.

## Stage 7 – Holding a Ballot

A2.37 If the Court decides a ballot is required, it will notify the parties in writing that it intends to arrange for a secret ballot in which the workers in the bargaining unit will be asked whether they want the union to be recognised for the purposes of collective bargaining on their behalf. This notice, once received by the parties, will begin the 'notification period', the expiry of which will require the Court to hold the ballot.

A2.38 From the date the union receives the Court's notice it has the **10 working days of the notification period** in which it can notify the Court that it does not wish a ballot to be held. In addition, the union and employer can jointly notify the Court of this (for example, if they reach a semi-voluntary agreement). In the latter case, the start date of the notification period will be determined by reference to the date the employer received the Court's notice (as opposed to the date the union received it).

A2.39 Withdrawing from the ballot at this stage is withdrawal from the statutory process and would still mean that the union is barred from applying to the Court for three years in respect of the same or substantially the same bargaining unit. Once the notification period is passed, it is no longer possible for the union, or the union in agreement with the employer, to withdraw from the statutory procedure and a ballot must be arranged. Both parties will be liable for the cost of the ballot (see below). The notification period can be extended, but only in circumstances where the parties have applied jointly to the Court for the extension.

A2.40 Notwithstanding that there may be negotiations for a semi-voluntary agreement the parties should use this 10 day notification period to agree access arrangements for the union during the ballot period. It is helpful if a copy of the access agreement can be sent to the Case Manager. If there are problems in agreeing access then the parties may seek the help of the LRA for conciliation as soon as possible. The Case Manager is likely to be in touch with the parties before the expiry of such period in case a hearing on access needs to be arranged or some other assistance can be offered by the Court.

A2.41 Assuming no request from the union (or from union and employer), the Court appoints a qualified independent person (QIP) to conduct the ballot. The Panel selects the QIP from those bodies specified in the Recognition and Derecognition Ballots (Qualified Persons) (Northern Ireland) Order 2001. While the QIP conducts the ballot, the Court 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 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.

A2.42 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 either party. 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 if they request this far enough in advance of the ballot for this to be practicable.

A2.43 The ballot must be held within **20 working days** of the appointment of the QIP. Again the Court can extend this period.

A2.44 Once the Court has appointed the QIP, the Case Manager will inform the parties. The Case Manager will write to the parties explaining the balloting process, drawing attention to the need to agree access arrangements (if this has not been achieved), and to inform the union of the opportunity to use the services of the QIP to circulate material to the workers in the bargaining unit. The Court would strongly encourage that a written Access Agreement is entered into by the parties and a copy of the Agreement sent to the Case Manager. If there are problems agreeing access then parties may seek the help of the LRA to conciliate.

A2.45 Once the employer has been informed of these details by the Court letter, the employer has five duties with which it must comply:

- *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 the 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 QIPs name and ballot arrangements. After providing this initial list the employer must also pass 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. Where the employer has already provided names and home addresses of relevant workers for the purposes of a union's communications with them after the application was accepted (see A2.18 above) this duty is amended accordingly so that the obligation on the employer is to provide the names and homes addresses of any workers who have joined or left the bargaining unit since the date that the employer was informed of the QIPs name and ballot arrangements. The Court will specify all relevant dates for the employer and, if the QIP is not the same organisation that was appointed as the SIP, the Court will, as soon as possible, pass on to them the names and home addresses already submitted by the employer for the earlier purpose.*

- *To refrain from making any offer to workers that induces 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 step ordered by the Court in a remedial order (see A2.48 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.*

A2.46 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. 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 A2.49 – A2.51). Similarly it is for the union to approach the employer with regard to access arrangements. The Case Manager will prepare an explanatory note about the ballot which the QIP will send to the workers in the bargaining unit, in addition to the ballot paper. 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.

A2.47 Any complaint that the employer has not complied with any of the five duties, must be made known to the Court before the ballot is held. Complaints regarding the employer's compliance with 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 Court will investigate the complaint, seeking advice from the QIP as appropriate. A site visit or hearing may be needed. The Court can extend the timetable for the ballot in these circumstances.

A2.48 If the Court 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 the Court can issue a declaration of recognition. Given the seriousness of the penalty, the Panel will spell out the consequences of

not complying with an order from the Court when the order is made. The Court can take into account all relevant circumstances including the behaviour of the union.

## Unfair Practices

A2.49 Each of the union and employer once informed by the Court of the name and appointment date of the QIP (see A2.44 above) must refrain from using any unfair practice. Either of the union and employer can complain to the Court if they believe the other 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, intention to vote a particular way or how he or she actually did vote.

