

COLLECTIVE EMPLOYEE REPRESENTATION AND THE IMPACT OF LAW: INITIAL RESPONSES TO THE EMPLOYMENT RELATIONS ACT 1999

ESRC Centre for Business Research, University of Cambridge, Working Paper
No. 206

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September 2001

This Working Paper relates to the CBR Research Programme on Corporate
Governance, Contracts and Incentives

Abstract

Using data gathered primarily during interviews with managers and trade union officials, this article examines how trade unions and employers have reacted to the introduction of the statutory procedure for union recognition in the Employment Relations Act 1999 (ERA). Findings indicate that the ERA and the drift of EU influence have had a substantial effect in shifting the balance of employer attitudes towards greater approval of trade unions and have accelerated the rate at which employers are redesigning their relationships with unions. Although employers are tending to restrict unions' influence over traditional issues such as pay-setting, they are increasingly seeking their assistance in implementing difficult organisational changes. The article explores the impact of such changes on trade union activity and collective representation more broadly.

JEL Codes: J53, K31

Keywords: Collective bargaining, employee representation, trade union recognition labour legislation.

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1. Background

There has been upheaval in the collective representation of employees in Britain over the past twenty years. The system of collective bargaining that was once the basis for regulating employment relations has been transformed. The coverage of collective agreements has almost halved since the late 1970s, and both the range of issues negotiated over and the impact of trade unions have diminished (Brown *et al*, 2000). This apparent fragility of the British system of collective bargaining is, at least in part, attributable to the tradition of ‘collective *laissez-faire*’ - the characteristic paucity of statutory support for collective employment rights in British labour law (Davies and Freedland, 1993). However, as the 20th century drew to a close, even as established collective bargaining arrangements were crumbling, this lack of legal support was itself subject to revision.

A statutory procedure for union recognition was introduced in June 2000 through the 1999 Employment Relations Act (ERA).¹ Under this, employers could be obliged to recognise a union that can demonstrate a certain level of employee support. Accompanying this were a number of measures to bolster trade union rights at work, most notably that any employee who has a serious grievance or discipline case has, in pursuing their case, a ‘right to be accompanied’ by someone of their own choice who, even where unions are not recognized, could be a trade union official.

The potentially far-reaching significance of the ERA is suggested by the conclusion of Bain’s classic study of white-collar trade union growth, that ‘...the strength of these unions will generally not be sufficient in itself to persuade employers to concede recognition; this will require the help of the government. In short, the future growth of white-collar unionism in Britain is largely dependent upon government action to encourage union recognition’ (Bain, 1970: 188). He was writing of an era when white-collar trade unions were more distinguished from other unions by their dependence upon employer acceptance, and he was writing of government action largely prompted by the exigencies of war. But by the end of the twentieth century this dependence had become a far more general feature of

trade unionism, and the call for government action came from the trade union movement itself.

A central aim of the ERA was to promote voluntary recognition agreements, with the statutory route using the Central Arbitration Committee (CAC) as a last resort (Brown *et al.*, 2001). Thus employers could avoid the statutory route altogether if they entered into a voluntary recognition agreement prior to the date when the new recognition law came into force in June 2001; even after this date, the new law provides ample opportunities for employers to forestall legal intervention by entering into negotiations with unions. Research into the early impact of the new procedures suggests that there has indeed been a substantial growth in voluntary agreements, largely in response to the new law (Gall & McKay 2000; TUC 1999, 2000, 2001; Wood *et al* 2001; ACAS, 2001). Gall & McKay (2001) concluded that, in the period prior to the legislation coming into force, the imminence of ERA had a significant impact in prompting recognition. TUC analysis of trends in recognition agreements also shows that the new rights have been a key influence over the greatly increased numbers of new agreements, and that employers have, as predicted, generally settled voluntarily in order to shape agreements and minimise conflict (TUC 1999, 2000, 2001). As Smith & Morton (2001:133) suggest, it may be that the ERA has helped to “re-legitimise” trade unionism.

The facilitating of trade union efforts to gain employer recognition was not, however, the sole objective of the new legislation. An additional intention, according to the preceding ‘Fairness at Work’ White Paper, was the promotion of workplace partnership. Funds were made available to facilitate partnership training within firms. When taken with the fact that the legislation barely changed the restrictions on strike activity built up over the previous twenty years, this suggested an intention to remodel the style of collective bargaining. Smith and Morton (2001:122) suggest that the object of the ERA is ‘not to promote trade unions as autonomous workers’ organisations, but to remould them’ as weaker ‘partners’ in a new relationship with management. Wood & Godard (1999:238) had earlier concluded that features of the Employment Relations Bill ‘could be viewed as means of enhancing the chances of employers’ accepting unions as partners,

albeit perhaps on their own terms'. In addition, even before the British government's grudging acceptance, again under union pressure, of the EU Draft Directive on Information and Consultation in June 2001,² British labour law had been increasingly favouring consultation as a model for employee representation. Although not directly encouraged by the ERA, it is a model that contrasts with traditional notions of collective bargaining.

