

ONLINE CHAPTER B

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B.1 COLLECTIVE LABOUR LAW AND TRADE UNIONS

In this chapter we will examine a key element of collective labour law by focusing on trade unions and their relationship with their members. This will involve the exploration of the legal status of a trade union, and the importance of independence. The role of the Certification Officer in listing trade unions will also be addressed. The chapter then turns to outline the functions, constitution and listing of trade unions, including the manner in which trade unions are required to operate. As part of that process, we consider the freedom of (collective) association and the central position adopted by trade unions in workplace representational participation in the UK under the traditional 'single channel' model. The rights of individual trade union members vis-à-vis their unions are then analysed, e.g. the right not to be forced to engage in strike action, the right to financial information, the right not to be excluded from trade union membership, the procedures a trade union must follow in order to discipline or expel its members, and the relationship between a trade union and its members. Finally, the focus will shift to the protection of trade union members in employment, i.e. the laws protecting members from being penalized by their employer for being a trade union member or engaging in union activities. The larger enterprise pursued in this chapter will be conducted within a contextual framework throughout, including an assessment of the relevant provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA').

B.1.1 Examining the history, role, and effectiveness of trade unions

At its most basic level, the received notion of the trade union is that it is an organization consisting of a group of working people who come together in solidarity to attempt to protect and improve their working lives and terms and conditions of employment. Whether such groups ought to attract legal recognition has been a politically contentious issue for 200 years. Trade unions were once regarded by the law as being a criminal conspiracy or a form of anti-competitive 'combination'¹ to be subdued by

¹ See J. Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721-1906* (Oxford, Clarendon Press, 1991) and D. Brodie, *A History of British Labour Law 1867-1945* (Oxford, Hart Publishing, 2003) 1-26. No less a figure than the venerable Adam Smith noted the irony that employers were as much likely as employees to engage in combinations, e.g. in order to resist the lifting of the wages of labourers above the actual wage rate: see A. Smith, *The Wealth of Nations*, Book I, Chapter 8 (Oxford, OUP, 1998).

criminal sanctions, but are now a standard, though by no means uncontroversial, feature of the industrial and political landscape. The extent to which the law has intervened to regulate the operation of trade unions has oscillated over time, and is largely a product of the differing political persuasions of successive UK Governments since the early twentieth century. Whether the accelerator or brake has been applied has largely depended on the underlying economic and political orthodoxies and conditions.

A brief historical sketch of the key pieces of legislation recognizing and regulating trade unions assists in informing our understanding of how this area of law has evolved. The Combination Acts 1799 and 1800 rendered the existence of collective organizations unlawful in the eyes of the law. The common law also subjected trade unions to criminal sanctions. The Trade Union Act 1871 heralded a new approach by recognizing trade unions as lawful organizations. This legislation sought to keep the courts out of industrial disputes involving trade unions, their members and employers by adopting a range of techniques, e.g. the removal of criminal sanctions in respect of combinations of working individuals, and in relation to trade union activities. However, employers and the common law courts responded by developing the law of economic torts to impose civil liability on trade unions for engaging in collective action. In 1906, the Government intervened to confer statutory immunities from suit on trade unions in respect of such civil torts by passing the Trade Disputes Act 1906. The Industrial Relations Act 1971, which was introduced in response to the recommendations of the report of the Donovan Commission,² heralded a system of trade union registration, and conferred corporate status on trade unions. The objective was to regulate the internal affairs of trade unions. The Trade Union and Labour Relations Act 1974 reverted to the non-interventionist approach of the 1871 legislation, removed the corporate status of trade unions and brought an end to outside oversight of the internal affairs of trade unions. However, in 1979, with the election of a Conservative Government, the balance shifted back towards legal intervention. During the period from 1980 to 1990, the Conservatives introduced six pieces of legislation increasing the legal controls on the activities of trade unions. The law was subsequently reformed and consolidated by TULRCA, and was then amended by the Trade Union and Employment Rights Act 1993. Further changes were made to TULRCA by the Labour Government in the Employment Relations Act 1999. These modifications were slightly less anti-union than previous measures, but the introduction of the Trade Union Act 2016 has swung the pendulum back in the opposite direction by tightening up the pre-strike balloting and notice requirements imposed on unions, which has the effect of rendering industrial action more difficult. The current position is that the TULRCA now contains a comprehensive and moderately restrictive regime regulating trade unions and their activities.

At this juncture, it is opportune to ask ourselves what trade unions are 'for' in the contemporary context. Bearing in mind the rapid decline in trade union membership from 13.2 million members in 1979 to just 6.865 million members in 2016/17³ – a process known as deunionization⁴ with the concomitant diminution in the percentage of workers in the UK covered by collective agreements⁵ – the process referred to as decollectivization – one must enquire whether trade unions continue to be relevant today in the context of the UK's service-based economy.⁶ It is widely understood that trade unions perform a

² Report of the Royal Commission on Trade Unions and Employers' Associations 1965–1968 (London, HMSO, Cmnd 3623).

³ See the 2016/17 annual report of the Certification Officer at p. 23, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629399/Cert_Off_An_n_Rep_2016-2017.pdf (last visited 15 May 2018).

⁴ On the decline in trade union membership in the UK and internationally, see A. Charlwood, 'The New Generation of Trade Union Leaders and Prospects for Union Revitalisation' (2004) 42 *British Journal of Industrial Relations* 379; D. Blanchflower, 'International Patterns of Union Membership' (2007) 45 *British Journal of Industrial Relations* 1; and J. T. Addison, A. Bryson, P. Teixeira, and A. Pahnke, 'Slip Sliding Away: Further Union Decline in Germany and Britain' (2011) 58 *Scottish Journal of Political Economy* 490.

⁵ See pp. 19–20 and 36 of 'First Findings from the 2004 Workplace Employment Relations Survey 2004', available at <http://webarchive.nationalarchives.gov.uk/20090609034232/http://www.berr.gov.uk/files/file11423.pdf> (last visited 15 May 2018) and W. Brown, 'The Contraction of Collective Bargaining in Britain' (1993) 31(2) *British Journal of Industrial Relations* 189.

⁶ See section 1.2.1. In the private sector, trade union membership is sitting at only 13.5% and in the public sector, the figure has now dropped to 51.8%: see page 5 of the Department for Business, Energy and Industrial Strategy Trade Union Membership 2017 Statistical Bulletin, June 2018 at

number of roles, and as observed by Ewing, the following five functions are recognized as the most significant:

- (1) The service function;
- (2) The representation function;
- (3) The regulatory function;
- (4) The government function; and
- (5) The public administration function.

Consider the following extract:

K. Ewing, 'The Function of Trade Unions' (2005) 34 *Industrial Law Journal* 1, 3-5

... A *service function*... involves the provision of services and benefits to members [in] two forms. One is the friendly society sense in the form of benefits such as health and unemployment benefits, modernised to include discount insurance or car hire... The other is professional services, notably legal advice and representation to help with problems at work, accidents on the way to work, or problems unrelated to work... A *workplace representation function* [entails the] represent[ation of] the interests of the employees in the workplace. This may take the form of individual representation... [or] collective representation in which case the representation may be close to the regulatory function of the trade union. Collective representation may take several forms, including consultation and bargaining on behalf of the workforce as a whole, members and non members alike... The *regulatory function*... acknowledges that trade unions are involved in a process of rule-making that extends beyond their members [which]... can be done directly through multi-employer collective bargaining, such as the Joint Industrial Councils which set terms and conditions for an industry or sector, and indirectly through regulatory legislation which trade unions play a part in securing. So far as the regulatory function of collective bargaining is concerned... [rates will be set] not only for non union members but also for enterprises where the union may not be recognised and may not have any rights of collective representation... The *governmental and public administration functions* [reflect the] need [of trade unions] to engage with government in order to secure legislation that will enable them to perform their other functions.⁷ They also need to engage with government in order to perform their regulatory function... the governmental and public administration functions have two dimensions. The first entails the organised political representation of working people, both as a means of restraining the power of the State and a means of harnessing the power of the State. But secondly, these functions also entail trade unions being engaged in the process of government in the sense of being involved in the development, implementation and delivery of government policy.

Ever since the nineteenth century, trade unions have focused their energies on the workplace representation and regulatory functions in order to further, and promote, the social practice of collective bargaining. As such, the service function identified in the Ewing extract was routinely treated as secondary to the commitment pledged to the process of collective bargaining through the deployment of the workplace representation and regulatory functions. This traditional emphasis on the social system of collective bargaining is attributable to the historical, and once-pervasive, industrial relations philosophy of 'collective laissez-faire',⁸ which was also known as 'voluntarism'.⁹ The theory underpinning voluntarism was that employers' organizations and trade unions would voluntarily come together to negotiate with one another over employment terms and conditions, resulting in a collective agreement. The law's contribution to this 'voluntarist' system of industrial relations was twofold. First, legislation performed an

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/712543/TU_member_ship_bulletin.pdf (last visited 26 July 2018).

⁷ For a discussion of the decline in the governmental and public administration functions of the trade unions, see K. D. Ewing, 'The Importance of Trade Union Political Voice: Labour Law Meets Constitutional Law' in A. Bogg and T. Novitz, *Voices at Work* (Oxford, OUP, 2014) 277, 287-292.

⁸ See O. Kahn-Freund, 'Legal Framework' in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 42, 53. The most powerful exposition of the virtues of collective bargaining is found in O. Kahn-Freund, 'Labour Law' in *Law and Opinion in England in the 20th Century* (London, Stevens, 1959).

⁹ See A. Flanders, 'The Tradition of Voluntarism' (1974) 12 *British Journal of Industrial Relations* 352.

auxiliary role in the sense that it offered ‘support for the autonomous system of collective bargaining ... by providing norms and sanctions to stimulate the bargaining process itself, and to strengthen the operation, that is promoting the observance of concluded agreements.’¹⁰ Secondly, the phenomenon of ‘legal abstentionism’ ensured that there was no such thing as a statutory framework of substantive rules governing terms and conditions of employment that supplemented those provided by the parties themselves or the content of the collective agreement. As such, there was a paucity of legal support for individual employment rights and the law had little or nothing to say about such substantive rights. In light of the fact that statutory employment rights require to be enforced before a court and adjudicated upon by the judiciary, this was perhaps no bad thing. In the words of Winston Churchill:

W. Milne-Bailey, *Trade Union Documents* (London, Bell, 1929) 380-1

It is not good for trade unions that they should be brought in contact with the courts, and it is not good for the courts. The courts hold justly a high and, I think unequalled prominence in the respect of the world in criminal cases, and in civil cases between man and man, no doubt they deserve and command the respect of all classes in the community, but where class issues are involved, it is impossible to pretend that the courts command the same degree of general confidence. On the contrary, they do not, and a very large number of our population has been led to the opinion that they are, unconsciously no doubt, biased.

Despite the unflinching focus of trade unions on the collective bargaining process, the decline in trade union power – see Table B.1 - and the resultant phenomenon of decollectivization¹¹ over the past forty years, have taken their toll on the orientation of the primary relevance of the five traditional trade union functions. The impact has been an increase in the relevance of the service, governmental and public administration functions, with a consequential decrease in importance of the workplace representation and regulatory functions.¹² This has been accompanied by the demise of ‘legal abstentionism’, with the wholesale emergence of statutory employment protection laws to fill in the gaps left by the decrease in the number of workers covered by collective agreements, i.e. decollectivization.¹³

Table B.1 Union decline, 1960-2010

	<i>Peak year (or earlier)</i>	<i>Peak</i>	<i>2010</i>	<i>% Change since peak</i>	<i>Rank</i>
United States (US)	1960	30.9	11.4	-63.1	5
Austria (AT)	1960	67.9	28.4	-56.8	6
The Netherlands (NL)	1960	40.0	19.3	-50.8	7
Switzerland (CH)	1960	36.1	17.2	-52.4	8
Norway (NO)	1961	60.8	54.8	-9.9	21

¹⁰ O. Kahn-Freund, ‘Industrial Relations and the Law: Retrospect and Prospect’ (1969) 7 *British Journal of Industrial Relations* 301, 302. See also O. Kahn-Freund, ‘Legal Framework’ in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 42, O. Kahn-Freund, ‘Labour Law’, in O. Kahn-Freund, *Selected Writings* (London, Stevens & Sons, 1978) 1 and O. Kahn-Freund, ‘Intergroup Conflicts and their Settlement’, in O. Kahn-Freund, *Selected Writings* (London, Stevens & Sons, 1978) 41.

¹¹ See W. Brown, ‘The Contraction of Collective Bargaining in Britain’ (1993) 31 *British Journal of Industrial Relations* 189, S. Milner, ‘The Coverage of Collective Pay-Setting Institutions in Britain, 1895-1990’ (1995) 33 *British Journal of Industrial Relations* 69, W. Brown, D. Nash, and S. Oxenbridge, ‘The employment contract: from collective procedures to individual rights’ (2000) 38 *British Journal of Industrial Relations* 611, and D. Blanchflower, ‘International Patterns of Union Membership’ (2007) 45 *British Journal of Industrial Relations* 1.

¹² K. Ewing, ‘The Function of Trade Unions’ (2005) 34 *Industrial Law Journal* 1, 20. See also, G. Lester, ‘Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 329.

