

United Kingdom

Introduction

The United Kingdom has seen a steady decline in the power of trade unions and in their membership since the miners' strikes of the 1980s. Legislation during the 1980s served to remove many trade union rights and immunities as well as the rights of their members. The ethos of that legislation has been compounded in recent years by an unprecedented growth in the number and scope of individual employment rights: for many employees, trade union membership may offer little additional benefit.

Since the election of a Labour government in 1997, the scope, if not the power, of trade union influence has widened somewhat. In particular, there is now a statutory right to recognition. Nevertheless, from a peak of 13.2 million in 1979, trade union membership has dwindled to less than 6.5 million. Today only one in five employees in the private sector and three in five in the public sector are members.

UK legislation enabling the creation of Information and Consultation bodies, or National Works Councils, was introduced in 2004. While take-up by employees has not been great, there is some evidence that the existence of the statutory procedure has encouraged employers to establish or improve existing employee consultative bodies.

Trade Unions

The General Role Of Trade Unions

The statutory definition of a trade union is set out in Section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"). Under the TULR(C)A, a trade union is a permanent or temporary organisation consisting wholly or mainly of workers of one or more descriptions, and one of its principal purposes is the regulation of relations between workers and employers. The scope of this latter point includes, but is not limited to, collective bargaining, meaning that an organisation with no negotiating function could theoretically be a trade union. Trade union structures are diverse – some are general unions and others target specialist areas – leading to overlap and competition, which arguably leads to improvements in services. In recent years, several medium sized unions have amalgamated to create much larger "super unions."

Trade unions offer their members a variety of services, including representing them in various ways (particularly in disciplinary meetings), offering them legal and other advice, negotiating with employers on their behalf, and representing them in tribunals. Their role has grown much wider.

Constitution Of A Trade Union

A trade union is an unincorporated association and does not have legal personality in the United Kingdom. Therefore, it cannot own property in its own right, meaning that trustees must hold any property in trust for the members. Legislation, however, affords trade unions certain attributes of legal personality, such as the ability to enter into contracts.

The rules of a trade union define its constitution and stipulate the powers of its officers and officials. They also define the relationship between each member and the trade union, and between the members themselves. Each trade union has a rulebook, which normally deals with these matters, although it is possible for terms to be implied into the rulebook. The trade union's customs and practices are also important in interpreting its rules. Courts will interpret the rules based on what they consider were the parties' intentions and on how they believe the members would understand them. Most importantly, the rulebook should contain the right to amend the rules, or amendments may not be possible.

Although a trade union can generally decide upon its own rules, one of the rules that must be included in the rulebook is that a member may terminate his or her membership at any time with reasonable notice. Moreover, the rules of natural justice cannot be excluded and must be observed in all circumstances. Where a trade union is in breach of its rulebook, or is threatening such a breach, members may bring an action against both the trade union and the officials responsible for an injunction and/or damages.

When holding an election for a union office, a trade union must comply with its rulebook. Under the TULR(C)A, a trade union must hold elections for certain union offices, such as for the president and general secretary, at least every five years. It must also ensure that the person elected has not recently been convicted of certain offences.

The Scope Of Trade Union Rights In Businesses

Section 1 and Schedule 1 of the Employment Relations Act 1999 (ERA) gave independent trade unions a legal right to request recognition for collective bargaining purposes from employers. The procedure is now set out in Schedule A1 TULR(C)A. “Recognition” can be at different levels and for a variety of purposes, but at the basic level it means that an employer agrees to the trade union occupying a certain role in the undertaking. This right only applies to employers with at least 21 workers. Collective bargaining covers, at a minimum, pay, hours, and holidays, although the employer and trade union can agree on additional topics.

The aim of the legislation is for the employer and trade union to reach a voluntary agreement concerning recognition. This allows maximum flexibility, and such an agreement will not be legally enforceable unless the parties agree otherwise. However, the disadvantage for the trade union is that the employer can withdraw voluntary recognition at any time without legal sanctions. If an employer refuses voluntary recognition, the trade union may commence the statutory recognition procedure.

Under the statutory recognition procedure, the trade union applies to the Central Arbitration Committee (CAC) to assist in reaching an agreement with the employer. The first point to be agreed upon is the scope of bargaining unit (i.e., what employees fall into the category of workers for which the union will conduct collective bargaining). Initially, the CAC will check that the majority of members in the proposed bargaining unit are in favour of its recognition. If the CAC is unable to help the employer and trade union reach an agreement within 20 working days after an application is made, the CAC itself must decide the appropriate bargaining unit.

