

ONLINE CHAPTER C

COLLECTIVE BARGAINING AND THE STATUTORY RECOGNITION OF TRADE UNIONS

C.1 Collective bargaining and the statutory trade union recognition procedure

C.1.1 An analysis of the role of collective bargaining and the statutory trade union recognition procedure

C.2 Collective bargaining and collective agreements

C.2.1 Collective bargaining

C.2.2 The legal status of collective agreements

C.3 Statutory recognition of trade unions

C.3.1 The voluntary recognition of trade unions

C.3.2 The statutory trade union recognition procedure

C.1 COLLECTIVE BARGAINING AND THE STATUTORY TRADE UNION RECOGNITION PROCEDURE

In Chapter B on the Online Resource Centre,¹ we were introduced to the idea that one of the key functions of a trade union is to press their members' claims and interests in negotiations with employers or employers' associations: this is the 'representational function' identified by Ewing.² This chapter focuses on the role of the trade unions in performing that representational function, which essentially entails an analysis of the historical and contemporary relevance and importance of the social institution of collective bargaining. The negotiated outcome of collective bargaining is a concluded collective agreement and the legal rules regulating such a process and agreement will form a key element of the larger enterprise conducted in this chapter. As part of that discussion, the legal status of collective agreements will be considered. We will then move on to explore the statutory machinery for the recognition of trade unions. The rights of recognized trade unions in that process and the role of the Central Arbitration Committee ('CAC') will be elaborated upon. Once again, the discussion in the chapter will be conducted within the framework of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA').

C.1.1 An analysis of the role of collective bargaining and the statutory trade union recognition procedure

In order to understand the landscape of the current legal regime regulating the process of collective bargaining, it is productive to delve briefly into the past. As such, we begin our discussion with a brief historical account of the general approach of the State towards the regulation of the activities of trade unions and employers. This impels us to address the policy and theory of 'collective laissez-faire' ('CLF')³ in UK labour law, which has been chiefly accepted⁴ as the principal paradigm by which the industrial relations field was regulated by the State up to the 1980s. CLF was an institution, or perhaps more accurately described, as an attitude, that was characterized by 'voluntarism'⁵ and legal abstentionism.⁶ This once prevalent social institution presumed that the industrial parties would jointly regulate their own relationships and entailed the absence of a state-imposed legal duty to bargain on trade unions and

¹ See Chapter B on the Online Resource Centre, section B.1.1.

² See K. Ewing, 'The Function of Trade Unions' (2005) 34 *Industrial Law Journal* 1, 3-5.

³ O. Kahn-Freund, 'Labour Law' in *Law and Opinion in England in the 20th Century* (London, Stevens, 1959) 215, 224.

⁴ For the critiques of CLF, see K. Ewing, 'The State and Industrial Relations: 'Collective laissez-faire' Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1, H. Collins, 'Against Abstentionism in Labour Law'. in J. Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence* (Oxford, OUP, 1987) 79 and P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford, Clarendon Press/OUP, 1993) 8-59. For a defence of CLF, see A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) 6-7 and 15-33.

⁵ A. Flanders, 'The Tradition of Voluntarism' (1974) 12 *British Journal of Industrial Relations* 352.

⁶ S. Deakin and F. Wilkinson, 'The Evolution of Collective Laissez-Faire' (2004) 17 *Historical Studies in Industrial Relations* 1, 1-2.

employers or employers' associations, coupled with the general abstention of the state from interference in the sphere of industrial relations.⁷ As such, the collective parties voluntarily came together within the private sphere to negotiate and were not legally compelled to do so. As noted by Dukes, '[t]rade unions and employers were free to decide not only on the content of negotiated agreements, but also on the methods of their negotiation, interpretation and enforcement.'⁸

A direct effect of CLF was that the law supplied no direct (i) sanctions in respect of any failure on the part of the parties to voluntarily engage in collective bargaining, or (ii) means of support for the social system of CLF, e.g. the granting of orders of injunctions or specific performance where a party to a collective agreement had breached a term, or was threatening to do so. Instead, the State abstained from direct involvement in industrial relations, and instituted indirect mechanisms that were primarily intended to secure the mandatory normative effect of collective agreements. The most obvious was the tacit State support for the institution of the 'closed shop',⁹ but other indirect 'auxiliary props'¹⁰ included organized 'fair wages councils, extension [mechanisms for] collective agreements [*erga omnes*]¹¹ and compulsory arbitration, and State provision of dispute resolution machinery'.¹² The following extract summarizes some of the hallmarks of CLF:

T. Colling, 'Trade Union Roles in Making Employment Rights Effective' in L. Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Oxford, Hart Publishing, 2012) 188-189

... Kahn-Freund also identified a... necessary function which was *auxiliary* to 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*'... Arguably this aspect of [CLF] has been under-emphasised in more recent treatments... Probably the most important mechanisms for enforcing and extending collective terms were deployed by the parties themselves[. e.g. the closed shop]... The effect was to bind employers, workers, and unions to the institutions of collective bargaining but the state did not leave this function solely to the parties themselves. It undertook an important *auxiliary* role, one referred to by Kahn-Freund as 'organised persuasion' and which he considered, 'a very fundamental social institution in this country'... This captures the administrative mechanisms through which collective bargaining was encouraged or compliance with it required. Wage setting in industries without collective bargaining was intended to encourage its development... Where bargaining was established, mechanisms were available to encourage the diffusion of terms across workforces. The Fair Wages Resolution 1946 and the Terms and Conditions Act 1959... provided for the extension of prevailing terms to workers engaged in work in the public sector and private industry respectively... While [the law] did not establish rights directly for the most part, or prescribe the form or content of collective bargaining, it did define the perimeters within which the parties could define employment terms and support their broader diffusion once agreed. In recent years, the influence of law has become much more prominent and direct...

⁷ See O. Kahn-Freund, 'Collective Agreements under War Legislation' (1943) 6 *Modern Law Review* 112, O. Kahn-Freund, 'Legal Framework' in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 42, O. Kahn-Freund, 'Industrial Relations and the Law: Retrospect and Prospect' (1969) 7 *British Journal of Industrial Relations* 301, O. Kahn-Freund, 'Labour Law' in *Law and Opinion in England in the 20th Century* (London, Stevens, 1959) 215, and O. Kahn-Freund, 'Intergroup Conflicts and their Settlement', in O. Kahn-Freund, *Selected Writings* (London, Stevens & Sons, 1978) 41.

⁸ R. Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice Without a Keystone?' (2009) 77 *Modern Law Review* 220, 222.

⁹ For an explanation, see Online Resource Chapter B, section B.2.2.

¹⁰ A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) 3.

¹¹ In other words, where a collective agreement concluded between a trade union and an employers' association applies to all employers working in a sector, irrespective of whether those employees are members of that trade union or not, i.e. fulfilling the 'regulatory' function of trade unions, on which, see Online Resource Chapter B, section B.1.1. Writer's annotations appear in square brackets throughout this chapter.

¹² A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) 5.

At the heart of CLF lay the endemic social practice of collective bargaining. For the Webbs,¹³ in their seminal work on industrial democracy, they classified this form of bargaining as a more effective substitute for individual bargaining from the viewpoint of the combined workers. It enabled them to secure more attractive terms and conditions from the employer by controlling the supply of labour and competition. For that reason, collective bargaining for the Webbs acted as a direct replacement of the individual contracting process. However, theorizing about the nature of collective bargaining, Flanders rejected the Webbs' analysis. In doing so, he identified three characteristic features of collective bargaining, namely (1) the rule-making dimension of collective bargaining, (2) collective bargaining as a manifestation of a power relationship between trade unions and employers or employers' associations, and (3) the procedural/substantive nature of collective bargains, which are illustrated in the following extract in parentheses:

A. Flanders 'Collective Bargaining – A Theoretical Analysis' (1968) 6 *British Journal of Industrial Relations* 1, 6-10

[(1) Collective bargaining and individual bargaining] are not, however, complete alternatives for they can continue to co-exist. The precise effect of the negotiation of collective agreements is to impose certain limits on the freedom of labour market bargainers, but not fully to extinguish their freedom so long as a labour market continues to function... It is more correct then to refer to collective bargaining as regulating, rather than replacing, individual bargaining [since it sets limits upon the extent to, and the parameters within, which individual bargaining may be conducted]... [(2)] This brings us to the second truly characteristic feature of collective bargaining, apart from its being a rule-making process, namely that it is a 'power relationship between organizations'... Accordingly the process of negotiation is best described as a diplomatic use of power. It has been said of trade unions that 'their primary function is the organization of their economic power derived from the possession and collective exercise of the will to work or abstain from working – a power exercised as truly in the negotiation of agreements as in the conduct of strikes'...[(3)] The parties to collective bargaining negotiate procedural as well as substantive agreements in order to regulate their own relationships as distinct from the employment relationships of their constituents. These procedural rules regulate, among other things, their behaviour in settling disputes, including possibly the assistance of third-parties and the use of arbitration... the joint making of procedural rules is normally an integral part of collective bargaining [which] means that everything appertaining to the resolution of conflict between the parties, including grievance settlement, must be considered as belonging to its institutions... [As such], *joint regulation* [is] a much more appropriate term to indicate [the] essential character [of collective bargaining].

For Kahn-Freund, these characteristics of collective bargaining are interwoven into its principal objective. This lies in the notion of 'countervailing power':

P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983), 69–70

We are concerned with the relation between management and organised labour, and, for an understanding of the role the law plays or does not play in that relation, the notion of countervailing power is indispensable. The conflicting expectations of labour and of management can be temporarily reconciled through collective bargaining: power stands against power. Through being countervailing forces, management and organised labour are able to create by autonomous action a body of rules, and thus to relieve the law of one of its tasks. More than that, the two sides of industry have at their disposal sanctions to enforce these rules against the other side and against the employers and workers on their own side. It is the conflict of interests which makes their agreements a valid instrument of 'social engineering.'... In the light of what we have said it is not difficult to summarise the purposes of collective bargaining: by bargaining collectively with organised labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc., should not be frustrated through interruptions of work. By bargaining collectively with management, organized labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity

¹³ S. and B. Webb, *Industrial Democracy* (London, Longman, Green, 1902) 174-179.

and moral dignity of the individual, and also that jobs should be reasonably secure. This definition is not intended to be exhaustive. It is intended to indicate... that the principal interest of management in collective bargaining has always been the maintenance of industrial peace over a given area and period, and that the principal interest of labour has always been the creation and the maintenance of certain standards over a given area and period, standards of distribution of work, of rewards, and of stability of employment. The relative significance of these various objectives varies from country to country. Thus the market regulating function of collective bargaining, its decisive role in job distribution, is far greater in this country than in the countries of the European continent...

The notion of 'countervailing power' explored in this passage is also connected to the proposition that engagement by trade unions and management in adversarial collective bargaining can act as a counterbalance to management discretion and thus serve to reduce 'agency costs' in the context of the employment relation. These agency costs are imposed on the employees of the employer who invest in firm-specific skills, and are generated as a result of the management of the firm being afforded unilateral discretionary prerogatives and discretions pursuant to the terms of the contract of employment: this is a consequence of the authority/power relation feature of the contract of employment which we examined in chapter 5.¹⁴ Moore suggests that collective bargaining can sustain a diminution in those agency costs and economise on the employer's overall costs of production.¹⁵

The argument that collective bargaining can have the positive effect of reducing an employer's aggregate production costs leads us on to address the economic benefits associated with the practice of collective bargaining. These have been spelt out by Freeman and Medoff,¹⁶ and are briefly summarized in the following passage:

C. Estlund, 'Why workers still need a collective voice in the era of norms and mandates' in C. L. Estlund and M. L. Wachter, *Research Handbook on the Economics of Labor and Employment Law* (Liverpool, Edward Elgar, 2012) 463-466

The affirmative case for promoting unionization and collective bargaining rests on several pillars, which I will only touch on here: a commitment to employees' basic freedom of association rights (long enshrined in international law instruments...), a belief in the civic virtues of democracy within the workplace, an egalitarian effort to boost wages [above the competitive wage rate] by enhancing workers' bargaining power, and the promotion of 'labor peace' through the legitimation and regulation of labor-management conflict.

Davies builds on some of the ideas articulated in this passage, referring to the 'distributional', 'democratic' and 'efficiency' justifications for collective bargaining:

P. Davies, 'Efficiency Arguments for the Collective Representation of Workers: A Sketch' in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015), 368-380

[The traditional] arguments... in relation to voice through collective bargaining... have been either distributional or democratic. So, collective bargaining is often presented as achieving a larger share of the firm's revenues for the workers (through the union wage premium), implicitly at the cost of a reduction in the proportion going to the firm's owners... More attractively, collective bargaining is [also] presented... as an extension of the democratic imperative from the political sphere into the industrial. One of the crucial benefits of collective bargaining, on this approach, is that it gives the workers the opportunity to participate in the setting of the rules which govern the workplace, irrespective of the size of the financial

¹⁴ See Chapter 5, section 5.1.1.

¹⁵ See M. Moore, 'Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance' (2014) 43 *Industrial Law Journal* 398, 426-427 and C. Villiers, 'Post-Crisis Corporate Governance and Labour Relations in the EU (and Beyond)' (2014) 41 *Journal of Law and Society* 73. See also the two techniques of collective bargaining that have historically been adopted in the UK: K. Ewing and J. Hendy, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 *Industrial Law Journal* 23, 49.

¹⁶ R. B. Freeman and J. L. Medoff, *What Do Unions Do?* (New York, Basic Books, 1984), chapters 6 and 11.

benefit that collective bargaining confers on them. On this view, collective representation is as important as a protection against abuse of power as it is as a generator of higher rewards... [But we ought] to [also] explore the question of whether a case can be made for collective employee voice on efficiency grounds... Efficiency is defined... as arranging governance rights in the company [employer] so as to minimize its costs of production....[the argument from efficiency runs] that allocating employees governance rights [in the company employer, e.g. in managerial decision-making, collective bargaining, etc.] might reduce the company's costs of contracting for labour inputs, because it could be part of an overall deal in which employees work more effectively to deliver the output the employer is seeking, in exchange for a greater input by employees into managerial decision-making.