¹³ See M. O’Sullivan, T. Turner & J. Wallace, ‘Is Individual Employment Law Displacing the Role of Trade Unions?’ (2015) 44 *Industrial Law Journal* 222, 227-232.

Japan (JP)	1964	35.5	18.4	-48.2	9
France (FR)	1969	22.2	7.9	-64.4	2
Australia (AU)	1976	50.2	18.0	-64.4	4
Italy (IT)	1976	50.5	35.5	-29.7	15
United Kingdom (UK)	1978	51.8	27.1	-47.7	11
Ireland (IE)	1978	64.0	36.6	-42.8	13
New Zealand (NZ)	1980	69.1	20.8	-69.9	1
Portugal (PT)	1980	54.8	19.3	-64.8	3
Greece (GR)	1980	39.0	25.4	-34.9	14
Spain (ES)	1980	18.7	15.6	-16.6	19
Denmark (DK)	1983	80.8	68.5	-24.8	16
Canada (CN)	1984	35.9	30.0	-16.4	18
South Korea (SK)	1989	18.6	9.7	-47.8	12
Germany (DE)	1991	36.0	18.6	-48.3	10
Finland (FI)	1993	80.7	70.0	-13.3	20
Sweden (SE)	1994	87.4	68.9	-21.2	17
Belgium (BE)	1995	55.7	50.6	-9.2	22

Source: J. Pontusson, 'Unionization, Inequality and Redistribution' (2013) 51 *British Journal of Industrial Relations* 797, 800.
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The process of decollectivization is partly attributable to the structural changes in the British economy that we identified in Chapter 1,¹⁴ i.e. the change in the UK from a manufacturing-based economy to a service-based economy. However, it is also partly attributable to the phenomenon whereby status has replaced class as the central element of an individual's sense of identity. As such, calls to protect the working class have less resonance with working individuals than calls to protect status inequalities such as sex, race and sexual orientation discrimination.¹⁵ Decollectivization can also be put down to the transformative effects of globalization, the adjustments to the labour market wrought by the increasing pace of technological change and the development of new flexible modes of production:

A. Charlwood, 'The New Generation of Trade Union Leaders and Prospects for Union Revitalization' (2003) 42 *British Journal of Industrial Relations* 379, 384

The result of shifts in the environment over the last twenty years, and the union organizational response to these shifts, is that union leaders today are faced with a particularly harsh and toxic climate with limited room to make strategic choices about the future. Their bargaining power in most industries and firms is minimal. They are constrained by tough legal restrictions. [Owing to the secular decline of Marxist and socialist ideologies, t]hey lack the ideological resources that sustained earlier generations during periods of difficulty. Political changes mean that their privileged access to the state has been withdrawn ... The organizational form of unions acts as a serious constraint on the ability of union leaders to develop alternative strategies. As a result, union membership levels and bargaining coverage are at their lowest levels since 1940 (Milner 1995). Despite the introduction of the 1999 Employment Relations Act to facilitate union recognition, the number of new recognition agreements was in decline at the start of 2003 (TUC 2003). The scope, importance and influence of collective bargaining in workplaces where it is still practised have diminished dramatically (Oxenbridge *et al.* 2003: 326–8). Unions do not deliver

¹⁴ See section 1.2.1.

¹⁵ See M. Hechter, 'From Class to Culture' (2004) 110 *American Journal of Sociology* 400.

greater wage equality in unionized workplaces established after 1980 (Gosling 1998; Charlwood 2003), so one edge of the union 'sword of justice' is gradually corroding.¹⁶

Amongst other points, this passage yields the insight that deunionization and decollectivization are also a product of the unmitigated political assault on the privileges of the unions over the past forty years. These privileges had been built up steadily over the course of the late nineteenth and twentieth centuries.¹⁷ The political campaign against trade unions – which was inherently suspicious of their hard-won power and privileges – tapped into the philosophy of neoliberal commentators who painted union practices as monopolistic, anti-liberal and anti-democratic:

F. A. Hayek, *The Constitution of Liberty* (London and New York, Routledge Classics, 2006) 233-8

Public policy concerning labor unions has, in little more than a century, moved from one extreme to the other... they have become uniquely privileged institutions to which the general rules of law do not apply. They have become the only important instance in which governments signally fail in their prime function—the prevention of coercion and violence ...The acquisition of privilege by the unions has nowhere been as spectacular as in Britain, where the Trade Disputes Act of 1906 conferred 'upon a trade union a freedom from civil liability for the commission of even the most heinous wrong by the union or its servant, and in short confer[red] upon every trade union a privilege and protection not possessed by any other person or body of persons, whether corporate or incorporate'... Everywhere the legalization of unions was interpreted as a legalization of their main purpose and as recognition of their right to do whatever seemed necessary to achieve this purpose—namely, monopoly. More and more they came to be treated not as a group which was pursuing a legitimate selfish aim and which, like every other interest, must be kept in check by competing interests possessed of equal rights, but as a group whose aim—the exhaustive and comprehensive organization of all labor—must be supported for the good of the public ... the coercion which unions have been permitted to exercise contrary to all principles of freedom under the law is primarily the coercion of fellow workers. Whatever true coercive power unions may be able to wield over employers is a consequence of this primary power of coercing other workers; the coercion of employers would lose most of its objectionable character if unions were deprived of this power to exact unwilling support...[Furthermore, the activities of the unions in the field of wage policy] are... economically very harmful and politically exceedingly dangerous. They are using their power in a manner which tends to make the market system ineffective and which, at the same time, gives them a control of the direction of economic activity that would be dangerous in the hands of government but is intolerable if exercised by a particular group. They do so through their influence on the relative wages of different groups of workers and through their constant upward pressure on the level of money wages, with its inevitable inflationary consequences...

The economic arguments against trade unions are grounded in the theory that they distort markets in the interests of lofty ideals of 'justice', duly extracting sectional concessions by increasing wage rates above the threshold that the market would naturally set wage levels. As such, they are branded as anti-competitive cartels or 'combinations'. It is contended that unions and their activities damage the economy by depressing the supply of labour below the competitive level. Moreover, the proposition that the solidarity engendered by trade unions serves to increase productivity is rejected by such commentators on theoretical grounds:

R. Posner, 'Some Economics of Labor Law', (1984) 51 *University of Chicago Law Review* 988, 999–1001

[It is claimed that unions increase workforce productivity] in various ways[, e.g.] by providing a vehicle for collecting, and communicating to the employer, workers' complaints about wages and working conditions. In the absence of such a vehicle... workers might be afraid to voice their complaints, and the employer would learn of them only indirectly and belatedly, by observing a higher quit rate. Another example: unions invariably press for inclusion, in any collective-bargaining contracts that they negotiate,

¹⁶ Writer's annotations appear in square brackets throughout this chapter.

¹⁷ See F. Raday, 'The Decline of Union Power – Structural Inevitability or Policy Choice?' in J. Conaghan, R. M. Fischl, and K. Klare (eds.) *Labour Law in an Era of Globalization* (Oxford, OUP, 2002) 353.

of a provision forbidding management to fire workers except for good cause, and requiring it, when it lays off workers because of an economic downturn, to lay them off in reverse order of seniority (i.e., juniors first). When such job security is lacking... the older, more experienced workers may—it is argued—be reluctant to share their know-how with the younger, newer employees, fearing that if they do the younger employees will then be competing for their jobs. As a result... productivity is thought to suffer. Although some empirical support has been marshaled for this productivity-enhancement theory of unionization, the theory is extremely hard to accept. It is inconsistent with the fundamental assumption of economics: that people, in this case employers, are rational profit or utility maximizers. Although this assumption may not hold true in all settings, the behavior of business employers towards their employees is one setting where it probably does. If granting his employees tenure will increase their productivity, the rational employer will do so, for this will reduce his costs of production. Even if the whole productivity gain is paid to the employee in the form of a higher wage, the employer will be better off. He will have lower total costs than his competitors and will therefore be able to expand his output relative to theirs and increase his profits. Even if only a single employer in a competitive industry tumbled to the advantages of granting tenure, competition would force the others to follow suit. And so with encouraging workers to complain rather than waiting for them to quit: the rational employer will encourage them to complain, by cash rewards or whatever it takes, if worker turnover is costly to him. The proposition that unions enhance productivity also flies in the face of massive, if unsystematic, evidence pointing to the opposite conclusion.¹⁸

Furthermore, empirical studies would suggest that a unionized workplace is not necessarily more productive, and that unionization has a negative impact on profitability, firm-specific investment and firm growth:

B. Hirsch, 'Unions, dynamism, and economic performance' in C. L. Estlund and M. L. Wachter, *Research Handbook on the Economics of Labor and Employment Law* (Liverpool, Edward Elgar, 2012) 115-36

... [empirical] evidence indicates that union-productivity effects in the US are not only variable, but on average close to zero ... This conclusion is reinforced in other surveys. The authors of a meta-analysis of the unions-productivity literature conclude that the average effect in the US is very small but positive, while negative in the UK ([C. Doucouliagos and P. Laroche, 'What do Unions Do to Productivity? A Meta-Analysis' (2003) 42 *Industrial Relations* 650]. Interestingly, a survey of labor economists at leading universities asking for an assessment of the union effect on productivity produced a median response of zero and mean of 3.1 percent ... Evidence on unions and profits is reasonably clear-cut, indicating lower profitability in union than in nonunion companies. This is not surprising as long as union-productivity (output) effects do not fully offset union increases in compensation ... Unions increase wages and benefits for their members, substantially so in many sectors of the economy. These union premiums are not offset (or not offset fully) by higher productivity. Rather, average union-productivity effects within establishments and firms are close to zero, although likely positive ... Because union wage premiums are not offset by productivity enhancements, profitability is lower in union companies, whether measured by accounting profits or market valuation measures. Investors' risk-adjusted expected returns must equalize, which occurs through a lower market valuation of equity in unions than in nonunion companies. Union premiums cannot be funded (or fully funded) from sustained super-normal profits because such profits are rare in a highly competitive economy. A principal way that wage premiums are funded is through appropriation of a share of the normal returns from prior investment in long-lived physical and innovative capital (so-called quasi-rents). In response to the tax on the returns to long-lived capital, union companies invest less in physical capital and R&D. Investment is reduced further due to lower profits among union firms, which limits the ability to finance investment internally. Lower investment in physical and innovative capital by union companies has led to slower growth in productivity, sales, and employment ... In the US economy of today, the macroeconomic (i.e. aggregate) effects of private sector unionism are likely to be minimal.

¹⁸ See also R. Posner, *Economic Analysis of Law*, 8th edn. (New York, Aspen Publishers, 2011) 335–342.

For the economic counter-arguments, the seminal work of Freeman and Medoff in the 1980s is undoubtedly the most influential.¹⁹ Freeman and Medoff's study emphasized the extent to which trade unions had a role to play in enhancing and promoting worker voice. They found that the improved communication flows between the worker collective and the employer which unions engendered, coupled with the concomitant dialogue between labour and management, resulted in beneficial productivity-enhancing effects. Freeman and Medoff also argued that the costs to the employer of engaging with trade unions were more than compensated by the positive impact on productivity. Workers would be more readily committed 'to invest in firm-specific human capital, [which would] ...outweigh the market distortions brought about by wage monopolization'.²⁰ As such, Freeman and Medoff's economic case in favour of trade unions is that they are economically useful insofar as they improve the working conditions of their members, assist in increasing the wage rate, and incentivise employees to engage in continuous training to upskill and reskill which indirectly benefits their employers through greater productivity and enhanced labour performance. The empirical work conducted by Bulkley and Myles would also appear to substantiate the claim that there are positive effects on worker effort in a unionized workplace:

G. Bulkley and G. D. Myles, 'Trade Unions, Efficiency Wages, and Shirking' (1996) 48 *Oxford Economic Papers* 75, 87

The popular perception that unions lead to reduced effort was confirmed for a monopoly union model with perfect monitoring by Bulkley (1992). In contrast, when imperfect monitoring is introduced, this conclusion is not generally true. For example with spot-check monitoring and a union that can specify only the wage rate, a higher effort level will result in the presence of a monopoly union than in a competitive labour market. If the effort of each worker is measured by a noisy signal, a union that can choose both the wage rate and the cut-off level of the signal will set a signal level below that which maximises effort, given the wage, but since a higher wage will be set, effort may again be greater than in the absence of the union. These results highlight the very different outcomes that arise under perfect and imperfect monitoring. The puzzle... that unions seem to reduce effort but raise output is explained by Freeman and Medoff as a result of improved communication flows. The results obtained in this paper suggest another explanation. Although some aspects of effort which are readily observed and contracted over may fall under unionisation other less easily observed aspects of effort may actually increase, which can result in the increase in output which Freeman and Medoff document.

In another study, the economic performance of unionized firms was compared with that of similarly situated non-unionized firms. The findings of this research conducted by Brown, Deakin, Hudson, Pratten, and Ryan²¹ suggested that unions had economically beneficial effects. Their findings did not show that the firms that had withdrawn from collective bargaining enjoyed any competitive advantage over those that had retained such bargaining arrangements. Deakin and Wilkinson have also rejected orthodox accounts which cast strong trade unions as drivers of higher unemployment, higher inflation and unstable and collapsing product prices:

S. Deakin and F. Wilkinson, 'The Economic Case for the Trade Union Reform Bill' in K. Ewing, *The Right to Strike: From the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006* (Liverpool, Institute of Employment Rights, 2006) 290

Is it possible to combine freedom for trade unions with low unemployment and stable prices? For the past thirty years or more, the conventional wisdom had been that this is impossible. Curbs on union power have been seen as the price that has to be paid to reducing inflation, and high levels of

¹⁹ R. Freeman and J. Medoff, *What Do Unions Do?* (New York, Basic Books, 1984).

