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The Social Dialogue in the United Kingdom and its Effectiveness

A tribute to Professor Michał Seweryński

It is with great joy that I dedicate this work to my friend and colleague Professor Michał Seweryński whom I have known for over a quarter of a century. I owe Michał a great debt of gratitude for it was he who introduced me to Poland in 1986. Those were dark days indeed, where night could only follow night! Things are different now and Poland, as a member state of the European Union, has grown to its former glory enjoying its rightful status. Little known to Michał, it was because of him that I had and still have the privilege of assisting Poland, perhaps in a minor way, in its progress from the *ancien régime* to its becoming a democratic state. For some twelve years prior to Poland joining the European Union, a team of us based at Nicholas Copernicus University in Torun, fed the Polish integration ministry with yearly research reports in a programme named “The Approximation of Polish Laws to European Union Standards”. Soon after, I was commissioned by the Commissioner for Civil Rights Protection of the Republic of Poland, the late Dr Janusz Kochanowski, to carry out a three year research programme entitled “The Treatment of Polish and Other A8 and A2 Economic Migrants in the European Union Member States” and to report and make recommendations of a legal character to him. Much has happened since those days; activities now include, *inter alia*, the organisation of international conferences, exchanges of students, research and publication programmes, the accreditations of dual

601

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degrees, ERASMUS programmes, police exchanges, a School of English Law being founded in Kraków, meetings of university Rektors, collaboration with numerous Polish universities and much more. All these have resulted from Michał's initial introduction to Poland. The theme chosen for this chapter is the efficacy of the British social dialogue. It is thus befitting that I should dedicate this chapter to Michał as an expression of my gratitude to him. I hope that he will enjoy reading it.

1. Definition of "social dialogue"

The term "social dialogue" means any communication, which may include consultation, information¹, an exchange of views in open discussion on given matters and/or negotiation² by which the social partners intend to influence the development or arrangement of work-related matters. Such social dialogue may be "bipartite"³ or "tripartite"⁴. If bipartite, such negotiations, the giving of information, exchanges of views or consultations take place between employers or their representatives and workers or their representatives; if tripartite, governments become involved in the dialogue process. Thus the social dialogue consists of relations between the social partners with⁵ or without⁶ government involvement.

The social dialogue is a flexible expression⁷ which enables the bipartite or tripartite social partners to manage changes in the field of employment and achieve the required or necessary social and economic change.

2. Historical background to the British social dialogue

Since the late 1970s, there has been a systematic decline in trade union influence and trade union membership, both of which have the effect of limiting the efficacy of the social dialogue concept. It will be recalled that the policy of the Conservative government of Mrs Margaret Thatcher

¹ For example, necessary information to be given by the employer(s) for collective bargaining purposes or information by the employee or the trade union on certain issues.

² An obvious example includes negotiations leading to the conclusion of a collective agreement. But negotiations may also be the precursor of an agreement to work together on policies and activities.

³ I.e. between employers or employers' associations and trade unions.

⁴ Namely between the social partners themselves and governmental authorities or even European Union representatives. Also known as "concertation" when there is an on-going tripartite dialogue.

⁵ Tripartite.

⁶ Bipartite.

⁷ See "The Multiple Meanings of the Social Dialogue" at p. 606 below.

was to weaken the trade union movement by either removing or watering down important collective rights enjoyed by trade unions and replacing these by stronger individual rights. A barrage of legislation was thus enacted between the years 1980 to 1993 to give effect to that policy⁸.

The overall effect of this legislation with its strict regulation of trade union rules and activities was twofold. Firstly to make trade unions more *democratic* in their internal affairs (and to a certain extent, such democracy having the effect of *weakening* them) by introducing the secret balloting of their members prior to industrial action⁹ being taken, by providing strict rules with regard to such ballots and detailed rules in relation to the elections of trade union officials. In the second instance, statutory measures were enacted which had the effect of *weakening* the trade union movement by making secondary¹⁰ industrial action and secondary picketing illegal, by creating the office of Commissioner for the Rights of Trade Union Members (CRTUM)¹¹ and subsequently, the office of Commissioner for the Protection Against Unlawful Industrial Action (CPAUIA)¹², by systematically outlawing the pre-entry and post-entry closed shop concept, by making unofficial industrial action unlawful, by requiring trade unions to give employers in dispute the appropriate statutory notice prior to taking industrial action and by tightening the trade union rules which treat the political funds of trade unions.

By this two-pronged attack on trade unions the then Thatcher/Major Conservative governments thus managed to *weaken* considerably the British trade union movement resulting in an important decline of its influence in the industrial relations field and notably in collective bargaining, which forms a significant aspect of the social dialogue concept¹³.

603

⁸ The legislation included the following Acts of Parliament; (a) the Employment Act 1980 (for a detailed analysis see J. Carby-Hall, *The Employment Act 1980 – A Means of Redressing the Balance* Managerial Law (1981), vol. 23, No 1; (b) J. Carby-Hall, *The Employment Bill 1982 – A Commentary and an Analysis*, “Managerial Law” 1981, vol. 23, No 6 and *The Employment Act 1982 – An Updating Note*, “Managerial Law” 1982, vol. 24, No 6; (c) the Trade Union Act 1984; (d) the Employment Act 1990 and (e) the Trade Union Reform and Employment Rights Act 1993.

⁹ Such action may include strikes, go-slows, work to rule and other forms of action.

¹⁰ Other than the first customer and supplier of the employer in dispute.

¹¹ For an analysis of the Commissioner’s role see J. Carby-Hall, *Le rôle du “Commissioner for the Rights of Trade Union Members” – Une Fonction Unique au Monde*, “Revue Internationale de Droit Comparé” [Paris] 1993, No 1, pp. 99–115. See too by the same author *The Commissioner for the Rights of Trade Union Members – An Evaluation of her Work and Achievements*, “Managerial Law” 1992, vol. 34, No 3/4/5 [MCB University Press].

¹² It should be noted that Mrs Gill Rowlands played a dual role of CRTUM and CPAUIA until both these offices were abolished.

¹³ For a step by step analysis on the weakening of the British trade union movement see J. Carby-Hall, *Le Syndicalisme en Grande Bretagne Etat Actuel et Perspectives in Le Syndicalisme Contemporain et son Avenir* (H. Lewandowski and Z. Hajn [eds]), Wydawnictwo Uniwersytetu Łódzkiego, Łódź 1995, pp. 74–112 particularly pp. 81–85.

