

# Worker Representation in the UK

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## A. Introduction

In the United Kingdom worker representation has traditionally been channelled through recognised unions. This is the famous single-channel approach where a recognised union has a monopoly on worker representation. Until very recently, the concept of works councils or their equivalents was unfamiliar in the UK as was the idea of direct representation (workers can represent themselves). The single channel approach, combined with the abstention of the state from involvement in industrial relations, have been distinguishing characteristics of British industrial relations since the nineteenth century.<sup>1</sup> Indeed, in 1954 Kahn-Freund observed that British industrial relations have, in the main, developed by way of industrial autonomy.<sup>2</sup> At the end of the 1970s he noted that although ‘[i]n many respects the law intervenes in the organisation of collective labour relations today in a decisive way ... [t]his intervention ... remains supplementary and is in no sense antagonistic to the principle of autonomy’.<sup>3</sup> The single channel model formed the centre-piece of the industrial pluralist model of worker representation which was informed by the idea of equality of arms and an acceptance of a conflictual relationship between employers and trade unions.

This picture has, however, significantly altered over the last ten years or so, due in part to increased government intervention in industrial relations and in part to external pressure from the European Community. At domestic level, the Labour government committed itself in its *Fairness at Work* White Paper,<sup>4</sup> to a programme of replacing the notion of conflict between employers and employees with the promotion of partnership.<sup>5</sup> As the government said:

...[I]ndividual contracts of employment are not always agreements between equal partners. Good employers and employees recognise that there is a basic justification in terms of fairness at work for fair representation of all employees. Collective representation of individuals at work can be the best method of ensuring that employees are treated fairly, and it is often the preferred option of both employers and employees.<sup>6</sup>

As far as the EU is concerned, worker information and consultation is the cornerstone of a flexible and productive workplace. According to the Commission, workers need to be

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<sup>1</sup> Clark and Winchester, “Management and Trade Unions” in *Personnel Management: Comprehensive Guide to theory and Practice in Britain*, K.Sisson (ed), Blackwell, Oxford, p.714.

<sup>2</sup> O.Kahn-Freund, “Legal Framework” in A.Flanders and H.Clegg *The System of Industrial relations in Great Britain*, (Oxford: Blackwell, 1954), 43, cited in B.Simpson *The Determination of Trade Union Representativeness in the United Kingdom*, Paper presented to the ILO, October 1994, 1.

<sup>3</sup> O.Kahn-Freund, “Labour Law” in *Selected Writings*, London: Stevens, 1978, 39, cited in Simpson, above, n.2, 1.

<sup>4</sup> <http://www.dti.gov.uk/IR/fairness>.

<sup>5</sup> Para. 1.11.

<sup>6</sup> Para. 4.2.

committed to the process of change. Thus, according to the Green Paper on *Partnership for a New Organisation of Work*, flexibility within organisations will be encouraged by reinforcing mechanisms for employee participation at the level of the plant or enterprise.<sup>7</sup>

The combined effect of these developments is the emergence of a significantly-weakened union structure with collective bargaining taking place predominantly at establishment/company or even plant level, combined with the emergence of alternative methods of worker consultation mechanisms influenced by the ‘dual channel’ approach found on the Continent. The developments at European Union level, while sitting awkwardly with the British model of single channel have, to a large extent, received the support of the British trade union movement and have, to a certain extent, helped to offer a lifeline to a declining institution by giving trade unions the chance to gain access to the workplace by fielding candidates for election as worker representatives, even where the employer does not actually recognise trade unions.

## B. British Trade Unions in Perspective

### 1. The Profile of British Trade Unionism

Total membership of unions in the UK in 2004 was 6.78 million people in employment,<sup>8</sup> 26% of all people in employment (see Figure 1), the lowest figure since 1945, and declining (by 0.5% or 36,000 since 2003).<sup>9</sup> Trade union membership has fallen by over 4.8 million since 1979 when the Conservative government came to power. The spread of trade union membership is far from even. Less than 1 in 5 (17.2%) of private sector employees in the UK were union members in 2004, with private sector union density declining by 1% in 2004.<sup>10</sup> Almost three in five (58.8%) public sector employees in the UK were union members. Public sector union density fell by 0.3% in 2004. Despite this fall in density, the number of public sector union members rose by approximately 138,000 in 2004 as the size of the public sector grew.<sup>11</sup> The number of trade unions<sup>12</sup> has also declined, from a peak of 1,384 in 1920<sup>13</sup> to 186 today (195 in 2004).<sup>14</sup>

The fall in the number of unions reflects the continuing process of union mergers<sup>15</sup> and transfers of membership, as well as declining unionisation. One of the most important mergers was that of COHSE, a health service union, and NALGO and NUPE, two public sector unions, to form UNISON, the Public Service Union.<sup>16</sup> It became the largest union, overtaking the Transport and General Workers’ Union (TGWU),<sup>17</sup> with 1.3 million members

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<sup>7</sup> COM(97) 127, para. 44.

<sup>8</sup> DTI, Trade Union Membership 2004, EMAR, April 2005.

<sup>9</sup> Cully and Woodland, “Trade union membership and recognition 1996-7: an analysis of data from the Certification Officer and the LFS” (1998) *Labour Market Trends* 353.

<sup>10</sup> DTI, above, n.8.

<sup>11</sup> Ibid.

<sup>12</sup> The Certification Officer keeps a list of trade unions: s.2 TULR(C)A 1992. Trade unions, as defined by s.1 TULR(C)A 1992, are organisations, whether temporary or permanent, whose principal purposes include the regulation of relations between workers and employers.

<sup>13</sup> Cully and Woodland, above, n.9, 354.

