# ACTIVITY 12: - Improving or enhancing your agreements

## Trade Union Recognition

When a trade union and an employer agree to bargain about employment terms and conditions, the employer is said to ‘recognise’ the trade union. Find out what it means if your workplace has a recognised trade union.

## The role of a recognised trade union

A recognised trade union represents workers in negotiations with their employer. These negotiations will usually centre on workers’ terms and conditions. When an employer recognises a trade union, it will be for bargaining on behalf of a particular group of workers. This group is often called a ‘bargaining unit’.

Rights of a recognised trade union

Use our online tool to help with requests for time off work for union duties

- Supporting union reps: a manager’s guide

An independent trade union recognised by an employer has certain legal rights. These include the rights for it’s:

- Officials to be given time off work by the employer to carry out their trade Union duties
- Members to be given time off work to take part in trade union activities officials to be given information by the employer that they can use in collective bargaining with the employer
- Learning representatives to be given time off for their duties in relation to the learning and training of employees and to have training to carry out those duties

An independent trade union recognised by an employer also has the right to be consulted by the employer about certain issues. These include:

- Health and safety matters
- When the employer is thinking about making a group of workers that includes
- trade union members redundant
- When the transfer of the employer’s business is being considered
- Employee information and consultation rights
- Collective redundancy consultation representatives
- Resolving problems with trade unions

## Gaining trade union recognition

A trade union can become recognised by making a voluntary agreement or following a statutory procedure involving the Central Arbitration Committee (CAC).

## Voluntary recognition

If your employer does not recognise a trade union in your workplace, then a trade union can become recognised by making a voluntary agreement with your employer. This is the way most regognition agreements in the UK are established.

## Statutory recognition

If your employer will not make a voluntary agreement with a trade union, then the trade union can follow a statutory procedure for recognition. The statutory procedure applies to employers that have 21 or more workers.

To follow the statutory procedure, the trade union must first write to your employer requesting recognition.

## The role of the CAC

If your employer doesn't agree to recognise a trade union, the trade union can apply to the CAC for recognition to be awarded for a particular bargaining unit (group of workers).

When the trade union applies to the CAC it will say what it thinks the bargaining unit should be. If the employer disagrees and no agreement can be reached, the CAC will decide what it should be.

## Support for applications to the CAC

The CAC will look at any applications against a number of criteria, many of which relate to the strength of support for recognition among the workers in the bargaining unit. For example, the CAC cannot proceed with an application if fewer than 10 per cent of those workers are members of the trade union.

If you are in the bargaining unit, the trade union can to write to you for support for their application, whether or not you are a trade union member.

If 50 per cent or fewer of workers in a bargaining unit are trade union members, the CAC will hold a secret ballot to find out how much support the trade union has. The CAC can only award recognition if:

- 40 per cent of all the workers in the bargaining unit take part in the vote
- A majority of those vote 'yes'.

If a ballot is held, the trade union will be entitled to hold meetings with workers in the bargaining unit in the run-up to the ballot. You will be given the opportunity to vote, even if you are not a member of the trade union. The ballot may involve voting in the workplace or voting by post.

## CAC recognition

If the CAC awards recognition to a trade union, your employer is required to bargain with it over your pay, hours and holidays for at least three years. After this three-year period, the employer or workers in the bargaining unit can apply to the CAC to derecognise the trade union (remove the need to bargain with the trade union).

The statutory recognition and derecognition procedures are explained in full in a guide produced by the CAC.

Source: Directgov

Also consult Unite website for examples of Recognition Agreements concluded between the union and various employers.

## What is an agreement?

An agreement is acknowledgement of how the union and employer have agreed to deal with a particular issue or range of issues. Agreements should always improve on statutory rights. They can add to but not take away any rights you have in law.

