

## The First Ten Years of the Third Statutory Union Recognition Procedure in Britain

### Introduction

The 6th June 2010 represented the tenth anniversary of the introduction of the third statutory union recognition procedure in Britain. In order to assess its outcomes and impact, the determinations of the bodies which administer the procedure, namely, the Central Arbitration Committee (CAC) covering Great Britain, and for Northern Ireland, the Industrial Court (IC) are used to form an aggregate picture of the outcomes of the applications. These individual applications are publicly available on their websites.<sup>1</sup> Using this picture provides a basis for assessing the impact of the procedure and the applications upon the voluntary arena of employment relations.<sup>2</sup>

### Applications and Outcomes

Initially, the CAC believed it would receive around 150 applications per annum.<sup>3</sup> This would have amounted to 1500 applications by 5 June 2010. Instead, there have been just 721 applications. An additional 40 applications have been made to the Industrial Court. However, the cumulative figure of 761 applications is, in actual fact, less than this because of the withdrawal and then subsequent resubmission of a significant number of cases. Taking this into account, the number of actual, distinct cases has been 694.<sup>4</sup>

Of the CAC/IC applications, 204 were withdrawn before an acceptance decision was made. Reasons for withdrawal concern unions' uncertainty about meeting admissibility and validity tests, particularly meeting the membership and worker support thresholds. However, a number (39) were also withdrawn because voluntary agreements were gained. Of those withdrawn at this stage, 67 cases were subsequently resubmitted. Of those applications not withdrawn before a decision on admissibility was made, 448 were accepted, meaning that the workers were not covered by an existing union recognition agreement. One hundred and one applications were rejected.

Following acceptance, 71 applications were withdrawn. In 63% of cases this was because voluntary recognition was gained. Of those that progressed after acceptance, 64% of the applications had their bargaining unit agreed or decided in favour of the union or its original proposal. However, fifty cases were withdrawn after this stage, again often because voluntary recognition was conceded. Where bargaining units differed from those proposed by the union, a check was made to see if they were still valid in terms of the 10% member and 50% worker support criteria. Eighty six per cent of these were.

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<sup>1</sup> See <http://www.cac.gov.uk> and <http://www.industrialcourt.gov.uk/>.

<sup>2</sup> For previous publications based on this research methodology by the author and used here see, for example, G. Gall 'Trade union recognition in Britain: a crisis of union capacity?' *Economic and Industrial Democracy*, (2007), 28/1:83-114.

<sup>3</sup> *Guardian*, 10 June 2000.

<sup>4</sup> In the subsequent text, the numbers at each stage do not equate to the total number of applications because by June 2010 determinations on a number of applications (at the different stages) were outstanding.

In terms of final outcomes, automatic recognition awards were made in 110 cases, and recognition awards through balloting were made in 119 cases (representing a 62% success rate here). Another 30 voluntary recognition agreements were gained at the stage before automatic recognition or through balloting, bringing the total number of voluntary agreements reached where statutory applications were made or progressed to some extent through the adjudication process to 120. Looked at in the following way, unions could be said to have won in 349 cases, which proportionately represents just over a fifty per cent success rate, and indicates that that reasonably strong 'shadow' and 'demonstration' effects existed. *Prima facie*, it seems despite initial misgivings, a case could be made that unions have been reasonably successful. However, when looking at the numbers covered by these recognition agreements, this is far from the case. In total, some 56,000 workers have been brought under union recognition by automatic, balloting and semi-voluntary means.

Yet, given that the intention of the 'new' Labour law-makers was to have the statutory procedure used as a method of last resort, the dimension of how the procedure's existence - in terms of its 'demonstration' and 'shadow' effects - is a vital method of assessing the impact of the statutory procedure. Examining the number of new recognition agreements signed on an annual basis, and which are neither the result of statutory awards nor semi-voluntary agreements solicited by statutory applications, is the best means to do so. Thus, the number of these new recognition agreements signed in the mid- to late 1990s was around 100 per annum. This rose to over 350 in 1999, to nearly 550 in 2000 and just over 650 in 2001. Thereafter, it fell to just over 340 in 2002, 210 in 2003 and just under 200 in 2004. From 2005, the annual number of these new recognition agreements began to fall back to its pre-1999 levels. However from 2009, the annual number fell well below the mid-1990s level with just 45 in 2009 and 28 in the first six months of 2010. In total, the number of new agreements here was just over two thousand eight hundred by June 5 2010. In terms of the known number of workers covered, a similar upward and downward trend over the period is recorded, with some 0.75m workers covered overall (albeit the number of workers covered was known in only 68% of cases).