What is also important to note is that most of this legislation had not been changed by subsequent governments, namely by the New Labour Blair / Brown governments and that of the Coalition government of Mr Cameron. The effect of this two pronged legislative attack on trade unions coupled by the recent economic crisis and the consequent austerity measures imposed on the UK by the coalition government, resulted in an important decline, since the latter part of the 1970s, in trade union membership¹⁴ and consequently of the British collective agreement and collective bargaining structures, particularly in the private sector¹⁵. It may therefore be said that trade unions have lost a great deal of their bargaining power in the last forty five years to 2014¹⁶. The then Secretary of State for employment was heard to say that “traditional patterns of industrial relations based on collective bargaining and collective agreements, seem increasingly inappropriate and are in decline”¹⁷.

¹⁴ In 1979 trade union membership in the UK was 13.212 million. In 1994 trade union membership fell to 8.231 million and by 2011 it fell further to 7.2 million though it has since stabilised (Source: Various Annual Reports of the Certification Officer). What is also significant is that the percentage of workers joining trade unions has decreased since 1979. In that year there were 25.2 million workers in employment and a trade union membership of approximately 50% of the workforce. By 2014 the workforce had increased to approximately 30.1 million but trade union membership fell to about 25% of the workforce. There has thus been a substantial decrease in trade union membership from 1979 to 2011! Resulting primarily from that decrease in membership, trade unions themselves needed to re-organise themselves through mergers. The Certification Officer’s records show that in 1988 there were 388 certified trade unions. By 2013 that number had dropped to 166. There was thus a reduction in numbers of trade unions by 222 during the past 25 years which represents well over 50% of British trade unions having amalgamated!

¹⁵ There are currently approximately 64% of enterprises which are not unionised most of which (78%) are in the private sector. See also B. Kersley *et al.*, *Inside the Workplace*, Routledge, London 2006.

¹⁶ Statistics show that in 1979, 80% of working age persons considered that British trade unions were given too much power under the then legislation, with 69% of trade unionists themselves agreeing with this fact. In 1989, by which time the new laws governing trade unions took effect, the number of persons believing that trade unions had too much power had dropped to 41% of the working age population and 26% of trade unionists. By 2014, that percentage dropped further to 29% of working age persons who thought that British trade unions had too much power. A significant majority of working age persons (78%) considered that trade unions are essential if workers’ interests are to be protected (Source: Ipsos Mori Attitudes to Trade Unions 1975 to 2014; <http://www.ipsos-mori.com/researchpublications/researcharchive/94/Attitudes-to-Trade-Unions-19752011.aspx>) (Retrieved 25th July, 2014).

¹⁷ See W. Brown, *The Contraction of Collective Bargaining in Britain*, “British Journal of Industrial Relations” 1993, vol. 31.

3. The Social Dialogue as it is understood in the United Kingdom

Applying the definition of the term “social dialogue” as given above and taking into consideration its historical background, there is little doubt that *ideal* industrial relations are achieved through permanent and constant bipartite or tripartite social dialogue.

3.1. Ingredients of the Social Dialogue

For the social dialogue to be effective certain “ingredients” should exist¹⁸. Firstly, there must be *recognition of the legitimate interests* of each of the social partners bearing in mind the fact that employers and trade unions each have legitimate differences of interest. Each of the partners must therefore cultivate a degree of goodwill, of trust, of respect of the interests of the other with a willingness to resolve these differences. Second, there must be *transparency* for a successful partnership to exist. There should be a complete and open sharing of information between the partners. This will lead to a realistic, successful and informed discussion taking place with a view to agreement on future plans and possible developments. Thirdly, there is a need to make the employee feel *secure* in his employment. He would thus be more motivated in his work and have a greater sense of loyalty towards the employer resulting in benefits for this latter. In the fourth instance, there must be attempts made for the improvement of the *employees’ quality of working life* and their *personal development*. Fifthly, there should be the creation by the social partners of schemes which instil a sense of *motivation and commitment* in employees. This is important for the workforce and also for the performance of the enterprise. Lastly, there must be a *commitment to the success* of the enterprise which means a shared understanding of, and commitment to, the business goals of the enterprise and to its lasting success through flexibility and best practice ideas.

To achieve this *ideal* of a successful social dialogue, trade unions’ attitudes, as well as employers’ attitudes, have to change from confrontation to a policy of collaboration. Yet partnership is not the *deus ex machina* which will solve all conflicts. Conflicts are inevitable because of the parties’ opposed interests, yet the very fact that the partnership exists provides a basis for trust and mutual respect which should assist towards the resolution of the conflict of interests. In cultivating the partnership culture, it should be realised by trade unions that changes are inevitable

¹⁸ These ingredients formed part of comments made, and advice given, by Jo Carby-Hall at the international conference organised by the then President of the Republic of Portugal and published in *Debates Presidência da República: A Reforma do Pacto Social*, Imprensa Nacional-Casa da Moeda, Portugal (1999) at p. 212.

and that they must adapt to these and become *flexible* in associating themselves with competitiveness, productivity, best practice and continuous improvement. Employers should learn to become more *transparent* when informing, consulting and negotiating with trade unions and cooperating with them after agreeing strategic objectives. This is what true partnership and effective social dialogue signifies¹⁹.

3.2. The Multiple Meanings of the British Social Dialogue

The term “social dialogue” has a multitude of meanings. In its original British sense it had the meaning of “industrial democracy”²⁰. It can also mean “worker participation” which itself has a variety of meanings²¹, for it means different things to different interest groups²². One form of worker participation is *share and profit participation* schemes²³ where employees are given the benefit of share ownership as regards both profit and control²⁴ to a certain extent only. The social dialogue is less accentuated in this aspect of worker participation but the control element implies some social dialogue taking place between management and workers. However very few such schemes exist in the United Kingdom²⁵.

¹⁹ *Ibidem*, p. 214.

²⁰ This expression was first used in the United Kingdom by Sydney and Beatrice Webb in 1891 in a book they wrote on collective bargaining and trade unions entitled *The Co-Operative Movement in Great Britain*. They were then thinking of “industrial democracy” as a bargain between employers and trade unions, namely collective bargaining *per se* in which the social dialogue plays an important part.

