Chapter 3
Collective Agreements

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Chapter 3
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Introduction

A Collective Agreement is an agreement reached between a union and an employer, typically as a result of collective bargaining. The majority of Collective Agreements are reached on a voluntary basis with the employer agreeing to recognise either one or more trade unions for collective bargaining purposes. A Collective Agreement is not usually enforceable as a matter of law and is usually concluded in a climate of co-operation between the parties.

A Collective Agreement may be incorporated into individual contracts of employment of the workers covered and thus assume contractual force indirectly.

There are various rules about the legal enforceability of Collective Agreements. The Trade Union Labour Relations (Consolidation) Act 1992 (‘the Act’) seeks to define what is meant by a ‘Collective Agreement’. It refers to a Collective Agreement as any agreement or arrangement made by, or on behalf of, one or more trade unions and one or more employers or employers associations and relating to one or more of the following matters:

- terms and conditions of employment, or the physical conditions in which any workers are required to work;
- engagement, non engagement, termination, suspension of employment or duties of employment, of one or more workers;
- allocation of work or the duties of employment between workers or groups of workers;
- matters of discipline;
- a workers membership or non membership of a trade union;
- facilities for officials of trade unions; and
- machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers associations of the right of a trade union to represent workers in such a negotiation or consultation, or in the carrying out of such procedures.
‘Collective Bargaining’ means negotiations relating to or connected with any of the above matters. It is clear, therefore, that an agreement can be a Collective Agreement irrespective of whether it is formal or informal or whether it is an oral agreement or in writing.

Legal enforceability

In order for a Collective Agreement to be legally enforceable there has to be some intention by the parties to enter into a legal relationship. It is often the case that Collective Agreements will specify aspirational principles and values that both the union and the employer agree to adhere to. Such wording may be vague and imprecise so as to make it particularly difficult to enforce. As such there is a common law presumption that Collective Agreements should not be legally enforceable unless the parties specifically agree that it should. This common law position was clarified in the Act.

Section 179 of the Act stipulates that Collective Agreements should be conclusively presumed not to have been intended by the parties to be legally enforceable unless the agreement:

- is in writing; and
- contains a provision (however it may be expressed) stating that the parties intend that the agreement should be a legally enforceable contract.

Where there is a Collective Agreement that does satisfy the above conditions, then it should be conclusively presumed by any Court or Tribunal to have been intended by the parties to be a legally enforceable contract. It is possible for part of a Collective Agreement to be legally enforceable if the parties confirm in writing within the Agreement that one or all parts of the Agreement should be legally enforceable. Where this is the case, the remainder of the Agreement shall be conclusively presumed not to have been intended by the parties to be a legally binding contract.

A straightforward point arising from the above is that oral agreements between an employer and a union can, therefore, never be enforceable at law. Furthermore, the stipulation that there should be a clear statement of the parties intention to show that they accept legal liability for their commitments requires the parties to commit to such a provision in a clear and unambiguous manner.
Incorporation of collectively bargained terms into individual contracts

It is a requirement of Section 1 of the Employment Rights Act 1996 that an employee beginning employment is entitled to a written Statement of Particulars of Employment (see chapter 1). This written statement of particulars of employment should stipulate whether there are any Collective Agreements which directly affect the terms and conditions of employment. This is an important statutory provision particularly for employees whose terms and conditions of employment, or at least some of their terms and conditions of employment, are subject to collective bargaining.

Where an employer recognises the union for collective bargaining purposes and there is a Collective Agreement in force, when endeavouring to establish precise terms and condition of employment governing that individual, it is important to have due regard to the terms of any Collective Agreement as well as to the individual contract of employment. This is so, irrespective of whether or not the Collective Bargaining Agreement between the employer and the union is legally enforceable.

This is because a Collective Bargaining Agreement often contains the details of how negotiations between the employer and the union will be conducted in respect of terms and conditions of employment for the relevant employees. In some cases the agreements will be incorporated into the individual’s contract without the need for express agreement by the parties to the contract (employee and employer). Incorporation can occur in three ways:

- express incorporation;
- implied incorporation; and
- incorporation by way of agency.
Express incorporation

For a collectively bargained term to be expressly incorporated into an individual contract of employment, there has to be some clear reference, either in the contract of employment or the Collective Agreement, that specific collectively bargained terms shall form part of an individual’s terms and conditions of employment. On the face of it this would seem relatively straightforward but there are often problems of interpretation.