Once the appropriate bargaining unit has been determined, the CAC can grant recognition rights to the trade union where the trade union demonstrates that the majority of workers in the bargaining unit are its members. Otherwise, the CAC must notify the employer and trade union that a secret ballot of the workers in the bargaining unit will be held to decide the issue of recognition. The trade union on its own, or together with the employer, may decide that it does not wish a ballot to be held, in which case the recognition procedure will stop.

If a ballot is to be held, the CAC must appoint a Qualified Independent Person (QIP) to conduct it. The trade union can require information it supplies to be sent to the workers in the bargaining unit by the QIP. The trade union also has the right of reasonable access to the workers in the bargaining unit to try to persuade them

to vote in favour of recognition. The CAC must order recognition where 40% or more of the workers in the bargaining unit vote in favour of recognition. If these tests are not satisfied, the CAC will refuse recognition, and that particular trade union cannot commence the statutory recognition procedure for substantially the same bargaining unit for three years.

Once the bargaining unit has been recognised, the trade union and employer have 30 working days to decide upon a recognition agreement. Failing agreement, the CAC will help, and as a last resort, impose a legally binding structure. This can be enforced by an application to the court for an order of specific performance.

Where an independent trade union has been compulsorily recognised, or the CAC decided upon the recognition agreement, the trade union is protected for three years from a request for its de-recognition by the employer or by a worker. If the employer or a worker wants to derecognise the trade union and is unsuccessful in that application, the employer or worker must wait three years before trying again.

Section 70BTULR(C)A obliges an employer to consult with trade unions recognised under the statutory procedure set out above, by inviting them to send representatives to meetings to discuss the training of workers in the bargaining unit. The employer must provide specified information to the trade union before the meeting. In default, an Employment Tribunal may award up to two weeks' pay to each person in the bargaining unit. There is a further right to training reviews for the employees in the bargaining unit in the relevant workplace. Training should be reviewed every six months, provided that the trade union is recognised for the purposes of collective bargaining.

Additionally, and crucially, trade unions have the right to authorise and organise lawful industrial action, provided they adhere to strict and complex rules, particularly in relation to balloting and notice of industrial action. Where the union fails to follow the rules an employer may be able to obtain an injunction to stop the industrial action and the union may be liable to pay compensation up to a cap.

The Function Of Trade Union Representatives

A trade union representative is elected by trade union members to represent some or all of them in the collective bargaining process with their employer. The representative can be a fellow employee of some or all of the members, an employee

of the independent trade union itself, or a member of the trade union. Any trade union member may put forward his or her candidacy for election, unless it would be reasonable to exclude him or her from so doing.

Fundamental to the success of any collective bargaining process is the balance effected by a trade union representative: the representative must ensure that all employees feel that their views are properly represented while at the same time keeping the procedure focused and not allowing it to degenerate into individual grievances. Collective bargaining means being involved in the decision-making process; it is, therefore, above and beyond mere consultation.

Works Councils

National Works Councils

The Information and Consultation of Employees Regulations 2004 give employees in businesses with 50 or more employees rights to be informed and consulted on a regular basis about issues in the business for which they work. Consultative bodies established under these Regulations are sometimes referred to as National Works Councils.

The Regulations do not apply to businesses with fewer than 50 employees.

The Regulations apply to public and private undertakings situated in Great Britain that carry out an economic activity whether or not operating for gain.

The requirement to inform and consult employees is triggered either by a formal request from employees for an Information and Consultation (I&C) agreement or by employers choosing to start the process themselves.

The Regulations also provide for the retention of pre-existing agreements (PEAs), as defined, which have workforce support. Agreements may cover more than one company, or establish different arrangements in different parts of a company. Where no agreement is reached following an employee request, “standard” provisions for informing and consulting representatives of employees will apply.

An employee request to negotiate an I&C agreement must be made by at least 10% of the employees in the undertaking (subject to a minimum of 15 and a maximum of 2,500 employees).

Upon receipt of a valid request, an employer must negotiate an agreement unless there is one or more valid PEA in place.

There is a three-year moratorium on employee requests where negotiated agreements are already in force, the standard I&C provisions apply, or an earlier employee request to negotiate a new I&C agreement in place of a pre-existing agreement was not endorsed by the workforce in a ballot.

Employers must initiate negotiations for an agreement no later than three months after a valid request is made.

Negotiations can last for up to six months, but the employer and representatives can agree to extend this period for as long as they like in order to reach an agreement.

A negotiated agreement must set out the circumstances in which the employer will inform and consult its employees, provide either for employee I&C representatives or for information and consultation directly with employees (or both), be in writing and dated, cover all the employees of the undertaking, be signed by the employer and approved by the employees.