The culmination of the collective bargaining process is the collective agreement. Unlike other European jurisdictions, collective agreements do not have any legally binding effect in UK law.¹⁷ Historically, the legal position owed something to the general hostility of trade unions to the common law courts and their desire to keep their codes peripheral to the legal process.¹⁸ Theoretically speaking, it can be attributed to the notion that neither party wishes to enter into legal relations,¹⁹ a conception that is wholly consistent with orthodox contractual tenets. Both parties will tend to be content with the absence of enforceability for a mixture of reasons. First, the collective parties will appreciate that resort to legal remedies such as injunctions and damages will simply heighten industrial tensions. Secondly, if any term of the collective agreement is subject to breach, the economic and social sanctions of industrial action on the one hand, e.g. a strike, and the exclusion of workers from the place of work on the other, e.g. a lock-out, are likely to be more effective than any potential legal solution.²⁰

A collective agreement was conceptualized in two possible ways by Kahn-Freund: first, as a contract, and secondly, as a normative code:

P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983), 154–169

A collective agreement is an industrial peace treaty and [contemporaneously] a source of rules for terms and conditions of employment, for the distribution of work and for the stability of jobs. Its two functions express the principal expectations of the two sides, and it is through reconciling their expectations that a system of industrial relations is able to achieve that balance of power which is one of its main objectives... To the two social functions of a collective agreement there correspond two actual or potential legal characteristics. The agreement may be, and in many count[r]ies is, a contract between those who made it, *i.e.* between an employer or employers or their association or associations on the one side and a trade union or unions on the other. At the same time the agreement is also potentially, and in many countries actually, a legal code. In this country it is generally neither a legally enforceable contract, nor (exceptions apart) a legally enforceable code. The contractual function is mainly, but not exclusively, subservient to the maintenance of industrial peace. The 'peace obligation' has received different interpretations at different times and places. Does it mean that a union party to the agreement undertakes during its currency not to strike at all or only that it will not strike in order to change the terms of the agreement, *i.e.* is the 'peace obligation' absolute or relative? Does it bind the members... as well as the union itself?.. These are some of the very difficult legal problems attaching to the 'contractual function' of collective agreements. The normative, *i.e.* the codifying and rule-making function, of a collective agreement serves to ensure that the agreed conditions are applied in the plant, enterprise or industry to which the agreement refers, *i.e.* applied by individual employers and workers... As a code, then, a collective agreement determines the content of existing and predetermines that of future contracts of employment. Often, usually, it prescribes only minima; sometimes, especially if it is a plant agreement, it sets a standard not to be departed from downwards or upwards. It determines the substance of the contract of employment, but not its existence. As a matter of law, the individual employers and worker

¹⁷ TULRCA 1992, s. 179(1).

¹⁸ O. Kahn-Freund, 'Labour Law' in *Law and Opinion in England in the 20th Century* (London, Stevens, 1959) 215, 232.

¹⁹ P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983), 168.

²⁰ O. Kahn-Freund, 'Legal Framework' in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 42, 57-58.

decide whether or not to enter into a contract; once they have done so, it is the collective agreement which says what are their rights and obligations under the contract.

In the following excerpt, Kahn-Freund provides a richer explanation of the hallmarks of the normative function of the collective agreement. In doing so, he draws a distinction between those components of the collective agreement that are open to incorporation into the individual employment contracts of the employees,²¹ and those which are not:

O. Kahn-Freund, 'Collective Agreements under War Legislation' (1943) 6 *Modern Law Reviews* 112, 115-116

... the crux of the matter is that the collective bargain is something else, apart from being a contract. It is a *lex contractus*, or, rather, a *lex contractuum*, it is an attempt made by the parties to the contract to lay down law for those who employ workers and who work in the trade or industry. It is a body of autonomous norms made for the guidance of, and observation by, individual employers and workers. It is the anticipated fixation of the conditions under which they may enter into contracts of employment and of the terms of those contracts... The collective agreement has two functions, a contractual function and a normative function... Broadly speaking, those parts of the collective agreement which are destined to have a normative effect may be divided into two categories: conditions for engagement and terms of employment. A condition for engagement is an agreement laying down under what circumstances certain categories of persons may be or must not be employed or seek employment for certain types of work... Examples of... terms [of employment] are provided by all those collective rules which regulate wages, piece rates, sliding scales, allowances, hours of labour, overtime, holidays, etc. The difference between these provisions and the conditions of engagement is that the former are, and the latter are not, capable of being incorporated in the contract of employment itself. Consequently terms of employment can, but conditions of engagement cannot, become usages which, like commercial customs in mercantile law, become the *lex contractus* for individual contracts as long as they have not been expressly contracted out. The collective agreement is the embodiment of a custom, pre-determining the content of contracts of employment, unless contradicted by the express terms of those contracts.

Kahn-Freund described the process by which the collective agreement became impliedly incorporated into every contract of employment as 'crystallized custom'.²² However, the notion of 'crystallized custom' never took hold.²³ Instead, the courts steadfastly refused to readily infer the incorporation of the terms of a collective agreement into an individual employment contract. Experience shows that the courts will seek to identify an intention to incorporate before they will entertain the possibility of implied incorporation.²⁴

The dominant paradigm of CLF began to collapse towards the latter part of the twentieth century. A historical account of the breakdown in the system of CLF is provided in the following extract:

S. Deakin and F. Wilkinson, 'The Evolution of Collective Laissez-Faire' (2004) 17 *Historical Studies in Industrial Relations* 1, 32

The arrival of a new Conservative administration in 1979 appears, in fundamental respects, to have been a turning point for the system of [CLF], marking a fundamental change in the philosophical underpinnings of industrial relations policy and the direction of legislative change. Collective bargaining was now viewed sceptically, as a potential impediment to the efficient allocation of labour and a contributing factor in high inflation. The economic arguments which were advanced at this time all pointed in the same direction: the need to change the law so as to limit the power and influence of trade unions, at the same

²¹ See the wider discussion on incorporation in Chapter 5, section 5.2.1.

²² See O. Kahn-Freund, 'Collective Agreements' (1941) 4 *Modern Law Review* 225, 226–227, Kahn-Freund, 'Legal Framework' in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 42, 58, and O. Kahn-Freund, 'The Shifting Frontiers of the Law: Law and Custom in Labour Relations' (1969) 22 *Current Legal Problems* 1.

²³ For a critique, see P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983), 168.

²⁴ See Chapter 5, section 5.2.1 and *Alexander v Standard Telephones Ltd. (No. 2)* [1991] IRLR 286.

time as removing what the government called ‘obstacles’ to the creation of jobs in the form of statutory regulation of terms and conditions of employment. The extent of legislative change was substantial... Alongside these general changes to collective labour law, the Fair Wages Resolution was rescinded; fair labour clauses in local government contracts prohibited; collective-bargaining rights removed from parts of the public sector, such as school-age education...

The dismantling of CLF in the 1980s and 1990s²⁵ gave rise to the phenomenon of decollectivization, i.e. a dramatic drop in the percentage and range of workers in the UK covered by collective agreements, together with a diminution in the depth of the topics included within the scope of a collective agreement.²⁶

K. Ewing and J. Hendy ‘New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining’ (2017) 46 *Industrial Law Journal* 23, 23-24

Immediately after the Second World War collective bargaining density was reported to be 85%. Although there were fluctuations thereafter, by the time of Thatcher’s accession in 1979, coverage stood at an estimated 82%. Inexorable decline has followed during the last 37 years, coverage today being around 20% and falling. This means that in the course of a working life, collective bargaining density has fallen from more than four out of five workers to little more than one in five, lower than before the First World War. This is not a problem unique to the UK, though the longevity and consistency of the decline is probably greater here than elsewhere. As it is, the UK has the lowest level of collective bargaining of any country in the EU, except for Lithuania. The US is one of only a few EU states where collective bargaining density currently is less than 50%... But although we are in the relegation zone, we are not yet bottom of the league of developed nations, since we have a coverage higher than the United States, whose ineffective and controversial trade union recognition laws we have largely adopted.

The fall in coverage is depicted in Table C.1:

Table C.1 Bargaining coverage (%), adjusted, and coverage change in Liberal Market Economies 1980-2010

| Country | 1980 | 1990 | 2000 | 2010 | Change 1980-2010, % points |
|-------------|------|------|------|---------|----------------------------|
| Australia | 85 | 80 | 50** | 40*** | -45 |
| Canada | 37 | 38 | 32 | 32***** | -5 |
| Ireland | 64 | 60 | 55 | 44**** | -20 |
| New Zealand | 70* | 61 | 20 | 17*** | -53 |
| UK | 71* | 54 | 36 | 33***** | -38 |
| USA | 26 | 18 | 15 | 13 | -13 |
| Mean LMEs | 59 | 52 | 35 | 30 | -29 |

Notes: *1979, **2001, ***2007, ****2008, *****2009

²⁵ For a more detailed historical review of the demise of CLF, see P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford, Clarendon Press/OUP, 1993) chapters 10 and 11 and W. McCarthy, ‘The Rise and Fall of Collective Laissez Faire’, in W. McCarthy (ed), *Legal Intervention in Industrial Relations: Gains and Losses* (Oxford, Blackwell, 1992) 1-78.

²⁶ For this distinction between the range, coverage and depth of collective bargaining, see W. Brown, ‘Negotiation and Collective Bargaining’ in T. Colling and M. Terry, (eds.), *Industrial Relations: Theory and Practice* (Oxford, Wiley, 2010).

Cabrelli: *Employment Law in Context*, 3e
Chapter C

Source: Visser (2011), from page 274 of G. Jackson and A. Kirsch, 'Employment Relations in Liberal Market Economies' in A. Wilkinson, G. Wood and R. Deeg (eds) *The Oxford Handbook of Employment Relations* (Oxford, OUP, 2014)
© G. Jackson and A. Kirsch, 2011. Reproduced with permission of the Licensor through PLSclear.

The breakdown of the CLF edifice and the resultant process of decollectivization entailed the diminution in importance of collective bargaining and collective agreements as a source of workplace norms and rules. Collective bargaining was replaced in its significance by individual bargaining and statutory employment protection. The received wisdom is that the growth in individual employment rights conferred through statute and the common law was a calculated exercise on the part of the judiciary and Parliament that was designed to plug the growing representation gap, and address deunionization, decollectivization and the deregulation of the labour market.²⁷ This process of decollectivization was accelerated by the decentralization of collective bargaining from the national to the company/enterprise level – see Table C.2:

Table C.2 The dominant level at which wage bargaining takes place in Liberal Market Economies 1980-2010

| Country | 1980 | 1990 | 2000 | 2010 |
|-------------|------|------|------|------|
| Australia | 3 | 4 | 2 | 2 |
| Canada | 1 | 1 | 1 | 1 |
| Ireland | 4 | 5 | 4 | 1 |
| New Zealand | 4 | 1 | 1 | 1 |
| UK | 2 | 1 | 1 | 1 |
| USA | 1 | 1 | 1 | 1 |

Notes: 5 = national or central level; 4 = national or central level, with additional sectoral / local or company bargaining; 3 = sectoral or industry level; 2 = sectoral or industry level, with additional local or company bargaining; 1 = local or company bargaining

Source: Visser (2011), from page 279 of G. Jackson and A. Kirsch, 'Employment Relations in Liberal Market Economies' in A. Wilkinson, G. Wood and R. Deeg (eds) *The Oxford Handbook of Employment Relations* (Oxford, OUP, 2014)
© G. Jackson and A. Kirsch, 2011. Reproduced with permission of the Licensor through PLSclear.

An explanation²⁸ of the extent to which decentralization of collective bargaining structures produces this effect is set out in the following passage:

G. Jackson and A. Kirsch, 'Employment Relations in Liberal Market Economies' in A. Wilkinson, G. Wood and R. Deeg (eds) *The Oxford Handbook of Employment Relations* (Oxford, OUP, 2014) 278-279
Collective bargaining is an important dimension and indicator of the overall coordination of employment relations. The level at which bargaining takes place and the degree of coordination between negotiations are both relevant. Collective agreements may be concluded on the national level, the sector or industrial level, and the local or company level. Bargaining coordination occurs when key negotiations influence other negotiations, effectively setting a pattern that is followed in other, formally independent,

²⁷ *Johnson v Unisys Ltd.* [2003] 1 AC 518, 532D per Lord Steyn. However, certain scholars have argued that statutory rights have been 'time and again... timid in ambition and complex in application and enforcement...', i.e. not effective replacements for collective bargaining, on which, see T. Colling, 'Trade Union Roles in Making Employment Rights Effective' in L. Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Oxford, Hart Publishing, 2012) 194.

²⁸ For another explanation why enterprise level-based statutory recognition regimes tend to accelerate the process of decollectivisation, see K. Ewing and J. Hendy 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 *Industrial Law Journal* 23, 45-46.

bargaining rounds. As a result, decentralized bargaining may include some centralized aspects if pattern bargaining takes place. Conversely, centralized bargaining at the national or industry level may be supplemented by further bargaining at lower levels, rendering it more centralized than it first appears. Bargaining is generally considered more centralized and coordinated in [coordinated market economies such as France and Germany] and more decentralized and uncoordinated in [liberal market economies such as the UK and the USA]...[there is a tendency towards] single-employer bargaining in English-speaking countries and a continued dominance of multi-employer bargaining in continental Europe. Today, a common feature of all [liberal market economies] is the decentralization of collective bargaining to the local level coupled with a low degree of bargaining coordination... There are various explanations for the observed decentralization trend. For example, the shift to post-Fordist production systems is argued to require the involvement of local actors in bargaining, and both international competition and industry deregulation may turn centralized wage setting into competitive hindrances. A further explanation regards conflict over the bargaining level as part of the struggle for power and control over the terms of employment, whereby decentralization is a consequence of a shift in power towards employers who expect it to lead to more favourable outcomes for them. Furthermore, legal support for multi-employer bargaining has been found to be an essential determinant of a country's overall bargaining structure. Where legal support is withdrawn, bargaining structures become more decentralized... [An] example of the effect of legislation on bargaining structure is the UK, where deregulation in the early 1980s similarly precipitated bargaining decentralization.

