Trade union recognition in the UK:

A guide for clients
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1. Introduction

1.1. A trade union pursuing a statutory recognition claim is seeking a legally binding ruling that would require the employer to recognise the union:

- in respect of a defined group of employees (the appropriate “bargaining unit”)
- for the purposes of collective bargaining
- in relation to pay ("pay" currently does **not** include an employee’s entitlement to an occupational pension or employers’ contributions to such schemes), hours and holidays.

The basic principle is that recognition is granted if a majority of the workers in the bargaining unit wish it, provided that the application meets statutory criteria. Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 sets out the statutory recognition rules.

1.2. It should be noted that a union securing recognition will also enjoy considerable statutory consultation rights on issues such as: collective redundancies; business transfers; health and safety matters; and certain changes to workers’ pension entitlements. Its local representatives also gain rights to time off at work, paid by the employer when undertaking union duties, unpaid when simply pursuing union activities.

2. The Central Arbitration Committee

2.1. In England, Wales and Scotland, statutory recognition claims are dealt with by a body known as the Central Arbitration Committee (CAC). Cases brought by trade unions in Northern Ireland are dealt with by the Industrial Court. The CAC and Industrial Court have to make a number of decisions under the statutory procedure (outlined below). Previous decisions reached by the CAC are available on its web site at [www.cac.gov.uk](http://www.cac.gov.uk). In Northern Ireland, the corresponding web site is [www.industrialcourt.gov.uk](http://www.industrialcourt.gov.uk).

2.2. The CAC is a statutory body whose members are appointed by the Secretary of State. In hearing cases it operates as a panel of three comprising a Deputy Chairman, a person with experience of representing workers and a person with experience of representing employers. Its general duty in exercising its power in relation to the trade union recognition regime is to encourage and promote fair and efficient practices and arrangements in the workplace.

2.3. The CAC can be called upon to make a number of key decisions, the most important are as follows:

- whether or not the application is admissible
- what the appropriate bargaining unit should be
- whether or not to hold a secret ballot
- whether the duties imposed on the parties are being observed
- how the ballot should be conducted
- the access that the trade union should have
- the method of collective bargaining
• the appropriate penalty for any unfair practice in the period leading up to a recognition ballot.

2.4. Up to 31 March 2012 (the date of the last Annual Report), a total of 785 applications for recognition have been registered with the CAC. Of these, 232 have gained statutory recognition, 212 were unsuccessful or were still pending and 341 were withdrawn. In the 12 months to March 2012 there was an increase in the number of applications received (43 compared to 28 in the previous year), thereby restoring the workload to the level of two years ago.

2.5. A review of the cases shows that this is not just an issue for big organisations. Unions trying to counter falling membership are quite prepared to pursue recognition claims in smaller undertakings: 45% of cases last year involved organisations with less than 200 employees. The average size of a bargaining unit was 261 workers (heavily influenced this time by just a few cases with large bargaining units), compared to 87 workers the previous year.

2.6. Each new application is allocated by the CAC to a Case Manager (a civil servant who is a member of the CAC’s staff) and that individual liaises with the parties on a day to day basis as the case is processed. The majority of CAC cases take 20-24 weeks to be completed, with complex cases likely to take in excess of 27 weeks. Last year, the average completion time was up from 23 weeks to 29 weeks, reflecting the nature of the cases involved.

3. The recognition process – formal request to employer

3.1. The procedure is summarised in Appendix 1. However, employers who do not wish to concede union recognition should watch out for a membership drive and evidence of petitions being circulated by union officials or activists among the workforce, and be ready to ensure at that point that employees understand the implications of recognition. Such petitions increasingly form a major plank in union arguments to the CAC for accepting their application.

3.2. The statutory procedure commences with the trade union making a formal request for recognition in respect of a bargaining unit to the employer. The request must be in writing, specifying the bargaining unit and referring to the legislation under which the request is made. An application to the CAC is inadmissible where no formal request for recognition has been made and a request is not valid unless it is received by the employer. As such, unions tend to use registered post, providing proof of despatch and delivery, for submitting requests to avoid its application being ruled inadmissible (see, for example, URTU v Booles’ Tools and Pipe Fittings Limited (TUR1/477/2005).

3.3. The employer, upon receiving the request, has 10 working days, i.e. two working weeks, to choose to respond to the request. Where no response is received the union will have the right to formally apply for recognition to the CAC. During this period there are a number of possibilities:

• the employer can agree that the trade union be recognised either on a purely voluntary basis or by way of an agreement for recognition
• the employer can reject the proposal but agree to negotiate, in which case a second negotiating period of 20 working days is triggered, or
• the employer may reject the application outright or fail to respond, in which case the union can lodge an application with the CAC.

