University of Leicester

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UK Report

Changes in the organization of collective bargaining

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1. The Practice of Collective Bargaining in Britain

The Trade Unions and Labour Relations (Consolidated) Act 1992 (TULRCA) is the major piece of legislation provided for industrial relations and collective issues of employment law. The TULRCA defines a Trade Union as,

> "… an organisation (whether temporary or permanent) -
> (a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between worker… and employers…; or
> (b) which consists wholly or mainly of-
> (i) constituent or affiliated organisations which fulfil the conditions in paragraph (a)…, or
> (ii) representatives of such constituent or affiliated organisations,
> and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations."[1]

The definition of an 'employers' association' is also set out in section 122 of the same Act. The Certification Office and the Central Arbitration Committee (CAC) are the main independent bodies in the UK who deal with issues of collective bargaining and collective actors[2].

Works Councils are not given legal definition in Britain and therefore are uncommon; however there are Joint Consultative Committees (JCC) in some companies or sectors. These are similar to works councils as they are a group of representatives from relevant Trade Unions, employee representatives and employers who meet but they primarily deal with consultation over workplace matters rather than negotiation[3]. The proportion of workplaces with five or more employees that had a workplace or

higher-level JCC in 2011 was 25 per cent, down from 34 per cent in 2004.[4]

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[1] TULRCA 1992 s1.

[2] Central Arbitration Committee website 'About Us' https://www.gov.uk/government/organisations/central-arbitration-committee/about.

[3] B Van Wanrooy et al, 'Workplace Employment Relations Study 2011: First Findings' (2013) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336651/bis-14-1008-WERS-first-findings-report-fourth-edition-july-2014.pdf.

[4] D Adam, J Purcell, M Hall, *Joint consultative committees under the Information and Consultation of Employees Regulations: A WERS analysis (*ACAS Research paper Ref: 04/14, 2014) p.5.

The Trades Union Congress (TUC) is the only confederation of Trade Unions in Britain (excluding Northern Ireland). In 2013, there were 149 recognised Trade Unions and 56 Employers' Associations, which continues the downward trend of recognition of these bodies[5]. Most Trade Unions are organised by company or occupational groups but there are still a small number organised by industry, such as the Union of Construction, Allied Trades and Technicians (UCATT) who represent the construction industry. The three major unions recognised in Britain are Unite the Union, Unison and the union of General Municipal Workers (GMB), all of whom are general unions representing a wide range of individuals, industries and companies, and together they make up 56% of the TUC membership[6]. The CBI (formerly the Confederation of British Industry) is the primary employers' association for the majority of businesses in the UK. In particular, the CBI works with the TUC on national level to negotiate national level policy but neither are involved in collective bargaining. For example, the TUC was consulted about the Information and Consultation of Employees Regulations 2004, and some other European Directives, and the statutory recognition procedure. Other smaller employers' associations, such as the EEF (formerly the Engineering Employers' Federation), would be involved in collective bargaining where appropriate.

Collective bargaining in Britain is primarily concluded by enterprise but there are some sector-level negotiations, such as in education. 29.5% of employees are covered by collective bargaining[7] and the Trade Union Membership Bulletin 2013 reports that larger workplaces are more likely to have collective agreements in place[8].

According to the UK Government, there were 6.5 million Trade Union members in 2013, which is a slight decrease of 0.1% since 2012 but a significant decrease compared to the peak of membership in 1979 with over 13 million members[9]. In 2013, the membership rate was 25.6% of the workforce[10]. However, in the Private Sector, the membership level has risen for the third consecutive year to 14.4% whereas the Public Sector membership rate declined to 55.4% (a reduction of 0.9%)[11]. Chart 1 shows the percentage of employees who are trade union members by industry sector[12].

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[5] Annual Report of the Certification Officer 2013-14 https://www.gov.uk/government/publications/annual-report-of-the-certification-officer-2013-2014.

[6] L Fulton, 'Worker Representation in Europe' (2013) http://www.worker-participation.eu/National-Industrial-Relations/Countries/United-Kingdom.

[7] Trade Union Membership 2013 Statistical Bulletin, Department for Business Innovation and Skills, 2014 https://www.gov.uk/government/statistics/trade-union-statistics-2013.

[8] ibid.

[9] ibid.