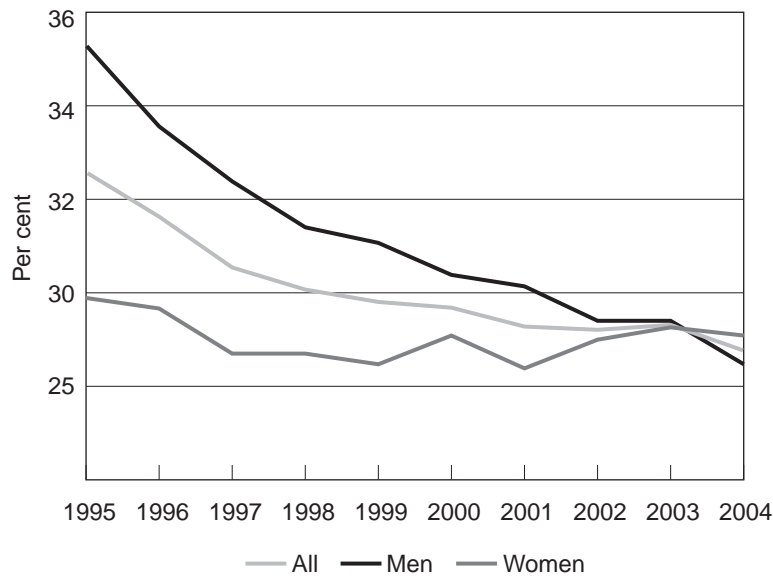
<sup>14</sup> Ibid., 7.

<sup>15</sup> For an amalgamation to occur, a resolution approving the instrument of amalgamation or transfer must be passed on a ballot of the members of the trade union held in accordance with sections 100A-E TULR(C)A - s.100 TULR(C)A 1992. See also Willman and Cave, “The Union of the Future: Super Unions or Joint Ventures” (1994) 32 BJIR 390.

<sup>16</sup> Other super unions include MSF (1989), GMPU (1991) and AEEU, formed from EETPU and the AEU (1992).

<sup>17</sup> TGWU had the largest membership for a number of years prior to 1993. Its membership fell in 1993 by nearly 90,000 to 949,000. It now stands at 750,000 (2004).

Figure 1. Trade union density figures for the UK, 2004, DTI.



in 2004. The 11 unions each with over 250,000 members now account for almost three quarters of total membership.<sup>18</sup> Nevertheless, some of the biggest unions, such as Amicus and GMB still reported significant decreases in union membership of over 100,000 each in 2004-2005.<sup>19</sup>

The trend towards amalgamation of unions has been characterised as defensive, since unions seek to rationalise their organisation in the face of reduced membership, in order to avoid competition for members or to combat financial difficulties through economies of scale.<sup>20</sup> Nevertheless, despite this trend, the survival of ex-craft unions, and the virtual abstention up until now (see below) of the law from the regulation of union recognition, has discouraged the practice of one union, one establishment,<sup>21</sup> and complex patterns of bargaining have survived. However, in the 1980s a number of 'new-style' single union agreements were signed, particularly on greenfield sites in manufacturing, such as the Pirelli plant in South Wales.<sup>22</sup> Although such agreements were eventually condemned by the 1991 TUC Conference as alien to the tradition of trade unionism, single union representation has in fact proved to be a widespread and long-standing phenomenon, more often in the service sector than in the new manufacturing plants.<sup>23</sup> However, workplaces with a single union tend to have weaker forms of unionism than multi-union workplaces. Membership density averaged 46% of employees in workplaces with a single union compared to 72% in multi-union workplaces.<sup>24</sup>

In order to represent their members effectively three conditions must be satisfied. First, the organisation must be a union as defined by the statute, second it must be independent and third it must be recognised by the employer. According to s.1 TULR(C)A 1992, a *trade union* means an organisation (whether temporary or permanent) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or

<sup>18</sup> Metcalf, see below, n.32, 5.

<sup>19</sup> Certification Officer's Annual Report, 2004-2005, 2.

<sup>20</sup> Simpson, above, n.2, 2.

<sup>21</sup> Clark and Winchester 1994, above, n.1, 715.

<sup>22</sup> See J.Clark, *Managing Innovation and Change*, (London: Sage, 1995).

<sup>23</sup> Millward, *The New Industrial Relations*, 1994, 121.

<sup>24</sup> *Ibid*, 122.

employers' associations.<sup>25</sup> Almost half of UK employees (48.4%) worked in workplaces where a trade union was present. However, union presence was much lower in the private sector (34.2%) than the public sector (84.7%).<sup>26</sup>

According to s.5 TULR(C)A 1992, an *independent* trade union means one which 'is not under the domination or control of an employer or group of employers or one or more employers' associations and is not liable to interference by an employer or any such group or association'. A trade union entered on the list of trade unions may apply to the Certification Officer for a certificate that it is independent.<sup>27</sup>

The *recognition* requirement is more difficult. The definition of recognition contained in S.178(3) TULR(C)A is circular: it merely says that recognition means 'the recognition of the union by an employer, or two or more associated employers, to any extent for the purposes of collective bargaining'. Once again the principle of autonomy is demonstrated by the almost total absence of any binding or universally agreed criteria or procedures for determining questions relating to trade union recognition – or derecognition – although this changed, at least in part, in 1999 (see below).<sup>28</sup> As a result, unions can achieve recognition and prevent derecognition mainly through persuasion.<sup>29</sup> Such persuasion may result in recognition only for the purposes of individual grievance representation or non-pay bargaining or consultation and not collective bargaining. This requirement of recognition clearly limits the effectiveness of union representation and generates the so-called 'representation gap' which, over the last decade or so the government has sought to fill using other forms of worker representation.

44.3% or around 10 million employees work in workplaces where trade unions are recognised by management.<sup>30</sup> However, it is striking that the decline in the proportion of employees who worked in workplaces at which trade unions were recognised is smaller than the fall in trade union density over the same period, implying that union density has fallen within workplaces with recognition.<sup>31</sup> In 1997 35.5% of employees had their pay determined by collective bargaining.<sup>32</sup> There was, however, a great variation between the degree of recognition in the public and private sector, with 79% of public sector employees reporting

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<sup>25</sup> The definition also includes constituent or affiliated associations: s.1(b) TULR(C)A 1992.

<sup>26</sup> DTI, above, n.8.

<sup>27</sup> s.6 TULR(C)A.

