



# DMH Stallard

Employment law webinar 2022

The rights of trade union members  
and issues for employers facing  
industrial action

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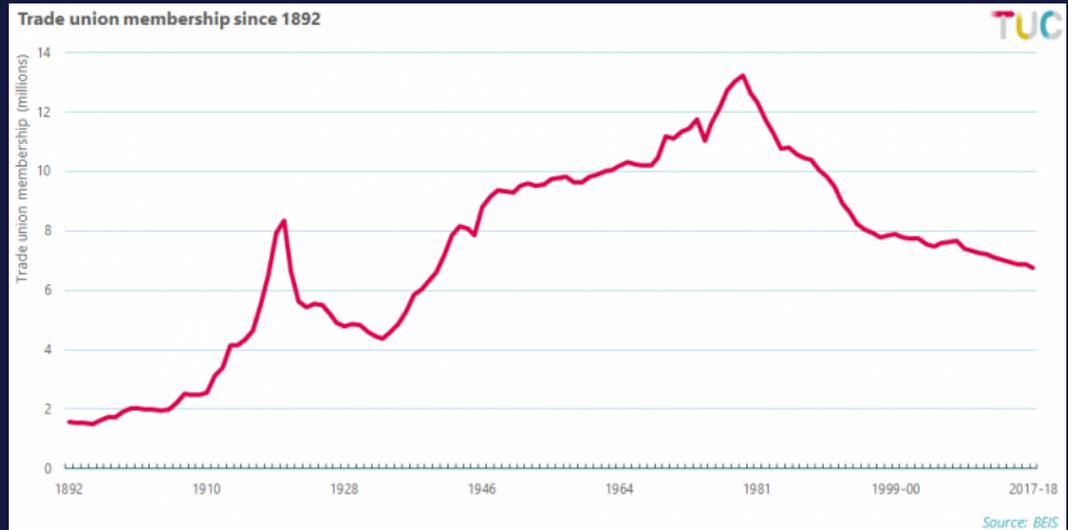
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# Introduction

Will Walsh

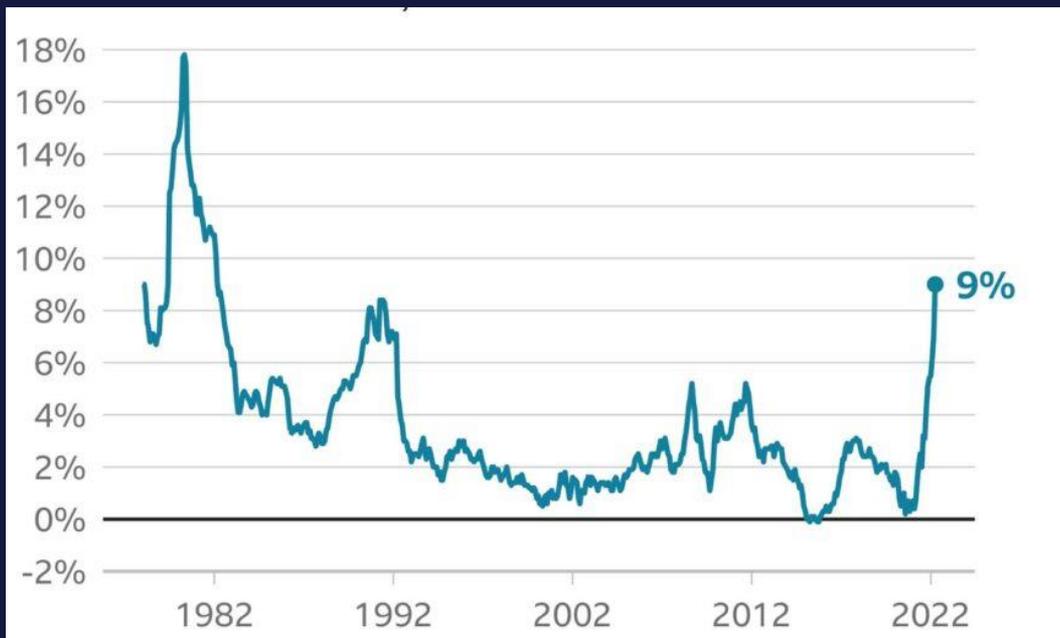
## Trade union membership trends

- Membership levels have been on downward trend in recent decades
- Membership decreased to 23.1% in 2021



