



In place of strife

New Labour honoured a pre-election pledge to the trade unions when it introduced a statutory union recognition procedure in 2000. Sian Moore and Stephen Wood assess how it has fared in its first two years.

In the foreword to the 1998 White Paper "Fairness at Work", Tony Blair described statutory union recognition as part of the lasting industrial relations settlement that he wanted to achieve in his first Parliament, a settlement designed to maintain and extend peaceful employment relations. He stressed, though, that unions and employers should find voluntary solutions to their problems over union representation and that the statutory recognition procedure should only be used as a long stop.

Nonetheless, a new legal procedure was introduced in June 2000 to deal with cases where a recognition dispute cannot be settled voluntarily and the Conciliation and Arbitration Committee (CAC) was charged with handling it. Labour's declared aim was to provide a right for union recognition where a majority of the workforce wants it. The core features of the statutory procedure reflect this.

Its essential feature, in comparison with the two past statutory systems, is the specification of unambiguous criteria for the acceptance of applications and the subsequent granting of recognition. The CAC can only accept an application from a union to establish a bargaining unit:

- in companies with 21 or more employees;
- where at least 10% of the employees are union members;
- providing there is not already a collective agreement covering some or all employees;
- if it is satisfied that a majority of employees are likely to be in favour of recognition.

Once an application is accepted and the bargaining unit settled, if the majority in it are union members, the CAC may declare the union recognised. If less than a majority are union members, it must order a ballot in which the union has to secure a majority of those voting and 40% of those balloted. Even where 50% or more of employees are union members, the CAC must decide whether certain conditions have been met before it can grant recognition without a ballot, one of which is whether this would be "in the interests of good industrial relations".

The CAC is also empowered to make judgements on the appropriateness of the bargaining unit. If the union and employer are not agreed on the bargaining unit by the time the application has been accepted, then the CAC must

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decide if the union's proposed unit meets certain criteria. The most significant of these is that it is "compatible with effective management". If it is not, then the CAC determines an alternative bargaining unit.

After two years it is still too early to judge the full effects of the legislation. First, the number of applications has not been large – 176 in the first 22 months. However, 24 of these were withdrawn and then resubmitted. Thus there have only been 152 distinct cases. Second, it is too soon to assess the nature of collective bargaining emerging from statutory recognition, or the effectiveness of the procedure's enforcement mechanisms. But there have been sufficient cases to give some indication of how the CAC is exercising its discretionary power and for us to speculate whether the legislation is helping to reverse the decline in union membership experienced since the early 1980s.

The CAC has so far decided on the acceptability of 102 applications. Only eleven of these have been deemed not to have met the criteria for acceptability: seven because the CAC gauged that a majority of the proposed bargaining unit was not likely to favour recognition; three because collective bargaining agreements already existed; and one because the employer had less than 21 employees.

The CAC has not settled on a rigid rule, such as a given level of current union membership, for deciding whether support for collective bargaining is likely. An application where membership was as low as 16% has been accepted, while one with 36% has been rejected. Our analysis of the cases so far does, however, suggest that, unless other really convincing evidence is provided, applications are only likely to be accepted when a union has at least 35% membership in the bargaining unit. Such

evidence is usually in the form of a petition or letters of support. The CAC will also take into account a union's difficulties in securing access to workers in the workplace. For example, in the case of a television company, MTV, the CAC accepted an application from the Broadcasting, Entertainment, Cinematograph and Theatre Union (BECTU) on the basis of 19% membership and a petition in support of recognition signed by 55 of those in a bargaining unit of 119 (46%). The CAC stated that it understood that the union had conducted its petition outside company premises and was unlikely to have had access to all workers in the bargaining unit.