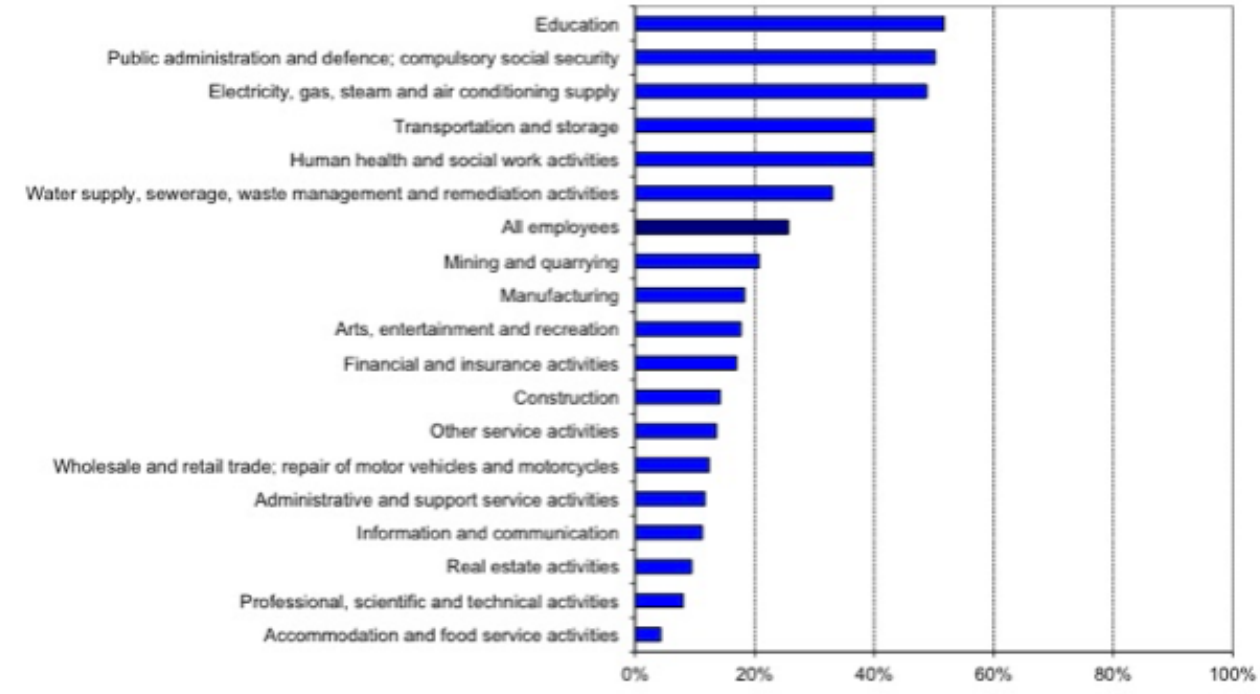
[10] ibid.

[11] ibid.

[12] ibid p16.

Chart 1: Trade Union Membership by Industry Sector:

Per cent of UK employees who are trade union-members



Source: Labour Force Survey, Office for National Statistics

Collective bargaining is only able to be concluded by recognised trade unions and the employer. In the UK, recognition of a Trade Union is either through voluntary recognition by the employer or, if the employer refuses to, through the statutory procedure set out in Schedule A1 of the TULRCA 1992. It is worth noting that it is the responsibility of the trade union to secure recognition[13]. There are three stages the trade union must pass to be recognised and therefore be able to undertake collective bargaining:

1. Apply to the Certification Officer[14] to become listed as a Trade Union;
2. Be issued a Certificate of Independence by the Certification Officer to verify they fulfil the TULRCA 1992 definition of a Trade Union;
3. Be recognised voluntarily by the employer or be issued a Declaration of Recognition from the CAC to enable them to undertake collective bargaining (which requires the confirmation of a majority representation)[15].

In 2013, there were 3 applications for recognition to the CAC of which two were granted a Declaration of Recognition and the other rejected[16]. It is worth noting that where the trade

[13] A.C.L. Davies *Perspectives on Employment Law* (2nd edn,CUP 2009).
[14] Certification Officer: About https://www.gov.uk/government/organisations/certification-officer/about#what-we-do
[15] S Deakin and G Morris, *Labour Law* (6th edn, Hart 2012).
[16] n-5.

union is recognised voluntarily by the employer, there is no constraint upon the employer to vary the scope of recognition or withdraw it altogether[17].

Traditionally, workers were represented by trade unions. There was a single channel of representation and the main function of unions was to bargain collectively. The statutory notion of works councils or consultative committee came from European Directives and was therefore an added facet to collective representation. Theoretically, consultative committees only have a function of consultation and not negotiation. They are separate from trade unions; in practice, many consultative committees have trade unions representatives however such committees do not bargain.

2. UK Legal System for Collective Bargaining

a) Legal Definition of Collective Bargaining

Section 178(1) of the TULRCA 1992 sets out the definition of a collective agreement to be,

> "…any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and 'collective bargaining' means negotiations relating to or connected with one or more of those matters."

The matters referred to in the TULRCA 1992 include: terms and conditions of employment, matters of discipline and facilities for officials of trade unions[18].

b) Participation in Collective Bargaining

The parties able to participate in the process of collective bargaining are recognised Trade Unions and employers (or an employers' association). Multi-employer bargaining has decreased in recent years; in the private sector it is rare[19] and in the public sector the decline has been from 58% in 2004 to 44% in 2011[20].

There has been an increase in employee representatives discussing and negotiating agreements with employers on behalf of a unit of employees; these agreements are called workforce agreements and are only recognised for certain statutory provisions, such as redundancy consultation[21]. The Workplace Employment Relations Study 2011 found only 7% of workplaces have non-union employee representatives present in the workplace.

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[17] n-15.
[18] TULRCA 1992 s.178(2).
[19] A Bogg, 'Representation of Employees in Collective Bargaining within the Firm: Voluntarism in the UK' (2006) 10 EJCL http://www.ejcl.org/103/art103-3.pdf.
[20] B Van Wanrooy et al, *Employment Relations n the Shadow of Recession. Findings form the Workplace Employment Relations Study* (Palgrave Macmillan 2013).
[21] n-19.

c) Conditions on the Contents of Collective Agreements

Provided the Trade Union is recognised either voluntarily or through the statutory procedure, there is no specific requirements or conditions of a collective agreement; it is up to the parties to define what should and should not be included[22]. However, Section 178(2) of the TULRCA 1992 does provide specific matters that may be incorporated into a collective agreement; primarily terms and conditions of employment (pay, holidays and working hours)[23]. Additional topics, such as training, pensions and employee relations policies are likely to be consulted over but not negotiated through collective bargaining[24].

