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Original Citation

Lane, Jackie (2016) The Threat to Facility Time in the Trade Union Act 2016—A Necessary Austerity Measure? *Industrial Law Journal*. dww031. ISSN 0305-9332

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The threat to facility time in the Trade Union Act 2016 – a necessary austerity measure?

Abstract

One of the less well publicised sections of the Trade Union Act 2016 is the provision for monitoring and potentially reducing the amount by which public bodies subsidise the duties carried out by trade union representatives in the workplace. The justification for the monitoring of costs and the potential for the imposition of a cap on such spending in the future appears to be based on dubious evidence. This paper examines the range of duties carried out by representatives and their attributed costs, consulting a large body of research which strongly suggests that the indirect cost-benefits to the employer greatly outweigh the direct costs which must now be reported to the Government by public employers. The paper highlights the concern that the indirect cost-benefits have not been taken into account in seeking justification for this legislative measure, and that reductions in facility time in the future may have a harmful effect on industrial relations.

1. Introduction

The various provisions of the Trade Union Act 2016 (TUA) pose possibly the greatest threat to trade union freedom since the raft of anti-union Conservative legislation enacted between 1979 and 1997. These new restrictions have been comprehensively documented and analyzed in the recent special issue of the *Industrial Law Journal*. Nevertheless, the threat to facility time for trade union workplace representatives, those at the coalface of trade union activism, is less well publicised. The Act puts at risk the paid time off which union representatives have come to expect as a right, and a vital adjunct to their role and responsibilities. This particular aspect of the new legislation carries potentially the greatest threat to the ability of trade unions to organise and bargain collectively, as it could undermine the ability of representatives to represent their members effectively and to promote membership in the workplace.

Good employers recognise the value of workplace representation, but a government which focuses purely on the financial cost of supporting the role of representatives will inevitably seek to reduce that expense, citing it as a ‘burden on business’ and, in the case of publicly-funded employers, a direct cost to the taxpayer. The true cost of the proposed restrictions to facility time may take many years to become evident, but this particular provision has the potential to place harmonious industrial relations in the workplace beyond salvation.

2. *What is a trade union representative, and why do they need facility time?*

The ACAS Code of Practice on Time off for Trade Union Duties and Activities 2010, issued under s. 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), defines a representative as ‘an employee who has been elected or appointed in accordance with the rules of the independent union to be a representative of all or some of the union’s members in the particular company or workplace’, and provides details of what a representative may be expected to do.

Among the 6.4 million trade union members in the UK (*Trade Union Membership Statistical Bulletin*, DTI, 2014), about 200,000 are involved in trade union duties in the workplace. Union representatives take an average of just over 13 paid hours per week, although 49 per cent of all union representatives spend less than 5 hours per week on their role (*WERS Study*, 2011). Where there are many thousands of members, the union representative may even be full-time, although paid as if he or she was an employee of the relevant employer. These are few in number, however, and in 2011 only one in six senior representatives carried out their role on a full-time basis. Representatives provide advice to members, represent them in grievance and disciplinary meetings, and negotiate with managers. They provide the main link between unions and their members, with the responsibility for facilitating communications between them. The Donovan Report 1968 (*Cmd. 3623*, 1968) also noted that they are involved in ‘recruiting new members and ensuring that existing members do not lapse’ and that without them ‘trade unions would lack for members, for money, and for means of keeping in touch with their members.’ This continues to be as true today as it was then, despite the improvements brought about by electronic communication.

Many of them have specialist roles relating to health and safety or environmental issues, while others specialise in equality and diversity matters, or work as union learning representatives (ULRs) who work to improve access to training opportunities. These ULRs promote, encourage

and support the take-up and delivery of learning at work, acting to raise interest in training and offering peer level support. They may negotiate with the employer around time off for employees to engage in training and can offer guidance and advice on training opportunities (*Reps in Action*, BERR, 2009).

3. *The legislation*

There has been a statutory right to reasonable time off from a union representative's job in order to carry out union duties and undertake training since 1975 (Employment Protection Act). This provision was replaced by TULRCA, s.168. The section imposes a duty on an employer to permit employees who are officials of a recognised, independent trade union, to take reasonable time off during working hours to carry out their duties. These include under s.168(1)(a) negotiations relating to collective bargaining on matters falling within s. 178(2)

Other duties include: performance on behalf of employees of functions related to or connected with that provision (s. 168(1)(b)); receipt of information from the employer or consultation by the employer under s.188 (redundancies) or under the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006 (s. 168(1)(c)); negotiations with a view to entering into an agreement under Regulation 9 of the TUPE Regulations (s. 168(1)(d)); or the performance on behalf of employees of functions related to the making of an agreement under that regulation (s. 168(1)(e)).