3.4. In relation to the second possibility above, the second negotiating period lasts for 20 working days from the end of the first period:
• if agreement is reached during the second period, the parties will enter into either an entirely voluntary arrangement or “an agreement for recognition”
• if no agreement is reached, the union may apply to the CAC to decide both the appropriate bargaining unit (if not already agreed) and whether the union has majority support in the unit.

If, however, the union has rejected, or failed to respond to, a request from the employer to involve ACAS within 10 working days of the employer notifying the union of its wish to enter the second period, the union cannot apply to the CAC.

4. **The recognition process – application to CAC**

4.1. Once an independent trade union has made an application for recognition to the CAC, the panel appointed must decide whether or not the application is valid as well as admissible. The CAC has 10 working days to do this, although this period may be extended, and frequently is to allow the CAC’s Case Manager to conduct a membership check, comparing the employer’s records of numbers employed in the union’s proposed bargaining unit and the union’s membership records, and to permit the parties to comment on the findings.

4.2. The key tests applied by the CAC to determine admissibility as well as validity are:

- Has the union made a legally valid request (i.e. made in writing in the proper form, identified the union and the proposed bargaining unit, stated that the request was made under the Schedule, received by the employer and adhered to the above timescales/negotiating periods and the union has a certificate of independence and the employer employs at least 21 workers)?
- Has the union a membership level of at least 10% within the claimed bargaining unit? In practice, this provision is not proving contentious as virtually all trade unions will have at least this level of membership before applying to the CAC.
- Has the union evidence of likely majority support within the claimed bargaining unit? This would typically involve a trade union relying on their membership levels alone to demonstrate that this provision is satisfied or, alternatively, on a combination of membership levels and a separate petition supporting recognition signed by other staff affected.
- Is any other union already recognised for the purposes of collective bargaining on behalf of any of the workers in the proposed bargaining unit or, is there a competing application?
- Has there been a previous application, or unsuccessful ballot, involving the same union in respect of the same or a similar bargaining unit within the last three years?

4.3. In 2012, the High Court gave a ruling on the territorial extent of the UK statutory recognition laws in the case of a UK company, employing workers under contracts governed by English law, where the majority of workers in the proposed bargaining unit lived outside the UK. The Court upheld a decision of the CAC that four key factors linking the workers’ employment to the UK outweighed other factors which pointed away from the UK. The four factors were that the employer was a UK company, the union had a Certificate of Independence from the UK Certification Officer, the contracts of employment chose English law as the law of the contract and UK National Insurance was paid in respect of the pilots. This decision gives a very broad territorial scope to the statutory recognition regime.

4.4. In other cases, the principal areas of dispute have focused on issues dealing with admissibility rather than on the validity tests.
4.5. The CAC have generally refused to consider that ‘the majority are likely to favour’ requirement is a mathematical test. However, in practice, a claim is likely to fail where a trade union has relatively low membership levels and no supporting evidence. In *GMB and Bisley Office Equipment* (TUR1/729/2010) a 33% level of support was held to be insufficient but the CAC noted that the union ‘need not show that it is supported by an actual majority but rather, it is for a Panel, having considered the parties’ evidence, to conclude whether a majority of the workers in the proposed bargaining unit would be likely to favour recognition - a hypothetical question rather than a strictly arithmetical one.”

4.6. Therefore, an employer faced with a trade union recognition claim should consider carefully the overall levels of union membership and whether there is any additional support for union recognition in the form of a petition. In *Unite the Union v Daniels Group* (TUR1/777/2012) the CAC allowed a petition that was made some 10 months prior to the application, despite the employer’s complaints. In the absence of evidence to the contrary, the CAC did not consider it unreasonable to attach weight to the petition.

4.7. The CAC panel should be encouraged to apply the ‘likely majority support test’ strictly based on tangible evidence, such as relevant correspondence from members of the proposed bargaining unit, rather than their industrial relations experience. The latter, in the majority of cases, operates against the employer. The reason is that its orthodoxy holds: first, that membership in itself is indicative of support for collective bargaining; and second, that some other workers, though not in membership, are silently supportive (see, for example, *Unite the Union v The College of Law* (TUR1/563/2007)).