The recognition of trade unions by employers has always been an essential precondition for collective bargaining. An inherent feature of the system of CLF was the absence of any compulsory recognition of unions. If a trade union wished to bargain collectively with an employer or employers' association, this was an intrinsically voluntary process: this is why the CLF framework was often referred to as 'voluntarism'. With the gradual removal of the indirect auxiliary props to encourage collective bargaining, it became more of a challenge for unions to persuade employers to recognize them for bargaining purposes. The Industrial Relations Act 1971 represented the first statutory experiment in trade union recognition, but was unsuccessful and repealed in 1974. During the 1980s and 1990s, a growing number of employers took advantage of the deregulated labour market to refuse to voluntarily recognize trade unions and others simply began to derecognize those unions which they had dealt with for a considerable period of time. As such, the inherently voluntaristic system of CLF ultimately collapsed. However, with the arrival of a new Labour administration in 1997, the Employment Relations Act 1999 was passed and Schedule A1 was inserted into TULRCA in June 2000. This prescribed yet another statutory trade union recognition procedure. One would be forgiven for thinking that the enactment of a statutory regime enabling trade unions to seek recognition furnished evidence of a renewed state commitment to collective bargaining, i.e. that it was intended to reboot the decaying system of CLF, shore up collective bargaining as an institution, and introduced partially in response to the growing phenomenon of decollectivization. However, Dukes's assessment of the mischief behind the statutory procedure is rather less sanguine:

R. Dukes 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 *Industrial Law Journal* 236, 265

In drafting the [statutory trade union recognition] procedure, the stated aim of the [Labour] Government was not to promote trade union recognition or collective bargaining, but to encourage voluntary agreement as a prerequisite to the establishment and maintenance of workplace partnerships [and t]he key principle which shaped the procedure was the idea that trade union recognition is primarily a matter of choice; that trade unions should have a legal claim to be recognized only where they have majority or close to majority membership within the relevant bargaining unit. Unless the union has the support of the majority of the workforce, the CAC will not make a declaration of recognition.

Cabrelli: *Employment Law in Context*, 3e
Chapter C

After more than ten years in force, the detailed and ‘technical[ly] complex...’²⁹ union recognition procedure has not been a success from the viewpoint of the trade unions. The statistics reveal a dramatic drop in the number of recognition applications, acceptances of applications, and actual recognitions – see Table C.3 and Figure C.1:

Table C.3 Number of cases and recognition awards (cumulative and each year)

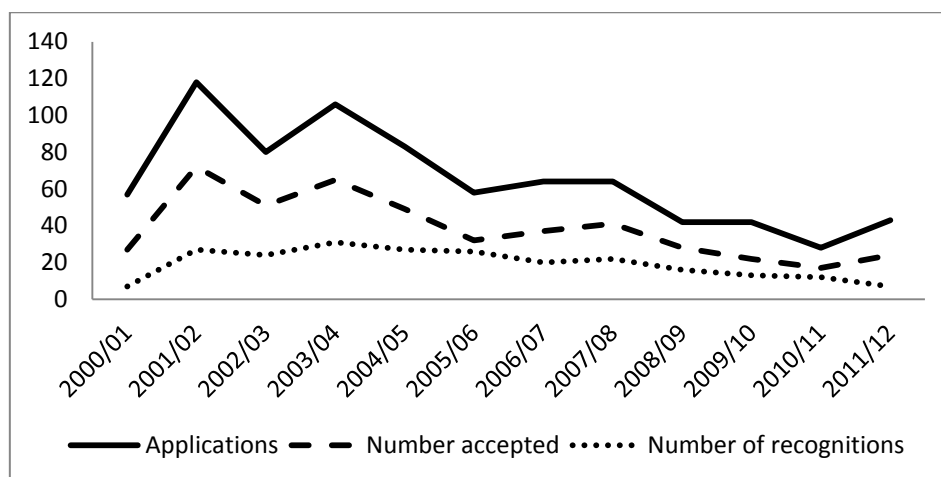
| Year | Number of cases (cumulative) | | Number of cases in this year only | Number and per cent of applications accepted | Number and per cent achieving recognition either without or with ballot (of applications accepted) |
|--------------|------------------------------|----|-----------------------------------|--|--|
| 2000/01 | 57 | | 57 | 27 (90%) | 7 (26%) |
| 2001/02 | 175 | | 118 | 72 (89%) | 27 (38%) |
| 2002/03 | 255 | | 80 | 51 (85%) | 24 (47%) |
| 2003/04 | 361 | | 106 | 65 (84%) | 31 (48%) |
| 2004/05 | 444 | | 83 | 49 (74%) | 27 (55%) |
| 2005/06 | 502 | | 58 | 32 (76%) | 26 (81%) |
| 2006/07 | 566 | | 64 | 37 (79%) | 20 (54%) |
| 2007/08 | 630 | | 64 | 41 (93%) | 22 (54%) |
| 2008/09 | 672 | | 42 | 28 (88%) | 16 (57%) |
| 2009/10 | 714 | | 42 | 22 (73%) | 13 (62%) |
| 2010/11 | 742 | | 28 | 17 (85%) | 12 (71%) |
| 2011/12 | 785 | | 43 | 24 (73%) | 7 (21%) |
| 2012/13 | 839 | 54 | | | |
| 2013/14 | 869 | 30 | | | |
| 2014/15 | 907 | 38 | | | |
| 2015/16 | 955 | 48 | | | |
| 2016/17 | 1006 | 51 | | | |
| | | | 785 | | |
| Total | | | | 465 (83%) | 232 (50%) |

Source: Based upon CAC Annual Reports, from page 72 of S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) reproduced with permission of SNCSC.

Updated from CAC Annual Reports to include the figures for 2012/13, 2013/14, 2014/15, 2015/16 and 2016/17.

²⁹ B. Simpson, ‘Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992’ (2000) 29 *Industrial Law Journal* 193, 194.

Figure C.1 Total applications, acceptances and recognitions – June 2000-March 2012



Source: Based upon CAC Annual reports, from page 73 of S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) reproduced with permission of SNCS.

Close scrutiny of the minutiae of the statutory procedure reveals its tendency to favour employers. Abundant scope exists for employers to adopt methods designed to frustrate the potential for recognition: Moore, McKay and Veale’s empirical study into the operation of the trade union recognition procedure revealed how employers adopt the varying strategies of pre-emption, contestation and intervention:

S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 111-141

[1. Pre-emption]... Creating alternative channels for worker involvement is one pre-emptive step employers take to attempt to avoid union recognition... This means... that an employer can pre-empt union recognition by concluding an agreement with a non-independent union or by selecting a union of its choice... [for example, see the decision of the Court of Appeal in *Pharmacists’ Defence Association Union v Boots Management Services Ltd.* [2017] IRLR 355 and the discussion at section C.3.2.2 below] [2. Contestation]... In the survey undertaken in 2000 union officers raised concerns about delays to the procedure, and particularly about the willingness of the CAC to grant extensions to time periods at the request of the employer even when they appeared to be consciously delaying the progress of cases. Employers may seek to forestall the recognition process by offering to engage in discussions over voluntary recognition, either prior to or once the statutory claim has been submitted, thus undermining the momentum of the union campaign... Ten years later there were still examples of employers engaging in discussions with unions on voluntary recognition with no real intention of reaching an agreement, ultimately forcing the union to make a CAC application... Employers may challenge the union at every stage of the procedure, including exploiting legal technicalities.... [3. Intervention] In a number of cases employers have not only questioned likely support for recognition at the admissibility stage, but appear to have intervened to contest it. [T]he main reason for the CAC rejecting applications is that unions cannot demonstrate such support and although in a number of cases the responsibility lay with the union, there is also clear evidence of employer attempts to undermine support. The CAC requires clear evidence that workers would not support the union’s claim... Other employers have provided evidence. Early in the operation of the procedure the CAC allowed for the difficulty the union has in gaining access to the workforce when interpreting evidence of likely majority support for recognition... There are examples where employers have provided evidence that leads to the application being rejected... Whilst a number of the cases... show that the CAC has disregarded employer attempts to question support for recognition, employer activity at this stage may be a prelude to intervention at later stages of the procedure in which they begin to raise the cost of union support for workers, whilst exposing the

volatility of that support... Once the application for recognition was in the statutory process all the case study employers challenged the union procedurally at all or some stages...

This extract yields the proposition that the statutory recognition procedure is deficient insofar as it might be viewed as a mechanism for the promotion of collective bargaining. It has been argued that the flaws in the statutory procedure are largely attributable to its conceptually distinct 'majoritarian' roots and its emphasis on the 'representational',³⁰ rather than 'regulatory' function of trade unions:

M. Doherty, 'When You Ain't Got Nothin', You Got Nothin' to Lose... Union Recognition Laws, Voluntarism and the Anglo Model' (2013) 42 *Industrial Law Journal* 369, 371

In a seminal work, Ewing has drawn the distinction between the 'representational' and 'regulatory' functions of trade unions. In terms of collective bargaining, the Anglo model of statutory recognition is grounded almost exclusively in a representational conception. This sees collective bargaining as a *private* market activity conducted by unions at the level of the enterprise (or parts thereof) as agents of a tightly circumscribed bargaining unit. This requires the consent of workers to choose to be represented by a trade union (membership alone is not sufficient to raise such a presumption) and this consent is revocable (an individual worker can choose to deal directly with the employer, notwithstanding that the majority of his or her colleagues choose to be represented by a union). By contrast, a 'regulatory' model of collective bargaining is premised on the idea that trade unions are involved in a process of rule-making that has an impact beyond their members (or members' immediate colleagues). Here, collective bargaining takes on an explicit *public* role, as employment standards are set, and applied, not only for employers that recognize trade unions and union members but for enterprises which do not engage in collective bargaining. This can happen through multi-employer collective bargaining, such as where joint industrial councils set standards for an industry or sector, and, where legal mechanisms permit the extension of collective agreements to all employers in a sector [i.e. *erga omnes*], such standards may be mandatory even for employers not affiliated to sectoral or industry-level employer associations.³¹

With these more structural flaws in the legislation in mind, we now turn to an examination of the statutory regulation of collective bargaining, collective agreements and trade union recognition.

Reflection points

1. To the extent that section 179 of TULRCA directs that collective agreements are presumed not to have any legally binding effect in UK labour law, do you agree with Kahn-Freund's categorisation of the collective agreement as a (1) contract and (2) normative code? If so, why? If not, why not?
2. To what extent should collective bargaining be promoted directly by the State? Should employment rights be channelled through statutory employment protection and common law rights instead of collective agreements concluded privately between independent trade unions and employers or employers' associations? Give reasons for your answer.
3. Should the state intervene to encourage the recognition of trade unions by employers for collective bargaining purposes? Alternatively, should matters be left to the parties to arrange recognition through voluntary means? Give reasons for your answer.

Additional reading on the role of collective bargaining and the statutory trade union recognition procedure

1. O. Kahn-Freund, 'Collective Agreements under War Legislation' (1943) 6 *Modern Law Review* 112.
2. O. Kahn-Freund, 'Legal Framework' in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 42.

³⁰ See K. Ewing, 'The Function of Trade Unions' (2005) 34 *Industrial Law Journal* 1.

³¹ See also A. Bogg, 'The Death of Statutory Recognition in the United Kingdom' (2012) 54 *Journal of Industrial Relations* 409 and K. Ewing and J. Hendy, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 *Industrial Law Journal* 23, 49 for the distinction between the regulatory and representational forms of collective bargaining.

3. O. Kahn-Freund, 'Labour Law' in *Law and Opinion in England in the 20th Century* (London, Stevens, 1959) 215.
4. A. Flanders, 'Collective Bargaining: A Theoretical Analysis' (1968) 6 *British Journal of Industrial Relations* 1.
5. O. Kahn-Freund, 'Industrial Relations and the Law: Retrospect and Prospect' (1969) 7 *British Journal of Industrial Relations* 301.
6. A. Flanders, 'The Tradition of Voluntarism' (1974) 12 *British Journal of Industrial Relations* 352.
7. O. Kahn-Freund, 'Intergroup Conflicts and their Settlement', in O. Kahn-Freund, *Selected Writings* (London, Stevens & Sons, 1978) 41.
8. P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983), chapters 3-6.
9. R. B. Freeman and J. L. Medoff, *What Do Unions Do?* (New York, Basic Books, 1984), chapters 6 and 11.
10. H. Collins, 'Against Abstentionism in Labour Law'. in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence* (Oxford, OUP, 1987) 79.
11. W. McCarthy, 'The Rise and Fall of Collective Laissez Faire', in W. McCarthy (ed), *Legal Intervention in Industrial Relations: Gains and Losses* (Oxford, Blackwell, 1992) 1-78.
12. P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford, Clarendon Press/OUP, 1993) 8-59 and chapter 10.
13. K. Ewing, 'The State and Industrial Relations: 'Collective laissez-faire' Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1.
14. S. Deakin and F. Wilkinson, 'The Evolution of Collective Laissez-Faire' (2004) 17 *Historical Studies in Industrial Relations* 1.
15. A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) chapter 1.
16. R. Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?' (2009) 77 *Modern Law Review* 220.
17. T. Colling and M. Terry, (eds.), *Industrial Relations: Theory and Practice* (Oxford, Wiley, 2010).
18. P. Davies, 'Efficiency Arguments for the Collective Representation of Workers: A Sketch' in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015), 367.
19. K. Ewing and J. Hendy, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 *Industrial Law Journal* 23.

C.2 COLLECTIVE BARGAINING AND COLLECTIVE AGREEMENTS

Our focus now turns to the rules contained in the TULRCA that regulate the process of collective bargaining. We then move on to consideration of the statutory controls on collective agreements.

C.2.1 Collective bargaining

At the international and European levels, support for collective bargaining as a process is supplied by various International instruments. These include International Labour Organization ('ILO') Conventions 98, 151 and 154,³² and Article 28 of the EU Charter of Fundamental Rights.³³ The decision of the Grand Chamber of the European Court of Human Rights ('ECtHR') in *Demir and Baykara v Turkey*³⁴ is also significant:

Article 4, ILO Convention 98

³² Right to Organize and Collective Bargaining Convention, 1949 (Convention 98), Labour Relations (Public Service) Convention, 1978 (Convention 151) and the Collective Bargaining Convention, 1981 (Convention 154).

³³ Pronounced on 7 December 2000 in Nice (OJ 2000 C 364, p.1) and a second time in Strasbourg on 12 December 2007 (OJ 2007 C 303, 1) and also published in OJ (2010) C 83/389.

³⁴ [2009] IRLR 766 (ECtHR). See K. Ewing and J. Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 1.

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 28 Workers' right to information and consultation within the undertaking

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

***Demir v Baykara App. No. 34503/97, 12 November 2008 at para [154]*³⁵
Grand Chamber of the ECtHR:**

... the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of contracting states in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the [European] Convention [on Human Rights], it being understood that states remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any 'lawful restrictions' that may have to be imposed on 'members of the administration of the state' within the meaning of Article 11(2)...

