

RECOGNITION AND CONSULTATION



THE OBJECTIVES OF THIS CHAPTER ARE TO:

- 1 DEFINE THE TERM 'RECOGNITION' AS IT APPLIES TO THE RELATIONSHIP BETWEEN AN EMPLOYER AND A TRADE UNION
- 2 EVALUATE THE CASES FOR AND AGAINST RECOGNISING TRADE UNIONS FROM A MANAGEMENT PERSPECTIVE
- 3 DISCUSS THE SEVERAL FORMS THAT UNION RECOGNITION AGREEMENTS CAN TAKE
- 4 OUTLINE THE MAIN FEATURES OF THE LAW ON TRADE UNION RECOGNITION INTRODUCED IN 2000
- 5 SET OUT THE SITUATIONS AND SUBJECTS ABOUT WHICH UK EMPLOYERS ARE OBLIGED BY LAW TO CONSULT WITH THEIR EMPLOYEES COLLECTIVELY
- 6 EXPLAIN WHY CONSULTATION CONSTITUTES GOOD MANAGEMENT PRACTICE AND SHOW HOW THE HR FUNCTION CAN CONTRIBUTE IN A PRACTICAL WAY

According to the 1998 Workplace Employee Relations Survey (Cully *et al.* 1999, pp. 90–4), trade unions enjoy some presence in 53 per cent of all UK workplaces employing more than 25 people. In four-fifths of these (that is, in 45 per cent of all workplaces), managers negotiate with trade unions over the pay and employment conditions of some or all employees. The Labour Force Survey for 2002 (*see* www.statistics.gov.uk) showed that 8.7 million employees in the UK, accounting for 35.6 per cent of the total, worked for employers who recognised trade unions and determined pay and conditions through collective bargaining machinery. We can thus conclude that while the proportion of the workforce in unionised workplaces has fallen over the past twenty years, collective bargaining and trade union recognition remain important institutions in the UK. This is particularly true of the public sector and of industries which were previously nationalised, union membership being heavily concentrated in these sectors (Cully *et al.* 1999, p. 86). As a result of new legislation requiring recognition under certain circumstances, the number of workplaces in which managers negotiate with trade unions increased recently after many years of decline (Gall and Hammond 2000, p. 14).

We can therefore be sure that some HR managers are in establishments where unions are not recognised and where recognition is unlikely, some are in establishments where they are working towards recognition and many others are in a situation where unions are recognised to some degree for at least part of the workforce. A fourth group will have experienced, or may yet experience, situations in which unions have had recognition withdrawn. In most cases, therefore, the issue of the extent and type of union recognition remains an issue of some significance in the day-to-day management of the HR function.

When a trade union is recognised its officials and members, along with the union itself, gain important rights in law. Among the most important of these is the right to be consulted over issues such as redundancy, pensions and health and safety. Irrespective of the law, consultation with unions over a range of issues is an essential contributor to the development of a harmonious, high-trust relationship, as is consultation with employees more generally.

DEFINING RECOGNITION

Recognition, in the context of employee relations, is defined fairly narrowly in law. Section 178 of the 1992 Trade Union and Labour Relations (Consolidation) Act contains the established legal definition of recognition as being a situation in which, either via a formal written agreement or through custom and practice, employers engage in collective bargaining with union representatives about some or all of the following matters:

- 1 Terms and conditions of employment, or the physical conditions in which any workers are required to work.
- 2 Engagement or non-engagement, or termination or suspension of employment or the duties of employment of one or more workers.
- 3 Allocation of work or the duties of employment as between workers or groups of workers.
- 4 Matters of discipline.

- 5 The membership or non-membership of a trade union on the part of a worker.
- 6 Facilities for officials of trade unions.
- 7 The machinery for negotiation or consultation and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures.

The decision to recognise or to withdraw recognition from a trade union has implications far beyond the terms of the agreement itself. Once recognised, the union gains a raft of defined legal rights to exercise on behalf of its members. First, there is the right to be consulted before redundancies are made or before a business is transferred to new owners. Recognised unions also have consultation rights in the fields of health and safety and occupational pensions, and are empowered to conclude workplace agreements with employers concerning the working time and parental leave regulations. Second, officials of recognised unions and union-appointed learning representatives have a right to reasonable paid time off work in order to carry out their duties and for training purposes. Union health and safety representatives enjoy these rights as well as others giving them access to office facilities. Third, recognised unions have the right to receive information from managers to enable them to engage in meaningful collective bargaining. Finally, the Transfer of Undertakings Regulations 1981 require that union recognition continues and collective agreements remain in force after the transfer of an undertaking to new ownership, provided that the transferred undertaking retains 'an identity distinct from the remainder of the transferee's undertaking'.