4.8. Employers may submit their own contrary evidence. However, counter-petitions, which some employers have sought to organise carry, less weight than the union equivalent (in *Unite the Union v Stephens and George Ltd* (TUR1/634/2008) the panel refused to deduct from the union petition all those who had also signed the employer’s).

4.9. The case of *GMB v Capital Aluminium Extrusions Limited* (TUR1/639/2008) gives useful guidance on when an employer’s contrary evidence can be persuasive. In this case, union membership levels in the proposed bargaining unit stood at 46.15%. However, the union failed to produce a petition showing additional support. The employer conducted a snap survey which showed that 61.54% did not support recognition. The panel were persuaded by this because the letter issued to all workers explaining the purpose of the survey, although setting out the employer’s position opposing recognition, did explain that there was no compulsion to provide a reply and that the workers were free to express their personal opinions if they did choose to respond. In addition, workers were given the chance to reply anonymously, and then place the replies in a sealed envelope before handing it to an individual who, the letter indicated, was a Union member. The envelopes were opened in the presence of that member and the MD.

4.10. As noted above, an application is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is recognised for at least one of the workers in the proposed bargaining unit. This is designed to avoid inter-union disputes over competing claims for recognition. The position was confirmed by the Court of Appeal in the case of *NUJ v Central Arbitration Committee, MGN Ltd* (Case No/1770/2004). On our advice, a voluntary agreement was entered into between the employer and a union which, while it had a very limited membership in the particular bargaining unit considered, it had already been recognised by the employer for bargaining units covering many similar workers in the same location.
This reduced the risk of a serious inter-union dispute involving the NUJ and the pre-existing union. The Industrial Courts in Northern Ireland followed the approach of the Court of Appeal in Unite the Union and Flybe (Case No. IL-38/2008). In Independent Pilots Association v Babcock Aerospace Limited (TUR1/742/2011) only one person in the proposed bargaining unit was already covered by an existing collective agreement, but this was enough to make the application inadmissible.

4.11. The 2012 decision in Pharmacists' Defence Association Union v Boots Management Services Ltd (TUR1/823/2012) has imposed new limits on this approach. The Pharmacists' Defence Association Union (PDAU) applied to the CAC seeking recognition in respect of a group of pharmacists. Boots argued that the CAC should not accept the application as Boots already had an established relationship with a listed trade union, the Boots Pharmacists Association, in respect of members of the proposed bargaining unit. The CAC recognised that, while there was a collective agreement in force, it only extended to consultation machinery and not to collective bargaining in relation to terms and conditions of employment, pay, working hours or holidays. It decided that to allow such an agreement to block the PDAU's application was contrary to Article 11 of the European Convention of Human Rights and allowed the application to proceed. In so doing, the CAC read some additional words into the legislation to enable this to happen. The outcome of this case suggests that seeking to block an application for statutory recognition by entering into a "sweetheart" deal with another trade union or staff association on limited, peripheral matters (outside bargaining on pay, hours and holidays) will not succeed.

5. The recognition process – duty on employer after acceptance

5.1. Where the application is accepted by the CAC but the bargaining unit has not been agreed, an employer is under a duty to provide certain information to the CAC and union within five working days, starting with the day after being given notice of acceptance. This information includes a list of the categories of worker in the proposed bargaining unit, their workplaces and numbers of workers in each of the categories at each workplace. Failing to comply can result in the CAC deciding the appropriate bargaining unit.

6. The recognition process – the appointment of a SIP

6.1. As soon as an application is accepted by the CAC, the union may take advantage of a facility to communicate with workers who are in the proposed or agreed bargaining unit. To do so, the union must apply, in writing, to the CAC asking it to appoint a suitable independent person (SIP) to handle these communications. The union bears the costs of the SIP, who will send to any relevant worker information that is provided to it by the union and will charge the union for this service.¹ The CAC will appoint the SIP as soon as possible after the union’s request and will then notify the name, and appointment date, of the SIP to the parties. This notification will begin the ‘initial period’ throughout which the union can send information to workers through the SIP.

6.2. The initial period starts on the day the CAC notifies the parties of the name and date of appointment of the SIP. It continues until the Panel informs the union of the

¹ A person may act as a SIP if specified in the Recognition and Derecognition Ballots (Qualified Persons) Order 2000 and (Amendment) Order 2002 and there are no grounds for believing either that he or she will carry out any functions arising from the appointment other than competently or that his or her independence in relation to those functions might reasonably be called into question.
Qualified Independent Person appointed to conduct a ballot, or the union is awarded recognition without a ballot, or the union withdraws its application.

