

# The influence of ‘soft’ fair work regulation on union recovery: A case of re-recognition in the Scottish voluntary social care sector

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## Abstract

This longitudinal case study contributes to debates concerning how ‘soft’ and ‘hard’ forms of regulation can interact to contribute to the advancement of worker rights. More specifically, the article explores the contribution of Scotland’s soft fair work (FW) programme and the UK’s hard statutory recognition procedure to union re-recognition in a voluntary sector social care provider. In combination, hard and soft regulations are found to have added breadth to the pressures for re-recognition exerted by the union, bringing reputational and financial costs associated with derecognition to the employer. Concerns nevertheless arose regarding the depth of impact from this interaction due to union compromises on key issues in the final recognition agreement. Due to the specific public service context of the study, doubts are also expressed regarding the potential for unions in other hard to organise sectors to achieve similar outcomes.

## 1 | INTRODUCTION

Framed within the employment relations literature on the effects of ‘hard’ and ‘soft’ forms of regulation (Howell, 2005; Stuart et al., 2011), this paper uses a longitudinal, qualitative case study of a Scottish voluntary social care provider to analyse the impact these forms of regulation

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have on union recovery following a derecognition decision. The analysis contributes to debates concerning the interaction between soft and hard regulations (Holgate et al., 2018; Johnson et al., 2019; Moore et al., 2013) and offers scrutiny of the claims of its ability to improve labour standards (Locke et al., 2013; Szabados, 2021).

Regulation can influence union recovery in a positive direction, because it is partly a function of the degree of employer recognition which, in turn, is a product of how far government encourages it (Bain & Elsheikh, 1976; Croucher & Wood, 2017). Analyses have been undertaken of the role of hard law (e.g., the Employment Relations Act [ERA] of the UK Government, 1999) on union recovery. The ERA's statutory recognition procedure, although designed to create an environment where unions and management sign voluntary deals, is classified as hard law because it contains a statutory procedure that enforces recognition where the parties cannot reach a voluntary deal (Kuruville & Verma, 2006). An abundance of research shows some employer compliance with the Act (Brodtkorp, 2012; Gall, 2006, 2010; Moore et al., 2013), including examples where it has laid the groundwork for unions to achieve re-recognition (Korczynski & Ritson, 2000).

Given the insufficiency of hard regulation on its own, however, scholars call for further research on the influence of soft forms of regulation on unions and collective bargaining (Howell, 2005; Marchington, 2015; Stuart et al., 2011). This links to the expectation that soft regulation can act as a substitute for, or a complement to, its hard counterpart and when combined together can compensate for their respective limitations. Soft regulations are measures that are not enshrined in law and can only persuade rather than compel employers to implement specific practices (Kuruville & Verma, 2006). Research into soft regulation is topical, as seen in a wide variety of studies exploring the cross-border employment regulation of multinational corporations (Hepple, 2005; Kuruville & Verma, 2006; Szabados, 2021), and more recent attention devoted to the measures adopted by the devolved governments in the United Kingdom to promote fair work (FW) (Heery et al., 2020; Sisson, 2019). Devolved governments in Scotland and Wales have designed FW to help build 'inclusive growth', instead of low wage, poor quality jobs. Soft regulation is chosen to achieve these goals because employment law remains one of the UK government's reserved powers, so the devolved governments cannot legislate through hard law (Heery et al., 2020; Sisson, 2019).

In Scotland, FW has five dimensions covering worker voice and explicit support for collective bargaining, as well as security, respect, opportunity and fulfilment (Fair Work Convention [FWC], 2016). Under the Scottish Fair Work (SFW) framework, representation through trade unions and other managerially sponsored mechanisms are seen as legitimate approaches to allow workers to speak, be heard and contribute to debates and decision-making. Moreover, there is a strong emphasis on 'mutual gains' as representation and voice are seen to benefit employers as well through improving organisational performance (FWC, 2016).

For some, these initiatives promoting FW are seen as promising alternative social democratic forms of employment relations in at least parts of the United Kingdom (Heery et al., 2020; Sisson, 2019). Not all, however, are as optimistic. Gall (2021) in his report utilising secondary sources, for example, offers a pessimistic assessment of these soft measures, identifying no discernible impact. These opposing claims are part of three competing perspectives on the impact of soft regulation. The first is that 'soft regulation' provides low to zero impact due to lack of legal standing/enforceability (Meardi, 2012; Stuart et al., 2011). The second sees soft regulation having a positive impact on its own because it can bring a range of alternative measures for compliance where hard regulation fails, for example, through raising public awareness and opinion, sanctions against products and the role of powerful soft intermediary bodies that

influence organisations, such as professional associations, employers organisations and unions (Heery et al., 2020; Kuruvilla & Verma, 2006; Marchington, 2015; Sabel et al., 2000; Sisson, 2019). The third sees soft regulation offering a positive impact due to its supplementation of 'hard law', that is, they are not mutually exclusive, as the former can fill the gaps that the latter does not reach (Locke et al., 2013; Szabados, 2021).