<sup>28</sup> Simpson, above, n.2, p.12. There are also no prescribed methods of confirming any recognition that does occur. The IRS survey indicated that formal agreements recognising trade unions were unusual in younger workplaces - Millward, above, n.23, 24. Under the Employment Act 1975 an independent trade union could refer recognition disputes to ACAS which could ultimately result in an employer being ordered to recognise a union ss.11-16 EPA 1975 (see IRS Employment Trends 641, 12). This procedure was widely used with some 1600 references of recognition issues made by independent trade union for investigation and report. The procedure was widely perceived to be undermined by legal challenges made by both employers and disappointed unions (Simpson, above, n.2, 13). This procedure was abolished in 1980. Now the only state supported mechanism for resolving recognition disputes lies in the general power of ACAS to conciliate in collective disputes - s.210 TULR(C)A 1992.

<sup>29</sup> Legislation prohibits union recognition requirements from being imposed in contracts for goods or services (s.186 TULR(C)A). In addition, a person or company cannot refuse to deal with a supplier or potential supplier who does not recognise one or more trade unions for the purpose of negotiating on behalf of workers or who does not negotiate or consult with one or more trade unions (s.187 TULR(C)A).

<sup>30</sup> Cully and Woodland, above, n.9, 360.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* According to David Metcalf's recently published figures, only just over a third of employees (around 8.8 million or 36%) are covered by collective bargaining. Of these, 5.5 million (22%) are union members. For further details, see David Metcalf, 2005. *British Unions: Resurgence or Perdition?* London: Work Foundation. He concludes: Whichever way one looks at it the last two decades of the twentieth century were a period of relentless, sustained corrosion of British unionization. Membership fell by 5.5 million and density from over half to under one third of employees. The fraction of workers whose pay was set by collective bargaining halved from around 70% to 35%.

that unions were recognised at their workplace ('the good employer model'), compared with 32% of employees working in the private sector in workplaces with 25 or more employees.<sup>33</sup> However, even if a union is recognised, this does not necessarily mean that all employees have their pay determined by collective bargaining. The number of unions recognised for collective bargaining over pay and working conditions fell by almost 20% between 1980 and 1990. It seems that this decline was largely due to a much lower rate of union recognition in establishments founded in the 1980s than in previous years, particularly in the private sector.<sup>34</sup>

There has also been a marked trend towards derecognition of unions, where establishments move from union to non-union status, with management discontinuing their voluntary recognition of trade unions for the purposes of collective bargaining.<sup>35</sup> Beaumont and Harris suggested that between 1984 and 1990, derecognition<sup>36</sup> occurred in 3.9% of establishments in the case of manual employees and 3.1% of establishments in the case of non-manual employees in their private sector sample.<sup>37</sup> To this group they added those workforces in which recognition was lost through loss of all union members in the workforce. This brought the total number of establishments to 9.5% (manual employees) and 7% (non-manual employees). There is thus evidence of what Brown *et al* describe as procedural individualisation: the removal of collective mechanisms for determining terms and conditions of employment. Therefore, the British position can be characterised as one of declining trade union membership, declining trade union recognition and more than half the workforce working for an employer which does not recognise trade unions.

The consequences of these changes are the following. Large parts of the private sector are now characterised by workplaces with few or no union members. Even where the workplaces do have a significant number of trade union members, the employer may well not recognise any trade union. Finally, particularly in the public sector, there are workplaces with recognised trade unions covering some, or all, grades of worker.

## 2. Why Has There Been a Decline in Trade Union Membership?

In the UK the fall in trade union membership is due in part to a fall in employment, especially in highly unionised industries, particularly construction and manufacturing,<sup>38</sup> and to new management policies. Newer workplaces tend towards non-union status: they are smaller, mostly in service industries, employ fewer skilled manual workers and take on many more part-timers.<sup>39</sup> Free market policies and privatisation may have exacerbated this trend.

<sup>33</sup> Cully and Woodland, above n.9, 361. In small private sector workplaces (with less than 25 employees) coverage is 7%.

<sup>34</sup> Disney, Gosling, Machin, "British Unions in Decline: Determinants of the 1980s fall in Union Recognition" (1995) 48 *Industrial and Labor Relations Review* 403.

<sup>35</sup> Simpson, above, n.2, p.19.

<sup>36</sup> They define derecognition as "management withdrew recognition of the union for the purposes of collective bargaining, although union members remained present in the workforce".

<sup>37</sup> "Union de-recognition and declining union density in Britain" (1995) *Industrial and Labor Relations Review* 389, 393-4. See also Gall and McKay, "Trade Union Derecognition in Britain, 1988-94" (1994) 32 *BJIR* 433.

<sup>38</sup> Some of this section is developed from Barnard, 'The changing shape of worker representation in the UK: the influence of European Community Law' [1999] *Australian Journal of Labour Law*, 1-21. See also W.Brown, S.Deakin and P.Ryan "The Effects of British Industrial Relations Legislation 1979-1997 [1997] *National Institute of Economic Review* 69. However, as Edwards *et al* point out in Ferner and Hyman (eds), *Changing Industrial Relations in Europe* (Oxford: Blackwell, 1998), 27, decline in manufacturing does not alone explain the severity of the decline. Not only did the number of jobs in manufacturing fall but so did the decline within manufacturing. They suggest that business cycle indicators - movements in unemployment, retail prices and wages - explain much of the short-term fluctuation in union membership.

<sup>39</sup> N.Millward, above n.23, 24.

Some authors also attribute this decline either directly or indirectly to the Conservative government's growing hostility towards trade unions from 1979,<sup>40</sup> strongly influenced by Hayekian concerns that trade unions represent a substantial impediment to the free operation of the market.<sup>41</sup> This hostility manifested itself in various forms. First, the government weakened and in some cases abolished representative institutions. For example, the National Economic Development Council (NEDC) and the Manpower Services Commission (MSC) – both of which had TUC nominated members – were abolished<sup>42</sup> and the duties of Advisory, Conciliation and Arbitration Service (ACAS) (on which there were also TUC nominated members) were modified to delete the requirement of encouraging the extension and reform of collective bargaining.<sup>43</sup> Second, the government withdrew support for collective bargaining in the public sector and government pressures for more decentralised pay determination in the public sector have undermined many long established national bargaining structures, especially where privatisation has occurred.<sup>44</sup>

Third, Conservative legislation interfered with the very operation of unions and their relations with employers, largely with a view to discouraging the establishment and operation of representative organisations of workers. This has resulted in an extensive body of legislation, now consolidated into a single Act, the Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) 1992.<sup>45</sup> The legislation also interferes with a trade union's ability to take industrial action by eroding trade union immunities from actions in tort.<sup>46</sup> In its Fairness at Work White Paper, the Labour government made clear that it had no intention of reversing these elements of Conservative legislation.

