The Next Step

Trade Union Recognition in Small Enterprises

by K D Ewing and
Anne Hock

PUBLISHED BY
Popularis Ltd

Printed by Centurion Press Ltd

Trade Union Recognition in Small Enterprises

By

K D Ewing and Anne Hock*

* The authors wish to acknowledge the assistance provided by Dr Frank Wilkinson, Emeritus Reader, Department of Applied Economics, University of Cambridge. The authors are solely responsible for any errors.

Contents

Recognition and Small firms

Foreword from Brendan Barber, General Secretary, TUC

When the statutory union recognition scheme came into force in June 2000, the TUC warmly welcomed it. For too long, employers had been allowed to ignore the wishes of their workforce when they wanted their union recognised. Now, if a majority supported recognition, the employer would have to grant it. Our warm welcome was tempered by one stark omission though. The new scheme did not apply to employers who employed fewer than 21 workers. We told the Government that this was unacceptable. It has meant that around six million workers in the UK have been denied rights that their counterparts in larger companies have. This is arbitrary and unfair and goes against the spirit of Government commitments to ensure "Fairness at Work". The TUC is determined to defeat the arguments of the small firms lobby and persuade the Government that union recognitions will not harm small businesses and is a democratic right owed to workers in those companies.

This booklet provides us with invaluable statistical and other information which makes an unarguable case for extending union recognition to small firms. I am pleased that the TUC and the four unions associated with this publication, GPMU, AMICUS, KFAT and Unifi, have been able to produce such an excellent booklet, for which credit must go to Professor Keith Ewing of King's College, London and Anne Hock of Popularis. I hope that this booklet will be widely read and will persuade decision makers that the case for extending union recognition to small firms is overwhelming.

Executive Summary

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. The law is arbitrary, discriminatory, and irrational, as well as inconsistent with international law and out of step with the practice of other countries.

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.

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.

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. Some have a threshold before various forms of workplace representation must be established. But that threshold varies from country to country, and in no country is there an exclusion of workplaces employing as many as 20 or more people.

Although there is a large recognition 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. 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.

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 existing threshold in the statutory recognition procedure so that more workers would have access to the scheme. There are, however, other options which may also be pursued, though these are not an adequate alternative to the simple expedient of removing the exemption altogether.

Chapter One

Introduction

1.1 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. The TUC estimates that more than 3,000 voluntary agreements have been concluded from about the time the Act was passed until November, 2002. But although the Act has led to a significant increase in the number of recognition agreements, a number of problems remain. In the White Paper *Fairness at Work* that preceded the Employment Relations Act 1999, the government stated that 'employers should not deny trade union recognition where it has the clear and demonstrated support of employees' (DTI, 1998: 12). It is clear that this principle is not followed in all cases. Partly this is because of the design of the legislation, and partly because of the way the legislation is operating in practice. So far as the former is concerned, there are a number of important exclusions and exemptions which mean that a union may not be able to obtain recognition regardless of the level of support. And so far as the latter is concerned, a growing problem is the anti – union activity of employers which the Employment Relations Act 1999 naively fails to anticipate.

1.2 The TUC has identified a number of concerns with the statutory recognition procedure in its submission to the DTI *Review of the Employment Relations Act* 1999. A major concern for several trade unions 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. Not surprisingly, the 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. This is a commitment which is underpinned to some extent by support in the form of guaranteed loans and grants. It is also a commitment which is underpinned by tax breaks and tax relief for small businesses such as those announced in the Budget for 2003.

1.3 In the pages that follow we examine why the small business exclusion should be repealed and consider some of the ways by which government could ensure that the trade union rights of workers in small enterprises are fully respected. Chapter 2 examines the extent of small business activity in Britain, together with the extent to which workers employed by small businesses are represented by trade unions. Chapter 3 considers the small business exclusion from the statutory recognition procedure in the context of the right to trade union representation in international law, and also examines some of the wider implications of the exclusion. Chapter 4 examines the impact of the small business exclusion on women in particular and considers some of its discriminatory consequences. Chapter 5 looks at the position in a number of other countries where we find a range of practices which vary from no exclusions for small businesses to exclusions set at a much lower threshold than in Britain. Chapters 6 and 7 consider a number of options for addressing the problem of worker representation in small businesses. These different options involve steps that could be taken by the Small Business Service as well as a number of legal changes that may help in specific industries. But in terms of a solution which applies to everyone, the best option would be to remove the exclusion altogether.

Chapter Two

Small Businesses and Employment Law

2.1 The starting point of an examination of the small business exclusion from the statutory recognition procedure is an understanding of the extent to which small businesses provide employment for workers in Britain. It is also necessary to have an understanding of the employment practices of such employers and to assess generally the extent to which they are bound by normal employment law principles and procedures. It is difficult of course to generalise about the small business sector apart from the fact that it appears to be growing, and that it enjoys the strong support of the Treasury and the DTI. Indeed in his Labour Party Conference speech in 2003, the Chancellor of the Exchequer made clear the government's commitment to the expansion of this sector. The sector is a mixture of traditional small businesses (such as clothing and hotels), low/medium skill firms (such as building sub-contractors), and new high skill firms (such as in information technology) (Edwards and Gilman, n d). There are nevertheless a number of points which can be made by way of background about the scale and extent of small business employment and the terms and conditions of employment in the small business sector. It should also be emphasised here that although most small businesses do not recognise trade unions, there are many that do without any apparent adverse affects.

Small Businesses in Britain

2.2 There is no single definition of a small business which is currently in use. The Companies Act 1985 refers to small businesses as normally having not more than 50 employees, though the definition is such that a business with fewer than 50 could be excluded depending on turnover and assets. Social scientists use varying definitions different from the statutory definition, with WERS referring to small firms as being those with between 10 and 99 employees. Still others distinguish between small businesses (as employing less than 50 people) and micro businesses (as employing less than 10 people). For the purposes of this study small businesses are those businesses employing 20 or fewer workers, reflecting the threshold for bringing an application under the statutory recognition procedure (though admittedly smaller employers may be caught if together with an associated

company they employ more than 20 people). These businesses account for what is by far the bulk of employers in Britain. According to the Small Business Service there are 3.8 enterprises in the United Kingdom, of which 1.2 million are employers. Of these 1.2 million employers, some 1.1 million employ less than 20 employees.

2.3 As already pointed out, government policy is to expand the small business sector as part of the 'enterprise culture' that the government is seeking to forge. This will be very challenging for the trade union movement, reflecting a commitment by the Chancellor of the Exchequer to 'deregulate where possible'. The commitment to deregulate reflects a belief that 'labour, product and capital market flexibilities are not the enemies of full employment but the only means to it' (*The Times*, 15 October 2003). The expansion of the small business sector is part of the desire to promote productivity, with 'new and successful businesses' being said to 'increase competitive pressure and facilitate the introduction of new ideas and technologies' (SBS, 2003: 19). Part and parcel of the desire to expand the small business sector is a desire to make entrepreneurship more inclusive: in the view of the Chancellor, 'there should be no no-go areas for the enterprise culture, as we rediscover Labour, and British, values and not only celebrate the work ethic, but also self-reliance and self-improvement' (*The Times*, 15 October 2003). There is a particular commitment to increase the level of female enterpreneurship as a contribution to the government's productivity agenda, in the process 'helping to achieve a sustained increase in the rate of growth' (SBS, 2003: 19).

Small Businesses and Employment Rights

2.4 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 social rights should be universal, this principle was breached in the Sex Discrimination Act 1975 which excluded firms with less than 5 employees. This was removed in 1986, however, following a decision of the European Court of Justice. The principle was also breached in the Employment Act 1980 when differential qualifying rules were introduced

for unfair dismissal purposes. The qualifying period for unfair dismissal was raised to two years for workers whose employer employed less than 20 employees, though this was repealed two years later when the two year rule was extended to everyone. In 1980 the government also removed the right to return to work after maternity leave for women whose employers had less than 5 employees. This too was repealed. The small business exclusion for trade union recognition thus looks increasingly anomolous.