This study addresses this third perspective on the impact of soft regulation. By evaluating the interaction of soft FW and hard recognition procedure in a longitudinal case study of a Scottish voluntary social care provider, it is argued to make four contributions to the relevant literature. Firstly, the study identifies that hard and soft measures can interact to produce a wider breadth of union interventions that bring reputational and financial costs to organisations. Secondly, it raises questions about the 'depth' of the outcomes unions can secure as a result of such interactions. Thirdly, previous research finds the outcomes from the interactions between hard and soft approaches vary by issues, national settings and relations subsisting between national and supra-national bodies (Locke et al., 2013; Szabados, 2021). This study adds to these factors that cause variation by suggesting differences according to sector. In particular, the study highlights potential limitations in the regulatory reach of soft and hard measures across difficult to organise sectors (retail, hospitality, etc.). Finally, the study sheds light on the limited opportunities for reciprocal and complementary 'hardening' (Szabados, 2021) or the deepening of soft and hard regulatory influence and related improvements in labour standards in contexts characterised by government commitment to neoliberal employment relations.

The paper proceeds by providing an overview of the literature on the interaction of soft and hard regulations, and the various factors that can determine positive outcomes in labour standards. This is followed by an outline of the various soft and hard measures influencing prospects for union recognition. Subsequent sections then present the methods and findings of the undertaken study and discuss its implications.

## 2 | THE INTERACTION OF SOFT AND HARD REGULATIONS

Attention has been paid to the effects on employment relations from soft non-legally binding forms of regulation intended to place restraints on employer actions and challenge the social and economic structures of capitalism (Howell, 2005; McDonough & Dundon, 2010; Stuart et al., 2011). Hard regulation on its own has been argued to be insufficient in the following respects: It struggles to deal with multiple forms of work, including work outside traditional employment relationships; has limitations in its response to changes in the structures of production that work occurs within, including supply chains; fails to challenge employer capacity to circumvent laid down requirements (e.g., UK National Minimum Wage); and has problems in creating effective incentives for compliance (Marshall, 2019). Meanwhile, soft regulation on its own is also seen to be limited because it lacks the capacity to compel employers into changing course and improving labour standards (Howell, 2005; McDonough & Dundon, 2010; Stuart et al., 2011).

Scholars increasingly are, therefore, exploring the interaction of the two forms of regulation (Locke et al., 2007, 2013; MacDonald & Charlesworth, 2021; Sisson & Marginson, 2001; Szabados, 2021). This perspective sees neither form as mutually exclusive nor do they function in isolation to produce positive outcomes in labour standards. Interaction occurs in several ways. In the global supply chain literature, for example, a combination of private and public

interventions is argued by some to be necessary to effectively regulate employment standards (Locke et al., 2007, 2013). At the same time, there are claims that in some circumstances soft regulation can act as a substitute for, or a complement to, its hard counterpart (Locke et al., 2007, 2013; Marchington, 2015).

Scholars also highlight processes of interaction that ‘harden’ soft regulation (Sisson & Marginson, 2001). For example, a study of EU corporate social responsibility (CSR) regulation sees hardening occurring across two levels—EU and nation state. This hardening can be reciprocal as the EU’s soft measures have influenced advances in nation state’s hard regulation and vice versa (Szabados, 2021). Crucial in such hardening processes is the role of national governments as the ‘missing link’ because of their capacity to legislate soft into hard regulation (Verma, 2003).

To further understand the above interactions, it is useful to know how each form of regulation achieves compliance. As previously mentioned, compliance through hard regulation links to its capacity to impose standards and penalties (Kuruville & Verma, 2006). Soft regulation brings multiple forms of enabling compliance (not all successful) including benchmarking and persuasion, financial and competitive incentives, multiple monitoring and enforcement measures, reducing conflict through offering flexibility and leeway to employers to meet labour standards and a range of different influencers/actors (e.g., government, NGOs, quasi-independent government bodies, intermediaries and international bodies) (Heery et al., 2020; Jacobsson, 2004; Kuruville & Verma, 2006; Marchington, 2015; Sabel et al., 2000; Sisson, 2019). Government remains a key authority and enabler among these actors. Authority can be through government establishing powerful normative, social incentives on firms to comply with labour standards, such as codes of conduct or guidance (Kuruville & Verma, 2006; Sabel et al., 2000). Governments also empower influential semi-autonomous bodies to disseminate and monitor the norms and values it seeks to encourage, for example, in the United Kingdom, the Advisory Conciliation and Arbitration Service’s (ACAS) advocacy of ‘mutual gains’ in employment relations (Marchington, 2015).