## Trade union membership trends

- Past membership peaks matched periods of discontent



## Trade union membership trends

- TUC has reported a 700% increase in visitors to its “find a union” webpage
- Between October 2021 and March 2022, GMB members entered into dispute with 42 employers, seven times the number compared to same period in 2019-2020
- Unite have seen 400% increase in disputes
- Large amount of high profile industrial action in 2022: British Airways, BT, Royal Mail, rail services, Post Office, etc
- Significant moves into the private sector: Ryanair, Deliveroo, Uber

## What could the impact be?

- Trade union recognition and collective bargaining
- Industrial action
  - Strikes
  - Action short of a strike
    - Working to rule
    - Overtime bans
    - Withdrawal of co-operation



## Poll Question

Which of these describes your organisation's position best:

- a) You have trade union members in your workforce and you have a trade union recognition agreement in place
- b) You have trade union members in your workforce and believe you may receive a request for recognition soon
- c) You have trade union members in your workforce but you do not believe that a request for recognition is likely
- d) You do not have trade union members at the moment but there is a strong chance that this will change in the next 12 months
- e) You do not have trade union members and you do not feel that this is likely to change in the next 12 months

# Trade unions: a brief history

Stephen ten Hove

## What is a union?

- It is an association which seeks to achieve better pay and working conditions for its members by collective, rather than individual, negotiation and/or action
- Modern trades unions began as workers associations in the early 19<sup>th</sup> century
- Address imbalance of bargaining power between individual worker and individual employer by collective bargaining and collective withdrawal of labour
- In Britain, no constitutional right of association or right to strike. In the early 19<sup>th</sup> Century, such associations were subject to the criminal law of conspiracy and the civil laws of restraint of trade and interfering with business by unlawful means

## Late 19<sup>th</sup> / early 20<sup>th</sup> century

- The Trade Unions' Act 1871: first time trade unions recognised as lawful associations. But was this enough?
- 1901 - two cases: Taff Vale Railway & Quinn v Leatham: House of Lords held unions could be liable for losses of employer during strike and could be liable in tort if put pressure on employer
- Trade Disputes Act 1906 gave trade unions immunity from liability in tort if action taken: "*In contemplation of or furtherance of an industrial dispute*"
- This remains broadly the position today: if "*the action*" and / or the "*industrial dispute*" are lawful then collective bargaining and subsequent strike are also lawful. And visa versa

## Late 19<sup>th</sup> / early 20<sup>th</sup> century

- Police and armed forces. Prohibited from taking industrial action and it remains a criminal offence to induce police officers and members of the armed forces to take such action



## Trade unions in 20<sup>th</sup> / 21<sup>st</sup> century

- In 1974, Government agreed with unions that it would
  - Strengthen legal rights of unions and unionists: Trade Union & Labour Relation Act 1974
  - Strengthen legal rights of individual employees: Employment Protection (Consolidation) Act 1978 [pre cursor of ELA 1996]
- Thatcher Government: Secondary picketing outlawed and secret ballots for strike action. Break law? Assets liable to seizure

## Trade unions in 20<sup>th</sup> / 21<sup>st</sup> century

- Trade Union & Labour Relations (Consolidation) Act 1992. TULRCA – still with us today. Not revised by subsequent Labour Government
- Trade Union Act 2016. Balloting requirements for strike action tightened



## Changes / future

- Employment Rights Act 1996 etc: workers pursue individual rather than collective rights
- Globalisation (Manufacturing in particular). Shift to services
- Flexibility (demanded by workers)
- Internet / social media – used by canny unions to recruit and to publicise injustice
- Trade union sponsored individual legal action – zero Hours, workers' status, employment tribunal fees. Good for union recruitment too
- Lobbying
- But: 2020: Terms and Conditions decided under collective agreements
  - Private sector 13.6%
  - Public sector 57.2%

# Types of recognition agreement

Will Walsh

## Voluntary recognition

- Union makes direct approach to employer outside of statutory process
- Employer agrees to recognise on entirely voluntary basis
- Complete flexibility on scope of recognition
- Normally includes recognition for collective bargaining
- Flexibility on subject matter for collective bargaining
- Termination provisions as may be agreed