6.3. An employer who is notified of the appointment of a SIP must comply with duties to provide information to the CAC that will enable the SIP to fulfil its role, including providing the names and home addresses of the ‘relevant workers’ within the (proposed) bargaining unit, within ten working days starting with the day after that on which the employer is informed of the name and date of appointment of the SIP. If a different bargaining unit is then agreed or decided, the details of those ‘relevant workers’ must also be supplied within a ten day window. If workers leave or join the bargaining unit after the initial list has been supplied, there is a duty on the employer to provide updates. The CAC may order the employer to remedy any failure to observe these duties and may also issue a declaration that the union is recognised.

7. The recognition process – the impact of a TUPE transfer

7.1. In CWU v Orange Personal Communications Systems (TUR1/679/2009), the CWU applied for recognition for a group of employees who were then transferred under TUPE to two new employers. As Orange was no longer the employer, it was confirmed that the application could no longer proceed against them. As for the new employer, the CWU was unable to identify a legal provision which permitted the whole or partial transfer of an uncompleted application to an employer different from that to whom the request for recognition was made.

8. The recognition process - what should be the appropriate bargaining unit?

8.1. Following acceptance, the CAC has twenty working days in which to try to help the parties reach agreement on what the appropriate bargaining unit is. This may involve ACAS or CAC mediation.

8.2. If no agreement is reached, the CAC has ten working days to decide whether the union’s proposed bargaining unit is appropriate and if not, what unit is appropriate. In doing so, the CAC must be satisfied that the bargaining unit is ‘compatible with effective management’. In addition, the CAC must take into account a number of lesser criteria:

- the views of the employer and the union
- existing national and local bargaining arrangements
- the desirability of avoiding small fragmented bargaining units within an undertaking
- the characteristics of workers falling within the proposed bargaining unit and any employees of the employer whom the CAC considers relevant and
- the location of workers.

8.3. The landmark case here is TGWU v KwikFit (TUR1/126/2001), a case where the employer attempted unsuccessfully to overturn the CAC’s initial decision in favour of the union by way of judicial review. The Appeal Court said that this was a one or two stage process:

- first, testing the union’s proposed unit in the light of the company’s argument that a different unit was appropriate
- second, considering an alternative bargaining unit only if the CAC considers the union’s proposal is inappropriate.

8.4. This test has been incorporated into the legislative regime. However, it requires the CAC, in taking the employer’s view into account for the purpose of deciding the
appropriate bargaining unit, to consider any evidence put forward by the employer that another bargaining unit would be more appropriate.

8.5. The practical effect is still that the union’s view of what is ‘appropriate’ will carry more weight than the employer’s view and the Courts are reluctant to interfere with the CAC’s decision. See, for example, R (on the application of Cable & Wireless Services UK Ltd) v CAC & Communication Workers Union (2008 EWHC 115), where the High Court stated that the CAC was an expert body and the Court would only interfere with its decision if it could be shown to have acted irrationally or made an error of law.

8.6. However, a well-organised employer can still succeed when arguing for an alternative bargaining unit. The company must concentrate on proving the incompatibility of the union’s proposal with effective management and offer an alternative that is better able to withstand the CAC’s analysis. In so doing, the main challenge is to be well-organised and present solid evidence, as in Unite the Union v Kettle Foods (TUR1/557/07), or risk failing, as in Unite the Union v Sports Direct International (TUR1/619/2008). An employer should look closely at working practices and the terms and conditions and benefits provided to staff in the union’s proposed bargaining unit as well as to other employees whom the company may be seeking to argue should be included within an alternative bargaining unit. This comparison should seek to establish what the employees in the bargaining unit, and those excluded by the union, have in common (and also what distinguishes them) in relation to pay and other terms, working practices and patterns, the degree to which they backfill or perform each other’s roles, their functions, how they are managed, history, organisational structure, promotions, qualifications and location. For example, what similarities and shared characteristics exist which means they should be treated as one larger unit? Can it be genuinely said that workers outside the union’s proposed bargaining unit are doing the same or similar work as employees within the proposed bargaining unit? In addition, would separation hinder effective team-working? The company should consider use of organisation charts and the structure and operational nature of the business generally. For some examples of an employer arguing successfully for a larger unit, see Unite the Union v Harry Lawson Limited (TUR1/620/2008), CWU v MCI (TUR1/482/2005), TGWU v Calor Gas Ltd (TUR1/198/2002) and Unite the Union v The College of Law (TUR1/563/07). In Unite the Union v Kellycare (TUR1/781/2012), the union’s unit was rejected by the CAC and the narrower of the two alternative, wider, proposals put forward by the employer adopted.