A range of other rights such as protection from discrimination on trade union grounds, the right to accompany an employee at a serious disciplinary or grievance hearing, and the right to organise lawful industrial action apply to unions and their members irrespective of whether or not they are formally recognised. However, these rights are conditional on the union concerned being recognised as an independent entity by the Certification Officer who has the responsibility of maintaining the official list of trade unions.

ACTIVITY 21.1

What do you think should be the main criteria used to establish whether a body should or should not be granted the status of a trade union?

Traditionally the Certification Officer has placed a great deal of importance on independence from management, ensuring that staff associations that are limited to specific companies cannot qualify. Is this fair?

THE CASES FOR AND AGAINST UNION RECOGNITION

When a trade union has recruited a number of members in an organisation, it will seek recognition from the employer in order to represent those members. The step



of recognition is seldom easy but is very important as it marks a highly significant movement away from unilateral decision making by the management.

If the employees want that type of representation, they will not readily cooperate with the employer who refuses. In extreme cases this can generate sufficient antagonism to cause industrial action in support of recognition. In such situations the employer may be forced to grant partial recognition or even concede the demand for full negotiating rights over a whole range of issues. Alternatively refusal may lead to a situation in which the employer is forced to recognise the union under the terms of the Employment Relations Act 1999 (*see below*).

However, there are also positive reasons for considering recognising trade unions, relating to the benefits that can flow as a result: there are employee representatives with whom to discuss, consult and negotiate so that communication and working relationships can be improved:

There are a number of reasons why employers should choose to work with, rather than against, unions at the workplace. Firstly, management may regard trade union representatives as an essential part of the communication process in larger workplaces. Rather than being forced to establish a system for dealing with all employees, or setting up a non-union representative forum, trade unions are seen as a channel which allows for the effective resolution of issues concerned with pay bargaining or grievance handling. It is also the case that reaching agreement with union representatives, in contrast to imposing decisions, can provide decisions with a legitimacy which otherwise would be lacking. It can also lead to better decisions as well. (Marchington and Wilkinson 2002, p. 425)

There are also various arguments that can be put against choosing to recognise a trade union and resisting doing so. Employers are often apprehensive about the degree of rigidity in employment practice that union aims for security of employment appear to imply, and they therefore consider to what extent collective consent can be achieved by other means, provided that the management work hard at both securing and maintaining that consent.

A survey undertaken by IRS (1995, pp. 3–9) asked company representatives to outline the advantages and disadvantages of trade union recognition. The benefits suggested included the stable structure such a relationship gives to the management of employees, the promotion of smooth industrial relations and its role in providing a mechanism for upward communication from the staff. A further perceived advantage was its cost effectiveness as a communication tool when compared to more individualised approaches. The drawbacks principally related to a perception that unions tend to resist change and take a long time to get things done. The result is a reduction in the ability of managers to respond quickly and flexibly to market pressures and opportunities.

Data from the Workplace Employment Relations Survey shows that managers are split over the issue of trade union recognition. Cully *et al.* (1999, p. 87) report that in 29 per cent of workplaces managers are broadly in favour of union membership and that in 17 per cent they are opposed. The remaining 54 per cent stated either that they were ‘neutral’ or that it was simply not an issue in their workplaces.

WINDOW ON PRACTICE

An interesting footnote to British industrial relations is the elimination of trade unions at the Government Communications Headquarters (GCHQ) at Cheltenham. GCHQ produces signal intelligence to support the security, defence, foreign and economic policies of the British government. As in most public sector bodies, there has been a strong tradition of union representation among the several thousand staff who are employed there.

In the early 1980s the government became concerned about the possible risk to security of this type of representation in a body where such sensitive data were handled. There was a particular apprehension about the possibility of industrial action impeding urgent defence initiatives. In January 1984 union members were offered £1,000 each to 'buy out' their membership. All but a small number accepted the offer, but the action was regarded as a serious attack on union rights and there were a series of legal moves, including an appeal to the European Court of Human Rights, to have the ban declared invalid. In October 1988, 14 of the employees who had not resigned their union membership were dismissed.

The incoming 1997 government was pledged to restore negotiating rights, and fulfilled the pledge within two weeks of taking office, although maintaining a ban against industrial action. In July those who had been dismissed returned to work.