A2.50 The Department for Employment and Learning's 'Code of Practice on Access and Unfair Practices during Ballots for Trade Union Recognition or Derecognition' recommends steps that can assist good practice for both employers and unions and gives guidance on which activities should be avoided in order to minimise the disruption to ballots that can be caused by complaints to the Court.

A2.51 The Schedule lists unfair practices. The following acts by the employer and the union are unfair practices if they are used with a view to influencing the result of the ballot:-

- *Offers to pay, with money or non cash offer, for relevant worker to vote in a particular way or to abstain;*

- *Offers to pay, with money or a non cash offer, reward to a relevant worker but only if a specific declaration is achieved following the ballot (the union being declared recognised or the union being declared not recognised) – 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 he or she intends to vote or abstain or how they intend to vote or have voted;*

- *Dismissal, or threats to dismiss, of a worker – note that this is not confined to just 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*

- *The use 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.

A2.52 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. This period starts 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.

A2.53 If the Court decides that the complaint is well founded (see A2.49 above) it will declare this finding and may then do one or both of the following: -

- Issue a remedial order telling the party what reasonable 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 give remedial order and/or 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 a declaration of recognition or non-recognition. The Schedule makes clear that the Court can give more than one order under these provisions.

## Circumstances in Which the Industrial Court Can Abandon a Ballot and Issue a Declaration

A2.54 In some circumstances where there have been serious failures by either the employer or the union, the Court has the power to cancel a ballot and make a declaration that the union is, or is not, recognised. 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 A2.49 above) 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 A2.53 above) that a complaint that the same party used an unfair practice is well founded.

In these cases of serious and/or repeated failures by the parties, if the failing party is the employer then the union can be declared recognised and of the failing party is the union then the Court may declare the union is not recognised.

A2.55 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.

A2.56 Where the Court declares that an unfair practices complaint is well founded and orders a fresh ballot – or where the Court declares that the union is recognised or not recognised in the circumstances described in A2.54 above – 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.

A2.57 If the Court orders a fresh ballot in the circumstances described at A2.53 above then the following changes to usual ballot procedure will take effect: -

*a) the notice period (for a union, or joint, request to cease the ballot arrangements) is reduced to 5 days.*

*b) The employer only needs to update the information on workers' names and addresses rather than provide them afresh*

*c) 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 an unfair practice is carried over and must be acted upon by the party concerned to the extent that the Court will specify in a notice to the parties – it does not become void simply because the tainted ballot has been abandoned.*

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

A2.58 Usually, (i.e. unless the circumstances in A2.57 d) apply) the costs of the ballot are shared between the employer and the union on a 50/50 basis. The Case Manager will send both parties a copy of the quotation received from the QIP selected to carry out the ballot and will ask that the QIP notify the Court and each of the parties of any likely changes to that estimate, including 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.

A2.59 Following the ballot the QIP will send the employer and the union, subject to any Court decision to the contrary (see A2.57 d) above), 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 either that the gross costs of the ballot are too great or the share of the 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.

## **Stage 8** – Result of Ballot

A2.60 In order for a trade union to be recognised for collective bargaining purposes following a ballot, a majority of those voting, and at least 40% of the workers in the bargaining unit must vote in favour of recognition. After the ballot the Court will either declare the union recognised, or issue a declaration that the union is not recognised. Following a declaration of non-recognition, the Court cannot accept any applications from the union concerned in respect of that bargaining unit or one substantially the same for three years. Once the 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.

## Stage 9 – Establishing the Bargaining Method

A2.61 Statutory Recognition is for collective bargaining on pay, hours and holidays and any other matters agreed by the parties. Once a union is recognised, a method for conducting collective bargaining on pay, hours and holidays needs to be agreed. If a method cannot be agreed, then the Court, taking into account the "model method" determined by Legislature,[5] must specify a method of collective bargaining to the parties.

A2.62 In the first instance it is for the two parties themselves to reach an agreement on a method of bargaining; they may wish to seek the help of the LRA in doing so. If the parties cannot agree a method themselves within **30 working days**, either party (union or employer) can apply to the Court for assistance. The Court then has the duty to try to help the parties reach agreement (which at this stage would not necessarily need to accord with the model method). The period for helping the parties reach agreement is 20 working days. The Court can extend this period with the consent of both parties.