9. The recognition process – changes to the bargaining unit

9.1. In circumstances where the CAC rules against the applicant union on the issue of the bargaining unit, or a bargaining unit is agreed that is different from that initially proposed, the CAC is required to move a step back and determine again whether or not the application is valid. Therefore, an employer may defeat an application, as in ISTC v Yamada (Europe) Ltd (TUR1/372/2004), relying on the arguments summarised above in relation to admissibility.

9.2. In an unusual development, the NUJ brought a case, National Union of Journalists v Bristol News and Media Ltd (TUR3/3/2006), under paragraph 66 of Part III of Schedule A1. This allows for the determination of whether the original bargaining unit awarded under the legislation is no longer appropriate and, if so, what would constitute an appropriate bargaining unit. This followed some restructuring at the employer. A new, wider bargaining unit was determined by the panel and it ordered that a secret ballot be held, which the union won.
10. **The recognition process - should a secret ballot be held?**

10.1. Once an application for recognition has been accepted and the bargaining unit determined, and providing the CAC is satisfied that the claim remains admissible, the panel then has to decide whether it must call a ballot. To win a ballot, the union has to meet two requirements:

- secure a majority of the votes cast, and
- win the support of not less than 40% of all those entitled to vote.

10.2. Assessing whether or not a ballot is needed will usually involve the CAC carrying out a further membership check at the relevant time, to determine the percentage of employees in the bargaining unit who are union members. Where union membership levels are below 50% the panel is obliged to order that a secret ballot be conducted. However, when membership levels exceed 50% the CAC must issue a declaration that the union is entitled to be recognised to conduct collective bargaining without a ballot — unless at least one of three qualifying conditions apply. It will be for the employer to build and present a persuasive case to the panel that it should conclude that one or more of the following applies:

- that the CAC is satisfied a ballot should be held in the interests of good industrial relations
- that the CAC has evidence, which it considers credible, from a significant number of union members in the bargaining unit that they do not want the union (or unions) to conduct collective bargaining on their behalf
- that membership evidence regarding the circumstances in which workers joined the union or their length of membership casts doubt on whether a significant number of the union members in the bargaining unit want the union (or unions) to conduct collective bargaining on their behalf.

10.3. Over 20 cases have been reported where union membership levels were in excess of 50% but, notwithstanding that fact, a ballot was still ordered. The majority of cases involved union membership levels of between 50% and 60% and, in reality, it is extremely difficult to persuade the CAC to grant a ballot in such circumstances. The historical average is that in 76% of cases where a union has demonstrated majority membership, recognition has been granted without a ballot.

10.4. In practice, it is the first exception, that a ballot is required in the interests of good industrial relations (GIR), which has been argued by employers most often when faced with the prospect of automatic recognition. Employers seeking to argue for a GIR ballot should consider the following points which have caused the CAC to order a ballot in the past:

- evidence that a significant number of the employees want a ballot (credible emails/letters to CAC for example)
- there is conflicting evidence over the wishes of the majority of the workforce
- that a ballot is needed to clear the air (reflecting union and employer antagonism) and the absence of a ballot would result in ongoing poor employee relations
- the majority membership level is very close to 50%, or is contested, and therefore a ballot would provide legitimacy to the result
- there are particular reasons why membership levels are as they are, for example, the union offers particular benefits, and these reasons are not associated with a wish for recognition which should be tested by a ballot
- employees do not understand what collective bargaining entails and a ballot would allow both sides to explain and allow an informed decision to take place
- a ballot would legitimise the recognition and, as a result, the employer would agree to engage more positively with the resulting process. This could be coupled
with an expression of willingness from the employer to cooperate fully with the union if they win the ballot. However, if recognition was imposed, it would do the minimum to comply.

10.5. In *Unite the Union (formerly known as Amicus) v Harrods Limited* (TUR1/559/2007), the employer succeeded in arguing that the second exception applied where the majority of employees wrote letters and emails against recognition. In such circumstances, the CAC will take into account whether undue pressure has been exerted upon the employees and whether their views were expressed confidentially.

10.6. In *Unite the Union v GE Caledonian Limited* (TUR1/759/2011) the CAC decided that it could not ignore the significant number of workers who had in different ways expressed their support for a secret ballot on whether the union should be recognised or not.