The CAC has ruled on the appropriateness of a bargaining unit in 31 cases. It has supported the union's proposed unit in 21 of these and a variation of the union's proposed unit in two. It has upheld employer objections in six and determined a different bargaining unit in two. In the case of 18 out of the 19 single-site companies before the CAC, the employer has argued for a "whole company" approach, including all the key occupations. In all but one of these cases, the CAC has resisted this argument on the basis that it has been demonstrated that the terms and conditions of the occupational group proposed are distinctive. The exception was the Staffordshire Sentinel newspaper, where the CAC decided that all editorial staff, and not just journalists, should be included in the National Union of Journalists' claim. In two multi-site companies, the employers successfully argued that all key occupations should be included. In one of these, the Essex Chronicle group, the CAC again determined that the bargaining unit should comprise all editorial staff and not just journalists.

In six out of eight multi-site company cases before it, the CAC has ruled that the bargaining unit should embrace workers sharing the same distinct terms and conditions on all sites in the organisation. In the case of Ryanair this ruling was in line with the union's proposed bargaining unit. However, in the other five cases the union's proposed bargaining unit was based on one site and it could not demonstrate sufficient support for recognition amongst the workers on the other sites subsequently included in the bargaining unit. In two of these cases – Hygena and DHL (Aviation) – following the redefinition of the bargaining unit the CAC ruled that the application was no longer valid on the grounds that there would not be sufficient support for recognition in the "new", larger bargaining unit. In another two – Getty Images and Maxims Casino – the union withdrew the case immediately after the CAC's decision, in the knowledge that it lacked the required support. In one case – Seabrook Crisps – the union did not withdraw and a ballot was lost.

There are two exceptions to the general trend of the CAC's rulings. In the case of Daryl Industries, the CAC backed the union and included only one of three sites because the company already had separate Works Councils for each site. And, in the case of Kwik-Fit, the CAC allowed the



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union's proposed bargaining unit, based upon the London region only.

There have been 20 submissions where the union has had more than 50% membership and the CAC has thus had to decide whether to ballot the bargaining unit. So far, recognition without a ballot has been awarded by the CAC in 12 of these cases. In one of the eight cases where a ballot was ordered – where the application at the UK branch of Türkiye İş Bankası involved 17 union members out of a bargaining unit of 21 – three members of the union wrote to the CAC stating they did not want the union to conduct collective bargaining on their behalf. The union submitted that these employees had done this under pressure from the employer. Nonetheless the CAC was bound to call a ballot, as one of the qualifying conditions is that a significant number of union members do not wish to have collective bargaining conducted on their behalf. In the cases of Huntleigh Healthcare and Unipart DCM Jaguar, the CAC determined there should be ballots because, in the first instance, membership had been recruited on the basis of no subscriptions and, in the second, on the basis of reduced subscription rates outside of the union's rules. In the case of Red Letter, the CAC invoked the "in-the-interests-of-good-industrial-relations" criteria, as it was aware that relations between the parties had not been particularly harmonious and judged that a ballot would "resolve any uncertainty and clear the air". This contrasts with the case of Fullarton Computer Industries, where over 50.3% of the bargaining unit were union members. Here the panel stated that "in this case the holding of a formal ballot, with each side campaigning for employee support for its position, would be likely to engender further antagonism and divisiveness detrimental to developing good industrial relations".

Of the 33 ballots ordered by the CAC, unions have lost eight out of the 29 of those where the outcome is known to us. In seven of the lost ballots the proportion of workers in favour of recognition was lower than the proportion of members at the time of the application. This also happened in one case where the union was victorious. Such outcomes may reflect labour turnover in the bargaining unit, or the ineffectiveness of the union campaign. Yet our research has revealed evidence that in some cases they reflect employer hostility during the ballot or even intimidatory behaviour beforehand. For example, in the Türkiye İş Bankası case, where only three employees had indicated to the CAC that they did not want collective bargaining, only 35% voted in favour of the union, despite a union membership level when the application was made of 80%

There have been four applications for judicial review of CAC decisions. The issues these concerned are: the confidentiality of union membership data (Essex Chronicle Series); the determination of the bargaining unit (Kwik-Fit); the impact on ballot results of recruitment into the bargaining unit after the submission of an application (Ryanair); and

the decision to grant recognition without a ballot and the delegation of membership checks to the case manager (both in Fullarton Computer Industries). With the Essex Chronicle, the application was withdrawn and with Ryanair the applicant was not granted a hearing. In the first case to have been heard (Fullarton Computer Industries), CAC procedures were upheld; in the second (Kwik-Fit), they were not, but this decision was overturned on appeal. In the Fullarton case, the employer challenged the reasoning behind the panel's decision not to hold a ballot. The judge concluded that the panel's discretion had not been exercised in an irrational or flawed way, although he did suggest that a ballot might have been appropriate in the circumstances, but stressed this was a personal view.