Section 168(2) further permits an employee to take time off during his working hours for the purpose of undergoing training in aspects of industrial relations. There is additional legislative provision for time off to accompany members to meetings (s. 10(6) of the Employment Relations Act 1999, and to act as a safety representative under regulations made under section 2(4) of the Health and Safety at Work etc. Act 1974. The duties of a trade union representative are therefore very varied, surprisingly wide, and can be extremely time-consuming. The

representatives also require considerable training in order to carry out their duties effectively, although this is usually provided by the relevant union or the TUC at no cost to the employer.

Section 13 of the Trade Union Act inserts a new section 172A into the 1992 Act. This relates primarily to publication requirements of facility time for public sector employers. Local authorities are already required to publish this information under the *Local Authorities (Data Transparency) Code 2015*. This provision empowers a Government Minister to make regulations requiring all public sector employers to publish information relating to the number of union officials within the organisation, the total amount spent on paying such officials, and the percentage of the employer's total bill spent on paying them (TUA, s. 13(3)).

Furthermore, s. 14 inserts a new s. 172B into the 1992 Act. This provides that, three years after the first regulations under s. 172A come into force, if a Minister has concerns about the amount of facility time provided in an individual employer's case, he may use his reserve powers to make regulations to restrict that time and its associated cost in the future. The Minister can then specify the percentage of total income that employers are able to spend on providing time off to trade union officials. Under s. 14(4), the regulations may make provision for restricting the rights of relevant union officials to facility time by amending or modifying the current legislation on time off for those officials. Perhaps most worryingly, under s. 14(10), this legislation may not only affect public sector employers, but *all employers where there is a recognised trade union*. Thus, in future, the government could potentially act to unilaterally reduce the facility time agreement which employers have negotiated with their recognised trade union, whether they are public or private employers.

This reserve power is potentially extremely wide, and arguably goes far beyond that which is necessary to limit public authority spending on trade unions. The amount of time spent on representing members in the workplace did not change between 2004 and 2011, but the range of issues and their prevalence did increase over this period (*WERS Study*, 2011), suggesting that

representatives needed more time, rather than less, in order to deal effectively with the increased workload. This would suggest that the valuable work of the representative is already underfunded; the danger with the new legislation is that it may well exacerbate that situation.

4. Difficulties currently faced by trade union representatives.

The 2016 Act could potentially decimate the existing provision of facility time for representatives. Meanwhile, the ongoing austerity programme and a vote in the EU referendum to leave the European Union may bring greater uncertainty, with further reductions in workers' rights and legal protections a distinct possibility. These additional concerns come at a time when representatives are already under severe pressure to provide support to members in the workplace.

The findings of a DTI Consultation Document (*Workplace Representatives: A Review of their Facilities and Facility Times*, January 2007) examined the function of workplace representatives and the difficulties they experienced in gaining sufficient time off to facilitate their roles. They highlighted the increasing demands on representatives, particularly in terms of individual representation, with organisational changes bringing increased demands and pressures. Managers were often resistant to representatives having more than their initial training, failing to recognise that representatives needed to update their skills in order to deal with organisational and legislative change. Staff cover was a major barrier to time-off for union representatives. There was a consensus that many managers neither understood nor appreciated the role of workplace union representatives and their entitlement to time-off for union duties. Representatives also felt strongly that their work was undervalued, and that this reflected the wider weakness in the perception of trade unions in the law and in society.

Many representatives have specialist roles relating to health and safety or environmental issues, while others specialise in equality and diversity matters, or work as union learning

representatives (ULRs). ULRs work to improve access to training opportunities; they promote, encourage and support the take up and delivery of learning at work, acting to raise interest in training and offering peer level support. They may negotiate with the employer around time off for employees to engage in training and can offer guidance and advice on training opportunities (*Reps in Action*, BERR, 2009).