²⁰ S. Deakin, 'Labor and Employment Laws' in P. Cane and H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford, OUP, 2010) 308, 314.

²¹ W. Brown, S. Deakin, M. Hudson, C. Pratten, and P. Ryan, *The Individualisation of Employment Contracts in Britain*, Employment Relations Research Series No. 4, London, Department of Trade and Industry, available at <http://webarchive.nationalarchives.gov.uk/20121212135622/http://www.bis.gov.uk/files/file11633.pdf> (last visited 15 May 2018).

unemployment (even today they are high in historical terms) have been tolerated for the same reason. Is this inevitable? Our analysis suggests not. There have been periods in the past when high and rising levels of union membership were combined with price stability and full employment, the 1950s being the most recent. However, this period was the result of a rare, beneficent conjunction of internal and external forces. For most of the 20th century, the British economy was subject to periodic exogenous shocks, the result of shifts in the global terms of trade, and union strength rose and fell in line with the economic cycle.

Recent economic studies have shown that the drop off in trade union membership would appear to have co-incided with a reduction in the share of the GDP of the UK and other developed countries that is allocated to wages with a concomitant increase in the share attributed to capital. There is an argument that this rebalancing of the division between capital and labour with a fall in the capital/labour ratio (aka 'capital shallowing') may be attributable to the decrease in the bargaining strength and industrial muscle of the trade unions.²² For example, in the period when trade union power was stable between 1900 and 1990, the share of the returns between labour and capital was a constant at around a 70/30% split. However, since 1990, there has been an adjustment in the labour share, which has settled to an approximate 60/40% ratio.²³ Although it would be premature, or misconceived at worst, to attribute this increase in the cost of capital and fall in the cost of labour to trade union weaknesses, without additional evidence, what these statistics do suggest is that further research is necessary to establish whether there is in fact any correlation.²⁴

Equipped with some of the historical background to the development of trade unions, their primary functions, and the various social and economic arguments against them and in their favour, in the next section, we turn to an examination of the legal significance attached to the institution of the trade union in UK labour law, as well as the connection between their role and freedom of association.

Reflection points

1. Which of the five functions of trade unions discussed earlier in this section, do you think are the most relevant in the modern era? Give reasons for your answer.
2. Consider the economic case against trade unions. In your opinion, are these arguments convincing? Give reasons for your answer.
3. If trade unions distort the market, why do you think they are tolerated by the legal and political system in the UK?

Additional reading on collective labour law and trade unions

1. A. Flanders, 'The Tradition of Voluntarism' (1974) 12 *British Journal of Industrial Relations* 352.
2. P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983), chapter 1.
3. R. Freeman and J. Medoff, *What Do Unions Do?* (New York, Basic Books, 1984).
4. H. Collins, 'The Productive Disintegration of Labour Laws' (1997) 26 *Industrial Law Journal* 295.
5. P. Levine, 'The Legitimacy of Labor Unions' (2001) 18 *Hofstra Labor & Employment Law Journal* 529.
6. E. Heery and M. Simms, 'Constraints on union organising in the United Kingdom' (2008) 39 *Industrial Relations Journal* 24.
7. E. Heery, 'The representation gap and the future of worker representation' (2009) 40 *Industrial Relations Journal* 324.

²² J. P. Pessoa and J. Van Reenen, "The UK Productivity and Jobs Puzzle: Does the Answer Lie in Wage Flexibility?" (2014) 124 *The Economic Journal* 433.

²³ L. Karabarbounis and B. Neiman, "The Global Decline of the Labor Share" (2014) 129 *The Quarterly Journal of Economics* 61, 71

²⁴ See J. P. Pessoa and J. Van Reenen, "The UK Productivity and Jobs Puzzle: Does the Answer Lie in Wage Flexibility?" (2014) 124 *The Economic Journal* 433, 435.

8. S. Procter and M. Rowlinson, 'From the British worker question to the impact of HRM: understanding the relationship between employment relations and economic performance' (2011) 43 *Industrial Relations Journal* 5.
9. G. Lester, 'Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 329.
10. P. Davies, 'Efficiency Arguments for the Collective Representation of Workers: A Sketch' in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl, *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015) 367.
11. E. McGaughey, 'Votes at Work in Britain: Shareholder Monopolisation and the 'Single Channel'' (2018) 47 *Industrial Law Journal* 76, 93-103 and 106.

B.2 FREEDOM OF ASSOCIATION, STATUS, LISTING AND INDEPENDENCE OF TRADE UNIONS

Our focus now turns to the rules contained in the TULRCA that regulate the legal status of trade unions, e.g. the extent to which statute prescribes that trade unions are legal persons distinct from their members. In the following section, the statutory procedures in place for the listing of an organization as a trade union are placed under the microscope. Finally, we address the principles applicable in order for a trade union to be recognized as independent from management.

B.2.1 Freedom of association and legal status

The starting point for our discussion in this section is to ask ourselves whether it is legitimate for groups of workers to come together to form trade unions. This question is distinct from that which probes whether there is a role for trade unions, or whether they are effective in enhancing the rights of their members.²⁵ Essentially, it is a question about the legitimacy of the social practice of collective association via the auspices of trade unions. Within orthodox liberal philosophy, the practice of workers coming together to associate is undoubtedly perceived to be legitimate, since it is motivated by the concern to facilitate the exercise of an individual's liberty and autonomy against the authority and coercion of the state:

J. S. Mill, *On Liberty* (New York, Cosimo Classics, 2005) 16

... from this liberty of each individual follows the liberty ... of combination among individuals; freedom to unite for any purpose not involving harm to others: the person combining being supposed to be of full age and not forced or deceived.

To that extent, freedom of association can be viewed as a fundamental right connected to liberty and autonomy as values. Once this has been accepted, a series of questions can be posed which probe the proper scope, content and basis of this freedom, when located in law:

A. Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in A Bogg, C. Costello, A. C. L. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015) 104-105

... (i) what is the normative basis of freedom of association? Freedom or some other value such as solidarity, equality or civic participation? If freedom, should we understand freedom in terms of negative liberty, positive liberty, non-domination²⁶ or 'capabilities'? (ii) Does freedom of association encompass a

²⁵ The evidence is surveyed in T. Colling, 'What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights' (2006) 35 *Industrial Law Journal* 140, 160. Here, it is argued that trade union bargaining has resulted in working conditions that are higher than the statutory minimum.

²⁶ On the role of non-domination' here, see A. Bogg and C. Estlund 'Freedom of Association and the Right to Contest: Getting Back to Basics' in A Bogg and T Novitz (eds), *Voices at Work* (Oxford, OUP, 2014) 141; A Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 391; G. Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33(3) *International Journal of Comparative Labour Law and Industrial Relations* 365; D Cabrelli and R Zahn 'Civic Republican Political Theory and Labour Law' in V. Mantouvalou and H. Collins, (eds.) *Philosophical Foundations of Labor Law* (Oxford,

negative freedom to disassociate? If it does, what is its extent? Does negative freedom to disassociate relate only to membership as such, or can it be asserted as a freedom not to bargain collectively or a freedom not to strike? (iii) What degree of 'thickness' does freedom of association display? Does it extend to certain 'activity-rights' such as the right to collective bargaining or the right to strike? What package of freedoms, claim-rights, powers and immunities does freedom of association encompass? To the extent that it grounds certain claim-rights, which duties are correlative to those claim-rights? (iv) Who are right-holders under freedom of association? Individuals? If individuals may those rights be confined to those working under particular kinds of personal employment contract or should it extend to persons as such? Are there collective rights for groups such as trade unions? If so, do corporations also enjoy collective rights under freedom of association? (v) Under what circumstances can freedom of association be limited? (vi) Should freedom of association be constitutionalized? Should we envisage constitutionalizing only its 'core' elements? If it is constitutionalized, should its interpretation be entrusted to constitutional courts? Or should it be safeguarded in the ordinary legislative process and be subject to popular democratic control?...

In the model of workplace representational participation found in the UK today, it is fair to say that the trade unions occupy a central position. This traditional 'single channel' model we explored in Chapter A of the Online Resource Centre.²⁷ is descriptive of a framework that conferred a monopoly in favour of trade unions for the purposes of engaging in collective bargaining with employers and employers' associations and collective industrial action. At the outset of this chapter, we noted how two of the principal functions of the trade unions related to workplace representation, namely the 'representation' and 'regulatory' functions.²⁸ The received notion of the trade union engaged in such representation is to a large degree indelibly linked to the individual's freedom of (collective) association. Seen from this perspective, the trade union can be understood as an institution that co-ordinates the ability of individuals to join together to further their interests. By joining together, working individuals are afforded 'voice' and are more likely to be heard through strength in numbers.²⁹

The philosophical conception of the liberty to collectively associate expounded by John Stuart Mill now finds its legal expression in various international and supra-national conventions. For example, Article 11 of the European Convention on Human Rights ('ECHR'), Article 12 of the European Union Charter of Fundamental Rights ('EUCFR') and Convention No. 87 of the International Labour Organization ('ILO') expressly permit workers to associate with one another to protect their interests. As such workers are free to form and join trade unions:³⁰

Article 11 ECHR Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12 EUCFR Freedom of assembly and of association

OUP, 2018, forthcoming); D Cabrelli and R Zahn, 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 339.

²⁷ See para A.1.1.

²⁸ K. Ewing, 'The Function of Trade Unions' (2005) 34 *Industrial Law Journal* 1, 20.

²⁹ See P. Levine, 'The Legitimacy of Labor Unions' (2001) 18 *Hofstra Labor & Employment Law Journal* 529 and A. Bogg and T. Novitz (eds), *Voices at Work – Continuity and Change in the Common Law World* (Oxford, OUP, 2014).

³⁰ This is subject to one principal exception, namely the police in England and Wales, who are prohibited from forming and joining unions: Police Act 1996, s. 64. For a challenge to this embargo based on an alleged infringement of the Article 11 ECHR freedom of association, see *Wandsworth LBC v Vining* [2018] ICR 499.

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise Convention, 1948

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved by administrative authority.

However, it should be stressed that freedom of association may occasionally be 'trumped' by other fundamental freedoms. For example, in *Sindicatul "Pastorul cel Bun" v Romania*,³¹ the Grand Chamber of the European Court of Human Rights ('ECtHR') held that the freedom of a break-away dissident group of Romanian Orthodox priests to form a trade union must give way to the freedom of religion of the Romanian Orthodox Church. The justification for this approach was that to permit the trade union to be registered would pose a grave risk to the religious autonomy of the Romanian Orthodox Church. On other occasions, the Article 11 ECHR freedom of association may be subject to the state's wide margin of appreciation in ensuring that a fair balance is struck between this freedom and other competing interests. For example, in the ECtHR's decision in *Unite the Union v UK*,³² it was ruled that the abolition of the Agricultural Wages Board did not represent an infringement of the Article 11 freedom of association in light of the margin of appreciation afforded to the UK as a state. That was notwithstanding that the effect of its abolition was to remove the only reliable legal mechanism for the promotion of collective bargaining in the agricultural sector.³³

The ability of workers to associate and join together in trade unions is reflected in the definition of the legal status of a trade union in section 1 of the TULRCA.

Section 1 Meaning of 'trade union'

In this Act a 'trade union' means 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 workers of that description or those descriptions and employers or employers' associations; or
- (b) which consists wholly or mainly of—

³¹ [2014] IRLR 49.

³² [2017] IRLR 438.

³³ This decision has been described as a 'regressive decision' by Arabadjieva: see K. Arabadjieva, 'Another Disappointment in Strasbourg: *Unite the Union v United Kingdom*' (2017) 46 *Industrial Law Journal* 289, 302.

- (i) constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), 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.

This statutory definition recognizes that a trade union must be an 'organization', i.e. an entity consisting of an association of more than one person. The organization may be permanent or temporary. Moreover, the organization must be wholly or mainly comprised of workers of one description or more than one description. Owing to the fact that the statutory definition of a 'worker' excludes individuals providing services to professional clients,³⁴ it has been held that the Law Society could not be a trade union.³⁵ Finally, it is explicitly provided that the principal purposes of the organization must include the regulation of employment relations, i.e. the relationship between workers of that description or descriptions and employers or employer's associations. In *Akinosun v The Certification Officer*,³⁶ the EAT ruled that whether such regulation of employment relations is one of the principal purposes of the organization is a question of fact, rather than simply to be gleaned from the organization's rule-book. Moreover, the focus is on the collective nature of the organization. As such, if a body's purpose is to represent individual employees in grievance or disciplinary proceedings, it will not qualify as a trade union:

***Akinosun v The Certification Officer* [2013] UKEAT 0180_13_0507 at para [5]³⁷
Mr Justice Langstaff (P):**

... the definition looks at the collective work done by the association rather than the work of a body or particular individuals within it. The regulation of relations is between groups, workers on the one hand and employers or employers' associations on the other. Therefore, an organisation which did not include such a purpose but which did exist to provide representation at hearings internal to the employer would not, purely by reason of that alone, be a trade union. There would be nothing of the collective about it. Thus it is to be expected that any organisation seeking certification will, the burden being on it, have to produce sufficient evidence to show that a purpose which is a principal purpose of the organisation is collective in nature, whatever other individual purposes it may be established to service.

