

# The Next Step (Executive Summary)

## Trade Union Recognition in Small Enterprises

By  
K D Ewing and Anne Hock

This report has been written with the support of Amicus, GPMU, KFAT, UNIFI and the TUC for submission to government to help the unions influence public debate and win a better deal for people at work.

The full report is available from the  
TUC [www.tuc.org.uk](http://www.tuc.org.uk) or Popularis Ltd [www.popularis.org](http://www.popularis.org)

### Introduction

- 1 On 6 June 2000 the recognition procedure introduced by the Employment Relations Act 1999 was brought into force. The procedure has been very successful and has led to a significant number of new recognition agreements. A major concern for a number of trade unions, however, is that the procedure does not apply to employers who employ less than 21 workers. There is no comparable exclusion in either of the two previous statutory recognition procedures which operated in this country (in 1971 and 1975), and there is no comparable exclusion in any other major western democracy.
- 2 The small business exclusion has a number of consequences, not the least of which is that a large sector of the workforce is denied the right to trade union representation and the right to engage in collective bargaining. This in turn has a number of implications for a range of issues including gender pay discrimination, skills and training, and health and safety at work. Yet the small business sector is a sector which is growing, so that the impact of the small business exclusion is likely to grow, particularly in light of the government's commitment to the expansion of the number of small businesses.

### Small Businesses and Employment Law

- 3 The idea of thresholds for employment rights is not new, though they have always been controversial by focusing on the position of the employer rather than the rights of the worker. The general rule has been that the law should apply equally to everyone, and that workers are entitled to the protection of the law regardless of the number of people they work beside. But although employment rights typically apply to small businesses, the small business sector is characterised by low levels of trade union membership, low levels of trade union recognition, and low levels of collective bargaining coverage.
- 4 These low levels of worker representation are paralleled by what has been referred to as the 'weak human resource policies, a high level of low pay and extensive use of dismissal as a disciplinary device' in small enterprises. Small businesses score badly on matters like low pay, equality policies, and some aspects of health and safety, with the 'rate of fatal injury in small manufacturing workplaces . . . more than double those in medium and large workplaces' (HSC, 2001). Small businesses also score badly when it comes to employment tribunal applications, where the sector has been over – represented.

### Small Businesses, Trade Union Recognition and Collective Bargaining

- 5 Trade union recognition is a precondition of free collective bargaining. The right to bargain collectively in turn is recognised as a human right by a number of international human rights treaties by which the United Kingdom is bound. These include ILO Convention 98, which provides by article 4 that

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

There is no qualification which says 'except in the case of small businesses' or 'except in the case of employers employing fewer than 21 workers'.

- 6 The obvious implication of the small business exclusion is that more than a fifth of the labour force is denied the right to trade union recognition and representation unless their employer agrees. 24,695 million employees are employed by 1.2 million employers, and of these employees,
- 1.6 million are employed by employers who have between 10 and 19 employees,
  - 1.5 million are employed by employers who have between 5 and 9 employees, and
  - 2.3 million employed by employers who have between 1 and 4 employees.

21.8% of the people employed are employed in businesses employing less than 20 employees.

### Small Businesses and Women's Rights

- 7 The importance of collective bargaining for women has recently been emphasised by the ILO in the following terms:

The ability of women to exercise freely their rights to join trade unions and have their interests represented on a par with those of their male colleagues is vital to the achievement of both gender equality and trade union strength. Not only should women take their place at the negotiation table but gender issues will have to be made more explicit during the collective bargaining process to ensure that any agreement reflects the priorities and aspirations of both women and men.

This concern that women should take their place at the bargaining table is undermined by the small business exemption in the statutory recognition procedure. This is partly for the obvious reason that women like men will be excluded from collective bargaining in a large number of cases. But it is also because the exemption bears harder on women than it does men.

- 8 The exclusion of small businesses from the trade union recognition procedure means that women are more likely than men to be denied the right to have their trade union recognised by their employer.

**Table 1**  
**Male and female employment by size of workplace**  
**(percentages)**

	All	males	females
No of employees:			
1 to 19	28.9	26.2	31.7
20 to 24	4.9	4.6	5.2
25 to 49	14.6	13.7	15.6
50 to 249	24.8	27.1	22.3
250 to 499	9.3	10.2	8.4
500 or more	17.5	18.2	16.8
No. of employees	23650979	12289934	11361045

Source: Labour Force Survey

Table 1 deals with the position in companies with 20 employees or less. It shows that female employment in small workplaces is higher than the average, and higher than male employment in small workplaces. However, it conceals the fact that there is a higher incidence of both female employment and small business employment in some sectors more than others.

### The Gender Pay Gap and Collective Bargaining

- 9 A continuing problem faced by women workers in the United Kingdom is the gender pay gap which stubbornly refuses to close. Recent figures suggest that the gender pay gap in Britain is among the highest in Europe, at 19% for full time employees and 41% for part time employees. The EOC has identified a number of possible explanations for the position in the United Kingdom, despite almost 30 years of equal pay legislation. One explanation is the decline in collective bargaining coverage, so that less than 1 in 3 workplaces is now covered by a collective agreement. The exclusion of a quarter of the workforce from legislation giving workers the right to trade union recognition cannot but be significant. It is all the more significant for the fact that the trade union representation deficit is highest among the groups excluded, that is to say the small businesses.