FORMS OF TRADE UNION RECOGNITION

Union recognition comes in various shapes and forms. It may be 'partial', in which case the range of topics subject to negotiation is limited, or it may be 'full', covering pay, conditions and all employer policies relating to the employment relationship. The irreducible minimum is assistance by a union representative for members with grievances, but the extent to which matters beyond that are recognised as being a subject of bargaining depends on the type of management regime that is in place. It also depends on the possible existence of other agreements that could take some matters out of the scope of local recognition. A feature of some collective agreements is an acceptance that certain matters are potentially subject to negotiation with the recognised union (e.g. pay and redundancy), while in other areas the union has the right only to be consulted or informed.

The second fundamental decision to be taken in respect of recognition concerns the number of unions to be recognised and the type of bargaining to be adopted. There are three basic alternatives:

1 Multi-union bargaining involves the recognition of several different unions, each of which negotiates separately on behalf of different groups of workers. Sometimes this leads to a situation in which the separate groups are employed on different sets of terms and conditions. Such an approach has traditionally been common in large public sector organisations such as the NHS, although union mergers in recent

years have tended to reduce the overall number that are recognised. As a rule different unions will represent different ‘bargaining groups’ such as unskilled manual workers, skilled manual grades and white-collar workers.

2 Single-table bargaining is a situation in which a number of unions are recognised, but where only one set of negotiations takes place over terms and conditions at a time. The full range of issues is thus determined for all groups of staff around a single table. It is usual for such arrangements to be associated with ‘single-status’ practices or harmonised terms and conditions, so that all workers enjoy the same basic entitlements as regards matters such as holiday, pensions, hours and sick pay.

3 Single-union bargaining is principally associated with situations in which only one union seeks recognition. However, it can also occur where an employer rejects multi-union bargaining and agrees instead only to recognise one union. These are popularly known as ‘sweetheart’ or ‘new style’ agreements and have been the subject of some controversy. They are typically found on greenfield sites and in businesses of technological sophistication, their essential novelty being the closeness and extent of the working relationship between management and union. Union officials find that they have less freedom of action on some matters than their members expect, but also find they are involved in the full range of human resource management questions, not simply the familiar terrain of collective bargaining. The agreements are also frequently accompanied by ‘no strike’ clauses, which supposedly remove the need for industrial action by providing for independent arbitration in situations where management and union fail to reach agreement. Single-status arrangements also often feature in single-union deals.

From a management perspective it is preferable, if possible, to conclude a **partnership agreement** with the union or unions which have been recognised. Such approaches have been actively encouraged by the government and by the TUC in recent years and may well become the dominant form in the future when European Works Councils become a statutory requirement in all larger organisations. Partnership deals represent an attempt to move away from the traditional, adversarial, low-trust form of union–management relationship towards one which is characterised by high trust and a willingness to engage in joint problem solving. Communication and consultation are watchwords, so that employees and their representatives are kept fully aware of the factors affecting management decision making and are themselves involved as far as is possible. Collective bargaining continues but is supplemented with other prominent institutions such as a company council:

This is a representative body consisting of employer and union representatives, which has a number of functions. These normally include: acting as a negotiating forum; acting as a consultative forum; establishing sub-committees and working parties; facilitating the resolution of grievances and disputes; and promoting the agreed principles of employee relations between the employer and the union(s). (Farnham 2000, p. 248)

Another feature of many recent collective agreements is the inclusion of specific undertakings relating to flexibility and new technology. **Flexibility agreements** aim to reduce the significance of demarcation between different groups of workers so

that greater numbers are willing and able to undertake tasks outside a tightly defined job role. They are typically introduced in response to intense competitive pressures and are concluded as a means of minimising job losses. In return for higher wages and appropriate training, the workforce agrees to become multiskilled and to abandon strict grade definitions that restrict which people can do which kinds of task. **Technology agreements** are concluded in order to facilitate the smooth introduction of new machinery and accompanying working practices. The result is a planned transfer to new systems in which employee representatives are fully involved. Issues that managers might otherwise consider unimportant (such as adjustments in the make-up of production teams) are thus included in discussions, while uncertainty and fears of job losses are kept to a minimum.

The third major way in which collective bargaining arrangements differ is in their level. Three approaches are commonly identified:

- multi-employer bargaining;
- single-employer bargaining;
- workplace bargaining.

All can operate within the same organisation at the same time with different matters being determined at different levels. However, in most organisations which recognise trade unions the most important decisions are taken in one forum.