²¹ It means something beyond mere collective bargaining. It means some form of participation in the decision-making process of the enterprise.

²² The meaning given to this expression by the European Commission is a more static one in that the Fifth Directive on the “Harmonization of Company Law” first proposed in 1972 (OJ EC 1972 No C.131/49); its 1983 version (OJ EC 1983 No C. 240/C); the Green Paper entitled “Employee Participation and Company Structure in the European Communities” (EEC Bull. Supp. 8/75) and Vredeling (July 13 1983 OJ C.217/3) made more concrete proposals. See Schmitthoff (1983) “Journal of Business Law”, 456 and J.R. Carby-Hall, *Worker Participation in the United Kingdom. A Myth or Reality?*, “Managerial Law” 1989, vol. 31, No 5 [MCB University Press particularly] at pp. 6–11.

²³ In this type of worker participation employees are able to buy shares in the company in which they work and thus have a say (dialogue) in the running of the company. Examples include, *inter alia*, the John Lewis Partnership; Kalamazoo Ltd.; the Scott Bader Commonwealth; and Landsman’s (Co-Ownership) Ltd.

²⁴ Hence the social dialogue element.

²⁵ There are also situations when employees buy shares in former nationalised industries which have been privatised. See the results of research carried out by Ch. Hanson, R. Watson, *Profit Sharing and Company Performance: Some Empirical Evidence for the UK*. See too D.W. Bell, C.G. Hanson in *Profit Sharing and Profitability*, Kogan Page, London 1987 and *ibidem*, *Profit Sharing and Employee Shareholding Attitude Survey*, Industrial Participation Association, London 1984.

Another form of worker participation is that of *employee participation in the establishment's decision making body*. Therein the social dialogue is implicit. However, in the private sector such participation is virtually non-existent. In the public sector and in the former²⁶ nationalised industries²⁷ there was some kind of worker participation which included the social dialogue, but such participation did not exist throughout the public sector. The legislation nationalising the particular industry²⁸ since 1946 provided for members with trade union experience to sit on the Board of Directors. This did not mean that there was an employee representative in the fullest sense, because the Regulations governing the nationalised industries²⁹ provided that no person who had an interest in the establishment should be on the Board since he would prejudice the exercise of its functions. In practice retired trade unionists only were on the Board. Nevertheless some social dialogue would have taken place in the public sector and in the nationalised industries as a result.

Collective representations through *works councils* and individual representation through *shop stewards* constitute another form of worker participation. In this form of participation the social dialogue is clearly visible as information is given by the employer, opinions are expressed on both sides of industry and consultations thus take place.

Worker control is yet another form of worker participation for some social dialogue does take place although it is of little significance because of the fact that historically only very few moves in that direction had taken place in the United Kingdom.

Thus some degree of significance may be attributed to the social dialogue in the fields of industrial democracy, worker participation, whether it be through share and profit participation schemes, employee participation in the establishment's decision-making body, collective and individual representation through works councils or shop stewards respectively, and worker control. The degree of significance attributed to the social dialogue thus varies to a greater or lesser extent in each of those fields.

²⁶ Nationalised industries in the United Kingdom are disappearing fast since the denationalisation policy of the Thatcher government in the 1980s and 1990s. The former Coalition government was, and current conservative government elected in May 2015 of Mr Cameron is also fostering this policy of denationalisation. Thus, *inter alia*, the steel industry, the railways, the coal industry, the water, gas and electricity utilities, the post office, *etc.* have all been denationalised.

²⁷ Depending upon the particular statute which had nationalised the industry.

²⁸ E.g. coal, gas, electricity, water, railways, *etc.*

²⁹ Apart from one exception, namely British Steel before it was denationalised. As a result of an agreement which existed with the Trades Union Congress Steel Committee, worker directors who were also active trade unionists could sit on the British Steel Corporation Divisional Boards.

3.2.1. British Collective Bargaining

In spite of the decline in trade union influence and trade union membership³⁰, collective bargaining may still be said to be the current most important British form of worker participation in which social dialogue takes place³¹. To be noted however is the important fact that only 29.3% of employees are covered by collective bargaining³², with 63.7% of employees being covered in the public sector and a mere 16.1% of employees in the private sector³³.

The tendency is that in the public sector, industry- wide collective agreements prevail although there are some local wage rate agreements in some civil service departments which have been subject to devolution³⁴. In the private sector on the other hand, the tendency is either for the employer to determine wages³⁵ or where collective bargaining occurs, it is usually at plant or company levels and rarely at industry/national level.

3.2.2. The British Collective Agreement

Collective agreements are concluded as a result of the social dialogue agreed between the social partners. Unlike all other countries, a peculiarity of the British collective agreement at both the common law³⁶ and under statute³⁷ is that traditionally it is not a legally binding³⁸ document.

³⁰ See pp. 602–604 *supra* entitled “Historical Background to the British Social Dialogue”.

³¹ Such social dialogue results in the conclusion of a collective agreement which in the great majority of cases lasts for one year (91% of the collective agreements). There are however exceptions with 4% of agreements being for two years and 1% lasting for three years with 4% of these lasting for various other periods. (Source: <http://www.worker-participation.eu/National-Industrial-Relations/Countries/United-Kingdom/Collective-Bargaining> (Retrieved 25th July, 2014).

³² Source: *Trade Union Membership 2012 Statistical Bulletin* of the Department of Business, Innovation and Skills (May 2013).

³³ It should be noted that collective bargaining is more prevalent among the larger enterprises (namely some 42% of employees covered) compared to the smaller ones (about 16% of employees covered).

³⁴ Source: L. Fulton, *Worker Representation in Europe* Labour Research Department and ETUI (2013) <http://www.worker-participation.eu/National-Industrial-Relations> (Retrieved 26th July, 2014).

³⁵ Approximately 70% of wage determination in the United Kingdom is unilaterally set by the employer.

³⁶ See *Ford Motor Company Ltd. V Amalgamated Union of Engineering and Foundry Workers* [1969] VI KIR 50. [1969] 2 QB 303. See too *Stuart v MOD* [1973] IRLR 143 (NIRC).