It is recommended that there be a formal recognition agreement in place to identify the areas which will be covered by collective bargaining, although this is not legally binding[25]. For example, it may include: the election of workplace representatives; variation terms or termination clause; what negotiations can take place; dispute resolution clause[26].

d) Procedure for Collective Bargaining and Ensuring Legal Effect

There is no specific legal procedure for collective bargaining in the UK, except where there is a statutory requirement[27]. Normally, the collective agreement or recognition agreement will detail the procedure for collective bargaining between the parties[28]. However, if there is no agreement on the method of bargaining, the CAC can impose a method for the parties if the union was recognised through the statutory procedure; in 2013-14 there were nine cases of this of which eight ended in the parties agreeing their own method and one requiring an enforced method[29].

Collective agreements are 'presumed not to have been intended by the parties as legally enforceable'[30] unless the agreement is in writing and specifies that the agreement is intended to be legally enforceable. If only some parts have been specified to be legally enforceable, these parts will be considered to be but the rest of the agreements will not be[31]. As collective agreements are not binding collectively, they can only be enforced individually. If there is a breach of a collective agreement, an employee can bring a claim to

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[22] H Collins, K D Ewing and A McColgan, *Labour Law* (CUP 2012).
[23] n-19.
[24] ibid.
[25] n-19.
[26] n-22.
[27] ibid.
[28] ibid.
[29] Central Arbitration Committee Annual Report 2013-14, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367557/CAC_Annual_Report_2013-14.pdf.
[30] TULRCA 1992 s.179(1).
[31] TURLCA 1992 s.179(3).

court for breach of contract as the collective agreement will have been incorporated in the contract of employment. However, not all terms of collective agreements can be incorporated. The case law has determined that only terms that benefit directly the employee can be incorporated (for example, pay, working hours, holidays). Procedural terms (for example redundancy procedures) may or may not be incorporated. This will be considered on a case by case basis.

3. Do legal criteria exist for qualifying as a bargaining party (in the sense of being able to conclude collective agreements), if so, what are they?

As indicated in question 1, a union is defined in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) section 1 (a), by reference to its form as an 'organisation'; personnel as 'wholly or mainly of workers of one or more descriptions; and purpose must 'include the regulation of relations between workers of that description or those descriptions and employers or employers' associations'[32]. However, TU are divided into sub-categories. First, the TU can be listed or unlisted, which is not compulsory but brings advantages to the listed unions, such as having legal protection for its members at work. Second, it may be independent or non-independent. The advantages of being independent are that union's members cannot be subject to discrimination on the grounds of their union membership or activities. Further, a union can only be recognised if it is independent. Third, TU can be recognised or not recognised. A union can only bargain collectively if it is recognised. The principle advantage of being certified as an independent union is the ability to apply to the Central Arbitration Committee (CAC) for statutory recognition, although non-independent unions can still reach a voluntary agreement with employers. In the case of unions with a Certificate of Independence, it is also unlawful for an employer to take action to discourage membership or to penalise members for participating in its activities. Unions which are both certified as independent and recognised can apply to the CAC for disclosure of information for the purposes of collective bargaining. The officials of such unions can also seek paid time off for trade union duties and training in industrial relations, and its members can seek time off to participate in their union's activities.

<u>Independence</u>

The general test for a TU to be independent comes under section 5 of TULRCA 1992, which states that '(a) is not under the domination or control of an employer or group of employers or of one or more employers' associations, and (b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatsoever) lending such control'. This test directs

[32] H Collins, KD Ewing, A McColgan- *Labour Law* (2012 CUP), page 493

attention to whether both the employer exercises domination or control over the union and whether it is exposed to the risk of interference tending towards such control[33].

The statute is silent on the kind of criteria to be used to determine whether there is domination, control or likelihood of interference. The decisions of the Certification Officer (CO) and the EAT (which is the court of appeal for the CO's decisions) give indications of the types of factors taken into account:

- assistance given by the employer for the establishment and maintaining of the organisation
- whether the constitution allows for interference of the employer in the union's affairs
- the scope of the union's membership base (is it all the employees of one company)
- The strength and sources of the union's finance (are they all coming from the employer?)
- the union's negotiations record

These factors were approved by the EAT in these case of *Blue Circle Staff Association* v *Certification Officer*[34]. However, they are simply guidelines and the weight of each criterion will depend on the circumstances. For example, if the employer provides offices for the trade unions, this does not mean that the union is not independent.

Recognition

Recognition in terms of TU means 'the recognition of the union by an employer, or two or more associated employers, to any extent, for the purposes of collective bargaining[35]. Collective bargaining means 'negotiations relating to or connected with' one or more of the matters specified in the TU and Labour Relations (Consolidation) Act 1992 s 178(2)[36].

Originally, recognition was left at the discretion of the employer. However, the Employment Relations Act 1999 revived what is called the statutory recognition procedure. If a union wishes to bargain but the employer refuses to recognise the union, the latter can use the law to impose recognition. The law can only require the notion of recognition if the parties themselves fail to sign a voluntary agreement, the law only intervening as a last resort.

[33] S Deakin & S Morris – *Labour Law* (2012 Hart 6th edn) – page 802
[34] [1977] IRLR 20
[35] TULRCA 1992 s178(3)
[36] TULRCA 1992 s178(1)

Conditions for application

Trade unions can apply for recognition via the statutory procedures if two important criteria are fulfilled: first the union must have a certificate of independence[37] and second the employer must employ at least 21 workers[38].