Each of these extracts stresses the extent to which the forces of labour and capital ought to be ascribed the freedom to bargaining collectively. At the domestic level, the definitions of 'collective bargaining' and 'collective agreements' are woven together in TULRCA:

178 Collective agreements and collective bargaining

(1) In this Act 'collective agreement' means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and 'collective bargaining' means negotiations relating to or connected with one or more of those matters.

(2) The matters referred to above are—

- (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
- (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- (c) allocation of work or the duties of employment between workers or groups of workers;
- (d) matters of discipline;
- (e) a worker's membership or non-membership of a trade union;
- (f) facilities for officials of trade unions; and
- (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

C.2.2 The legal status of collective agreements

In this section, we embark on an examination of the meaning of the expression 'collective agreement'. Here, once again, the terms of section 178 of TULRCA reproduced earlier are instructive. They provide

³⁵ Sourced from BAILI at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/ECHR/2008/1345.html&query=baykara&method=boolean> (last visited 21 August 2018).

that a collective agreement is any agreement 'or arrangement' made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified in section 178(2). Section 178(2) furnishes an exposition of the range of matters for negotiation which are included within the content of a collective agreement. For instance, employment terms and conditions are subject to negotiation, as are disciplinary procedures/sanctions and negotiations about trade union recognition. In *Pharmacists' Defence Association Union v Boots Management Services Ltd.*,³⁶ the interaction between each of the issues itemized in section 178(2)(a) to (g) was considered.³⁷ Commenting on the effect of section 178(2), Lord Justice Underhill remarked that 'the range of matters which can be the subject of collective bargaining is very wide; and the definition [in section 178] is satisfied so long as the negotiations relate to any one of the specified matters.'³⁸ This means that an agreement addressing the matters referred to in section 178(2)(a) only, for example, will still constitute a 'collective agreement' if the content of that agreement fails to deal with any of the issues identified in paragraphs (b), (c), (d), (e), (f), or (g) of section 178(2).³⁹ This broad interpretation of section 178(2) has the effect of extending the scope of the protections afforded to trade unions. As for the legal effect of a concluded collective agreement, this is spelt out in no uncertain terms in section 179:

179 Whether agreement intended to be a legally enforceable contract

(1) A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement—

(a) is in writing, and

(b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract.

(2) A collective agreement which does satisfy those conditions shall be conclusively presumed to have been intended by the parties to be a legally enforceable contract.

(3) If a collective agreement is in writing and contains a provision which (however expressed) states that the parties intend that one or more parts of the agreement specified in that provision, but not the whole of the agreement, shall be a legally enforceable contract, then—

(a) the specified part or parts shall be conclusively presumed to have been intended by the parties to be a legally enforceable contract, and

(b) the remainder of the agreement shall be conclusively presumed not to have been intended by the parties to be such a contract.

As such, a collective agreement is presumed to be a gentleman's agreement, i.e. binding in honour only. The terms of the collective agreement impose moral obligations upon the parties to comply with its terms. In return for industrial peace, the employer agrees to abide by its terms. If the parties wish to rebut the statutory presumption, then the collective agreement must be in writing and include a written term explicitly to the effect that it is legally binding. However, trade unions are generally reluctant to clothe the agreement with legal enforceability. As noted by Lord Justice Rimer, '[i]n modern industrial relations, it is unusual to find provisions in a collective agreement expressing an intention that all or any part of it is intended to be a legally enforceable contract.'⁴⁰ Trade unions generally prefer to rely on their industrial muscle through collective action to force the hand of any employer who has breached its terms, rather than resort to the common law courts. A more legalistic justification for the absence of legal effect is the doctrine that neither of the parties have any intention to create legal relations. An additional consideration is the difficulties that are furnished by contract law:

³⁶ [2013] IRLR 262.

³⁷ [2017] EWCA Civ 66; [2017] IRLR 355.

³⁸ *Pharmacists' Defence Association Union v Boots Management Services Ltd.* [2017] IRLR 355, 356.

³⁹ See also *Edinburgh Council v Brown* [1999] IRLR 208, *HM Prison Service v Bewley* [2004] ICR 422 and *Burke v Royal Liverpool University Hospital NHS Trust* [1997] ICR 730.

⁴⁰ *George v Ministry of Justice* [2013] EWCA Civ 324, at para. [18].

P. Lorber & T. Novitz, *Industrial Relations Law in the UK* (Cambridge, Intersentia Publishing Ltd., 2012) 79-80

Legally, a collective agreement does not fulfil the conditions required to define a contract. The latter must be signed between parties which will be bound directly by the agreement. The unions represent workers and therefore act as 'agents' when signing the collective agreement. For example, the union will not be the recipient of the new working arrangements or the new pay. Individuals who work for the employer will benefit from the agreement. This process is not permitted under English contract law. There is a further anomaly in relation to collective agreement [sic] when compared to contract law. When the agreement is signed, it is applicable to the whole workforce and not only to the members of the union within that bargaining unit. There is therefore an *erga omnes* effect that does not tally with normal contractual principles.

The inability of contract law to countenance *erga omnes* impact – i.e. the extension of the collective agreement to employees who are not members of the trade union for a particular employer, or within an industrial sector – represents an obstacle to the effectiveness of such agreements from an individual worker's perspective. The only legal means available for such agreements to be afforded legal status is for their terms to be incorporated expressly or impliedly into an employee's contract of employment. As discussed elsewhere in this book, the courts have imposed a variety of hurdles and preconditions to such an effect.⁴¹ The end result is that the terms of a vast majority of collective agreements are denuded of legal effect.

C.3 STATUTORY RECOGNITION OF TRADE UNIONS

Where an independent trade union is formally recognized, this has the important effect of empowering that union to engage in collective bargaining with employers or employers' associations:

178 Collective agreements and collective bargaining

(3) In this Act 'recognition', in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and 'recognised' and other related expressions shall be construed accordingly.

2.3.1 The voluntary recognition of trade unions

A trade union may be voluntarily recognized by an employer, but as highlighted in the following extract, a high threshold is imposed:

***National Union of Gold, Silver and Allied Trades v Albury Bros Ltd.* [1979] ICR 84, 89D-91**

Lord Denning MR:

... there is general agreement and consensus of opinion in these respects: a recognition issue is a most important matter for industry; and therefore an employer is not to be held to have recognised a trade union unless the evidence is clear. Sometimes there is an actual agreement of recognition. Sometimes there is an implied agreement of recognition. But at all events there must be something sufficiently clear and distinct by conduct or otherwise that one can say, 'They have mutually recognised one another, the trade union and the employers, for the purposes of collective bargaining.'... an act of recognition is such an important matter involving such serious consequences on both sides, both for the employers and the union, that it should not be held to be established unless the evidence is clear upon it, either by agreement or actual conduct clearly showing recognition...

Eveleigh LJ:

... it seems to me that recognition entails accepting a trade union to some extent as the representative of the employees for the purpose of carrying on negotiations in relation to or connected with one or more

⁴¹ See section 5.2.1.

of the matters set out in section [178(2) of TULRCA]. Thus it entails not merely a willingness to discuss but also to negotiate in relation to one or more-such matters. That is to say, to negotiate with a view to striking a bargain upon an issue, and thus it involves a positive mental decision. How that decision will be manifested will of course vary from case to case. There may be a declaration. It may be that dealings between the parties will have reached a point where one can use the expression: 'It goes without saying.'.. In so far as there was to some extent discussion between the union and the employers, that certainly did not amount in my view to negotiations for the purpose of bargaining in any sense of that word.

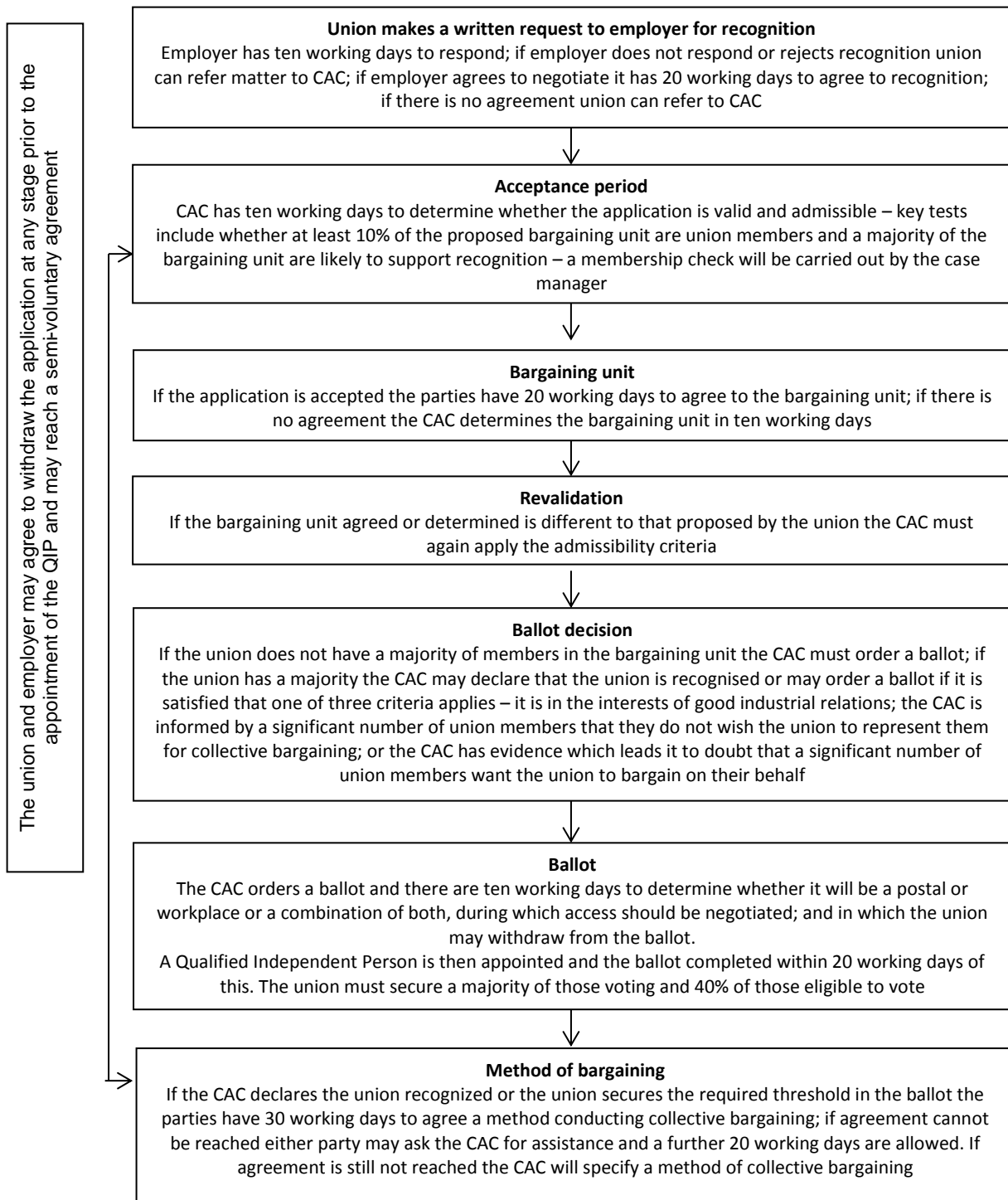
In the absence of voluntary recognition, the only option left to the trade union is for it to invoke the statutory recognition procedure in an attempt to force the employer's hand.

C.3.2 The statutory trade union recognition procedure

The starting point for our discussion in this section is to stress that the statutory procedure is highly technical and complex. In many respects, it represents a compromise between the interests of employers and that of trade unions. In total, if exhausted to the full, it takes around an average of 24 weeks for the process to be completed.⁴² Figure C.2 lays down the basic architecture of the process:

⁴² See S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 36.

Figure C.2 Basic building blocks of the statutory trade union recognition procedure



Source: Figure C.2 from page 24 of S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) reproduced with permission of SNCS.

C.3.2.1 The trade union's written request

The process is kick-started by the trade union making a written request to the employer for recognition in respect of an identifiable group of workers,⁴³ referred to in the legislation as the 'bargaining unit'.⁴⁴ However, the union's application/request must first negotiate the hurdle of 'validity'. In order to be 'valid', a number of criteria must be satisfied by the union. First, the request for recognition must be in writing, identify the union or unions and the bargaining unit, state that it is made under Schedule A1 to TULRCA, and finally it must be received by the employer.⁴⁵ The CAC had decided that it is crucial that the trade union is in fact the employer of the workers comprised in the bargaining unit.⁴⁶ Secondly, the union making the request must be independent.⁴⁷ Finally, there is a 'small employer' exemption, whereby the written request is treated as invalid if the employer, taken with associated employers, employs fewer than 21 workers.⁴⁸ In the following extract, Simpson explores the policy rationale behind this restrictive provision:

B. Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *Industrial Law Journal* 193, 195-196

The existence of any threshold in order to exclude 'small' employers from the scope of Schedule A1 was and is likely to remain a matter of controversy... The government's repeated justification of the existence of any limitation by reference to workforce size and the '21 workers' threshold chosen owed more to political pragmatism than principle. The principled argument was that 'small firms may be different in that they are often managed on a personal basis and collective bargaining may be inappropriate'. It was, however, offset by recognition that 'the principle behind statutory recognition is protection of the vulnerable members of society' and the fundamental principle of protecting the vulnerable meant that they could not ignore workers in smaller companies. Squaring this circle was only possible on the pragmatic basis that the government 'had done its best not to impose unnecessary costs on small employers' while providing for the threshold to be varied up or down. While the policy was to encourage voluntary recognition in companies of any size 'there was no requirement for companies with fewer than 21 workers to go through the statutory procedures'; the threshold was what the government considered to be a balanced proposal where the social partners had failed to agree. The effect was said to be to exclude 8.1 million workers, approximately 31% of the workforce, from the recognition procedure.

This 'small employer' exemption is by far the most exclusionary of the factors relevant to the validity of the trade union's initial written request.

Once the employer has received the written request, Schedule A1 to TULRCA envisages a number of potential responses. First, that the employer within ten working days of receiving the written request agrees the bargaining unit and that the union is to be recognized to conduct collective bargaining. Secondly, that the employer informs the union within the same timescale that it does not accept the request but is willing to negotiate within a further period of twenty working days. In both those cases, the outcome is a recognition agreement and there is no requirement to take any further steps. However,

⁴³ TULRCA, Schedule A1, para. 4.

⁴⁴ TULRCA, Schedule A1, para. 2(2).

⁴⁵ TULRCA, Schedule A1, paras. 5 and 8.