³⁷ Trade Union and Labour Relations (Consolidation) Act 1992, p. 179 (1) and (2).

³⁸ For an analysis and evaluation on the nonlegally binding British collective agreement, see Jo Carby-Hall, *The Collective Agreement – Legal Enforceability?*, “Managerial Law” 1993, vol. 35, No 1/2 [MCB University Press].

It is a gentleman's agreement binding in honour only which is not enforceable in a court of law. Any sanctions for breach of a collective agreement by any one of the social partners remain in the domain of industrial relations such as further negotiations and ultimately industrial action³⁹. The reason for this is that there is a presumption that the social partners do not *intend* their collective agreement to be legally binding⁴⁰. Both employers and trade unions wish to keep industrial relations away from the law. Furthermore, trade unions have, traditionally and historically⁴¹ been suspicious of the courts as a result of certain decisions taken by the courts which affected trade union interests. Nor does the British collective agreement have immediate and automatic effect by automatically replacing the terms and conditions of the contract of employment by those in the collective agreement. There needs to be an *incorporation* – either directly or indirectly – of the collective agreement terms into the contract of employment⁴².

³⁹ Such action may include a strike, go slow, work to rule, refusal to work overtime, withdrawal of good will, *etc.* It should be particularly noticed that the taking of industrial action has become much more difficult since the 1980s when the Thatcher government which was in power at the time tightened considerably the laws relating to industrial conflict. For an evaluation of these laws see Jo Carby-Hall, *Le droit du Travail en Grande Bretagne – Innovations*, "Revue Internationale du Droit Comparé" 1991, No 4, pp. 881–893; *Essor et Declin du "Closed Shop" en Grande Bretagne*, "Revue Internationale de Droit Comparé" 1991, No 4, pp. 775–827; and *Le Délit d'Incitation à la Rupture du Contrat et l'Immunité des Syndicats en Grande Bretagne*, "Revue Internationale de Droit Comparé" 1992, No 4, pp. 883–938. The effect of these laws was to reduce considerably the number of strikes or other industrial action. Thus in 1981 there were 1338 disputes between the social partners. By 1991 these dropped to 357, in 2001 there was a further drop to 187 and in 2011 they dropped even further to 139 (Source: Office of National Statistics – UK).

⁴⁰ Of course the social partners may wish to have their collective agreement legally binding and if so, they should clearly state that intention in writing and fulfil other statutory criteria. Research carried out by this author in this very field has shown that the social partners have historically (apart from one exception) never intended to be legally bound by their collective agreement.

⁴¹ See for example *Taff Vale Railway Co. v Amalgamated Society of Railway Servants* [1901] AC 426 (HL) where the then House of Lords (now renamed the Supreme Court), found the trade union liable for committing certain industrial torts, namely inducing breaches of contract, conspiracy and so on. See too the analysis on this topic, namely trade unions being suspicious of court decisions, in J. Carby-Hall, *The Digestive System of the British Judge in a liber amicorum* in honour of Professor Valverde, a Spanish Supreme Court judge, to be published by Editorial Comlutense in 2015.

⁴² For a detailed analysis as to how an incorporation takes place see J. Carby-Hall, *The Concept of Direct Incorporation in Great Britain*, [in:] *Estudios de Historia del Derecho Europeo. Homenaje al Profesor G. Martínez Díez*, ed. R. Pérez Bustamante, vol. 2, Editorial Comlutense, Madrid 1994, pp. 173–227.

Also relevant, is the fact that the employer has to *recognise*⁴³ a trade union in order to carry out a social dialogue with it.

What has been said above in relation to the British system of industrial relations, spells of a *voluntary approach* to collective bargaining, to employer recognition⁴⁴ of a trade union for collective bargaining purposes, to the disclosure of information by the employer for collective bargaining purposes⁴⁵ and to the conclusion by the social partners of collective agreements; all of which emanate from the parties' social dialogue.

3.2.3. An Alternative System of Representation – Information and Consultation

Yet, information and consultation – which is not collective bargaining as such, but which forms part of the social dialogue – is required by some of the European social legislation such as the Acquired Rights Directive⁴⁶, the Collective Redundancies Directive⁴⁷, and the Health and Safety at Work Directive. The British *voluntary* approach to the social dialogue needs in such cases to be buttressed by an alternative and compulsory

⁴³ On the issue of recognition see J. Carby-Hall, *State Function in Collective Bargaining*, "Managerial Law" 1984, vol. 26, No 5 [MCB University Press] at pp. 6–11 where a short evaluation on recognition takes place. See too the Trade Union and Labour Relations (Consolidation) Act 1992 which provides for the statutory recognition procedure which needs to be followed. Schedule A1 Collective Bargaining, Part 1 Recognition; Part II voluntary recognition; Part IV Derecognition – General, Part V Derecognition where Recognition Automatic. A trade union can become recognised by entering into a *voluntary agreement* with the employer or following a *statutory procedure* involving the Central Arbitration Committee (CAC). In the case of voluntary recognition both the employer and the trade union can agree voluntarily to have a voluntary arrangement. This is the way in which most of the recognition agreements in the United Kingdom are established. If the employer is not willing to enter into a voluntary agreement with the trade union, the trade union is enabled to follow the statutory procedure path of recognition, namely through the CAC. The statutory procedure applies only to employers who employ twenty one or more workers.

⁴⁴ The Trade Union and Labour Relations (Consolidation) Act 1992 treats recognition of a trade union by the employer. See especially Part II (in footnote 43 above) which provides for *voluntary recognition*.

⁴⁵ See the analysis relating to the disclosure of information in the context of legislative encouragement to promote collective bargaining by the use of the indirect method of the sanction of incorporation by means of a Central Arbitration Committee (CAC) award in J.R. Carby-Hall, *Incorporation in Relation to State Promotion of Collective Bargaining – Disclosure of Information*, "Managerial Law" 1984, vol. 26, No 4 [MCB University Press].

⁴⁶ Council Directive No 2001/23 (OJ 2001, L. 82/16) on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

⁴⁷ Council Directive No 98/59 (OJ 1998/59, L. 225/16) on the approximation of the laws of Member States relating to collective redundancies.

(as opposed to voluntary) system of representation namely, the giving of information to, and the consulting with, *employees or employee groups* where trade unions are not recognised by the employer⁴⁸ for collective bargaining purposes.