**An agreement:**

- Protects workers enabling their collective interests are taken into account
- Prevents conflicts in that a shared approach helps cut down the risk of disruption to work
- Helps ensure equality and fairness preventing unfair treatment of individuals

**Types of agreements and policies**

In many workplaces existing agreements include:

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|---|---|
| Pay | Sick pay |
| Holidays | Hours |
| Overtime | Risk Assessments |
| Grievance and discipline | Equal opportunities |
| Work-Life balance | Bullying and harassment |
| Maternity/paternity/adoption | Stress |
| Education and training | Facilities for union reps |

These issues can be divided into two types of agreement:

Substantive i.e. what we get in terms, for instance, of pay and holidays (to do with money)

Procedural i.e. how things get sorted out, for instance, discipline and grievance.

STATUTORY REQUIREMENTS AND LEGAL RIGHT:
THE ELEMENTS OF THE CONTRACT OF EMPLOYMENT

**Contract of Employment:**

A contract of employment is an agreement entered into by an employer and an employee under which they have certain mutual obligations. Contracts of employment may be oral or written. They may be of indefinite duration, or for fixed terms. They may be for training, apprenticeship or other purposes. In law, employees have a contract of employment as soon as they start work even where the written statement of employment particulars required by the legislation has not been given to the employee. Furthermore, the law regards the contract as a central aspect defining the rights of employer and worker. The contract is the reference point for determining whether workers are employees or self-employed labour-only subcontractors.

A contract is an enforceable promise between two or more parties. There must be ‘consideration’. If I offer to dig your garden for nothing, you have no legal redress if I fail to keep my promise; if you agreed to pay me for it, either party can sue on the other’s failure to keep the promise. It follows that the contract exists at the time of the promise; a worker who accepts the offer of a job which is withdrawn before she or he has even started it, can sue, at least for the notice period.

If no contract of employment exists beforehand, one will come into existence as soon as an employee starts work and, by doing so, demonstrates that he or she accepts the job on the terms offered by the employer. The contract need not be in writing, unless it is a contract of apprenticeship (employers

should note however that a contract of apprenticeship may be found by the courts to be implied even if it is not in writing). Its terms can be written, oral, implied or a mixture of all three.

Implied terms might include those that are too obvious to be expressly agreed – for example, a term that the employee must accept reasonable instructions from the employer – those that are necessary to make the contract workable and those that are established by custom and practice in the particular organisation or industry concerned.

**Illegal contracts of employment:**

Some contracts of employment will be illegal if:

- The employee gets all or part of their wages as 'cash in hand'; and
- Tax and national insurance contributions are not paid; and
- The employee knows they are getting paid in this way to avoid paying national insurance and tax

**Written statements:**

The most common misunderstanding, sometimes deliberately fostered, is that the document usually given to new starters is the contract. It is, in fact, a statement of the principal terms and conditions of the contract. If you are an employee, you must get a 'written statement of employment particulars' setting out some of your main terms.

If the employer has already provided a written contract of employment or letter of engagement containing all of the items required in the statement, there is no need for a statement to be provided as well. Statements do not need to be provided for employees who are employed for less than one month.

Your employer must give you the written statement within two months of starting work (section 1 of the Employment Rights Act 1996). The statement must include:

- Pay
- Hours of work
- Holiday entitlement
- Sick pay arrangements
- Notice periods
- Information about disciplinary and grievance procedures

If the terms of the contract change, your employer must give you the new information in writing within one month.

**Restrictive covenants:**

Post termination restrictive covenants (i.e. Restrictive covenants in employment contracts which are intended to operate after employment has ended) are anticompetitive and in restraint of trade. The basic position is therefore that they are void as being contrary to public policy. If an employee contests the legal validity of such a covenant the onus is therefore on the employer to establish that it is a justifiable covenant. Thus, for example, agreements not to poach staff or customers/clients from the employer or not to work for a competitor after employment has ended are basically void. They are enforceable only if the ex-employer can show that they do no more than is reasonable to protect his/her legitimate business interests.

The position is different during employment. A Court may grant an injunction forbidding an employee to work for her/his employer's competitors while the employment contract subsists regardless of possible non-enforceability of posttermination restrictive covenant. There is a general rule (sometimes called the rule in General Billposting Co Ltd v Atkinson HL 1909 AC 118 HL) that where an employer has behaved so badly towards his/her employee that the employee can treat his/her employment contract as at an end (i.e. can treat the contract as having been "repudiated" by the employer) then, because the contract has been ended by the employer's own fault s/he, the employer, cannot as a general rule enforce any posttermination restrictive covenants it may have contained. In practice this rule is, for obvious reasons, especially important in cases where there has been constructive dismissal of a senior employee.