2.5 The exclusion is all the more anomolous following the Employment Act 2002 which removes restrictions in the Employment Rights Act 1996 applying to the employer's obligation to provide a note about disciplinary procedures and pensions to employees. Here the restriction applied in the sense that the information need not be provided where the number of employees employed by the employer was less than 20. This is not to say that the small business exclusion in the statutory recognition procedure is the only small business exclusion still in operation. But yet another one of these is in the process of being removed. This is the exclusion of small businesses from the Disability Discrimination Act 1995. For this purpose a small business is one that employs fewer than 15 employees, though previously the exception applied to businesses employing fewer than 20 employees. The existing restriction will be removed to bring British law into line with European law. The removal of the exclusion from the Disability Discimination Act 1995 means that there will be few small business exclusions which survive. One such exclusion relates to duties of employers under the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242). Several of the specific duties set out in the regulations do not apply to employers with less than 5 workers.

Small Businesses and Employment Rights in Practice

2.6 Small businesses are characterised by low levels of trade union membership, low levels of trade union recognition, and low levels of collective bargaining coverage. But it should not be assumed that trade union and collective bargaining activity is wholly absent in the small business sector. The WERS survey suggests that there was a trade union presence in 20% of businesses with between 10 and 20 employees and that 9% of these businesses recognised a trade union. WERS also suggests that there is a lower incidence of consultative committees or works councils in small businesses,

giving rise to concerns about 'the opportunity for employees in small businesses to give voice to their concerns' (Cully et al, 1998: 27). Small businesses are nevertheless legally required to consult workers' representatives on a range of issues including business transfers and health and safety. 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, though there is a great diversity between businesses (Edwards and Gilman: n d). 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: 3).

2.7 Small businesses also score badly when it comes to employment tribunal applications, where the sector has been over – represented. If we take employers with less than 25 employees, we find that in 1998 they accounted for 46% of tribunal applications (DTI, 2002), though employers employing less than 20 accounted in 2002 for only about 20% of employment and 22.3% of people employed. Similarly if we take employers with less than 10 employees, we find that in 1998 these accounted for 26% of tribunal applications from what in 2002 was 15.6% of people employed. The figures suggest further that in 1998, 50% of redundancy payments cases, 32% of discrimination cases, 61% of 'Wages Act' cases, 56% of breach of contract cases, and 42% of unfair dismissal cases originate from enterprises employing less than 25 employees (ibid). It is difficult to see how this will improve, and it remains to be seen whether the Employment Act 2002 will have a significant effect in reducing the number of applications. Although it introduces mandatory new grievance and disciplinary procedures, in doing so it also creates new opportunities for litigation. Better working practices and a greater awareness of legal obligations are a more likely way to reduce the volume of tribunal applications.

Conclusion

2.8 The striking feature of the existing law on thresholds is that they are highly exceptional. But there are concerns that a two tier labour force is emerging in British employment law, the Draft Information and Consultation

Regulations being another example of special treatment for small businesses. With a qualifying threshold of 50 employees these will apply to even fewer employers than the recognition procedure. A second feature of the existing law is that although they are exceptional, the thresholds are arbitrary with the same threshold rarely applying to more than one aspect of the law. If employers with more than 5 employees must comply with health and safety obligations why should they not also have to comply with the Disability Discrimination Act? And if employers with more than 15 employees have to comply with the Disability Discrimination Act why should they not have to comply with the statutory recognition procedure? And if as the government claims is it 'not appropriate to impose collective employment relations on smaller employers' (DTI, 2003: 2.11), why should the cut off be 20 but not 15 or 10 or 5? Yet not only is domestic law on thresholds arbitrary and irrational, it is even more so when compared to the experience of other countries.

Chapter Three

Small Businesses, Trade Union Recognition and Collective Bargaining Rights

3.1 Trade union recognition is a precondition of free collective bargaining. The right to bargain collectively in turn is recognised as a human right in a number of international human rights treaties by which the United Kingdom is bound. These include ILO Convention 98, which has inspired the Council of Europe' Social Charter of 1961, and the International Covenant on Economic, Social and Cultural Rights of 1966. The right to bargain collectively is also recognised by the EU Charter of Fundamental Rights and by the *ILO Declaration on Fundamental Principles and Rights at Work*. So far as ILO Convention 98 is concerned, this 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'. There are, however, a number of reasons to be concerned about the extent to which the statutory recognition procedure complies with ILO Convention 98. In this chapter however we concentrate on the small business exclusion which is in many respects the most significant.

The Small Business Exclusion

3.2 The exclusion of small businesses from the statutory recognition procedure thus appears to be inconsistent with ILO Convention 98 as well as the other international treaties which draw upon it. Convention 98 expressly provides for the exclusion of only three groups of workers. Two of these are the armed forces and the police, in relation to both of whom the extent to which the guarantees provided by the Convention are to apply 'shall be determined by national laws or regulations'. The other excluded category are 'public servants engaged in the administration of the State'. The

Convention is said not to 'deal with' them, though it is not to be 'construed as prejudicing their rights or status in any way'. This last exclusion in particular has been narrowly construed by the ILO Committee of Experts which has said that the distinction to be drawn is 'basically between civil servants employed in various capacities in government ministries or comparable bodies and other persons employed by the government, by public undertakings or by independent public corporations' (ILO, 1985: 110).

3.3 There are otherwise few – if any - qualifications permitted to these rights. Indeed the ILO has commented that

> While recognising the voluntary nature of collective bargaining, it is incumbent on member States to encourage and promote the full development of machinery for voluntary negotiation (emphasis added).

Complaints about restrictions on particular groups of workers tend to be related to public servants, though the ILO has expressed concern about restraints in some countries on the collective bargaining rights of teachers, agricultural workers, and domestic workers, all of whom are entitled to enjoy the right to bargain collectively. There is no suggestion in the recent jurisprudence of the Committee of Experts that it is permissible to exclude small employers from the State's obligation to promote collective bargaining machinery under article 4 of Convention 98. On the contrary the growth of the number of small employers has been said to require states to extend their steps to promote collective bargaining if the requirements of Convention 98 are to be met:

> The need for promotional action in respect of collective bargaining is all the more evident given contemporary labour market developments. For instance, the increasing fragmentation of labour markets; the fact that more people work in numerically small units; the emergence of a new economy in which there is little tradition or practice of bargaining; as well as the growth of the informal economy and outsourcing and similar arrangements which are edging out the standard employment relationship, all pose challenges to the realization of the right to collective bargaining (ILO, 2000: 37).

Implications of the Small Business Exclusion

3.4 The obvious implication of the small business exclusion from the statutory recognition procedure 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 are 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. The impact of the exclusion is not, however, spread evenly across all sectors of the economy, in the sense that there are sectors with fewer than the average number of small enterprises, and on the other hand sectors where there are a larger than average number of small enterprises. It is also the case, of course, that within some sectors the impact of the legislation may vary enormously, as for example in manufacturing which is below the average in terms of the number of employees in small businesses. But as we will see in chapter 4 there are a number of areas within the sector - notably clothing and printing – where the number of small businesses is much higher than the average.