Hostile judicial decisions exacerbated the problem. For example, a decision of the House of Lords in *Associated Newspapers v Wilson*<sup>47</sup> made clear that the right to be a trade union member<sup>48</sup> and to be active in that union<sup>49</sup> meant merely the right to hold a trade union card. It did not mean that members could call on the assistance of their union for help in dealing with their employer.<sup>50</sup> In that case the employer decided to offer higher pay increases to employees who agreed to accept personal contracts in place of collectively agreed terms and conditions of employment. Employees who refused to do so, and consequently did not receive the increase, claimed that the employer had taken action short of dismissal against the employees on grounds of their union membership contrary to what is now s.146 TULR(C)A

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<sup>40</sup> P. Edwards *et al*, in Ferner and Hyman (eds), above, n.38, 1. However, as they point out, if the law was the only factor, one would expect, with the further tightening of legal controls, an accelerating decline in density since 1986 (the date they take for when governmental controls really started to bite); this has not occurred.

<sup>41</sup> See generally Lord Wedderburn, "Freedom of Association and Philosophies of Labour Law" (1989) 18 ILJ 1.

<sup>42</sup> The government initially downgraded the role of the NEDC and then abolished it in 1992. The MSC was abolished in 1989.

<sup>43</sup> s.209 TULR(C)A 1992, as amended by s.43(1) TURERA 1993.

<sup>44</sup> Simpson, above n.2, 11.

<sup>45</sup> Legislation interfering with the internal operation of unions has, for example, regulated elections to certain positions (ss.46-59). It has given members rights to a ballot before industrial action (s.62) and provided members with the right not to be unjustifiably disciplined (ss.64-7), the right to terminate membership (s.69), and the right not to be excluded or expelled unreasonably from a union (ss.174-7).

<sup>46</sup> For example, while the legislation gives the union immunities from liability for certain torts (s.219), this immunity has gradually been removed in respect of action to enforce trade union membership, action taken because of dismissal for taking unofficial action, secondary action and pressure to impose union recognition requirements (ss.222-225). In addition, the trade union must take a ballot before industrial action (ss.226-234) and notify the employer of the industrial action (s.234A). Finally, unfair dismissal protection is removed from those taking part in unofficial industrial action (s.237).

<sup>47</sup> [1995] IRLR 258.

<sup>48</sup> s.174 TULR(C)A 1992.

<sup>49</sup> ss.46-48 TULR(C)A 1992.

<sup>50</sup> K. Ewing, 'The Implications of *Wilson and Palmer*' (2003) 32 ILJ 1.

1992.<sup>51</sup> According to the leading judgment in the Court of Appeal, the right of an employee under s.146 was not only a right to union membership itself. Dillon LJ said there was no genuine distinction between membership of the union and making use of essential services of the union.<sup>52</sup> By contrast, the House of Lords held that withholding from an employee a benefit which was conferred upon another employee could not amount to 'action', whatever the purpose of the omission and hence the employers had not taken action short of dismissal against the employees by withholding benefits. Consequently, the existing legal protection for trade members under s.146 meant no more than the right to carry a union card. The decision therefore paved the way for employers to discriminate against union members.<sup>53</sup> While, as we shall see, the legal position has changed since the European Court of Human Rights condemned the UK the House of Lords' decision illustrated the general climate of hostility to trade unions.

These various steps led Edwards *et al* to conclude that the legal climate was one factor encouraging employers to resist unionisation after 1987; its effects have been indirect rather than direct. With such a climate it is not surprising that trade union membership declined. Nevertheless, such a decline was not confined to the UK: other states have experienced similar declines during the 1980s and 1990s, even in countries more sympathetic to trade unions.<sup>54</sup>

## C. Forms of Worker Participation

### 1. Introduction

Collective bargaining is seen as the most intense form of worker participation. Where regulation exists, this is broadly a matter for domestic law. Traditionally, the UK has not been concerned with the less intense forms of worker participation such as information and consultation.<sup>55</sup> However, it is this form of workers participation, together with a desire to encourage worker representatives to have a role on company boards, which has preoccupied the European Union. The EU has focused on the information/consultation aspect of collective labour law, partly because it has no clear competence in respect of pay, freedom of association, strikes and lock-outs,<sup>56</sup> despite general aspirations to that effect in the Community Social Charter of 1989, and partly because it coincides with the EU's agenda to develop high trust workplaces based on high skill and high productivity.

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<sup>51</sup> The relevant provision at that stage was s.23(1) Employment Protection (Consolidation) Act 1978.

<sup>52</sup> The government then amended s.146 TULR(C)A to provide that in determining the purpose of the action taken against the complainant in a case where there is evidence that the employer's purpose was to further a change in his relationship with all or any class of his employees, and there is also evidence that his purpose was to take action short of dismissal against a union member, the tribunal shall have regard only to the first purpose, unless it considers that the action was such as no reasonable employer would take having regard to the first purpose.

<sup>53</sup> The Labour government proposes to reverse this ruling: DTI, *Fairness at Work White Paper*, 1998, para.4.25. This approach would be in keeping with the UK's obligations under Article 11 of the European Convention on Human Rights which the UK is due to incorporate as part of domestic law.

<sup>54</sup> W.Brown, S.Deakin, M.Hudson, C.Pratten and P.Ryan, "The Individualisation of Employment Contracts in Britain", DTI Report, 1998.

<sup>55</sup> See generally, P. Davies and C. Kilpatrick, 'UK Worker Representation After Single Channel', (2004) 33 ILJ 121.