A2.63 If the parties cannot reach agreement with the help of the Court, the Court will specify a method of collective bargaining. In drawing up a method, the Court will take account of the views of the parties, and also of the model method. Where either party wishes the Court to depart from the model method, it should propose changes to the model and explain its reasons for the changes. The Court may call a hearing to decide the method.

A2.64 At any time up to the point at which the Court specifies the method of collective bargaining, it is still open to the parties to jointly request that the Court ceases its consideration of the method and the Court will comply with that request. This might perhaps be the case in circumstances where the parties believe that agreement is preferable to the imposition of a method by the Court.

A2.65 Where the Court specifies the method of collective bargaining, that method is legally enforceable unless -

a) both parties agree in writing that the method – or a specific part of that method - is not to be legally binding, or

b) where both parties agree in writing to vary or replace the method.

In these circumstances it is the written agreement between the parties that is legally enforceable.

A2.66 As with any legally binding contract, enforcement is a matter for the Courts. The remedy for a breach of any aspect of the method is specific performance. If either party ignored a court order for specific performance, it would be in contempt of

[5] *Found in the Trade Union Recognition (Method of Collective Bargaining) Order (Northern Ireland) 2001.*

court. It is not the Court's role to enforce the method of collective bargaining that has been specified.

## **Stage 10** – Performance of Method

A2.67 If the bargaining method was agreed between the parties, rather than specified by the Court, then either of the parties can apply to the Court for assistance if it believes that the other party has failed to carry out the agreement. In these circumstances, the Court will repeat Stage 9 (in other words, first try to help the parties reach agreement, and then if no agreement is reached, specify a method of collective bargaining).

A2.68 As stated above at Stage 9, a bargaining method specified by the Court is legally binding (unless both parties agree that it should not be).

**Annex 3**

# Outline of Other Procedures Under Schedule 1A

A3.1 While Part I of Schedule 1A deals with statutory recognition, applications can also be made under other Parts of the Schedule.

A3.2 This note only gives a very brief outline of the processes under other parts of the Schedule. For more detailed information, you should refer to the Employment Relations (Northern Ireland) Order 1999 or the Explanatory Notes to the Order published by the Department of Higher and Further Education, Training and Employment, now the Department for Employment & Learning. Both are available from the Stationery Office. Explanatory notes for these other parts of the Schedule and the relevant application forms are available from the Court

A3.3 **Part II (Semi-voluntary Recognition):** applies where the union and employer have reached a voluntary agreement following a request by the union for statutory recognition. In other words, the parties have reached agreement and withdrawn from the statutory process (i.e. a semi-voluntary agreement). Where an application has already been submitted to the Court by the union and an agreement is then reached between the parties, both the employer and the union are required to notify the Court that they no longer wish it to continue considering the application. When a semi-voluntary agreement has been reached, the parties can ask the Court to specify the method of collective bargaining. Any method specified by the Court will be legally binding unless both parties agree otherwise. The employer cannot unilaterally terminate an agreement under Part II for three years, but the union can end it at any time. [Note - Schedule 1A refers to this as “voluntary recognition”]

A3.4 **Part III (Changes Affecting Bargaining Unit):** applies if, following statutory recognition, there is a change in the organisation, structure, or activities of the business, or a substantial change in the numbers employed which makes the bargaining unit inappropriate. Either party may make an application under Part III. If the Court accepts the application, the parties can reach agreement on a new unit. If the parties fail to reach agreement, the Court will consider whether the unit is still appropriate, and if not, decide what the new unit should be. Where the new unit overlaps with an existing bargaining unit, special provisions apply depending on the status of the overlapped bargaining unit. In addition, applications under Part III can be made by an employer on the grounds that the bargaining unit has ceased to exist. Applications under Part III can be made at any time after a declaration of recognition, provided that a method of collective bargaining is in place.