3.5 The sectors where there are only small numbers of workers affected by the small business exclusion include the following (with the % relating to people employed in businesses employing less than 20 employees):

- Mining & Quarrying; Electricity and Gas Supply 3.8%
- Financial Intermediation 7.7%
- Transport, Storage and Communication 15.4%
- Manufacturing 16.3%
- Health and Social Work 16.25%

In contrast those where there are larger than average numbers of employees employed in small businesses include (with the % relating to people

employed in businesses employing less than 20 employees:

- Agriculture, Forestry and Fishing 86.1%
- Hotels and Restaurants 35.5%
- Real Estate, Renting & Business Activities 37.6%
- Construction 45.8%
- Wholesale, Retail and Repairs 28.2%

Implications of the Exclusion for Other Rights

3.6 Apart form the fact that more than one in five workers is denied the right to recognition of their trade union, this in turn means that these same workers are denied a number of employment rights which depend as a pre-condition on their trade union being recognised. The most obvious of these are the rights to time off for trade union duties and the right to the disclosure of information, both of which are related to collective bargaining. If there is no collective bargaining there is no need for the rights in question. But in other areas the lack of recognition affects the quality of the right available without denying it altogether. So in the case of information and consultation about health and safety matters or about the transfer of undertakings, there is a right to trade union representation only where the union is recognised. Where the union is not recognised, the employee must make do with much less effective procedures, either in the form of an elected workplace representative or direct and personal information and consultation. Because of the exclusion, workers in small businesses may never have the opportunity for more effective representation. This is particularly significant in the context of health and safety in light of research studies which 'have found the collective representation of workers to have beneficial consequences for standards of worker protection, particularly where it is trade union based' (James and Walters, 1999: 83).

Trade Union Recognition and Health and Safety at Work

'. . . both British and American studies have found safety committees to be more effective where management and employee members are well trained, while other research indicates that safety representative effectiveness is strongly influenced by

- the presence of a strong, centralised workplace trade union organisation;
- the integration of representatives into workplace union organisation;
- consultation between representatives and their constituents; and
- the provision of adequate information and training'

(James and Walters, 1999: 91)

3.7 There are also questions about entitlement to the full services provided by union learning representatives. New rights for learning representatives were introduced by the Employment Act 2002. The duties for which time off is provided include the analysis of teaching needs, providing information and advice about teaching and learning, and arranging learning or training. But this right to time off work with pay is available only where the learning representative's union is recognised by the employer, the government choking at the prospect of giving union learning representatives rights in workplaces where the union was not recognised, ostensibly on the ground that to do so would be to 'give unions representational entitlements where their membership and organisational basis is under-developed' (DTI, 2002a). But by making the facility conditional on union recognition where a union cannot secure recognition means also that that unions are denied representational entitlements even where their membership and organisational basis is fully developed. This disadvantages not only the union learning representatives but also the workers they service. It has never been responsibly suggested that learning needs are not as great in small businesses as they are in larger enterprises or that small businesses would not also benefit from improving the skills of their staff.

Conclusion

3.8 The range of the statutory recognition procedure is less than 100,000 employers, though this is not something to be diminished or under-estimated. But it does mean that the procedure currently applies to less than 8% of British employers. Reducing the threshold to 10 or more employees would more than double the number of employers covered by the procedure, while reducing it to 5 or more employees would extend its scope to c 35% of employers. In terms of the number of employees who are covered by the scheme, 21.8% of people employed are employed by employers who employ less than 20. This means that over 5.5 million people are denied the right to trade union representation on equal terms with workers employed elsewhere. It also means that over 5.5 million workers are denied the rights that are conditional upon their trade union being recognised. About 15.3% of British workers are employed in workplaces where there are less than 10 employees, with 6.4% employed in businesses that employ between 10 and 19 employees. The effect of thus reducing rather than removing the threshold to say more than 10 would have the effect of bringing in less than another 1.6 million workers. Reducing it to more than 5 would bring in another 3.1 million.

Chapter Four

Small Businesses and Women's Rights

4.1 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 (ILO, 2000: 14).

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. Not only are more women than men denied access to collective bargaining, but as a result more women than men will be denied access to certain statutory rights which are conditional on their trade union being recognised.

The Gender Pay Gap and Collective Bargaining

4.2 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. This has coincided with the rise in the role of the market for pay determination, with individualised contracts leading in turn to less transparency about pay and greater employer discretion. The solution to the gender pay problem is said by the EOC to require 'active participation' by the three main actors in the

labour market: government, employers and trade unions. The prescription for reform includes pay audits, addressing the long hours culture associated with full time work, the integration of equal pay into the collective bargaining agenda, and partnership agreements which include equal opportunities as a core value (EOC, 2001).

4.3 These are important proposals, and a number of trade unions have consciously extended the bargaining agenda in the manner advocated. Some of the successes in raising the profile of gender equality in collective bargaining have recently been reported by the TUC (TUC, 2003: 4 – 5). But that aside, it is a remarkable feature of the EOC prescription that it does not meet the diagnosis. Thus if one of the main explanations for the gender pay gap is the decline in collective bargaining coverage, is it not reasonable to assume that one way of closing the gap would be restore collective bargaining? As one leading commentator has remarked, 'the gender pay gap . . . in any particular country [is] affected by the degree of collective bargaining coverage within that country' (McColgan: 1997: 322). Not only is collective bargaining as a process instrumental in reducing the gender pay gap, but it is also an essential precondition of gender equality as a collective bargaining issue. To the extent that collective bargaining generally is a major device in promoting pay equity, 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 from the legislation, that is to say the small businesses.

Recognition, Discrimination and Collective Bargaining

4.4 The exclusion of small businesses from the trade union recognition procedure may impact adversely on women because the absence of collective bargaining generally is associated with pay inequity. Another way of looking at the small business exclusion is not just that the absence of collective bargaining will impact disproportionately on women, but that it will also mean that women are more likely than men to be denied the right to have their trade union recognised by their employer. This latter claim needs to be supported by evidence that there are more women than men employed in small businesses so that women are more likely than men to be denied the right to recognition.

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

No of employees	All	males	females
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

4.5 Table 1 deals with the position in companies with 20 employees or less. It is based on available data which deal only with workplaces (not employers) and with workplaces with less than 20 (not 21) employees. Nevertheless the Table does show that female employment in small workplaces is higher than the average, and higher than male employment in small workplaces. The impact of the small business exclusion from the statutory recognition procedure is such that it is thus hardly calculated to address the need to ensure that there is no gender imbalance in collective bargaining. But the information contained in Table 1 also has implications for the Draft Information and Consultation Regulations which - as already pointed out - apply only to employers employing more than 50 employees. So while 44.5% of males work in workplaces with less than 50 employees, 52.5% of females are so employed. This perhaps reflects a view in the DTI that the woman's voice in the workplace in less important than that of her male colleagues. The undervaluing of women in this way is reflected further in the provision of the Draft Information and Consultation Regulations which provide that for some purposes a part time worker is to be counted as only half a worker.

Sectoral Implications for Women

4.6 Table 1 is concerned with the workforce as a whole across all sectors. As we have seen there are wide variations in terms of the number of employees employed in small businesses in different industrial sectors. But there will also be important sectoral variations in terms of the number of female employees and the number of small enterprises.

- insurance and pension funding: the number of employees in small businesses (less than 20 employees) is 1.8% but the number of female employees is 52.3%.
- health and social work: the number of employees in small businesses (less than 20 employees) is 16.2% but the number of female employees is 83.1%.
- manufacturing: the number of employees in small businesses (less than 20 employees) is 16.3% but the number of female employees is 27.2%.
- retail trade: the number of employees in small businesses (less than 20 employees) is 23.9% but the number of female employees is 66.8%.
- hotels and restaurants: the number of employees in small businesses (less than 20 employees) is 35.5% but the number of female employees is 59.1%.

4.7 There are also variations within each sector. Take manufacturing, where we find that in a number of industries within the sector, there is both a higher than average number of employees in small businesses, and a higher than average number of female employees. Prominent examples are textiles; wearing apparel; leather and leather products (including footwear); and publishing and printing. Table 2 shows that in relation to these four industries:

- a high proportion of enterprises employ fewer than 20 employees, and in most cases the proportion is higher than the average for manufacturing as a whole (81.7%)
- the proportion of total employees in enterprises employing less than 20 is slightly or significantly higher than the average for manufacturing as a whole (16.3%)
- the proportion of women employed is significantly higher than the average for the manufacturing sector as a whole (27.2%).