There has been much speculation about the potential effects of the ERA on both trade unions and management practice. There have been predictions that the statutory recognition procedures could entrench or strengthen employer opposition to unions (Gall & McKay 2001, Towers 1999, Wood & Godard 1999). Some writers anticipate that problems encountered by US unions stemming from employer anti-unionism may occur in the British context (Adams 1999, Gall & McKay 2001, Smith & Morton 2001, Towers 1999, Wood & Godard 1999). They point to the growth in popularity of US non- and anti-union management practices among British managers, and highlight strategies available to employers who wish to avoid recognition or to reduce its effects, such as gerrymandering bargaining units, or concluding pre-emptive agreements with malleable unions. More generally, Wood & Godard (1999:237) suggest that the assumption that collective bargaining is the best way of conducting industrial relations no longer runs through public policy. Millward and his colleagues (2000:235) predict that collective bargaining will continue to contract in extent and effectiveness, and that union representation and communication structures will continue to be replaced by management-controlled methods. The nature of employment relationships, they conclude, will become increasingly a matter for managerial choice.

This study explores the initial impact of the legislation by means of interviews with employers and unions, conducted over the period during which the ERA was being introduced. It is concerned with the extent to which the legislation appears to be modifying (and in some ways reversing) the retreat of collective bargaining that has been under way in recent years, and with how far it is modifying the nature of collective worker representation more generally.

2. Research method

The primary aim of the research was to assess, by means of case studies and interviews with trade union and employer association officials, initial and anticipatory responses to the ERA. It was conducted during 1999 and 2000 as part of the ESRC's 'Future of Work' Programme. It developed from an earlier case study based analysis of 'The Individualisation of Employment Contracts in Britain' which had drawn attention to the extent to which employers, well before there was any prospect of the ERA, had been reducing the procedural involvement of trade unions in regulating the employment contract (Brown *et al*, 1998).

The case studies were conducted through personal interviews, in selected industries, with owners, senior managers, and human resources (HR) staff in 60 companies and establishments characterised by a range of attitudes to trade unions. Drawing on the suggestions of trade union and industry association officials, we targeted companies and workplaces where changes in recognition had been made or were expected. To place this in a broader representative perspective, 1998 WERS 4/5 digit industry-level data were analysed to identify sectors of interest in terms of recent requests for recognition, newly-concluded recognition agreements, and derecognition. Firms were then selected from sectors where changes in recognition were evident. Around half of the employer interviews were conducted between January and May 1999, prior to the passage of the Employment Relations Act, with the remainder conducted in the latter half of 1999 or early 2000.

The cases were chosen to ensure broad coverage of sectors where recognition might be contentious. Near-equal numbers of production and service sector firms, and also of SMEs and large organisations, were selected. Only one wholly public sector organisation was included, although another nine companies had operations in the public sector. The companies and establishments studied were divided equally into those that had operations located throughout England, the UK, or worldwide; those located in eastern and south-eastern regions; and those in the midlands and northern regions. Of the case study

firms and establishments, 24 had recognition agreements, and 36 did not, although some of the latter expected that recognition was imminent. Managers in eight of the firms or workplaces had derecognised trade unions. In most cases, they had derecognised unions in one section or workplace and retained recognition for employees in others.

It should be emphasised that this was not intended to be a representative sample of employers. Such a sample would probably have yielded very few firms where union recognition was a live issue. The intention was to identify a broad range of employers for whom the ERA recognition procedures might have an impact, and to explore the circumstances and motivations that shaped their response. A key aim was to ascertain the nature and determinants of individual employer changes in behaviour in order to shed light on how aggregate behaviour might develop in the longer term. The cases were thus selected to provide indications of types of response and not to be representative of responses as a whole. In this account we consequently eschew providing percentage breakdowns of our data, drawing on them instead for qualitative descriptions of the behaviour patterns we find.

Additional interviews were conducted with 34 paid full-time trade union officials located in national and regional trade union offices, and 15 industry association officials, most of whom operated in the same industry sectors as the case study organisations. Particular value was attached to talking to all three sets of interviewees (employers, trade unions, and industry associations) during the period in which they might be planning for the new legislation, in order to assess what motivated their response, if any, to the new law. It was felt the period during which a response was under active consideration would reveal more about salient factors, and about possible pre-emptive action, than when legislation was either a vague prospect, or a *fait accompli*.

Data were collected from interviewees relating to employer/trade union relationships and partnership arrangements, and responses in anticipation of the statutory recognition provisions in the ERA 1999. Employer representatives were also questioned extensively about the

nature and characteristics of their consultative, communication, and pay-setting arrangements, and recognition agreements. With the exception of three ‘sweatshops’, where circumstances were constrained, interviews were formal and structured around a questionnaire. Most were tape-recorded and fully transcribed. Interview data were inputted into a spreadsheet of results to form a matrix of responses that was analysed thematically.