Application to the employer

Practically, a trade union must give the employer a written request for recognition for a specified group of workers (called a bargaining unit). Two possible scenarios can occur. On the one hand, the employer accepts the bargaining unit and recognises the union within a specific time frame (10 days of the request) or accepts to negotiate on these issues within 20 working days. If a recognition agreement ensues, there is no need to take any further steps. This agreement is protected against unilateral termination by the employer for three years unless the parties agree on an earlier date.

If, on the other hand, there is no response from the employer or no agreement within the specified time, the union can apply to the Central Arbitration Committee (CAC) to determine the bargaining unit and whether recognition can be granted. Before going onto these two critical points, the CAC must check the admissibility of the demand according to certain criteria.

Conditions of admissibility

There are four substantive grounds on which an application will be inadmissible.

(i) First, ***if a collective agreement is already in force with a union***, which is entitled to conduct collective bargaining on behalf of any workers falling within the proposed bargaining unit, the application will be rejected. This reflects the priority given to existing voluntary bargaining arrangements. However, it could be that pre-existing agreements are with unions which are not independent or not representative and this may be a way for employers to avoid recognising some unions. It may also be that unions are recognised but only on certain matters of s 178(2) TULRCA (e.g. facility for union's representatives or machinery for consultation) but not pay or working hours. It has been argued that this condition can breach freedom of association and potentially article 11 of the European Convention on Human Rights. The CAC recently agreed with this argument. This is currently subject to appeal.

(ii) Second, there must be ***a relevant level of existing union membership and a potential support for recognition***[39]. The union must effectively show that it is representative of the workforce. It must establish that 10% of the workforces in the bargaining unit are members of the union and that a majority of the workers in the bargaining unit would be likely to

[37] TULRCA 1992, Sch A1, para 6.
[38] Ibid para 7.
[39] TULRCA 1992, Sch A1, para 36.

favour recognition. This is more contentious and difficult to establish but can be demonstrated by petition or that the majority of the workers in the bargaining are members of the trade union.

(iii) Third, ***more than one union applying for recognition renders the application inadmissible*** unless the various unions show that they will co-operate and bargain together on behalf of the workers in the bargaining unit[40]. The TUC provides help with application to the CAC and has tried to minimise inter-unions problems.

(iv) Fourth, the statute ***prohibits a union to re-apply for recognition*** if the application had been accepted within the previous three years for the same bargaining unit[41].

If these hurdles are passed, the first aspect on which the CAC is likely to have to make a decision is the bargaining unit.

The bargaining unit

If employer and trade union cannot agree on the relevant bargaining unit, the CAC must determine whether the bargaining unit proposed by the union is appropriate. Its first task is to try to get the parties to agree on the bargaining unit within a specific time (20 days). If this fails, the CAC will determine the bargaining unit always taking into account the need for the unit to be compatible with effective management. For this it will use a number of criteria given by Schedule A1 such as views of the employer and the union, characteristic of workers in the bargaining unit and location of workers. Trade unions will tend to tactically argue for small bargaining units where union membership is strong while employers will want to extend the bargaining unit in order to avoid having to deal with separate recognition requests.

Once the bargaining unit is established, the next step for the CAC is to decide whether recognition should be granted or not.

Criteria and procedure to determine recognition

In order to grant recognition, the CAC must be convinced that this is the wish of the majority of the workforce in the bargaining unit. Two routes are available to demonstrate this support.

First automatic recognition can be granted by the CAC if the majority of the workers are members of the applicant trade union in the bargaining unit. However, this is not mandatory. Even with a majority of trade union members in the bargaining unit, the CAC can use the second method, which is to hold a ballot of the workforce in the bargaining unit. Three reasons can trigger the ballot where the union has enough members in the bargaining unit[42]: if it is in the interest of good industrial relations; if a significant number of unions

[40] Ibid para 37.
[41] Ibid para 39.
[42] TULRCA 1992, Sch A1, para 22 and 23.

members have indicated that they do not wish the union to conduct collective bargaining on their behalf; if there is 'membership evidence' that casts doubt over members' willingness to have the union conducting collective bargaining on their behalf. This is a situation where for example a great number of workers have recently joined and this may have been due to pressure.

The second route is recognition granted following a ballot of the relevant workforce. Two criteria have to be fulfilled in relation to the result of the vote[43]: the union must be supported by a majority of the workers voting, and at least 40% of the workers constituting the bargaining unit. Further the ballot procedure to follow is relatively complex and detailed[44]. Significant elements include: the ballot must be conducted by a qualified independent person (QIP) appointed by the CAC; the cost of the ballot must be shared between employer and union; the ballot can be postal or at the workplace (or combination, depending on the kind of pressure that can be exerted by employer or union).

However, unions have been given some protection against employers who would try to influence the outcome of the ballot, for example by not allowing unions' access to the workforce or by putting pressure on them. A number of duties are therefore imposed on the employer during the ballot[45] (e.g. the employer must co-operate with the union and the QIP; the employer must give union access to workers constituting the bargaining unit as it is reasonable to enable the union to inform the workers of the object of the ballot and seek their support and their opinion). Further, neither employer nor unions can engage in unfair practices (eg threats of dismissal) to influence the outcome of the ballot. The practices are listed exhaustively in TULRCA and includes financial inducement, threats of dismissals, etc.