Table 2
Female employment and small businesses in manufacturing

	Enterprises employing fewer than 20 employees (%)	Total employees in enterprises employing less than 20 (%)	Number of women employed (%)
Textiles	78.9	18.3	47.5
Wearing apparel	87.1	31.9	57.1
Leather and leather products	83.8	17.6	44.8
Publishing and Printing	87.9	17.9	41.5
Manufacturing as a whole	**81.7**	**16.3**	**27.2**

Source: Small Business Service

Conclusion

4.8 The effect of the small business exclusion is to compound the difficulties for women in some areas of the economy to secure recognition from their employer. The importance of collective bargaining for women has been highlighted by the ILO and it is widely acknowledged that collective bargaining has an important role to play in addressing the gender pay gap. Yet the effect of the small business exclusion is to exclude more women than men from the legislation, with the problem being potentially more serious in some areas of the economy than in others. 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 referred to in paragraphs 3.6 and 3.7 above 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.

Chapter Five

The Practice Elsewhere

5.1 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. It is of course difficult to draw comparisons between the collective bargaining laws in other countries and collective bargaining laws in this country. Such comparisons are difficult to undertake because the collective bargaining practices are very different in different countries. There are different levels at which collective bargaining is conducted in different countries, different forms of trade union structure, and different forms of workplace organisation. But all major industrial countries in Europe and beyond have legislation providing for some form of worker representation even if the enterprise is not the main focus of collective bargaining activity. 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. Still others have a threshold before various forms of workplace representation must be established. But that threshold varies, and in no country is there an exclusion of workplaces employing as many as 20 or more people.

Workers' Representatives in France and Spain

5.2 Workplace representation in **France** takes the form of workers' delegates and enterprise committees. So far as the former are concerned, the threshold is more than 10 employees. It is compulsory to establish workers' delegates in all enterprises employing at least eleven employees and having employed them for 12 months whether consecutively or not during the past three years (Despax and Rojot, 1987). There are complex rules to determine what happens in the event of multi-enterprise establishments, and what happens where there may be several establishments of the same enterprise employing fewer than 11 employees. It is the responsibility of the employer to organise the elections, though there may be many situations where there are no delegates because no candidates have come forward. In terms of the responsibilities of the workers' representatives, these have been described in the following terms:

As now defined by section L422-1 of the Labour Code, the role of the workers' delegates is multifold. Their main task is to transmit to the head of the establishment all grievances of the employees, either individual or collective. These grievances may concern wages or the observance of the Labour Code and of laws and regulations concerning the protection of employees and their health, safety and social protection. This implies that all questions regarding labour regulation, whether legal or conventional, are within the competence of the delegates . . . (ibid).

5.3 Workplace representation in **Spain** is by way of workers' delegates and enterprise committees. The former must be established in enterprises employing more than 10 workers, and the latter in enterprises employing 50 or more. In smaller enterprises, a workers' delegate must be elected if a majority of the workers so request, though this applies only in companies with more than 6 workers. Where the enterprise employs more than 10 but no more than 30 employees, one workers' delegate may be elected, and in companies with more than 30 but less than 50 employees 3 delegates may be elected. According to one leading authority, the workers' delegates are the representatives of the employees in dealing with the employer and his representatives 'about the one – thousand – and – one questions immediately emerging from the place and time of work' (Alonso Olea and Rodriguez – Sanudo, 2001). The delegate is said to 'interpose his representative authority between the employer and the employees represented by him, when the latter believe that their rights and interests are infringed by the former's orders or decisions in the working situation' (ibid). The delegates will perform the role of the enterprise committees in businesses with fewer than 50 employees, and in some cases this means that they will have a collective bargaining function as part of their representative role.

Works Councils in Germany, Austria and The Netherlands

5.4 In both Germany and Austria collective bargaining takes place at the sectoral level between trade unions and employers' associations. At the workplace, representation takes the form mainly of works councils which have extensive rights relating to information, consultation and co-determination. It has been said of the position in **Germany** that 'in principle and according to law' the works councils are separate from trade unions, and are made up

of representatives of the workforce as a whole (Weiss, 1999). However, trade unions provide candidates and trade union candidates in fact constitute by the far the largest number of elected works council representatives. But the duty to establish a works council applies only in relation to enterprises with more than 5 employees, though not all enterprises with more than 5 employees have a works council. It has been explained that 'it is up to the employees of the respective establishment whether or not they establish a works council. There is no sanction if they fail to do so' (ibid). In **Austria** the obligation arises in respect of enterprises with more than 5 employees which means that the law covers about 75% of the dependent labour force, of whom about 50% are estimated to be covered by a works council.

5.5 In the case of **The Netherlands,** the position is slightly different in the sense that the threshold is higher. The law was changed in 1998 and differentiates between three kinds of enterprise. The first are those with more than 50 employees where a works council with full powers has to be established. The second are those enterprises with less than 50 but more than 10 employees. In this case 'a representative body of the employees has to be established if either the employer or the majority of the employees so wish' (Rood, 1999). The third are those enterprises with less than 10 employees, where the employer is free to set up a works council but is under no obligation to do so. So far as the second category is concerned (10 – 50), it has been said that the works council in these cases has 'a right to information, limited powers of advice and of co-determination' (ibid). Where there is no works council in these cases 'the employer has to convene with all employees at least twice a year, provide information and ask for advice before being able to make certain decisions' (ibid). Dutch law provides extensive rights to information and co-determination, which go well beyond the requirements of the EU Information and Consultation Directive.

Trade Union Certification in the United States and Canada

5.6 In the **United States**, collective bargaining law is governed by the National Labor Relations Act of 1935. The matter is governed by federal law, though there is also some regulation by the States particularly in relation to their own public servants. Under the 1935 Act (or the Wagner Act as it is

sometimes referred to), a trade union can secure certification (as the recognition process is called) from the National Labor Relations Board if it can show majority support in the bargaining unit. Majority support for this purpose will normally have to be demonstrated by a secret ballot of the workers in the bargaining unit. The system thus bears striking similarities to our own system. But in the United States there is no minimum threshold of employees an employer must employ before an application is made for certification under the procedure. There is however an exception for small businesses, though this is based on the practices of the Board rather than the legislation itself. But here the exception is based on the gross annual receipts of the employer ($500,000 for retail establishments and $50,000 for non retail establishments), rather than the number of employees.

5.7 The position in the United States is controversial, with small businesses looking for bigger privileges in the legislation. But so far Bills to extend such privileges have been blocked in Congress. The position in **Canada** is different from the United States in the sense that trade union recognition law is a provincial rather than a federal responsibility. This means that each Province has its own legislation for trade union recognition. However, these laws are broadly similar in design though there are important variations. But they all tend to be based on the US model of certification of a union as an exclusive bargaining agent by a labour relations board only where the union has majority support. So far as thresholds are concerned, 'the legislation generally provides that an employer is simply a person who employs one or more employees' (Carter et al, 2001). In the case of one Province (Nova Scotia) the legislation provides that the employer must employ more than one person, which means that the threshold is two, as it is in Ontario by virtue of a statutory requirement that the bargaining unit must have more than one employee. In another case (Saskatchewan), the Act applies only to employers who employ at least three employees.

Conclusion

5.8 There are thus different forms of workplace organisation in different countries, including certified or recognised trade unions, works councils and workers' delegates. Nowhere do we find an exemption for small firms like the one that operates in the United Kingdom. In some countries there

is no exemption. In other countries where there is an exemption it is pitched at a much lower level than the United Kingdom's statutory recognition procedure. Britain has not only the most restrictive laws in Europe on this as on so many other issues, but the most restrictive laws among major countries in the developed world. Before concluding this chapter, for completeness reference may be made to the different experiences of New Zealand and Sweden:

- In **New Zealand** the position is governed by the Employment Relations Act 2000. This is said to be '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' (Anderson, 2001: 26). Although a 'relatively simple legislative structure', 'common sense and the need to bargain effectively are likely to ensure that most bargaining takes place through larger unions and involves a significant number of employees' (ibid: 27). Nevertheless 'the government sees the structure and organisation of bargaining as something to take place and develop in the labour market rather than by detailed legislative intervention' (ibid).