Soft regulation also includes competitive incentives, which are based on encouraging organisations to attract customers through promoting strong labour standards (Kuruville & Verma, 2006). Such changes to the basis of competition can include recommendations for stronger labour standards across multinational business activities as a way to achieve better productivity and improved performance (Elliott & Freeman, 2003). Changes to competitive factors can be a feature of the governance of public sector supply chains, for example, where governments or local devolved political administrations have encouraged suppliers to adopt the real living wage (RLW) (see Heery et al., 2020 for Scottish and Welsh initiatives).

Other enablers outside of state authority are influential intermediary bodies such as trade unions and employers’ associations that can encourage indirect forms of participation to fill the regulatory space when the scope of hard regulation is limited (Marchington, 2015). Combined together, these enablers of soft regulation are seen to allow a degree of flexibility and leeway to introduce improvements in labour standards (Kuruville & Verma, 2006).

## **2.1 | Enabling union recognition in Scottish social care through soft and hard regulations**

As previously mentioned, Scotland’s soft regulation to improve labour standards is the SFW agenda. This initiative is characterised by many of the above normative, social measures and

incentives outlined above. For example, the Fair Work Action Plan (Fair Work Convention, 2019) and guidance includes benchmarking tools for employers and a commitment to promoting the extension of collective bargaining coverage in key unorganised sectors, such as social care (and early years and childcare, hospitality and construction) (FWC, 2019). Moreover, Scottish employers are influenced by soft intermediary monitoring agencies such as the Fair Work Convention (FWC)—an independent advisory body to Scottish Ministers and policy makers with a mission to advocate FW principles. FWC fulfils the monitoring role for government by publishing research reports and evaluations of progress towards Scotland becoming a Fair Work nation (see FWC, 2020).

Social care has also received government policy incentives to address distortions in competition brought about by outsourcing in its public service supply chain. As part of the social care public service supply chain, voluntary social care providers are resource dependent on local authorities, and the Scottish government has sought to incentivise them to abide by FW. Since 2015, the Scottish government introduced soft regulation that committed funding to pay front-line adult social care workers the RLW (Cunningham et al., 2018). Scottish government also encourages public authorities and their suppliers to be charged with aspiring to be FW employers (Scottish Government, 2018). The FWC has also recommended the end of local authority contracting that encourages organisational insecurity and zero-hour contracts (FWC, 2019).

In the area of union recognition, the SFW interacts with hard regulation, specifically New Labour's statutory recognition procedure. This procedure has created a 'shadow effect', encouraging thousands of voluntary union—management recognition agreements, and a minority where employers have been compelled to grant recognition (Brodtkorp, 2012; Korczynski & Ritson, 2000; McKay et al., 2006; Moore et al., 2013; Smith & Morton, 2006). Scholars feel, however, that the statutory procedure has not fundamentally challenged the prevailing policy environment. New recognition agreements have diminished over the years (Gall, 2006). Employers have also successfully impeded many attempts to gain new agreements through counter-mobilisation strategies (Keller, 1998), including suppression, substitution and refusing to engage meaningfully with unions even after recognition (Moore et al., 2013).

In explaining these limited outcomes, it has been noted that the statutory procedure was introduced by a New Labour government committed to a deregulated labour market with minimum union rights (Bogg, 2009; Doherty, 2013; Gall, 2010; Smith, 2015). As a result, the statutory procedure is criticised for being too employer friendly because of its complexity, high balloting thresholds, lack of applicability to small business and the considerable scope left for employers to resist union organising efforts. A further criticism is that the legislative provisions enable employers to trigger a derecognition procedure 3 years after the granting of recognition through the Central Arbitration Committee (CAC) (Bogg, 2009; Doherty, 2013; Gall, 2010).

The above summary raises the potential for SFW to fill the gaps left by the statutory procedure on recognition. Specifically, it lacks complex legal hurdles, contains no controversial coercive enforcement mechanisms and, in the spirit of the statutory procedure, encourages flexible voluntary agreements. There are, however, concerns relating to SFW. Although SFW's five principals include commitment to representation, some scholars contend that it contains strands of the aforementioned neoliberal agenda. Studies of soft regulation, at EU and national level, identify zero to limited impact because of lack of enforceability (see Hepple, 2005; Meardi, 2012). SFW is seen to only encourage the type of unionisation familiar to the neoliberal 'partnership'

agendas that have been pursued in countries like Ireland and the United Kingdom, where unions are viewed as acceptable when contributing to management efficiency and productivity (Gall, 2021). Such national initiatives have been observed as a result to have failed to provide real benefits for unions and workers (D'Art & Turner, 2011; Doherty & Erne, 2010; Johnstone et al., 2009; Kelly, 2004; McDonough & Dundon, 2010; Stuart et al., 2011).