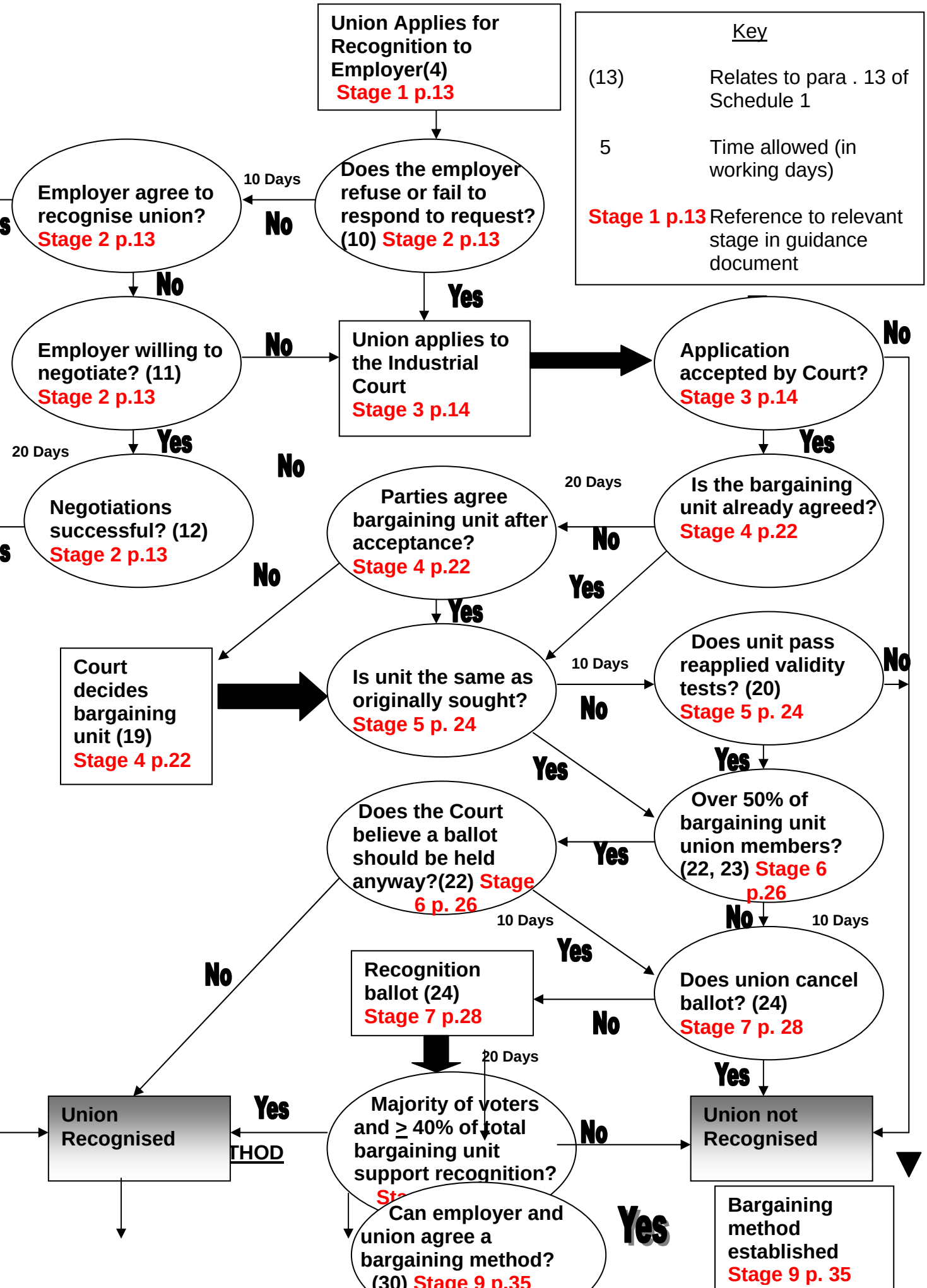
A3.5 **Part IV (Derecognition Where Recognition was Achieved Following a Ballot):** applies where an employer, or worker seeks to derecognise a union which was recognised under Part I. Statutory derecognition can only take place three years or more after recognition was granted. The employer can ask the union to end recognition arrangements and if the union does not agree, the employer can apply to the Court asking for an end to the bargaining arrangement. The Court conducts tests similar to the Part I admissibility tests in reverse, and the question is settled by a ballot. A worker or workers in the bargaining unit can apply to the Court for an end to the bargaining arrangements. The employer can also apply for derecognition on the grounds that the entire workforce has fallen below 21. The Court has produced a Guide to Part IV.