In terms of relations with management, the DTI Consultation Document revealed a consensus that many managers neither understood nor appreciated the role of workplace union representatives and their entitlement to time-off for union duties. Management and union interpretations of what was 'reasonable' were quite different, although insofar as the issue involved Union Learning Representatives (ULRs) and Health and Safety representatives, there was less disagreement. The reason for this could be that the benefits to the organisation were more immediately apparent and more readily quantifiable. Nevertheless, with such disparate views of what constituted 'value' to the employer, particularly if this is measured in financial terms rather than on any qualitative assessment, the next question must be whether facility time does in fact provide demonstratively good value to the employer.

5. *Does 'time off' provide value to the employer?*

The focus of policy attention has been on cost-effectiveness of trade unions, rather than on facilitating effective representation, and accords with the general move towards cutting 'unnecessary' costs to employers, begun by the Coalition Government's 'Red-Tape Challenge'. The facility time restrictions in the 2016 Act seem to be rooted in the notion that employers spend an unnecessary percentage of their income on providing time off to representatives, yet this takes no account of the *indirect* cost-saving to employers engendered by the work they do. The DTI Consultation Document identified a broad spectrum of ways in which representatives provide benefits to employers, although it is acknowledged that applying a precise cost benefit to

their involvement is not an exact science. Nevertheless, the potential benefits in a number of areas were clearly thought to outweigh the costs. These were categorised as: skills and training; lower exit rates and labour turnover through effective dispute resolution; and worker safety and productivity.

i. Skills and training

The concept of the Union Learning Representative (ULR) was fairly new at the time of this report, having only gained a statutory footing in 2002 (TULRCA 1992, s. 168A). Therefore there was little empirical data available for consideration in the report in 2007, but financial benefits of ULRs (through improved productivity brought about by the higher skills) were estimated by the Department for Education and Employment (DfFE) to range from £11 million to £49 million in the first year (*Regulatory Impact Assessment for Providing Statutory Backing for ULRs*). The DfFE also estimated that around twelve employees per ULR would complete their training and thereby enhance productivity as a direct result of ULR intervention. The report admitted that how these productivity gains are accrued ‘will vary according to the structure of the labour and product market, as well as the climate of industrial relations,’ but assuming ‘a 3-5 per cent premium on the average wage of those who received additional training, this gives annual benefits in 2004 of £94 - £156 million.’ The TUC was able to offer a revised estimate of the value made to the UK’s GDP in 2011, suggesting that where there is a ULR in a workplace, employees were eight times more likely to receive between two and five days training each year. Based on data in the Leitch Review of Skills, (*Leitch Review of Skills: Prosperity for All in the Global Economy – world class skills*, 2006), the value to GDP was estimated at £6 billion.

ii. Exit rates, labour turnover and dispute resolution

It is suggested that workplace representatives offer an alternative to leaving employment in order to voice a grievance (R. Freeman and J. Medoff, *What do Unions Do?* 1984; cf. A.O.

Hirschman, *Exit, Voice and Loyalty*, 1970). This results in savings on recruitment costs and the cost of reduced labour productivity as a result of loss of job skills (*DTI Consultation Document*). Research also found that ‘direct and representative participation had a positive impact on employee attitudes and behaviour, which in turn improved labour retention and reduced absenteeism.’ According to the 2004 WERS data, the dismissal rate in organisations with a representative voice (which could include non-union representation), was 1.53 per cent compared with 1.96 per cent where there was no representation. Similar evidence can be found in the WERS data published in 2014 which showed that avoiding unnecessary exits saves millions of pounds in recruitment costs, in addition to the ‘substantial psychic costs for employees’. In an updated TUC review of the DTI data in 2011 (*The Facts about Facility Time, 2011*), using the same formulae, it was estimated that the work of union representatives results in:

- Overall productivity gains worth between four and twelve billion pounds to the UK economy;
- Savings of at least £19 million as a result of reducing dismissals;
- Savings to employers of between £82 million and £143 million in recruitment costs as a result of reducing early exits.