In the light of the above summary, the paper explores the following questions:

- What is the contribution of soft regulation under SFW to union re-recognition following derecognition and how does such regulation interact with hard legal measures?
- What factors influenced the nature and scale of this contribution?
- How far can these outcomes be seen to carry lessons for union recovery in other contexts and sectors?

### 3 | METHOD

Data are drawn from a longitudinal (3 years), qualitative investigation in a voluntary social care organisation—Charity X. In terms of choice of case-study method (Yin, 2019), a longitudinal single case study is appropriate for gaining detailed and contextualised insights into the contribution of soft regulatory measures under SFW to union re-recognition. The in-depth qualitative case data form part of a wider 3-year investigation into strategic change, work organisation and employment relations in Charity X. During research into the change process, Charity X chose to derecognise and then re-recognise its union. The original union agreement that was subject to derecognition was a long-standing voluntary one and not signed under the CAC's statutory procedure. To investigate these decisions, semi-structured interviews were held with frontline social care workers, middle managers and senior managers in Charity X, alongside union representatives. Table 1 provides details of the 82 interviews that were undertaken. Due to high

TABLE 1 Profile of respondents

Respondents	Year 1	Year 2	Year 3	(Continuity over 3 years)
Senior management	7	4	2	1
HR managers	1	—	2	1
Business leaders	3	4	3	3
Coaches	4 (1)	4 (1)	3 (1)	3
External coach	1	1	—	—
Service managers	1	1	1	1
Union shop stewards	1	2	3	1
Union officers	1	2	1	1
Team leaders	3 (1)	3 (1)	—	—
Team members	5 (3)	10 (7)	9 (7)	4
Total union members including workplace activists	5	9	8	4
Overall total	27	31	24	(15)

Note: Figures in brackets equal union members.

turnover of staff at all levels, we were able to interview only 15 participants across each of the 3 years, although key informants among union officials and senior and HR managers remained constant in the interview group.

Table 1 also provides information on union members interviewed (in brackets). The organisation employed approximately 1800 staff during the period of the field work. At the beginning of the change programme, membership was around 300 or (17%). At the peak of the dispute, this was to rise to just over 900 (+50%).

Access was provided by management to key stakeholders such as frontline staff. The union provided access to its workplace and senior officials. Researchers were given contact details of team members (TMs), where interviews were then conducted, and further snowballing occurred to select other participants. Informed consent was gained from all participants. Interviews were recorded and transcribed verbatim. The interviews conducted during the first phase of fieldwork were designed to elicit the aims and objectives of the business reorganisation and the related industrial relations issues including sources of tension and cooperation. From the first interviews, the process of coding data into a framework began with a 'start-list' of codes around the themes outlined above. Data analysis identified central themes directly from participants' accounts of organisational change and the industrial relations implications. The second and third phases of the field work followed up on the industrial relations issues identified in the previous year. To aid this process, influenced by Miles and Huberman's (1994) approach, 'marginal remarks' were frequently used to highlight, clarify, reflect on and question data. This led to emergent themes that entailed a growing polarisation of views regarding union recognition in the second year, and then, in the third, moves to resolve these tensions, and the factors that led to the decision to re-recognise the union. This analytical process involved constant comparison of contrasting or similar accounts in seeking to understand management decision-making and actions and union strategies for recovery. In addition, there was a process of constant back and forth with the literature on FW, union derecognition and recognition and research material.

## 4 | FINDINGS

In presenting the findings, initial attention is paid to the business reorganisation programme and the nature of management-union relations and how they contributed to derecognition. The focus then moves on to evaluate the interaction of hard and soft measures and their contribution to re-recognition.

### 4.1 | Tensions leading to the derecognition decision

After several years of austerity funding and low or zero pay rises for frontline staff, senior management in Charity X proposed radical organisational changes. The change programme was formulated as a result of several factors. The organisation faced a significant recruitment and retention crisis. A major factor causing this crisis was the ongoing austerity in local authority contracts making it difficult to award even cost of living pay increases to frontline staff. Wages were just above the statutory minimum wage. Citing the influence of SFW, and in particular its aspirations of worker representation, fulfilment and security (especially in income), leaders in the organisation sought to reverse this undervaluation of care.

The solution was for workers to be relocated into self-organised teams (SOTs). The influence of the normative social power of the Scottish Government's SFW was evident as Charity X received financial support from FW budgets to implement the change programme. Scottish Government recognised the sector's low pay and recruitment and retention problems and wanted to support organisational innovations in care work that increased skills and rewards under the banner of FW.