Another development is for new employers to set out in great detail in the written statement terms which they could not otherwise impose. Examples are the right to search employees and the right to suspend without pay. Obviously, such terms should be resisted. The best advice is not to sign for the written statement if possible or alternatively to sign for its receipt only. In reality, this may be pious advice. If the statement is obviously wrong, for instance with respect to continuity of employment, or contractual hours, it may need to be challenged, if necessary by application to a Tribunal.

**What to do if you don't have a contract of employment:**

If you're an employee, you automatically have a contract of employment as soon as you accept a job offer. What you may not have is a 'written statement of employment particulars' setting out your terms of employment. If you're not given this, or if it's wrong or unclear, of if you're dismissed for asking for it, you should first try to sort it out with your employer directly; if you have an employee representative (for example, a union shop steward), they should be able to help. Ultimately you may be able to make a claim to an Employment Tribunal (Industrial Tribunal in Northern Ireland). Dismissal for asking for a written statement will be automatically unfair.

**Common law obligations:**

This refers to the rules developed by judges about what they think are the duties and obligations of employers and employees to each other; a duty of an employee, for example, might be to "be ready and willing to work", while for an employer, it could include things like "to pay agreed wages" or "to take reasonable care of the employee's safety".

**Terms imposed by statute:**

These are laws which set down general requirements about hours, pay etc. An example is the law on the National Minimum Wage. Most statutory individual rights cannot be taken away.

**Work rules:**

These are usually assumed to be incorporated into the contract.

**Custom and practice:**

Some contact terms that aren't expressly stated may be implied through custom and practice in a particular trade or with a particular employer. For example it may become customary, if it has become the norm over a significant period of time, to leave early on a Friday in your workplace, or to add an extra day to a Bank Holiday. Sometimes the idea of custom and practice is used to interpret an express term, for example "reasonable overtime". The legal test for establishing custom and practice is that the practice must be reasonable, certain and notorious. This means that it must be fair, predictable, established, well known and unambiguous.

Discretionary benefits, for example, enhanced redundancy payments which are not expressly written into the Written Statement of Employment Particulars or other contractual documents such as a Company Handbook, will not necessarily become implied through custom and practice simply because they have been given in the last few redundancy exercises. In the event of a disagreement an Employment Tribunal will have the ultimate determination over whether such terms form part of the contractual entitlement.

**Conflicting terms:**

Frequently, different parts of the contract may conflict with each other. The written statement gives certain working hours; in practice, work always finishes early on a Friday. A part of the Work's Rules may conflict with a safe working practice. The letter of appointment may conflict with the collective agreement. National agreements may conflict with local agreements. There is no clear rule as to which part of the contract is dominant in a situation where two or more parts conflict. The general principles are, first, that the agreed terms carry more weight than those imposed by one party and, second, that recorded terms carry more weight than unwritten terms. The principles should be applied in this order.

It may be possible, through collective bargaining, to get collective agreements expressly incorporated into workers' contracts so as to automatically include new agreements; identify the active agreement where there are several; make it clear that in a conflict between the collective agreement and other terms of the contract, it is the collective agreement which will count; and prevent the employer from changing terms of introducing new ones without going through the proper procedures.

**Variation of contract:**

An employer may wish to vary the terms of the contract because of changed economic circumstances or due to a reorganisation of the business. Possible areas of change could include pay rates, hours or days worked, duties, supervisory relationships or place of work. Conversely, an employee may seek to vary the contract to bring about improvements in pay or working conditions, for instance by requesting additional holidays, or to change the conditions so that they suit him or her better, e.g. by requesting a change from full-time to part-time working because of domestic responsibilities.

**How can contracts be varied?**

An existing contract of employment can be varied only with the agreement of both parties. Changes may be agreed on an individual basis or through a collective agreement (i.e. agreement between employer and employee or their representatives). An employer who is proposing to change an employee's contract of employment should fully consult with that employee or his or her representative(s) and explain and discuss any reasons for change. Variations of contract can be agreed verbally or in writing. It is preferable for any agreed changes to be recorded in writing. Where a variation in the contract has been agreed and the changes concern particulars which must be included in the written statement of terms and conditions, the employer should give written notification of the change to the employee, within a month of the change taking effect.