We start by considering the direct responses of, first, trade unions and, second, employers to the approach and arrival of the ERA. We then broaden the discussion by reporting on how the nature of collective bargaining in particular, and of employer/trade union relationships more generally, are changing. After an account of emerging patterns of joint consultation, we make a tentative assessment of the initial impact of the ERA.

3. Trade union responses to the ERA

The prospect of the ERA was taken very seriously by trade union officers. Most had stepped up planning of recognition targets, including mapping levels of unionisation across localities and within companies to assess recognition potential. This was often coupled with national or geographically based recognition campaigns. Unions were focusing efforts on sites with union members and no recognition agreement, on companies where they had been derecognised but retained high levels of membership, and on firms with recognition covering some part of the company or workforce but not the whole. In general, workplaces with either existing recognition agreements, or union members, were more likely to be targeted than non-union sites without agreements.

All trade union interviewees expressed concerns about the costs and time that were involved in running campaigns to organise greenfield sites from scratch. Those unions which used a broad range of organising model methods and employed TUC Organising Academy trainees and graduates were more likely to allocate resources to

targeting new non-union areas for recruitment and recognition. It was evident, as Heery and his colleagues also found (2001), that TUC Organising Academy unions were more likely to target greenfield sites, and that unions which used a greater range of organising methods were more likely to encounter a hostile response. Not only are ‘organising’ unions more likely to encounter a hostile response because they target anti-union employers, but also employers, when confronted with ‘adversarial’ organising campaigns, appear to respond in a hostile manner.

Most unions were preparing for the legislation by trying to build membership levels up to 50 per cent of all employees. There was more evidence of unions recruiting members prior to seeking recognition than *vice versa*, and thus building a position of strength rather than “organising the employer”. Other studies report similar findings (Gall & McKay 2000, TUC 2001, Wood *et al* 2001). High initial levels of membership were felt to be important because there was considerable variation in the warmth or hostility of employer responses to recognition requests.

Towers (1999:85) reports that union leaders are placing emphasis upon making the recognition procedure work, perhaps because of evidence that more aggressive American organising model methods had proven ineffective. He warned that the procedures should not provide a substitute for organising. However, it seems that the two are going hand in hand, with trade unions first building majority membership and then seeking recognition. A key issue then is whether they are simply recruiting members, or ‘organising’ them in the sense of building effective self-sustaining workplace structures. In the former there is a chance that membership will attenuate and union strength will dissipate once a recognition agreement has been achieved.

Other aspects of the 1999 Act have brought about a changed role for trade unions. The continued rise in the range of individual statutory rights for their members, and the potentially substantial significance of the ‘right to be accompanied’ in individual disciplinary and grievance cases which the 1999 Act has provided, have combined to place what

may become unmanageable burdens on trade union full-time officials. The majority of officials saw the new rights as a double-edged sword. On the positive side, they were optimistic that the new accompaniment rights would bring opportunities and provide levers to build membership and recognition in hitherto non-union areas. For employers who wished to deal with only one union - if they had to deal with one at all - the accompaniment rights brought the threat of multi-unionisation. Some union officials attempted to capitalize on this by warning that unless their own union was given sole rights, employers might be faced with a multiplicity of unions.

There was, on the negative side, widespread concern that unions would be deluged with calls for help from individual members, and would be unable to respond due to a lack of resources. Officials acknowledged that strong lay representative structures were necessary if they were to take advantage of the recruitment opportunities presented by the new rights. They expected their already onerous individual workloads to increase once the new provisions came into force. Some suggested that this would encourage greater devolution of representation in discipline and grievance cases to workplace union representatives. Indeed, some unions are developing a new style of lay activist to deal with accompaniment, not so much a bargainer with management over collective rights as a 'bare-foot doctor' dealing with members' individual rights. Otherwise, if the accompaniment provisions are to enhance recruitment in the longer term, union officials will need to 'collectivise' complaints and organise collectives of workers around commonly-shared individual grievances rather than accompanying members on a case-by-case basis. As Wood & Godard note (1999:229), the new right offers a form of 'partial recognition' in all workplaces.³ But it remains to be seen how far unions will be able to use the rights as a springboard for stronger organisation and fuller recognition.

4. Employer response to the ERA

What impact did employers expect the ERA to have on employment relations practice? Most managers who expected changes in their organisations as a result of the Act believed that its recognition provisions would be the sole cause of such changes. They felt that changes to other provisions relating to union involvement – such as accompaniment in discipline and grievance cases, strike ballots, dismissal of strikers, blacklists, and discrimination against union members and activists - would have virtually no impact.