The general picture

The Transfer of Undertakings Directive, the Collective Redundancies Directive and the Framework Directive on Health and Safety⁴⁹ have each been translated into British law by the Transfer of Undertakings (Protection of Employment) Regulations⁵⁰, by the Trade Union and Labour Relations (Consolidation) Act, 1992⁵¹ and by the Health and Safety (Consultation with Employees) Regulations 1996⁵² (as amended) respectively. Under each of these British laws the employer has an obligation to *consult and inform prior* to a transfer of an undertaking taking place⁵³, *prior* to making mass redundancies⁵⁴ and consult and inform on health and safety matters. Both consultation and information form part of the social dialogue.

⁴⁸ This has been necessitated, *inter alia*, as a result of the ECJ judgement in Case C-382/92 *Commission v UK* [1994] ECR I-2435 where the court held that, by confining the information and consultation obligations to recognised trade unions only, the United Kingdom had failed to transpose the Directive fully because British law did not provide a mechanism for the designation of workers' representatives where *the employer refused to recognise a trade union*.

⁴⁹ Framework Directive 89/391/EEC (OJ [1989] L 183/1.)

⁵⁰ Originally by the Transfers of Undertakings (Protection of Employment) Regulations 1981. S.I. 1981, No 1794 (Known as TUPE Regulations 1981). The original 1981 Regulations were revised by the TUPE Regulations 2006. S.I. 2006, No 246. The Transfer of Undertakings (Protection of Employment) (Transfer of Staff to the Department of Works and Pensions) Regulations 2014. S.I. 2014, No 1139 is not relevant in the context of the social dialogue and is mentioned solely for purposes of completeness.

⁵¹ Trade Union and Labour Relations (Consolidation) Act, 1992, at pp. 188–198 (Part II Procedure for handling redundancies).

⁵² The Regulations apply to employees whose employer *does not* recognise a trade union for collective bargaining purposes or where the employer has decided *not to consult* directly the union. The Safety Representatives and Safety Committee Regulations, 1977 apply to employees whose employer *does* recognise a trade union for collective bargaining purposes.

⁵³ The reader will find a complete discussion and analysis on the employer's duty to consult where a transfer of undertakings is to take place in J. Carby-Hall, *Transfer of Undertakings in the United Kingdom*, [in:] *La transmisión de Empresas en Europa*, B. Veneziani and U. Carabelli (eds), vol. 1, European SOCRATES Programme, Cacucci Editore, Bari 1999 at pp. 187–263.

⁵⁴ For an evaluation and analysis on the employer's duty to consult where collective redundancies are about to occur see J. Carby-Hall, *Redundancy in the United Kingdom*, [in:] *Licenziamenti per Riduzione di Personale in Europa* Professors B. Veneziani and U. Carabelli (eds), vol. 2, European SOCRATES Programme, Cacucci Editore, Bari 2001 at pp. 387–537.

Under all three of these legislative requirements the employer has an obligation to consult with the recognised trade union⁵⁵. Where there is no recognised trade union, the employer has an *alternative*, namely an obligation to consult with either the *elected* or the *appointed* representatives of the employees affected by the transfer, by the redundancies and by matters of health and safety as the case may be.

The British voluntary approach to collective bargaining and therefore to an aspect of the social dialogue indicates clearly that there is a need in cases such as transfers of undertakings, collective redundancies and health and safety matters, to have legislation in place for purposes of developing the social dialogue concept to beyond the traditional employer/trade union group by extending it to *alternative* bodies such as employee elected or appointed representatives. This alternative system of representation is *novel* and a *departure* from the traditional British collective bargaining system and structure.

Transfer of undertakings

The legal obligation to *consult* and *inform* employee representatives – whether they be trade unions, or elected or appointed representatives of the employees affected by the transfer – in advance of a transfer of undertaking taking place, is provided for by the TUPE Regulations, 2006⁵⁶ as follows: – “Long enough”⁵⁷ before a relevant transfer to enable the employer of any affected employees⁵⁸ to consult all the persons who are appropriate representatives⁵⁹ of any of those affected employees the employ-

612

⁵⁵ See J.R. Carby-Hall, *Representativity*, “Managerial Law” 1993, vol. 35, No 4, 5, 6 [MCB University Press] where an analysis takes place on the British trade union as an unincorporated body representative of its members.

⁵⁶ Transfer of Undertakings (Protection of Employment) Regulations, 2006. S.I. 2006, No 246. Reg. 13 (4). So as to fulfil the transferor’s obligations under Reg. 13 (2) (d) (namely the measures which the transferee envisages (See full text of Reg. 13 (2) at p. 8 below) the transferee has to give the transferor the necessary information. Reg. 13 (4).

⁵⁷ There is no indication in the Regulations as to how long before the transfer, information has to be given and consultation has to take place. “Long enough” may mean a longer or shorter period before the relevant transfer takes place. It is suggested that at the time when the transfer is *proposed* there is no obligation to inform and consult (Reg. 13 (2) (a) talks of “the fact that the relevant transfer is to take place”) and when the process of electing representatives is taking place the employer will be treated as complying with the time requirements if he does so “as soon as is reasonably practicable after the election of the representatives” (*Ibidem*. Reg. 13 (10) (b)).

⁵⁸ Footnote inserted by the author. The term “affected employees” means any employees of the transferor or the transferee who may be affected by the transfer or may be affected by measures taken in connection with it (*Ibidem*. Reg. 13 (1)).

⁵⁹ Footnote inserted by the author. The term “appropriate representative” has been widened to take into account the ECJ’s (as it was then called) decision in *E.C. Commission*

er must inform those representatives "... (a) [...] that the relevant transfer is to take place, when, approximately, it is to take place and the reasons for it; and (b) the legal, economic and social implications of the transfer for the affected employees⁶⁰; and (c) the measures which he envisages he will, in connection with the transfer, take in relation to those employees or, if he envisages that no measures will be so taken, that fact; and (d) if the employer is the transferor, the measures which the transferee envisages he will [...] take in relation to [...] those employees as [...] become employees of the transferee after the transfer, or if he envisages [...] no measures [...] that fact"⁶¹.