The CAC may ultimately award recognition without a ballot if employers do not allow reasonable access or continue unfair practices[46].

Effect of recognition

If the CAC declares a union recognised, the parties have 30 days to agree a 'method' by which they will conduct collective bargaining. If they cannot agree, the CAC has a duty to try to help them agreeing the method, but failing that, it is the CAC which will specify the method to conduct collective bargaining.

The word method is not defined in statutes. It is clear that it is not an obligation upon employer and trade union to reach a collective agreement, or even to bargain in good faith. It is simply a duty to meet and discuss. In practice, this means that the 'method' will deal with procedural aspects, namely when parties meet, what do they discuss, how often, etc.

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[43] Ibid para 29.
[44] Ibid para 25.
[45] TULRCA 1992, Sch A1 para 26.
[46] TULRCA 1992, Sch A1, paras 27 and 27D.

Further, the only items that need discussing are pay, hours and holidays. This is a more limited agenda than the items listed under TULRCA 1992, section 178(2) which constitute the subject matters of collective bargaining.

When the CAC specifies the method, it uses a model given by the government and which can be found in The Trade Union Recognition (Method of Collective Bargaining) Order 2000[47] (although the CAC can depart from it). If the employer breaches the method imposed by the CAC, the union may apply for specific performance. The method imposed by the CAC is considered as a legally enforceable contract. Failure to comply with the order of specific performance constitutes contempt of court.

Assessment of the recognition procedure

Numerically, the shadow of the law lead to a significant increase of recognition agreements to be reached just before and after the statutory recognition procedure came into force. However, as the years have passed, the number of voluntary agreements has decreased but so has the number of applications to the CAC[48], with its lowest number recorded in 2013-14. The table below shows this significant decline.

Application to the Central Arbitration Committee for recognition[49]

Year	Number of applications
2000-1	57
2001-2	118
2002-3	80
2003-4	106
2004-5	83
2005-6	58
2006-7	64
2007-8	64
2008-9	42
2009-10	42
2010-11	38
2011-12	43
2012-13	54
2013-14	30
TOTAL	869

[47] SI 2000/1300.

[48] See for example S Oxenbridge, W Brown, S Deakin and C Pratten, 'Initial Responses to the Statutory Recognition Provisions of the Employment Relations Act 1999' (2003) 41 BJIR 315.

[49] Information compiled using Central Arbitration Committee Annual Reports.

4. What is the binding effect of collective agreements in your country?

a) What are the requirements for binding effect in legislation and in case law?

A collective agreement is unlikely to be a legally enforceable contract. This absence of legal effect for collective agreements is demonstrated in statute.

Section 179 The Trade Union and Labour Relations Consolidation Act 1992 (hereafter referred to as TULRCA) states:

> (1) A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement-
>
> (a) is in writing, and
>
> (b) contains a provision which (however expressed) states that the parties intended that the agreement shall be a legally enforceable contract.[50]

This is not to say that this statute is the main cause for the lack of legal enforcement, rather it is submitted that the statutory presumption merely emphasizes what is likely to be the case in fact. It is asserted that whilst the provision leaves open the possibility that a legally enforceable agreement might be reached, in practice the parties are unlikely to wish to use legal remedies in order to enforce the agreement. It is suggested that the reason for this is that the use of legal sanctions such as an injunction against breach of the agreement is likely to exacerbate and prolong conflict rather than to help the parties resolve their differences with the minimum disruption to production and income.[51]

Ewing, Collins and McColgan suggest other effective, but non-legal sanctions which the trade union and employer are able to use instead in order to enforce the agreement: *'the union can threaten industrial action, and the employer can exclude the employees from the workplace (a lock-out) or threaten deductions from pay for any refusal to work in accordance with the agreement.'*[52]

Nevertheless, one can ensure the binding effect of a collective agreement by incorporating it into a legally enforceable contract of employment. Employment contracts in the workplace can encapsulate a collective agreement that has been reached by stating ***expressly*** that the wages, hours and other conditions of employment will be set by a particular collective agreement and subsequent revisions of it.

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50. Section 179 The Trade Union and Labour Relations Consolidation Act 1992
51. Ewing, Collins and McColgan, *Labour Law,* (CUP 2012)
52. Ibid.

Express incorporation

Through use of express terms, courts will accept that a relevant collective agreement is contractually binding, if it has been referred to as forming part of the contract in either the contract of employment or in any documents issued by the employer to the employee such as a rule-book (the regulations or standard of behaviour that should be followed in a job or workplace) or statement about the principal terms of employment. Alternatively, if as a consequence of a new collective agreement, an employer introduces new terms and conditions, the employees will be regarded as having consented to the change by continuing to work normally.[53]

The effect of such express incorporation is that aspects of legally unenforceable collective agreements become part of the legally enforceable express terms of the individual contract of employment.

Implied incorporation

If there are no such express terms written into a contract of employment, one comes to rely on a court inferring implied terms into the contract. In principle, the issue turns on the joint intention of the parties to the contract of employment and the question the courts ask is whether the employer and the individual employee (not the trade union) intend to incorporate parts of the collective agreement into the contract of employment.[54]

This inference might be discovered by reference to:
a) custom, where parties have not laid down express terms and so terms of agreement are applied according to industry and district, on the basis of which employers and employees contract,[55] or

b) a course of dealing between the parties. This is relevant where it can be demonstrated that a particular contract of employment has in the past been determined in its details by a collective agreement, a presumption arises that the parties to the contract of employment intended to continue that method for supplementing the content of their agreement.