There were sectoral differences. Service sector employer associations anticipated little impact of the statutory recognition procedures on their members. By contrast, production sector bodies expected substantial effects and emphasised the potential for disagreements relating to the boundaries of the bargaining unit. It was the accompaniment provisions that the service sector employers' bodies felt were more likely to have an effect in their sectors. Interviewees in several of our service sector firms also anticipated that unions would use the accompaniment provisions 'to get a foot in the door'. Some were contemplating extending an existing 'shallow' recognition agreement covering a small proportion of the workforce to *all* employees, in order to prevent a multiplicity of 'new' unions from representing employees. Employers were opposed to multi-unionisation more generally, with some reducing the number of unions by, for example, derecognising minority-membership unions.

Employers were responding to the new law in strategic and pragmatic ways. There was a high level of management knowledge and awareness of the various provisions of the ERA, and considerable evidence of planning in anticipation of the new law. Almost one-half of all employers eligible expected that the statutory recognition provisions would have an impact on them. Indeed, they were mostly being targeted for recognition by trade unions. Most were already partially unionised but without recognition agreements, or had only partial recognition coverage, circumstances consistent with union targets reported earlier. They were located across a broad range of

production and service sectors, and comprised both small and large organisations.

Three main employer responses were evident in those firms where the statutory recognition provisions were expected to have an impact. About half of them – a mix of small and large, mainly production sector employers - were examining strategies for resisting recognition attempts. These included stalling by waiting for the Act to be passed before they responded to requests for recognition; upgrading terms and conditions of employment so as to reduce the potential attractions of trade unionism; setting up consultative arrangements, again as pre-emptive devices; and manipulating potential bargaining units so as to prevent unions winning ballots. Moreover, a sizeable group of interviewees who did *not* think that statutory recognition would have an impact on them also remarked that they, too, planned to reshape their bargaining units if approached for recognition. There was much concern amongst trade union officials regarding the potential for employers to contest definitions of the bargaining unit. Most of these tactics were being recommended to some extent by employer association officials.

Among these resisters of recognition, senior management attitudes were crucial. Three quarters of firms resisting were doing so not because they were institutionally anti-union, but simply because individual senior executives - managing directors, chairmen, owners, senior managers or board members - opposed recognition, in many cases *despite* advice to the contrary from HR staff. In only a minority of cases was the HR or personnel manager opposed to recognition. This suggests that such resistance might prove quite fragile.

The remainder of those employers who expected recognition procedures to have an impact were evenly split into two groups. The first ‘non-resisting’ group comprised those who were resigned to recognition and were not planning to obstruct union efforts. Their response was relatively passive, although in most cases they were using the new procedures as an impetus for rationalising existing multi-union recognition arrangements.

Employers in the second ‘non-resisting’ group had adopted a more active strategy of managing the recognition process by attempting to manipulate the choice of union and bargaining unit to achieve an optimal outcome for their company. A number stated that they were willing to concede recognition on their own terms, which generally meant minimising the impact of recognition on the business by marginalising union activity. Some talked of ‘choosing’ a particular union or official to negotiate with whom they believed could be easily managed or advantageous to the company. These firms were mainly in the manufacturing sectors, and most had been targeted for recognition by several different unions. All but one could be considered to be, in most other respects, ‘pro-union’ employers. Managers in several of these firms were contemplating choosing, or had recently attempted to choose, a ‘soft’ union or official in order to exclude others whom they believed would be ‘more trouble’.

Likewise, many union officials described how employers were approaching them to ward off other unions, and some officials had tailored their recognition appeals to take advantage of this nervousness among employers. Nearly all trade union interviewees described how, when approaching certain employers for recognition, they ‘warned’ them that if they neglected to conclude a deal with their particular union, they might subsequently be compelled to sign an agreement with another less desirable or appropriate union. This was a particularly pertinent threat given that employees can now choose any union to accompany them in serious grievance and disciplinary cases,⁴ and given that many employers were being targeted for recognition by several unions.

5. The recognition process

It was common for several unions to target the same company. One senior official likened the environment to the ‘wild west’ as unions rode out and staked recognition claims in companies. Consistent with our employer interviews, it was reported that those union officials prepared to use more confrontational organising methods – such as factory-gate leafleting – usually came off worse where there was inter-

union competition, while those perceived by employers as ‘soft’ often benefited from employer choice. Union officials were aware of the dilemma this presented; some expressed doubts that organisation on sites where an employer had done a sweetheart deal with a union would remain robust.

The considerable scope for inter-union disputes - particularly in the local government sector - was of concern to many officials. Some officials had developed agreements with competing unions to prevent such disputes, but senior officials argued that the TUC should play a greater role in adjudicating these disputes, as they were distracting unions from the key task at hand, that of organising the unorganised.

Almost all union officials and employers who felt that the recognition procedures would have an impact thought that recognition would come about through voluntary recognition procedures. Voluntary agreements were preferred by both parties because they allowed them to manage the process rather than have an agreement imposed upon them. Only a small minority (two of each) contemplated going down the statutory recognition route likely to involve formal, supervised balloting, in the first instance. About half of officials stated, however, that if efforts to gain recognition through voluntary procedures failed – for example, when faced with an obstructive employer - they would then use the legal route as a backstop.