Workers and their team leaders (TLs) could volunteer to form an SOT, which were located within newly established branches, headed by branch leaders (BLs), and supported by coaches, managers given the brief to work with teams and trained in coaching techniques. To foster frontline empowerment, considerable responsibility was devolved to SOTs including budgets, liaison with external professionals, funding bodies and external regulators, as well as HR issues such as recruitment, managing rotas, appraisals, supervision, absence management, job rotation and task allocation (Director of Change). Once the team was trained, TLs faced the choice of becoming a TM, accepting redundancy or quitting voluntarily.

The competitive incentives of SFW public procurement measures were evident as Charity X branded itself to local authorities as 'an employer of choice' committed to FW and employing highly skilled labour. Senior managers argued that efficiencies and improved funding from more local authority contracts, priced at a higher level to account for increases in TM skills, would be converted into frontline salary increases. TMs would receive a pay rate (higher than non-SOT members) of £10.00 an hour, moving eventually to £12.00+.

... staff are not valued ... for me it's not acceptable and it's not good enough ... seeing the impact financially that most care providers are in and how difficult it is. We describe it as the race to the bottom to pay staff, or having to fight or scramble to find money to pay the Scottish living wage before Scottish Government obviously funded it ... there's no doubt it had to change (Director of Change Management).

Union representatives supported the proposal's principles but had issues regarding implementation, including limited information and consultation; issues of morale, loss of knowledge and pay protection among TLs; inadequate plans to upskill the workforce; pay not reflecting the proposed increases in skills, responsibilities and accountability; the implications for staff employment rights and protection against unfair treatment within the teams; the reduction in promotion opportunities; and proposed changes to staff supervision and appraisal.

I think is a great idea. It's the way they have gone about it, is wrong. They've not consulted the frontline staff. The people that matter are the people who support ... they have not been consulted enough, I believe ... the frontline staff. My personal opinion is, frontline staff should have been offered a big uplift in pay and given all the training and this will work (Shop steward).

In Year 1, lengthy and difficult pay negotiations occurred before reaching agreement on a £10.00 an hour rate for TMs. Management-union relations were stabilised for a short period, but tensions re-emerged during negotiations for the next pay deal.

Management's derecognition decision in Year 2 of the business reorganisation was based on the aforementioned pay and conditions dispute and related social media campaign, a perception that the union wanted to delay or stop the business restructuring, and anti-union/unitarist attitudes. In the first of these tensions, the union's ballot of its membership led to



an overwhelming rejection (92%) of the organisation's pay offer of £10.10 an hour (Union officer 1). In the second, managers believed the union was being overly critical of the business reorganisation:

it was just block, block, block, block; everything they were doing was criticising everything I was doing, every step I was trying to take they were trying to stop it (Senior Manager).

In the latter case, anti-collectivist elements were part of the change process. For example, a rival non-union Employee Forum, which had no negotiating rights and where members were appointed on senior management's recommendation, was informed of the change process before the union (Union officer 2). Moreover, no definitive timetable or process to negotiate over the proposals was forthcoming from management (Union officer 1). The CEO proposed an eventual splitting of the existing bargaining unit as branches transformed into franchises, determining their own pay and conditions. Senior management further wanted an end to the perceived 'them and us' culture through dissemination of the new values of team work. The union's criticisms and their insistence on following agreed procedures to discuss change drew increasing management hostility. The senior union official responsible for negotiating with Charity X came under persistent criticism regarding her interventions despite the officer publicly supporting the change programme and addressing workers to persuade them to join SOTs.

In Year 2, the CEO and the Director of Change stopped attending Joint Negotiating Committee (JNC) meetings. The CEO reported that derecognition should have occurred before the start of the change programme because unions were 'incompatible with our values as an empowered, team working organisation' (CEO). Eventually, by the end of the year, the above tensions culminated in senior management writing to the union informing them of their intention to terminate the collective agreement after a 3 months' notice period. Workers unsurprisingly expressed concern over the derecognition decision.

I'm kind of astonished and bewildered that I've found myself working in a third sector organisation, a care and support organisation, and it's the first time in my working life that I've experienced this level of hostility and discord. That you know the language of "we are at war with (the union), that's common language ... I'm not at war with anybody!" (Union Member).

## 4.2 | The reversal of derecognition

The period of derecognition lasted approximately 15 months from the date of notifying the union. Changes in personnel helped facilitate the subsequent re-recognition. The CEO who made the derecognition decision resigned at the end of Year 3, and the replacement was perceived to be much more pragmatic in terms of managing industrial relations. In early 2020, both sides agreed on negotiations about a voluntary deal. An initial meeting was described as 'very difficult ... all about airing all the dirty laundry and getting it out of the road' (Senior Manager). Nevertheless, by the third meeting, a draft voluntary agreement emerged, which was presented to Charity X's board and agreed, then signed (mid-February 2020).