⁴⁶ See the CAC's dismissal of the IWGB's application for recognition in *IWGB v Cordant Security Ltd*. TUR1/1026 (2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/673096/Acceptance_Decision.pdf (last visited 21 August 2018).

⁴⁷ TULRCA, Schedule A1, para. 6 and see Chapter B on the Online Resource Centre, section B.2.2.

⁴⁸ TULRCA, Schedule A1, para. 7.

it is the third possible response where there is scope for the involvement of the CAC.⁴⁹ Here, the employer fails to respond to the employer's request within ten working days of receipt of the union's written request, or tells the union that it does not accept the request within the same period.⁵⁰ In such a case, paragraph 12 of Schedule A1 to TULRCA empowers the union to apply to the CAC in the required form⁵¹ to decide whether (i) the proposed bargaining unit is appropriate, and (ii) the union has the support of a majority of the workers constituting the appropriate bargaining unit.⁵²

C.3.2.2 The trade union's application to the CAC

Notice of the union's application to the CAC and copies of it and any supporting documents must be furnished to the employer.⁵³ However, before the CAC addresses (i) the appropriateness of the union's proposed bargaining unit and (ii) whether the union has majority support, it must be satisfied that the union's application under paragraph 12 is admissible. These admissibility conditions are fourfold:

- (1) The CAC must be satisfied that there is not already in force a collective agreement under which a union is (or unions are) recognized as entitled to conduct collective bargaining⁵⁴ on behalf of any workers falling within the relevant bargaining unit.⁵⁵ As such, if a non-independent trade union is recognized by the employer, the CAC will have no option but to dismiss an independent trade union's application for recognition. This is an obvious avoidance mechanism for an employer to adopt,⁵⁶ and the restrictions on the kind of managerial behaviour prescribed in the legislation are surprisingly somewhat limited.⁵⁷

A particularly difficult issue arises where the employer has recognized one trade union ('Trade Union 1') for the purposes of collective bargaining, but that recognition is limited to (i) facilities for trade union officials, and (ii) the agreed machinery for consultation, and a second trade union ('Trade Union 2') subsequently applies for recognition to engage in collective bargaining in respect of another matter, such as (iii) the terms and conditions of employment, or the physical conditions in which the workers in the bargaining unit are required to work, e.g. matters concerning pay, hours and holidays.⁵⁸ The question for resolution is whether the employer's recognition of Trade Union 1 precludes the recognition of Trade Union 2. This will be a particularly fraught issue where Trade Union 1 is a 'sweetheart' union that is friendly to the employer and has been recognised for that reason. Consider the following hypothetical:

Hypothetical A

Danny's Demolishers Ltd. ('the Employer') recognises the National Union of Demolition Workers ('NUDW'), which is a non-independent trade union. However, recognition of the NUDW is limited to collective bargaining in respect of facilities for trade union officials and the content and design of the machinery for negotiation and consultation with demolition workers employed by the employer and the NUDW. Another independent trade union with the title the Union of Clerical Staff ('UCS') has penetrated a significant percentage of the office staff of the Employer, who are members of the UCS. The Employer refuses to voluntarily recognise the UCS, so the latter makes a written request to the CAC under Schedule A1 to the TULRCA. The UCS seeks to engage in collective bargaining with the Employer in respect of the office staff's pay, holidays and working hours only. The question is whether the CAC is bound to dismiss the application of the UCS in light of the fact that the NUDW are recognised for collective bargaining purposes, albeit to a limited degree.

⁴⁹ See section 2.3.6 for more detail on the role of the CAC.

⁵⁰ TULRCA, Schedule A1, para. 11(1)(a) and (b).

⁵¹ TULRCA, Schedule A1, para. 33.

⁵² TULRCA, Schedule A1, para. 12(2)(a) and (b).

⁵³ TULRCA, Schedule A1, para. 34.

⁵⁴ For this purpose, the extended definition of collective bargaining in section 178 of the TULRCA is applicable.

⁵⁵ TULRCA, Schedule A1, para. 35.

⁵⁶ For example, see *R (on the application of the National Union of Journalists) v Central Arbitration Committee* [2006] IRLR 53.

⁵⁷ See TULRCA, Schedule A1, para. 35(4).

⁵⁸ See the definition of 'collective bargaining' in section 178(2).

Such a scenario occurred in the case of *Pharmacists' Defence Association Union v Boots Management Services Ltd.*⁵⁹ Here, the Court of Appeal decided that the CAC would be bound to apply the terms of paragraph 35(4) of Schedule A1 to TULRCA to render Trade Union 2's application for recognition inadmissible in such circumstances. This finding was rooted in the ability of Trade Union 2 to seek derecognition of Trade Union 1 (the "BPA") under the relevant statutory derecognition procedure adumbrated in Part VI of Schedule A1 to TULRCA. Once Trade Union 1 had been derecognised, this would subsequently enable Trade Union 2 to invoke the statutory recognition procedure in Schedule A1 to seek recognition and paragraph 35(4) would no longer function as an impediment to such application for recognition. On this basis, there could not be said to be any infringement of Trade Union 2's right to engage in collective bargaining under Article 11 of the European Convention on Human Rights ('ECHR') post-*Demir and Baykara v Turkey*.⁶⁰ As such, if Trade Union 2 made an application to a court, the court would have no power to declare the terms of paragraph 35(4) of Schedule A1 to TULRCA as incompatible with Article 11 of the ECHR in terms of section 4 of the Human Rights Act 1998. The Court of Appeal's decision that the CAC's rejection of Trade Union 2's (the "PDAU") application for recognition did not infringe Article 11 of the ECHR has attracted a measure of criticism:

A. Bogg and R. Dukes, "Article 11 ECHR and the Right to Collective Bargaining: *Pharmacists' Defence Association Union v Boots Management Services Ltd.*" (2017) 46 *Industrial Law Journal* 543, 550-551

A number of criticisms may be brought to bear on this reading of Article 11 and the right to collective bargaining... In *Boots*, the Court of Appeal's characterisation of the PDAU's complaint as 'based on the denial of a right to compel an employer to engage in collective bargaining'... was reinforced by its adoption of a Hohfeldian framework that rights must, as a logical necessity, correspond to correlative duties. The 'real question' before the Court, according to Underhill LJ, was whether Article 11 conferred a right to bargain collectively with the employer 'and its correlative obligation'... In rendering the PDAU's application for recognition inadmissible, the recognition procedure might have been seen to deny the union a 'right to compel ... collective bargaining', but for the possibility of derecognition of the BPA. In our opinion, the Lord Justice's focus upon the existence of a putative obligation on the part of the employer to bargain collectively with the union is a misleading distraction. As Bogg and Ewing have argued, the Hohfeldian notion of rights and duties is unhelpful in the context of collective bargaining for the very reason that it leads to a preoccupation with jural relations between private parties, diverting attention from the crucial role that positive duties on governments play in securing the effective realization of human rights. The better point of focus for a court tasked with interpreting the right to collective bargaining is not the employer's duty to recognise or to bargain, but rather the state's duty to ensure that collective bargaining is effectively promoted through a range of supportive techniques. This interpretation... fits neatly with the so-called 'voluntarist' tradition of the UK, according to which there was no legal duty on employers to recognise trade unions but, instead, a right to strike... what the 'right to collective bargaining' entails is... not a 'universal right on any trade union to be recognised in all circumstances' but—arguably—a right for any independent trade union to be afforded the opportunity and appropriate positive legal support to persuade/apply pressure on an otherwise reluctant employer to recognise it. This is what the right to strike affords trade unions, and what the statutory recognition procedure aims to afford them in some circumstances...

- (2) The CAC must decide that (a) ten per cent or more of the workers in the bargaining unit are members of the trade union and (b) a majority of the workers in that bargaining unit would be likely to favour

⁵⁹ [2017] IRLR 355. See the prior decision of the High Court in *R (on the Application of Boots Management Services Ltd. v Central Arbitration Committee* [2014] IRLR 278 and *R (on the Application of Boots Management Services Ltd. v Central Arbitration Committee (No. 2))* [2014] IRLR 887. For a similar scenario, see *Transport and General Workers' Union v Asda* [2004] IRLR 836.

⁶⁰ [2009] IRLR 766. See K. Ewing and J. Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 1.

recognition of the union.⁶¹ This begs the question as to how the CAC ought to approach whether more than 50% of the workers in the bargaining unit 'would be likely' to favour recognition, e.g. how such a level of support is to be demonstrated? One obvious example is where a majority of the workers in the bargaining unit are members of the applicant trade union. Other than that, surveys and petitions will be sufficient to establish such evidence:

B. Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *Industrial Law Journal* 193, 203-204

The likelihood of a majority of the workers in the [bargaining unit ('BU')] favouring recognition is a far less tangible criterion. It is not clear if this refers to recognition to any extent, or recognition to the extent of, "and confined to, negotiations over pay, hours and holidays. That point apart, it is hard to see how the level of potential support can be assessed without the CAC carrying out the same sort of surveys of worker opinion as were carried out by the [Commission on Industrial Relations ('CIR')] and ACAS in their work on union recognition in the 1970s. This stage of the... procedure relates to a fundamental issue. Research evidence has shown that union membership often increases after recognition... This is one issue on which the potential for a discontented employer to seek judicial review of a CAC decision that a majority would be likely to favour recognition appears to be considerable.

- (3) The CAC has the power to reject a trade union's application for recognition if another trade union has also tendered an application.⁶² An exception applies where the applicant unions satisfy the CAC that they will co-operate with each other in a manner likely to secure and maintain stable and effective collective bargaining arrangements and they are able to show that if the employer so wishes, they will enter into arrangements under which collective bargaining is conducted by the unions acting together on behalf of the workers in the bargaining unit. As such, the unions must go to the lengths of 'committing themselves to joint bargaining, should the employer require this.'⁶³
- (4) If the CAC has rejected a trade union's application for recognition and the bargaining unit in its subsequent application is the same or substantially the same, if three years from the initial rejection has not yet elapsed, the subsequent application must be rejected.⁶⁴

C.3.2.3 The CAC's determination of the appropriate bargaining unit

Assuming that none of these four criteria are engaged and the union's application is not dismissed by the CAC, the next step is to decide the appropriate bargaining unit. This is an area where the CAC is under a statutory duty to seek to assist the parties in reaching agreement.⁶⁵ If the CAC is unable to do so within a period of 20 days or such longer period as it may so specify,⁶⁶ it is then subject to an obligation to decide whether the bargaining unit proposed by the trade union is appropriate.⁶⁷ It must do so within a period of ten working days⁶⁸ and the criteria that the CAC must apply are laid down in paragraph 19B of Schedule A1 to TULRCA:

19B

(2) The CAC must take these matters into account—

- (a) the need for the unit to be compatible with effective management;
- (b) the matters listed in sub-paragraph (3), so far as they do not conflict with that need;

⁶¹ TULRCA, Schedule A1, para. 36.

⁶² TULRCA, Schedule A1, para. 37.

⁶³ B. Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *Industrial Law Journal* 193, 198.

⁶⁴ TULRCA, Schedule A1, para. 39.

⁶⁵ TULRCA, Schedule A1, para. 18(1).

⁶⁶ TULRCA, Schedule A1, para. 18(2).

⁶⁷ TULRCA, Schedule A1, para. 19(2).

⁶⁸ TULRCA, Schedule A1, paras. 19(4) and 19A(4).

(3) The matters are—

- (a) the views of the employer and of the union (or unions);
- (b) existing national and local bargaining arrangements;
- (c) the desirability of avoiding small fragmented bargaining units within an undertaking;
- (d) the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant;
- (e) the location of workers.

(4) In taking an employer's views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the CAC must take into account any view the employer has about any other bargaining unit that he considers would be appropriate.

The CAC must evaluate the applicant trade union's proposed bargaining unit by applying the factors identified in paragraph 19B. If it is the opinion of the CAC that the proposed unit is appropriate, its inquiry should end there.⁶⁹ The Court of Appeal has ruled that there is no duty incumbent on the CAC to treat the employer's proposed bargaining unit on an equal footing as the union's, or to enter into a comprehensive assessment of what constitutes the most optimal bargaining unit in the circumstances.⁷⁰ In this way, '[b]argaining units other than that proposed by the union [are of limited relevance but]... may enter the picture in two ways: as a means of testing whether the union's bargaining unit is indeed appropriate; and as an alternative bargaining unit to be inserted in the request should the union's bargaining unit be seen as inappropriate.'⁷¹ It has been held that it is not possible under paragraphs 19, 19A and 19B for a trade union to gain recognition in respect of a bargaining unit that covers workers employed by more than one employer.⁷²

Around the time of the introduction of the statutory recognition procedure, Novitz and Skidmore expressed the opinion that the criteria set out in paragraph 19B are essentially pro-employer in nature. They argued that the various factors in paragraph 19B would preclude the recognition of small and fragmented bargaining units and only those that were management-friendly would be treated as appropriate by the CAC:

T. Novitz & P. Skidmore, *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights* (Oxford, Hart Publishing Ltd., 2001) 90

This central emphasis on compatibility with effective management reduces the chances of broader-based bargaining and gives precedence to the employer's preferences. This was what the CBI asked for in the 'Joint Statement' and ultimately what it got. The Government has claimed that this is a 'modern definition of recognition', 'tailored for single-status, single-table bargaining workplaces, if that is what the employer wants'. In this way, New Labour managed to distance itself from trade union demands and reassure business. The employer will therefore have considerable influence in determining the scope of the workforce balloted for recognition.⁷³

However, Moore, McKay and Veale's research revealed that the evidence is more mixed. For example, in practice, and despite the wording of paragraph 19B, not all bargaining units are large, stable entities: some are in fact much smaller than one might expect.⁷⁴ The CAC has adopted an even-handed approach

⁶⁹ *R (Kwik-Fit (GB) Ltd.) v Central Arbitration Committee* [2002] ICR 1212, 1215G per Buxton LJ.

⁷⁰ *R (Kwik-Fit (GB) Ltd.) v Central Arbitration Committee* [2002] ICR 1212, 1216D-F per Buxton LJ.

⁷¹ *R (Kwik-Fit (GB) Ltd.) v Central Arbitration Committee* [2002] ICR 1212, 1215G per Buxton LJ.

⁷² *Graphical, Paper and Media Union v Derry Print Ltd.* [2002] IRLR 380.

⁷³ See also B. Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *Industrial Law Journal* 193, 206.