Individual trade unions and the TUC were proceeding cautiously, restricting and monitoring which applications would go to the CAC as the first test cases, in order to improve their chances of winning a ballot if that could not be avoided. Several larger unions set up internal clearing-house procedures to vet cases going to ballot and determine which would be the most likely to win, as the first cases taken. They did not want to establish poor case law, or for the first test case to be ‘a Grunwick’ which resulted in a legal ruling hostile to the prospects for recognition.⁵ Moreover, several felt that a voluntary agreement, willingly entered into, was more likely to last and lead to more harmonious, stable employer-union relationships.

The experience of ACAS supports this picture. There has been a substantial upswing, dating from well before the Act actually came into effect, in the number of disputes concerning recognition in which ACAS conciliators have been involved. The number rose from around a hundred per year in the earlier 1990s to 384 in 2000-01 (ACAS, 2001). But, since the full weight of the law has come into effect, only a tiny proportion of these have gone on to use that weight in the CAC – of 57 that had been applied for, 27 had been accepted and 14 reached the balloting stage in the first ten months (CAC, 2001). Furthermore, the percentage of ACAS recognition conciliations that have been resolved in favour of the trade union (as opposed to the employer) has increased substantially – from 37 per cent in 1999-2000 to 66 per cent in 2000-01 - as has the rate of success in achieving recognition agreements (ACAS, 2001). To this should be added reports from trade union officers of many recognition agreements having been reached informally without the involvement of ACAS or the CAC. In short, the prospect and later the presence of the new law has encouraged the formation of voluntary recognition settlements with little actual recourse to its legal procedures.

6. Changing employer-trade union relationships

So much for the direct response of employers and trade unions to the mechanics of the new legislation. But to concentrate on this would be to neglect the more diffuse, demonstrative effect that much social legislation has, and its symbolic role in asserting new officially approved standards of behaviour. How far is the ERA, with its stated commitment to encouraging ‘workplace partnerships’, reasserting and reshaping the acceptability of collective bargaining?

Managers and union officials spoke repeatedly of a change in “climate” or “atmosphere”. Trade union officials believed that employers were more receptive to union involvement than in the past. This was due to a combination of factors, including the election of a Labour government, new labour laws, and - as also reported by Gall & McKay (2000) and TUC (2000) - opportunistic motivations, as some private service sector employers viewed union agreements as an

advantage in winning future public sector contracts. Many managers, too, felt that unions were becoming more “business-focused” and “useful” to employers.

Such changes in attitude might suggest that a convergence of interests has occurred, spurred by both legal changes and competitive pressures. But this convergence is not universal. Consistent with our research method of choosing enterprises that displayed a range of attitudes towards trade unions, almost half of the managers interviewed expressed anti-union views and actively pursued a variety of union-avoidance strategies. And most trade union interviewees stated that they experienced a range of employer behaviour, from positive to fiercely anti-union.

However, where recognition agreements did exist, managers reported union-employer relationships to be very positive. To be more precise, managers described their dealings with full-time union officials as universally constructive, but their relationships with stewards and other lay representatives were not as consistently cooperative, although the majority still reported positive dealings with them. Many employers preferred to deal mainly with national-level union officials, whom they believed to be more moderate and sympathetic to business needs or whom they felt had a degree of strategic oversight that was lacking among local union officials or lay representatives. Moreover, local officials and workplace representatives were described as more likely to obstruct or resist management of change initiatives. Accordingly, several managers bypassed or refused to deal with more ‘troublesome’ union officials, while others used strategies aimed at co-opting representatives.

Of those managers who had contact with trade unions, all but one stated that over the past five years their relationships with unions had remained consistently good or had improved. In many cases this was due to a change of senior management or HR staff, or because companies had actively sought union involvement in organisational change processes. Around one-fifth of the firms in our study - some with anti-union pasts, and most with newly-recruited HR executives – had recently built positive relationships with trade unions in order to

seek their assistance in implementing organisational change programmes necessitated by competitive pressures. There are grounds for predicting that many firms currently hostile to trade unions may swing over to union acceptance quite quickly. As has been noted, hostility to unions is often confined to the owner or chief executive, and improved relations with trade unions often coincided with the appointment of new senior or HR managers. Some firms that had traditionally had little involvement with trade unions had anticipated the coming legislative changes and had recruited new HR staff with extensive experience of working with unions. For these firms the demonstrative impact of the ERA was very evident.

The partnership arrangements that were in evidence in eleven of our case study firms covered a wide spectrum. This ranged at one end from closely collaborative arrangements, referred to by employers as 'partnership relationships' in which management sought to manage an existing cooperative, informal relationship with the union proactively and positively, encouraging it to grow. At the other end, employers who were more concerned with restricting the union role than with cultivating it had negotiated formalised partnership *agreements*. Indeed, the more formal the agreement, the more likely it appeared to be concerned with setting clear boundaries to union influence (Oxenbridge and Brown, 2001). In general, union rights were greater in those companies that had informal partnership *relationships* than they were in those companies that had formal partnership *agreements* with unions.