11. **The recognition process - how should the ballot be conducted?**

11.1. In deciding the type of ballot to be held — i.e. workplace, postal or indeed combined, the CAC is required to consider:

- the likelihood of the ballot being affected by unfairness or malpractice if it were conducted at a workplace or workplaces
- costs and practicality, or
- any such matters as the CAC considers appropriate.

11.2. In practice, the CAC writes to both parties seeking their views on the format of the ballot. Where the parties agree, it is normal for the CAC to order that a ballot takes place by the agreed method.

11.3. An analysis of all of the ballots undertaken up to October 2008 suggests that a workplace ballot will often reward the employer. The employer has been successful in 58.33% of workplace ballots and 50% of combination ballots, compared with just 22.35% of postal ballots. However, postal ballots are ordered much more often than workplace ballots and this is an increasing trend. This is the outcome of a policy decision by the CAC. In these circumstances, the employer’s next best option tends to be a combination ballot.

12. **The ballot process - what duties must the parties observe?**

12.1. Where an employer is informed by the CAC that a ballot will take place, the employer is placed under five duties as follows:

- to co-operate generally with the union and the Qualified Independent Person (the QIP is appointed by the CAC) conducting the ballot
- to give the union reasonable access to the workers within the bargaining unit (see further below)
- to give to the CAC within 10 days the names and home addresses of all the workers within the bargaining unit and to notify the CAC as soon as practicable should any workers leave or join the bargaining unit
- to refrain from making any offer to workers in the bargaining unit which has, or is likely to have, the effect of inducing any or all of them not to attend the union access meetings and which is not reasonable
- not to take or threaten to take any action against a worker because they either planned to attend a meeting with the union or in fact attended/took part in any meeting between the union and the other workers in the bargaining unit.
The CAC may ultimately issue a declaration for recognition if the employer fails to comply with an order to remedy its failure.

12.2. The fifth is supplemented, so that an employer will be taken to have failed to comply with this obligation if:

- the employer refused a request for a meeting between the union and the workers to take place in the absence of the employer or any representative of the employer
- the employer or an employer representative attended such a meeting without invitation
- the employer seeks to record or seeks be informed of what takes place in any such meeting, or
- the employer refuses to give an undertaking that it will not seek to record or find out what took place at such a meeting.


13. The ballot process - unfair practices

13.1. Seven unfair practices are specified in the legislation and they apply to both an employer and a trade union once a ballot has been ordered. These significantly limit the way in which both parties (particularly an employer) can campaign during a recognition ballot. The seven unfair practices are:

- offering to pay money or give money’s worth to a worker entitled to vote in the ballot in return for the worker’s agreement to vote in a particular way or to abstain from voting — effectively purchasing of votes is outlawed
- making an ‘outcome specific offer’ to a worker. An outcome specific offer is defined as an offer which is conditional on the CAC issuing a declaration that the union is, or is not, entitled to be recognised
- coercing or attempting to coerce a worker entitled to vote to find out whether the worker intends to vote/abstain or how he/she intends to vote (or has voted)
- dismissing or threatening to dismiss a worker
- taking or threatening to take disciplinary action against a worker
- subjecting or threatening to subject a worker to any other detriment
- using or attempting to use undue influence on a worker who is entitled to vote (for example, threatening or inducing employees by linking a bonus payment to the outcome of the ballot).

An unfair practice complaint must be made on or before the first working day after the date of the ballot or, if votes can be case on more than one day such as in a postal ballot, the last of those days (see TGWU v Comet Group Limited (TUR1/501/2006) where the complaint was made too late). If upheld, the CAC can issue a remedial order (steps to be taken to mitigate the effect of the unfair practice) and/or order a new ballot. In some serious cases, the CAC can also order that a union is or is not recognised.

13.2. Reflecting on the lack of success of unfair practices complaints to date, the Chairman of the CAC has noted that the relevant statutory provisions are quite testing:

“in that the party making the complaint has to satisfy three requirements: first, whether the other party took one of the actions listed in the Schedule; secondly, whether the motivation for that action was to influence the result of
the ballot; and thirdly, whether that action had the effect of changing, or was likely to change, a worker’s intention to vote.”

13.3. However, this should not lull employers into a false sense of comfort as any union challenge, successful or not, will threaten the momentum or direction of the employer’s campaign. To avoid a successful challenge, the objective of an employer should be to communicate thoroughly on the issue and present a legally reviewed argument, which is factually based, reasoned and balanced, as to why trade union recognition is not necessary or desirable within the organisation. This could legitimately focus on questioning trade union promises, presenting objective reasons as to why union recognition could have an adverse impact on the organisation. Heavy-handed, over-zealous managers, and in some cases the activities of independent consultants, will need to be managed carefully to avoid falling foul of the legislation.