It is to be noted that both of these analyses rely on past practice in order to incorporate a collective agreement into a contract of employment, and so these explanations run into

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[53] *Henry v London General Transport Services Ltd* [2002] EWCA Civ 488
[54] *Alexander v Standard Telephones & Cables Ltd* (No.2); *Wall v Standard Telephones & Cables Ltd* (no.2) [1991] IRLR 287 (QB)
[55] Otto Kahn-Freund, 'Legal framework', in A. Flanders and H. Clegg (eds.), *System of Industrial Relations in Great Britain* (Oxford: Blackwell, 1954), p.58.

difficulty when past practice is ambiguous or uncertain. Therefore, a reliance on converting collective agreements into implied contractual terms means that one becomes vulnerable to contrary evidence with respect to the intentions of the parties.

It has also to be noted that a common term in collective agreements is the assertion that the agreement is not enforceable via incorporation into the contract of employment. Despite the fact that statement should not govern this issue, because it is the intention of the employee and employer that is vital, and not the intention of the union representatives,[56] in most instances a court will infer that the parties to the contract of employment do not intend that the terms should be incorporated from the collective agreement where such a clause is present.[57]

b) Who is (directly or indirectly) bound and who is not bound by a collective agreement?

Whether a provision of a collective agreement is suitable for enforcement by its incorporation into the contracts of employment depends in part on the language used in the collective agreement and in part on the context of the whole document. As the cases below demonstrate, even if employees establish that the collective agreement had been expressly incorporated into the contract of employment, many provision that it contains will still not be regarded as binding legal entitlements. This section begins by looking at the binding nature of collective agreements upon employers when employees seek to enforce the terms.

Enforcement by employees

It is usually accepted that terms of the collective agreement that set the core obligations of the wage/work bargain such as wages and hours have been incorporated into the contract of employment. Other terms that have been considered suitable for incorporation include enhanced redundancy payments above the statutory minimum, disciplinary procedures and grievance. On the other hand, provisions for conciliation over disagreements about the meaning of the collective agreement, or statements that represent aspirations for the future will not be regarded as suitable for incorporation.[58]

Much of the litigation about the binding nature of collective agreements has concerned redundancy procedures. The collective agreements used in these cases have tried to determine in advance how the employer should handle the need to dismiss workers for economic reasons. The agreement may establish procedures for negotiation and

[56] Ewing, Collins and McColgan, *Labour Law*, (CUP 2012)
[57] *Martland v Co-operative Insurance Society Ltd* [2008] UKEAT 0220_07_1004 (10 April 2008)
[58] *National Coal Board v National Union of Mineworkers* ([1986] ICR 736

consultation with the union, and determine the criteria for selection for compulsory redundancy. The legal issue that arises, with regard to enforceability, is whether an employee can compel the employer to comply with the collective agreement by enforcing its provisions through the contract of employment. As the case law demonstrates, the courts have not been willing to bind the parties by their collective agreements regarding dismissals for redundancy.

In *Kaur v MG Rover Group Ltd*, the claimant's conditions of employment included the following term: 'Employment with the company is in accordance with and, where appropriate, subject to…collective agreements made from time to time with the recognized trade unions representing employees within the company.' The defendant, the employer, had entered into a collective agreement which asserted that *"It will be our objective to ensure that the application of the Partnership Principles' will enable employees who want to work for Rover to stay with Rover…There will be no compulsory redundancy."* Furthermore, the agreement stated that "*any necessary reductions in manpower will be achieved in future, with the cooperation of all employees, through natural wastage, voluntary severance and early retirement, after consultation with the trade unions."* Nevertheless, the Court of Appeal in this case refused to grant the declaration that the applicant had a contractual right not to be made compulsorily redundant. [59]

It can be shown, therefore, that even in cases where there was an express incorporation of the collective agreement into the individual contract, the court will look to see whether the content and character of the relevant parts of the collective agreement were such as to make them apt to be a term of the individual contract of employment.[60] In the case of *Kaur*, the court regarded such statements as aspirational 'objectives' rather than binding commitments. It was deemed that the use of the term "*cooperation of all employees*" showed that job security was regarded as a collective matter, and so was unsuitable as a basis for individual contractual rights.

The enforceability of a collective agreement was also brought up in the case of *Malone v British Airways plc*. The case concerned a term in a collective agreement that specified the minimum number of cabin staff for each type of plane. This term formed part of a collective agreement that limited monthly hours of work, established procedures for rosters for working, reporting processes, and lateness for work, and set out what would happen if flights were cancelled or delayed. The union and the airline had failed to agree on reduced staffing levels on planes, and so the managers then introduced these changes unilaterally. The question that came before the court was whether the rules on staffing levels had been incorporated into the employees' contracts of employment.

[59] *Kaur v MG Rover* [2004] EWCA Civ 1507
[60] Ewing, Collins and McColgan, *Labour Law*, (CUP 2012)

Whilst the Court of Appeal accepted that some of the terms in the collective agreement were suitable for incorporation (e.g. the rules on maximum working hours), the provisions regarding cabin crew staffing levels were not regarded as appropriate for incorporation. The Court justified this decision on the ground that there might be disastrous consequences for the employer. This has since been criticised for giving relevance to the potential adverse consequences for the employer when the key legal question concerns the intentions of the parties to the contract of employment.[61]

Enforcement by employers

The same issue of whether or not provisions in a collective agreement are appropriate for incorporation into a contract of employment can also apply to terms that impose obligations or restrictions on employees.

