

# Increasingly irrelevant?

Are trade unions outdated, or is there a bright future ahead?

Richard Kenyon of Field Fisher Waterhouse looks at the evidence

**T**rade unions are becoming 'increasingly irrelevant', Digby Jones, director general of the Confederation of British Industry, told a CBI dinner at the

beginning of September. Workers had lost interest due to unions' outdated notions of work, and fewer workers needed union membership because rising skill levels were making them less vulnerable, he said. In making these comments, Jones cited figures from the private sector, where the rate of union membership (union density) in the workforce, based on figures drawn from the autumn 2003 Labour Force Survey, is 18.2%.

According to the *Trade Union Membership 2003* booklet, published on 30 July 2004 by the DTI, 7.38 million UK workers belonged to a trade union in autumn 2003. While less than one in five private sector employees in the UK are union members, the picture is rather different in the public sector. Almost three in five public sector employees in the UK are union members. Public sector union density fell to 59.1% of employees in autumn 2003, from 59.7% in 2002. But despite this fall in density (caused by growth in the size of the public sector) the number of public sector union members actually rose by around 40,000 in 2003. In fact, 87.4% of public sector

employees were in a workplace where a trade union was present.

Given that trade unions continue to be very relevant within the public sector, it is useful to review the basic rules on recognition and collective agreements, as well as provide tips on maintaining good relations with recognised unions.

## Recognition

'Recognition' is the process by which an employer accepts a trade union's entitlement to represent a group of employees (referred to in the statutory recognition procedures as a

'bargaining unit') for some purpose. The extent of recognition is a matter for the employer and the union, and refers to the range of issues in respect of which the employer has, in effect, decided to cede unilateral decision-making for bilateral agreement. Given the extent of existing 'voluntary recognition' arrangements within the public sector, the following does not expand upon the concept of 'statutory recognition' (being the process by which a union can require an employer to recognise it as entitled to conduct collective bargaining on behalf of employees in respect of matters relating to pay, hours and holidays).

Recognition may arise formally or informally. It may be inferred from a course of dealing, but in such a case the evidence must be clear, for example, that the employer has habitually dealt with the union on a particular issue over a period of time. However, evidence that an employer has dealt with a union on a particular issue before is not necessarily proof that it intends to do so in the future.

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- terms and conditions of employment or the physical conditions in which workers are required to work;
- engagement or non-engagement, or termination or suspension of employment

or the duties of employment, of one or more workers;

- allocation of work or the duties of employment between workers or groups of workers;
- matters of discipline;
- workers' membership or non-membership of a trade union;
- facilities for officials of trade unions; and
- machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or the carrying out of such procedures.

It is not enough that the employer is willing to inform and consult the union; it

must be willing to negotiate on one or more of the issues listed in s178. Given that recognition can be achieved informally (and therefore possibly by mistake), it is important for an employer to have a clear understanding internally among its managers and externally with the union in respect of which issues recognition exists precisely.

## Consequences of recognition

Recognised unions enjoy benefits beyond those in respect of which they are recognised in any agreement with the employer, including the right to:

- paid time off for union officials to carry out trade union duties (s168 TULR(C)A);
- unpaid time off for union members to take part in union activities (s170 TULR(C)A);
- information for collective bargaining purposes (s181 TULR(C)A);
- consultation on proposed redundancies (s188 TULR(C)A);
- consultation on health and safety matters (s2(6) Health and Safety at Work etc Act 1974); and
- to be informed and, where 'measures' are envisaged, consulted in respect of a transfer of an undertaking (Regulation 10 Transfer of Undertakings (Protection of Employment) Regulations 1981).

In addition, although the right for individual employees to be accompanied to disciplinary and grievance hearings by a trade union official (s10 of the Employment Relations Act 1999) is not dependent upon recognition, experience has shown that unions which do not enjoy recognition rights are reluctant to provide officials for these purposes. Recognition, therefore, often has the additional benefit for employers of ensuring that employees are accompanied so that any deficiencies in a disciplinary or grievance process are highlighted at an early stage, and unnecessary and unfair dismissals, in particular, are avoided.

## Collective agreements

Collective agreements define the working relationship between an employer and a recognised trade union. Section 179(1) TULR(C)A provides a statutory presumption that a collective agreement is not legally enforceable unless it is in writing and expressly states that the parties intend the agreement to be legally enforceable. The vast majority of collective agreements are therefore binding in honour only (subject to the threat of industrial action if the employer reneges, of course).

Notwithstanding the non-contractual nature of a collective agreement, terms of that agreement could become binding between employees and their employer by express or implied incorporation of those terms into contracts of employment. Whether or not this is desirable or even workable depends upon the contents of the collective agreement. For example, a collective agreement might deal with pay, holidays or redundancy pay. Such terms may be suitable for incorporation into contracts of employment and this can be achieved by express cross-reference in individual contracts.

Other terms in a collective agreement may not be suitable for incorporation into individual contracts of employment because, for example, they govern the relationship between the union and the employer (eg procedural provisions intended to resolve disputes between union and employer). The distinction between terms which may or may not be suitable for incorporation is not necessarily as clear as it might be if the employment contracts expressly incorporate the entire collective agreement by cross-reference.

