Ten years of statutory recognition – A changed landscape for UK industrial relations?

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In 2000 a new statutory trade union recognition procedure came into force, enabling unions that could demonstrate majority support for collective bargaining to be recognised in the workplace. In their forthcoming book Sian Moore (University of the West of England), Sonia McKay (London Metropolitan University) with Sarah Veale (TUC) evaluate the impact of the procedure over the ten years of its operation and its implications for the so-called UK 'voluntarist' approach to regulating industrial relations. In this it moves beyond a purely legal interpretation, to place the law within the wider and changing context of work. The book is largely based upon Central Arbitration Committee (the CAC – the body administering the procedure) reports on each application for recognition under the procedure and published on their web-site (www.cac.gov.uk). These provide a rich source of data, not only on the operation of the procedure, but also on workplace industrial relations in the early 21st Century – documenting a legal process, but also reflecting the wider forces shaping employment relationships. The book traces the operation and outcomes of the CAC procedure over more than ten years. This short article summarises some of its key themes.

The statutory recognition procedure was the key provision of the Employment Relations Act 1999 (ERA99), legislation designed to be the industrial relations settlement for the Labour Government's first term of office (Fairness at Work White Paper 1998). The Blair Government did not intend that the law should promote collective bargaining and in that sense the procedure should be judged in modest terms; that is as a last resort in circumstances where employers and unions cannot come to a voluntary agreement over recognition, despite support for it in the workplace. In these terms it has been deemed a success by the CAC, although for the CAC this is largely measured in not having its decisions challenged in the civil courts – in contrast to the 1970s procedure. The spectre of previous statutory recognition procedures has encouraged caution for unions bringing claims, but also for the CAC in making rulings.

One important fact is the sharp decline in applications to the statutory procedure since 2004. By the end of the year 2011-12 there had been 785 applications to the CAC. After peaking in 2001-02, the proportion subsequently declined from an average of 89 applications a year in the first five years, to 54 in the five years to 2010-11. A variety of explanations have been advanced for both the relatively small number of claims in the early years of the operation of the procedure, and for the more recent decline in applications. One argument is that since the aim of the law was to assist in the promotion of voluntary

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recognition agreements outside of the law, the number of applications submitted to the CAC is not a key indicator of the effectiveness of the procedure.

Another explanation is the adoption of a strategy by the trade unions to ensure that there was not a high level of failed applications that might jeopardise the future of the procedure. This meant that a number of more speculative claims were not submitted or were quickly withdrawn; 27 per cent of applications were withdrawn after submission over the whole ten year period. Withdrawal allows the union to resubmit, whereas having the claim declared as invalid by the CAC excludes the union from submitting an application for the same bargaining unit for a three year period – a bargaining unit is the group of workers that recognition will potentially cover, generally defined by shared terms and conditions and workplace. In addition to withdrawals for technical reasons, the CAC recorded that in 2002-3 around 20 per cent of applications were withdrawn at some stage because a voluntary (or 'semi-voluntary') recognition had been reached – this figure has fluctuated but in 2011-12 was 16 per cent.

The admissibility and validity tests, which the CAC must apply in relation to each application require that the union demonstrates that it has at least ten per cent of the membership in the proposed bargaining unit and that a majority of workers are likely to support recognition. CAC published records show that between 2000 and 2011-12 465 claims were accepted – with 17 per cent rejected (CAC Annual Report, 2011-12). The fact that there has been no substantial decline in rejections may suggest that unions have not learned the lessons of earlier cases and/or that during the course of the procedure the nature of cases submitted were increasingly those where it was harder to demonstrate majority support for recognition. It has become clear that if a union does not have majority membership, in order to demonstrate that majority support is likely, it must have at least ten per cent membership and submit a petition showing at least 40 per cent of the bargaining unit is committed to recognition for collective bargaining. The principal cause of the application not being accepted was lack of evidence, in the view of the CAC, that a majority of workers was likely to be in favour of recognition. Approaching half (43 per cent) of all rejections were on this ground. The second reason for rejection has been the pre-existence of a collective agreement covering the bargaining unit (in 19 per cent of cases) - this may reflect employer attempts to circumvent recognition applications by drawing up an agreement with another union; whilst competing applications from two unions were grounds for rejection in seven per cent of the cases.