⁷⁴ See S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 83-87.

where employers have actively sought to contest or manipulate the bargaining unit.⁷⁵ Further, in *R (Cable & Wireless Services UK) v CAC*,⁷⁶ the Court of Appeal held that there is nothing undesirable about a small bargaining unit, provided that it was not fragmented, lacking in identifiable boundaries or not self-contained.⁷⁷ The principal concern of the legislature was to avoid the recognition of bargaining units that would be divisive in the workplace and lead to the 'risk of proliferation [of competing units]'.⁷⁸ Likewise, in *R (on the application of Lidl Ltd.) v CAC*⁷⁹ where the Court of Appeal ruled that the CAC had adopted the correct test in dismissing the concerns of Lidl about the negative effects of recognising a union in respect of a small number of employees who were located at a single site. In this way, the courts appear to be vigilant to some degree to prevent the concerns of the employer to be afforded ultimate priority. As such, they seek to strike a kind of balance between the interests of the unions and employers, notwithstanding the employer-friendly language of paragraph 19B. Indeed, in *R (on the application of Lidl Ltd.) v CAC*,⁸⁰ the Court of Appeal advised that the courts should exercise caution and restraint in upholding legal challenges to the decisions of the CAC under paragraph 19 of Schedule A1.

C.3.2.4 The CAC's determination whether to grant recognition

Once the CAC has determined the appropriate bargaining unit, the next stage in the process is for it to address whether recognition should be granted to the trade union. Here there are two possibilities. First, the CAC has the power to grant automatic recognition where it is satisfied that a majority of the workforce in the bargaining unit are members of the applicant trade union.⁸¹ However, the second option enables the CAC to order that a rigorous ballot procedure be conducted notwithstanding that a majority of the workers in the bargaining unit are members of the applicant union. Here, the ballot will be ordered to determine whether it produces the result that a majority of votes cast by the workers in the bargaining unit are in favour of recognition and that there was a minimum 40% turn out of the workers constituting the bargaining unit in the voting process.⁸² For that reason, it is clear that the bare existence of a majority of trade union members in the bargaining unit is insufficient of itself to statutorily compel the CAC to grant automatic recognition. However, in practice, 'up to March 2012, [the CAC] had declared recognition without a ballot in 77 per cent in cases in which a union had majority membership [of the bargaining unit and] in just under a quarter ballots were [ordered]'.⁸³ In this way, at the time of writing, Simpson's fear at the inception of the statutory recognition procedure that 'ballots on recognition could well become the norm even where the union has majority membership in the [bargaining unit]'⁸⁴ does not appear to have been realized.

The CAC has three grounds, which if satisfied, empower it to order a ballot notwithstanding majority trade union membership in the bargaining unit.⁸⁵ The legislation refers to the three grounds as 'qualifying conditions'.⁸⁶ The first circumstance recognized by statute is where the CAC is satisfied that a ballot should be held in the interests of 'good industrial relations'.⁸⁷ This is potentially a broad category and of

⁷⁵ See S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 125-130.

⁷⁶ [2008] ICR 693.

⁷⁷ [2008] ICR 693, 700G-701A per Mr Justice Collins.

⁷⁸ *R (Cable & Wireless Services UK) v CAC* [2008] ICR 693, 700G per Mr Justice Collins.

⁷⁹ [2017] EWCA Civ 328; [2017] IRLR 646.

⁸⁰ [2017] EWCA Civ 328; [2017] IRLR 646, 648 per Lord Justice Underhill.

⁸¹ TULRCA, Schedule A1, paras. 22(1) and (2).

⁸² TULRCA, Schedule A1, para. 29(3).

⁸³ S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 89.

⁸⁴ B. Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *Industrial Law Journal* 193, 209.

⁸⁵ TULRCA, Schedule A1, para. 22(3).

⁸⁶ TULRCA, Schedule A1, para. 22(4).

⁸⁷ TULRCA, Schedule A1, para. 22(4)(a).

considerable assistance to employers who wish to avoid automatic recognition.⁸⁸ However, the CAC have policed this criterion in such a way that it will tend to prioritize collective bargaining over the ballot procedure:

A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing Ltd., 2009) 183-184

A broad interpretation of [the] scope [of paragraph 22(4)(a)] by the CAC would have... undermine[d] the efficacy of the [statutory recognition] procedure. Predictably this qualifying condition is the one that has been most frequently invoked by employers. However, it has been operative in only a narrow range of cases, and 'has never been viewed by the CAC as an 'easy' option for ordering a ballot'. Two main arguments have been offered by employers: we might term these the argument from democratic legitimacy, and the argument from democratic therapy. The argument from democratic legitimacy identifies the secret ballot⁸⁹ as the pre-eminently authoritative, democratic arbiter of majority opinion. The seal of democratic legitimacy that a ballot confers on the union's recognition claim dispels any doubts or uncertainty about the extent of support and this lays the foundations for a stable collective bargaining relationship. The argument from democratic therapy identifies the ballot process as an opportunity for both parties to clear the air, to heal the wounds of divisiveness and acrimony, and this enables the parties to conduct trust-based collective bargaining. On occasion these arguments have persuaded the CAC. Nevertheless, the CAC has generally been unreceptive to generalised assertions based on the democratic imperative of a ballot. Receptiveness to generalised assertion raises the spectre that 'the exception would swallow up the rule' of recognition without a ballot in a situation of majority membership. The CAC has resisted the lure of 'democracy creep' in its reasoning... This has been underpinned by two recurrent lines of argument in CAC decisions. First, the CAC has tended to emphasize the virtue of collective bargaining, as opposed to the ballot procedure, as the preferred method of facilitating the voluntary resolution of disagreement between the parties... Secondly, the CAC has been sympathetic to union submissions that, in contrast to the democratic therapy argument of employers, ballots tend to exacerbate divisiveness and polarise the bargaining parties, heightening tensions in the workplace, and this risks poisoning any subsequent collective bargaining relationship.

This extract yields the insight that what could have been adopted as a fairly straightforward means of mainstreaming ballots as a standard part of the process has been resisted by the CAC, namely the 'good industrial relations' criteria. However, evidence suggests that unions have struggled to win subsequent ballots where the second qualifying circumstance in paragraph 22(4)(b) is invoked by the employer to attempt to persuade the CAC to order a ballot, i.e. that the employer is able to produce some evidence that 'a significant number of union members [in the bargaining unit did not want]... the union to bargain on their behalf...'⁹⁰ Paragraph 22(4)(b) limits the ability of employers to invoke this qualifying condition, since the CAC must consider such evidence to be 'credible'. Further, the number of members in the bargaining unit against the union conducting collective bargaining on their behalf must be 'significant'. These criteria are used by the CAC to test the evidence when paragraph 22(4)(b) is raised by an employer:

A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing Ltd., 2009) 182

... the evidence need[s]... to be 'credible'. So, for example, where an employer adduced the results of a non-confidential straw poll initiated and conducted by the employer suggesting that polled union members did not support recognition, the [CAC] rejected this evidence on the basis that it was not 'credible'. Moreover, speculative inferences from circumstantial evidence—have been rejected as not

⁸⁸ See the techniques adopted by employers in promoting a ballot in S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 130-136.

⁸⁹ For alternatives to ballot-based trade union recognition systems, e.g. 'petition-based' and 'majority-support determination' regimes, see A. Forsyth, J. Howe, P. Gahan and I. Landau, 'Establishing the Right to Bargain Collectively in Australia and the UK: Are Majority Support Determinations under Australia's Fair Work Act a More Effective Form of Union Recognition?' (2017) 46 *Industrial Law Journal* 335.

⁹⁰ See S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 130.

disclosing 'credible' evidence... [Furthermore] the number of union members needs to be 'significant'. In *TGWU and Cardinal Health* the [CAC] took the view that two out of 77 members was not 'significant'... even in a situation of marginal majority membership where a small number of communications might depress membership below a majority of the bargaining unit, what mattered was the proportion of dissenting union members when compared with the total number of union members. Nevertheless, in a situation where the employer successfully orchestrates⁹¹ individually written communications from a substantial proportion of union members to the CAC, perhaps using captive audience meetings or one-to-one interviews with senior management as an inducement, then the employer's invocation of paragraph 22(4)(b) is likely to be successful in the absence of specific testimony by workers that they have been pressurised into writing letters.⁹²

The third qualifying circumstance which the CAC may apply to justify the ordering of a ballot is specified in paragraph 22(4)(c) as follows:

22

(4) These are the three qualifying conditions...

(c) membership evidence is produced which leads the CAC to conclude that there are doubts whether a significant number of the union members within the bargaining unit want the union (or unions) to conduct collective bargaining on their behalf.

(5) For the purposes of sub-paragraph (4)(c) membership evidence is—

(a) evidence about the circumstances in which union members became members;

(b) evidence about the length of time for which union members have been members, in a case where the CAC is satisfied that such evidence should be taken into account.

Research has revealed that this third qualifying criterion, 'according to CAC records, [has] only been invoked in one case, that of the *AEEU and Huntleigh Healthcare*...^[93] Here the CAC determined there should be a ballot because union membership had been granted on the basis of no subscription.'⁹⁴ We can take from this evidence that the third qualifying condition is of limited utility to the employer seeking to contest the applicant trade union's effort at recognition, 'since [CAC] scrutiny of evidence has been particularly strict'.⁹⁵

Where the CAC instructs that a ballot be conducted, the terms of paragraph 25 of Schedule A1 assume importance. The procedure is detailed, technical and rigorous, but differs from that put in place for the conduct of ballots on industrial action, including strikes.⁹⁶ The essence of the process is that the ballot must be conducted at the employer's workplace or by post or a combination of the two, within twenty working days of the CAC's appointment of a qualified independent person.⁹⁷ The costs of the procedure must be borne equally by the employer and the union.⁹⁸ It is also provided that the CAC must take into account the three criteria in determining how the ballot ought to be conducted: the likelihood of the ballot being affected by unfairness or malpractice if it were conducted at a workplace or workplaces, the costs and practicality of the ballot and such other matters as it considers appropriate.⁹⁹ The legislation

⁹¹ See *R (On the application of Gatwick Express) v CAC* [2003] EWHC 2035 (Admin).

⁹² See S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 90.

⁹³ TUR1/19/2000.

⁹⁴ S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 91.

⁹⁵ A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing Ltd., 2009) 177.

⁹⁶ See Online Resource Chapter D, section D.2.6.1.

⁹⁷ TULRCA, Schedule A1, para. 25(1)-(4).

⁹⁸ TULRCA, Schedule A1, para. 28(2).

⁹⁹ TULRCA, Schedule A1, para. 25(5).

prescribes certain protections in favour of trade unions, which can be divided into two camps. The first consists of a series of duties imposed on employers in connection with the holding of the ballot. Meanwhile, the second is encapsulated in the statutory concept of 'unfair practices'. The first protective measure is laid down in paragraph 26 of Schedule A1:

26

(2) The first duty is to co-operate generally, in connection with the ballot, with the union (or unions) and the person appointed to conduct the ballot, and the second and third duties are not to prejudice the generality of this.

(3) The second duty is to give to the union (or unions) such access to the workers constituting the bargaining unit as is reasonable to enable the union (or unions) to inform the workers of the object of the ballot and to seek their support and their opinions on the issues involved.

(4) The third duty is to do the following (so far as it is reasonable to expect the employer to do so)—

(a) to give to the CAC, within the period of 10 working days starting with the day after that on which the employer is informed... the names and home addresses of the workers constituting the bargaining unit;

(b) to give to the CAC, as soon as is reasonably practicable, the name and home address of any worker who joins the unit after the employer has complied with paragraph (a);

(c) to inform the CAC, as soon as is reasonably practicable, of any worker whose name has been given to the CAC under paragraph 19D or (a) or (b) of this subparagraph and who ceases to be within the unit.

(4A) The fourth duty is to refrain from making any offer to any or all of the workers constituting the bargaining unit which—

(a) has or is likely to have the effect of inducing any or all of them not to attend any relevant meeting between the union (or unions) and the workers constituting the bargaining unit, and

(b) is not reasonable in the circumstances.

(4B) The fifth duty is to refrain from taking or threatening to take any action against a worker solely or mainly on the grounds that he—

(a) attended or took part in any relevant meeting between the union (or unions), and the workers constituting the bargaining unit, or

(b) indicated his intention to attend or take part in such a meeting.

These provisions are supplemented by a Code of Practice on Access and Unfair Practices during Recognition and Derecognition Ballots,¹⁰⁰ which cover the union's right of access to the workers in the bargaining unit. This Code of Practice is motivated by a concern to prevent employers placing undue pressure on the workers prior to the ballot. Paragraph 27 of Schedule A1 to TULRCA also prescribes various sanctions which may be imposed on the employer by the CAC if it is satisfied that the employer has failed to fulfil any of the aforementioned five duties. For example, the CAC may instruct the employer to take various steps to remedy the failure as it considers reasonable and within such period it considers reasonable.

The end result is that the legislation makes certain expectations about the proper conduct of an employer in the context of a ballot. The burning question, however, is whether these statutory incantations are effective in practice. At the time of the introduction of the statutory recognition procedure, Simpson cast the rules on ballots as striking an admirable balance between the interests of employers and unions in somewhat anodyne terms:

¹⁰⁰ See <https://www.gov.uk/government/publications/code-of-practice-access-and-unfair-practices-during-recognition-and-derecognition-ballots> (last visited 26 August 2018).

B. Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *Industrial Law Journal* 193, 210

While the provisions on the type of ballot are somewhat inelegant, they can be seen to reflect a fair attempt to compromise between a desire to maximise turnout and to minimise the potential for both malpractice and employer victimisation of workers.

However, armed with approximately ten years of experience, Bogg struck a much more sceptical note:

A. Bogg 'The Mouse that Never Roared: Unfair Practices and Union Recognition' (2009) 38 *Industrial Law Journal* 390, 395

The ballot procedure... gives the employer a myriad of opportunities to erode the union's support in the bargaining unit through vigorous campaign activity... [One technique has been for the employer to] inflate... the size of the bargaining unit through rapid recruitment of workers in response to an alleged upturn in business.

As for the statistics, they suggest that unions will more often win a ballot in practice than they will lose them:

S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 93-95

[During the period from 2000 to 2011-12 overall, CAC statistics reveal that] unions lost 38 per cent of the ballots and... there has been no substantial increase in the proportion of ballots won over the period — rather it has remained relatively stable, albeit dipping near or below the 50 per cent mark in 2006-7 and 2008-9; in fact the trend line shows a downward trajectory.