- 10 But not only are women losing out on collective bargaining, they are also losing out on some of the legal rights which arise as a result of collective bargaining or which depend upon the trade union being recognised. These rights include

- the right to paid time off for trade union duties and training in these duties, as well as the right to the disclosure of information about the undertaking;
- the right to trade union representation on health and safety matters, important because trade union representatives are likely to have greater expertise and to have undergone training;
- the right to be consulted in the event of a business transfer, with trade union representation likely to be more effective than representation by a fellow employee untrained for such a role;

There is in addition to the foregoing the right to make use of the full services of union learning representatives who only have the right to time off if their union is recognised. It is not clear why the government should assume that women are prepared to accept reduced access to skills and training opportunities.

## The Practice Elsewhere

11 An examination of the position in other countries is striking for the fact that there is no parallel exclusion of workers in small firms from the coverage of workplace protection laws. All major industrial countries in Europe and beyond have legislation providing for some form of worker representation. So far as thresholds are concerned, some have no minimum threshold: one worker is enough. Some require two or more for the purpose of collective bargaining. In no country is there an exclusion of workplaces employing as many as more than 20 people.

12 The position in selected countries is as follows:

- In **France** it is compulsory to establish workers' delegates in all enterprises employing at least eleven employees.
- In **Spain** workers' delegates must be established in enterprises employing more than 10 workers and enterprise committees must be established in enterprises employing 50 or more.
- In **Germany** and **Austria** the duty to establish a works council applies in relation to enterprises with more than 5 employees, though it is for the employees to take the initiative to request the employer to establish a works council.
- In **The Netherlands**, 'a representative body of the employees has to be established if either the employer or the majority of the employees so wish' in enterprises with more than 10 employees.
- In the **United States**, there is no minimum threshold of employees an employer must employ before an application is made for recognition (or certification as it is called there) under the statutory procedure.
- In **Canada** the position varies from Province to Province. In two Provinces the threshold is two, and in another the Act applies only to employers who employ at least three employees. Otherwise there is no threshold.
- In **New Zealand** the position 'based on the principle that employees who wish to bargain collectively are entitled to do so – presumably as long as there are two members employed by the employer'.
- In **Sweden** a trade union has 'the right to negotiate with an employer on matters which concern the relationship between the employer and such members of the union who are or have been employees of the employer'. One member is enough.

## Support by the Small Business Service

13 British law on trade union representation is arbitrary, discriminatory, and irrational, as well as inconsistent with international law and out of step with the practice of other countries. So what is to be done? The first step that government could take to address the representation gap in small businesses would be to use its resources to bring to the attention of small businesses some of the benefits of collective bargaining. Although there is a large representation gap in small businesses, it is often overlooked that there are many small businesses that do recognise a trade union. It is also overlooked that small business growth does not simply require entrepreneurs, but that it requires individual workers who are also prepared to make investments and take risks.

14 The Small Business Service ought to promote the interests of small businesses in a way that takes account of the interests of the employee as well as the entrepreneur, and in a way that has regard to government policy in other areas. These include fairness at work, pay equity between men and women, reducing the number of tribunal applications in an era of expanding employment rights, promoting the training of the workforce, and giving workers a voice in decision making. It is the responsibility of the SBS to remind employers of

these policies and the different ways by which they can be effectively developed. A number of very simple steps could be taken in the first instance by the SBS to discharge what should be a duty to address the representation gap and the employment practices in small businesses. These include:

- **Investigation:** conducting research into the performance of companies which recognise a trade union. Although there is a trade union representation gap in the small business sector, there are many small businesses which do conduct collective bargaining. Why do they do it, and what are the benefits?
- **Dissemination:** publishing information about the results of research conducted about trade union representation in small businesses. This would include explaining the different benefits to small businesses where there is a recognised trade union and collective bargaining.
- **Partnership:** working with public authorities (such as ACAS), interested trade unions, and representative small business organisations to increase understanding and awareness of each others concerns, and to provide trade unions with an opportunity to explain their role.

## The Need for Legislation Options for Change

15 In terms of government initiatives to deal with the representation gap in the small business sector, it is thus important to emphasise the role of government through agencies such as the Small Business Service. But even though there is much that could be done without changing the law, it is difficult to escape from the fact that some kind of legal support will be necessary to underpin a serious trade union role in the small business sector. The most obvious solution would be to remove or reduce the threshold so that more workers would have access to the statutory recognition scheme. There are, however, other options which may also be pursued. Three 'alternative' options to the repeal of the small business exclusion in the statutory procedure are as follows:

- Converting the right to be accompanied on grievance and disciplinary matters into a right to be represented on all matters relating to the employment relationship
- Extending the range of existing national collective agreements so that they apply to all the workers employed in an industry including those in non union companies
- Removing statutory restraints so that contractors may contract with suppliers on terms that the latter recognise a trade union or observe collective agreements

16 But although there are a number of options for addressing the small business exemption, they are not a full solution to the simple expedient of removing the exemption altogether. The case in favour of repealing the exclusion of small businesses from the statutory recognition procedure is a strong one. It is based on the following considerations:

- The exclusion is arbitrary, different from other small business privileges in employment law, without explanation or justification
- The exclusion is irrational in the sense that it reinforces poor employment practices and a high level of employment tribunal complaints from the small business sector
- The exclusion is contrary to the requirements set by minimum international standards, which are legal obligations binding upon the United Kingdom
- The exclusion runs contrary to the concerns of the ILO that steps should be taken to encourage rather than exclude collective bargaining in small companies
- The exclusion is discriminatory in its application in the sense that it denies women more than men the opportunity to engage in collective bargaining
- The exclusion has discriminatory implications in the sense that certain statutory rights are conditional on the employee's union being recognised
- The exclusion has discriminatory implications in view of the fact that the gender pay gap is likely to be higher where there is no collective bargaining
- The exclusion has no parallel on the scale of the British legislation in the workplace representation laws of any other major country in Europe or North America.