One context for the all entire number of new recognition agreements has been that throughout the years from 1999/2000 to 2010, the best available proxy measure of union recognition coverage has continually fallen (albeit within the period characterised by a decline in manufacturing where recognition had been widespread, an expanding labour force and expanding public sector employment where existing recognition is widespread). Thus, from the Labour Force Survey<sup>5</sup>, the percentage of employees whose pay is affected by collective agreements has fallen from 36.1% in 1999 to 32.7% in 2009. Another context is that since 2003, unions have become relatively more reliant upon using the statutory procedure to gain recognition agreements. Thus, between the 2001 and 2002, the proportion secured through this means was an average of 10% whereas since 2003 this average has increased to 21%.

It is wholly improbable that unions would not have signed any new recognition agreements in the period without the statutory procedure, not least because agreements were signed before its introduction and because both public policy – which influences employer behavior – became relative less antagonistic towards unions after 1997, and because adoption of a 'partnership' perspective by many unions made them less unappealing to prospective employers. Moreover,

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<sup>5</sup> Table 4.1, J. Archur *Trade Union Membership 2009*, Department for Business, Innovation and Skills, London, 2010.

the influence of the statutory procedure upon the rate of signing of new agreements must logically lie somewhere between 100 agreements per year (as per the pre-1999 figures) and the actual number of entirely voluntary agreements signed per year. However, it should not be assumed that the influence of the procedure is constant over time. Indeed, the rise and fall and further fall of the number of new (entirely) voluntary agreements between 1999 and the first half of 2010, indicates a more complex process is afoot.

This centres upon the mutually-conditioning and inter-dependent relationship between agency and environment. In anticipation of 6 June 2000, unions were able to sustain existing campaigns for recognition and generate new ones, where they enjoyed something approximating to majority membership and/or majority worker support. The onset of 6 June 2000 accentuated this process with the effect that the unions built up a tranche of such strong campaigns. Those employers which consented to voluntary agreements were the more amenable (sic) employers.<sup>6</sup> The tipping point for them was the existence (the 'shadow' effect) and potential use of the statutory procedure (aided by the earlier statutory successes as per the 'demonstration' effect), where the pill – if it was seen in this light by them - may have been sweetened by a partnership approach. But as one union leader put it at the time neither these effects nor the restricted nature of statutory procedure itself allowed the unions to get beneath 'the permafrost' to the millions of non-unionised workers employed in the private service sector, where employer opposition is keen and worker disinterest in unions often the result of not apathy but perceived union weakness. In other words, the statutory procedure's multi-faceted influence has varied over space and time, and this has largely depended upon the balance of power between capital and labour at the enterprise level with the effect that a weak (for the unions) statutory procedure was able to play a broadly positive role initially but, for the unions, foundered thereafter. Another way of approaching the issue is to say that while it was highly unlikely that the early annual number of new agreements gained immediately after 2000 could be sustained, it appears that their subsequent numbers sank to a level significantly below that which might have been expected with a more robust, and thus union-friendly, statutory procedure. Thus, the procedure's weakness was largely masked early on because a large tranche of strong recognition campaigns. Either way, this overall point is that the era of legislatively induced voluntarism has effectively come to an end with the current existence and complexion of the statutory procedure.