## Semi-voluntary recognition

- Trade union makes request for recognition under the statutory process
- The union and the employer reach agreement on recognition within set period
- Union is recognised as entitled to conduct collective bargaining on behalf of a group of employees
- Collective bargaining for pay, hours and holidays
- May agree further areas for collective consultation
- Termination
  - May be terminated by the Union at any time
  - Unless otherwise agreed, employer cannot terminate agreement for three years
  - After initial period, employer may terminate with or without consent of union

## Application to CAC

- If voluntary arrangements are not agreed, union can apply to CAC for recognition
- Union must have support over minimum levels
- CAC can determine bargaining unit
- CAC may impose default method for collective bargaining on pay, hours and holidays
  - Joint negotiating board
  - Timings of meetings
  - Facilities
  - Six step bargaining process



# Union recognition: the key stages

Stephen ten Hove

# Union request for recognition by an employer

1. The request must be
  - a) Made in writing
  - b) Identify the relevant union/s
  - c) Identify the relevant bargaining unit
  - d) State that it is made under TULRCA 1992 Schedule A1 paragraph 8
  - e) The employer must have received the request

2. On receipt of a request an employer may
  - a) Agree to the request (which it must do within 10 working days) and, if it does so, nothing further need be done
  - b) If the employer does not agree to the request, but agrees to negotiate, the union will be deemed to be recognised if the parties are able to agree within the next 20 days. ACAS assistance may be requested to achieve this
3. **Note:** It is always possible for both employer and union to come to a voluntary agreement outside TULRCA 1992, altogether

4. If the employer fails to respond within 10 days or to negotiate (or negotiations break down during the subsequent 20 day period) the union may apply to the Central Arbitration Committee (CAC) to determine
  - (i) The appropriate bargaining unit
  - (ii) If the union has the support of the majority of workers within that unit

Or, only

- (i) If the parties have agreed on (ii)

**Note:** the union may not apply to CAC if it has rejected or failed to respond to a proposal by the employer that ACAS be requested to assist with negotiations

- The application must cover “workers” and must concern a legal employer
- The application must be in the form prescribed by the CAC
- The union must send the employer notice that it is applying to the CAC together with a copy of its application and the documents supporting it. It is vital the application includes a description of the bargaining unit
- CAC must reject an application as being inadmissible unless it decides that
  - Members of the union make up at least 10% of the workers in the relevant bargaining unit and
  - A majority of workers in the bargaining unit would be likely to favour recognition of the union to conduct collective bargaining on their behalf

**Note:** CAC will not accept competing applications for recognition by rival unions. These should not be confused with joint claims for recognition which will be accepted

- Once the CAC has accepted an application it will give notice that it has done so to the employer who must, within five days, provide the CAC and the union with the following information
  - A list of the categories of worker in the proposed bargaining unit
  - A list of the workplaces at which the workers in the proposed bargaining unit work
  - The number of workers the employer reasonably believes to be in each category at the workplace



## Appropriate bargaining unit?

- The employer and trade union may agree. If they do not, the union proposes a bargaining unit and, if the CAC finds the proposed bargaining unit is not appropriate, it must go on to decide one that is. The primary consideration is the need for the unit to be “compatible with effective management”; but the views of employer and union are important as are existing national local bargaining arrangements, together with other factors
- Finally, if the bargaining unit selected is different from that the union proposed the CAC must confirm that the union’s application complies with certain “validity” provisions

## Recognition

- Once the bargaining unit has been agreed or decided, the CAC proceeds to decide whether it should issue a declaration that the union is recognised
- It may grant recognition without a ballot if it is satisfied the majority of workers in the bargaining unit are members of the union (there are exceptions to this)
- Where the CAC concludes that the majority of workers are not union members it will arrange a secret ballot in which the workers in the bargaining unit will be asked whether they wish to be recognised or not



## Ballot

- To win recognition the union needs to have obtained the support of both
  - A majority of the workers voting and
  - At least 40% of the workers constituting the bargaining unit
- If the union is unsuccessful in the ballot the CAC will issue a declaration that it is not entitled to be recognised and that declaration will bar the union from making another application in respect of that bargaining unit for a period of three years