**In what circumstances can an existing contract authorise changes in the employee's working conditions?**

A contract may contain express terms which allow an employer to make changes in working conditions. Through flexibility clauses, for example, an employer may expressly reserve the right to alter the employee's duties. The contract may therefore be drafted to permit reasonable changes to be made within the terms of the existing agreement. Sometimes tribunals and courts may consider that the contract contains implied terms which may authorise or prevent alterations of working conditions.

For instance, it would be usual for an employee to be expected to work within reasonable daily travelling distance of his or her home.

**How can an individual contract be varied by a collective agreement?**

A contract of employment is in law an agreement between an employer and an individual employee. Any variations in the contract need that individual's agreement. However, an employer and employee can agree, either expressly through a clause or reference in the employee's contract, or through an implied term, that relevant changes in terms and conditions negotiated by a trade union(s) are incorporated into individual employees' contracts. This may be the case whether or not the employee is a member of the relevant trade union(s).

**What happens when an employer varies a contract without the agreement of the employee?**

If an employer imposes changes in contractual terms without the agreement of the employee, there will be a breach of contract.

**What could an employee do in these circumstances?**

The employee can accept the breach and continue to work under the amended contract. Where an employee continues to work under revised terms without objections, then in due course he or she may be regarded as having agreed to the changes.

Where an imposed changed involves a significant change to the contract, e.g. a reduction in pay or alteration of working hours, an employer may well be acting in fundamental breach of contract. Where there is an fundamental breach, the employee may treat the breach as bringing the contract to an end and leave the job. In such circumstances and subject to having the necessary qualifying service, the employee will have the opportunity to make a claim of constructive dismissal before an employment tribunal. In coming to a decision the tribunal will take into account whether the employer acted reasonably in all the circumstances of the case.

Alternatively, the employee may continue to work within the varied contract but under protest, making it clear that he or she does not accept the terms and is treating the change as a breach of contract and dismissal from the original contract. In these circumstances the employee will retain the right to seek damages from the employer for a breach of contract and/or a declaration from the courts that the employer must abide by the original terms. Subject to having the necessary qualifying service, the employee may also have the opportunity to make a claim for unfair dismissal before a tribunal. The tribunal, in the first instance, will have to decide whether the new terms are so substantially different as to be an entirely new contract and not a variation of the old one.

Whether or not the breach is a fundamental one, the employee may sue for damages for breach of contract in the civil courts; or if the employment has terminated, the claim can be made to an employment tribunal, which can award damages limited to a maximum of £25,000.

**Is there an alternative method of making contractual changes if agreement on a variation cannot be reached?**

Yes. If, after negotiation, agreement on a variation of contract has proved to be impossible, an employer can – having followed the statutory dispute resolution procedures, where they apply, and observed any relevant procedural agreements – terminate the original contract, with proper notice, and offer a new contract to the employee, including the revised terms. There will be no breach of contract as a result of taking such action. If the employee accepts the new contract, continuity is preserved. Proper notice will be as specified (or implied) in the employee's contract, or the minimum

statutory notice period, whichever is the longer.

Under the law the termination will be regarded as a dismissal and it will be open to all eligible employees to claim unfair dismissal before an employment tribunal – whether they refuse to accept the new contract and leave, or are dismissed under the old contract and re-engaged.

Agreements in practice:

- For agreements to be effective the employer should ensure;
- All managers know what is in the agreements and why
- Members know who to contact if they feel agreements are being breached
- All members are treated fairly
- Managers respect agreements

Situations change over time and management or union may seek to change agreements. There should be a procedural aspect to this process involving consultation and negotiation.

Keeping members informed

It is essential that we keep members informed of what has been agreed so that they will know instantly if an agreement is being breached. We need to:

- Talk to new and existing members on a regular basis
- Get a slot at inductions for new staff
- Use the union notice board
- Produce newsletters and posters