13.4. Finally, it should be noted that unfair practice complaints are not just pursued by the unions. In *Prospect & PCS v National Maritime Museum* (TUR1/529/06), the employer complained that the union had asked the QIP to circulate campaigning materials to all workers’ home addresses on the grounds that this was outside the access agreement terms; was recommended by the Code of Practice only as a means for reaching ‘atypical’ workers; that its being sent in close proximity to the ballot papers in a similar mailing by the QIP might prejudice the result in their favour; and that the employer should have been alerted. The CAC disagreed — all the actions were permissible.

14. The ballot process - what access must the Trade Union have?

14.1. In circumstances where the CAC has ordered a ballot to determine whether the trade union should be recognised for collective bargaining purposes, an employer is under a legal duty to cooperate generally in connection with the ballot and to give the trade union such access to the workers in the bargaining unit as is reasonable to enable the union to inform the workers of the object of the ballot and to seek their support and opinions on the issues involved.

14.2. The Code of Practice, entitled ‘Access and Unfair Practices during Recognition and De-Recognition Ballots’, gives practical guidance about the issues arising when an employer is required to grant access. Its advice on trade union access during a recognition ballot does not extend to access outside the workplace and outside working hours, as a union is perfectly free to access workers in whatever way it sees fit outside the workplace (e.g. hiring a public hall to hold a meeting or using local media to put across its case). The Code deals with specific circumstances of access during the period of recognition or de-recognition ballots. Whilst the Code is not legally binding, any breaches will be admissible in evidence and will be taken into account before proceedings at the CAC.

14.3. An employer who refuses to cooperate with the ballot and to provide reasonable access during the specified ballot period (normally a period of 20 working days) could ultimately be faced with recognition being awarded without a ballot.

14.4. Once the CAC have indicated their intention to conduct a union recognition ballot the parties will be given a period of time to draw up an ‘access agreement’. Access during the ballot period can take many and varied forms depending on the type of workplace and the characteristics of the workforce.

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2 Chairman’s Review of the Year, in CAC Annual Report 2007-8
14.5. Normally, the trade union will put forward their proposals for access in writing for the employer to respond. Where access cannot be agreed voluntarily the CAC can intervene and rule on the issue if required. Access is usually given to individual union members employed by the employer who are nominated as lead representatives by the trade union, or to full time union officials. It is envisaged that access will take place at the workplace during normal working hours. The CAC will have regard to the employer’s typical methods of communicating as a benchmark for determining how the union should communicate. In essence, however, the union will be granted meetings with the workforce.

14.6. The Code envisages both small and large group meetings. It is suggested that the union should be granted at least two large group meetings during the ballot period, which will ordinarily be the 20-working-day period as specified by the CAC in the run up to the ballot. The first large group meeting should take place during the first 10 working days of the ballot period and the second should take place in the second 10 working days of the ballot period. However, if employees work on different shifts the practical effect could be a requirement for more than two meetings to enable the union to address everybody. The Code envisages that large group meetings will last 30 minutes.

14.7. With regard to small group meetings the CAC suggests that surgeries may be appropriate. This would ordinarily involve a full time official of the union having a private room on site in which to meet with people within the bargaining unit who wish to have a short period of time with union officials on a one-to-one basis or in groups of two or three employees at a time. In addition to this type of access, there are often arrangements that enable the union to have access to electronic communications. The union will also be entitled to have a notice board at the company’s premises.

14.8. The issue of access is highly emotive and can result in disputes between the parties about consistency and equality of access. An employer will need to think carefully about how access should be managed in their workplace and what their own strategy for communicating and accessing the workforce should be in the context of trade union access rights. Planning their own approach on communication channels and key messages for them as a business should be done at an early stage, in advance of the trade union having formal access rights under the CAC process.

15. The ballot process – the declaration

15.1. To achieve recognition, the union must not only achieve a simple majority of votes, but also attract the support of at least 40% of those entitled to vote. Once the ballot result is known the CAC will issue a Declaration. Depending on the voting, this will state either:

- that the union is entitled to be recognised, or
- that the union is not entitled to be recognised.

In cases where the CAC decides no ballot is required because the evidence of majority union membership is sufficient, the Declaration is always of the former kind.

