LEWIS SILKIN

Ius Laboris Global HR Lawyers
LEWIS SILKIN

Trade union recognition

Inside

Introduction

Trade unions exist to further the interests of their members and to help regulate their relations with their employers.

This Inbrief outlines the concept of trade union recognition and explains the implications for employers of recognising a trade union.

Background

The number of employees who are members of a trade union has risen in recent years. Government data published in 2020 confirmed that trade unions had 6.44 million members in 2019, of which 40% were employed in the private sector. The Coronavirus pandemic has accelerated this trend as employees look for support during uncertain times. It has also led to renewed tripartite engagement between unions, businesses and the government.

All employees enjoy certain rights in the workplace that are related to trade unions. For example, they may be accompanied by a union official at a disciplinary or grievance hearing. Employers are also prohibited from refusing employment to any individual because of their trade union membership.

The concept of trade union recognition extends significantly beyond those rights by establishing a direct relationship between employer and trade union.

The concept of recognition

Most trade union recognition arises voluntarily from an employer agreeing to recognise a union. Unions' requests for recognition are nonetheless made "in the shadow of the law", because they are legally entitled to make a court application for an order granting recognition (for certain limited purposes) if the required number employees support that. We explore this concept of "statutory recognition" in more detail below.

"Recognition", in relation to a trade union, means that an employer will undertake "collective bargaining" with it. That, in turn, means negotiations related to or connected to a "collective agreement", which is any agreement or arrangement between a union and employer relating to one or more of the following matters:

- terms and conditions of employment, or physical conditions of work
- recruiting, terminating or suspending employees
- allocation of work or duties
- disciplinary matters
- membership of a trade union
- facilities for trade union officials
- negotiations or consultations on any of the above

While many employers understand union recognition as the bargaining of a specific group of employees' pay in accordance with a detailed collective bargaining agreement, this is too simplistic.

It is also significant that recognition can arise from a mere arrangement rather than by agreement, and even if there is an agreement it does not need to be in writing. Employers should accordingly be careful when engaging with a trade union that they do not recognise, to avoid inadvertently recognising it.

Legal status of collective agreements

A collective agreement is conclusively presumed not to be legally enforceable between a union and an employer unless it is in writing and expressly provides that it, or a part of it, shall be a legally enforceable contract.

As such a provision is rare, most collective agreements are binding "in honour only", which means that neither party may enforce the agreement's terms in court. This means that industrial action is a trade union's ultimate recourse for an employer's breach of their agreement.

Legal effects of collective agreement on employees' contracts

Notwithstanding that a collective agreement may not be legally enforceable by the trade union against the employer, it can still have legal effects as between the employer and its employees. This is because certain terms of a collective agreement may become incorporated into individual employees' contracts of employment. An employee may then enforce those terms against their employer.

An employment contract may, for example, expressly incorporate collectively bargained terms relating to pay rates. The employee could then bring a claim for breach of contract or an unlawful deduction of wages if the employer failed to pay at the stipulated rate.

Collectively bargained terms may also be impliedly incorporated into a contract of

employment. This can happen if there is a recognisable contractual intent between an employee and an employer that collectively bargained terms should be incorporated. One significant example of this is where there is a notorious custom and practice of both parties to abide without protest with such terms whenever they are revised.

There is an important exception to the general rule about incorporation of terms into employment contracts, which concerns industrial action. Any term of a collective agreement prohibiting or restricting the right of employees to engage in industrial action will not form part of any contract of employment unless the agreement: is in writing; expressly states that this term shall be incorporated into employment contracts; and is readily accessible to employees. In addition, the union must hold a certificate of independence.

As industrial action inherently involves employees breaching their contracts of employment in any event, however, the practical value of such a "no-strike" clause for the employer is minimal.

Implications of recognition for unions

Various consequences follow automatically from an employer recognising a trade union in respect of a group of its employees.