Union respondents viewed the new recognition deal as a success in so far as it gave it access to the workforce for recruitment purposes; contained stipulations on shop-steward numbers,

facility time and training; and the frequency of attendance at JNC meetings. There were also clearer guidelines on the scope of bargaining, which included pay, terms and conditions, health and safety, hours, job evaluation, pensions, sickness policies, outsourcing, equality, redundancy, discipline, capability and grievance policies and 'any other item both sides agree to refer'. Management efforts to include a 'no-strike' clause and a behavioural code for negotiators in the deal were unsuccessful.

### 4.3 | The impact of hard recognition law

For the first 8 months of the campaign in Year 2, having anticipated the derecognition decision, the union succeeded in mobilising its existing membership to organise for growth within Charity X. Membership reportedly trebled over this period, from 300 to just over 900, taking density to just over 50% of the workforce, and the number of shop stewards increased from three to a maximum of 12. The election of new geographically dispersed stewards was seen to be particularly influential in the success of the membership recruitment campaign, as they supported a focus on building membership in areas where the union previously had limited strength.

Union recruitment was based on the need to secure recognition so that the issues (primarily pay) related to the change process could be returned to collective bargaining. In emphasising the legal process under the Employment Relations Act 1999, union officials were initially confident that they would secure an automatic award of recognition from the CAC under the provisions of the law because they had reached the legally required 50%+ membership in their proposed bargaining unit.

Union officers recognised drawbacks in the statutory procedure, however. They did not want to force Charity X into recognition, as it was not felt to be the best way to ensure subsequent good industrial relations. Moreover, a statutory recognition award would only provide for bargaining over pay, hours and holidays, while a voluntary agreement could extend to encompass a broader scope of subjects. Campaigning using the statutory procedure was therefore intended to provide the union with leverage to persuade the employer into signing a voluntary agreement.

You do not want to force somebody to come around the table and consult and negotiate with you, because they ain't going to do it. If I said to you, you have to be there, and you have to sit and consult and negotiate and you have got no choice, you are going to go in there with an attitude anyway and go, I'm not going to listen to a word they have got to say. But if you genuinely agree to meet, although you maybe do not agree with everything that's getting said, you are going to be more open-minded (Shop Steward)

While the union cautiously pursued the statutory route, management adopted counter-mobilisation strategies (Keller, 1998). These strategies included contesting the union's definition of the bargaining unit. The vast majority of the growing union membership was located among permanent frontline employees, so the union wanted to define its bargaining unit around this group. In an effort to undermine the union's case for recognition, management wanted to include relief workers in the bargaining unit, where membership was rare and support for recognition was likely to be lower. The controversy surrounding the boundaries of Charity X's

bargaining unit led to delays in the CAC's decision-making. The CAC was supposed to confirm the bargaining unit in early summer of Year 2, but this was delayed until autumn and further delayed until the end of the year. These delays meant that the union had to invest considerable resources in trying to maintain its membership gains against the backcloth of high employee turnover.

Counter-mobilisation strategies entailed management raising the profile of the Employee Forum. Union officers also revealed that management used newsletters and social media to persuade approximately 100 employees to write letters stipulating they did not want re-recognition due to reported concerns that negative social media comments by the union were undermining the organisation's reputation, by spreading alarm among families and disrupting services (Union officer 1). Management then sent the letters to the CAC but received a response that reinforced the point that a far greater number of employees were currently in favour of recognition, based on union membership. More widely, the senior union officer reported how other employers (where it had recognition) were questioning the future of their collective agreements in the light of low membership figures and the actions of Charity X. By the beginning of Year 3 of data collection, several stewards reported difficulties retaining members because of employee turnover. These challenges led to the union abandoning efforts to gain automatic recognition under the statutory procedure. The union officers reported that the best way forward was to quickly sign a voluntary agreement to nullify these counter-mobilisation efforts. If the voluntary route was not possible, however, then they would continue to work towards winning a statutory ballot.

Management also began to look for a resolution. Some managers (coaches and BLs) were conscious of the influence of hard law and believed that a period of campaigning for and against recognition through the statutory ballot would not help employment relations.

The organisation only agreed to talk about a voluntary deal, once the campaign for the statutory ballot arose (SOT member).

Senior members of the board of Charity X reportedly became increasingly uncomfortable with the derecognition decision, the subsequent protracted legal battle and associated reputational, time and financial costs. Once the CEO resigned, the board sought an agreement. The deal was agreed in the early part of Year 3.