For the most part, collective agreements are created to confer benefits on employee, so that the employer has little reason to seek enforcement of its terms. However, it is certainly possible for employers to use suitable language that is precise and can be translated into individual obligations, for a collective agreement to place significant obligations upon employees, such as express requirements to work at different tasks flexibly and to accept variable hours of work.

With regards to 'peace obligations' in collective agreements, which are promises not to take any form of industrial action for the period of the agreement, there are statutory obstacles which make it difficult for an employer to enforce the agreement against an employee. The Trade Union and Labour Relations Act 1992 (Section 180) states that an employer cannot enforce such a clause without an express written agreement with the relevant union to that effect. Furthermore, if such an agreement were concluded, a court would not grant an injunction against an employee for refusing to work if that would amount to an order to force the employee to resume work. Additionally, strike action would constitute breach of contract and employee dismissal, even without the additional breach of contract constituted by breach of any express peace obligation. It is therefore unlikely that employers would ever wish to enforce this aspect of any collective agreement.[62]

c) Is there a system of extending the binding effect by means of a decision of the government/minister or other public authority: who is bound by such extension and in which way?

[61] Ibid.

[62] Ewing, Collins and McColgan, *Labour Law*, (CUP 2012)

The current legislation relevant to collective bargaining is the Statutory Recognition Procedure 1999 which is best understood as "a procedure for encouraging voluntary agreement in recognition and not as a procedure for encouraging collective bargaining."[63]

Historically speaking, the compulsory arbitration and statutory recognition procedures of the past created a system whereby decisions of public authorities could have the effect of extending the binding effect of a collective bargain over an employer. Ruth Dukes has stated that this revealed a willingness to use legislation to persuade otherwise unwilling employers to bargain with trade unions. The legislation included sanctions which put employers at risk of having terms and conditions imposed upon them by an external body and ensured that the relevant employees enjoyed fair contractual terms regardless of the employer's final decision.

The current legislation, however, has broken away from this tradition because it is designed to promote a voluntary agreement as a good in itself, and not to secure improved terms and conditions of employment for the relevant workers.

d) Is deviation from acts or collective agreements by other collective agreements or works councils agreements possible in a way that is detrimental to the workers?

Unlike most other legal systems, collective agreements in the United Kingdom are not usually enforceable by the parties. The aim is to keep the courts out of the task of adjudication over claims based upon collective agreements. It is submitted, however, that this legal abstention leaves uncertainty about the precise significance of collective agreements for the individual contracts of employment. Whether or not a term of a collective agreement becomes incorporated into a contract depends partly on whether it has been expressly or impliedly incorporated and partly on whether the term is apt for incorporation. This allows the courts considerable discretion on the fundamental question of whether the parties are bound by promises made in collective agreements. Collins, Ewing and McColgan therefore refer to the use of a collective agreement between the union and the employer as "a cease-fire or temporary truce rather than a permanent peace treaty."[64] Further, as equivalent bodies of works councils are not envisaged as bargaining agents, there is no practice of deviation.

e) Does the favorability principle apply in case of concurring instruments?

This principle is not applicable to the UK system of collective bargaining.

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[63] R Dukes 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 ILJ 236

[64] Ewing, Collins and McColgan, *Labour Law*, (CUP 2012)

5. Do works councils have any formal role in collective bargaining?

a) Are works councils legally allowed to bargain with the employer and conclude agreements on employment conditions or other issues related to the interests of the employees?

No formal works councils exist in the United Kingdom (UK) although they are not prohibited by law. There are however bodies which are informed and consulted on a wide range of issues but they can be called information and consultation forums or (joint) consultative committees.

The term Works Council is not used in the UK except in the context of European Works Councils. The law on information and consultation came from European Directives. The UK does not have a history of statutory works councils. The industrial relations system used to be characterised by unions being the sole workers' representatives (through a single channel, meaning that there was no other representation) and their main function is bargaining.

The Information and Consultation of Employees Regulations 2004 (ICE) transposed Directive 2002/14/EC requiring Member States to allow information and consultation arrangements and was implemented in 2005. The requirements of the Regulations are not compulsory per se as information and consultation will only be in existence if triggered by the employer or a portion of the workforce (at least 10%). The regulations promote consultation and while not prohibiting negotiations, it is not mentioned in law. In practice, agreements between consultative committees and employers are therefore not reported.

b) What is the legal effect of agreements by the works council?

In the UK, the equivalent of works councils have no legal personality. This is not a scenario that has been envisaged by the legislator or tested in courts as this is not reported to happen. Theoretically, such an agreement would not constitute a collective agreement as it is not concluded with a union and therefore would have no legal effect.

c) What is the relationship between works councils and trade unions in the context of collective bargaining?

In order to transpose the Directive the UK required a method for information and consultation in areas where there were no recognised unions as well as areas where there was a recognised union in operation. Unusually, prior to the introduction of ICE the UK

government carried out extensive consultation with the Confederation of British Industry (CBI) and Trades Union Congress (TUC) to gain agreement to the proposed legislation.