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3 Very rarely, the CAC may order a rerun of the ballot because of complaints about the conduct of the ballot, not attributable to the employer or union, when it concludes that workers have not had a fair opportunity to vote.
16. What method of collective bargaining should apply?

16.1. Once the ballot result is declared there are two possibilities. A losing union is prevented from making a further application for the same group of workers for a period of three years. Alternatively, where the union wins after a secret ballot, the employer is required to recognise that union for collective bargaining purposes relating to the pay, hours and holidays of the workers identified within the appropriate bargaining unit. The statutory procedure contains both a negotiation period of 30 days and an agreement period of 20 days for the parties to agree an appropriate collective agreement to enable bargaining to take place. In the event that an agreement cannot be reached, the CAC will impose recognition and, in doing so, take into account the model collective agreement set out in the Trade Union Recognition (Method of Collective Bargaining) Order 2002.

16.2. This Order contains a model collective agreement known as ‘the specified method’. There is little to be gained by an employer failing to reach an agreement with the union if the union has been successful in the ballot. The specified method has disadvantages. The method imposed by reference to this Order will be a legally binding arrangement between the parties and can be enforced in the ordinary civil courts. The great majority of collective agreements in the UK are deliberately framed to avoid possible litigation - they are binding in honour only and cannot be enforced through the civil courts.

16.3. Furthermore, the specified method is prescriptive in terms of how collective bargaining should take place and how many representatives should be appointed. Consequently, there is limited scope for flexibility if the specified method is imposed. Admittedly the parties can agree to vary the terms of the imposed method, including the requirement that it be legally binding, but following the breakdown of negotiations, the circumstances for reaching such an agreement will not be good.

16.4. When negotiating a method of collective bargaining the employer should seek advice on what arrangements might suit the organisation best. It can help to have an informed awareness of the limits to what the union will be awarded if it has to revert to the prescribed method. The trade union can be expected to press for more and a watchful employer can use the method to contain such ambitions and secure a better deal.

17. Appealing the decisions of the CAC

17.1. The Schedule contains no proper appeal mechanism to challenge decisions of the CAC on a point of law. The only possibility is to use ‘judicial review’ as an appeal mechanism. Under the judicial review procedure, the High Court can overrule the CAC (as the CAC is a statutory body) if it is persuaded that the CAC has acted in excess of its powers or has plainly misapplied the law. The practical problem is that given the huge discretion given to the CAC at each stage of the procedure, it is extremely difficult to argue successfully that the CAC has acted in excess of its powers.

17.2. Of 785 applications made to the CAC between June 2000 and March 2012 under the Trade Union Recognition provisions in Part 1 of the Schedule, only nine have resulted in applications for judicial review of CAC decisions and only three have been successful. The Court of Appeal has underlined the fact that the CAC is ordinarily the place where industrial relations decisions of this nature should be taken and the Court should be reluctant to intervene. In summary, the judicial review process is one in which few parties will be able credibly to mount a case and where fewer still can hope to succeed.
18. Derecognition

18.1. Although most of the focus in this briefing has been recognition claims, it is important to appreciate that Schedule A1 also deals with derecognition. Following the expiry of three years from a declaration of recognition by the CAC, an employer may issue a request to the trade union to agree an end to the collective bargaining arrangements. Where the union rejects or fails to respond positively to such a request, the employer may apply to the CAC with a view to a secret ballot being held to decide whether the bargaining arrangements should be ended. As with the recognition procedure, for the employer to be successful at de-recognising a trade union it must secure the support of 40 per cent of the workers within the bargaining unit as well as a simple majority. To date, there have been no successful derecognition applications.

*Please note this material is not intended to be exhaustive or a substitute for legal advice. You are advised to seek specific advice upon any given problem.*

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Our experience

Eversheds has undertaken more advisory work and represented more companies at the CAC than any other law firm.

Our specialist labour law team has unrivalled experience in both UK and international labour law and trade unions. Effective legal advice in this field, in particular, requires experience and not just book-learning. Our continuous exposure to industrial relations issues gives us a knowledge of strategy and tactical options which we deploy for the benefit of our clients.

Areas of expertise

- trade union collective agreements
- formal claims for trade union recognition
- collective bargaining
- industrial action
- strike injunctions
- information and consultation during large-scale redundancies and business transfers
- establishing employee consultation groups
- collective grievances and failures to agree
- rights of trade union officials and members
- European works councils
- international labour relations
- international or global framework agreements.

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