Recognised unions enjoy a statutory right to be provided with information from the employer that will enable it meaningfully to engage in collective bargaining. The right is not unlimited, and it must be in accordance with "good industrial relations practice" for the union to be provided with the information that it requests.

Collective bargaining is, however, interpreted widely in this context. It is not limited to a specific, formal negotiation that is taking place but refers more generally to the ongoing relationship. Acas has produced a helpful Code of Practice on disclosure of information for collective bargaining but, if parties ultimately cannot agree on what information the employer should provide, the union may apply to the Central Arbitration Committee (CAC) for a disclosure order.

Recognition of a trade union also means that the employer must inform and, as appropriate, consult representatives of it on certain prescribed matters. These include:

- collective redundancies
- TUPE transfers
- certain pensions changes, such as the closure of a "final salary" pension scheme
- health and safety matters
- the process for electing UK members of European Works Councils (despite Brexit).

Recognised trade unions do not enjoy any legal right to be involved in the establishment or operation of an employer's works council or any other kind of employee forum. It is nonetheless common for employers voluntarily to involve any recognised union.

Implications of recognition for employees

Consequences also follow for employees if their employer recognises a trade union:

- Employees who are officials of the union are entitled to take a reasonable amount of paid time off to carry out their trade union duties, undergo training related to those duties, or act as learning representatives.
- Employees who are members of the union may take a reasonable amount of unpaid time off time to participate in activities of the union, such as attending workplace meetings or meeting with union officials. Importantly, taking part in industrial action does not count as a union activity for these purposes.
- Where employees' terms are determined by collective bargaining, the employer is prohibited from offering inducements to get them to agree for their terms no longer to be collectively bargained (such as in return for a one-off payment).

Statutory recognition

If an employer refuses voluntarily to recognise a trade union, it may apply to the CAC for an order declaring it as recognised. Highly complex rules and timetables govern such applications. At each stage, however, the process (summarised below) is designed to enable the parties to reach agreement rather than the CAC having to impose an outcome on either side against its wishes.

First, the trade union must prove the following three things:

- 10% of the group of employees in respect of which it wishes to be recognised are members of the union.
- A majority of all employees in that group is likely to favour recognition. Evidence for these purposes might include already high union membership and a petition signed by employees.
- There is not already another trade union recognised in respect of any of the employees.

Secondly, the CAC must agree that the group of employees is an appropriate one to constitute a bargaining unit. One especially important factor is whether the bargaining unit would be compatible with effective management. This prevents a union from cherry-picking a group of employees to pass the first set of tests (above) despite such a group not representing a sound basis for an ongoing working relationship between the union and the employer.

If the union's choice of bargaining unit is not appropriate, the CAC must determine what would be an appropriate one. The application can then still proceed if that revised group would also pass the first set of tests above.

Thirdly, the CAC must determine whether to grant statutory recognition. This will usually happen automatically if over 50% of the group of employees are members of the union. Otherwise, the CAC will order a secret ballot by an independent third party. The ballot follows a period during which each side may campaign within certain rules designed to ensure its fairness. The CAC will only grant recognition only if a majority of those voting are in favour, including at least 40% of all employees.

Finally, if the employer and the union cannot reach a collective agreement between themselves, the CAC will impose a default method on the parties requiring them collectively to bargain the pay (excluding pensions), hours and holiday of employees in the bargaining unit. Importantly, either party can enforce this default method as if it were a legally enforceable agreement.

Statutory derecognition

Statutory recognition ordinarily lasts for at least three years. After that period of time, an employer or any employee may apply to the CAC for it to end the trade union's recognition. The CAC must then apply a similar series of tests to determine whether the employees in the bargaining unit favour the continuing recognition of the union or whether it should come to an end.

For further information on this subject please contact:

David Hopper
Partner
+44 (0) 20 7074 8280
david.hopper@lewissilkin.com

Vince Toman
Barrister
+44 (0) 20 7074 8171
vince.toman@lewissilkin.com

Emily Atkinson
Associate
+44 0) 20 7074 8115
emily.atkinson@lewissilkin.com