At the end of the CAC's first 22 months, 110 cases had been dealt with and 40 are live as we write. Of the cases for which we have information, recognition was granted through the procedure in 33 cases (30% of those completed). In addition, 41 applications have been withdrawn at some stage, because the employer and union had come to or were discussing a voluntary agreement. This means that 74 (67%) of cases that have passing through the CAC procedure have resulted in recognition or discussions on recognition; and 27% of the cases are known not to have resulted in recognition. (The outcome of the remaining 5% of cases is currently not known to us.)

The number of cases processed is slightly fewer than the number of cases that the Advisory, Conciliation and Arbitration Service (ACAS) investigated in the first two years of the procedure that it operated in the 1970s, the last time there was a statutory recognition system. But the number of applications is considerably fewer, as under



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ACAS unions were able to put in applications without having any members. The Association of Scientific, Managerial and Technical Staff (ASTMS) was particularly prone to do this as a first move in a recognition campaign.

The proposed bargaining units in applications thus far have been relatively small, a median of 87 employees, with 41% having over 100 workers, 29% fewer than 50 and only 17% having over 250. CAC rulings on bargaining units suggest that unions are more likely to succeed at this stage in single-site companies, or by limiting bargaining units to narrow groups of workers with distinctive terms and conditions. Faced with the difficulty of recruiting sufficient members in large, multi-site organisations, unions may be encouraged by the legislation to approach employers at national level for a voluntary agreement.

The direct impact of the CAC procedure is limited. The cases where it has granted recognition cover under 10,000 workers. And 4,000 of these are accounted for by the AEEU's successful recognition ballot at Honda at Swindon. In addition, the 22 semi-voluntary cases where we have been able to acquire figures represent around 5,000 workers.

Moreover, the CAC cases so far have been concentrated in a limited number of industrial sectors and those in which unions have historically had a presence. Nearly half of both applications and the successful cases have been in manufacturing, with around 10% each in transport, print, newspapers and finance.

However, unions have not just relied on the statutory procedure. The voluntary route to recognition, the only means available for the 20 years from 1980 to 2000, has been increasingly successful in achieving results. The TUC recorded 450 new voluntary agreements signed between November 2000 and October 2001, representing nearly three times those achieved for the previous 12 months and covering an estimated 120,000 workers. Similarly, ACAS has experienced a significant increase in requests for collective conciliation assistance over recognition, both prior to the introduction of the statutory procedure and subsequently.

For the first ten year's of ACAS's life (1975-1985), the annual number of cases was consistently over 200 (the highest figure being 697 in 1976), but this dropped steadily to a low point of 93 in 1994. The figure returned to over 200 in 2000 for the first time since 1985. As a proportion of the conciliation workload of ACAS, it reached nearly 18%, the highest figure since the 1970s. Even more significantly, full recognition was agreed in a record 65% of the cases. This trend in voluntary recognition suggests that the procedure is having an indirect effect and that its shadow is influencing unions and employers to reach agreements when they might otherwise not have done.

The limited number of CAC applications reflects a combination of factors. First, the design of the statutory procedure has prescribed which cases are likely to be accepted and to meet the thresholds required for recognition. Second, when the procedure came on stream there were very few ready-made cases that could be submitted to the CAC. This is confirmed by a survey of private sector workplaces with 50 or more employees that we conducted in August 2000. This showed, on the one hand, that there were many workplaces (90%) either with no union recognition or where groups of workers were not covered by recognition for collective bargaining. On the other hand, it showed that in only just under a third of these workplaces were there any union members. In fewer than 10% of workplaces was there 10% or more union membership – the minimum required for acceptance by the CAC – and only a tiny minority of these had more than 50% membership, or anything like the sort of level that the CAC would require to demonstrate majority support for recognition.