<sup>56</sup> Art. 137(6) after the renumbering caused by the Treaty of Amsterdam.

## 2. Collective Bargaining

### 2.1 Legal Support for Collective Bargaining

Collective bargaining between employers or employer's organisations and recognised trade unions is considered the most intense form of worker representation. British law supports this in four ways. First, it guarantees freedom of association through specific rights. S.137 TULR(C)A 1992 concerns refusal of access to employment on the grounds of trade union membership, s.152 makes it automatically unfair dismissal to dismiss an employee on the grounds of their trade union membership, activities or because they have sought to use the services of a trade union; and s.146 prohibits detrimental treatment against an individual worker on the grounds of trade union membership, activities or services.<sup>57</sup> As we saw above, s.146 used to concern action short of dismissal, a concept which the House of Lords in *Wilson and Palmer* gave a narrow interpretation. The UK was subsequently condemned by the European Court of Human Rights<sup>58</sup> which made clear that:

It is the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests becomes illusory.

The amendments made to s.146, together with new provisions prohibiting financial inducements s.145A and s.145B TULR(C)A 1992 were the UK's response. But these reforms are individualist rather than collectivist in nature,<sup>59</sup> despite the suggestion of the European Court of Human Rights in *Wilson and Palmer* that trade unions have rights independent from those of the workers.

Second, British law encourages trade union recognition. As a result of the British tradition of collective *laissez faire*, recognition has been a voluntary process: employers have the choice whether to recognise a particular trade union and if so on what terms. Recognition, if it occurs, often takes the form of a written recognition agreement but this is not necessarily the case. And the lack of formality for recognition of a trade union is matched by the ease with which employers can derecognise a trade union. However, as an incentive to encourage employers to recognise a trade union, s.244(1)(g) TULR(C)A provides that one of the grounds of immunity for industrial action is where a trade dispute concerns a union seeking recognition.

In its 1997 election manifesto, the Labour government committed itself to introducing a compulsory statutory recognition procedure (SRP). It achieved this through the Employment Relations Act 1999 which introduced a new Schedule (A1) into TULR(C)A 1992. According to this procedure, which encourages voluntary or semi voluntary recognition at every state, an independent trade union in a workplace with more than 21 workers can apply to the employer for recognition. If the employer refuses, the matter goes to the Central Arbitration Committee (CAC) which determines first whether the trade union's request is admissible and, if it is, what the relevant bargaining unit is. If the trade union can demonstrate majority membership in that bargaining unit then there is automatic recognition. If there is not, then the CAC can order the employer to hold a ballot. If the ballot shows that a majority of those voting and at least 40 % of those eligible to vote are in favour of recognition CAC will order recognition and the employer and trade union will then be required to sort out arrangements for collective bargaining. However, the collective bargaining is confined to pay, hours and holiday. In terms

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<sup>57</sup> All three provisions apply equally to non membership of a trade union.

<sup>58</sup> *Wilson and NUJ v. UK; Palmer, Wyeth and National Union of Rail Maritime and Transport Workers v. UK; Doolan and others v. UK* [2002] IRLR 568.

<sup>59</sup> Bogg, 'Employment Relations Act 2004: Another False Dawn for Collectivism?' (2005) 34 ILJ 72.



of final outcome, the number of applications accepted by the CAC over the first five years of operation of the SRP was 272. Of these, automatic awards of recognition have been made in 52 cases and awards of recognition by ballot in 72 cases. Unions lost ballots in 44 cases with just over 23,000 workers being covered by statutory awards.<sup>60</sup>

Opinion is divided over the success of the procedure. Some argue that the rather lower than expected number of applications to CAC (80 to 100 as opposed to 150) indicates that the procedure has had the desired effect: it has encouraged employers to recognise trade unions without going through the SRP<sup>61</sup>. This 'shadow' effect has led to 1800 new voluntary recognition deals being signed covering just over 800,000 employees.<sup>62</sup> Others lament the complexity of the procedure. However, the detail contained in Schedule A1 was a deliberate tactic to discourage judicial review of the CAC's decisions<sup>63</sup> (there have been only eight applications for judicial review of which six were granted and five ultimately supported the CAC) and to ensure that the British procedure does not suffer from some of the problems experienced by its American counterparts.

The third limb of support for collective bargaining in British law can be found in s.168 TULR(C)A on paid time off for trade union officials in respect of trade union activities and duties and, in s.170, on unpaid time off for trade union members. The fourth and final limb is s.181 TULR(C)A which obliges employers to provide trade unions with information in connection with collective bargaining.

## 2.2 Legal Effect of Collective Agreements

Collective agreements themselves are presumed not to be legally binding (s.179 TULR(C)A)<sup>64</sup> and, unlike Continental systems they do not have *erga omnes* effects. However they can have legal effect through individual contracts of employment provided two conditions are satisfied: first, there needs to be a bridging term (which can be express or implied, including through custom) and second, the terms themselves must be suitable for individuation (that is that they contain matters relating to the individual (eg redundancy selection procedures,<sup>65</sup> disciplinary and grievance procedures<sup>66</sup>) as opposed to collective or procedural terms.

Because collective agreements derive their legal force from the contract, this has three significant consequences. First, all employees with a bridging term in their contracts will benefit from the collective agreement, whether trade union members or not. Second, because collective agreements do not operate as a floor of rights in the UK, employers and employees can agree that the terms of the collective agreements do not apply to them. Thirdly, even if the employer breaches the collective agreement, this has no effect on the individual contracts of employment; the individual contracts themselves will need to be amended if the employer wishes to remove all effects of the collective agreement.<sup>67</sup> In 2002 there were 8.7 million employees whose pay was affected by collective agreements, which is 36 per cent of all employees.<sup>68</sup>

<sup>60</sup> Gaal, 'The First Five Years of Britain's Third Statutory Recognition Procedure' (2005) 34 ILJ 345, 346.

<sup>61</sup> Ibid, 348.

<sup>62</sup> Ibid, 347.

<sup>63</sup> For an example of judicial deference to CAC's decision making, see *Fullarton Computer Industries Ltd v. CAC* [2001] IRLR 752.