The Court of Appeal in the case of *Henry and Others -v- London General Transport Services Limited 2002 IRLR 472*, considered carefully the individual contract of employment, the terms and conditions of employment and the effect of a Collective Agreement.

London General Transport employed 1500 staff at different garages. The employers and the recognised trade union, the Transport and General Workers Union entered into negotiations relating to changes in terms and conditions of employment. These negotiations resulted in a framework agreement which contained details of reduced rates of pay and terms and conditions which were generally less favourable to the work force. The union conducted a number of work place meetings and thereafter informed the employers that the majority of the 1500 employees affected had consented to the new terms. There was no ballot of employees despite the fact that this was the previous practice on other occasions when negotiations had resulted in contractual change. The Company then drew up notices outlining the changes in pay and conditions and these were displayed at the various workplaces. Employees were then asked to sign individual statements of changed terms and conditions of employment.

With effect from 5th November 1994 new terms and conditions came into effect at the Stockwell Garage. This was the case even though a number of employees had refused to sign statements accepting the new terms. The Company received a petition signed by more than 130 of the staff at Stockwell two days later expressing their dissatisfaction with the framework agreement, but employees continued to work under protest. There was a further petition submitted at the Stockwell Garage again by approximately 130 staff in December 1994 and the workforce requested a ballot in respect of the new terms and conditions, but no ballot was held.

Ultimately proceedings were commenced in the Employment Tribunal in November 1996 some two years later. The claim was an unlawful deduction-from-wages application.
In the first instance the Employment Tribunal upheld the complaint of the employees. The Tribunal were of the view that, notwithstanding that there had been a tradition of collective negotiation between the Company and the union, the agreement that had been reached between the union and the Company dealt with fundamental changes including a reduction in pay and it was insufficient to establish that fundamental changes could be incorporated into individual contracts by virtue of collective bargaining, notwithstanding the existence of the framework agreement. The Tribunal was looking for ‘strict proof’ that employees had accepted the terms and conditions. It appears that the Tribunal was looking for evidence of a ballot. No ballot was conducted and the Tribunal was not satisfied with the framework agreement that had been reached between the Company and the union.

The Employment Appeal Tribunal upheld an appeal against the decision by the employers. The EAT concluded that the Tribunal was wrong to conclude, because the changes envisaged by the employer were ‘fundamental’ i.e. they related to pay, that it was necessary to demonstrate strict proof, by reference to custom and practice, that employees had accepted the changes. The EAT also considered that the petitions in themselves were not sufficient evidence that employees had not accepted the terms and conditions of employment which, when one considers the size of the workforce involved, this was probably the correct decision to have reached. The employees thereafter appealed to the Court of Appeal and on 21st March 2002 the Court of Appeal dismissed the appeal. The Employment Tribunals were wrong in holding that the framework agreement that had been reached was insufficient evidence of the custom and practice which was capable of affecting fundamental change to the terms and conditions of employment.

The Court of Appeal accepted that it is necessary when establishing a custom and practice for there to be clear evidence of practice and that any argument in support of custom and practice should be properly scrutinised and tested. However, the responsibility on an employer to demonstrate strict proof in these circumstances is not required according to the Court of Appeal. When establishing custom and practice it has to be more likely than not that a custom and practice exists on the balance of probabilities.

A further point considered by the Court of Appeal in this case was the fact that the employees themselves had worked for two years under the new terms and conditions, notwithstanding that they were maintaining that the new terms and conditions had not been accepted and that they were working under protest. In this regard the employees relied on the petition. However, the very fact that the employees had worked under the new rotas and terms of employment, as had all of the other employees who had not signed the petition, was evidence that they had accepted the revised terms.
Implied incorporation

In the absence of an express agreement, it is possible to infer agreement to incorporate the appropriate collectively bargained term. The distinction between express incorporation and implied incorporation is that express incorporation would ordinarily require the individual employment contract to expressly state that certain of its terms are regulated by a Collective Agreement under Section 1 of the Employment Rights Act 1996. Implied incorporation is where there is a clear custom and practice that terms of collective agreements are incorporated into individual contracts. In the case of Henry and Others -v- London General Transport Services Limited it is in effect a combination of express and implied incorporation. In that case, it was a framework agreement expressly agreed between the Company and the union which intended to vary the terms and conditions of employment of the work force. The union took the framework agreement to employees and indicated thereafter that the majority of employees had accepted the terms of the framework agreement. As stated above, the Court of Appeal was satisfied that the union had authority to bind the employees to the terms of the framework agreement and were satisfied that the union’s word that a majority of the employees had accepted the terms of the framework agreement was sufficient. The Tribunal therefore took this view irrespective of the fact that the terms of the framework agreement had not been signed or expressly accepted by individual employees.