# Scenario

Will Walsh

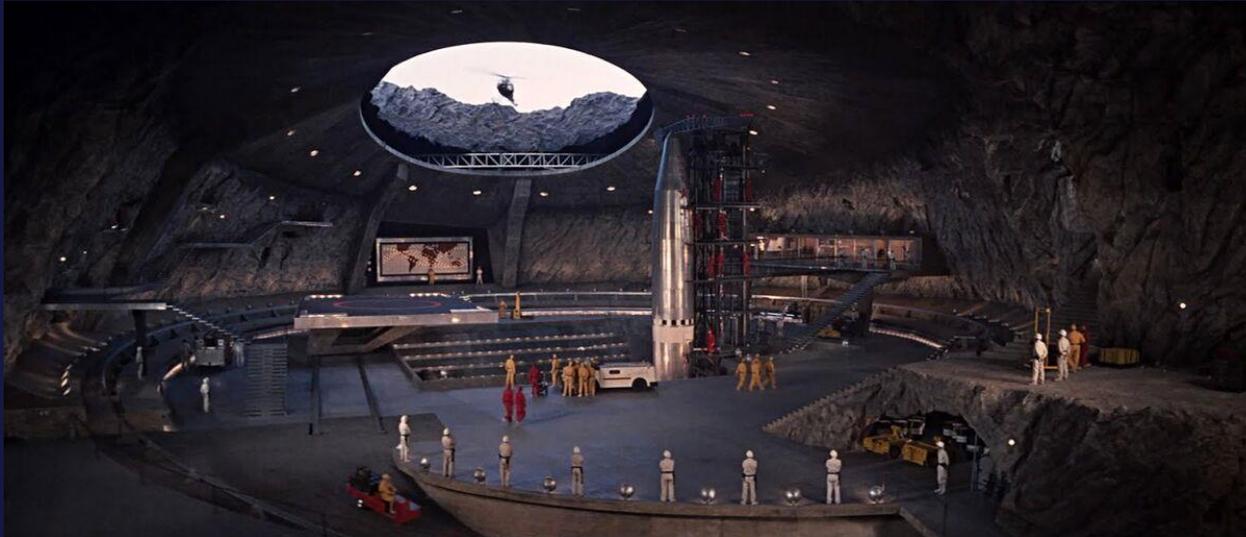
## The boss

Ernst Stavro Blofeld is the CEO of Spectre Limited.



## The business

The business is in the middle of constructing a large base, hidden inside an inactive volcano. From there they will launch a rocket into space, equipped with a laser satellite. They will require payment of ten billion pounds from each nuclear superpower country, under the threat that the laser will destroy the weapon stockpiles of those who refuse to pay.



## Company divisions

Spectre has a large workforce involved with the project, falling into four main divisions.



Dr Julius No, Science Director



Dr Kananga, Head of Engineering



Jaws, Director of Construction



Rosa Klebb, Head of Security

## Workforce problems

All workers are paid low basic salaries, with construction and security receiving National Minimum Wage only. They have been promised bonus payments on successful completion of the extortion, to be calculated based on net profits.

The workers are becoming disgruntled and worried about their cost of living. They realise that profits, and therefore bonus payments, will be hit by increased cost of building materials and rocket fuel, the enormous energy costs to heat and power a volcano base, particularly with its oversized piranha pool that has to be maintained at 28 degrees.

Scientists, who are freelance workers, have been declined all paid leave for the past 6 months.

Security are unhappy with the number of night shifts each worker has to do, with the increased risk of attack from spies during the hours of darkness.

## Further concerns

The workers are particularly worried about Spectre's disciplinary policy:

- Stage 1:** Invitation to meeting
- Stage 2:** Blofeld makes decision
- Possible outcome:** Piranha pool



## Request for recognition

007 has infiltrated Spectre. She has identified an opportunity to stall the plans by helping the workforce push their complaints. She has encouraged a number of them to join her trade union, Work Without Bonds.



Work Without Bonds make a request to Spectre for recognition, allowing them to undertake collective bargaining on behalf of all workers, at all levels, in respect of all matters relating to pay, hours, holidays, plus the ability to negotiate on all other contractual terms and company policies.