What is particularly apparent from this extract and the terms of section 1 of the TULRCA is how central the notion of the collective representation and regulatory functions remain to the idea of a trade union. This definition will cover trade unions intending to bargain with employers or employers' associations³⁸ at plant or sectoral level, e.g. in respect of a particular premises or factory, or in respect of a particular sector of industry, e.g. the construction and demolition sector.

³⁴ See s. 296(1)(b) of the TULRCA and section 4.2.1. See A. Bogg and R. Dukes, "The Contract of Employment and Collective Labour Law" in M. Freedland et al (eds), *The Contract of Employment* (Oxford, OUP, 2016) 96 and M. Freedland and N. Kountouris, 'Some Reflections on the 'Personal Scope' of Collective Labour Law' (2017) 46 *Industrial Law Journal* 52 for a comprehensive treatment of those individuals covered by UK collective labour law.

³⁵ *Carter v Law Society* [1973] ICR 113.

³⁶ [2013] IRLR 937.

³⁷ Sourced from BAILII at [http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2013/0180_13_0507.html&query=\(akinosun\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2013/0180_13_0507.html&query=(akinosun)) (last visited 15 May 2018).

³⁸ The principal example of an employers' association is the Confederation of British Industry ('CBI'), which is a central business lobbying group in the UK, on which, see <http://www.cbi.org.uk/> (last visited 15 May 2018). Section 122 of the TULRCA defines an employers' association as a permanent or temporary organization consisting wholly or mainly of employers or individual owners of undertakings of one or more descriptions and whose principal purposes include the regulation of employment relations, i.e. relations between employers of that description or those descriptions and workers or trade unions.

As an alternative route, an organisation comprised wholly or mainly of constituent or affiliated organizations fulfilling the same role may be classified as a trade union, i.e. the aforementioned regulation of employment relations, or representatives of such constituents or affiliated organizations whose principal purposes include the regulation of such employment relations or between its constituent or affiliated organizations. This latter provision is sufficiently broad to cover organizations such as the Trades Union Congress ('TUC').³⁹ The TUC is comprised of numerous affiliated trade unions and seeks to further the interests of unions at a national and European level. It also undertakes national-level collective bargaining, i.e. collective bargaining with employers' associations that cover all workers employed in a particular industry or sector throughout the UK.

Once an organization has satisfied the definition in section 1 of the TULRCA, the question then is whether it has legal personality that is separate from its member workers. One can imagine how the law might simply treat a trade union as an unincorporated association, i.e. as a collection of individual members. However, in *Taff Vale Railway Co. Ltd. v Amalgamated Society of Railway Servants*,⁴⁰ whilst reaching the decision that the exact legal status of trade unions was unclear, the House of Lords acknowledged that they could be sued in their own name. Section 10 of the TULRCA now goes further and ascribes a quasi-corporate status on trade unions in the following terms:

10 Quasi-corporate status of trade unions

(1) A trade union is not a body corporate but—

- (a) it is capable of making contracts;
- (b) it is capable of suing and being sued in its own name, whether in proceedings relating to property or founded on contract or tort or any other cause of action; and
- (c) proceedings for an offence alleged to have been committed by it or on its behalf may be brought against it in its own name.

(2) A trade union shall not be treated as if it were a body corporate except to the extent authorised by the provisions of this Part.

(3) A trade union shall not be registered—

- (a) as a company under the Companies Act 2006, or
- (b) under the Friendly Societies Act 1974 or the Industrial and Provident Societies Act 1965; and any such registration of a trade union (whenever effected) is void.

The effect of section 10 is that whilst a trade union is not treated as a body corporate like a private limited liability company by shares, it has the legal capacity to enter into contracts, own property and be sued in its own name, albeit that certain damages awards against a trade union in tort⁴¹ are restricted by section 22(2) of the TULRCA in the following terms:

22 Limit on damages awarded against trade unions in actions in tort ...

(2) In any proceedings in tort to which this section applies the amount which may awarded against the union by way of damages shall not exceed the following limit—

Number of members of union	Maximum award of damages
Less than 5,000	£10,000
5,000 or more but less than 25,000	£50,000
25,000 or more but less than 100,000	£125,000

³⁹ See <https://www.tuc.org.uk/> (last visited 15 May 2018).

⁴⁰ [1901] AC 426.

⁴¹ These statutory monetary limits are subject to two key exceptions, namely tort actions against the trade union for personal injury as a result of negligence, nuisance or breach of duty, and proceedings for breach of duty in connection with the ownership, occupation, possession, control or use of property.

100,000 or more

£250,000

The position in respect of trade union property is governed by section 12 of the TULRCA. This statutory provision directs that property is held in trust in favour of the trade union, rather than its members who have no proprietary interest in such assets. Section 11 of the TULRCA is another immensely significant provision inasmuch as it enables a trade union to engage in its affairs lawfully without fear of breaching the common law rules on restraint of trade. As such, by simply furthering its objects and drawing up its rule-book, the common law rule to be derived from the decision of the House of Lords in *Hornby v Close*⁴² is thereby excluded:

11 Exclusion of common law rules as to restraint of trade

(1) The purposes of a trade union are not, by reason only that they are in restraint of trade unlawful so as—

- (a) to make any member of the trade union liable to criminal proceedings for conspiracy or otherwise, or
- (b) to make any agreement or trust void or voidable.

(2) No rule of a trade union is unlawful or unenforceable by reason only that it is in restraint of trade.

B.2.2 Listing and independence of trade unions

Although there is no legal compulsion for an organization purporting to act as a trade union to be registered as a trade union with a public authority or regulator, if an organization lists itself with the approval of the Certification Officer ('CO'),⁴³ it may apply for a certificate of independence to be issued by the CO in terms of section 6 of TULRCA. Section 981 of the Corporation Tax Act 2010 also furnishes various conditional corporation tax reliefs to listed trade unions. As such, although listing is a voluntary process and governed by sections 2 and 3 of the TULRCA, the ancillary benefits attached to listing ensure that it is an option with broad appeal. These statutory provisions stipulate that if an organization applies for listing in proper terms, the CO must list that organization if it is satisfied that it meets the criteria for a trade union in terms of the definition in section 1 of TULRCA. Section 2 of the TULRCA imposes a duty on the CO to maintain a list of trade unions. If an organization is listed, section 2(4) directs that this is evidence (sufficient evidence in Scotland) that it is a trade union. The CO's annual report furnishes an exposition of the number of bodies listed as trade unions. For example, in 2016/17, there were 137 organizations included on the list.⁴⁴ The CO also has a statutory power to remove organizations from the list in terms of section 4 of the TULRCA.

Once an organization is listed as a trade union, it is entitled to apply for a certificate of independence. This is an entirely voluntary process, but independence status has certain benefits and advantages for trade unions, as follows:

1. First, only an independent union can invoke the statutory recognition procedure prescribed in Schedule A1 to the TULRCA.⁴⁵ Recognition entitles a trade union to engage in collective bargaining on behalf of a group or groups of workers with management; and
2. Secondly, independence is an essential precondition for trade unions and their members to access a whole swathe of protective statutory rights.

Independence status also has the added attraction of assuring the outside world that an organization is not beholden or connected in any way to an employer or employers' association, i.e. that it is not a

⁴² (1867) LR 2 QB 153, 158 per Cockburn CJ.

⁴³ See Chapter 2, section 2.3.5.

⁴⁴

See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629399/Cert_Off_An_n_Rep_2016-2017.pdf at p. 11 (last visited 15 May 2018).

⁴⁵ See Chapter C on the Online Resource Centre, section 2.3.2.

'sweetheart' union. This was an important protection for workers when the practice of the 'closed shop' – where the employer would insist that an individual join a recognized trade union in order to be hired as a worker or employee, or would dismiss the employee if he/she was not a member of such union,⁴⁶ or refused to become such a member - was lawful in the UK.⁴⁷ The statutory definition of 'independence' is laid down in section 5 of the TULRCA:

Section 5 Meaning of 'independent trade union'

In this Act an 'independent trade union' means a trade union which—

- (a) is not under the domination or control of any 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) tending towards such control;

and references to 'independence', in relation to a trade union, shall be construed accordingly.

In its annual report for 2014/15, the CO addresses the specific criteria it applies in evaluating whether an organization ought to be independent. These reflect the jurisprudence of the EAT in *Blue Circle Staff Association v Certification Officer*⁴⁸ and are expressed in the following terms:

Annual Report of the CO 2016/17, 16

The principal criteria which have been used by the [CO] in determining whether or not an applicant union satisfies the statutory definition... appear under the headings: history, membership base, organisation and structure, finance, employer-provided facilities and negotiating record ... Other considerations, such as the effect the issue of a certificate might have on employment relations, may not be taken into account.

It is particularly noteworthy that there is no obligation imposed on the trade union to satisfy the CO that its constitution enables it to engage in industrial action. An illustration of the application of the 'history, membership base, organisation and structure, finance, employer-provided facilities and negotiating record' criteria is set out in Hypothetical A:

Hypothetical A

Danny's Demolishers Ltd. ('the Employer') is the leading demolition company in the UK. It has never recognized a trade union, notwithstanding that over two-thirds of its 2,560 employees are members of a representative organization called the National Union of Demolition Workers ('NUDW'). The NUDW has a 20-year history of affording effective and impartial professional advice and representation to its members in individual grievance and disciplinary hearings and procedures. As part of this process, it has negotiated professionally and profitably with the Employer and other employers in the demolition and construction trade for 15 years. It is well-organized and well-resourced with an approximate annual turnover of £12 million. Its management operations comply with the UK Corporate Governance Code and are wholly independent of any employer in the demolition industry. The NUDW now wishes to engage in collective negotiations with the Employer and other employers in the trade.

⁴⁶ For an example, see the facts of *Rookes v Barnard (No. 1)* [1964] AC 1129.

⁴⁷ The 'closed shop' is no longer lawful in the UK. For example, where an employer dismisses an employee, or makes an employee redundant, owing to the fact that he/she has refused to join a trade union, this is treated as an automatically unfair dismissal in terms of ss. 152(1)(c) and 153 of the TULRCA. Likewise, it is unlawful for an employer to refuse to hire an individual as an employee if the employee refuses to join a recognized trade union: s. 137(1) of the TULRCA. See also *Young, James and Webster v UK* [1981] IRLR 408.

⁴⁸ [1977] 1 WLR 239.

In light of its history, large membership base (we know that it boasts at least 2/3rds x 2,560 members and potentially many more individuals), organization, structure and finance (we know it is unconnected to management and is not vulnerable to, or exposed to the risk of, interference from management),⁴⁹ and its trade record in negotiating with employers, there would appear to be ample justification for the CO to issue a certificate of independence.

If a CO issues a certificate of independence, this is treated as conclusive evidence that the trade union is independent. In certain circumstances, a certificate of independence can have retrospective effect.⁵⁰ Where the CO refuses an application for a certificate, the trade union may appeal the CO's decision on a point of law to the EAT.⁵¹

B.3 THE RIGHTS OF TRADE UNION MEMBERS VIS-À-VIS THE TRADE UNION

We now turn in this section to an in-depth examination of the protections available to members of a trade union in their relations with their trade unions. The more statutory rights afforded to trade union members, the greater the interference in the trade union's ability to govern its own affairs. As such, an overly interventionist stance has a direct negative effect on the autonomy of trade unions and their governance, and curtails their freedom of action. In the UK, the law interferes in the powers of trade unions to exercise and enforce the private rules contained in their rule-books by adopting two distinct techniques. First, statute and the common law shape the actual substance of those rules, e.g. by implying terms through custom and practice,⁵² or by statutorily prescribing a fixed list of reasons for the exclusion or expulsion of members from membership of a trade union.⁵³ Secondly, the courts impose public law constraints on a trade union's enforcement of its rules as regards access to, suspension of, and expulsion from, trade union membership. They do so by subjecting the exercise of union discretion to control through the application of the principles of natural justice.⁵⁴ As such, the union must afford its members a right to be heard at a fair hearing, and not act or take a decision in an arbitrary, capricious or biased manner.⁵⁵ The rate of deployment of these techniques has intensified since the 1970s to the point that trade union autonomy and governance is severely restricted by legal constraints in the modern day. The extent to which this is a justifiable approach is a matter of some debate, particularly since there is the argument that strong trade unions clothed with powerful legal immunities and privileges should be held democratically accountable directly to their members:

H. Collins, *Employment Law*, 2nd edition (Oxford, OUP, 2010), 249

... [A] survey of the law governing the relation between trade unions and their members reveals a pattern of intensive mandatory regulation in the UK. The propriety of this degree of state interference in organisations of workers is constantly challenged by reference to the standard of the [freedom of association/]the social right to organize. No doubt it is correct to be concerned about state interference, for totalitarian governments use such techniques to control workers' movements and to stifle the potential input of trade unions as representative institutions to broader political debate. Although the historical perspective explains the misgivings about state controls over trade unions, it can be suggested that, if organizations of workers are to be recognised as vital ingredients in a new conception of citizenship, these organizations must accept the discipline of public accountability, transparency, and democracy. Instead of union autonomy being sacrosanct, what is more important is that workers' organizations can claim the authority derived from high standards of good internal governance, so that they can claim to be the legitimate representatives in the various mechanisms for setting labour standards at different levels of governance. In other words, an expanded notion of citizenship implies that representative institutions that engage with the broader issues involved should conform to public

⁴⁹ See *Squibb UK Staff Association v Certification Officer* [1979] IRLR 75, 78 per Lord Denning MR.