A collective agreement might include:

- A precise definition of the issues in respect of which the union is recognised for collective bargaining purposes. If an employer has a collective agreement, it should check what it says on recognition against the practices of the organisation when dealing with the union. Employers may go further in practice than the agreement states. Re-evaluate what issues should be covered and seek to agree these with the union.

- According to the ACAS Code of Practice on Time Off for Trade Union Duties and Activities, there can be positive advantages for employers and trade unions in establishing agreements on time off to provide clear guidance, avoid misunderstanding, facilitate better planning and ensure fair and reasonable treatment. Agreements should specify:

- the amount of time off permitted;
- the occasions when time off can be taken;
- in what circumstances time off will be paid;
- to whom time off will be paid;
- the procedure for requesting time off; and
- the procedure for resolving grievances about time off.

## Good relations generally

According to the ACAS Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purposes, employers should aim to be as open and helpful as possible in meeting trade union requests for information. Any reason for refusal should be explained and capable of being substantiated. Information agreed as relevant should be provided as soon as possible in a form and style which recipients can reasonably be expected to understand.

Although the Code identifies keeping employers informed of the names of the representatives authorised to carry out collective bargaining on the union's behalf as a union responsibility, in practice it is also incumbent upon the employer to know who it is dealing with at the union. Ideally, the employer should maintain a regular dialogue with union officials in addition to meeting them more formally for the purposes of collective bargaining.

It generally helps to conduct meetings to a formal agenda, agreed in advance with the union. Ad hoc meetings or discussions should be avoided. Furthermore, employers should seek to ensure that clear lines of communication are agreed and formalised. Minutes should be taken, circulated for comment and the final version stored and accessible to both parties for later reference.

It is important that communications with the union, and with employees in relation to union matters, are conducted professionally at all times. Employers should avoid attacks on the union or individual union officials in communications with employees or in a public context.

## Information and consultation

When the Information and Consultation of Employees Regulations 2004 come into force next year, employees will be able to request that their employer negotiates an information and consultation agreement, setting out the circumstances in which they will be informed and consulted. 'Employer' in this context will include some but not all public bodies, given the limitations of the term 'undertaking' arising out of the ECJ judgment in *Henke v Schierke & anr* [1996] – see Constanze Hewson's article on the Regulations in PSELJ Vol 1 Issue 3.

To trigger the negotiation process under the 2004 Regulations, the request must be made by at least 10% of the employees in the undertaking. This is significantly less than the 50%+ support required in a ballot to secure a union recognition agreement under the statutory recognition procedures. Organised workforces may see this as a way of bypassing a recognised union where membership within the workplace is low; instead obtaining direct information and consultation rights with their employer through their own representatives. Equally, however, the 2004 Regulations may provide a way for unions to try to get a foothold in some organisations where they are not already recognised.

## Public Services Forum

Recognising the importance of trade unions to the public sector, the Public Services Forum was set up following a meeting between the Prime Minister and trade union leaders in September 2003. Its aim is 'to improve the dialogue between

Government, public service employers and trade unions on taking forward the public service and workforce reform agenda to improve delivery and the citizen's experience of public services'.

On 10 September 2004 the Cabinet Office published the Public Services Forum's first report: the *Audit of Trade Union and Employee Involvement in Public Services Reform*. It concluded that while there was growing evidence that organisations are transforming the way they involve staff in reform, there is scope for improvement in communicating and involving staff in the case for reform to improve public services for all.

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The report includes ten case studies to identify innovative practices in engaging trade unions and employees in reform of frontline public services. These demonstrate, according to the Cabinet Office, 'that if staff are effectively engaged in the reform process public services can be improved – an interest Government and trade unions both share'.

## The TUC Partnership Institute

The TUC Partnership Institute was launched in 2001 to help organisations improve industrial relations and develop partnerships between unions and employers, which has included developing the 'TUC Partnership Principles' to help organisations develop successful partnerships between unions and employers. The Principles are:

- *Commitment to success of the enterprise:* effective partnerships are ones where unions and employers have a shared understanding of the organisation's business strategy and a joint commitment to its success.
- *Recognising legitimate interests:* genuine partnerships recognise that unions and

employers will have differences in interests and views. There should be arrangements to resolve those differences in an atmosphere of trust.

- *Commitment to employment security:* many employers embrace partnership as a way of increasing flexibility in the workplace. Good partnerships complement flexibility with action to improve employment security in the workplace.
- *Focus on the quality of working life:* partnership should broaden the scope of employment and organisational issues

tackled by unions and employers. It should lead to improvements in terms and conditions and more opportunities for employees to participate in decisions about their work.

- *Transparency:* with successful partnerships, managers share information with unions about the business at an early stage, and conduct meaningful consultations with unions and staff.
- *Win-win:* the hallmark of an effective partnership is whether it delivers concrete improvements to business performance, terms and conditions, and employee involvement. Partnership is about mutual gains for unions and employers.

Given the level of union membership and recognition within the public sector plus new partnering initiatives, it does seem a little premature for Digby Jones to be writing off unionism just yet.

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*Henke v Gemeinde Schierke & Verwaltungsgemeinschaft 'Brocken'*  
[1996] IRLR 701