Incorporation by way of agency

Under the laws of agency, for a union member to be bound by an agreement entered into by a union, the union must have authority to negotiate on the member’s behalf. This can be actual or ostensible authority, once again express or implied. Implied authority is that which is inferred from the conduct of the parties and the circumstances of the case. In the case of Harris -v- Richard Lawson Auto Logistics Limited, the Company and the union entered into a Closed Shop Agreement covering employees of a Depot where Mr Harris was employed. Clause 5 of the Agreement under the heading of ‘Recognition’ dealt with the position of the Shop Steward. It stated ‘…the Company will recognise the Shop Steward and the Deputy Steward, formally elected by the members of the Depot, as the official representatives of the union. The Stewards agree to act in a responsible manner and confine themselves to specific issues relating to the welfare of their members’. There was an agreement reached between the Company and the Shop Steward in 1996 to resolve problems over holiday pay. Mr Harris was
a lorry driver employed by the Company and in 1997 he volunteered for redundancy. His holiday pay was calculated by reference to the 1996 Agreement between the Company and the Shop Steward. He contended that this Agreement was not binding and that he was entitled to be paid in accordance with earlier agreements which would have meant that he would have received a further £4,290 by way of additional holiday pay. There was an issue before the County Court as to whether or not a Shop Steward had actual or ostensible authority to sign the 1996 Agreement and bind the drivers. Judge Poulton dismissed the claim on the grounds that the Agreement was ‘well within’ the Shop Stewards implied or ostensible authority. This point was presented to the Court of Appeal but the appeal was rejected and the Court of Appeal supported the view of the County Court Judge. They agreed that the Shop Steward had apparent or ostensible authority to negotiate revised terms of employment and, as a result, the terms of the agreement negotiated by the Shop Steward applied to Mr Harris’ holiday pay entitlement.

**Provisions restricting rights to take industrial action**

Notwithstanding the above and the ability of an individual or a Company to enforce collective negotiated terms on the basis that they constitute an express or implied individual contractual term, there are restrictions relating to provisions which seek to prohibit the right of individuals to participate in industrial action.

Any term of a Collective Agreement which prohibits or restricts the right of workers to engage in a strike or other industrial action does not form part of any contract between a worker and employer unless the following conditions are met the Collective Agreement must be:

- in writing;
- contain a provision expressly stating that those terms shall or may be incorporated in such a contract;
- be reasonably accessible at the place of work to the worker to whom it applies and be available to him to consult during working hours; and
- is one where each trade union which is a part of the Agreement is an independent trade union.
It is a further condition that the terms of the Collective Agreement must be expressly or impliedly incorporated into the individuals terms and conditions of employment. Both provisions are contained in Section 180 of the Act and should be read in conjunction with the trade union’s statutory right to call upon its members to take part in industrial action pursuant to other statutory provisions of the Act, the details of which are dealt with in Chapter 7 below.

**Trade union recognition**

The Employment Relations Act 1999 (‘ERA’) is the first significant piece of legislation to enhance union powers since the Employment Protection Act of 1975. This Act, contains the Government’s Union Recognition Regime and amends the Trade Union and Labour Relations (Consolidation) Act 1992 by adding a new Schedule A1 to it. The provisions came into force on 6 June 2000. Prior to this date, irrespective of a union’s level of membership within an undertaking and amongst particular workers, if a Company did not wish to recognise the union for collective bargaining purposes and enter into a collective agreement, there was no statutory mechanism available to a union to force the Company to do so.

The procedure enabling trade unions to apply for recognition requires a formal application to the Central Arbitration Committee (‘CAC’). This process is complicated. Schedule A1 is long and complex divided into nine parts with 172 paragraphs.

The CAC has been established for many years and was initially introduced to arbitrate in particular disputes between unions and Companies. The CAC is a permanent independent body with statutory powers whose main function is now to adjudicate on applications relating to the statutory recognition or derecognition of trade unions for collective bargaining purposes in circumstances where recognition or derecognition cannot be agreed voluntarily. The committee consists of a Chairman, (Sir Michael Burton an experienced Barrister), 11 Deputy Chairmen, 24 members experienced as representatives of employers and 22 members experienced as representatives of workers.
Schedule A1

The following is an overview of the key provisions of Part 1 of Schedule A1.