Multi-employer bargaining used to be very common in the UK and remains so in many European countries. Negotiations over basic pay and conditions of employment take place at industry or national level through the auspices of employers associations. The result is the presence of industry norms, the same rates of pay and agreements on hours being honoured by all employers in a particular industry. The 1980s and 1990s saw a rapid decline in multi-employer bargaining in the UK, with the collapse of long-established agreements in industries such as engineering and textiles. According to Millward *et al.* (2000, pp. 184–99) only 6 per cent of UK workplaces engaged in manufacturing and 3 per cent of private services operations now determine pay through a multi-employer agreement. The figure for the public sector is a great deal higher (39 per cent), but here too there has been substantial decentralisation in recent years.

Most bargaining therefore takes place within organisations either at employer level, or in multi-site operations at the level of the workplace. The former is better where core terms and conditions are standardised across the organisation. It is also the more efficient approach as it ties up less managerial time than is the case where each workplace carries out its own negotiations.

ACTIVITY 21.2

What do you think are the main reasons for the breaking up of so many industry-level collective agreements in the UK over recent decades? Why have they survived in other countries such as Denmark and Italy?



DERECOGNITION

Derecognition of trade unions is often seen in published literature as being redolent of fundamentally undesirable ‘macho’ approaches to employee relations. While outright derecognition against the stated wishes of the workforce has been relatively rare, instances of employers withdrawing from collective bargaining arrangements increased somewhat during the 1990s (*see* Gall and McKay 1999). The comparative rarity of derecognition is also a finding of successive Workplace Employment Relations Surveys (*see* Millward *et al.* 2000, pp. 103–4), the majority of episodes relating to specific grades of employees rather than the entire workforce. In other cases partial derecognition has occurred where the scope of matters covered by collective bargaining is narrowed. Such situations often accompany moves by employers to establish personal employment contracts and/or to move towards pay rises based on individual performance or contribution. The result is the retention of collective bargaining machinery, but a tendency for it to be used more and more rarely in important decision making.

It could be argued that partial derecognition of this kind ultimately leads to full derecognition as fewer staff see any particular advantage in joining the union. Over time the union becomes so numerically weak that there is no longer a persuasive case for its continued recognition – even over the limited range of issues for which it retains bargaining rights.

In such circumstances there is a good case for accepting that the union is no longer performing a useful representative function and that employees’ interests might thus be better served with the introduction of other forms of collective or individual involvement.

TRADE UNION RECOGNITION LAW

Since 2000 there has been in place a formal legal route which unions can use as a means of forcing employers to recognise them and to bargain with them in good faith about the pay and conditions of the workers they represent. The new law was introduced as part of the Employment Relations Act 1999 and is highly complex. A central role is played by the Central Arbitration Committee (CAC), a statutory body which is independent of government, to which union recognition claims are sent. The CAC is required to consider the claim and to seek voluntary agreement between the parties. Where this cannot be established it can either require management to recognise the union or organise a ballot of the workforce concerned. The law applies in all organisations employing more than 20 people where there is no existing collective bargaining arrangement in place.

The process is started by a union or a group of unions acting together making a formal recognition claim on behalf of a defined bargaining group. Management can then accept the claim, reject it outright or seek to negotiate a more favourable deal. If necessary the CAC panel dealing with the case will ask officials from the Advisory, Conciliation and Arbitration Service (ACAS) to help the parties reach a voluntary agreement. Only when such avenues fail are formal hearings held and decisions made. The CAC will consider the case if the bargaining group concerned is coherent, includes everyone who should be included and is generally ‘compatible with effective management’.

Where it can be shown that over 50 per cent of the workers in the defined bargaining group are members of the union/unions bringing the claim, the CAC will order recognition unless there is evidence to suggest that sufficient members may not want their union to be recognised or where the panel is persuaded that it would not be in the interests of good industrial relations to require recognition without first organising a ballot. Where the union concerned shows that over 10 per cent of the bargaining group are members and produces evidence to suggest that a ballot for recognition stands a good chance of succeeding the CAC will order that a ballot should take place. In most cases the evidence required will be in the form of a petition of workers in the defined bargaining group.

Ballots ordered by CAC panels are funded jointly by employers and unions, and are supervised by independent scrutineers. Ballot papers are sent to employees' home addresses, to which campaigning literature can also be sent. In order to win the ballot, the union side must secure a majority of the votes cast and those of at least 40 per cent of the employees in the bargaining group. Strong support must therefore be shown for recognition among the workers concerned. A majority voting for recognition will not succeed if only a minority decide to vote. Once a ballot has been won and a recognition order served, the employer is obliged to bargain in good faith for at least three years. Only then is it possible to consider derecognition; in which case a further application has to be made to the CAC and another ballot held along similar lines.