7. The coverage and scope of recognition

Does this observation that closer working relationships have recently been developing between employers and trade unions imply that they may be returning to a style of collective bargaining comparable to that of twenty years earlier? In order to address this we consider in more detail the recognition agreements that were in operation at 40 per cent of the firms in our study. We take in turn the extent of their coverage, the scope of issues they cover, and the depth of union influence that they imply.

The recognition agreements were far from comprehensive in coverage. In half of all firms with agreements they covered only a minority of employees. In almost all of these cases, this was because minority groups of unionised employees had been transferred into companies as a result of acquisitions or public sector contracting processes. Indeed, in almost half of all firms with recognition, the recognition status had been transferred into the enterprise along with unionised groups of workers. Most commonly public sector workers had been transferred into private sector organisations as a result of outsourcing in sectors such as IT, nursing homes, NHS ancillary services, and temporary employment.

This is an important incidental side-effect of legislation with a quite different objective. As a result of privatisation and outsourcing, the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) has brought together the contrasting employment relations practice and cultures of the unionised public sector and the non-union private sector. This has encouraged hitherto non-unionised organisations to recruit managers with experience in unionised sectors to manage newly acquired unionised workforces, or to train existing managers in how to manage these employees. Transfers have also resulted in multiple sets of terms and conditions, and often in distinct sets of consultation and communication structures. This has produced a mixture of union committees on unionised sites, and non-union committees or management-dominated communication processes elsewhere (or in addition). Since transferred recognition agreements usually apply to a minority of employees within much larger organisations, there is considerable scope for unions to extend both membership and recognition coverage throughout the broader organisation. Indeed, in the majority of our case study firms into which recognition agreements had been transferred, the unions party to the agreements were using these recognised groups as a springboard for extending recognition throughout the wider, largely non-union organisation. In most cases this had met with employer opposition.

Just as the proportion of the workforce affected by recognition agreements is often restricted, so also is the scope of issues for which

rights are recognised. Our cases with union recognition could be divided into two groups. One-third of cases - mainly service sector employers with low union density - had 'shallow' agreements that mainly provided for consultation over a limited number of issues, or provided only for union representation of individuals.⁶ In only three of the firms in this group were unions recognised for negotiating pay, and in one of these, union influence over pay levels was described as 'very limited'. The other two-thirds of cases with recognition had apparently comprehensive agreements that ostensibly allowed for negotiation with unions over most of the following items: pay, non-pay terms and conditions of employment, health and safety, pensions, training, termination and suspension of employment, and union representation in grievance and discipline cases. TUC data suggest that 94 per cent of the estimated 159 new recognition agreements negotiated during 2000 allowed for this sort of comprehensive recognition (TUC, 2001).

This, however, is misleading for in fewer than half of our firms in which recognition ostensibly covered pay – which was only one-tenth of *all* cases – was pay actually negotiated at the workplace or company level for the majority of employees. For the remainder, what pay negotiations there were only affected a minority of the workforce, or the employer followed national industrial agreements or, the employer did no more than consult with employee representatives on pay. In most case study organisations – around two-thirds - we found that pay increases for the main group of employees were set wholly by managers, without any consultation or negotiation with employee representatives of any description. Although the samples are not directly comparable, these results are consistent with the representative picture provided by WERS98 (Brown *et al*, 2000).

This exclusion of union influence from pay was reinforced by the choice of pay system. Half of our cases used individual performance-related pay (PRP) schemes, with two-thirds of these using PRP to set pay for the majority of employees. Many firms in the finance, retail and IT sectors had introduced such schemes recently, or were planning to do so soon. Many firms also planned to introduce team bonuses in coming years. As other studies have found, our cases

suggest it is very unusual for trade unions to be involved in the administration of these largely appraisal-based PRP schemes (for example Gunnigle *et al*, 1998, Brown *et al*, 1998).

In summary, the scope of bargaining in those cases where unions had recognition agreements was narrow and their impact was limited. We found no evidence to suggest that the arrival of the ERA would alter this. Union recognition has become a diffuse and often shallow status (Brown *et al*, 2001). On the one hand, where trade unions are *not* formally recognised, rights to *individual* representation are generally widespread. But, on the other hand, where trade unions *are* recognised, they have very limited influence over pay, which is perhaps the most fundamental issue for collective bargaining. This is a finding consistent with WERS98 (Brown *et al*, 2000). It suggests that a fundamental change has occurred in the character of collective bargaining. Whether it is irreversible is another matter.