Where the employer envisages taking measures in relation to any employees affected by the transfer he has the obligation to inform and consult the appropriate representatives of the affected employees *with a view to seeking their agreement to the measures to be taken*⁶².

During the course of consultations the employer must *consider seriously* any representations made by the representatives and furthermore, he is required to *reply* to the representations made. Were he to reject any of the representations made, he must state his *reasons* for doing so⁶³.

What is interesting in this provision is that the Regulations state that the employer's obligation to consult is in respect of "the measures which he envisages he will [...] take in relation to those employees"⁶⁴. He need not consult with regard to "the fact that the relevant transfer is to take place [...] and the reasons for it"⁶⁵ or, "The legal, economic and social implications"⁶⁶ or "the measures which the transferee envisages"⁶⁷. Indeed it would be difficult for the transferor employer to consult on mere facts, as for example, that the transfer will take place or the legal, economic

v United Kingdom Case C-382/92 [1995] CMLR 345 (ECJ). Thus the appropriate representatives of any employee are (a) those directly *elected* by the employees themselves; (b) representatives of a trade union which is recognised by the employer for collective bargaining purposes; or (c) representatives of employees who have been *appointed* for this purpose or other purposes and who are deemed to be appropriate for the purposes of transfers of undertakings also. Should there exist both, or all types of representatives, namely recognised trade union(s), elected or appointed employees, the employer is left with a *choice* as to who he is to inform and consult with (*Ibidem*. Reg. 13 (3) (b)). It should be noticed that there is no duty under the 2006 Regulations or the Directive provisions to consult *individual* employees of the undertaking which is to be transferred.

⁶⁰ TUPE Regulations, 2006. Reg. 13 (2) (a) (b).

⁶¹ *Ibidem*. Reg. 13 (2) (c) (d).

⁶² *Ibidem*. Reg. 13 (6).

⁶³ *Ibidem*. Reg. 13 (7) (a) (b).

⁶⁴ *Ibidem*. Reg. 13 (2) (c).

⁶⁵ *Ibidem*. Reg. 13 (2) (a).

⁶⁶ *Ibidem*. Reg. 13 (2) (b).

⁶⁷ *Ibidem*. Reg. 13 (2) (c).

and social implications that the transfer will have on employees, for these are not necessarily matters in which consultation may take place. There is however no reason why consultation may not take place in these matters in relation to the measures to be taken⁶⁸.

As far as the obligation to give information is concerned, this must be given in the case of all four heads, namely the fact that the relevant transfer is to take place, the legal, *etc.* implications, the measures envisaged by the transferor and the measures which the transferee envisages⁶⁹. Such information must be given to each of the representatives or sent by post⁷⁰.

Should there be special circumstances which render it not reasonably practicable for the employer to give the necessary information and to consult he must take the necessary steps towards performing that duty as are reasonably practicable in the circumstances⁷¹. There is here an element of proportionality in that the employer cannot just sit back and do nothing about it in circumstances where "special circumstances" exist. He must take the necessary steps to inform and consult proportionate to what is "reasonably practicable" Mummery L.J. in the Court of Appeal case of *Warner v Adnet Ltd.*⁷² held, *inter alia*, that normally a dismissal would be regarded as being unfair if there had been no proper consultation prior to the transfer, but in certain exceptional circumstances where the financial situation of the undertaking was serious, as was the case here, and it was necessary to find a buyer quickly, it was open to the tribunal to find that formal consultation would have made no difference. The employee's dismissal was therefore fair under the then 1981 Regulation 8 (2).

Where at the time of the transfer there exists a collective agreement between the transferor and a recognised trade union(s) which covers any employee whose contract of employment is preserved⁷³ under the Regulations, such collective agreement will, after the transfer, be deemed to have been entered into between the transferee and the trade union(s). Anything done in connection with the collective agreement by the transferor before the transfer took place will, after the transfer be deemed to have been done by, or in relation to, the transferee⁷⁴. It should be noted that the collectively agreed terms are effective at the very moment the transfer takes place.

⁶⁸ But note the view to the contrary expressed by Millet J., in *PCS v Secretary of State for Defence* [1987] "Industrial Relations Law Reports" [I.R.L.R.] 373 (Although dealing with other matters, namely dockyards under the then TUPE Regulations 1981 Reg. 10 (which was adopted for these purposes).

⁶⁹ *Ibidem.* Reg. 13 (2) (a) (b) (c) (d) discussed *supra*.

⁷⁰ *Ibidem.* Reg. 13 (5).

⁷¹ *Ibidem.* Reg. 13 (9).

⁷² "The Times", 12th March, 1998 (C.A.)

⁷³ TUPE Regulations 2006. Reg. 5 (a).

⁷⁴ *Ibidem.* Reg. 5 (b). In this connection see the interesting case of *Whent et. al. v T. Cartledge Ltd.* [1997] I.R.L.R. 153 (EAT).

There is therefore no break in time or gestation period⁷⁵. A transferee employer would, of course, not be bound *ad infinitum* by the collective agreement which he had inherited from the transferor employer and to which he is not a party. He will have the option eventually of giving notice of changes to the employees concerned, alternatively, of negotiating a variation of terms in the relevant contracts of employment.

Whereas the Directive provides that Member States may limit the period for observing collective agreement terms and conditions, “with the proviso that it shall not be less than one year”⁷⁶ there is no minimum time limit for observance of collectively agreed terms and conditions under the Regulations. This provision applies only to the transferred employees who were employed by the transferor undertaking at the time when the transfer took place and were subject to the collective agreement terms. Those employees who were recruited subsequent to the transfer would obviously not be bound by that collective agreement.

Collective Redundancies

The original British legislation which introduced the redundancy payments scheme was the Redundancy Payments Act, 1965. This was the first of the British substantive statutory *individual* rights granted to employees. The current relevant provisions on *individual* redundancies are to be found in the Employment Rights Act, 1996⁷⁷. Although elements of social dialogue feature therein, it is not proposed to treat the *individual* redundancy social dialogue provisions of the 1996 legislation⁷⁸. What is proposed is to analyse briefly the social dialogue element in *collective* redundancies.