This is a question that has troubled trade unions (TU) in the UK. They have not engaged with the Information and Consultation Regulations because they are fearful that employers would try to use consultative committees to replace collective bargaining or consult on topics that used to be a matter for negotiations. Some trade unions therefore see equivalent of works councils as threats. Academics have considered that unions had an ambivalent attitude towards works councils[65]. On the other hand, a number of unions combined bargaining in the workplace and being consulted on serious issues by sitting on consultative committees. Union representatives can therefore often sit on consultation bodies although they can operate without union involvement.

d) Can works councils agreements be invoked or challenged by individual employees? Not applicable.

e) Can works councils agreements deviate from collective agreements? Theoretically yes if unions are members of consultation committees and bargain with the employer, but this does not happen as consultative committees have a different remit than the subject matters of bargaining.

f) Are there examples of issues that have been addressed by works councils agreements (if possible at all)? No

6. **Can two (or more) collective agreements (on sectoral or company level) be applied simultaneously in the same company?**
This is an unlikely scenario in practice and not a situation envisaged by the legislator.

a) If so, is there a solution of possible concurrence of collective agreements?

b) Does a hierarchy exist between the collective agreements involved?

7. To what extent has your collective bargaining system changed or has it been changing in recent years (are there, in particular, decentralisation trends?)

Since 1980 there has been a decline in trade union influence. Legislation has supported this shift by providing greater individual employment rights (National Minimum Wage 1998, Agency Workers Regulations 2002 etc) thus lessening the benefits of trade union subscription and by curtailing the rights of unions as collective bodies.

[65] M Hall, 'A Cool Response to the ICE Regulations: Employers' and Trade Unions' Approaches to the New Legal Framework for Information and Consultation' (2006) 37 IRJ 456

The Labour government (1997-2010) provided statutory right to recognition, with the intent of boosting collective bargaining and giving back a voice to trade unions. While a number of unions obtained recognition in the shadow of the law or following statutory recognition, this trend has now significantly slowed down. Today fewer than one in five employees in the private sector and three in five in the public sector are union members.

2004 saw a continued decline in union influence although it was slower than the 1990s. There was no compensation for this through other forms of collective representation however direct communication with workers gained support and strikes were rare.

Bibliography

Books

Collins H, Ewing KD, and McColgan A, *Labour Law*, (Cambridge University Press 2012)

Deakin S and Morris GS, *Labour Law,* (Sixth Edition, Hart Publishing 2012)

Hall M and Terry M *'The Emerging System of Statutory Worker Representation'* in Healy G, Heery E, Taylor P and Brown W '*The Future of Statutory Worker Representation'* (Basinstoke, Palgrave) pp 207-228

Selwyn N, *Selwyn's Law of Employment*, (Oxford University Press 2011)

Van Wanrooy B, Bewley H, Bryson A, Forth J, Freeth S, Stokes L and Wood S '*Employment Relations in the Shadow of Recession: Findings from the 2011 Workplace Employment Relations Survey'* 2013 Palgrave MacMillan

Deakin S and Wilkinson F 'The Evolution of Collective Laissez-Faire' (2004) 17 Historical Studies in Industrial Relations, Keele University Centre for Industrial Relations, 1
Ewing KD 'The Functions of Trade Unions' (2005) 34 ILJ 1

Background Articles

Alan L Bogg '*Representation of Employees in Collective Bargaining within the Firm: Voluntarism in the UK. Report to the XV!!th International Congress of Comparative Law*,' July 2006

Bercusson Brian *'The European Social Model Comes to Britain'* 2002 ILJ 31(3): 209

Brewster C, Wood G, Croucher R and Brokkes M '*Are Works Councils and Joint Consultative Committees a Threat to Trade Unions? A Comparative Analysis'* Economic and Industrial Democracy 2007 , Vol 28(1): 49-77

Hall M, A cool response to the ICE Regulations? *'Employer and trade union approaches to the new legal framework for information and consultation' Industrial Relations Journal 37:5, 456-472 ISDN 0019-8692*

Lorber P '*Implementing the Information and consultation directive in Great Britain: A New Voice at Work'* The International Journal of Comparative labour law and Industrial Relations, Volume 22/2, 231-258, 2006

Sciarra S '*The evolving structure of Collective Bargaining in Europe 1990-2004'* Research project co-financed by the European Commission and the University of Flourence VS/2003/0219-S12.359910

Trade Union Membership 2012: Statistical Bulletin, Department for Business Innovation and Skills 2013

Van Wantrooy B, Bewley H, Bryson A, Forth J, Freeth S, Stokes L and Wood S *'The 2011 Workplace Employment Relations Study: First findings'* 2013

Deakin S and Wilkinson F 'The Evolution of Collective Laissez-Faire' (2004) 17 Historical Studies in Industrial Relations, Keele University Centre for Industrial Relations, 1
Ewing KD 'The Functions of Trade Unions' (2005) 34 ILJ 1

Web-based materials

www.ejcl.org/103/art103-3.pdf
www.gov.uk/join-trade-union/unioin-negotiations-with-your-employer
www.gov.uk/government/statistics.trade-union-statistics-2013
www.gov.uk/government/publications.annual-report-of-the-certification-officer-2013-2014
www.gov.uk/government/publications/cac-annual

Reports
www.acas.org.uk/media/pdf/3//0314-Worker-representation-in-Great_Britain-2004-2011
www.acas.co.org.uk
www.worker-participation.eu/National-Industrial-Relations/Countries/United-Kingdom/collective-Bargaining
www.bis.gov.uk
www.cipdemploymentlaw
www.danielbarnett.co.uk
www.direct.gov.uk
www.gov.uk
www.peoplemanagement.co.uk
www.whichlaw.co.uk/employmentlaw