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The definition of the bargaining unit is a crucial component of any successful application for recognition. In most cases which get beyond the acceptance stage, the bargaining unit has either already been agreed by the parties or is agreed before it reaches the bargaining unit determination stage. Where there is no agreement the CAC will determine the bargaining unit; either by accepting the union's proposal, by substituting it with the employer's proposed bargaining unit or by determining a different bargaining unit. Between 2000 and 2011-12 there was agreement between the parties on over half (58 per cent) of bargaining units, with the CAC determining the bargaining unit in the remainder. Unions are far more likely to win (though a ballot, automatic recognition or through a semi-voluntary agreement) recognition where the CAC supports its bargaining unit and far less likely to be successful where the employer's bargaining unit prevails (the application may not be revalidated, may be withdrawn because the union cannot demonstrate majority support in the new bargaining unit or it may lose a ballot). Where the employer challenges the union's

bargaining unit it generally proposes an expanded bargaining unit based on a wider occupational or contractual group, or one based on more sites than in the original application. Unions have experienced difficulties where the employer sought to include all or more sites in the company, as they generally cannot subsequently demonstrate sufficient support for recognition amongst the workers on the other sites included in the revised bargaining unit.

Following determination or agreement of the bargaining unit the next stage is for the CAC to decide if recognition without a ballot should be declared or if a ballot should be held. Where a majority of the bargaining unit are not union members, the CAC will order a ballot; if the union has a majority of the bargaining unit in membership the CAC may grant recognition without a ballot. However, the CAC may still order a ballot where it considers one of three conditions apply:

1. That it is 'in the interests of good industrial relations' to hold a ballot;
2. that the CAC has evidence, which it considers to be credible, from a significant number of the union members within the bargaining unit that they do not want the union (or unions) to conduct collective bargaining on their behalf; and
3. membership evidence regarding the circumstances in which workers joined the union or length of membership leads to doubts whether a significant number of union members in the bargaining unit want the union to conduct collective bargaining on their behalf.

Over the period the CAC has declared recognition without a ballot in over three-quarters (77 per cent) of the cases where a union originally had majority membership, but this still leaves around one in four cases where despite majority membership a ballot has been imposed – in these circumstances the union was found to be more likely to lose than win (just over half). In a third of these cases the ballot was called because the union no longer had a majority in membership, in some cases because the numbers in the bargaining unit had increased. Again the union was more likely to lose than win these ballots and it raises questions about the ability of unions to sustain membership once in the procedure. In just over one in five cases the ballot was called because the CAC had received evidence to doubt that a significant number of union members wanted the union to bargain on their behalf and the union subsequently lost over three quarters of these cases.

Overall by 2011-12 the CAC had reported on the outcome of 203 recognition ballots held under the statutory procedure since 2000. The statistics on ballots show that consistently a third are lost, despite the fact that the union demonstrated majority support on application. Furthermore in nearly one quarter of unsuccessful ballots, 50 per cent or more of those voting had supported recognition, but the union did not achieve the 40 per cent threshold (of those in the bargaining unit rather than those voting) that it needs to secure recognition. In just under a third of ballots (31 per cent) the proportion of workers voting in favour of recognition in the ballot was below the membership level, as verified before the ballot, and this proportion rose to over two thirds where ballots were lost. This means that membership levels or density (through changes in the bargaining unit) fell during the procedure and/or that union members abstained or voted against recognition in the ballot. Having a higher proportion of the bargaining unit in union membership on application was not related to ballot success. The mean percentage membership on application was higher at 41 per cent in unsuccessful ballots, compared to 38 per cent in successful ballots. This suggests that during the statutory recognition process, a number of contending factors come into play, introducing uncertainty and encouraging

employers to intervene in the procedure to ensure there is a ballot. It also places emphasis upon union organisation and activity.

Of the 465 applications that were accepted as valid by the CAC between 2000 and 2011-12, recognition was awarded without a ballot in 106 cases (23 per cent of all the cases accepted) while in another 126 (27 per cent) recognition was awarded following a ballot. Thus overall just half (50 per cent) of the applications accepted secured recognition through the procedure (that is excluding those withdrawn because the parties had secured a semi-voluntary agreement), although taking all of the original 785 applications into account, the proportion securing statutory recognition falls to just under one in three (30 per cent).