One of the primary sources of the legislation on collective redundancies was to be found in the Royal Commission on Trade Unions and Employers’ Association Report (Donovan Report) in 1968⁷⁹ but the thrust of this legislation emanates from the European Communities’ Directive on collective redundancies which lays down procedures and standards which employers must apply where collective redundancies occur. Collective redundancies are “dismissals effected by an employer for one or more

⁷⁵ See in this respect *Thompson v Walton Car Delivery; Thompson v BRS Automotive Ltd.* [1997] I.R.L.R. 343.

⁷⁶ Transfer of Undertakings Directive Art. 3 (2).

⁷⁷ Part XI. The original 1965 Redundancy Payments Act was repealed and re-enacted by the Employment Protection (Consolidation) Act 1978. That latter Act was also repealed with the current Act of 1996 replacing it.

⁷⁸ For a detailed study on individual redundancies see J. Carby-Hall, *Redundancy in the United Kingdom...* at pp. 387–491.

⁷⁹ Cmnd. 3623.

reasons not related to the individual workers concerned”⁸⁰. Under the Directive (and the Trade Union and Labour Relations (Consolidation) Act 1992⁸¹ which transposes the equivalent Directive provisions) the employer is required to consult representatives of workers “with a view to reaching an agreement” and with a view to finding “a means of avoiding mass redundancies or reducing the numbers affected”⁸². Furthermore, workers’ representatives may send any comments “to the competent public authority”⁸³.

Where the employer proposes to dismiss as redundant twenty or more employees in one establishment within a period of ninety days or less, the employer must consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be dismissed⁸⁴. “Appropriate representatives” consist of two categories of employees, namely (a) employee representatives elected by them or (b) if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of that trade union. The employer has the prerogative of choosing which of these two groups to consult if both categories exist in the establishment. The consultation must be in respect of all employees within the group whether or not they are trade union members⁸⁵.

616

The reasons for consultations to take place are varied. They include consultation about ways of avoiding the proposed redundancies, ways of reducing the numbers of employees to be dismissed for redundancy and ways of mitigating the consequences of the dismissals. Consultations must be undertaken by the employer with a view to reaching an agreement with the appropriate representatives⁸⁶. This means that the employer must consider seriously all arguments put forward by the representatives and try his best, bearing in mind the interests of the establishment, to implement the requests made by them. A mere listening to the representatives’ points of view and then dismissing their argument does not fulfil the statutory requirement. The employer must show that he took into serious consideration the arguments put forward by the representatives

⁸⁰ Source: European Communities’ Council Directive on collective redundancies 75/129/EEC. 17th February, 1975 OJ 48/29 25th February 1975 as amended by Directive 92/56 and Directive 98/59/EC O.J. 1998 L.225/16. See too Dolding (1992) ILJ 310.

⁸¹ Ss. 188–198.

⁸² Council Directive 98/59/EC art. 2 (1) (2).

⁸³ *Ibidem*, art. 3 (2).

⁸⁴ Trade Union and Labour Relations (Consolidation) Act, 1992, p. 188 (1).

⁸⁵ See *Governing Body of the Northern Ireland Hotel and Catering College and North Eastern Education and Literary Board v NATFHE* [1995] I.R.L.R. 83 which confirms the statutory wording.

⁸⁶ Trade Union and Labour Relations (Consolidation) Act, 1992, s. 188 (2) (a) (b) (c).

and made a genuine attempt to accommodate these. The final decision rests with the employer as he has the sole prerogative to decide, but if he acted reasonably in meeting the statutory requirements he would have fulfilled his statutory obligations.

The legislation clearly envisages a social dialogue through consultation rather than through negotiation with the appropriate representatives leading to a final decision to be taken by the employer. The fact that there is a duty to consult "with a view to reaching an agreement" implies that there is a "*rapprochement*" taking place in the direction of negotiation though, of course, it is not negotiation!⁸⁷ In order to avoid or reduce dismissals as much as possible the employer should consider introducing a new strategy in the establishment such as eliminating or reducing overtime, introducing flexible hours of work, transferring an employee to another section of the establishment, to introduce job-sharing, *etc.* By taking such action the employer can reach an agreement with the appropriate representatives.

For informed consultation purposes there is a statutory duty on the employer to disclose in writing⁸⁸ to the appropriate representatives (i) the reason why he proposes to dismiss employees as redundant, (ii) the number and descriptions of employees whom he proposes to make redundant, (iii) the total number of employees of such description employed at the establishment in question, (iv) the proposed method of selecting the employees, (v) the proposed method of carrying out the dismissals, having regard to the agreed procedure, (vi) the period over which the dismissals are to take effect and (vii) the proposed method of calculating the amount of any redundancy payments to be made to the dismissed employees⁸⁹. From these provisions, it becomes obvious that consultation must take place on an *informed* basis.

617

⁸⁷ See *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price* [1994] I.R.L.R. 72 (Div. Ct) where the Divisional Court considered that consultation included (a) meaningful consultations during the proposals to make redundancies, (b) the information given by the employer to the appropriate representatives must be adequate, (c) the appropriate representatives must be given adequate time for them to respond, and (d) the employer must give conscientious consideration of the appropriate representatives' responses during the consultation.

⁸⁸ But see *ASTMS v Hawker Siddeley Aviation* [1977] I.R.L.R. 418 where verbal disclosure was given. See also *National Society of Metal Mechanics v Gascoigne, Gush and Dent* [1976] I.R.L.R. 278 and Slynn J. in *Spillers-French (Holdings) Ltd. v ASDAW* [1979] I.R.L.R. (EAT) who said "It might be that if all the information had been given orally to a trade union representative, a Tribunal would not take a very serious view of that as a failure to comply with a requirement".

⁸⁹ TULRCA, 1992, s. 188 (4) (a) to (f).

Slynn J. in *Spillers-French (Holdings) Ltd v USDAW*⁹⁰ made it clear that “failure to give reasons at all, or failure to include one of the matters specified in [p. 188 (4)] might be serious. A failure to consult at all or consultation only at the last minute might be taken to be even more serious”.

Consultation of employees over health and safety matters

Under the Health and Safety at Work Act, 1974 Act⁹¹ (as amended) and its Regulations, the employer has a duty to consult the employees⁹² or their representatives on health and safety matters. Two Regulations made under the 1974 legislation⁹³ are of relevance in the social dialogue context, namely (i) the Safety Representatives and Safety Committees Regulations 1977⁹⁴ (as amended) and (ii) the Health and Safety (Consultation with Employees) Regulations, 1996⁹⁵ (as amended). Both those Regulations apply to onshore establishments.