⁵⁰ *Bone v North Essex Partnership NHS Foundation* [2016] IRLR 295.

⁵¹ TULRCA, s. 9.

⁵² *Heatons Transport (St. Helens) Ltd. v TGWU* [1973] AC 15, 101F per Lord Wilberforce.

⁵³ See s. 174(2) and (3) of the TULRCA.

⁵⁴ *Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175.

⁵⁵ *Roebuck v NUM (Yorkshire Area) No. 2* [1978] ICR 676.

standards. In so far as mandatory regulation guarantees those standards, it should not be criticized simply because it involves state interference with trade unions. On the other hand, if state interference imposes considerable costs on unions and in other ways obstructs their attempts to evolve effective organizations, one must question whether this legislation is inspired by a search for a broader conception of citizenship that embraces the Webbs' ideal of industrial democracy based upon voluntary membership of self-governing trade unions...⁵⁶

One might also argue that the current statutory regime is contrary to the UK's international and ECHR obligations, particularly since in *ASLEF v UK*,⁵⁷ it was iterated that a union's freedom of autonomy is a central component of the freedom of association and the right to form trade unions. In taking the ILO's Convention No. 87⁵⁸ into account in its judgment, the ECtHR pointed towards overly restrictive statutory provisions as having the capacity to flout the terms of Article 11 of the ECHR. Essentially, as will become apparent as the discussion unfolds in this chapter, the difficulties inherent within the system are symptoms of a framework that recognizes *the right to disorganize* as well as the right to organize: in the words of Lord Diplock:

***Cheall v A.P.E.X.* [1983] 2 AC 180, 191B-C**

Lord Diplock:

My Lords, freedom of association can only be mutual; there can be no right of an individual to associate with other individuals who are not willing to associate with him.

Furthermore, as noted by Lorber and Novitz:

P. Lorber & T. Novitz, *Industrial Relations Law in the UK* (Cambridge, Intersentia Publishing Ltd., 2012) 102

... reforms are clearly needed because the system still reflects an out-dated reaction to a closed shop (which has now been abolished) and strong unions (which no longer exist in the same way that they did during the 1970s).

B.3.1 Trade union members' entitlements: the contract of membership and the trade union rule-book

The trade union's rule-book encapsulated in the contract of membership is the lynchpin upon which the relationships between the members of a trade union inter se, and the trade union itself, are regulated. As such, one would assume that the rule-book is treated like any other contract, whose terms, if breached, give rise to legal remedies. However, the legal status of the rule-book has been the subject of debate in the common law. This debate may be attributed to the inherently constitutional character of the rule-book, in the sense that it establishes a series of contractual relationships whilst also serving as the constitution of the trade union itself. This gives rise to two potential approaches to the treatment of the rule-book. First, one technique would be to treat the rule-book as a code going beyond a simple contract, enabling the courts to control the content of the rule-book by subjecting its terms to constraints akin to those found in administrative law.⁵⁹ Secondly, an alternative method would be for the courts to characterize the rule-book as a contract, which must be construed like any other contract in accordance with the common law principles of contractual interpretation, and supplemented by implied terms and custom and practice:

⁵⁶ See also S. Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 24.

⁵⁷ [2007] IRLR 361, 366.

⁵⁸ Freedom of Association and Protection of the Right to Organise Convention, 1948, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 (last visited 26 July 2018).

⁵⁹ See *Breen v AEU* [1971] 2 QB 175, 190F-H per Lord Denning and *Bonsor v Musicians' Unions* [1954] Ch 479, 485-6 per Lord Denning.

***Wise v Union of Shop, Distributive and Allied Workers* [1996] ICR 691, 700D–E**

Chadwick J:

[If a] decision has been made, or [an] election held, in a manner which contravenes the contract into which the member has entered by joining the union[, that is a breach of contract]. Accordingly, as it seems to me, the right of a member to complain of a breach of the rules is a contractual right which is individual to that member; although, of course, that member holds the right in common with all other members having the like right.

The latter ‘contractual’ technique has been established as the orthodox position, albeit that clear traces of the former approach may be detected in the context of disciplinary rules concerning access to, suspension of, and expulsion from, trade union membership. Here, the courts are willing to subject trade union discretion conferred under the rule-book to the tenets of natural justice and general public law constraints. For example, the decisions in *Roebuck v NUM (Yorkshire Area) No. 2*,⁶⁰ *Lee v Showmen’s Guild of Great Britain*,⁶¹ and *Eccleston v NUJ*⁶² are all paradigmatic of judicial intervention aimed at the striking out of rules in the trade union constitution that are contrary to the principles of natural justice that afford members the right to notice of the accusations against them,⁶³ and the right to be heard at a fair hearing with an impartial judge. Furthermore, statute has intervened to override certain contractual terms in the rule-book which are deemed to be contrary to public policy, e.g. specific provisions in the rule-book which oust the jurisdiction of the courts in relation to internal trade union matters:

63 Right not to be denied access to the courts

(1) This section applies where a matter is under the rules of a trade union required or allowed to be submitted for determination or conciliation in accordance with the rules of the union, but a provision of the rules purporting to provide for that to be a person’s only remedy has no effect (or would have no effect if there were one).

(2) Notwithstanding anything in the rules of the union or in the practice of any court, if a member or former member of the union begins proceedings in a court with respect to a matter to which this section applies, then if—

(a) he has previously made a valid application to the union for the matter to be submitted for determination or conciliation in accordance with the union’s rules, and

(b) the court proceedings are begun after the end of the period of six months beginning with the day on which the union received the application,

the rules requiring or allowing the matter to be so submitted, and the fact that any relevant steps remain to be taken under the rules, shall be regarded for all purposes as irrelevant to any question whether the court proceedings should be dismissed, stayed or sisted, or adjourned ...

(4) If the court is satisfied that any delay in the taking of relevant steps under the rules is attributable to unreasonable conduct of the person who commenced the proceedings, it may treat the period specified in subsection (2)(b) as extended by such further period as it considers appropriate.

(5) In this section—

⁶⁰ [1978] ICR 678.

⁶¹ [1952] 1 All ER 1175.

⁶² [1999] IRLR 166.

⁶³ *Annamunthodo v Oilfield Workers’ Trade Union* [1961] AC 945.

(a) references to the rules of a trade union include any arbitration or other agreement entered into in pursuance of a requirement imposed by or under the rules; and

(b) references to the relevant steps under the rules, in relation to any matter, include any steps falling to be taken in accordance with the rules for the purposes of or in connection with the determination or conciliation of the matter, or any appeal, review or reconsideration of any determination or award.

(6) This section does not affect any enactment or rule of law by virtue of which a court would apart from this section disregard any such rules of a trade union or any such fact as is mentioned in subsection (2).

The statutory right in section 63 also covers the situation where the rule-book is silent, but it is not entirely clear whether it would apply where the rule prescribes that internal remedies must first be exhausted. Statute provides that a copy of the rule-book must be furnished to a member on request, either free of charge or on the payment of a reasonable charge.⁶⁴ A failure to do so is a criminal offence.⁶⁵

A member has two options where a provision of the rule-book has been breached or simply overlooked, and he/she wishes to take enforcement action. First, the member may raise proceedings in the court for a remedy. Secondly, sections 108A to 108C of the TULRCA enable the member to enforce by applying to the CO subject to strict conditions.⁶⁶ Section 108A(14) and (15) of TULRCA directs that these two avenues are alternative options. As such, once one route has been exhausted, the other means of enforcement is precluded. The CO has the power to refuse to accept an application unless he is satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union.⁶⁷ Further, the grounds for application to the CO for a remedy are limited, as is the range of remedies available if the member is successful. For instance, section 108A(2) restricts the grounds upon which a member may make an application to the CO to the following matters:

108A Right to apply to Certification Officer ...

(2) The matters are—

- (a) the appointment or election of a person to, or the removal of a person from, any office;
- (b) disciplinary proceedings by the union (including expulsion);⁶⁸
- (c) the balloting of members on any issue other than industrial action;
- (d) the constitution or proceedings of any executive committee or of any decision-making meeting;
- (e) such other matters as may be specified in an order made by the Secretary of State.

The remedies which the CO may proclaim are restricted to declaratory and enforcement orders, e.g. an order enjoining the union to take steps to remedy the breach of the rule-book or alternatively to secure that a breach or threat of the same or a similar kind does not occur in the future. This can be contrasted with the broader powers of the court, e.g. to make a declaration, as well as award damages and injunctions. Where the member must take action quickly to secure a remedy, once again, the law favours that he/she make an application to the court for two reasons. First, unlike the CO, the court has the power to award interim injunctive relief. Secondly, a member only has six months from the date of the breach or threatened breach to apply to the CO, whereas proceedings may be raised in the High Court within six years (or five years in the Court of Session in Scotland). On the other side of the coin, however, is the fact that proceedings before the CO will be less formal, expensive or time-consuming than in a

⁶⁴ TULRCA, s. 27.

⁶⁵ TULRCA, s. 45(1).

⁶⁶ For example, see *Gates v Society of Chiropodists and Podiatrists*, (18 July 2018) available at <https://www.gov.uk/government/publications/breach-of-union-rules-decision-gates-v-society-of-chiropodists-and-podiatrists> (last visited 26 July 2018).

⁶⁷ TULRCA, s. 108B(1). For discussion, see S. Cavalier and R. Arthur, "A Discussion of the Certification Officer Reforms" (2016) 45 *Industrial Law Journal* 363, 367.

⁶⁸ See *Irving v GMB* [2008] IRLR 202, where it was held that if the rules of the trade union do not confer a power on the trade union to impose sanctions, then the rule concerned cannot be said to relate to disciplinary proceedings.

court.⁶⁹ An appeal on a point of law may be made from the CO to the Employment Appeal Tribunal ('EAT'). A final noteworthy point is that the provisions of the union's rule-book in respect of the termination of a member's membership are subject to the statutory injunction in section 69 of TULRCA: this provides the member with an implied right to terminate his/her membership of the union, on providing reasonable notice and complying with any reasonable conditions. As such, it is an implied term of the contract of membership that a member is not required to have a good reason, or any reason for terminating his/her membership, for that matter.

B.3.2 Trade union members' entitlements: statutory protection from unjustifiable discipline

As we noted in section B.3.1, the common law imposed various constraints on trade unions adhering to the rules in the constitution in order to discipline their members. These were primarily constraints akin to administrative law-type interferences over discretionary powers, e.g. by imposing the principles of natural justice. However, these common law qualifications on the discretionary entitlements of trade unions are overlaid by a much more prescriptive and rigorous form of statutory regulation. These strict statutory controls are grounded in the notion of the individual civil liberties or human rights of trade union members, with the conceptual basis being that a trade union should have no power to subject a member to disciplinary action where that would impede or interfere with the member's right to oppose the union's call to take industrial action. As such, sections 64 to 66 of TULRCA represent an attempt by Parliament to recognize a member's individual rights against the collective rights of the trade union.

Section 64(1) stipulates that a member of a trade union has the right not to be subjected to unjustifiable discipline by a trade union. The term 'discipline' is then defined:

64 Right not to unjustifiably disciplined ...

(2) For this purpose an individual is 'disciplined' by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official of the union or a number of persons including an official that—

- (a) he should be expelled from the union or a branch or section of the union,
- (b) he should pay a sum to the union, to a branch or section of the union or to any other person;
- (c) sums tendered by him in respect of an obligation to pay subscriptions or other sums to the union, or to a branch or section of the union, should be treated as unpaid or paid for a different purpose,
- (d) he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the union, or a branch or section of the union,
- (e) another trade union, or a branch or section of it, should be encouraged or advised not to accept him as a member, or
- (f) he should be subjected to some other detriment;

and whether an individual is 'unjustifiably disciplined' shall be determined in accordance with section 65.

In *NALGO v Killorn and Simm*,⁷⁰ the EAT interpreted section 64(2) of TULRCA broadly to include suspension of the complainant from membership, since this inevitably meant depriving him of trade union benefits accruing from such membership within the meaning of section 64(2)(d) of TULRCA. Furthermore, it was held that if an employee member has his/her name circulated to members and noted as a strike-breaker, this would constitute a 'detriment' in terms of section 64(2)(f) of TULRCA. Likewise, in *UNISON v Kelly*,⁷¹ the banning of members from holding office was ruled to be a 'detriment'.

⁶⁹ See D. Cockburn, 'The Certification Officer', in L. Dickens and A. Neal (eds), *The Changing Institutional Face of British Employment Relations* (Kluwer Law International, 2006) 91.

⁷⁰ [1991] ICR 1.

⁷¹ [2012] IRLR 442.