Agreements may cover more than one undertaking or provide for different arrangements in different parts of an undertaking, such as individual establishments (sites), divisions, business units, or sections of the workforce.

The standard I&C provisions apply where negotiations fail to lead to an agreement or where an employer fails to initiate negotiations following a valid employee request.

Where the standard I&C provisions apply, employee I&C representatives must be elected and the employer must inform and consult them in the way set out in the Regulations, i.e., provide information on the recent and probable development of the undertaking's activities and economic situation; information and consultation on the situation, structure, and probable development of employment within the undertaking and, in particular, on any threat to employment within the undertaking; and provide information and consult *with a view to reaching agreement* on decisions likely to lead to substantial changes in work organisation or in contractual relations.

Consultation means giving enough time and information to allow I&C representatives to consider the matter and form a view, with genuine and conscientious consideration of that view by the employer. The standard I&C provisions require the employer to meet the I&C representatives at a level of management relevant to the subject under discussion and to give a reasoned response to any opinion they may give.

Employers may, on confidentiality grounds, restrict information provided to I&C representatives in the legitimate interests of the undertaking. They may also withhold information from them altogether where its disclosure would be prejudicial to, or seriously harm, the functioning of the undertaking.

Pre-Existing Agreements

Where employers already have in place one or more PEAs they may ballot the workforce to ascertain whether it endorses the request by employees. If they choose not to ballot the workforce, they will come under the obligation to negotiate a new agreement.

Where a ballot is held, and 40% of the workforce plus a majority of those who vote, endorses the employee request, the employer would come under the obligation to negotiate a new agreement.

To be valid, PEAs must meet specific criteria set out in the Regulations.

European Works Councils

The European Works Councils (EWC) Directive sets out requirements for informing and consulting employees at the European level, in undertakings (which may include partnerships or other forms of organisation as well as companies) or groups with at least 1,000 employees across the member states and at least 150 employees in each of two or more of those member states.

The directive is implemented in the UK by the Transnational Information and Consultation of Employees Regulations 1999. They set out the procedures for negotiating a European Works Council agreement (or other European-level information and consultation procedure), the enforcement mechanisms, provisions on confidential information, transitional provisions and exemptions, and statutory protections for employees.

An EWC agreement normally follows negotiations between management and the employees. The process is triggered either on management's own initiative or after a written request from at least 100 employees or their representatives in two or more Member States (no obligation exists if no request is received). The employees are represented in the negotiations by a "special negotiating body" (SNB), which consists of representatives of employees from all the EEA member states in which the undertaking has operations. The number of representatives is determined by where

the undertaking's central management is located. The UK Regulations prescribe one representative from each of the EEA countries in which the undertaking operates plus additional ones where 25% or more, 50% or more and 75% or more of the European workforce is located in a member state, up to a total maximum of four. The way in which the SNB members are selected is determined by the legislation of the member state where they are employed. UK members are selected by a ballot of the UK workforce unless there exists a consultative committee whose members were elected by a ballot of all the UK employees and which performs an information and consultation function on their behalf. Where such a consultative committee does exist, it may appoint from within its members the UK representatives on the SNB.

The Regulations are largely concerned with the initial establishment of the SNB: the subsequent negotiations and the detail of the EWC agreements are for the most part left for agreement between the parties concerned - although the default model will be persuasive.

If management refuses to negotiate within six months of receiving a request for an EWC, or if the parties fail to conclude an agreement on transnational information and consultation procedures within three years, an EWC must be set up in accordance with the "Statutory model" set in the Schedule to the Regulations. The Schedule lists topics on which the European Works Council has the right to be informed and consulted (e.g., the economic and financial situation of the business; its likely development; probable employment trends; the introduction of new working methods; and substantial organisational changes).

The Regulations provide that management may withhold information, or require the EWC to hold it in confidence, where "according to objective criteria it would seriously harm the functioning of the undertaking or be prejudicial to it" if it were revealed. EWC members can appeal to the CAC if they believe the management is withholding information or imposing confidentiality beyond what is permitted in the Regulations, and the CAC would then make a ruling on a case-by-case basis.

The employees and SNB/EWC members are given statutory protections when asserting their rights or performing duties under the Regulations.

The Regulations do not apply to undertakings which had already concluded voluntary agreements providing for the transnational information and consultation of the employees, and which covered the entire workforce in the EEA. Such agreements had to have been concluded by September 22, 1996 or December 15, 1999,

depending on whether the undertaking was subject to the original directive or not. Undertakings which consider they have a valid voluntary agreement but which receive a request to establish an EWC may apply to the CAC for a declaration that the Regulations do not apply to them.