8. Consultative structures

A fundamental change appears to have occurred in the character of collective bargaining and our cases did not suggest that the ERA will moderate this. But what of the wider aspects of collective representation? What has happened to collective consultation? Writing at a time when workplace bargaining was in the ascendant, McCarthy concluded that ‘in general...it appears that joint consultative committees are only able to retain a primary place in the workplace system of labour relations where unionisation and shop steward representation is non-existent or weak’ (McCarthy, 1967: 34). Might the decline workplace bargaining lead to the restoration of collective consultation to this ‘primary place’?

A slight majority of the firms we studied had stable, regular consultative committees, works councils, or some other consultative body. Half of the non-union firms had them. Particularly notable is that just under half of our cases with workplace consultative committees had established them in the last four years. Furthermore, a substantial minority were planning to establish new committees, or to make existing procedures more structured, in the near future. Five

employers were planning or making changes because they anticipated that negotiation of a new recognition agreement as a direct impact of the ERA would necessitate the establishment of a new consultative structure, or would lead to union representatives having more involvement in existing, more formalised structures. Nine of our case study firms had recently, or were about to, set up consultative structures to comply with the European Works Council or Draft Information and Consultation Directives. We might expect more activity of this nature, now that a version of the latter Directive has been agreed by the member states.⁷

Other managers who planned to make changes to consultative structures intended to extend committees from a minority of sites to all sites, or to increase the extent of consultation with employees within existing structures. Those in the latter group expressed a desire to expand the role of committees or councils by increasing the volume and range of issues discussed by these bodies. In most cases, they anticipated that this would come about as a result of a change in management style and priorities, or by management implementing specific initiatives to bolster consultative structures.

Many employers were planning substantial changes to committees to increase their role in change management processes. They reported that the issues most commonly discussed by existing consultative committees related to organisational change, including the implementation of restructuring, redundancy and short-time working programmes, and the harmonisation of terms and conditions following company mergers and acquisitions and the transfer of workers after winning outsourcing contracts. Committees that discussed these issues tended to be dominated by union members or officials and to be in firms with recognition agreements.

Change management issues were at the forefront in most of the firms and establishments studied. For example, over three-quarters of our cases had made some employees redundant in the five years preceding the interviews, with most doing so recently. Most of these firms had restructured working hours and shift patterns during this period, and

one-third of firms had been involved in mergers or acquisitions recently, with many expecting further activity in the near future.

When asked for an example of a significant recent issue over which they had consulted employees, most managers from firms *without* consultative structures stated that they too had consulted over similar issues related to change such as redundancies, reorganisation after taking on new brands, and introducing annualised hours. The growth of consultation over such issues may offer an explanation as to why many employers were planning new, formal committees.

Tempering this, however, several managers mentioned that workers were increasingly reluctant to take on the role of worker representative because they did not want to deal with issues of organisational change, particularly implementing redundancy and short-time working programmes. This, and the fact that union members often resist changes, may explain why some employers are keen to involve full-time union officials in change processes instead. Increasingly, HR staff were using committees to generate ideas for increasing output and profits. In one-third of firms with consultative structures, committees discussed 'business' issues related to improving product quality, performance, customer service and sales. We might conclude that many committees have very little effective power, with information flowing in one direction, except where managers feel that committees can be a useful means of generating profit-making ideas.

Slightly over half of firms with consultative committees of some sort had recognition agreements, and a similar proportion had councils or committees in which most or all employee representatives were union members. Many employers referred to the benefits of union communication and consultation structures in terms of persuading employees of the need for change, and the reduced transaction costs of dealing with one channel in change processes. However, at the same time, some were actively endeavouring to reduce union control over structures in order to shift employee loyalty towards the company and to increase the involvement of non-union employees. Most union officials stated that this was a common management strategy for

weakening union influence. Some managers had established, or planned to develop, dual union and non-union structures or committees. These typically took the form of committees comprising representative quotas of union and non-union representatives, or steward committees operating alongside more diffuse and influential management-controlled communication channels, such as team briefs and focus groups.

It appears that both the new EC directives and the accelerated pace of change within organisations have resulted in greater management consultation and communication with the workforce, through more formalised structures. The prospect of recognition and future EC legislation is leading to greater union involvement in some firms, while in others employers are actively restricting union participation in consultative structures. We might conclude that although the ERA legislation was concerned principally with union recognition rather than with the development of consultative arrangements, it has certainly not hindered the growth of consultation. Indeed, in many firms it has acted as a catalyst for the formalisation of existing structures and the development of new consultative bodies.

9. Conclusion

The attribution of behavioural change to legal innovation is never straightforward. The success of any legislation depends to a large extent on how far it goes with the grain of underlying societal changes and thereby steers, rather than forces, the process of adjustment. What can be said, at this relatively early stage, of the impact of the ERA upon collective representation in British employment?

Our interviews indicate widespread agreement among employers and union officials that the ERA has made a major contribution to achieving a change in both the atmosphere and conduct of employment relations. There can be no doubt that there has been a strong symbolic impact. Trade unions have regained official tolerance, if not encouragement, and they are experiencing a more sympathetic response from employers. Employers for their part have responded

with their characteristic pragmatism, as evidenced by their recruiting managers with experience of dealing with unions.