Formal written request

In order for a union to commence the legal process for recognition it must make a formal written request pursuant to Paragraphs 48 and 49 of the Schedule. The written request must be provided to the employer and must be clearly presented as a request for recognition under the Schedule. It must also state the bargaining unit over which the trade union is seeking recognition rights. The union must have a Certificate of Independence and the employer must employ at least 21 workers on the date that the request is made, or employ an average of at least 21 workers in the 13 weeks ending with that day.

Once a trade union has made a formal request for recognition there will be a fairly short period of time, known as the ‘first period’, of 10 days at the end of which the employer has to decide whether to:

- agree to recognition;
- agree to negotiate further; or
- refuse recognition.

If the employer is agreeable to recognition, the parties will agree a bargaining unit and agree that the union is recognised as entitled to conduct collective bargaining on behalf of that unit. There is then no need to continue with the statutory procedure because the union has recognition. There would, however, be important negotiations between the employer and the union to agree the precise terms of any collective bargaining arrangement as this will indirectly impact upon individual terms and conditions of employment for the workers in the bargaining unit irrespective of whether or not they are union members.

An employer may not be prepared to agree to recognition as a result of a formal request by a union but, equally, it may not feel it is appropriate to reject the request out of hand. In these circumstances the Schedule allows the parties a further period of 20 working days (or longer by agreement) to enter into negotiations about recognition. In many cases an employer and union choosing to trigger this second period would seek the assistance of the Arbitration and Conciliation Body known as ACAS to enable them to endeavour to reach an agreement. This period of time would typically involve the company and the union meeting to discuss the possibility of recognition. The parties may agree to pursue an alternative process to determine the issue of recognition, for example, by voluntary
ballot arranged in conjunction with ACAS with or without the assistance of an independent ballot organisation.

If an employer rejects the request out of hand it is open for the union to make a formal application to the CAC.

Application to the CAC

It is at this stage that the CAC will become formally involved for the first time. The main duty of the CAC is to adjudicate an application for statutory recognition and the role played by the CAC, both in helping employers and trade unions to reach agreement and in making specific decisions, is critical to this process. The CAC has prepared a guide for parties which is available upon request from their offices. The guide is designed to explain the formal process to the parties as well as at what stage decisions will need to be taken by the CAC. The CAC’s approach is to encourage voluntary arrangements wherever possible and, if appropriate, to advise the parties to seek the assistance of ACAS. Each application will be heard by a panel of CAC members and will be chaired either by the Chairman, Sir Michael Burton or, more likely, a Deputy Chairman. There will be one member with experience of representing employees and one with experience of representing employers on any panel. The panel will take all decisions on the application and they will be supported by a Case Manager. The Case Manager is the primary point of contact for the parties.

The statutory process involves the trade union completing an application form, copies of which can be obtained from the CAC’s offices. The application form identifies the union making the application and the employer to whom the application is being made. It also requires the union to confirm that they have a Certificate of Independence and asks them specific details about whether or not they have made a formal request for recognition and what the Company’s response was. Importantly, the union is required to provide data about the number of workers employed as well as details of the employees for whom they seek collective bargaining rights, i.e. identifying the proposed bargaining unit. The union is also required to provide details of what evidence, if any, that they have that a majority of the employees within the proposed bargaining unit would be likely to favour recognition.

Once an application has been received the CAC will send it to the employer who will be required to complete a questionnaire which sets out his response to the union’s application.
Once the CAC have received this initial data they will be required to make a number of key decisions:

- firstly, the CAC must decide whether the application is admissible or whether it should be rejected;
- secondly, assuming the application has been ruled admissible, the CAC must determine what the appropriate bargaining unit should be;
- thirdly, if the bargaining unit is different from that initially proposed by the trade union, the CAC has formally to determine again whether or not the application remains valid;
- fourthly, if the bargaining unit has membership levels in excess of 50% in respect of the bargaining unit the CAC must determine if, despite that fact, a secret ballot should be ordered.

The CAC also has to determine in all cases where a ballot is ordered, i.e. where membership levels within the determined bargaining unit are less than 50%, if the ballot should be at the workplace or postal and, where the union is successful in the ballot or if recognition is ordered, what the method of collective bargaining should be in the absence of agreement.