- The position in **Sweden** is perhaps even more far reaching. This provides that 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'. It has been pointed out that for a trade union to acquire this right, 'no other test of representativeness is required – one member is enough' (Adlercruetz, 1998). In principle any such agreement concluded as a result of such negotiations applies only to the members on behalf of whom the union is acting. In practice, 'nothing prevents the result from being applicable to non – members', as is typically the case (ibid).

Chapter Six

The Role of the Small Business Service

6.1 British law on trade union representation is arbitrary, discriminatory, 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 recognition 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. This latter consideration requires a much greater level of understanding than is currently being displayed in the promotion by government of the small business sector. The focus of this chapter is on the steps that could be taken in government to raise awareness of both of these matters, steps that could be taken in the first instance without the need for legislation. The issue is the extent to which the Small Business Service could 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. The other issue is the extent to which the Small Business Service could promote the interests of small businesses which had full regard to the rights of employees and the responsibilities of employers.

What is the Small Business Service?

6.2 The Small Business Service was established in April 2000 as an Executive Agency of the DTI. Under the terms of its Public Service Agreement it must

> . . . help build an enterprise society in which small firms of all kinds thrive and achieve their potential, with an increase in the number of people considering going into business, an improvement in the overall productivity of small firms, and more enterprise in disadvantaged areas.

For this purpose the SBS is seen as the 'champion' of the small business sector in government. In its annual report for 2002 – 2003, the Service stated that it wanted to encourage more people to set up in business, and to create a supportive business environment with all small businesses finding it easy to respond to government and access its services (SBS, 2003). The Service is advised by the Small Business Council which was also established in 2000 as a non departmental public body. Composed of mainly men and women from small businesses, the SBC seeks to influence and educate ministers and policy-makers about the needs of small businesses.

6.3 The SBS has a role in implementing government policy towards small businesses, as set out in *Small Business and Government – The Way Forward*, published in December 2002. In this important document the government identified 7 strategic themes as being 'drivers for economic growth, improved productivity and a wider involvement in enterprise for all'. These 7 themes are identified as follows:

- Building an enterprise culture
- Encouraging a more dynamic start – up climate
- Building the capability for small business growth
- Improving access to finance for small businesses
- Encouraging more enterprise in disadvantaged communities and under–represented groups
- Improving small business experience of government services
- Developing better regulation and policy

The SBS has indicated that it will work with 'partners' at national, regional and local level to develop these strategic themes into national strategies, and then seek to implement them. Its 'partners' include government departments, regional development agencies, and bodies such as ACAS. Useful contacts identified by the Service include the CBI, the IOD, and the Federation of Small Businesses, but not the TUC or individual trade unions, including those with significant levels of membership in small businesses (such as AMICUS – AEEU, GPMU and KFAT).

State Support for Small Business

6.4 The government provides a number of forms of support for small businesses and there is talk of much more to come. There are also attempts being made to ensure that small businesses benefit from public procurement and government contracts. Existing support includes guaranteed loans, and research and development grants, with the former being described as a United Kingdom wide government backed scheme administered through the SBS, providing loans to small firms with viable business proposals. The loans are provided by participating banks, with the SBS acting as guarantor where the business in question otherwise lacks adequate security for the loan. The facility guarantees up to 75% of loans between £5,000 and £250,000, and allows staged repayments and capital repayment holidays. As such, it applies to businesses employing fewer than 200 employees, and only to manufacturing businesses with a turnover of no more than £5 million, and to other eligible businesses with a turnover of no more than £3 million. It is a condition of the guarantee that the business is able to repay the loan, and that the money is used for business development purposes, such as financing a project, start up costs, and expansion and investments designed to improve efficiency.

6.5 Another form of support is by way of research and development grants 'to help small businesses develop technologically innovative products and processes'. For this purpose different grants are available for different purposes depending on the size of the firm and the purposes for which the money is sought. These include:

- Micro Projects, described as low cost development projects lasting no longer than 12 months. Grants of up to £20,000 may be paid to businesses with fewer than 10 employees.

- Research Projects, described as planned research lasting between 6 and 18 months. Grants of up to £20,000 may be paid to businesses with fewer than 10 employees.

- Development Projects, described as shaping industrial research into a pre-production prototype of a technologically innovative product or industrial process. Grants of up to £200,000 may be paid to businesses with fewer than 250 employees.

In addition to the above, grants of up to £500,000 may be made for exceptional projects, which are likely to generate wider economic benefits and are recognised as of strategic importance for an industrial sector.

The Missing Links

6.6 These emerging arrangements provide an opportunity for the government to address the questions of the representation gap and the employment practices in small businesses. A number of very simple steps could be taken in the first instance by the SBS. 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.

  From partnership should come joint initiatives. Both the government and the SBS have a role in fostering such initiatives which could include joint work between small businesses and representative trade unions to deal with training and skills on the one hand, and health and safety on the other. For partnership to be effective there has to be a dialogue between the SBS, ACAS, the small businesses themselves and the trade unions. One of the functions of the SBS should be to facilitate and promote such dialogue. There should also be trade union representation on the SBC.

6.7 Beyond these supportive measures, there are other steps that could be taken to address the representation gap in small businesses. As we have pointed out, the government now provides a growing number of benefits to small businesses, including financial support in the form of guaranteed loans, and research and development grants. There are others, and others still may be on the way. This support provides an opportunity for the SBS to remind any beneficiaries of government benefits and public money that they have obligations to their employees. It also provides an opportunity for the SBS to disseminate information about the benefits to some small businesses of recognising trade unions. The next step would be to tie any government hand – outs of public money to trade union representation. That is to say that it would be a condition of receipt of any government funding or support that the business in question recognises a trade union for the purposes of collective bargaining. But even if this is considered as a step too far (as it might be for a number of reasons), there is nevertheless a monitoring role which ought to be performed by the SBS before public money is used to support any business. This means at the very least that support should be dependent to some extent on the employment practices of the potential recipient. Although this would not directly require the business to recognise a trade union, it may do so indirectly in the sense that trade union recognition would help to meet these conditions.

Conclusion

6.8 The creation of the SBS to give small businesses a champion in government is an important initiative. But what is striking about the SBS literature and indeed the speeches of ministers extolling the virtues of small business is a very one dimensional view of business. In particular there is not yet any recognition of the point made forcefully in *Fairness at Work* that

> The best modern companies, whether large or small, have some things in common: they seek to harness the talents of their employees in a relationship based on fairness and through a recognition that everybody involved in the business has an interest in its success (DTI, 1998: 11).

People employed by small businesses also make commitments, and they are entitled to expect that their interests will be properly and effectively represented. The SBS could do much more to acknowledge and promote

this dimension, which will become a matter of growing concern as the small business sector expands. They also have a duty to ensure that the small business sector develops in a manner which is consistent with other government policies. 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.

Chapter Seven

Trade Union Representation, Workers' Rights and Small Businesses: Options for Change

7.1 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, and it is these other options that are the focus of this chapter. 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

Extending the Right to be Accompanied

7.2 There is much to be said for extending the existing right of workers to be accompanied which was introduced by the Employment Relations Act 1999. One way by which this could be done is that the right of workers to be accompanied would become a right of workers to be represented on all matters relating to their employment. This would allow an individual worker or a group of workers to approach their employer with their trade

union representative where they are unhappy with existing terms and conditions of employment. The workers in question would be able to do this where the union was not already recognised for collective bargaining whether voluntarily or under the statutory procedure. Such a move would help overcome problems with the small business exemption as well as the other problems with the statutory recognition procedure which are beginning to emerge. Where a group of workers did seek representation by a trade union official, it would be for the employer to decide whether to extend the agreed outcome of any such representation to workers who were not represented in this way. In practice, however, most employers would be likely to do so.