#### **4.4 | The impact of soft regulation through its supplementation of hard law**

The union's use of soft regulation emerged gradually and alongside its pursuit of statutory recognition. While threatening a hard statutory ballot, the union began to offer management the flexibility of a voluntary deal that would contain soft SFW principles. Alongside this, it benchmarked the diminishing differential between the Scottish Government's FW commitment to fund the payment of all adult social care workers to the level of the RLW and Charity X's recent pay offer. At this stage, the RLW was approaching £9.00 an hour. This narrowing differential added to workforce unease that the additional £1.00 above the RLW hourly rate was insufficient to account for their rise in responsibility as TMs. Several shop stewards reported that benchmarking the pay offer with the RLW was a substantial factor in workers rejecting the former.

This idea of ten pounds an hour being spectacularly good and market leading and significantly differentiate the additional responsibility that comes from moving from a support worker to a TM, that pay's not there. I think people are looking at it and saying, "wait a minute, I was already getting paid nine pounds-odd an hour as a support worker" (SOT member).

Union officials reported this aspect of their campaign secured approximately 120 new members in a single month.

The power of government authorship of the SFW agenda and intervention from what Marchington (2015) calls semi-autonomous soft bodies meanwhile raised the reputational costs of derecognition. Senior representatives of the FWC questioned the organisation's reputation, making public pronouncements regarding the inconsistencies behind the organisation claiming to be a FW employer but derecognising its union. Several union officials and managers reported that Scottish Government representatives felt the dispute reflected badly on the reputations of both parties and were particularly uncomfortable with the derecognition decision. It was reported that the Scottish government 'encouraged' the two parties to negotiate to sign a voluntary agreement that reflected its SFW principles:

There's a political will for the care sector to be working more collaboratively with unions in general. There was a high degree of dissatisfaction by the minister with the way in which the union and Charity X had undertaken a very public fallout and all of the behaviours on both sides that then took place (Senior Manager).

and:

the Scottish government will not be impressed with a project that they are funding for an employer to walk away from fair work. The Scottish government will really not be impressed which then means COSLA [Scotland's local authority representative body] and the local authorities will have an issue (Union officer 1).

Members of the organisation's charitable board were reportedly aware of this growing reputational damage.

I think there were a few voices on the board saying, this is much, much messier than we imagined it would be and not good for us, not good for the reputation of the organisation, we need to try and fix it (Coach).

Also influential was the resource dependency by Charity X on local authority funding and their joint responsibility to abide by the duty of public authorities and their suppliers in procurement processes to aspire to be FW employers (Scottish Government, 2018). The union's local government branches acting as 'soft' intermediaries (Marchington, 2015) pressured local authorities where Charity X was trying to grow its business to support the re-recognition campaign, reminding them of this responsibility.

we actually had several local authorities who did that and wrote to the CEO to say "unless you repair this relationship with (the union) we are not going to give you any more money". We know particularly in one area that hurt them really hard.

Once they changed their perspective, then the local authority changed their view.  
So, I think we were quite influential in that (Union officer 11).

Union officials and managers reported that local commissioners found Charity X's actions unacceptable because it was in receipt of significant amounts of public money and espousing SFW. Charity X's financial problems (revealed in Year 3 of the study) exacerbated their vulnerability to these union tactics. The problems were linked to underfunding of many of its contracts by multiple local authorities and the running down of its reserves. Members of the voluntary board, again, questioned the wisdom of breaking a long-standing union agreement, given the accompanying financial costs.

Finally, when the voluntary recognition agreement was signed, although none of our front-line respondents made any direct reference to SFW in their interviews, it included statements outlining both parties' commitment to the shared values of SFW and to working together to grow a FW culture.

This agreement commits both to work together to grow a culture of fair work within Charity X, embedding the fair work dimensions into collective bargaining and partnership working arrangements. (Extract from agreement)

One of the external union participants in the negotiations highlighted the capacity of soft regulation capacity to reduce conflicts of interest as the five principles of SFW were seen to form the 'glue' upon which both parties could reach agreement despite their differences. The deal also used partnership as a commitment to 'mutual gains', emphasising better employee health and rewards in exchange for greater efficiency and productivity for the organisation.

At the same time, questions arise over the security of the union from this interaction of soft and hard regulations. As a condition of management signing the agreement, the union changed its senior negotiator, conceded the inclusion of relief staff in the bargaining unit and accepted a clause stipulating that the collective agreement would be up for review after 1 year to assess whether it was contributing to good employment relations. Stewards questioned whether management should have such influence on who negotiates for its members alongside their reservations over the continued problems of sustaining membership, raising fears that derecognition could occur again.