**Admissibility of the application**

The general provisions about admissibility are contained in paragraphs 33 to 42 of Schedule A1. An application to the CAC will not be admissible unless the CAC decides that:

- members of the union amount to at least 10% of the workers constituting the bargaining unit identified by the union; and
- a majority of workers in their relevant bargaining unit would be likely to favour recognition of the union as being entitled to conduct collective bargaining on behalf of the workers within the unit.

The first point is unlikely to be contentious as the union, in all probability, will not proceed with an application to the CAC unless their membership levels are considerably in excess of 10% within their claimed bargaining unit. The second test, which requires the union to demonstrate that the majority of employees within the bargaining unit would be likely to favour recognition of the union as being entitled to conduct collective bargaining has resulted in a number of contested cases before the CAC. A union in seeking to demonstrate that it has satisfied the above test will not only rely on membership levels but will often rely on petitions signed by workers. This is because, where a trade
union offers no evidence as to the likely views of the majority of employees in the bargaining unit, the application is likely to fail. In the case of NUM -v- Hatfield Colliery Company (TUR1/55/2001) the CAC reached a view that, where support for recognition of the trade union could not be reasonably inferred from actual membership levels (in this case membership levels were at approximately 30%), some other evidence of support for recognition was required and, in the absence of such evidence, the application had to be rejected.

There are a significant number of cases in which unions have succeeded in having their applications accepted, notwithstanding that union membership levels have been considerably less than 50% and where there has been less than 50% support for recognition amongst workers on any petition. This is because the CAC have, in certain cases, relied on their own industrial relations experience to conclude that, where membership levels appear to be rising significantly, notwithstanding that they are at the time of making the decision below 50%, this in itself is sufficient evidence that the majority of employees would be likely to favour recognition.

The CAC does not require petitions to be disclosed to the employer, although they will typically scrutinise petitions themselves on a confidential basis. This is the position that has been adopted by the CAC and is supported by the recently revised guidance to the parties.

Determining the bargaining unit

Once the question of admissibility is determined there is a further period of time known as the ‘appropriate period’, a period of 20 working days or longer as ordered by the CAC. During this time the parties are required to try and reach agreement on the appropriate bargaining unit. This involves the employer considering the union’s proposed bargaining unit and assessing whether or not it is appropriate. In many cases the Company will propose their own bargaining unit. If the parties fail to reach an agreement on the appropriate bargaining unit, the CAC will make a ruling within 10 working days of the expiry of the ‘appropriate period’ as to what the appropriate bargaining unit should be. It is possible for the CAC to vary this time limit.

The principal criterion in determining the appropriate bargaining unit is that it must be compatible with ‘effective management’. The CAC, when considering whether a unit is compatible with effective management needs to take into account:

- the views of the employer and of 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 of any other employees which the CAC considers relevant; and

• the location of workers.

In applying Schedule A1 in this regard, the most important decision is that of the Court of Appeal in the case of Kwik-Fit Limited -v- the CAC (18 March 2002). This case involved a dispute over the appropriate bargaining unit. The union claimed it should be solely depots within the M25, the Company said that it should be all the depots throughout the country. The Company lost before the CAC but appealed to the High Court by way of judicial review. Whilst they won before the High Court the matter was referred to the Court of Appeal who ultimately restored the decision of the CAC.

The Appeal Court’s view was that the CAC, in determining the appropriate bargaining unit, should initially consider the union’s proposal and determine whether it is appropriate. The CAC are required to:

• test the union’s proposed unit in light of the Company’s arguments that a different unit is appropriate; and

• thereafter, consider the appropriateness of the Company’s alternative bargaining unit if the CAC consider (in light of the Company’s representations) that the union’s proposal is inappropriate.

If the bargaining unit that the CAC determine is different from that initially proposed by the trade union, the CAC has formally to determine again whether or not the application remains valid. This involves the CAC reapplying the admissibility tests by reference to the newly determined bargaining unit.

Ordering of the secret ballot

Once the CAC has made a ruling on the appropriate bargaining unit (and determined, if necessary, the issue of re-admissibility) it is required to make a decision as to whether a ballot should be ordered. The CAC will conduct a membership check of employees in the bargaining unit by reference to the union’s membership records and the list of employees which they require the Company to submit. If the CAC conclude that less than 50% of employees in the bargaining unit are members of the union, then a secret ballot will be ordered to determine the question of union recognition. Even where the union shows that it has member-
ship of 50% in the bargaining unit, it will be necessary for the CAC to order the secret ballot if any of the following situations are applicable:

- the CAC believes a ballot is required in the interests of good industrial relations
- a significant number of union members in the bargaining unit inform the CAC that they do not want the union to conduct collective bargaining on their behalf
- membership evidence is produced to the CAC which leads it to be believed that there are doubts whether a significant number of union members in the bargaining unit want the union to conduct collective bargaining on their behalf.