7.3 It does not follow, however, that the right to representation would be an adequate substitute for trade union recognition in all cases. It may work for some unions, but for others it may create additional burdens. One of the goals of recognition is that the workplace can be encouraged to develop its own trade union structures and its own procedures for dealing with the employer. A reliance on representation rather than recognition rights means that the function of workplace representation will tend to be performed by full time officers rather than lay representatives. This could be a significant financial cost for some unions. A reliance on representation rather than recognition rights also means that workers would have no incentive to join the union but every incentive to free ride. If the employer has to deal with the union because of the wishes of a few, and if the agreements with the representatives of the few were then normally applied to everyone, why would the non members take the trouble to join the union? The importance of recognition is that it is based on demonstrated support which the union has to recruit and retain. This strength in numbers is important where there is a dispute when the support of the workforce may be necessary. It is also important of course for the financial security of the union as an institution. Collective bargaining assumes a level of collective organisation.

The Wilson and Palmer case

It seems likely that the right to be accompanied will be reinforced by changes to the law proposed in the Consultation Document, *Review of the Employment Relations Act 1999* (DTI, 2003). These proposals have been designed in response to the decision of the European Court of Human Rights in *Wilson and Palmer v United Kingdom* (2002) which upheld a complaint that British law and practice violated article 11 of the European Convention on Human Rights. The applicant in that case had been penalised by his employer following the derecognition of his trade union and the introduction of personal contracts. The applicant insisted on being paid in accordance with the terms of the collective agreement in force at the time of the derecognition, with the result that certain bonus payments made to others were withheld from him. According to the Strasbourg Court this amounted to a breach of article 11, even though it did not breach domestic law then in force. According to the Court, 'by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention'.

In reaching its decision in this case, the Court also addressed more general questions about the rights of trade union members under article 11. According to the Court, employees 'should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf'. But not only that: it is said to be 'the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employer'. It is not clear that the government's response to this aspect of the decision is adequate. *The Review of the Employment Relations Act* (DTI, 2003) proposes that workers will have the right to consult their trade union representatives, and there is a suggestion that it may be possible to do so during working time. But this still falls some way short of a right to be represented rather than accompanied, and it falls a long way short of the right of workers to be represented when seeking 'to regulate their relations with their employer'. The right to be represented acknowledged by the Strasbourg court is not qualified to apply only to grievances about 'the performance of a duty by an employer in relation to a worker'.

Extending National Agreements

7.4 A second option for dealing with the problem of recognition in small firms would be to treat national agreements (where they exist) as setting a norm for the industry. The agreement would then be extended by a statutory procedure to all the employers in the industry in question. There are strong arguments for such an initiative, based on fairness between employers and the risk that good employers paying agreed rates are undercut by bad employers who operate on the basis of low labour standards and poor employment conditions. There are also arguments based on fairness to employees, with two tier workforces operating in some of the industries where national agreements apply. These include the clothing industry where alongside the formal sector with national agreements, there is a large informal sector with a heavy reliance on casual labour. Part, though not the whole, purpose of making the national agreement the norm for a specific industry is to address these concerns of employers and employees. Machinery for the extension of collective agreements in this way operates in a number of European countries, though the detail varies from country to country.

7.5 Like the first option discussed above, this initiative alone would not fully meet the recognition problem in small companies for the simple fact that not all industries in the private sector now have multi-employer collective bargaining arrangements. But this does not mean that there are no such agreements, with printing being an example where they still apply. National bargaining currently takes place between the British Printing Industries Federation and the GPMU, the Scottish Print Employers' Federation and the GPMU, and the Screen Printing Association and the GPMU. The knitwear and hosiery industry is another industry where national collective bargaining continues to operate. Here there are two agreements which are important. The first is the agreement between the British Footwear Association and KFAT, and the other is the National Joint Industrial Council for the Knitting Industries Agreement on Wages and Conditions. The membership of the latter consists of representatives of the Knitting Industries Federation and KFAT. The way in which an extension scheme might operate is considered in the appendix. Although this option is not the solution to the small business exclusion as a whole, it must be emphasised that it would go a long way in some sectors in particular.

The Benefits of National Bargaining

There are many different reasons for encouraging national collective bargaining arrangements such as those enjoyed by GPMU and KFAT. Some of these were identified by the OECD as long ago as 1994. The principal reasons are as follows

- National bargaining helps to explain why collective bargaining coverage is so high in the other EU countries where national or regional sectoral bargaining is the norm.

- National bargaining helps to explain why collective bargaining coverage is so low in the United States, Canada and Japan where enterprise bargaining is the norm.

- National pay bargaining introduces fairness to a sector, by ensuring that workers are paid for the value of the work they do, rather than who they do it for.

- National pay bargaining helps to prevent destructive competition between firms based on spiralling pay cuts and low labour costs within a sector.

- National pay bargaining may help to reduce the gender pay gap, on the ground that more centralised pay determination contributes to pay equity.

- National pay bargaining reflects the practice of pay determination in some industries where pay is set at national level (in the railways by the regulator) but negotiated formally at company level.

- National pay bargaining reduces collective bargaining costs incurred by trade unions, by reducing the number of bargaining units.

- National pay bargaining reduces employer resistance to trade union recognition at plant level by removing the main areas of bargaining conflict from the workplace.

Extending the Role of Market Freedom

7.6 The third option for dealing with the problem of recognition in small firms would require government intervention to remove legal constraints on both trade unions and employers. This is an option which would allow trade unions and employers to take steps to encourage small employers to recognise trade unions, as many companies outsource more and more of their activities. Here the government speaks with a contradictory voice. One of the most interesting innovations fostered by the present government is the Ethical Trading Initiative whereby British companies sign up to a commitment to respect international labour rights in sourcing goods from the developing world. The growing number of companies which have signed up to this initiative are Tesco and Sainsbury. But although they may undertake to work with suppliers to implement internationally accepted labour standards, these same companies are limited in terms of applying similar practices when sourcing in the United Kingdom. It is true that they could have regard to the labour standards operating in their domestic supply chain. But because of statutory restrictions, they cannot make it a condition of a contract of supply that the supplier recognises a trade union. Any such term in a contract is void, and there is no protection for industrial action which is designed to impose such a term in a commercial contract.

7.7 This was a restriction first introduced over 20 years ago in very different labour market conditions as an incidental part of a package designed to destroy the closed shop. It is similarly impermissible to have a term in a commercial contract requiring that the work under the contract be done by union-only labour. Some trade unionists take the view that it ought to be possible for employers and trade unions to be able to insert recognition clauses in their collective agreements. Others take the view that it ought to be possible for trade unions which do not organise in a particular company to negotiate an agreement with the company that it will purchase only from suppliers who recognise a trade union. An example was given in the clothing industry of KFAT negotiating an agreement with clothes retailers (where it does not have members) an agreement that the companies in question will purchase only from suppliers (where it does have members) which recognise a trade union. This would be a kind of ETI for the domestic market, equivalent to that which applies in international markets. Companies would not of course be bound to enter into such

agreements, but at the present time the unions have no incentive in seeking them because they are void and unenforceable.

Conclusion

7.8 The use of social clauses in private contracts is no more a complete solution to the problem of recognition in small firms than the other two options discussed in this chapter. This is because there would be no obligation on the part of big companies to enter into contracts of this kind. But some might, so that along with the other options the social clause in private contracts could be a valuable tool for trade unions. So too could a greater use of social clauses by State regulators (such as OFCOM, OFWAT, OFGEM, the Financial Services Authority, and the SRA) which ought to be authorised to require licence holders and franchise holders to comply with fair labour standards and to take part in collective bargaining procedures. But although there is scope for greater use of State regulators, it also needs to be recognised that this too is not a complete solution to the problem of trade union recognition in small businesses. This is principally because most of these companies would not fall under the supervision or control of the regulator. The position might be improved, however, if the regulator were empowered also to give guidance for the contracts which license and franchise – holders make with suppliers and others. Thus the regulator could require or authorise the regulated community to give preference to companies which meet prescribed social obligations.

Chapter Eight

Conclusion

8.1 There are thus a number of options for addressing the small business exclusion. Although those considered in chapters 6 and 7 might go some way to address the problem in different ways, they are not a full solution to the simple expedient of removing the exclusion 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.