Section 65(1) to (4) of TULRCA provides that where the reason or reasons for disciplining the member is actual or supposed conduct constituting one of the following types, the member may present a complaint that he/she has been unjustifiably disciplined to an employment tribunal within three months of the determination having been made in terms of section 64(2):⁷²

List of examples of ‘unjustifiable discipline’

- (1) Failing to participate in or support a strike or other industrial action⁷³ (whether by members of the union or by others), or indicating opposition to or a lack of support for such action—section 65(2)(a) of TULRCA;
- (2) Failing to contravene, for a purpose connected with such a strike or other industrial action, a requirement imposed on him by or under a contract of employment—section 65(2)(b) of TULRCA;
- (3) Asserting (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law—section 65(2)(c) of TULRCA;⁷⁴
- (4) Encouraging or assisting a person to perform an obligation imposed on him by a contract of employment, or to make or attempt to vindicate any such assertion mentioned at (3)—section 65(2)(d) of TULRCA;
- (5) Breach of a requirement imposed by or in consequence of a determination which infringes the individual’s or another individual’s right not to be unjustifiably disciplined —section 65(2)(e) of TULRCA;
- (6) Failing to agree, or withdrawing agreement, to the making from his wages (in accordance with arrangements between his employer and the union) of deductions representing payments to the union in respect of his membership—section 65(2)(f) of TULRCA;
- (7) Resigning or proposing to resign from the union or from another union, becoming or proposing to become a member of another union, refusing to become a member of another union, or being a member of another union—section 65(2)(g) of TULRCA;
- (8) Working with, or proposing to work with, individuals who are not members of the union or who are or are not members of another union—section 65(2)(h) of TULRCA;
- (9) Working for, or proposing to work for, an employer who employs or who has employed individuals who are not members of the union or who are or are not members of another union— section 65(2)(i) of TULRCA;
- (10) Requiring the union to do an act which the union is, by any provision of TULRCA, required to do on the requisition of a member—section 65(2)(j) of TULRCA;
- (11) Consulting or asking the CO to provide advice or assistance with respect to any matter whatever, or which involves any person being consulted or asked to provide advice or assistance with respect to a matter which forms, or might form, the subject-matter of any assertion as mentioned at (3)—section 65(3) of TULRCA; and
- (12) Proposing to engage in, or doing anything preparatory or incidental to, conduct falling within (1) to (11)—section 65(4) of TULRCA.

If the member’s complaint is upheld by the employment tribunal, compensation is determined on the ‘just and equitable’ basis, is subject to a maximum award of (1) £15,240 + (2) the lower of (a) £83,682 or (b) one year’s gross pay of the complainant member, the principles of contributory fault, and the member’s duty to mitigate his loss. An award of compensation may also consist of an element in respect of injury to feelings.⁷⁵ Moreover, there is a minimum award of £9,118, to which the member is entitled if he/she is successful in his/her claim.⁷⁶

⁷² TULRCA, ss. 66(1) and (2).

⁷³ See *Knowles v Fire Brigade Union* [1997] ICR 595.

⁷⁴ For an example, see *UNISON v Kelly* [2012] IRLR 442.

⁷⁵ For example, see *Massey v UNIFI* [2007] IRLR 902.

⁷⁶ TULRCA, ss. 67(1), (5), (6), (7), (8) and (8A), and 176(6A).

B.3.3 Trade union members' entitlements: statutory protection from exclusion or expulsion

Section 14 of the Trade Union Reform and Employment Rights Act 1993 introduced section 174 of TULRCA in order to regulate the grounds upon which trade unions can exclude or expel their members. In total, there are four statutory justifications for exclusion or expulsion. As such, by implication, trade union members are afforded the statutory right not to be excluded or expelled for reasons other than those four duly prescribed. The distinction between 'exclusion' and 'expulsion' has been explored by the judiciary:

NACODS v Gluchowski [1995] UKEAT 734_95_0420 at paras [29]-[35]⁷⁷

Maurice Kay J:

In our judgment, 'exclusion' refers to a refusal to admit and not to suspension ... [and we] have some doubt as to whether constructive expulsion falls within s.174 [of TULRCA] in any event.

The statutory provisions are set out as follows:

174 Right not to be excluded or expelled from union ...

(2) The exclusion or expulsion of an individual from a trade union is permitted by this section if (and only if)—

(a) he does not satisfy, or no longer satisfies, an enforceable membership requirement contained in the rules of the union,

(b) he does not qualify, or no longer qualifies, for membership of the union by reason of the union operating only in a particular part or particular parts of Great Britain,

(c) in the case of a union whose purpose is the regulation of relations between its members and one particular employer or a number of particular employers who are associated, he is not, or is no longer, employed by that employer or one of those employers, or

(d) the exclusion or expulsion is entirely attributable to conduct of his (other than excluded conduct) and the conduct to which it is wholly or mainly attributable is not protected conduct.

Section 174(2)(a) is intended to cover the situation where a member of a trade union no longer satisfies the union's restrictions on membership, e.g. where the member ceases to belong to a particular occupation (including grade, level or category of appointment), or his/her employment in a specified trade, industry or profession comes to an end, or he/she no longer possesses a specified trade, or industrial or professional qualification or work experience.⁷⁸ Meanwhile, the second justificatory ground in section 174(2)(b) of TULRCA is designed to enable a trade union to expel a member where he/she no longer resides in a particular geographical area and the union is restricted to operate in that area. Consider the following illustration:

Hypothetical B

Danny's Demolishers Ltd. ('the Employer') is the leading demolition company in the UK. In Scotland, it recognizes the Union of Demolition Workers of Scotland ('UDWS') as a trade union. Archie McCaig ('AM') has been a member of the UDWS for five years and has worked for the Employer in Aberdeen for the same period of time. For personal reasons, AM asks the Employer to relocate him from Aberdeen to the

⁷⁷Sourced from BAILII at http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/1995/734_95_0410.html&query=gluchowski&method=boolean (last visited 26 July 2018).

⁷⁸ For a detailed discussion of this ground, see B. Simpson, 'Individualism versus Collectivism: an Evaluation of Section 14 of the Trade Union Reform and Employment Rights Act 1993' (1993) 22 *Industrial Law Journal* 181, 186-9. For some fascinating contemporary reflections on this aspect of Simpson's seminal article, see A. Bogg, "'Individualism' and 'Collectivism' in Collective Labour Law" (2017) 46 *Industrial Law Journal* 72, 88-90.

Chester office of the Employer. The Employer agrees and AM moves to Chester to work for the Employer. Section 174(2)(b) would enable the UDWS to expel AM lawfully.

As for section 174(2)(c), this authorizes exclusion or expulsion by a single-employer union, e.g. a 'house' union, where a member ceases to be employed by that employer. However, section 174(2)(d) of TULRCA is by far the most important of the four grounds. This provision sanctions conduct-related exclusions or expulsions.⁷⁹ The principal keys to unlock the gateway to section 174(2)(d) are the definitions of 'excluded conduct' in section 174(4) and 'protected conduct' in section 174(4A)-(4H). First, if the member's conduct is 'excluded conduct', that is conduct consisting of him/her being or ceasing to be a member of another trade union, or employed by a particular employer or at a particular place, or conduct relating to section 65 of TULRCA, i.e. behaviour in respect of which the member has a statutory entitlement not to be unjustifiably disciplined, then it is not permissible for the trade union to exclude or expel that member. This exception of 'excluded conduct' thus precludes a trade union from excluding or expelling a member because of his/her blanket refusal to participate in industrial action. The second point to make about section 174(2)(d) of TULRCA is that if the member's conduct to which his/her exclusion or expulsion is attributable is 'protected conduct', then this will be lawful. The net effect of section 174(4A)-(4H) is that a member can be excluded or expelled on the grounds of membership of a political party subject to certain conditions. Those conditions are that membership of the political party must be contrary to the rules or objectives of the trade union, and that it must be reasonably practicable for those objectives to be ascertained by a member of the trade union in the case of the expulsion of a member, or a person working in the same trade, industry or profession as the individual in the case of an exclusion.⁸⁰ Finally, the member must not be in the position of losing his livelihood or suffering other exceptional hardship by reason of not being, or ceasing to be, a member of the union.⁸¹

This power to exclude or expel members on the grounds of membership of a political party in restricted circumstances is predicated on the cardinal decision of the ECtHR in *ASLEF v UK*.⁸² This judgment was based on Article 11 of the European Convention on Human Rights ('ECHR'), namely the excluded or expelled member's freedom of expression:

ASLEF v UK [2007] IRLR 361, 366-367

Judgment of the Court:

Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership ... The Court has taken account of the fact that membership of a trade union is often regarded, in particular due to the trade union movement's historical background, as a fundamental safeguard for workers against employers' abuse and it has some sympathy with the notion that any worker should be able to join a trade union (subject to the exceptions set out in Article 11(2) in fine). However ... ASLEF represents all workers in the collective bargaining context and there is nothing to suggest in the present case that [the member expelled] is at any individual risk of, or is unprotected from, any arbitrary or unlawful action by his employer. Of more weight in the balance is the [union]'s right to choose its members. Historically, trade unions in the United Kingdom, and elsewhere in Europe, were, and though perhaps to a lesser extent today are, commonly affiliated to political parties or movements, particularly those on the left. They are not bodies solely devoted to politically-neutral aspects of the well-being of their members, but are often ideological, with

⁷⁹ Simpson takes the view that it is 'difficult for unions to confidently rely on this reason [,since] there is a heavy onus on a union to establish that conduct was the only reason for a particular exclusion or expulsion', on which, see B. Simpson, 'Individualism versus Collectivism: an Evaluation of Section 14 of the Trade Union Reform and Employment Rights Act 1993' (1993) 22 *Industrial Law Journal* 181, 185.

⁸⁰ TULRCA, ss. 174(4C), (4D) and (4E).

⁸¹ TULRCA, ss. 174(4F), (4G) and (4H).

⁸² [2007] IRLR 361.

strongly held views on social and political issues. There was no hint in the domestic proceedings that the [union] erred in its conclusion that [the] political values and ideals [of the member expelled] clashed, fundamentally, with its own.

Once again, the philosophy underpinning the statutory regulation is laid bare, namely that the freedom to disassociate is as strong as the freedom of association itself. Having said that, the provisions empowering trade unions to exclude or expel members for membership of a political party in section 174(2)(d) and (4A)-(4H) have been subjected to a trenchant critique. These criticisms are grounded on the stringency of the statutorily prescribed conditions which trade unions must satisfy in order to exclude or expel, which it is argued fail to adequately transpose the jurisprudence of the ECtHR in *ASLEF v UK* into UK labour law:

K. Ewing, 'Employment Act 2008: Implementing the *ASLEF* decision – A Victory for the BNP?' (2009) 38 *Industrial Law Journal* 50, 59

The over-prescription created by section [174(2)(d) and (4A)-(4H)] make it highly unlikely that a trade union will in practice be able to exclude or expel someone for reasons of BNP membership alone. Unless trade union rules say expressly that BNP membership is contrary to the terms of membership, trade unions will run the risk of being drawn later into pointless expense and needless litigation with the BNP on questions whether BNP membership is or is not incompatible (on the facts) with membership of the union; but even if the rules do make such express provision, it will be impossible for a union to exercise the power in the knowledge that no 'exceptional hardship' will be caused thereby, 'exceptional hardship' being something which is likely to be known only after the event. As a result, a union would be sorely tempted and well advised to do what the Strasbourg Court said it ought not to be required to do, which was 'the pretext of relying purely on [the member]'s conduct which was largely carried out by him as a member of, and reflected his adherence to the aims of, the BNP', when its objections to [the expelled member in *ASLEF v UK*] were 'primarily based on his membership of the BNP'...

The process for enforcement where a member is unlawfully excluded or expelled is prescribed in sections 174(5), 175, and 176 of TULRCA. A member may present a complaint to an employment tribunal within six months of the date of the exclusion or expulsion.⁸³ If the tribunal finds the member's complaint to be well-founded and makes a declaration to that effect, the member may then apply to the tribunal for an award of compensation to be paid by the union,⁸⁴ provided that this is done within four weeks and six months of the date of the tribunal's declaration.⁸⁵ The tribunal is enjoined to award compensation on the basis of what it considers to be 'just and equitable in all the circumstances',⁸⁶ subject to the maximum figure of (1) £15,240 + (2) the lower of (a) £83,682 or (b) one year's gross pay of the complainant.⁸⁷ If the former member had not been admitted or re-admitted to the union by the date of his/her application to the tribunal for compensation, the minimum award is £9,118.⁸⁸ The doctrine of contributory fault applies to reduce the member's award where there is evidence that he/she to any extent caused or contributed to the union's conduct.⁸⁹

B.3.4 Trade union members' entitlements: elections

The election of trade union officials is one area where the law dictates that the rules of the trade union must be respected and the members given a voice. The common law evolved to police the rules of the union's rule-book,⁹⁰ whilst technical statutory prescriptions are designed to enhance the internal democratic machinery of the trade unions by fostering the direct accountability of key trade union

⁸³ TULRCA, ss. 174(5) and 175.

⁸⁴ TULRCA, s. 176(1) and (2).

⁸⁵ TULRCA, s. 176(3).

⁸⁶ TULRCA, s. 176(4).

⁸⁷ TULRCA, s. 176(6).