In this context ‘membership evidence’ is evidence about the circumstances in which the union members became members and about the length of time for which union members have actually been members.

**Holding a secret ballot**

If the CAC is not satisfied that the majority of the workers constituting a bargaining unit are members of the union, it must give notice to the parties that it intends to arrange for the holding of a secret ballot. The purpose of a secret ballot will be to ask workers whether they want the union to conduct collective bargaining on their behalf.

When the CAC decides to hold a ballot it must decide whether the ballot should be a workplace ballot or a postal ballot. In making their decision they should consider the likelihood of the ballot being affected by unfairness or malpractice if it were conducted at the workplace. The CAC will appoint an independent person to conduct the ballot and will inform the employer and the union accordingly. A Company faced with a ballot for union recognition is required to adhere to the following:

- firstly, to co-operate with the union and the independent person in connection with the ballot;
- secondly, to give the union reasonable access to the workers in the bargaining unit.
- thirdly, to give the CAC the names and address of those workers in the bargaining unit and inform the CAC if any individual either joins or leaves the bargaining unit.
There is a Code of Practice governing the union’s right to access to workers during recognition and de-recognition ballots. This document provides guidance to the parties on how a union’s access should be managed and what type of access is appropriate in these circumstances. The Code requires the union to submit its request for access to the Company in writing and typical access would involve large group and/or small group meetings. The union would also have a right to a notice board. The union is also entitled to provide literature to the qualified independent person appointed to run the ballot to enable that individual to post information to the home addresses of employees on the union’s behalf. The union is required to bear the cost of postage of such information.

If an employer fails to comply with its statutory duties set out above, the CAC may issue a declaration that the union is recognised to conduct collective bargaining on behalf of the bargaining unit.

The cost of the ballot will be shared between the employer and a trade union on a 50/50 basis.

The union will win the ballot if it is supported by a majority of the workers who vote and at least 40% of the workers constituting the bargaining unit. Therefore, if the bargaining unit consists of 100 workers, 40 must vote in favour of recognition with fewer than 40 voting against. If the union is successful in the ballot, the CAC must issue a declaration that the union is recognised and is entitled to conduct collective bargaining on behalf of the bargaining unit. If the Company is successful in the ballot, the CAC must issue a declaration that the union is not entitled to conduct collective bargaining on behalf of the bargaining unit. If the union lose the ballot it is not allowed to reapply for recognition for the same, or broadly the same, bargaining unit for a minimum of three years from the date of the ballot result. Alternatively, if the union are successful in the ballot it is entitled to be recognised for collective bargaining purposes for a minimum of three years from the date of the ballot result.

If the union is successful in a ballot for recognition under the CAC’s procedure and a Company wished to de-recognise the union at some future point, there is a complicated procedure (again governed by Schedule A1) which requires the Company to go through a number of steps before being able formally to derecognise the union. The reality is that it is likely that this process would again involve a further ballot.

Once the CAC has issued a declaration as to the ballot result, a further period of time known as the ‘negotiation period’ of 30 days (or longer by agreement) is triggered. During this time the employer and the trade union (with the assistance of the CAC, if required) aim to reach agreement on a method by which they will conduct collective bargaining.
If the parties fail to reach an agreement, either party can refer the matter to the CAC triggering the fifth period known the ‘Agreement Period’ of 20 days or longer as specified by the CAC. During this period of time the CAC again will help the parties to reach agreement on how they will collectively bargain but, if agreement proves impossible, the CAC will specify the method as to how collective bargaining will be conducted.

**Imposed bargaining method**

The imposed bargaining method is governed by the Trade Union and Recognition (Method of Collective Bargaining) Order 2000. The main difference between the bargaining method imposed by the CAC and a voluntary arrangement is that it has effect as if it were a legally binding contract between the parties. If one party believes the other is failing to follow the specified method, that party may apply to the Court for an Order of Specific Performance ordering the other party to comply. Failure to comply with such an Order could constitute contempt of Court. Once a bargaining method has been imposed it can be varied (including whether or not it is legally binding) by agreement between the parties in writing.

There is very little to be gained by a Company failing to agree a bargaining method with a trade union once the question of recognition has been determined by the CAC. This is because the specified method is very prescriptive in its format and requires the employer and the union to establish a joint negotiating body with a specified number of representatives on both sides.