## 5 | DISCUSSION

This study focused on the contribution of soft regulation under SFW to union re-recognition following derecognition and how such regulation interacts with hard legal measures. It did so on the grounds that the combining together of such forms of regulation is seen to potentially overcome their respective limitations. Adding to debates concerning the interaction between soft and hard regulations (Holgate et al., 2018; Johnson et al., 2019; Moore et al., 2013), first, this study supports the view that soft regulation can act as a supplementation of hard legal measures. The combination of hard and soft regulatory measures was found to exert an influence over the decision to re-recognise by generating concerns among management and board members about associated reputational, time and financial costs. The statutory procedure's 'shadow effect' (Brodtkorp, 2012; Moore et al., 2013) was confirmed as management drew back from costs associated with statutory recognition. Soft regulation further supported the re-recognition

process by imposing reputational costs in the eyes of levels of government and influential intermediaries (FWC). It also carried an important and somewhat related financial threat due to the combination of the organisation's resource dependency on local authority contracts and the Scottish government's expectation that its SFW agenda would shape competition for them, thereby incentivising compliance with FW requirements (Kuruville & Verma, 2006).

In terms of both soft and hard impacts, there was a crucial role for unions as intermediaries (Marchington, 2015). As found in other studies, the use of statutory recognition, both as an incentive to voluntary recognition and a source of a legally required one, necessitated effective organising by the union to recruit members (McKay et al., 2006; Moore et al., 2013; Smith & Morton, 2006). With regard to SFW, wider public service union branches were crucial in exerting pressure on behalf of members in Charity X on local authorities to comply with the aforementioned changes to competitive incentives in public service supply chains.

Illustrating the additional breadth of its influence, soft regulation also impacted in several other ways. Benchmarking Charity X's pay deal with the RLW led to increases in union membership. Reflecting soft regulation's capacity to settle and reduce conflicts of interest (Keller, 2000), the final deal contained an FW statement as its guiding principles and was perceived by officials as a bridge upon which management and union could begin to rebuild relations.

This study suggests there are qualifications about the ability of soft and hard interactions to improve wider labour standards, however. Although combining hard and soft regulation was found to add breadth to the union's re-recognition campaign, the study raises question marks over the depth of this influence. Scotland's soft employment regulation did not stop derecognition occurring in the first place within an organisation that branded itself an SFW employer: raising concerns regarding whether other employers will pick and choose the elements of SFW, rather than demonstrating full commitment. Furthermore, the interaction of forms of regulation failed to close down opportunities for the employer to instigate counter-mobilisation strategies. The statutory procedure was subject to familiar counter-mobilisation efforts including delaying the process, questioning the bargaining unit, and undermining officials while the union struggled to maintain momentum in organising workers (see Gall, 2010; McKay et al., 2006). These concerns were reinforced by the way in which other employers were monitoring events to see if they could make similar moves. Finally, concerns arose regarding the depth of impact from the interaction of soft and hard regulations due to union compromises on key issues in the final recognition agreement. The scope of bargaining was widened, but key negotiators were dropped; the bargaining unit included casual workers; and questions were raised regarding the longevity of the agreement.

A further related contribution of this study is linked to research highlighting that outcomes from soft and hard regulatory interactions can vary according to issues, national context and across national and supra-national boundaries (Locke et al., 2007, 2013; Szabados, 2021). In this study, there is a case for also suggesting variability in impact depending on the sector. The successes of this study for union recovery may not be repeatable in other hard to organise sectors. Much like the aforementioned research on partnership (see Stuart et al., 2011), this study partly echoes other studies that reveal some positive improvements in a public services context. Unions in other hard to organise sectors (e.g., retail and hospitality) will not, however, have the same recourse to strong external intermediaries such as public sector union branches to support them through advocating soft labour standards such as FW. In addition, because of low membership density, unions in the wider service sectors would also struggle to prove 'reasonable support' to enact rights under the statutory procedure.

A final contribution is to not overstate the potential for complementary hardening between soft and hard regulations across the Scottish and UK governments, and, in turn, the capacity of the FW agendas of the devolved governments as a significant corrective against neoliberal orthodoxy (Heery et al., 2020; Sisson, 2019). National governments have been labelled the missing link between moving from soft into hard regulation (Verma, 2003), but context remains important (Locke et al., 2013). Unless the UK government either abandons neoliberalism, no longer retains employment regulation as a reserved power, or Scotland achieves independence, there is doubt whether the United Kingdom will see the kind of complementarity and reciprocal improvements in labour standards between UK and devolved nation levels found in other studies of multi-level regulatory dynamics (Szabados, 2021).

## 6 | CONCLUSION

The study explored the interaction of soft and hard regulations on union recovery following derecognition in a social care organisation. Such soft and hard interactions, alongside union organising, were found to raise the costs of derecognition for the employer and so facilitate a willingness to re-recognise. Doubts, however, arose regarding the depth of impact of such interactions. The study also cautions against assumptions that soft and hard regulatory interactions can achieve similar outcomes across other hard to organise sectors. Finally, it raises additional doubts regarding whether there can be complementary hardening across multiple levels of government to improve labour standards in national contexts that remain wedded to neoliberal employment relations.

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