Interaction Between Works Councils And Trade Unions

There are few National Works Councils in the UK and thus the UK experience is limited. They tend to perform very different roles in organisations which have both.

Trade Union Employee Protection Rights

Under TULR(C)A section 146 a worker has the right not to be subjected to any detriment as an individual by an act, or any deliberate failure to act, by his or her employer if the act or failure takes place for the sole or main purpose of:

- Preventing or deterring him or her from being or seeking to become a trade union member, or penalising him or her for doing so;
- Preventing or deterring him or her from taking part in the activities of an independent trade union at an appropriate time or penalising him or her from doing so;
- Preventing or deterring him or her from making use of trade union services at an appropriate time, or penalising him or her for doing so, or;
- Compelling him or her to be or become a member of any, or any particular, trade union.

Also, TULR(C)A section 145A gives workers a right not to have an offer made to them by their employer for the sole or main purpose of inducing the worker:

- Not to be or seek to become a trade union member;
- Not to take part in the activities of a trade union;
- Not to make use of trade union services, or;
- To be or become a member of any, or any particular, trade union.

An employee who is taking part in *official and protected* industrial action (i.e., lawfully organised as described in TULR(C)A section 219) is automatically unfairly dismissed

if the reason or principal reason for the dismissal was that the employee has taken part in protected industrial action, if the date of dismissal falls during a protected period of 12 weeks starting from the day the employee started taking part in the industrial action. The dismissal will also be unfair if it falls after the protected period if the employee did not participate in industrial action after the protected period or, where the employee continued to participate after the protected period, before the employer has taken reasonable steps to attempt to resolve the dispute.

Where the action is not protected or where it is unofficial, different rules apply.

Section 3(1) of the ERA also aims to prevent “blacklisting,” which infringes upon workers’ freedom of choice to join a trade union. It enables the Secretary of State to make regulations (although none have been made to date) prohibiting the compilation and/or use of lists of trade union members and those who participate in trade union activities, where the list is intended for use by employers or employment agencies. Individuals affected by the compilation and/or use of such lists have recourse against both the compilers and the users in the Employment Tribunal.

Other Types Of Employee Representation

Health And Safety

The “Framework Directive,” 89/391/EEC, requires employers to consult workers and/or their representatives, providing information on health and safety matters and allowing their participation in the discussion of such matters. In a unionised undertaking, the trade union may appoint an employee in the undertaking as a safety representative to review health, safety, and welfare arrangements. In a non-unionised undertaking, the employer must inform and consult either each employee individually or the employees’ elected representative. The method of election is not prescribed. In both cases, the safety representative is entitled to time off work to discharge his or her functions and has the right not to be discriminated against in his or her employment.

TUPE Transfers And Collective Redundancies

In a unionised undertaking, any recognised trade union representatives must be informed and consulted about certain aspects of a TUPE transfer and about collective redundancies (in which it is proposed that more than 20 workers at an establishment are to be made redundant within 90 days of each other).

In a non-unionised undertaking, the employer can either consult previously elected employee representatives who have the authority of affected employees or it can invite the affected employees to elect representatives specifically to represent them in this area. If they fail within a reasonable time to do so, the employer should provide the relevant information to each individual employee affected. In each case, the representatives are entitled to time off work for training and have the right not to be dismissed or discriminated against in their employment on the grounds of the representation. Failure to comply with the obligation may lead to the employer having to pay an award to each employee.

Working Time

The Working Time Regulations 1998 limit the length of night work a worker may undertake and place minimums on the length of rest breaks and daily and weekly rest periods. Derogation is possible by trade union negotiated collective agreement or, in a non-unionised undertaking, by a written workforce agreement concluded between the employer and workers or their elected representatives. Workers whose employment terms and conditions were decided by collective bargaining are excluded from the latter type of agreement. The elected representatives and candidates for such positions are protected from dismissal and discrimination in relation to such activities.

Disciplinary And Grievance Hearings

Under the ERA 1999, all workers have the right, upon their reasonable request, to be accompanied by their choice of a “single companion” when required by their employer to attend a disciplinary or grievance hearing. The “single companion” can be a fellow worker or a trade union official, and in the latter case, the trade union does not need to be recognised. The chosen companion can address the hearing and confer with the worker during it, but cannot answer questions on the worker’s behalf. The companion is entitled to paid time off work to accompany the worker and together with the worker has the right not to be dismissed or discriminated against for doing so.