Third, the unions have carefully managed their use of the procedure. In line with the commitment to using the legislation as a last resort made by the TUC in its joint statement with the CBI before it came in, the majority of unions that we surveyed in early 2001 reported that they would, in the first instance, aim to achieve voluntary recognition through majority membership. In addition, unions were concerned that cases submitted to the CAC should not be lost, so they aimed to submit cases that they were confident would secure automatic recognition or win a ballot. Consistent with this, in 50% of the CAC applications that have been decided unions had at least 50% membership (and in 80% the membership was at least 35% of the proposed bargaining unit). Centralised internal procedures were



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established in the majority of unions to control the flow of cases to the CAC and most TUC-affiliated unions allowed the TUC an advisory role in the submission of applications.

Taken together, these factors suggest that unions will have to substantially intensify their recruitment efforts to significantly extend union recognition, either through the legislation or under the threat of its use. Our workplace survey showed that employers are unlikely to initiate union recognition discussions. When they do, it will be where union membership is approaching the proportion where a CAC case could be won and/or to exclude a particular union in favour of another. This latter kind of behaviour is illustrated by one CAC case where the ISTC put in a claim for recognition at Bausch and Lomb, only to have it rejected on the grounds that there was already a recognition agreement in place – an agreement with an independent union that had in fact only been reached two days before the application.

The legislation has been designed to ensure that employers both co-operate with the CAC (as all were not prepared to do with ACAS in the 1970s) and reach agreements with the union involved once it has been awarded a recognition order by the CAC. It also guarantees that access to the workforce is given to the union during a ballot. But it does not prevent employers from placing undue pressure upon employees when a case is in the pipeline or from victimising activists. Neither does the procedure allow the union access to the workforce or workplace outside the ballot period.

Yet the results of our survey revealed that the aim of the vast majority of unions is to gain significant numbers of members, rather than to seek voluntary recognition regardless of the level of union membership. The largest unions

are putting more resources into organising and we found that unions for whom new recognitions are important are indeed taking a systematic approach. The legislation has played a role in this, as the unions have a greater confidence that there will be a return on any investment they make in recruitment and organising.

The CAC system is the third such statutory recognition procedure to have been tried in the UK. The first, introduced by the 1971 Industrial Relations Act, was largely ineffective as the unions did not register as intended. The second (ACAS) ultimately became inoperable because rulings in key judicial reviews meant that ACAS concluded that it could not operate the procedure properly. The prospects for the survival of this third attempt look more promising. Judicial reviews have not as yet threatened its operation. Its key design features, the way the CAC has worked it so far and the unions' approach all bode well for its future. The success rate of CAC applications suggests that in most cases recognition is being granted where the majority of the workforce is in the union. Yet the number of ballots that have been lost despite majority union membership means that this outcome is not inevitable and indicates that employer resistance may be playing a role.

But the implication of our research on the procedure's first two years is that its direct effects are likely to be marginal. Its shadow effect, the signing of voluntary agreements, looks like being greater. This suggests that the statutory route can, paradoxically, support or even enhance what remains of the "voluntary" tradition of UK industrial relations. Yet the scale of the task facing unions in reversing membership decline remains great, regardless of employer opposition, and will involve their organising well beyond their conventional terrains.

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Further reading

Wood, S., Moore, S. and Willman, P. (2002), "Third Time lucky for statutory union recognition in the UK?", available from the CEP (Working Paper No. 1189). A version of the Working Paper will appear in the *Industrial Relations Journal*, August 2002.

Stephen Wood and Paul Davies, "A sword of Damocles: New Labour and statutory recognition", *CentrePiece* Summer 2000.

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