iii. Worker safety and productivity

The WERS *First Findings Report* 2014 compiled a list of the ways in which employers consult with their workforce on health and safety matters, finding that twenty per cent communicate through employee representatives, a figure which varied only slightly according to the size of the workforce. A number of studies have indicated that the presence of health and safety representatives and joint consultation plays a significant role in improving health and safety in the workplace. The HSE study by Walters et al was able to conclude from an

examination of a large number of previous studies that the great majority of them ‘broadly support the notion that joint arrangements, trade unions and trade union representation on health and safety at the workplace are associated with better health and safety outcomes than when employers manage OHS without worker representative participation,’ (*Contract Research Report 363*, HSE 2005). Another study based on WERS 1998 data found specifically that in workplaces with a trade union presence, the injury rate was 24 per cent lower, (A.S. Litwin, *Trade Unions and Industrial Injury in Great Britain*, LSE, 2000). Even assuming a modest reduction of ten to fifteen per cent, the Walters study estimated that the reduction in injuries in the collective workforce would be between 8,000 and 13,000. The Health and Safety Executive estimated that the full cost to society as a result of injury or ill health caused by current or recent working conditions to be £14.3 billion in 2013/14 (*Health and Safety Statistics at a Glance, 2014/15*, HSE). Significantly, although around 60 per cent of the costs are borne by the individual, 20 per cent are borne by both the employer and the State, so any reduction in this cost through effective union representation should be given serious consideration by the government.

Research on the value of facility time (*The Value of Trade Union Facility Time: Insight, Challenges and Solutions*, NatCen, 2012) identified four main benefits arising from the use of facility time:

- Provision of a ready-made structure for meaningful consultation and negotiation, saving organizations money and providing reassurance for members that their views are valued in decision-making.
- Facilitation of partnership-working with trade unions that improved workplace relations and the reputation of an employer as ‘a good place to work’.
- Earlier intervention in relation to complaints, grievances and disciplinaries preventing escalation into more serious problems; thereby saving organizations and taxpayers money by reducing the impact on staff time and possible legal costs.

- Better communication to manage change during restructuring and redundancy processes; thereby improving understanding of decisions, minimizing negative impacts and reducing the number of working days lost through industrial action.

Additionally, the report identified that the time had value in itself, leading to ‘better representation of members’ views and improved availability of representatives to work with employers on areas of common interest.’

Previous analyses carried out by the Department of Business, Enterprise and Regulatory Reform, BERR, (now BIS, the Department for Business, Innovation and Skills) suggested that the economic benefits of facility time outweighed the costs (*Reps in Action: How workplaces can gain from modern union representation*, 2009). The TUC cited the research in a later report (*The Facts about Facility Time*), claiming that:

The reality of the provision of facilities and facility time [is that] they cannot simply be regarded as ‘costs’ to employers, that on the contrary, union reps and the work that they do for members and with employers represent an important workplace resource for UK employers in both the public and private sector.

In an analysis of overall economic benefits, Freeman and Medoff (*What do Unions Do?*) were able to point to new quantitative studies in the United States which indicated that productivity appeared to be higher in unionised establishments than in otherwise comparable establishments that were non-union, and concluded that higher productivity appears to run hand in hand with good industrial relations.

6. *What was the justification for the TUA measures?*

With such strong evidence as to the financial and indirect advantages of unionization in industry, and effective representation in the workplace in particular, it is doubtful whether such benefits were given adequate consideration by the policy-makers. The Conservatives’ desire to

introduce the reforms during the Coalition years was blocked by their Liberal Democrat colleagues. Nevertheless, the Trade Union Bill was introduced less than two months after the incoming Conservative Government gained power in May 2015. The Trade Union Reform Campaign (a group set up with a view to reducing trade union rights) had in fact been working on the details of this legislation for several years. It was a limited company (now dissolved), led by right-wing Conservatives. Unite the union described the group as ‘a vehicle for discredited Tories to pursue an ultra-right wing agenda, but it is the true face of the Tory Party’, while the union’s General Secretary, Len McCluskey, called it a ‘rogues gallery, full of discredited Tories and unpalatable right wing views’.

The agenda for change was ideologically driven, with a view to undermining trade unions in general and the position of trade union representatives in particular. Although there had been sufficient opportunity to make an assessment of the indirect cost-benefits of trade-union representation in the workplace, there is little evidence that the Government has given any consideration to this evidence in the rush towards ‘reform’.

Much reliance appears to have been placed initially on the Tax Payers’ Alliance’s (TPA) report which purported to show that taxpayers’ money was being used to subsidise trade union activities (*TPA Research Note 140*, 2014). This neo-liberal organization also had some dubious credentials, with John Cruddas, the Labour MP, describing it as ‘an arms-length Tory front operation run by big powerful business interests’, while Tim Horton, research director of the Fabian Society, claimed the group was ‘fundamental to the Conservatives’ political strategy’.