⁸⁸ TULRCA, s. 176(6A).

⁸⁹ TULRCA, s. 176(5).

⁹⁰ For example, *Leigh v NUR* [1970] 326.

officials to the membership. Section 46 of TULRCA stipulates that the general secretary, president and any member of the executive of a trade union must be elected directly by the members in accordance with the statutory procedures laid down in sections 46 to 61 of TULRCA. In addition, each of these officers must put themselves up for re-election every five years.⁹¹ The vote is conducted by postal ballot and every member has the right to participate.⁹² Moreover, section 47(1) provides that the trade union must not unreasonably exclude any member from standing as a candidate in an election, and a member must not be a member of a political party to be eligible as an election candidate.⁹³ If the member is excluded on the basis that he belongs to a constituency from which members are excluded by the rules of the trade union, this will not constitute an unreasonable exclusion in terms of section 47(1) of TULRCA unless the union rules provide for such constituency to be determined by the union at its own discretion.⁹⁴ The election process is also subject to oversight from an independent scrutineer and other detailed technical requirements are imposed.⁹⁵ If a member or candidate in the election wishes to enforce a breach of the statutory provisions by the trade union, sections 54 to 56A of the TULRCA enable that person to raise a complaint with the CO or to apply to the court within one year of the date of the election.⁹⁶ If the CO finds the applicant's claim to be well-founded after making enquiries and conducting a hearing, he/she may make the declaration sought by the applicant and also make an enforcement order. The CO will, so far as reasonably practicable, endeavour to determine the complaint within a period of six months. As for an enforcement order, this is an order imposing an obligation on the trade union to (i) secure the holding of an election in accordance with the order, (ii) take such other steps to remedy the declared failure specified in the order, and (iii) abstain from such acts as specified in the order with a view to securing that a failure of the same or a similar kind does not occur in the future.⁹⁷ An order of the CO may be relied on and enforced as if it was an order of the court.⁹⁸ Section 56A of TULRCA stipulates that a decision of the CO may be appealed before the EAT on a point of law. Proceedings before the court mirror those laid down in respect of the CO.⁹⁹ The only difference is that it is competent for the court to provide interlocutory relief and interim orders.¹⁰⁰

B.3.5 Trade union members' entitlements: miscellaneous

The TULRCA provides members with an assortment of ancillary statutory entitlements with the objective of enabling them to hold the trade union to account. The lion's share of these statutory rights concern the organization, management and finances of the trade union and seek to ensure a degree of accountability to the membership. For example, unions have a statutory duty to maintain an accurate and up-to-date list of members' names and addresses, and a 'membership audit certificate'.¹⁰¹ Members are afforded a statutory right to take copies of an entry on the register relating to him/her either free of charge or on payment of a reasonable charge, and the union must supply such entry to the member as soon as reasonably practicable.¹⁰² Rights of inspection and access are afforded to members in respect of the accounting records of the trade union which the latter is obliged to keep and make available pursuant to sections 28 and 29 of TULRCA.¹⁰³ The trade union is also statutorily bound to produce an annual report and submit it to the CO,¹⁰⁴ which must contain detailed and specific information about any industrial action (and accompanying ballot) taken during the return period.¹⁰⁵ A member must be supplied with a

⁹¹ TULRCA, s. 46(1)(b).

⁹² TULRCA, ss. 51 and 50.

⁹³ TULRCA, s. 47(2).

⁹⁴ TULRCA, s. 47(3) and (4).

⁹⁵ TULRCA, ss. 49 and 52.

⁹⁶ TULRCA, s. 54.

⁹⁷ TULRCA, s. 55(5A).

⁹⁸ TULRCA, s. 55(8) and (9).

⁹⁹ TULRCA, s. 56.

¹⁰⁰ TULRCA, s. 56(7).

¹⁰¹ TULRCA, ss. 24 and 24ZA.

¹⁰² TULRCA, s. 24(3).

¹⁰³ TULRCA, ss. 28, 29, and 30.

¹⁰⁴ TULRCA, s. 32(1).

¹⁰⁵ TULRCA, s. 32ZA.

copy either free of charge or on the payment of a reasonable charge.¹⁰⁶ An auditor must be appointed each accounting year by the trade union to audit the accounts contained in the annual report.¹⁰⁷ Section 37 of TULRCA furnishes a broad range of powers to the auditor to enable the auditor to discharge its statutory obligations, including the entitlement to access at all times the trade union's accounting records and all other documents relating to its affairs, and to seek such information and explanations as it deems necessary for the performance of its duties. The auditor also has the right to attend general meetings of the members of the trade union, to receive all notices and other communications in respect of such meetings which members are entitled to receive, and to be heard at such general meetings in respect of any business concerning him/her/it as an auditor.¹⁰⁸ TULRCA vests in members various means of enforcement of these statutory rights, ranging from the entitlement to make a complaint to the CO, to the imposition of criminal sanctions.

B.4 THE RIGHTS OF TRADE UNION MEMBERS VIS-À-VIS THE EMPLOYER

The origin of the statutory protections from anti-union discrimination for employees is undoubtedly the ILO's Convention No. 98¹⁰⁹ which has been ratified by the UK:

ILO Convention No. 98 on the Right to Organise and Collective Bargaining, 1949

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to—
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

This protective regime stems from the obvious point that in its absence, a worker's entitlement to join and form a trade union would be little more than an empty formality: an employer could take action to dissuade an individual from continuing to be a member of a trade union by simply refusing to employ him/her at the recruitment stage. Alternatively, once the individual has been recruited and joins a union, the employer could dismiss him/her or subject him/her to a detriment for a reason related to his/her continuing trade union membership or activities. As such, the regime is designed to confer safeguards on individuals, employees and workers (in the case of 3 and 4) and the precise circumstances in which they apply are as varied as they are numerous and significant:

1. Protection for an individual from being refused employment for a union-related reason – introduced for the first time in 1990 and now found in section 137 of TULRCA;
2. Protection for an employee from dismissal for a reason related to trade union membership, activities, and services, and for failing to accept an offer made by the employer to induce the employee not to be a member of a trade union or take part in its activities, etc. – section 152 of TULRCA;
3. Protection for a worker from subjection to a detriment, the purpose of which is to (a) prevent or deter him from being or seeking to become a member of an independent trade union, partaking in its activities, or making use of its services, or (b) compel him to be or become a member of any independent trade union – section 146 of TULRCA; and

¹⁰⁶ TULRCA, s. 32(5).

¹⁰⁷ TULRCA, s. 33.

¹⁰⁸ TULRCA, s. 37(1) and (3).

¹⁰⁹ Available

at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312243:NO (last visited 26 July 2018).

4. Protection for a worker against inducement in respect of the membership and activities of an independent trade union – sections 145A-145F of TULRCA.

We now address each of these four protections in turn.

B.4.1 Protection from refusal of employment

Where an individual is refused employment by a prospective employer or employment agency because of his/her membership of a trade union,¹¹⁰ sections 137 and 138 of TULRCA apply to render such conduct unlawful. As such, a prospective employer is proscribed from refusing to recruit an individual for a reason related to his/her union *membership*. The proscribed reasons for an unlawful refusal are set out in section 137(1) and the breadth of the notion of 'refuse' is laid bare in section 137(5) of TULRCA:

137 Refusal of employment on grounds related to union membership

(1) It is unlawful to refuse a person employment—

- (a) because he is, or is not, a member of a trade union, or
- (b) because he is unwilling to accept a requirement—

- (i) to take steps to become or cease to be, or to remain or not to become, a member of a trade union, or
- (ii) to make payments or suffer deductions in the event of his not being a member of a trade union
...

(5) A person shall be taken to be refused employment if he seeks employment of any description with a person and that person—

- (a) refuses or deliberately omits to entertain and process his application or enquiry, or
- (b) causes him to withdraw or cease to pursue his application or enquiry, or
- (c) refuses or deliberately omits to offer him employment of that description, or
- (d) makes him an offer of such employment the terms of which are such as no reasonable employer who wished to fill the post would offer and which is not accepted, or
- (e) makes him an offer of such employment but withdraws it or causes him not to accept it.

If any individual is unlawfully refused employment in terms of section 137 of TULRCA, he/she has the right of complaint to an employment tribunal within three months of the date of the conduct to which the complaint relates.¹¹¹ However, there is an exception whereby the three-month period may be extended as the tribunal considers reasonable if it was not reasonably practicable for the complaint to be presented within that three-month period. If the tribunal finds the complaint to be well-founded, it is bound to make a declaration to that effect. It also has the power to award compensation to the complainant or make a recommendation if it considers it just and equitable to do so.¹¹² Compensation is assessed on the same basis as a claim for breach of statutory duty, is subject to the maximum cap of the lower of (a) £83,682 and (b) one year's gross pay of the complainant,¹¹³ and may include an award for injury to feelings.¹¹⁴ Meanwhile, a recommendation is an order that the respondent must take specified action within a particular period of time that the tribunal considers practicable for the purpose of obviating or reducing the adverse effect on the complainant of any conduct to which the complaint relates.¹¹⁵

¹¹⁰ Unlike the protections afforded by ss. 152, 146, and 145A to 145F of TULRCA, there is no requirement that the trade union is independent for an individual to avail him/herself of this provision.

¹¹¹ See TULRCA, s. 139.

¹¹² TULRCA, s. 140(1).

¹¹³ TULRCA, s. 140(4).

¹¹⁴ TULRCA, s. 140(1)(a), (2) and (4).

¹¹⁵ TULRCA, s. 140(1)(b).

A key point to note is that section 137 of TULRCA prohibits a prospective employer from refusing to employ an individual for a reason related to his/her union *membership*. The protection here is narrow insofar as there is nothing unlawful about a prospective employer refusing to recruit an individual because of the latter's prior participation in trade union *activities*.¹¹⁶ Whilst this undoubtedly represents a glaring gap in the statutory regime, a partial measure of redress of sorts is afforded in two ways. Firstly by the decision of the EAT in *Jet2.com Ltd. v Denby*,¹¹⁷ where it was held that section 137 will include trade union activities that are incidental to the individual's membership, e.g. past participation in trade union activities and advocacy. Secondly, by the Employment Relations Act 1999 (Blacklists) Regulations 2010 ('the Blacklisting Regulations').¹¹⁸ After the endemic blacklisting of individuals in the construction sector was unearthed by the Information Commissioner's Office in early 2009,¹¹⁹ the Blacklisting Regulations were introduced in the dying stages of the last Labour Government and came into force in March 2010. Subject to five itemized exceptions,¹²⁰ regulation 3(1) renders the compilation, use, sale or supply of a 'prohibited list' a breach of statutory duty, which will sound an action in damages in the court.¹²¹ Regulation 3(2) defines a 'prohibited list' as a list which contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and is compiled with a view to being used by employers or employment agencies for the purposes of treating those persons less favourably than others on grounds of trade union membership or activities in relation to the recruitment or treatment of workers. The relational scope of protection afforded in terms of the Blacklisting Regulations is rather restricted, as demonstrated by *Smith v UK*.¹²² Smith had agency worker status and the decision served to draw attention to the fact that agency workers are denied a remedy under the Blacklisting Regulations.

B.4.2 Dismissal protection

Section 152 of TULRCA provides employees with an entitlement to treat their dismissal as an automatically unfair dismissal¹²³ where it is grounded on certain trade union-related rationales, as follows:

152 Dismissal of employee on grounds related to union membership or activities

(1) For purposes of Part X of the Employment Rights Act 1996 [{"ERA"}] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

- (a) was, or proposed to become, a member of an independent trade union,
- (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time,
- (ba) had made use, or proposed to make use, of trade union services at an appropriate time,
- (bb) had failed to accept an offer made in contravention of section 145A or 145B [of TULRCA], or
- (c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.

Section 153 of TULRCA mirrors the above provisions in relation to an employee's selection for redundancy on the same grounds, i.e. related to union membership or activities.

¹¹⁶ See *Harrison v Kent County Council* [1995] ICR 434.

¹¹⁷ [2018] ICR 597.

¹¹⁸ SI 2010/493.

¹¹⁹ For a fuller explanation of the impetus for the Blacklisting Regulations, see C. Barrow, 'The Employment Relations Act 1999 (Blacklists) Regulations 2010: SI 2010 No 493' (2010) 39 *Industrial Law Journal* 300, 301-3.

¹²⁰ The Blacklisting Regulations, regulation 13(1) and (3).

¹²¹ The Blacklisting Regulations, regulation 4. Oddly, no criminal offences are prescribed.

¹²² [2017] IRLR 771.

¹²³ See Chapter 16, section 16.2.4.2.