8.2 The case in favour of retaining the small business exemption is developed in the Consultation Paper on the *Review of the Employment Relations Act* 1999 (DTI, 2003). There it is asserted that it is not appropriate to have collective labour relations in small firms. Apart from the fact that there are small companies where there are collective labour relations, this is surely a matter for employees themselves to determine. It may not be appropriate if the workers believe that their interests are well served without collective

bargaining, but it may be appropriate if workers feel that they are not being fairly treated or that their voice is not being heard. Indeed these are problems which are more likely to occur in small rather than large firms. A variation of this argument is that employers need to be protected from the red tape and bureaucracy that collective bargaining would bring. Collective bargaining would mean that the employer would have to meet the union on a regular basis to discuss matters affecting staff. But although a superficially attractive argument, this is not one that bears detailed scrutiny. Trade union recognition and collective bargaining would save employer time in the sense that negotiations would take place with one representative rather than each employee individually. It would also save time by improving procedures, thereby reducing the likelihood of time consuming and potentially expensive tribunal cases.

8.3 It does not follow that if the small business exemption in the statutory recognition procedure were removed or reduced that the levels of trade union organisation and collective bargaining density generally or in the small business sector in particular would be transformed overnight. It is not being suggested that trade union recognition should be mandatory in small companies but that workers should be entitled to be represented by their union and that their union should be recognised by their employer where the statutory criteria are met. Levels of trade union density and collective bargaining coverage in small firms might thus still remain disproportionately low for a number of reasons. These include the contentment of the workers, personal contact with the boss, portability of employee skills, self-reliance and independence of the workers, and resources of the unions in terms of being able effectively to organise so many workplaces. The use of the statutory recognition machinery is expensive for trade unions in terms of staff resources and external advice and assistance. There are then the costs incurred which flow from recognition, in terms of servicing members in these workplaces where there may not be effective lay structures. But there is no rational reason why workers should be denied trade union recognition if this is what they want. If there is such a reason it has yet to be fully explained by the DTI which must spell out clearly why it is appropriate to have irrational and discriminatory legislation which violates international standards and has no parallel in any other developed country.

REFERENCES

Adlercruetz (1998): A Adlercruetz, 'Sweden', in R Blanpain (ed), *International Encyclopaedia of Labour Law and Industrial Relations*, vol 13

Alonso Olea and Rodriguez – Sanudo (2001), M Alonso Olea and F Rodriguez – Sanudo, 'Spain', in R Blanpain (ed), *International Encyclopaedia of Labour Law and Industrial Relations*, vol 12

Anderson (2001): G Anderson, *Labour's Labour Law: Labour Law Reform in New Zealand under a Labour Government* (Institute of Employment Rights, 2001)

Carter, et al (2001), D D Carter, G England, B Etherington and G Trudeau, 'Canada', in R Blanpain (ed), *International Encyclopaedia of Labour Law and Industrial Relations*, vol 4

Cully et al (1998): M Cully, A O'Reilly, N Millward, J Forth, S Woodland, G Dix, and A Bryson, *The 1998 Workplace Employee Relations Survey. First Findings* (DTI, ESRC, ACAS, PSI, 1998)

Despax and Rojot (1987): M Despax and J Rojot, 'France', in R Blanpain (ed), *International Encyclopaedia of Labour Law and Industrial Relations*, vol 6

DTI (1998): Department of Trade and Industry, *Fairness at Work*, Cm 3968 (1998)

DTI (2002): Department of Trade and Industry, *Findings from the 1998 Survey of Employment Tribunal Applications* (2002)

DTI (2002a): Department of Trade and Industry, *Consultation Paper – Providing Statutory Rights for Union Learning Representatives* (2002)

DTI (2003): Department of Trade and Industry, *Review of the Employment Relations Act 1999*. Consultation Paper (2003)

Edwards and Gilman (nd), P K Edwards and M W Gilman, *Industrial Relations and SMEs: The UK* (Eiro, nd)

EOC, 2001: J Rubery and D Grimshaw, *The Gender Pay Gap: A Research Review* (EOC, 2001)

Gernigon, Odero and Guido (2000): B Gernigon, A Odero and H Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 *International Labour Review* 33

HSC (2001): Health and Safety Commission, *Levels and Trends in Workplace Injury: Rates of Injury within Small and Large Manufacturing Workplaces* (HSC, 2001)

ILO (1994): International Labour Organisation, *Freedom of Association. Digest of Decisions and Principles of the Freedom of Association Committee and the Governing Body of the ILO* (4th ed, 1994)

ILO (2000): International Labour Organisation, *Your Voice at Work. Global Report under the Follow-up to the Declaration on Fundamental Principles and Rights at Work* (2000)
James and Walters (1999): P James and D Walters, *Regulating Health and Safety at Work: The Way Forward* (Institute of Employment Rights, 1999)
McColgan (1997): A McColgan, *Just Wages for Women* (Oxford University Press, 1997)
Rood (1999): M G Rood, 'Netherlands', in R Blanpain (ed), *International Encyclopaedia of Labour Law and Industrial Relations*, vol 10
Small Business Service (2003): *A Strategic Framework for Women's Enterprise*
Small Business Service (2003a): *Business Plan* 2003
Strasser (1992): R Strasser, 'Austria', in R Blanpain (ed), *International Encyclopaedia of Labour Law and Industrial Relations*, vol 3
TUC (2003): TUC, *General Council Report* 2003
Vallee and Charest (2001): G Vallee and J Charest, 'Globalisation and the Transformation of State Regulation of Labour: The Case of Recent Amendments to the Quebec Collective Agreement Decrees Act' (2001) *International Journal of Comparative Labour Law and Industrial Relations* 79
M Weiss (1999), 'Germany', in R Blanpain (ed), *International Encyclopaedia of Labour Law and Industrial Relations*, vol 7

Appendix

Trade Union Representation, National Agreements and Small Businesses

1 This appendix provides an opportunity for a more detailed examination of the option of extending national agreements to cover all workplaces operating in a particular industry. These agreements are typically concluded between trade unions and employers' associations, and the effect of the extension would be to require employers who are not members of the association or not otherwise party to an agreement to observe its terms. The extension of agreements in this way serves several purposes. The first and most obvious is to give the national agreements a quasi-legislative effect so that they set standards for the industry as a whole. Secondly, in so doing the extension of national agreements addresses the need for fair labour standards in the industry dealing with a range of matters in a detail that it is not possible to cover in legislation. Thirdly, in addition to extending substantive terms and conditions of employment, they also have the potential to extend procedural terms and conditions in which the trade union role will be impressed by the agreement. Although it is this last dimension that is the main focus of this paper, it is not one which has been seriously addressed by earlier extension initiatives in Britain.

The Features of an Extension Procedure

2 How could such a system operate? The first step is to acknowledge that it would have to be activated by a public body exercising legal powers. This could be a government minister, though in the modern world ministers are likely to want to distance themselves from decisions of this kind. The power could be exercised by the CAC which could have the authority to make a statutory order that collective agreements are to apply to all the workers in the industry in question. But having decided who would have the authority to give agreements a quasi – statutory effect, it would then be necessary to determine in what circumstances and by whom an application could be made under the procedure. Here there are a range of options, it being possible to provide that an application may be made by (i) either party to the national agreement, (ii) on the basis of a joint request by both parties, or (iii) by a government minister after consulting the parties. The

question would then arise about the circumstances in which an extension order could be made. One option would be to say that an extension would be mandatory on application, perhaps if certain conditions are met (for example that the parties to the agreement represent a majority or a significant number of workers in the industry).