<sup>64</sup> See also *NCB v. NUM* [1986] IRLR 439 and *Ford Motor Co v. AUEFW* [1969] 2 QB 303.

<sup>65</sup> *BL v. McQuilken* [1987] IRLR 245; *Anderson v. Pringle of Scotland* [1998] IRLR 64.

<sup>66</sup> *Dietman v. Brent LBC* [1988] IRLR 299.

<sup>67</sup> *Robertson v. British Gas* [1983] IRLR 302.

<sup>68</sup> Labour Market Trends, Spotlight, July 2003.

### 3. Information and Consultation

#### 3.1 Information and Consultation on Specific Topics

In some of the earliest social policy Directives the European Community focused on the obligation of information and consultation of ‘representatives of the employees provided for by the law and practice of the Member States’ (Article 2(c) of Directive 77/187/EEC on transfers of undertakings, now Directive 2001/23) or ‘workers’ representatives’ (Article 1(b) of Directive 75/129 on collective redundancies, now Directive 98/59) in times of economic difficulties, albeit that the obligation does not allow the worker representatives to interfere with the managerial prerogative to take decisions. In the UK the obligation was implemented by requiring employers to consult with a recognised trade union.<sup>69</sup> While in the late 1970s, when the Directive was first implemented, this may have been adequate, the subsequent decline in trade union recognition highlighted the inadequate implementation of the Directive in respect of at least half the workforce. As a result the European Commission brought against the UK in Case C-383/92 *Commission v UK*<sup>70</sup> arguing that the UK had failed to fulfil its obligations under Articles 2 and 3 of Directive 75/129/EEC on collective redundancies by not providing a mechanism for the designation of workers’ representatives in an undertaking where the employer refused to recognise such representatives. The Commission made a similar allegation in Case C-382/93 *Commission v UK* in respect of Directive 77/187/EEC on transfers of undertakings. The British government argued that since workers’ representatives were defined in the Directive as ‘those representatives provided for by the laws or practices of the Member States’ the representation of workers in the UK has traditionally been based on voluntary recognition of trade unions by employers and for that reason an employer who did not recognise a trade union was not subject to the obligations laid down in the Directives.

The Court of Justice rejected the UK’s arguments and found that the UK had not implemented the Directives correctly.<sup>71</sup> This meant that the UK had to rectify this representation gap. As Davies pointed out, for the first time the Court effectively required a Member State to amend collective representation structures to bring them into line with Community norms, raising complex issues on trade union recognition. However, since the Directives did not require “full harmonisation of national systems for the representation of employees in an undertaking”<sup>72</sup> the UK government had considerable discretion as to how to bring UK law into line.

The UK’s initial response can be found in SI 1995/2587 The CRATUPE Regulations<sup>73</sup> requiring an employer to consult with ‘appropriate representatives’ of any of the employees who are going to be dismissed in the case of collective redundancies and ‘affected employees’ in the case of transfer of undertakings. These ‘appropriate representatives’ of any employees are:

- (a) employee representatives elected by them, *or*
- (b) if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union.<sup>74</sup>

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<sup>69</sup> Section 188 TULR(C)A 1992 provided: “An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of the union about the dismissal in accordance with this section”. Regulation 10 of the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 1981 contained a similar provision.

<sup>70</sup> Case C-383/92 [1994] ECR I-2479.

<sup>71</sup> See generally P. Davies, “A Challenge to Single Channel” (1994) 23 ILJ 272.

<sup>72</sup> Para. 28 of Case 382/92 and para. 25 of Case 383/92.

<sup>73</sup> The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995.

<sup>74</sup> Regulation 3(1), Regulation 9(4).

Initially, the employer could choose which group to consult.<sup>75</sup> The ‘grudging, minimalist’<sup>76</sup> Regulations received much criticism, with the TUC said that they undermined established industrial relations by allowing employers to bypass recognised employee representatives. However, subsequent amendments introduced by the Labour government gave priority to a recognised trade union: only if there was no recognised trade union could worker representatives be elected.

However, by envisaging a role for collective worker representatives, these regulations marked the first substantial inroad into the single channel.<sup>77</sup> This new approach is described as ‘a modified single channel’<sup>78</sup> or ‘single channel plus’. However, there are criticisms. In particular, the government did not believe that there was any need for standing arrangements for elected representatives, saying that effective ad hoc arrangements would be acceptable,<sup>79</sup> with the result that the election process itself may well erode the time allowed for consultation of those representatives.<sup>80</sup> The government also did not specify the means of conducting the election, considering that this was a matter best left to employers and employees,<sup>81</sup> nor did it place any restriction on who was to be elected: the representatives did not even need to be employees.<sup>82</sup>

### 3.2 General Mechanism for Worker Information and Consultation

Two of the EU’s most significant pieces of legislation in the field of information and consultation in recent years are the European Works Councils (EWC) Directive 94/95/EC,<sup>83</sup> implemented in the UK through the TICE Regulations and Directive 2002/14 on national level information and consultation,<sup>84</sup> which have been implemented in the UK through the ICE Regulations.<sup>85</sup> The EWC Directive requires the establishment of a European Works Council (EWC) or a procedure for informing and consulting (ICP) employees in Community-scale

<sup>75</sup> In the context of health and safety the 1977 Regulations (SI 1977/500 as amended by SI 1992/2051) allowed a recognised trade union to appoint a safety representative. The 1996 Regulations (SI 1996/1513) provided that where the employees are not represented by safety representatives under the 1977 Regulations the employer shall consult with either the employees directly or elected employee representatives.

<sup>76</sup> M.Hall, “Beyond Recognition? Employee Representation and EU Law” (1996) 25 ILJ 15, 17.

<sup>77</sup> Department of Employment, *Consultation about collective redundancies and business transfers: a legislative proposal*, April 1995.

<sup>78</sup> Davies, above, n. 72, 279.

<sup>79</sup> The TUC disagrees. It argues that there must be an element of continuity otherwise the effectiveness of the consultations is weakened. It will always be the employer who proposes the redundancies or effects the transfer. To combine that with the selection of workers and to guarantee meaningful consultation with a view to reaching agreement would be extremely difficult. It would also be difficult to find suitable representatives at a time of crisis to volunteer - *Consultation about collective redundancies and business transfers: TUC response to legislative proposals*.

