



Representative Action and Trade Unions – an issue for the “Root and branch review of the framework for settling disputes between employers and employees”

To: Michael Gibbons

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Amicus is the UK’s second largest trade union, with a greater number of members in the private sector than any other union and it is the fastest growing in the public sector. Now with 1.2 million members, Amicus has members in a range of industries including financial services, manufacturing, print, media, the voluntary and not for profit sectors, local government and NHS health professionals. We are now on track to merge with the Transport and General Workers Union – to create a union of some 2 million members.

Responsible Unions

Amicus members, in common with many other citizens have a need for legal support. Trade Unions are in a unique position to provide advice and assistance particularly in the field of labour law. This paper focuses on the issue of representative (or class) actions.

We recognise the aim of Government, consistent with the Tribunal Service overriding objective, to keep disputes away from tribunals and to avoid unnecessary time being spent and costs incurred. This is, of course, also in the interests of businesses and potential respondents.

It is in the nature of the role of trade unions not to resort to courts or tribunals to resolve workplace disputes affecting individuals or groups of workers in the first instance. We have no financial incentive to bring claims before the Employment Tribunals. We have an interest in the collective good of our members as well as their individual rights.

Attending the DTI workshop on 8 January our representative was encouraged by the apparent consensus that:

1. trade unions are a force for good in relation to the employment tribunal system, not least by weeding out poor claims and encouraging the responsible conduct of claims;
2. representative or class actions, including those brought in the name of the union, can have their place.

We would like to extend our involvement in assisting the tribunal services and access to justice by encouraging representative actions. That they may be provided for should not necessarily have a downside for others involved in the process.

Reasons for representative actions

The saving of time and costs for both parties and the Tribunal Service is a major consideration. In practice the use of representative actions should achieve this, without any reduction in access to justice.

Often workplace disputes affect more than one individual in relation to the same or a very similar argument. Industrial relations can be adversely affected when individuals have to be named.

There are very significant logistical issues in taking cases on behalf of a number, even a relatively small number of named individuals. These difficulties are time consuming and costly for the parties and the Tribunal Service. Not only are there multiple actions, but one or more of the claimants may drag the others back.

As an example, the very real problems faced by women, often elderly, who were entitled to a pension as part time workers, were substantial. Many simple lost out as a result, in relation to a case that took 6 years to progress. A class action could have given them perhaps 6 years from judgment to enforce their individual entitlement.

There are moves to promote and exploit the benefits of representative actions elsewhere – within the Civil Justice Council, for example, and in other jurisdictions, such as Australia and Canada¹.

Particular Circumstances for the use of Representative Actions

We do not envisage this as being a matter confined to trade unions, but we can obviously speak with some authority about the circumstances when they come into play in connection with union related matters.

One way in which a representative action could be brought by the union on behalf of a number of members, with inevitable consequences for non-members, would be in relation to a contract interpretation issue. Such an action may be brought before the Tribunal in the form of a declaration (under s11 Employment Rights Act, or by a contract claim following termination).

Evidence may still be adduced from by individuals and their particular facts. The respondents would have an opportunity convince the Tribunal, if their view was that the facts relating to individuals were too were idiosyncratic to make the action meaningful, or to apply for parameters to be set or questions posed.

It is possible to imagine a variety of other circumstances when a representative action could helpfully come into play – over redundancies, or pension issues, for example.

There are a variety of time off provisions, such as the right of an employee to seek a reasonable amount of time off to consult his Union Learning Representative under s 170(2B) of the Trade Union and Labour Relations Act 1992. Even if only one individual is affected at one time, an error on the part of the employer affects all who would wish to exercise that right and a representative action may be appropriate. Further, when the right for an employee representative, or for public duties, the right applies to an individual in a representative capacity, which of itself would justify representative action.

The most substantial positive impact of representative actions could turn out to be in relation to Equal Pay cases. There are often many individuals affected and there is a collective element in most instances. The Employment Tribunal Service is already overloaded by equal pay matters, for example, arising from Local Authorities' Single Status and back pay issues. *Indeed the parties and the Tribunal Service might find great benefit from ratifying a collective agreement that the Tribunal was in a position to approve.*

The Effect of Representative Actions in Practice

¹ The Civil Justice Council held a Forum on Multi-Party Litigation on 16 November 2006 and there was a report back at the Council earlier this month. We can assist in relation to contact with the CJC and supply of relevant materials, including those relating to other jurisdictions, if required.

Some comments have been mentioned above – like those relating to evidence and parameters. We would be happy to assist in relation to other practical issues and concerns.

However, whilst a representative action by a union would not necessarily preclude an individual taking a case, even in relation to an equal pay order that ratified an agreement, the inclination to and the scope for would be greatly diminished in practice.

The effect on time limits from an application being brought by the union, if the Tribunal declines to treat the case as a representative action, is another matter that requires attention, but it is easy to see that suspension of the normal time limit affecting the individual in such circumstances would do the trick.

Existing examples of representative actions

There are a number of instances in which some form of representative action is already permitted and useful experience and jurisprudence has developed. The Civil Procedure Rules permit representative actions in some circumstances where there are claims that 'have the same interest' (CPR r 19.6). However, these rules are not as expansive as those that have developed in Canada and Australia in particular. (Useful work on this has been undertaken by Rachael Mulheron published in Civil Justice Quarterly 2005, 24(OCT), 424-449²).

There is already a form of representative action under the current Employment Tribunal system action may be brought by a union that is not consulted, for example, over redundancies. (See s189 Trade Union and Labour Relations Act 1992).

Another example of representative action is the "super complainer status" brought in by the Enterprise Act 2002 for consumer bodies to raise issues with the Office of Fair Trading.

Conclusion

We strongly support the extension of representative actions in the Employment Tribunal Service – in the interests of the employers, the tribunals, claimants, and their representatives.

We have an opportunity now to provide for this in the context of the UK Employment Tribunal Service. Perhaps there will even be such an opportunity to raise this in the Tribunals Courts and Enforcement Bill, currently before Parliament.

We can clearly envisage circumstances when other bodies can also use the facility of a representative action to deliver justice more effectively for all concerned. We understand this is a position endorsed by the TUC. We will be happy to assist with further comment and information at any time to progress this matter.

Georgina Hirsch

Amicus Director of Legal Services
35 King Street
Covent Garden
London E2E 8JG

Contact for further information/clarification: John.Usher@amicustheunion.org
Telephone 020 7420 8925/020 7420 8924

² We can supply a copy if requested.