Its findings suggested that trade unions received a subsidy of £108 million per year - at taxpayers’ expense - in 2012-13, with at least 2,841 FTEs (full-time equivalent staff) working on trade union duties in the public sector in the same period. However, according to the NatCen report on the value of facility time, the report did not make findings as to the possible benefits of facility time and failed to provide contextual information, such as the number of people

represented. The findings are therefore unreliable and their use as the main source of evidence to support such a radical change is questionable.

On 29 February 2012, the Conservative MP, Fiona Bruce, introduced a debate in the House of Commons on the transparency, accountability and fairness of trade union funding, and on finding the right balance 'between effective representation of trade union members and value for money for the taxpayer'. Bruce claimed that trade unions themselves should pay for the work done by representatives. Nevertheless, it appeared that she, like the TPA on whose evidence her arguments were apparently based, had not considered the indirect cost-saving that trade unions brought to the employers, and seemed determined to focus only on its headline figures. Controversially, these figures were also based merely on estimates and were therefore unreliable, since not all public sector employers published the details of the percentage of their budget which went towards facilitating trade union duties. Of those 1,074 public sector organizations surveyed by the TPA, 344 either did not fully record facility time or did not record it at all in 2012-13 (*TPA Research Note 140*, 10 September 2014). Nevertheless, despite the serious gaps in the data, the TPA chose to conclude that the estimate of 2,841 FTEs was an *understatement*, when it could just as easily have been an overestimate of the cost of providing facility time.

Could the Government have in fact been responding in a mature and carefully considered way to genuine public or business concerns about unions, rather than following an ideological agenda? The research appears to suggest that this was not the case. The IpsosMori Trade Unions Poll carried out in 2013 found that 78 per cent of Britons agreed that trade unions are essential to protect workers' interests, a finding that had remained consistent over the four decades during which the polling organization had been tracking public opinion on trade unions. Only 35 per cent believed that unions had too much power, while 50 per cent disagreed. Concern over trade union power was much lower than in the 1970s and 1980s when lengthy, damaging strikes rocked the country (see K. Laybourn, *A History of Trade Unionism, c. 1770-1990*, 1992). The report

noted that, for the last ten years, the issue of trade unions and strikes had not been mentioned as an important issue by more than 1 per cent of those polled.

Furthermore, in the 2009 report (*Reps in Action*) produced jointly by BERR (for the Government), the CBI (for the employers) and the TUC (for workers and trade unions), there was no finding of serious concern either about trade union power or about the cost of providing facility time. In examining seven case studies from a diverse range of organisations, the three bodies were able to conclude that ‘all those involved – employees, the union and the employer – have directly benefited’ from the work of lay union representatives. Findings showed that, ‘where workplaces are unionised, employers and trade unions who work efficiently and constructively together can improve workplace performance for the mutual benefit of the employer and employee.’

7. *Conclusion*

To have a reasonable chance of success, legislation should be reasonable, based on solid, empirical evidence, and provide demonstrable economic justification, in order to be accepted by those on whom it has the greatest impact. The evidence presented here indicates an overwhelming cost-benefit to workplace representation, with representatives performing many valuable services for the employer. There is no discernible, hard evidence to justify an attack on trade union facility time, either in the public or the private sector. In fact there is a plethora of evidence that trade unions are a precious resource for employers, helping to reduce staff turnover, facilitate disciplinary and grievance activity, promote staff training and assist in ensuring a safer workplace. The evidence strongly suggests that a workplace would suffer greatly if paid time off for representatives was reduced. There could also be a substantial cost to the employer, to society and to the tax-payer if a reduction in facility time were to be ordered by the Minister in the future.

The arguments for reducing facility time should not be reduced to a simple mathematical exercise which merely considers the figures on an annual balance sheet. Nevertheless, one suspects that whatever figures are presented to the Government over the coming years, the Minister will declare them to be excessive, since it is doubtful whether the legislator recognises the full value to the employer of the work undertaken by union representatives. There will almost certainly be some reductions in facility time in the future, but the overall impact on the effectiveness of trade union representation and its attendant indirect financial benefits could be nothing short of devastating.

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