<sup>80</sup> Provided the employer has issued the invitation for the employees to hold the elections long enough before the time when the consultation is required to begin, the employer is treated as having complied with the requirements.

<sup>81</sup> This contrasts unfavourably with the detailed prescription found in the legislation regulating how a ballot should be held by trade unions prior to industrial action.

<sup>82</sup> This raises questions about the independence of such appointments, since the employers would be free to put forward their own nominations.

<sup>83</sup> OJ 1994 L254/64 considered by C.McGlynn, ‘European Works Councils: Towards Industrial Democracy’ (1995) 24 ILJ 78.

<sup>84</sup> OJ [2002] L80/29.

<sup>85</sup> SI 2004/3426 The Information and Consultation Regulations 2004.

undertakings or Community-scale groups of undertakings<sup>86</sup> with more than 1,000 employees across the now 28 States<sup>87</sup> and at least two establishments<sup>88</sup> in different Member States each employing at least 150 people.<sup>89</sup> The Framework Directive on Information and Consultation 2002/14 is open textured and un-prescriptive. It leaves nearly all detail to be sorted out by the Member States or by the social partners. Given its ‘ground breaking’<sup>90</sup> potential for changing the face of British worker participation, we shall focus on the impact of this Directive.

The ICE Regulations depart from the priority for recognised trade union model considered above: no priority is given to recognised trade unions at all. Instead, they provide for three means of informing and consulting workers (see Annex I): through a pre-existing agreement (PEA), through a negotiated agreement (NA) and through the standard information and consultation provisions laid down by the regulations in the case of failure of the other two routes. Both the PEA and the NA envisage information and consultation not only with workers representatives but also with individual employees. Only the standard, fallback rules require that information and consultation must take place with elected worker representatives and not just to employees. The standard rules, like the collective redundancies directive, also envisage the strong form of consultation: ‘with a view to reaching agreement’. It is here that the boundary between consultation and collective bargaining becomes blurred. By contrast, the PEA and the NA envisage only the softer form of consultation, requiring consultation but not with a view to reaching agreement.

#### 4. Statutory Bargained Adjustments

The 1995 CRATUPE Regulations paved the way for the implementation of other European Directives such as the Working Time Directive 93/104 (as it then was now 2003/88), the Parental Leave Directive 96/34 and the Fixed Term Work Directive 99/70. These three Directives make provision for the ‘social partners’<sup>91</sup> to take certain steps, such as fleshing out the provisions controlling the abuse of fixed term contracts in Directive 99/70 or expanding the detailed rules for applying for parental leave in Directive 96/34. In the case of the Working Time Directive, the social partners can *derogate from* (ie lower) standards laid down in the Directive on for example breaks, nightwork, daily rest periods. Together these Directives permit what are referred to as ‘statutory bargained adjustments’.

What worker participation mechanism does the UK use to give effect to this? The Working Time Regulations provide a good example. They refer to a relevant agreement, ‘in relation to a worker, means a workforce agreement which applies to him, any provision of a

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<sup>86</sup> Articles 1(1) and (2). A group of undertakings means a controlling undertaking - defined to mean an undertaking which can exercise a dominant influence over another undertaking by virtue of ownership, financial participation or the rules which govern it (Article 3(1) and (2)) - and its controlled undertakings (Article 2(1)(b)). These definitions are based on Council Directive 89/440/EEC (OJ No.L210, 21.7.89, p.1) amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts.

<sup>87</sup> The prescribed thresholds for the size of the workforce are to be based on the average number of employees, including part-time employees, employed during the previous two years calculated according to national legislation and/or practice - Article 2(2). The figure of 17 includes the EEA states but excludes the UK. The UK has now agreed to be bound by the Directive.

<sup>88</sup> In the case of Community scale groups of undertakings, read groups of undertakings in the place of establishments - Article 2(1)(c).

<sup>89</sup> Article 2(1)(a) and (c). Member States may provide that this Directive does not apply to merchant navy crews - Article 1(5).

<sup>90</sup> This is the description given by the government minister responsible for the Regulations, cited in Hall, ‘Assessing the Information and Consultation of Employees Regulations’ (2005) 34 ILJ 103.

<sup>91</sup> Various descriptions in the Directives as management and labour (Parental leave), social partners (fixed term work) and the two sides of industry (Working Time).

collective agreement which forms part of a contract between him and his employer, or any other agreement which is legally enforceable as between the workers and his employer'.<sup>92</sup> Collective agreements take priority. Therefore, as with the CRATUPE Regulations, there is priority for recognised trade unions. This is made clear in the definition of 'Workforce agreements' which are designed to provide a mechanism for employers to agree working time arrangements with workers who do not have *any terms and conditions set by collective agreement*.<sup>93</sup> To be valid a "workforce agreement" must:

- be in writing;
- have effect for a specified period not exceeding five years;
- apply either to all of the relevant members of the workforce (other than those covered by collective agreement – thus employers cannot by-pass a recognised trade union), or to all of the relevant members of the workforce who belong to a particular group. Employers must decide at what level they wish to make an agreement;
- be signed by the representatives of the workforce or the representatives of the group where appropriate, (excluding in either case any representative not a relevant member of the workforce on the date on which the agreement was first made available for signature). However, significantly, if the employer employed 20 or fewer workers on the date on which the agreement was first made available for signature it must be signed either by the appropriate representatives *or* by the majority of workers (a "majority agreement").

Thus, in a workforce of less than 20, the Working Time Regulations make provision for so-called direct representation ie individuals and not their representatives can enter agreements with the employer under the rubric of workforce agreements. Individuals can also enter 'relevant agreements with their employers, as Regulation 2(1) makes clear. Relevant agreements include not only workforce agreements and collective agreements but also 'any other agreement in writing which is legally enforceable as between the worker and his employer'. Effectively this allows for individual agreements to replace what would otherwise be collectively agreed norms. This demonstrates how easily the quest for decentralisation can lead to individualisation.