### **Employer Response**

Employer responses to the presence and experience of the statutory procedure can be judged in a number of ways. Amongst these are legal challenges, and the abiding by the final determinations for recognition. Thus, there have been just ten judicial reviews of CAC/IC determinations (nine of the former, one of the latter), all of which bar one were made within the first three years of the statutory procedure. All the determinations were upheld. This small volume of judicial reviews indicates that the CAC/IC determinations have been, by and large, uncontentious. Given that eight were at the behest of employers, this may be taken to indicate that there is a general, if reluctant, acceptance of the way the CAC/IC work and the principles by which they operate in as much as these are not seen to be too onerous (and where the

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<sup>6</sup> See G. Gall 'Trade union recognition in Britain: a crisis of union capacity?' *Economic and Industrial Democracy*, (2007), 28/1:83-114.

unsuccessful nature of the challenges has not allowed avenues of opportunity to be open up to those employers seek to contest them). But there is a wider point, which is that, employers may feel there is sufficient latitude for them to not unlawfully oppose recognition before, during and after the statutory procedure (see below). In terms of the final determinations, the vast majority of employers have accepted the recognition awards in as much as they have agreed to methods by which recognition is to be operationalised, and these methods have not in the main been imposed upon them by the CAC/IC. However, this degree of acceptance also highlights employers' ability to influence the process of determining the methods to produce outcomes, which they believe, are acceptable.

Yet underlying the acceptance and acquiescence is a far more important phenomenon, namely, that the statutory procedure has been inserted into a terrain of collective employment relations which is still heavily characterised by voluntarism. This means the influence and remit of the procedure towards the voluntary arena is limited and the influence of the voluntary arena upon the operation of the procedure is, by contrast, much greater, particularly in terms of unions' ability to raise the number of applications and their ability to have strong cases which can result in recognition awards. One particular aspect worth highlighting here is that within the CAC/IC determinations, there is considerable evidence that many of the most reluctant or resistant employers have taken measures to try to head off being compelled in the (prior) voluntary arena to grant recognition, and thus also potentially stymie the prospects of unions being able to make statutory applications or have them accepted.<sup>7</sup> Thus, establishing company/works/staff councils has to been used as a means of union substitution. These means take on a renewed significance when allied to other means of union substitution and union suppression at the time of any subsequent application for statutory recognition. Although there is a now a form of regulation against unfair practices, unions allege<sup>8</sup> employers have the latitude – if they so wish – to influence the final outcome, particularly where ballots are held. Through the CAC/IC determinations and secondary sources (such as union journals) just over 200 applications were found to be affected by acts of substitution and suppression.

To summarise, employer response has been overwhelmingly pragmatic, with this pragmatism having two complexions. Firstly, accepting the *realpolitik* of the situation where unions can use the procedure directly and indirectly to gain recognition where substantial worker support can be demonstrated whilst at the same time acknowledging that granting the procedural right of recognition does not necessarily predetermine the substantive outcomes of recognition. Secondly, comprehending that, if opposition and resistance to granting recognition are deemed desirable, there are lawful and not unlawful means by which to do so.

## **Conclusion**

The argument presented here has been that the benefit of the statutory procedure to unions has been marginal to say the least. In the alter-factual sense, and all other things being equal, the situation they may have found themselves in would no doubt have been worse without the

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<sup>7</sup> See, for example, G. Gall 'British employer resistance to trade union recognition' *Human Resource Management Journal*, (2004), 14/2:36-53.

<sup>8</sup> See, for example, the TUC press release 'Union busters not welcome in the UK says TUC' (11 February 2008) for the launch of the commissioned *US Union Avoidance Consultants: A Threat to the Rights of British Workers*.

procedure's existence and operation. Yet, it is also clear that there has been little in the way of overall, positive benefit. This is all the more galling for unions given that they were the procedure's progenitors. However, this poses questions both for the nature of the statutory procedure and unions' ability to benefit from it. Union critics can point to the low and declining volume of applications as evidence of unions' inability to productively use what is available to them. The underlying point of their critique is that unions are not good at doing their job of recruiting and organising. But, this perspective is not cognizant of the intimate relationship between agency and environment, and particularly the potential influence of a more robust and efficacious statutory procedure to create gravitational push towards unions in terms of their motivation, workers' motivation, creation of resources therein for leverage against employers, and opportunities afforded by more credible chances of success within the statutory process itself. Thus, it is plausible to believe that a stronger procedure would encourage more and stronger recognition campaigns, and more and stronger campaigns for recognition would be far less thwarted with such a stronger procedure.