In the UK, unlike in most other industrialised countries, collective agreements are not generally legally enforceable. They are binding on the parties 'in honour only', so if one side breaches the agreement no legal action can be taken to ensure that it is honoured. Elsewhere in the world, across Europe and in the United States, this is not the case. As a result collective agreements have the character of a contract and tend to be written in less unambiguous language than in the UK. An important exception to this rule has been made for collective agreements formed as a result of an order by the CAC. Where an employer is forced to recognise a trade union as a result of the legal procedure described above, the resulting agreement can be enforced in a court. Employers are thus prevented from formally recognising a trade union and then subsequently failing to engage with it in meaningful collective bargaining.



WINDOW ON PRACTICE

During the first three years of the compulsory recognition procedure the CAC received 255 applications from trade unions, of which 23 resulted in recognition without a ballot and a further 35 after a ballot had been held. These figures suggest that the law on recognition has had only a marginal impact, but this is not the case. Of the applications, 124 were withdrawn after an application to CAC had been made, most because a voluntary recognition agreement had been reached between the parties. In addition, over 700 further recognition agreements were signed between unions and employers in the four years following the announcement that this law was to be introduced and in its first years of operation (i.e. 1998–2002). This represents a very substantial increase in voluntary agreements that can only be explained by the

presence of a compulsory recognition procedure. Because employers know that they may be forced to recognise a union or unions on terms decided by a third party, they prefer to do their own deal locally first (see Wood *et al.* 2003).

IDS (2000) provides several useful examples of recognition agreements signed in the aftermath of compulsory recognition. They show that some employers prefer to organise ballots themselves with the same rules as can be imposed by the CAC as a means of deterring trade unions from making formal applications.

COLLECTIVE CONSULTATION

Among the legal rights that are conferred on unions when they are recognised is a requirement to be consulted over particular issues. However, the duty on employers to consult with their workforces on a collective basis is not restricted only to those which recognise trade unions. The legal requirement to consult thus takes a variety of different forms. In this context the term ‘consultation’ means formally talking to employee representatives with a view to reaching agreement. There is no obligation on employers to negotiate or to conclude any formal deal, but an attempt must be made in good faith.

Redundancy

Where an employer proposes to make 20 or more people redundant there is an obligation to consult when formal proposals are drawn up. Where a union or unions are recognised, consultation must be with their representatives. In non-union organisations the obligation is to consult with representatives chosen by all relevant sections of the affected workforce. The aim of the consultation is to find ways of avoiding redundancies and/or to mitigate the consequences. Consultation should take place over issues such as the proposed selection procedure, the method used to determine the pool of affected employees and the basis on which redundancy payments are to be calculated.

Transfer of undertakings

The same regulations covering redundancies apply in transfer of undertakings cases (namely, situations in which one organisation is taken over by another, usually as a result of a sale). Consultation is a requirement placed on both the transferor and transferee companies. The duty to consult extends to representatives of employees whose work or conditions will be directly affected by the transfer. There is a more general duty to inform representatives of other workers about the reasons for the transfer and its longer-term implications.

Health and safety

Under the Health and Safety (Consultation with Employees) Regulations 1996 employers have a general duty to consult with worker representatives about all

health and safety matters. Here too the obligation is to consult with trade union appointed safety representatives wherever a union is formally recognised. In other organisations employers can either consult with the workforce directly or set up a health and safety committee to which employee representatives are elected. There are specific duties to consult ‘in good time’ on the introduction of any measure (e.g. new technology or working arrangement) which substantially affects health and safety, and on procedural arrangements for managing health and safety issues.

Pensions

Recognised unions must be consulted where an employer proposes that its occupational pension should ‘contract out’ of the State Earnings Related Pension Scheme (*see* Chapter 29). They also have the right to receive on request information concerning a pension scheme’s rules and membership numbers, as well as copies of its accounts and actuarial valuations.

European Works Councils

As of 2001, European Works Councils have to be set up in all ‘community scale undertakings’, defined as organisations which employ over 1,000 people in the European Union and including at least 150 in two EU states. They are not instruments of industrial democracy and there is no right to co-determination with management over areas of employment policy, as has long been the approach in Germany. The major requirements are as follows:

- Councils must have between 3 and 30 members.
- These individuals must be elected to the council by the workforce.
- Council meetings are to be held annually and at such meetings the management is obliged to give reports concerning progress, prospects, the financial situation and plans relating to sales, production, employment, investment and/or the corporate structure.
- Special meetings are to be held in ‘exceptional’ circumstances when, for example, large-scale redundancies or plant relocations are being contemplated.
- Councils have the right to be informed and consulted about ‘any measure liable to have a considerable effect on employees’ interests’.
- Only matters that are ‘community scale’ need be discussed. There is no legal requirement to cover affairs affecting employees in only one EU country.