This passage states that a significant minority – standing at 38 per cent – of the ballots conducted have been lost by trade unions. This may be partly attributable to the application of undue pressure by employers on the workers in the bargaining unit prior to the CAC making an order for a ballot to be conducted:¹⁰¹ there is nothing unlawful about such a *pre-ballot* practice on the part of management. A key element of the statutory techniques introduced after 2004 was the 'unfair practices' concept: this was specifically designed to combat victimization of workers by employers *during* the ballot procedure. It finds its expression in paragraph 27A of Schedule A1 to TULRCA.

27A

- (1) Each of the parties informed by the CAC... must refrain from using any unfair practice.
- (2) A party uses an unfair practice if, with a view to influencing the result of the ballot, the party—
- (a) offers to pay money or give money's worth to a worker entitled to vote in the ballot in return for the worker's agreement to vote in a particular way or to abstain from voting.
 - (b) makes an outcome-specific offer to a worker entitled to vote in the ballot.
 - (c) coerces or attempts to coerce a worker entitled to vote in the ballot to disclose—
 - (i) whether he intends to vote or to abstain from voting in the ballot, or
 - (ii) how he intends to vote, or how he has voted, in the ballot,
 - (d) dismisses or threatens to dismiss a worker,
 - (e) takes or threatens to take disciplinary action against a worker,
 - (f) subjects or threatens to subject a worker to any other detriment, or
 - (g) uses or attempts to use undue influence on a worker entitled to vote in the ballot.

¹⁰¹ R. Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 *Industrial Law Journal* 236, 249 and A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) 166.

Paragraph 27B stipulates that either party may submit a complaint to the CAC that the other has used an unfair practice on or before the first working day after the date of the ballot or the last of the days that votes can be cast in the ballot.¹⁰² The CAC has ten working days to make a decision on the complaint and to determine whether it is well-founded.¹⁰³ The CAC must find the complaint to be well-founded if there has been an unfair practice, and if it is satisfied that the use of that practice changed or was likely to change the intention of the worker to vote or abstain from voting, his intention to vote in a particular way, or how he voted.¹⁰⁴ If the CAC upholds the complaint, paragraph 27C of Schedule A1 to TULRCA directs the CAC to make a declaration to that effect and to order the party concerned to take any action specified in the order within such period as may be so specified, or give notice to the employer and to the union (or unions) that it intends to arrange for the holding of a secret ballot in which the workers constituting the bargaining unit are asked whether they want the union (or unions) to conduct collective bargaining on their behalf.¹⁰⁵

On paper, this statutory provision would appear to be sufficiently robust to hold employers to account where they seek to intimidate or threaten workers in the bargaining unit. However, academic studies and a review of the case law would suggest otherwise.¹⁰⁶ In practice, none of the seven complaints of an unfair practice raised by trade unions under paragraph 27B of Schedule 1 to the TULRCA had been successful as at the middle of 2012.¹⁰⁷ Various explanations may be advanced for the failure of the unfair practices concept to offer redress to trade unions. First, for the CAC to uphold a complaint, it must be satisfied that the use of the unfair practice changed or was likely to change the intention of the worker to vote or abstain from voting, his intention to vote in a particular way, or how he voted. In practice, this means that ‘unions not only have to prove that there has been an unfair practice, but that it has affected the way that workers vote in the ballot, [which] places a very high bar to a successful complaint.’¹⁰⁸ The reason for this is that ‘it seems implicit in the decisions that only direct evidence from workers that their voting intentions or behaviour were in fact affected would suffice to meet this test.’¹⁰⁹ A more balanced approach would entail some amendment to the legislation to adopt an ‘objective test, with the CAC ascertaining whether a *reasonable* worker might change his/her voting intention in the circumstances outlined in the complaint.’¹¹⁰ Secondly, another reason for its lack of success has been the ultra-cautious approach adopted by the CAC. Bogg has opined that there are two explanations for the stance adopted by the CAC:

A. Bogg ‘The Mouse that Never Roared: Unfair Practices and Union Recognition’ (2009) 38 *Industrial Law Journal* 390, 399

First, there is the spectre of judicial review and the CAC’s legitimate concern to minimise its impact on the Schedule A1 procedure... Second, the CAC’s interpretive frame of reference is anchored in an underlying normative model of collective labour relations. This is reflected in the Code of Practice [on Access and Unfair Practices during Recognition and Derecognition Ballots]’s central assumption that partisan and vigorous campaigning by the parties is a normal and legitimate activity... This model of competing political parties is a central element in the democratic model upon which the statutory

¹⁰² TULRCA, Schedule A1, para. 27B(2).

¹⁰³ TULRCA, Schedule A1, para. 27B(3) and (5).

¹⁰⁴ TULRCA, Schedule A1, para. 27B(4).

¹⁰⁵ TULRCA, Schedule A1, para. 27C(2) and (3).

¹⁰⁶ See A. Bogg, ‘The Mouse that Never Roared: Unfair Practices and Union Recognition’ (2009) 38 *Industrial Law Journal* 390, A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) 159–186 and S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 177–207.

¹⁰⁷ S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 206–207.

¹⁰⁸ S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 207.

¹⁰⁹ See A. Bogg, ‘The Mouse that Never Roared: Unfair Practices and Union Recognition’ (2009) 38 *Industrial Law Journal* 390, 398.

¹¹⁰ A. Bogg, ‘The Mouse that Never Roared: Unfair Practices and Union Recognition’ (2009) 38 *Industrial Law Journal* 390, 398. See also A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) 167–168.

procedure is based, enshrining the legitimacy of the employer's role as an oppositional force to the trade union. It is coupled with a liberal conception of the state's role as demanding scrupulous neutrality towards the competing positions of unions and employers.

In this passage, the point was made that the courts retain the supervisory jurisdiction over the decisions of the CAC in connection with the conduct of ballot. The scope for judicial review of the decisions of the CAC has been addressed by the courts, but the extent to which they will be prepared to intervene is particularly limited:

***R (Kwik-Fit (GB) Ltd.) v Central Arbitration Committee* [2002] ICR 1212, 1214F-G**
Lord Justice Buxton:

I would also venture to endorse in strong terms... that the CAC was intended by Parliament to be a decision-making body in a specialist area, that is not suitable for the intervention of the courts. Judicial review, such as is sought in the present case, is therefore only available if the CAC has either acted irrationally or made an error of law.

This deferential approach was also evident in the approach of the Court of Appeal in *R (on the application of Ultraframe (UK) Ltd. v CAC ('Ultraframe'))*.¹¹¹ This case concerned the rule in paragraph 29 of Schedule A1 to TULRCA that for the union to win the ballot and be entitled to recognition, it must be supported by a majority of the workers voting on a voting turnout of at least 40% of the workers concerned. For obvious reasons, the 40% 'minimum voter turnout percentage' has proven somewhat controversial:

B. Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *Industrial Law Journal* 193, 212

The 40% requirement would, it was asserted, prevent a vocal minority overriding majority wishes and disrupting good industrial relations, a justification that rests on the unlikely premise of 'good industrial relations' being reflected in a workforce too apathetic to vote in favour of continuing these 'good industrial relations' by actually voting against recognition. Alternatively it would, it was said, be bad for industrial relations if a recognition ballot was won on a low turnout. But this rather points up the question whether recognition should be dependent on a ballot in the first place. Reliance on purely quantitative criteria regardless of qualitative considerations such as whether there would be support for recognised unions sufficient to sustain the effectiveness of collective bargaining, which was a central concern... in the 1970s, is a distinctive characteristic of the 1999 procedure that may well prove to be one of its greatest weaknesses.

In *Ultraframe*, the number of votes cast by the relevant members in the bargaining unit fell short of the 40% minimum by a mere four votes. The trade union complained that not all of the members in the bargaining unit had received their ballot papers, and in particular that five members, if given the opportunity to vote, would have voted in favour of recognition. Notwithstanding the absence of any provision in Schedule A1 explicitly empowering the CAC to do so, it decided that the ballot had to be re-run because the relevant statutory standards regarding the conduct of the ballot had not been satisfied. The employer challenged the decision of the CAC in judicial review proceedings. The High Court overturned the CAC's decision to reorder the ballot, but when the case reached the Court of Appeal, the conclusion was reached that policy considerations dictated that the CAC should bear responsibility 'for all disputes in and around the ballot process'.¹¹² As such, the CAC's decision was upheld, meaning that the CAC has the power to annul ballots and re-order them.

¹¹¹ [2005] ICR 1194. For additional evidence of this deferential approach, see *R (on the application of Cable & Wireless Services UK Ltd.) v CAC* [2008] ICR 693 and *Netjets Management Ltd. v Central Arbitration Committee* [2013] 1 All ER 288.

¹¹² [2005] ICR 1194, 1201C-D per Lord Justice Buxton. For commentary, see A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) 174 and S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 93-97.

C.3.2.5 Statutory recognition and the method of collective bargaining

Once the CAC has made an award of recognition in favour of a trade union, the next stage in the process is for the union and the employer to agree on the 'method' of collective bargaining.¹¹³ They have 30 working days to agree on this method.¹¹⁴ Research conducted by Moore, McKay and Veale shows that the parties will indeed come to an agreement on the method of collective bargaining in as much as 91% of the cases where the CAC has made a recognition award.¹¹⁵ Despite such evidence of success in voluntarily engaging the parties to agree on the detail of the collective bargaining machinery, paragraph 31 of Schedule A1 places a duty on the CAC to help the parties to reach an agreement where they are unable to do so within the prescribed 30 working day period and the parties apply to the CAC for assistance.¹¹⁶ The CAC then has a period of 20 working days from the date of the receipt of the application from the parties to offer assistance.¹¹⁷ If the input of the CAC proves fruitless, paragraph 31(3) of Schedule A1 directs that it 'must specify to the parties the method by which they are to conduct collective bargaining'.

The template that the CAC may adopt or depart from, is found in the Trade Union Recognition (Collective bargaining) Order 2000 ('the Order').¹¹⁸ this statutory template is best thought of as a sort of 'model' approach that the parties will take to collective bargaining, i.e. a kind of default procedure agreement. One of the principal limitations of the model would appear to be that it limits discussions in collective bargaining between the trade union and employer to 'pay,¹¹⁹ hours and holidays of the workers comprising the bargaining unit.'¹²⁰ As such, the scope of what falls within the process of collective bargaining appears to be restricted here when compared with the broader definition of collective bargaining for the purposes of section 178 of TULRCA.¹²¹ For example in *British Airline Pilots' Association v Jet2.Com Ltd.*,¹²² the trade union recognition order extended to 'pay, hours and holidays'. The question was whether operational rostering arrangements for pilot members of the trade union which were contained in the employer's Rostering and Crew Policy ("RCP") fell within the scope of the recognition order enjoining the employer to supply information to the trade union about such arrangements and engage in collective bargaining about them. The High Court ruled that these rostering arrangements about the shifts, hours and prescribed periods worked by the pilots were not core contractual terms concerning 'pay, hours and holiday'. Since they were not contractual, they would have to be capable of incorporation into individual contracts of employment; however, the High Court held that the provisions of the RCP were not apt for incorporation and so were not contractual in nature. Moreover, the provisions regarding the working hours of the pilots were ancillary matters.¹²³ As such, there was no obligation imposed on the employer to collectively negotiate with the trade union about such arrangements. However, such a restrictive approach was rejected by the Court of Appeal. Overturning the decision of the High Court, the Court of Appeal reached the conclusion that there was nothing in the phrase 'negotiations relating to pay, hours and holidays' to suggest that it covered only proposals which, if agreed, would give rise to individual contractual rights. Moreover,

¹¹³ TULRCA, Schedule A1, para. 30(2). For broader discussion, see S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 97-101.

¹¹⁴ TULRCA, Schedule A1, paras. 30(3) and (4).

¹¹⁵ S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 98.

¹¹⁶ TULRCA, Schedule A1, paras. 31(1) and (2).

¹¹⁷ TULRCA, Schedule A1, paras. 31(3) and (8).

¹¹⁸ SI 2000/1300.

¹¹⁹ In *UNIFI v Union Bank of Nigeria* [2001] IRLR 712, the CAC ruled that the word 'pay' included pension contributions in defined contribution schemes and pension benefits in defined benefit schemes.

¹²⁰ TULRCA, Schedule A1, para. 3(3) and the Order, regulation 2. For commentary, see S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013) 31.

¹²¹ See section 178(2) of TULRCA and section 2.2.1.

¹²² [2015] IRLR 543 (High Ct) and [2017] ICR 457 (Court of Appeal).

¹²³ [2015] IRLR 543, 550 per Mr Justice Supperstone.

in the opinion of the Court of Appeal, the terms of paragraph 17 of the Order militated against such a limited construction and drawing a distinction between core and ancillary matters was felt to be unhelpful. Seen from this perspective, the wording of paragraph 3(3) of Schedule A1 and regulation 2 of the Order was given a much broader construction than might first appear to be warranted.

The model method of collective bargaining envisages that the parties will establish a joint negotiating body ('JNB'), consisting of three employer representatives and three trade union representatives.¹²⁴ The JNB will then conduct annual rounds of negotiations with regard to contractual terms relating to pay, hours and holidays.¹²⁵ The detail of the JNB's procedure is specified in Regulation 15 of the Order:

15

Step 1 — The union shall set out in writing, and send to the employer, its proposals (the 'claim') to vary the pay, hours and holidays, specifying which aspects it wants to change. In its claim, the union shall set out the reasons for its proposals, together with the main supporting evidence at its disposal at the time...

Step 2 — Within ten working days of the Employer Side's receipt of the union's letter, a quorate meeting of the JNB shall be held to discuss the claim. At this meeting, the Union Side shall explain its claim and answer any reasonable questions arising to the best of its ability.

Step 3 — (a) Within fifteen working days immediately following the Step 2 meeting, the employer shall either accept the claim in full or write to the union responding to its claim. If the Employer Side requests it, a quorate meeting of the JNB shall be held within the fifteen day period to enable the employer to present this written response directly to the Union Side. In explaining the basis of his response, the employer shall set out in this written communication all relevant information in his possession. In particular, the written communication shall contain information costing each element of the claim and describing the business consequences, particularly any staffing implications, unless the employer is not required to disclose such information for any of the reasons specified in section 182(1) of [TULRCA]...

(b) If the response contains any counter-proposals, the written communication shall set out the reasons for making them, together with the supporting evidence. The letter shall provide information estimating the costs and staffing consequences of implementing each element of the counter proposals, unless the employer is not required to disclose such information for any of the reasons specified in section 182(1) of the 1992 Act.