**Drafting of collective agreements**

Collective Agreements vary in complexity and detail. A well drafted Collective Agreement ought to make it expressly clear, in the first instance, who the parties to the agreement are with a precise definition of which employees within an organisation are to be subject to collective bargaining. It may be in the Company’s and the union’s best interests to ensure that the scope of the agreement is drafted as widely as possible to avoid the recognition of a number of other trade unions for similar classes of employees within an organisation.

**General principles**

Collective agreements will often contain a set of principles which are relevant to the parties. A well drafted ‘principles and values’ section in a collective agreement should reflect the organisation’s business plan and will aim to ensure that
the parties co-operate for mutual benefit. Employers will want to ensure that they retain the ability to manage the business in a way that enables them to operate quickly and decisively should the need arise. A trade union would wish to ensure that, whilst it is important for any organisation to be able to operate quickly and decisively in business, this should not be to the detriment of employees. It is in this section of the agreement that the Company and the union would seek a commitment to resolve any differences in a constructive manner with the objective of avoiding any industrial action, if at all possible.

Consultation, negotiation and information

It is important for the parties to consider those issues which they are prepared to consult about and those matters which will be a matter of negotiation for the parties.

In relation to those issues which the employer agrees to consult upon, these are likely to address the organisation’s consultation obligations as set out in the Act, for example, collective redundancy situations, business transfers, health and safety issues and matters affecting pension schemes. An employer should also consider entering into sensible consultation concerning changes to working practices as a matter of good industrial relations.

If recognition arises as a result of an application to the CAC, a union will be entitled to conduct collective bargaining (i.e. negotiation rights) over pay, hours and holiday. As a minimum, therefore, a trade union entering into a voluntary arrangement would seek negotiating rights in connection with these three areas. There is no definition of ‘pay, hours and holidays’ within either the Act or Schedule A1. If the parties are to reduce the potential for dispute as to what is a matter of negotiation and what is a matter on which a union is entitled to be consulted, the parties should consider defining terms.

Issues about which, as a matter of good industrial relations, a Company may wish to inform the trade union can include, for example, investment issues, economic trends and the financial and operational performance of a business. However, in light of the forthcoming enactment of the ‘Information and Consultation Directive’ EC Directive No. (2002/14/EC) which the United Kingdom committed to in March 2002, there will, in due course, be further information and consultation obligations that a Company will be faced with which may well have a bearing on a Company’s relationship with a recognised trade union.
Broadly, Article 4 of the Directive imposes three obligations on employers:

- Firstly, an obligation to provide information on recent and probable development of the organisation’s activities and economic situation.

- Secondly, to provide information and consult (in this context, defined as meaning the exchange of views and the establishment of dialogue between the employees’ representatives and the employer) on the situation, structure and probable development of employment within the organisation and on any anticipatory measures envisaged, in particular, where there is a threat to employment.

- Thirdly, to provide information and consult (which in this latter context is defined as consultation with a view to reaching agreement on decisions within the scope of the employer’s powers) on decisions likely to lead to substantial changes in work organisation or in contractual situations, including situations already covered by the existing EC Directive on collective redundancies (98/59 EC) and any other existing obligations to consult.

The Directive will apply to:

a) undertakings employing at least 50 employees in any one Member State; or

b) establishments employing at least 20 employees in any one Member State.

Article 2 defines an undertaking as ‘a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States’.

‘Establishments’ are also defined under Article 2 as ‘a unit of business defined in accordance with national law and practice and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources’.

The implementation phases in the UK are:

- Three years from adoption: undertakings with at least 150 employees or establishments with at least 100 employees (April 2005).

- Four years from adoption: undertakings with at least 100 employees or establishments with at least 50 employees (April 2006).

- Five years from adoption: undertakings with at least 50 employees or establishments with at least 20 employees (April 2007).
Information and Consultation of Employees Regulations 2004

In July 2004 the government issued what are effectively the final draft regulations to be known as the Information and Consultation of Employees Regulations 2004. The government have also published draft DTI guidance in respect of the regulations.