Workplace agreements

Two recent pieces of legislation originating in Europe provide employers with the opportunity to determine their local application via workplace agreements. These are the Working Time Regulations 1998 and the Maternity and Parental Leave etc. Regulations 1999 (as they apply to parental leave). In both cases the basic rights are set out together with a ‘default scheme’ which contains more detailed rules on their application. However, employers are permitted to develop their own local rules to replace the government’s default scheme, provided these are agreed through a formal workplace agreement. Where unions are recognised this can be achieved using

established collective bargaining machinery. Otherwise the employer needs either to secure the explicit agreement of a majority of employees or to arrange for representatives to be elected to a consultative forum.

The Information and Consultation Directive

A major new EU directive extending information and consultation rights was agreed in March 2002. Its aim is to extend the European Works Council principle to all workplaces employing 50 or more people, but at the time of writing (early 2004) it is unclear how significant an impact it will have on UK employment relations in practice. Implementation will start in March 2005 for workplaces employing over 150 workers, later dates in 2007 and 2008 being earmarked for its introduction in smaller workplaces. The directive requires that workers in qualifying workplaces should regularly receive information from their employers and be consulted on all issues which affect their interests, these being defined as anything which affects employment prospects, changes in work organisation or substantial changes in terms and conditions of employment.

The UK government successfully opposed attempts by other EU countries with a tradition of works councils to impose a standard model on all organisations, negotiating a fair degree of flexibility. At the time of writing only draft regulations are available, and they may change, but most anticipate that the legislation implementing the directive in the UK will contain the following features:

- 1 The Central Arbitration Committee (CAC) will have the major enforcing role and not employment tribunals.
- 2 Quite substantial financial penalties for non-compliance (up to £75,000) will be payable.
- 3 New arrangements will only have to be put in place where 10 per cent of the workforce request their establishment.
- 4 Employers and employee representatives will be free to establish arrangements that suit local circumstances, a default system being designed for use where no agreement is reached.
- 5 Where there are existing consultation arrangements in place changes would only be introduced following a ballot of employees with the same rules as exist currently for union recognition (i.e. a majority vote including at least 40 per cent of the electorate).

The draft regulations set out the arrangements that will probably apply where management and workforce are unable to reach agreement about another system. This is likely to be the model that is adopted in most workplaces, as is currently the case with the working time and parental leave regulations, which also provide for local variation via workplace agreements (*see above*). The major features are as follows:

- 1 Appointment to an information and consultation committee will be via election, a secret ballot of all employees being held.
- 2 The maximum number of representatives will be 25, one person being elected for every 50 employees.
- 3 Management will be required to provide information to the committee in three areas:

- a the recent and probable development of the undertaking's activities and economic situation;
 - b the situation, structure and probable development of employment – and about any threats to employment;
 - c decisions likely to lead to substantial changes in work organisation or contractual relations.
- 4 Management will be required to consult the committee on items **b** and **c** above, namely employment and work organisation.
 - 5 Once established, the committee itself would determine how and in what way, if any, it wanted to move away from the default scheme – this could be achieved if management and a majority of members agreed.

ACTIVITY 21.3

The UK government is known to have opposed the extension of works councils beyond community-scale undertakings and sought, with other countries, to block the Information and Consultation Directive. Why do you think this might have been? What arguments could be put for and against requiring all substantial UK employers to operate works councils?



CONSULTATION IN PRACTICE

Irrespective of legal obligations, consultation is generally regarded as a hallmark of good management. An employer who fails to consult properly, particularly at times of significant change, is likely to be perceived as being unduly autocratic. The result will be dissatisfaction, low levels of motivation, higher staff turnover and poorer levels of customer service. Moreover, consultation has important advantages as a means by which good ideas are brought forward and weak ones challenged.

In workplaces where unions are recognised it is usual for consultation to take place over a range of issues and for permanent consultative institutions to be established. The joint consultative committee (JCC) is the most common form, being a forum in which managers and union representatives meet on a regular basis. Importantly, JCCs are kept distinct from negotiating forums – despite the fact that the membership is often the same:

In Britain, voluntary collective bargaining and voluntary joint consultation have traditionally been seen as separate and complementary processes, with collective bargaining focusing on the divergent interests of employers and employees and consultation focusing on their common interests . . . This has meant in many cases that collective bargaining has been concerned with pay determination and conditions of employment and joint consultation with welfare, health and safety, training and efficiency. (Farnham 2000, pp. 81–2)

The partnership approach to recognition outlined above, in seeking to move away from adversarial approaches to employee relations, is associated with a process of strengthening or upgrading consultative forums (such as JCCs) at the expense of those used for bargaining.