Step 4 — Within ten working days of the Union Side's receipt of the employer's written communication, a further quorate meeting of the JNB shall be held to discuss the employer's response. At this meeting, the Employer Side shall explain its response and answer any reasonable questions arising to the best of its ability.

Step 5 — If no agreement is reached at the Step 4 meeting... another quorate meeting of the JNB shall be held within ten working days. The union may bring to this meeting a maximum of two other individuals employed by the union who are officials within the meaning of sections 1 and 119 of [TULRCA]. The employer may bring to the meeting a maximum of two other individuals who are employees or officials of an employer's organisation to which the employer belongs. These additional persons shall be allowed to contribute to the meeting, as if they were JNB members.

Step 6 — If no agreement is reached at the Step 5 meeting..., within five working days the employer and the union shall consider, separately or jointly, consulting ACAS about the prospect of ACAS helping them to find a settlement of their differences through conciliation. In the event that both parties agree to invite

¹²⁴ The Order, regulations 4 and 5.

¹²⁵ The Order, regulation 15.

ACAS to conciliate, both parties shall give such assistance to ACAS as is necessary to enable it to carry out the conciliation efficiently and effectively.

The Order imposes an overarching obligation on the parties to 'take reasonable steps to ensure that this [model] method to conduct collective bargaining is applied efficiently and effectively.'¹²⁶ Once agreed, the model method of conducting collective bargaining is treated as a contract with enforceable terms,¹²⁷ but it is unlike any other contract when it comes to remedies. For example, the remedy for non-compliance with the terms of the agreement is restricted to an order against the employer or trade union for specific performance. Various commentators have made sceptical remarks about the merits of such an approach:

R. Dukes 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 *Industrial Law Journal* 236, 253-254

As Lord Wedderburn has pointed out, however, specific performance is singularly unsuited to the sphere of employment relations. It is a highly technical, equitable remedy, 'properly understood only by the finely attuned Chancery mind of property relationships... [Moreover] it carries with it collateral legal principles such as the maxim 'He who comes to equity must come with clean hands' . I am not sure what the shop floor will make of that'. Providing for a remedy of specific performance has the effect of making the courts the final adjudicators of statutory recognition matters. Viewed against the policy, pursued in the UK since the 1960s, of progressively relocating legal resolution of employment disputes to specialist courts, this is, in itself, surprising. In the words of Lord Wedderburn, it will 'put the judges into the centre of the merits of disputes in a manner that could do little but harm'.

Another notable point is that once the CAC has recognized a trade union and the method of collective bargaining has been agreed by the parties, or the model method in regulation 15 of the Order imposed upon them, the obligations owed by the employer can by no stretch of the imagination be described as robust in any sense of that word. Instead, statutory recognition simply obliges the parties to meet and discuss issues, and there is no obligation imposed on them to negotiate with a view to reaching an agreement. As noted by Mr Justice Supperstone in the decision of the High Court in *British Airline Pilots' Association v Jet2.Com Ltd.*,¹²⁸ 'the obligation to negotiate under the specified method does not impose any obligation on a party to come to negotiations with a particular state of mind about any particular issue',¹²⁹ which essentially sets aside any obligation on a party to statutory recognition to bargain in good faith:¹³⁰

B. Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *Industrial Law Journal* 193, 215

What is clear from the [model] method... is that the legal obligation imposed on employers by a CAC declaration of recognition is an obligation to meet and talk, within a prescribed framework, about pay, hours and holidays, to observe the statutory rights of recognised unions, their officials and members, and little — if anything — else.¹³¹

¹²⁶ The Order, regulation 29.

¹²⁷ TULRCA, Schedule A1, paras. 31(4).

¹²⁸ [2015] IRLR 543. The High Court's decision was subsequently overturned by the Court of Appeal ([2017] ICR 457), but this does not affect the point being made by Supperstone J.

¹²⁹ [2015] IRLR 543, 553.

¹³⁰ Contrast this with the obligations of the employer in the context of collective redundancies, on which, see Chapter 20, sections 20.2.2 and 20.4.2.

¹³¹ See also R. Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 *Industrial Law Journal* 236, 265.

The absence of a legally enforceable duty to bargain is but one of the many deficiencies inherent within the statutory recognition procedure. Others can be identified. For example, one can point to the fact that recognition agreements are restricted to contractual terms of pay, hours and holidays.¹³²

Bogg has referred to this intrinsic limitation in the procedure as 'impoverished',¹³³ particularly since it can be contrasted with the more expansive coverage in section 178(2) of TULRCA. Furthermore, if a trade union is not independent, it is unable to kick-start the statutory process.¹³⁴ The requirement that the employer, taken with associated employers, employs no fewer than 21 workers¹³⁵ also functions to exclude a great number of workers from the operation of the statutory recognition procedure. One might also single out the various provisions which set percentage thresholds of one sort or another, e.g. the stipulations that at least:

- (i) ten per cent or more of the workers in the bargaining unit must be members of the applicant trade union for the application for recognition under paragraph 12 of Schedule A1 to TULRCA to be valid,¹³⁶ and
- (ii) forty per cent of the workers in the bargaining unit must have voted in the ballot to decide whether a majority of such workers supported the right of the trade union to conduct collective bargaining on their behalf.¹³⁷

As for the restriction of the enforceability of model agreements relating to the method of collective bargaining to an order for specific performance, this also emphasizes the lack of imagination in the statutory regime. All of this serves to underscore the point that the statutory recognition procedure displays an inherent bias in favour of employers.¹³⁸ As noted by Gall, 'what may look at first sight as reasonably fair and balanced is not when inserted into an unequal power and resource relationship between capital and labour.'¹³⁹

C.3.2.6 Statutory duty to disclose information for the purposes of collective bargaining

Once the applicant trade union has been recognized and the method of collective bargaining has been settled, very few statutory obligations are imposed on the employer. In fact, the only duty of the employer is to disclose information to the trade union for the purposes 'of all [of the] stages of collective bargaining'.¹⁴⁰ If requested by the trade union, the employer must provide such information in writing.¹⁴¹ The nature and quality of the information to be supplied is governed by section 181(2). This directs that the information must relate to the employer's undertaking, and include information about the employer's use of agency workers. Further, for the relevant information to cross the disclosure threshold, it is a requirement that its absence would materially impede the ability of the trade union to engage in collective bargaining. Finally, the disclosure of the information must accord with 'good industrial relations practice'. Additional guidance on these statutory conditions is furnished in ACAS's Code of Practice 2 on the Disclosure of Information to Trade Unions for Collective Bargaining Purposes:¹⁴²

¹³² TULRCA, Schedule A1, paras. 3(3) and the Order, regulation 2.

¹³³ A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) 284.

¹³⁴ TULRCA, Schedule A1, para. 6.

¹³⁵ TULRCA, Schedule A1, para. 7.

¹³⁶ TULRCA, Schedule A1, para. 36.

¹³⁷ TULRCA, Schedule A1, para. 29(3)(b).

¹³⁸ R. Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 *Industrial Law Journal* 236.

¹³⁹ G. Gall, (2014) 43 *Industrial Law Journal* 218: Book Review of S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013). Section 181(4) stipulates that regard must be had to the ACAS Code of Practice in order to determine what would be in accordance with good industrial relations practice.

¹⁴⁰ TULRCA 1992, s. 181(1).

¹⁴¹ TULRCA 1992, s. 181(3).

¹⁴² See http://www.acas.org.uk/media/pdf/2/q/CP02_1.pdf (last visited 26 August 2018).

ACAS Code of Practice on the Disclosure of Information to Trade Unions for Collective Bargaining Purposes

10 To determine what information will be relevant, negotiators should take account of the subject-matter of the negotiations and the issues raised during them; the level at which negotiations take place (department, plant, division, or company level); the size of the company; and the type of business the company is engaged in... The relevant information and the depth, detail and form in which it could be presented to negotiators will vary... Consequently, it is not possible to compile a list of items that should be disclosed in all circumstances. [However, s]ome examples of information relating to the undertaking which could be relevant in certain collective bargaining situations are [as follows]:

(i) *Pay and benefits*: principles and structure of payment systems; job evaluation systems and grading criteria; earnings and hours analysed according to work-group, grade, plant, sex, out-workers and homeworkers, department or division, giving, where appropriate, distributions and make-up of pay showing any additions to basic rate or salary; total pay bill; details of fringe benefits and non-wage labour costs.

(ii) *Conditions of service*: policies on recruitment, redeployment, redundancy, training, equal opportunity, and promotion; appraisal systems; health, welfare and safety matters.

(iii) *Manpower*: numbers employed analysed according to grade, department, location, age and sex; labour turnover; absenteeism; overtime and short-time; manning standards; planned changes in work methods, materials, equipment or organisation; available manpower plans; investment plans.

(iv) *Performance*: productivity and efficiency data; savings from increased productivity and output, return on capital invested; sales and state of order book.

(v) *Financial*: cost structures; gross and net profits; sources of earnings; assets; liabilities; allocation of profits; details of government financial assistance; transfer prices; loans to parent or subsidiary companies and interest charged.

This passage perhaps gives the impression that the range of information that is potentially subject to disclosure is particularly broad. However, the terms of section 182 would suggest otherwise. For example, a number of statutory exceptions are specified: there is no requirement for the employer to provide information which would be contrary to law, or the interests of national security.¹⁴³ Furthermore, the embargo extends to confidential information, information that relates specifically to an individual, or information that if disclosed, would cause substantial injury to the employer's undertaking.¹⁴⁴ If an employer fails to make the requisite disclosure of information in terms of section 181 of TULRCA, the trade union may lodge a written complaint to that effect with the CAC.¹⁴⁵ The CAC will initially consider whether it is reasonably likely that the dispute at the heart of the trade union's complaint can be settled between the employer and trade union by conciliation. If the CAC is of the opinion that it can, it must refer the complaint to ACAS, and the latter will seek to promote a settlement. If ACAS does not get involved in the dispute, or informs the CAC that further attempts at conciliation are unlikely to result in a settlement, the CAC is bound to hear and determine the complaint. After consideration, the CAC must declare whether it finds the complaint to be well-founded, and state its reasons for its findings. If the CAC finds the complaint wholly or partly well-founded, its declaration must specify the information in respect of which it finds that the complaint is well-founded, the date on which the employer refused or failed to disclose to confirm in writing any of the information in question, and a period within which the employer ought to disclose that information, or confirm it in writing.

¹⁴³ TULRCA 1992, s. 182(1)(a) and (b).

¹⁴⁴ TULRCA 1992, s. 182(1)(c), (d) and (e).

¹⁴⁵ TULRCA 1992, s. 183(1).

Cabrelli: *Employment Law in Context*, 3e
Chapter C

In practice, the CAC receives very few complaints under section 183 of TULRCA from trade unions on an annual basis. The CAC's 2016/17 annual report¹⁴⁶ narrates that '[t]he number of new complaints received in 2016/17 was seven, a decrease on last year's total of nine.'¹⁴⁷

Reflection points

1. In your opinion, is the statutory recognition procedure an example of worker democracy in action? Give reasons for your answer.
2. Are you convinced by the argument that the statutory recognition procedure contains an inherent bias against trade union recognition? Before you answer this question, consult the statistics on statutory trade union recognition in the CAC's 2016/17 annual report.

Additional reading on the statutory recognition of trade unions

1. K. Ewing, 'Freedom of Association and the Employment Relations Act 1999' (1999) 28 *Industrial Law Journal* 283.
2. Lord Wedderburn, 'Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition' (2000) 29 *Industrial Law Journal* 1.
3. W. Brown, S. Deakin, M. Hudson and C. Pratten, 'The Limits of Statutory Union Recognition' (2000) 32 *Industrial Relations Journal* 180.
4. B. Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *Industrial Law Journal* 193.
5. K. Ewing, 'Recent Legislation. Trade Union Recognition and Staff Associations – A Breach of International Labour Standards?' (2000) 29 *Industrial Law Journal* 267.
6. S. Oxenbridge et al, 'Initial Responses to the Statutory Recognition Procedures of the Employment Relations Act 1999' (2003) 42 *British Journal of Industrial Relations* 315.
7. S. Wood, S. Moore and K. Ewing, 'The Impact of the Trade Union Recognition Procedure under the Employment Relations Act, 2000–2' in H. Gospel and S. Wood (eds), *Representing Workers: Union Recognition and Membership in Britain* (London: Routledge, 2003).
8. B. McArthur, 'The Efficacy of Statutory Union Recognition under New Labour: A Comparative Review (Part I)' (2004) 20 *International Journal of Comparative Labour Law and Industrial Relations* 399.
9. A. Bogg, 'Employment Relations Act 2004: Another False Dawn for Collectivism' (2005) 34 *Industrial Law Journal* 72.
10. G. Gall, 'The First Five Years of Britain's Third Statutory Union Recognition Procedure' (2005) 31 *Industrial Law Journal* 345.
11. J. Blanden, S. Machin and J. Van Reenen, 'Have Unions Turned the Corner? New Evidence on Recent Trends in Union Recognition in UK Firms' (2006) 44 *British Journal of Industrial Relations* 170.
12. R. Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 *Industrial Law Journal* 236.
13. A. Bogg, 'The Mouse that Never Roared: Unfair Practices and Union Recognition' (2009) 38 *Industrial Law Journal* 390.
14. A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009).
15. G. Gall, 'The First Ten Years of the Third Statutory Union Recognition Procedure in Britain' (2010) 39 *Industrial Law Journal* 444.
16. G. Gall, 'Union Recognition in Britain: The End of Legally Induced Voluntarism?' (2012) 41 *Industrial Law Journal* 407.
17. A. Bogg, 'The Death of Statutory Recognition in the United Kingdom' (2012) 54 *Journal of Industrial Relations* 409.

¹⁴⁶ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629689/CAC_Annual_Report_2016-17.pdf (last visited 26 August 2018).

¹⁴⁷ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629689/CAC_Annual_Report_2016-17.pdf (last visited 26 August 2018) 12.

Cabrelli: *Employment Law in Context*, 3e
Chapter C

18. T. Brodtkorb, 'Statutory Union Recognition in the UK: A Work in Progress' (2012) 43 *Industrial Relations Journal* 70.
19. M. Doherty, 'When You Ain't Got Nothin', You Got Nothin' to Lose... Union Recognition Laws, Voluntarism and the Angle Model' (2013) 42 *Industrial Law Journal* 369.
20. S. Moore, S. McKay and S. Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, Palgrave Macmillan, 2013).