## Poll Question

If you were in Blofeld's position, which aspect of the recognition request would worry you the most?

- a) The prospect of having any trade union recognition in place at all?
- b) The fact that the request is looking to cover all members of staff, at all levels of seniority and all types of worker status?
- c) The scope of the proposed subject matter for collective consultation, covering work policies as well as employment contract issues?

## Scenario

1. Should Spectre agree to voluntary recognition?
2. What should the bargaining unit be?
3. Which particular areas should be included as matters for collective bargaining?

# Individual employment rights of trade union members

Rustom Tata

## Trade union membership and employment

- It is unlawful to refuse someone employment because they are, or are not, a TU member, or are not willing to become or remain one
- Also:
  - Job advertisements
  - Employment agencies
- Exceptions
  - The self employed



## Blacklisting

- A list of those involved in trade union activities
- 'Prohibited list' contains details of members of TUs, or persons who have taken part in TU activities, with a view to being used by employers or employment agencies for the purposes of discrimination in relation to the recruitment or treatment of workers



# Inducements

- Limits on employer seeking to 'induce' a worker to do certain things
  - Not make any offer to a worker for the sole or main purpose of inducing the worker
    - Not to be or become a member of an independent trade union (ITU)
    - Not to take part in activities of an ITU or
    - To be or become a member of an ITU
  - A worker who is a member of an ITU recognised by the employer shall not be subject to any offer by the employer where purpose or effect would be that T&Cs are no longer determined by collective agreement

## Dismissal on ground of TU (non)membership or activities performed at the appropriate time

- Automatically unfair dismissal (no minimum service requirement)
- What are 'activities'?
- When is the 'appropriate time'?
- Redundancy selection
- Impact of activities on performance



## Interim relief

- Unusual form of protection
- Short notice hearing
- Preliminary assessment of the case
- If the employee succeeds at this stage ET can make an order for continuation of employment, but it is of limited effect



## Action short of dismissal

- No worker to be subject as an individual to a 'detriment' – action or deliberate failure to act by employer, where the act is for the purpose of
  - Preventing or deterring membership of an ITU
  - Compelling membership of a TU
  - Preventing or deterring participating in activities of ITU at an appropriate time
  - Preventing or deterring use of TU services at an appropriate time

## Dismissal in connection with industrial action

- More details in our next webinar...
- Lawful 'official' action – employer can dismiss, but subject to stringent conditions (timing and procedural steps being taken)
- Unlawful action – TU has created the unlawfulness, and lost immunity, but still no picking and choosing by employer when dismissing employees
- Unofficial action – no right to claim unfair dismissal, but genuine consideration between employees as to whether or not they were striking is not unlawful
- Lock outs – employees cannot claim unfair dismissal unless they can show employer has been 'picking and choosing'

## Time off for TU duties for an Official of the union

- Time off is paid where the work relates to
  - Negotiations with the employer in connection with collective bargaining
  - The performance on behalf of other employees in respect of matters agreed by the employer or
  - Receipt of information from the employer and consultations re redundancy and TUPE transfers

## Time off for TU activities for a member of the union

- Time off is unpaid, for broader range of
  - Any activities of the trade union (narrowly defined) and
  - Any activities where the employee is acting as a representative of the trade union

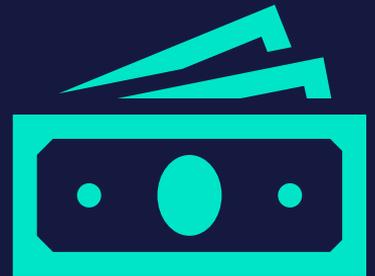


## Time off work for TU learning representatives

- Time off is with pay where the work relates to certain groups of employees, in order to
  - Analyse the learning or training needs of those employees
  - Provide information and advice about learning training needs
  - Arrange the learning or training
  - Promote the value of learning or training
  - Consult with the employer about any of these activities and
  - Prepare for any of the above

## Check off and political funds

- Employer will often agree to administer check off arrangements, but
- Employer needs to make sure that the deductions are agreed by the worker, and
- The TU member has the right to claim unlawful deduction, if the employer gets it wrong



# Questions?

**Save the date for part two: Thursday 10 November**

## Speakers



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