JCCs are twice as common in union workplaces as in those where unions are not recognised (Millward *et al.* 2000, pp. 108–9), suggesting that they are mostly still used in parallel with collective bargaining machinery. However, research by Marchington (1989) found evidence that they were used in some workplaces as a substitute for collective bargaining or as a means of discouraging the development of a union presence. Managers in such workplaces believe that unions are less likely to gain support and request recognition if the employer keeps its staff informed of issues that affect them and consults with them before taking decisions. Consultative forums in non-union firms also provide a means whereby managers can put their case effectively without the presence of organised opposition.

In many workplaces, union or non-union, JCCs often play a very marginal role from the perspective of most employees. This typically is true where decision making is heavily decentralised to the level of the department or to individual teams of employees. If budgets are devolved too, people may also be uninterested in the outcomes of collective bargaining, because their pay and career prospects are effectively determined by their immediate managers. This poses a problem for management at times of significant change, because there is a need to engage everyone in proper consultation. Without it people will not understand the reasons for the proposed changes or the alternative strategies that are being considered, and will not have the opportunity to contribute their own ideas. From time to time, therefore, managers need to organise one-off consultation exercises as a means of making change management processes as smooth and effective as possible. Common examples are business reorganisations, major policy changes, the introduction of new product lines, organisational relocations and cultural change programmes.

From a management perspective, the great danger is that people come to believe that management is not genuinely interested in hearing their views or in taking them on board. Rose (2001, p. 391) refers to this approach as a ‘pseudo-consultation’ in which managers are really doing little more than informing employees about decisions that have already been taken. Cynicism results because there is perceived to be an attempt on the part of managers to use consultative forums merely as a means of legitimising their decisions. They can say that consultation has taken place, when in truth it has not. Pseudo-consultation typically involves assembling employees in large groups with senior managers present. The management message is then put across strongly and a short time is given for others to respond. In such situations employees have no time to give proper consideration to the proposals and are likely to feel too intimidated to articulate criticisms. The result is often worse in terms of employee morale and engagement with the changes than would have been the case had no consultation been attempted.

Even where managers genuinely intend to undertake meaningful consultation, they can very easily create an impression that it is no more than a ‘pseudo’ exercise. It is therefore important to avoid the approaches outlined in the above paragraph. Employees should be informed of a range of possible ways forward (not just the one favoured by management) and invited to consider them in small groups. The results of their deliberations can then be fed back to senior managers and given proper consideration. In this way the appearance of pseudo-consultation, as well as the reality, can be avoided.

WINDOW ON PRACTICE

An issue of significance for employers recognising trade unions for the first time is the need to reassure non-union members that their voices will still be heard. IDS (2000, p. 7) gives several examples of the way in which employers use consultative machinery to ensure that this is the case.

It is particularly important where a union is recognised even though it represents only a minority of the workforce. While union representatives necessarily dominate the staff side in collective bargaining institutions, this need not be the case with joint consultative committees, company councils or health and safety committees.

IDS describes the way that firms such as Yoplait Dairy Crest and Monarch Aircraft Engineering have reserved specific seats on key consultative committees for the representatives of both union members and employees who do not wish to join the recognised union.

HR ROLES IN RECOGNITION AND CONSULTATION

HR specialists play different roles in the recognition, bargaining and consultation processes, much depending on the status achieved by the HR function within the organisation. Broadly it is possible to identify three types of role: facilitating, advisory and executive.

The **facilitating** role is the most restricted. Here HR staff do little more than manage the administrative aspects of recognition and consultation. They organise the meetings, circulate agendas, take minutes and provide factual information, but do little more than support the line managers who take the leading role. The **advisory** role also involves the HR manager being present in a supporting capacity. Here, however, there is considerably more direct involvement with the substance of employee relations management. Specialist advice is provided on legal matters, procedure and precedent, as well as on the HR implications of different courses of action. Line managers chair meetings and take the lead in negotiations, but are directly assisted and supported by an HR specialist who participates in decision making. The third '**executive**' model is one in which employee relations management is largely devolved to the HR function. Here HR managers lead the negotiations, chair consultative meetings and are chiefly responsible for decision making concerning matters such as recognition and derecognition. The advisory role, in such situations, is played by line managers.

In order to carry out the advisory or executive roles effectively, HR managers need to be able to combine specialist knowledge with detailed knowledge of the organisation and its business strategy. Practical negotiation skills and experience of handling sensitive employee relations matters are also significant. HR managers' role has been enhanced in recent years by the great growth in the volume and complexity of legislation.