When the law is effective in April 2005 (in respect of undertakings employing more than 150 people), then employees may at any time trigger the legal regime by making a request to the employer to establish an information and consultation forum. A request can be triggered by 10% of the employees in the undertaking. The request is likely to be in the form of a petition and it may be that a Union that is seeking consultation rights and collective bargaining will organise an employee petition in this regard. The request to file such a petition can be made either directly to the employer or the petition can be sent to the Central Arbitration Committee. It is possible in limited circumstances for the employer to challenge the request on the basis that it contains false information but generally, in the majority of cases, the numbers will be right and therefore the request will be allowed to proceed. A trade union has the right to ask the employer to provide the number of employees currently employed within the undertaking and therefore the employees (or the union) will know upfront how many signatories it needs to satisfy the 10% test.

What happens next will depend upon whether the employer wants to argue that it has an existing information and consultation process in place which complies with specific criteria set out within the regulations. The criteria for existing arrangements are that the arrangement:

- is in writing,
- covers all employees of the undertaking,
- has been approved by the employees,
- sets out how the employer is to give information to the employees or their representatives and to seek their opinions on such information.

If the employer decides that an existing information and consultation procedure is in place then the employer can, in these circumstances, arrange a ballot in support of the existing arrangements. Where there is no existing arrangement in place the employer will be required to elect or appoint negotiating representative’s for the purposes of seeking to agree an information and consultation forum. For the existing arrangements to be overturned in a ballot more than 40% of employees must vote to endorse the original employee request and
that 40% must also amount to a majority of those that vote. A ballot must be fairly run and all employees must be entitled to vote. A ballot must also be in secret.

The great advantage for an employer who holds a ballot in such circumstances and then goes on to win the ballot is that no further challenge to existing arrangements is possible for a period of three years.

It is also possible for the existing arrangements to cover groups of undertakings where there are a number of different subsidiary companies. Where there are no existing arrangements in place, the law goes on to make clear that the employer must elect negotiating representatives and initiate negotiations within one month with those representatives with a view to reaching an agreement on an information and consultation structure for the particular business. There is a period of six months for the agreement to be reached or longer by agreement. Where agreement is reached then the employees must approve the agreement. Employee approval in these circumstances means that at least 50% of employees must approve the arrangement in writing or there must be a ballot showing approval. Additionally, the agreement must be signed by a majority of the negotiating representatives. Ultimately in the event of no agreement there are default information and consultation provisions which apply and which are more onerous (on the employer) than a negotiated agreement may be. There is therefore an incentive for Companies to familiarise themselves with the default provisions and consider either establishing a pre-existing agreement or at least be prepared to manage information and consultation in the workplace in such a way as to minimise the likelihood of a request being submitted by employees and/or the union.

Working with the trade union

It is sensible in any collective agreement to specify a framework as to how the Company and the trade union will work together. For example, is it proposed to establish a negotiating body for consultation and negotiation purposes? This area of the agreement should make it clear how often the parties propose to meet and also what the constitution of the negotiating body will be. Furthermore, if a Company has any requirements in terms of the type of individual in their employment who can be considered as a trade union representative by reference to length of service or disciplinary records, then this should be specifically set out in any agreement.
Trade union membership

A trade union may wish to consider requesting a Company to operate ‘check off’. Check off is a method by which an organisation deducts union membership fees from employees who are union members directly from their salary with a view to remitting payment to the appropriate union. Employers should be aware, however, that if they are prepared to agree to this pursuant to any request by a union, the specific consent of individual employees is needed in writing before any deductions can be made.

Trade union facilities

Where an organisation is able to provide the recognised union with facilities to carry out their responsibilities then parties may wish to specify this in any agreement. It is not unusual for Companies to provide a notice board for official union notices and minutes.

Equal opportunities

There will often be a section in a voluntary agreement which states that both partners to the agreement are committed to promoting equal opportunities regardless of colour, race, creed, marital status, age, sex, sexual orientation, political affiliation or ethnic origin. This is an important aspect of any agreement for many organisations. Other areas of sensitivity relevant to a particular business can be built into any voluntary agreement.

Avoidance of disputes procedure

For many employers the ability to ensure that the trade union adheres to the provisions of any disputes procedure and its various stages before considering recourse to industrial action is often very important. A disputes procedure typically sets out the various stages of the procedure and at what point senior trade union officials and managers should intervene and whether or not the parties are committed to involving ACAS mediation and/or arbitration.
Termination

If voluntary there is no requirement for an agreement to last for any specified period. Typically a collective agreement will contain a provision which entitles either the union or the Company to terminate it upon notice. The very fact that collective agreements are generally binding in honour only would, in any event, enable a union or a Company to depart from the agreement, often without legal consequence, irrespective of any notice provisions relating to the termination of the agreement.