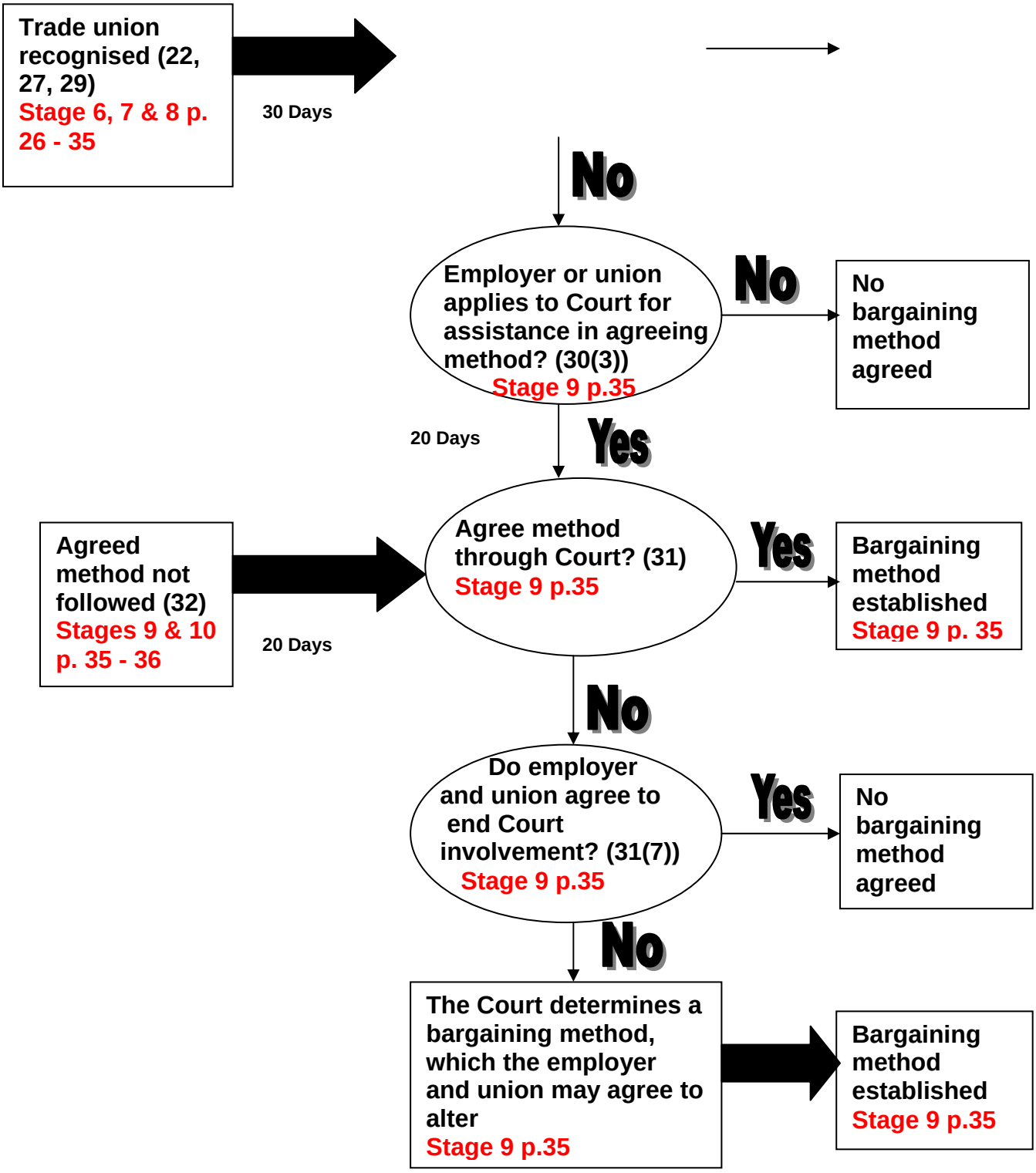
A3.6 **Part V (Derecognition Where Recognition Was Achieved Without a Ballot):** applies where the union was granted recognition under Part I or Part III without a ballot. The main differences from Part IV are that only the employer can make use of this Part of the Schedule and the test for accepting the employer's application is whether fewer than half the workers in the bargaining unit are members of the union. The question of derecognition is settled by a ballot, as with Part IV. Again the employer cannot apply for three years after recognition was granted.

A3.7 **Part VI (Derecognition Where the Union is Not Independent):** if a non-independent union is voluntarily recognised for collective bargaining purposes, a worker or workers within the bargaining unit can apply to the Court to have the bargaining arrangements ended. While the workers concerned can be backed by another union, that union cannot itself use this route. Again the Court applies some initial tests of admissibility, attempts to help the employer, union and worker to end the bargaining arrangements and arranges a ballot to take place if necessary. This process has to be halted if the non-independent union obtains a certificate of independence. The main difference between this route and Parts IV and V is that, under Part VI, a worker can apply anytime after recognition was granted - there is no need to wait for three years.

A3.8 **Part VII (Loss of Independence):** if a union recognised under Part I of the Schedule loses its certificate of independence, then statutory recognition ceases.

**STATUTORY RECOGNITION PROCEDURE** **Annex 4**






*All time periods in working days*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