Paragraph 2 of Schedule 1 provides that 'representatives of the workforce' are workers duly elected to represent the relevant members of the workforce; 'representatives of the group' are workers duly elected to represent the members of a particular group, and representatives are 'duly elected' if their election satisfies the requirements of paragraph 3 of the Schedule. The Working Time Regulations provide some details of the method of carrying out elections.<sup>94</sup> The Working Time Regulations are, however, far less prescriptive than those contained in TULR(C)A for the election of trade union officials and, as the TUC has pointed out, employers have too much power in deciding how the representatives are to be elected and there are no controls on ballot-rigging.<sup>95</sup> This has prompted concern as to whether the elected worker representatives will pass the test of representativity laid down by the Court of Justice in *UEAPME*.<sup>96</sup> Finally, worker representatives enjoy the same statutory protection as, for example, employee representatives for consultation over redundancies or transfers. Therefore, they have the right not to suffer detriment, not to be dismissed (in the case of employees only) and not to be selected for redundancy on the grounds of performance of their functions (Regs 31 and 32) but they do not have an express right to time-off to fulfil their various functions.

<sup>92</sup> Reg. 2(1) Working Time Regulations.

<sup>93</sup> Sch 1, para.2.

<sup>94</sup> Schedule 1, paragraph 3.

<sup>95</sup> Research paper 98/82, 25.

<sup>96</sup> Case T-135/96 *UEAPME v. Council of the European Union* [1998] IRLR 602.

What legal effect do these workforce or individual agreements have? They are similar to collective agreements in that they are negotiated; they differ because they may not be negotiated by independent representatives and the sanction to persuade an employer to enter into them is not the threat of industrial action but the threat that the statutory procedures will apply in the event of a failure to reach an agreement. Their legal force may derive from being incorporated into a contract or it may derive from the statute introducing the concept of statutory bargained adjustments.

Despite the novelty of the workforce agreement, research on the Working Time Regulations suggest that they have been used only rarely due to the complexity of the procedure and because of the prevailing culture of UK industrial relations: although non-statutory works committees and similar representative bodies are becoming more common in the UK, there is no tradition of such bodies negotiating over the implementation or variation of statutory standards on working time, as there is on the continent, where statutory works councils and enterprise committees commonly perform this task.

#### **D. The Response of the British Trade Union Movement to the Changing Face of Worker Representation**

The Continental European systems of worker representation have been characterised, on paper at least, by a division of functions between trade unions and worker representatives: crudely speaking, the trade union function is external to the workplace, negotiating agreements at sectoral or intersectoral level, while the worker representative function is internal to the workplace dealing with issues such as personnel matters. The two bodies therefore serve a complementary roles. By contrast, in the UK, where collective bargaining is conducted largely at the enterprise/company or even plant/establishment level, this does not apparently leave a 'space' for worker representatives. Furthermore, while competition between unions is regulated by the so-called Bridlington principles, no such rules apply to 'competition' between trade unions and works councils/elected worker representatives. Therefore, in the UK any second channel might be perceived as a threat to established trade unions and might risk undermining collective bargaining. Furthermore, there has been a tendency for trade unions to consider worker representatives to be rather second rate: unions pride themselves on their independence from the state and employers. Other forms of worker representatives are seen as dominated by the employers.

However, implementation of the ICE Regulations provides an interesting illustration of the changing perspective by trade unions both towards the unions views of the second channel and the changing nature of the relationship between the trade unions, the employers' organisation (the CBI) and the government. As Hall explains,<sup>97</sup> during the first half of 2003 the DTI met with representatives of the CBI and the TUC to agree an outline scheme setting out a framework for Regulations to implement the Directive. This was a novel move for the UK but the TUC in particular, saw important political benefits in achieving a national social partner style framework agreement as the basis for the UK's transposition of the legislation. Both the CBI and the TUC were keen to maintain existing company practice for informing and consulting staff.

Will the developments at European Community and national level stop the slide towards individualisation? The response is inevitably mixed. The emphasis on information and consultation requirements does preserve some space for collective employee representation, albeit that in the UK this is no longer the exclusive province of trade unions. The modified

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<sup>97</sup> Hall, 'Assessing the Information and Consultation of Employees Regulations (2005) 34 ILJ 103, 108.

single channel has, however, helped to modify the tension between the Continental and British traditions. The European-level collective agreements, on subjects such as parental leave, part time and fixed term work, have served to reinvigorate both centralised collective bargaining and the European trade union confederation, and decentralised, plant-level bargaining for the implementation of any agreement reached. On the other hand, the lack of Community competence in respect of freedom of association, strikes and lock-outs prevents the creation of a fully-fledged collective dimension in EC law. In this respect, the incorporation of the European Convention of Human Rights into British law by the Human Rights Act 1998 has offered an alternative ‘European magic wand’ to help solve problems.<sup>98</sup>

Many commentators note the economic rather social imperatives of market integration inform much of the debate at Community level<sup>99</sup> and this is intensely damaging in creating a fully fledged individual and collective social dimension at EU level. On the other hand, some argue that effective collective rights are not only a consequence of economic success but a vital component of the European social model which produces that success.<sup>100</sup> Even the British government has started to recognise this. In introducing its proposals for a statutory recognition procedure the government recognised that ‘businesses will gain’ by accommodating the employees’ wish to have a trade union voice. It adds ‘Businesses and other organisations are unlikely to establish a successful partnership for change and competitiveness while overriding the wishes of a substantial group of employees’.<sup>101</sup>

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<sup>98</sup> Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law*, Lawrence and Wishart, 1995, 391.

<sup>99</sup> See, for example, S.Deakin, “Labour Law as Market regulation” in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* (Clarendon, 1996); P.Davies, “Market Integration and Social Policy in the Court of Justice” (1995) 24 ILJ 49.

<sup>100</sup> See, for example, W.Streeck and J.Rogers, “Workplace Representation Overseas: the Works Council Story” in R.Freeman (ed), *Working Under Different Rules*, 1994 National Bureau of Economic Research.

<sup>101</sup> *Fairness at Work White Paper*, Para.4.12.