In the past HR advice used to be thoughtful and genuinely intended to be helpful, and was sometimes welcome, but its basis was simply general experience and good

intentions. The recipient could use or ignore it at will, depending on the common-sense assessment of its value. Legislation has caused the need for advice of the type offered by a professional. This is thoughtful and intended to be helpful, but may not be welcome. It will be based on an informed examination of statute and precedent, and will include a full appreciation of the strategic implications of whatever is being considered. No HR manager can now regard the general company strategy as something of concern only to other members of the management team. Although this is such an obvious point, it needs reiteration as a number of those applying for courses in HRM retain a view that their role is to be much more even-handed, and some commentators castigate personnel managers for adopting a managerial approach. One commentary criticised HR managers for abandoning their social and religious principles, adopting a managerial rather than an independent professional stance, ignoring the pluralistic nature of work organisations and consolidating an exploitative relationship between people at work (Hart 1993). Today's HR manager is inescapably and necessarily a representative of management interests. In union recognition issues in particular, there is no point in having a personnel manager involved who does not adopt that perspective.

The HR manager therefore carries a specific type of authority. As well as receiving advice, the employer needs to see that all employment matters are administered in a way that is consistent with the legislative framework, and part of that requirement is that managerial actions should be consistent with each other. It may also be that people see the need not only for advice, but also for representation by someone who knows the esoteric rules of procedure and behaviour in a highly stylised form of discussion.

SUMMARY PROPOSITIONS

- 21.1** While trade union recognition is less common than it was 25 years ago, collective bargaining remains the main means by which pay and conditions are determined in a large minority of workplaces. It is still dominant in the public sector.
- 21.2** An employer is deemed in law to have recognised a trade union if it negotiates with it about pay, conditions or employment policy. Recognition gives trade unions and their representatives important rights in law.
- 21.3** There are compelling cases from a management perspective both in favour of and against trade union recognition. Their validity is determined by the circumstances of the organisation.
- 21.4** Collective bargaining varies in terms of its scope and its level and in the number of unions involved. Recent years have seen moves towards partnership agreements, as well as those designed to achieve flexibility and to facilitate the introduction of new technology.
- 21.5** Since 2000 there has been in place a legal route for trade unions to use as a means of securing recognition. The result has been an increase in the number of voluntary agreements reached.

- 21.6** Recognised unions have a right to be consulted about a range of issues. Collective consultation is also a legal obligation in non-union firms.
- 21.7** Consultation is a hallmark of a good employer. In order to be effective, consultation processes must be meaningful and genuine.

GENERAL DISCUSSION TOPICS

- 1 Why has trade union membership remained so high in the public sector when it has declined so markedly in the private sector?
- 2 How effective do you think the recognition provisions in the Employment Relations Act 1999 will turn out to be over the long term?
- 3 What are the arguments for and against extending the concept of the ‘workplace agreement’ to fields of employment law beyond working time and parental leave?

FURTHER READING

British Journal of Industrial Relations

There is no shortage of thoughtful, up-to-date and very well-researched literature on the subjects covered in this chapter because so many of our most prominent academics choose to focus their attention on industrial relations issues. The above journal is recommended as a place to read about the latest research on union recognition and collective consultation issues.

Barrow, C. (2002) *Industrial Relations Law*. London: Cavendish Publishing

Marchington, M., Wilkinson, A., Ackers, P. and Dundon, A. (2001) *Management Choice and Employee Voice*. London: CIPD

Morris, G. and Archer, T. (2000) *Collective Labour Law*. Oxford: Hart Publishing

Solid, detailed accounts of the various ways in which UK law requires employers to consult with their workforces are provided by Morris and Archer (2000) and by Barrow (2002). By contrast, Marchington *et al.* (2001) provide an effective assessment of the business case for meaningful consultation between employers and employees.

Wood, S., Moore, S. and Ewing, K. (2003) ‘The impact of the trade union recognition procedure under the Employment Relations Act 2000–2002’, in H. Gospel and S. Wood (eds) *Representing Workers*. London: Routledge

Several detailed evaluations of the compulsory recognition procedures contained in the Employment Relations Act 1999 have been published. The government’s own assessment is carried on the Department of Trade and Industry website. This article provides a good, critical, up-to-date discussion of the procedure in action.

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An extensive range of additional materials, including multiple choice questions, answers to questions and links to useful websites can be found on the Human Resource Management Companion Website at www.pearsoned.co.uk/torrington.