A number of preliminary points can be raised about section 152. First, of particular note is the relational scope of the provision: it is limited to ‘employees’, rather than ‘workers’.¹²⁴ This can be contrasted with the statutory protections sanctioned under sections 146 and 145A to 145F in respect of the subjection of ‘workers’ to a detriment and against inducements relating to union membership and activities. Secondly, the dismissal of the employee is treated as valid, albeit one that is automatically unfair for the purposes of Part X of the ERA.¹²⁵ As such, unlike a standard unfair dismissal claim,¹²⁶ the employee has no obligation to establish that he/she has been continuously employed by the employer for a minimum period of two years to be eligible to claim.¹²⁷ Another feature which characterizes the protection from dismissal in section 152 of TULRCA is the availability of interim relief.¹²⁸ This effectively enables the employee to be reinstated or re-engaged pending the date of the tribunal hearing if he/she is able to satisfy the tribunal that it is likely to determine that he/she has been dismissed for one of the reasons listed in section 152(1).¹²⁹ Furthermore, the burden of establishing that the reason for the employee’s dismissal falls within the scope of section 152 rests with the employee. Finally, if successful, the dismissed employee is entitled to a minimum basic award,¹³⁰ currently fixed at £6,203.¹³¹

Section 152 can be divided into four components:

1. First, the protection is triggered where the employee is dismissed for being, having been, or having proposed to become a member of an independent trade union.¹³² Therefore, it is crucial that there is a link between the employee and a trade union that is independent.¹³³ Conversely, the employee is also protected if he/she was dismissed because he/she was not a member of any trade union,¹³⁴ or of a particular trade union, or had refused to become such a member.¹³⁵ This provision essentially removes legislative support for the operation of the ‘closed shop’.¹³⁶
2. Secondly, a dismissal that is attributable to an employee’s participation in the ‘activities of an independent trade union’ ‘at an appropriate time’ will amount to an automatically unfair dismissal. Since the dismissal of an employee for the reason that he/she has engaged in an official strike or official industrial action is protected by section 238A of TULRCA,¹³⁷ it has been held that participation in such action will rarely, if ever, come within the compass of the word ‘activities’ in section 152(1)(b): *Britool Ltd. v Roberts*.¹³⁸ Nonetheless, if the employee is dismissed on the ground that he/she was engaged in preliminary conduct preparatory to official strike action, e.g. prior planning and organization, that may well constitute trade union ‘activities’ to which section 152(1)(b) applies. Much will depend on the context. For example, if a dismissal is attributable to the employee’s conduct in retaining and making limited use of leaked confidential information belonging to the employer in order to support union members in raising grievances, this will nevertheless be treated

¹²⁴ See TULRCA, ss. 295 and 296 and contrast Chapter 4, section 4.2.1 with Chapter 3, section 3.2.1. For an extensive discussion of the relational scope of collective labour laws and the proposal that rights to collective bargaining be extended to the self-employed, see M.Freedland and N. Kountouris, ‘Some Reflections on the ‘Personal Scope’ of Collective Labour Law’ (2017) 46 *Industrial Law Journal* 52, 65-71.

¹²⁵ See Chapter 16, section 16.2.4.2.

¹²⁶ ERA, s. 108 and see Chapter 16, section 16.2.1.1.

¹²⁷ TULRCA, s. 154.

¹²⁸ TULRCA, s. 161.

¹²⁹ TULRCA, s. 163(1).

¹³⁰ For an analysis of the basic award, see Chapter 17, section 17.3.3.1.

¹³¹ TULRCA, s. 156(1).

¹³² TULRCA, s. 152(1)(a).

¹³³ Contrast this with the protection from refusal of employment in respect of section 137 of TULRCA.

¹³⁴ Note that there is no requirement here for the trade union to be ‘independent’.

¹³⁵ TULRCA, s. 152(1)(c).

¹³⁶ See section B.2.2.

¹³⁷ For a more detailed discussion, see Web Chapter D on the Online Resource Centre.

¹³⁸ [1993] IRLR 481 and *Drew v St Edmundsbury Borough Council* [1980] IRLR 459.

as related to trade union ‘activities’. In such a case, the dismissal will be automatically unfair.¹³⁹ The tribunals and courts have also drawn a distinction between the situation where a trade union member participates in the kind of activities (i) which his trade union pursues, and (ii) those which his trade union pursues and the trade union has authorized that member to do on its behalf. Where (i) applies, it has been ruled that such activity does not fall within s.152(1)(b) of TULRCA, whereas in the case of (ii), the member will indeed enjoy the protection of s.152(1)(b).¹⁴⁰ Meanwhile, the expression ‘at an appropriate time’ essentially signifies that the conduct of the employee must occur outside his/her working hours, or within working hours with the permission of the employer.¹⁴¹

3. Thirdly, an employee who is dismissed because he used or proposed to use trade union services at an appropriate time will be treated as automatically unfairly dismissed. The words ‘at an appropriate time’ once again entail the conduct of the employee outside his/her normal working hours. As for the meaning of the expression ‘trade union services’, we are told by section 152(2A)(a) that this will include services made available to the employee by an independent trade union by virtue of his membership of the union. As such, this is sufficient to cover legal, financial, representation and other professional services generally afforded by unions to their members.
4. Finally, an employee is entitled to protection where he/she is dismissed because he/she refused an offer made by his employer that was designed to induce the employee to give up his/her union membership or to disincentivize him/her from participating in union activities or from using union services. This is addressed in greater detail in section B.4.4.

The employee’s right under s. 152 is enforceable by presenting a complaint to an employment tribunal in the same manner as automatically unfair dismissals are enforced.¹⁴²

B.4.3 Protection from detriments

Turning to the protection of employees from being subjected to a detriment, the relational scope is broader than that applicable in the case of a dismissal: statutory provision is afforded to ‘workers’ rather than ‘employees’:

146 Detriment on grounds related to union membership or activities

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

- (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
- (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,

(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions ...

(2C) A worker also has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place because of the worker’s failure to accept an offer made in contravention of section 145A or 145B.

¹³⁹ *Morris v Metrolink Ratp Dev Ltd*. [2018] EWCA Civ 1358.

¹⁴⁰ *Dixon and Shaw v. West Ella Developments Ltd* [1978] ICR 856.

¹⁴¹ See TULRCA, s. 152(2) and *Post Office v Union of Post Office Workers* [1974] ICR 378.

¹⁴² See Chapter 16, section 16.2.4.2.

(2D) For the purposes of subsection (2C), not conferring a benefit that, if the offer had been accepted by the worker, would have been conferred on him under the resulting agreement shall be taken to be subjecting him to a detriment as an individual (and to be a deliberate failure to act).

Although section 148 of TULRCA prescribes that in a detriment claim ‘it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act’, this does not mean that the burden of proof operates as in a discrimination claim. As such, a detriment will not be inferred unless the employee demonstrates otherwise.¹⁴³ Likewise, it is not enough to satisfy the terms of the section for the employer’s conduct to have one of the preventive or deterrent effects set out in section 146(1)(a), (b), (ba) or (c). Instead, the employer’s conduct must also have one of these preventive or deterrent effects as its purpose or main purpose.¹⁴⁴ The expression ‘at an appropriate time’ harbours the same definition applicable in the case of the section 152 protection from dismissal.¹⁴⁵ Likewise, the approach to the scope of the terms ‘activities of an independent trade union’ and ‘trade union services’ mirrors those applicable in the case of the protection from dismissal in section 152.¹⁴⁶ There is no definition of the word ‘detriment’ in TULRCA, which is rather surprising given that it is the lynchpin upon which the protection in section 146 hangs. Nonetheless, it is generally understood to involve actions, such as the service on the employee of a final warning,¹⁴⁷ or omissions¹⁴⁸ on the part of the employer that are disadvantageous to the employee, but which fall short of an actual dismissal, e.g. a suspension, failure to promote, demotion, etc.¹⁴⁹ However, the principal exception applies where a worker is not an employee, since in such a case the definition of ‘detriment’ does include the dismissal of the worker as a result of section 146(5A) of TULRCA. As such, the dismissal of a worker for one of the reasons enumerated in section 146(1) will constitute a ‘detriment’. Where the individual dismissed, however, is an employee, he/she must use section 152 in order to avail him/herself of protection. A final point to make is that although the words ‘any act, or any deliberate failure to act’ in section 146(1) of TULRCA undoubtedly cover the conduct and omissions of employers, one should not necessarily presume that an employer’s threat of adverse consequences will fall within the scope of a detriment. For example, in *Brassington v. Cauldon Wholesale Ltd*,¹⁵⁰ Bristow J in the EAT did not decide the issue but, from the tenor of his judgment, one can detect a view that a threat of consequences was not the same thing as a detriment or an ‘act’.

A worker may enforce the entitlement conferred under section 146 by presenting a complaint to an employment tribunal¹⁵¹ within three months of the date of the act or failure to act to which the complaint relates, or, where that act or failure is part of a series of similar acts or failures (or both), the last of them.¹⁵² If the complaint is successful, the employment tribunal will make a declaration and may award compensation which it ‘considers just and equitable in all the circumstances’ having regard to the infringement complained of and to any loss sustained by the worker which is attributable to the act or

¹⁴³ *Serco Ltd v Dahou* [2017] IRLR 81.

¹⁴⁴ *Bone v North Essex Partnership NHS Foundation* [2016] IRLR 295.

¹⁴⁵ See TULRCA, s. 146(2).

¹⁴⁶ See TULRCA, s. 146(2A)(a).

¹⁴⁷ *Gayle v Sandwell & West Birmingham Hospitals NHS Trust* [2011] IRLR 810.

¹⁴⁸ As such, the finding in *Associated Newspapers Ltd. v Wilson; Associated British Ports v Palmer* [1995] 2 AC 454 that section 146 does not offer protection where the employer *omitted to act* is no longer good law. Here, the omission was a failure to raise the pay of an employee who refused to sign a new contract of employment. For example, in *Bone v North Essex Partnership NHS Foundation* [2016] IRLR 295, it was held that an employee had been subjected to a detriment where the employer failed to formally discipline officials from another trade union who were subjecting the employee to insults and disparaging treatment.

¹⁴⁹ This is by analogy with the jurisprudence that may be derived from the case law on the equality legislation, e.g. *Shamoon v RUC* [2003] ICR 337 at 349F–373B per Lord Hope, on which see, Chapter 10, section 10.2.2.

¹⁵⁰ [1978] ICR 405. In *Brassington*, the employer had threatened to cease trading, dismiss the whole of the workforce and resume trading under a new name if the workers joined a union. Meanwhile, the jurisprudence of the ECtHR in *Young, James and Webster v UK* (1982) 4 EHRR 38 suggests that a threat of adverse consequences is an illegitimate interference with the worker’s Convention rights to join a trade union and thus is contrary to the ECHR.

¹⁵¹ TULRCA, s. 146(5).

¹⁵² TULRCA, s. 147(1).

failure which infringed his or her right.¹⁵³ An element of the compensation may include non-financial loss,¹⁵⁴ and the compensation that may be awarded is uncapped, which differs radically from the enforcement of section 152.

B.4.4 Protection from inducements

In the judgment of the ECtHR in *Wilson and the NUJ v UK*,¹⁵⁵ it was held that the UK breached the Article 11 ECHR principle of freedom of association by permitting employers to use financial incentives to induce employees to surrender their trade union membership, or to refrain from participating in union activities, use union services, or engage in collective bargaining. In response to this case, the UK Government reformed the law to make such inducements unlawful and those provisions are now found in sections 145A to 145F of TULRCA:

145A Inducements relating to union membership or activities

(1) A worker has the right not to have an offer made to him by his employer for the sole or main purpose of inducing the worker—

- (a) not to be or seek to become a member of an independent trade union,
- (b) not to take part, at an appropriate time, in the activities of an independent trade union,
- (c) not to make use, at an appropriate time, of trade union services, or
- (d) to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions...

145B Inducements relating to collective bargaining

(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if—

- (a) acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and
- (b) the employer's sole or main purpose in making the offers is to achieve that result.

(2) The prohibited result is that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.

In the case of *Kostal UK Ltd. v Dunkley*,¹⁵⁶ the employer attempted to circumvent the operation of section 145B of the 1992 Act. It sought to do so by making offers to its employees of financial bonuses and increases in pay which would have had the result that these financial terms and conditions of employment would no longer be determined by collective agreement (although other terms and conditions of employment continued to be determined collectively). In evidence, it was clear that the employer's sole or main purpose in making the offers had been to achieve that result and as such, its conduct was treated as an infringement of section 145B. Where such financial sweeteners are offered by the employer, a worker has the right to enforce a breach of sections 145A or 145B by presenting a complaint to an employment tribunal within three months of the date of the employer's offer.¹⁵⁷ If upheld, the tribunal must make a declaration upholding the complaint and make an award of compensation to the worker, which is currently fixed at £4,059.¹⁵⁸

Reflection points

¹⁵³ TULRCA, s. 149(2).

¹⁵⁴ *Brassington v. Cauldon Wholesale Ltd.* [1978] ICR 405.

¹⁵⁵ [2003] IRLR 568.

¹⁵⁶ [2018] ICR 768.

¹⁵⁷ TULRCA, s. 145C(1).

¹⁵⁸ TULRCA, s. 145E(2) and (3).

1. Should trade union autonomy be qualified by the principle of democratic accountability to the union's membership? Give reasons for your answer.
2. Consider the case for the right to disorganise. In your opinion, are these arguments convincing? Give reasons for your answer.

Additional reading on the rights of trade union members vis-à-vis the trade union and the employer

1. S. Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 24.
 2. B. Simpson, 'Individualism versus Collectivism: an Evaluation of Section 14 of the Trade Union Reform and Employment Rights Act 1993' (1993) 22 *Industrial Law Journal* 181.
 3. K. Ewing, 'The Implications of *Wilson and Palmer*' (2003) 32 *Industrial Law Journal* 1.
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