Extending the Coverage of National Agreements

Procedures for the extension of collective agreements are to be found operating in Austria, Germany, France, Spain and Portugal. In other countries such as Belgium, collective agreements may be extended by legislative act to have universal application in the industry in question. But it is not only in Europe where we find procedures of this kind. A similar procedure has existed in Quebec since 1934, and now operates alongside a statutory recognition procedure similar to that operating in the United Kingdom. In Quebec an application may be made to the Minister of Labour to have an agreement extended to the other employers in the industry in question. It is to be pointed out, however, that the Quebec legislation has been changed recently with its scope diluted: Vallee and Charest (2001). This means that the minister may refuse to extend agreements in industries which are subject to intense global competition, the phrase used in the amending act being that the extension would not cause 'any serious inconvenience for enterprises competing with enterprises operating outside Quebec'. But although this has significantly reduced the impact of the extension legislation, it has by no means been eclipsed. In 2000 there were still 20 extension decrees in operation, down from 29 in 1996. 4 of the 20 were in manufacturing.

3 But the power to extend agreements could be discretionary, with the body empowered to extend an agreement being bound to have regard to a number of considerations. Following the example of Quebec (see Box on this page), these considerations might include:

- The impact on the levels of employment in the industry in question
- The impact of foreign competition in the industry in question
- The nature of the burden which extension would impose on employers
- The low level of terms and conditions in the industry outside the agreement
- The benefits of extension to dispute resolution in the sector having regard to the procedures in the national agreements

- The contribution to gender pay equity in the industry
- The contribution to eliminating casualisation and the informal economy in the industry in question.

If discretionary powers of this kind were built into the procedure, they would be beyond what it would be reasonable to expect a body such as the CAC to undertake. This would therefore point to the power to extend being vested in the minister. A further discretion might be given to determine whether all of the terms of an agreement should be extended to all employers. There might be a power to exclude the very small employers, or to provide for the extension of procedural obligations only.

Extension and Trade Union Recognition

4 Perhaps the most obvious impact of an extension procedure is that it would extend terms and conditions of employment throughout an entire industry or at least those parts of the industry that were covered by the extension order. Indeed previous attempts at extension in this country saw extension as a fair wages initiative rather than a trade union recognition initiative. But how does this assist with the problem of trade union recognition? Companies may be forced to apply national agreements but it does not follow that they would have to recognise the union at enterprise level. Although this may not always be a problem, it would be significant where the national agreement was setting a minimum standard rather than the going rate, as in the case of the printing industry. In that situation the extension of national agreements is not the whole solution. The answer to this problem, however, is that if national agreements were extended throughout an industry, there is no reason why the procedural as well as the substantive parts of the agreement could not also be extended. It would be up to the parties to the agreement to ensure that the procedural terms of their agreements were drafted in such a way as to be capable of application by employers who were not party to them.

5 How would this work? Take for example the BPIF/GPMU National Agreement for the Printing Industry. This provides a detailed procedure for resolving disputes between individual employees and individual companies. Under the various stages of the procedure difficulties involving individual employees may be raised by the individual personally or through the FOC

or MOC with the appropriate level of management. Any dispute or difference that cannot be settled in this way can be moved on to be dealt with by a management representative and a chapel officer. This latter stage may also be used for a 'dispute or difference' which concerns 'a group of employees or an important principle'. Failure to resolve the matter at this level may lead to the dispute being pushed up to be dealt with by national officers of the GPMU and the BPIF, and finally to a joint panel of the trade union and the employers' association. If these procedural terms were extended to non-federated firms, it would have the effect of extending what is a de facto recognition procedure to these companies. This is because the union could raise any individual or collective grievance with the company which would be bound to use its best endeavours to reach an agreement at the earliest possible stage in the procedure.

Extension Procedures and Enforcement

6 The final question for consideration relates to enforcement of the agreement once it had been extended. One immediate problem is that the agreements typically provide that they are not intended to be legally binding. So the extension of the agreement without more would mean extending a non legally binding agreement which both parties could ignore. So it would be necessary to create some kind of enforcement mechanism, which typically might be a provision that the terms of the agreement are to be implied into the contracts of employment of the workers to whom the agreement was extended. This would enable the terms of the agreement to be enforced by way of normal proceedings for breach of contract. But while this might apply to the substantive terms of the agreement, it may not be so appropriate for the procedural terms which the courts are inclined to say are not suitable for incorporation into contracts of employment. This would be true for example of collective grievance or disputes procedures. It would be unrealistic to expect an employer who was not a party to the agreement to accept an undertaking binding in honour to apply it. So there is a problem.

7 There may, however, be a solution. This would involve giving to the body which extends the agreement the power to specify which terms (including procedural terms) are to be incorporated into contracts of employment. This could include those terms which provide that a worker could request

his or her trade union to raise difficulties, disputes and differences on his or her behalf. In cases where there is a common difficulty, dispute or difference affecting a number of workers the union could raise these matters on behalf of them all collectively. Failure on the part of the employer to observe the procedure would be subject to the normal contractual and statutory remedies. This would preserve the intention of the parties to these national agreements that they should not be legally enforceable between the parties who made them (the trade union and the employers' association). It would also serve to ensure that the no strike and no lock out provisions would not be legally enforceable. But it would mean that the substantive terms and conditions as well as the core procedural obligations would be directly enforceable by individual workers through the contract of employment.

Conclusion

8 The extension of collective agreements in this way would mean that all workers in an industry were covered by a collective agreement and the minimum terms which the agreement contains. It could also mean that they were covered by the terms of any procedure agreement operating in the industry. This could mean in practice that the union was entitled to represent its members on individual and collective grievances. But the value of extending disputes procedures in this way would depend greatly on how the disputes procedures were drafted and on whether they were capable of being extended to non-federated firms. Although it may not remove the need for the repeal of the threshold in the statutory recognition procedure, the extension of collective agreements could nevertheless provide a solution to the recognition problems in some sectors.

about the authors

KEITH EWING is Professor of Public Law at King's College, University of London. He is President of the Institute of Employment Rights.

ANNE HOCK founded Popularis Ltd in December 2000. Popularis Ltd is named in Statutory Orders as Independent Scrutineer for the purposes of trades union ballots and elections, and as Qualified Person for the purposes of trades union recognition and de-recognition ballots.

Popularis LTD

Popularis Ltd
55a New Walk, Leicester, LE1 7EA
www.popularis.org

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.

amicus the union

GPMU

KFAT

TUC

unifi changing minds changing work

TUC

The TUC is the voice of Britain at work. With 71 affiliated unions representing nearly seven million working people from all walks of life, we campaign for a fair deal at work and for social justice at home and abroad. We negotiate in Europe, and at home build links with political parties, business and the community.

General Secretary: Brendan Barber

Congress House, Great Russell Street, London WC1B 3LS

www.tuc.org.uk

Amicus

Amicus organises workers in manufacturing, engineering, energy, construction, IT, defence aerospace, motor industry, civil aviation, chemicals and pharmaceuticals, steel and metals, shipbuilding, scientists, technologists, professional and managerial staff, electronics and telecommunications, tobacco, food and drink, textiles, ceramics, paper, professional staff in universities, commercial sales, the voluntary sector, financial services, and the National Health Service.

General Secretary: Derek Simpson

35 King Street, Covent Garden, London WC2E 8JG

www.aeeu.org.uk

GPMU

Graphical, Paper and Media Union organises workers in paper and board making, ink making, graphic design, graphic reproduction, printing, packaging, bookbinding and print finishing. National, regional and local newspapers. Clerical, administration and production workers in all areas of printing, publishing and allied trades, multi-media and information technology.

General Secretary: Tony Dubbins

63-67 Bromham Road, Bedford MK40 2AG

www.gpmu.org.uk

KFAT

National Union of Knitwear, Footwear and Apparel Trades organises workers in knitwear, lace, textiles, hosiery, dyeing and finishing, footwear, leather, gloving, made up leathergoods and other apparel.
General Secretary: Paul Gates
55 New Walk, Leicester LE1 7EA
www.kfat.org.uk

UNIFI

Unifi organises workers in banking, insurance, building societies and financial institutions.
General Secretary: Ed Sweeney
1b Amity Grove, London SW20 0LG
www.unifi.org.uk

£5

PUBLISHED BY
Popularis Ltd

55a New Walk, Leicester, LE1 7EA