The design of the procedure encourages the contestation of claims by employers and the CAC's need to appear even-handed allows them to influence CAC discretion. In a number of cases employers have intervened at the application stage specifically to undermine likely support for recognition. Evidence shows that union membership and support are volatile in the face of employer opposition, but also employer capacity to stall the CAC process further undermines this. Employer influence is evident over the definition of bargaining units where the employer can actually impose upon the union the constituency that it most favours and where the union may have few members. Of equal importance is employers' apparent ability to manipulate the bargaining unit once it has been agreed or determined. Whilst employers have not defeated the 2000 procedure they have been able to constrain union success and although both are a function of the design of the procedure, the willingness of the CAC to call a ballot where employers produce 'evidence' to challenge union support for recognition has resulted in uncertain outcomes for unions. The extent to which employers are willing to invest substantial resources into opposing unionisation is a key factor in recognition ballots, but it is not the only factor. In six case studies of ballots held under the procedure there were varying degrees of opposition, but in five of these employers were unsuccessful, focussing attention on to union strategies and the resilience of the activists themselves.

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A survey of unions showed that the statutory procedure introduced a new legal context for union mobilisation, reinforcing, but also shaping, union strategies. Statutory claims were generally the result of mobilisation at the level of the workplace rather than facilitating the formal recognition of a residual membership. The statutory procedure remained significant for many unions as they looked to reverse membership decline, and its use had been closely linked to organising strategies. In the past five years, privatisation has encouraged public services unions to resort to the procedure, reflecting the fragmentation of collective bargaining and resulting in some contract-based bargaining units covering very small numbers of workers. Yet for unions the value of the recognition procedure continued to be in its shadow effect in encouraging voluntary agreements - although the number of recognition targets and the success rate for unions had reduced. There is little published data on the number of voluntary recognition agreements concluded in the second five years of the procedure, what evidence there is, suggests that there has been a similar or even greater rate of decline than has been witnessed for the statutory scheme. This is reflected in Acas conciliation cases involving recognition disputes. From a gradual decline from a peak of just fewer than 700 in 1977, to a low of 93 in 1994, there was then a gradual increase, with a substantial rise in 2000, when the

statutory procedure was introduced, taking the figure beyond 200 for the first time since 1985 (Wood *et al.* 2003). The figure peaked at 385 in 2002-03, before beginning to fall again. At the same time unions reported that the statutory process had influenced employers' responses to recognition claims outside of the procedure, demanding majority membership or a ballot before conceding voluntary recognition. The legal procedure has shaped voluntary relationships between trade unions and employers and this may restrict the scope and depth of bargaining.

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Union activity, for better or worse, is shaped by the potential for recognition under the statutory procedure, despite evidence that it is limited in its ability to deliver wider collective bargaining coverage. The case studies of recognition claims that went to a ballot suggest that the design of the procedures allows for employer counter-mobilisation. In particular, its dependence upon majority support and ballots facilitate adversarial behaviour at the level of the workplace and raise questions as to the definition of 'legitimate' employer behaviour. Concerns about the operation of the 1999 Act led to the law being amended in 2004 through the introduction of an unfair practices provision. Yet whilst the unions had sought a law which would give them additional protection against unfair practices by the employer, what they eventually got was a law that could be used against them by employers alleging that union recruitment methods, at least in the ballot period, themselves were capable of amounting to unfair practices. The inequity of the employment relationship continued to be ignored: in the eight years following its introduction none of the cases that have been brought were upheld. The fact that unions not only have to prove that there has been an unfair practice, but that it has affected the way that workers vote in the ballot, places a very high bar to a successful complaint. Further, in raising such a complaint, the union effectively prolongs the procedure, something which generally works against it. The fact that the provisions cover only the ballot period mean that they have not been able to address systematic campaigns to defeat unions in the workplace from the point at which the union requests recognition.

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Conclusion

The central trend has been the decline in applications and this may result from the operation of the procedure which has been to discourage unions from making applications, but it also reflects the capacity of the unions to organise. The operation, but more importantly the design, of the procedure places few restrictions on employer advantage in the workplace, whilst an examination of union strategies suggests their limited capacity to generate new recognition claims. Both are a function of the wider landscape of work and employment relations and its political and legal context. This interaction suggests it is unlikely that CAC applications will increase substantially in the future.

Statutory regulation and employment relations: The impact of statutory trade union recognition (Moore, S. and McKay, S. with Veale, S.) should be published in June 2013 by Palgrave Macmillan

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