Whether or not individual employers have welcomed the ERA, most of those who do not already fully recognise trade unions have become aware of its statutory recognition procedures and have responded to them. Some have been prompted to strengthen their anti-union employment strategies, but many have taken the opportunity to review their policy towards trade unions. They have redefined the basis of their recognition of unions, including the scope of bargaining and of consultation, the pattern of bargaining units, and the structure of representation. Many have taken the opportunity to reconsider which unions they choose to deal with, gratuitously assisted in this by the readiness of unions to compete with each other. But although the nature of collective bargaining has been changing, with growing constraints on bargaining over pay, these constraints cannot be attributed to the ERA. The conclusion is rather that the ERA has had the effect of speeding up a process of managed trade union recognition, re-recognition or (in some workplaces) exclusion that had already got well under way during the 1990s.

It is not only employers who have been forced to make choices. Within trade unions, as Gall & McKay (2000:5) note, the ERA has 'engendered a sense of urgency and a concentration of minds'. But it has not simply accelerated developments that would have occurred anyway. More positively, the ERA - along with EU influenced legislative changes - has had a substantial effect in shifting the balance of employer attitudes towards greater approval of trade unions. Although employers are tending to restrict unions' influence over traditional issues such as pay-setting, they are increasingly seeking their assistance in implementing difficult organisational changes. Their appetite for workplace partnership reflects this, albeit on terms largely dictated by employers. A key question for trade unions is whether, where managers have embraced them as partners in change, they can build membership, and exert greater influence over the employment relationship across a broader range of issues.

In one major respect - the provision of employees with information and consultation rights - the ERA failed to go with the grain of contemporary developments in employment relations. In choosing instead to focus on recognition rights, it risked an unwelcome return to adversarial industrial relations. But in practice, it has not impeded the continuing growth of the consultation model. Indeed, adjustment to the ERA appears to have been accompanied by a surge in consultative activity, sometimes to pre-empt recognition, sometimes to structure it, and sometimes simply because employers could see the direction in which the legislative wind is blowing from Europe. The acceptance of the Draft Directive can be expected to accelerate and to shape further developments in consultative arrangements, and to establish them as a central feature of collective representation in Britain. Of particular importance to trade unions may be opportunity that the provision of consultative rights will offer them to establish a presence in the large tracts of employment where at present they have no members. Their success in this will depend upon how far they can persuade both unorganized workers and non-union employers that the presence of an independent trade union can enhance the consultative process.

Thus collective representation of employees is expanding once again. It is true that this does not, on the whole, take the form of traditional collective bargaining, but rather of consultative and representational arrangements which are less dependent than in the past upon the potential for collective worker action. The 1999 Act and the drift of EU influence have accelerated the rate at which employers are redesigning their relationships with unions. But if employer attitudes are changing, a note of caution should be sounded so far as the unions are concerned. Consultation arrangements can be seen as co-opting unions into managing processes of organisational change. While this potentially expands the role of unions in the workplace, it can also come into conflict with their task of representing the rights and interests of workers in the face of employer pressure. If unions find that they can only win employer acceptance by conceding influence over key issues such as pay, communication with the workforce, and the conduct of work, the greater the likelihood that they will lose grass-roots appeal and the enthusiasm of the lay activists on whose effective functioning they more than ever depend.

Notes

- ¹ For an account of the new law which places it in the context of developments in the practice of union recognition, see Brown *et al.*, 2001.
- ² Political agreement on a text of a proposal for a Directive establishing a general framework for informing and consulting employees in the European Community was reached in the Council of Ministers on 11 June 2001. The text will now be considered (and may be amended) by the European Parliament. The current text grants member states of the EU five years from the date of the Directive's adoption to bring their laws into line with its provisions. On the legal significance of the 'consultation' model as distinct from approaches based on union recognition, see Brown *et al.*, 2001.
- ³ Granting individuals the right to be accompanied by a union official of their choice does not, as such, confer legal 'recognition' rights upon unions, for the reasons discussed by Brown *et al.*, 2001; however, as indicated in the text, the accompaniment provisions are having a significant practical effect in terms of enhancing union presence on the ground.
- ⁴ Recognition of one union does not prevent an individual invoking the right to be accompanied by an official of another, but both unions and employers appear to have acted on the assumption that recognition would diminish the practical value of such a step from the point of view of the individual, and correspondingly help the employer to reduce the costs of dealing with multiple unions.
- ⁵ On the Grunwick case and other decisions which restricted the statutory powers of ACAS under the recognition laws of the 1970s, see Simpson, 1979.

⁶ It is unclear whether these agreements would amount to ‘recognition’ in the legal sense of that term, which normally implies that the employer agrees to negotiate with the union and not simply to consult with it. For analysis of the different legal definitions of recognition currently in force and their relationship to the practice of recognition, see Brown *et al.*, 2001.

⁷ See note 2, above.

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