The first of these (namely (i) above), applies to employers who recognise a trade union, or trade unions, for collective bargaining purposes. The second (namely (ii) above), applies to employers whose employees are not trade union members and/or employers who do not recognise a trade union, or the trade union(s) does not wish to represent those employees who are not trade union members.

618 Onshore employers⁹⁶ may have the statutory obligation to consult only under the 1977 Regulations provisions or may have to consult under both the 1977 and the 1996 Regulations provisions depending upon the circumstances⁹⁷.

⁹⁰ [1979] I.R.L.R.339 (EAT) Slynn J. also put forward similar ideas in relation to consultation in that “it may result in new ideas being ventilated which avoid the redundancy situation altogether. Equally it may lead to a lesser number of persons being made redundant than was originally thought necessary. Or it may be that alternative work can be found during the period of consultation”.

⁹¹ 1974 c. 37. It should be noticed that the European Framework Agreement on Health and Safety (OJ [1989] L 183/1) was inspired by the British health and safety legislation.

⁹² It should be noted that some self-employed workers working under a contract for services, may be classed as employees for the purposes of the health and safety legislation and therefore need to be consulted.

⁹³ Under ss. 2 (4) & (7); 15 (1) (3) (b) and 5 (b); 80 (1) & (4); and 82 (3) (a) of the 1974 legislation.

⁹⁴ S.I. 1977, No. 500 which became operative as from 1st October 1978.

⁹⁵ S.I. 1996, No. 1513 which came into force on 1st October 1996.

⁹⁶ Offshore employers need to satisfy the provisions of the Offshore Installations (Safety Representatives and Safety Committees) Regulations, 1989.

⁹⁷ Where health and safety consultation arrangements already exist in the establishment and where they accord with the legislation, there is no requirement to replace these except that the employer must periodically carry out reviews to ensure that these arrangements meet the minimum statutory requirements.

The Regulations impose upon employers the obligation to consult employees on a variety of matters⁹⁸. So as to avoid confusion, each of the two Regulations' provisions which treats the functions of the health and safety representatives will be discussed separately. This will, of necessity, mean that there will be some repetition because of the similarity of functions of these representatives with whom the social dialogue is carried out. The *differences* within the functions of health and safety representatives however merit this approach.

Under the Safety Representatives and Safety Committees Regulations 1977, *safety representatives*⁹⁹ are *appointed in writing* by the independent trade union recognised by the employer for collective bargaining purposes¹⁰⁰. The functions of the safety representatives are (a) to *investigate* potential dangerous occurrences and hazards in the workplace; (b) to *receive and investigate* any complaints from employees on matters relating to health, safety and welfare in the workplace; (c) *investigate the causes* of accidents which have occurred and (d) make *representations* to the employer resulting from the investigation. Furthermore (e) make any *additional representations* on general issues relating to health and safety in the establishment; (f) carry out an *inspection* in the workplace¹⁰¹; (g) *represent* employees in all matters to do with the health and safety inspectorate and (h) *receive and disseminate* relevant information from that inspectorate and (i) *attend* all health and safety committee meetings¹⁰².

619

Where at least two safety representatives request in writing the employer to establish a safety committee, the employer has the obligation to consult both the safety representatives who made the request and the recognised trade union, post notices informing the employees of those proposals and the names of the members of that committee. The employer must establish the committee within three months from the date of the request¹⁰³. The safety representative thus takes an active and important part

⁹⁸ Source: The aforementioned two Regulations. See too the Health and Safety Executive (HSE) publication referenced NDG 232 (Rev. 2.) of April 2013 which this author highly recommends the reader to consult. This latter document is in plain English and easily understood by the non-lawyer.

⁹⁹ Safety Representatives and Safety Committee Regulations, 1977 Reg. 2 (1). A person appointed as a safety representative must have at least two years' experience with the current employer or at least two years' experience in similar employment (Reg. 3 (4)).

¹⁰⁰ *Ibidem*. Reg. 2 (1) See too Health and Safety at Work, *etc.* Act 1974 (as amended) s. 2 (4).

¹⁰¹ *Ibidem*. Reg. 5 (1) including inspections following notifiable accidents, occurrences and diseases (under Reg. 6 (1) and inspection of documents and the provision of information under Reg. 7 (1) (2) (a) to (e)).

¹⁰² *Ibidem*. Reg. 4 (1) (a) to (h)

¹⁰³ *Ibidem*. Reg. 9 (1) (2) (a) to (c).

in the social dialogue, not only with the employer on behalf of the employees he/she represents, but also with the inspectorate and the setting up of, and taking part in, the activities of the safety committees.

The role of the *representatives of employee safety*¹⁰⁴ under the Health and Safety (Consultation with Employees) Regulations, 1996, though similar to that of the safety representatives under the 1977 Regulations, is not identical. Such representatives are *elected*¹⁰⁵ by the workforce they represent. The functions of the representatives of employee safety are (a) to make *representations* to the employer on potential hazards and dangerous occurrences in the establishment, (b) to deal generally with *all matters* which affect, or could affect, the employees' health and safety in the establishment, (c) to make *representations* to the employer on specific matters relating to the duty of the employer to consult and (d) to *represent* employees in dealings with the health and safety inspectorate¹⁰⁶.

Although the representatives of employee safety (under the 1996 legislation) have fewer functions than the safety representatives (under the 1977 legislation), in that they do not have the function of inspecting the workplace, or attend health and safety committee meetings, or receive information from the inspectorate, or request the setting up of a safety committee, nevertheless they play an important role in the health and safety social dialogue and act as a "*porte parole*" of the employees they represent in the workplace.

Where there are employees who are not represented by either safety representatives under the 1977 Regulations or by representatives of employee safety under the 1996 Regulations, the employer is required to consult the *employees directly*¹⁰⁷. Where the employer consults the employees directly, he has an obligation to make available to those employees such information as is necessary to enable them to participate fully and effectively in the consultations¹⁰⁸.

Where the employer consults representatives of employee safety (under the 1996 Regulations), he must make available to those representatives such information within the employer's knowledge as is necessary to enable them to participate fully and effectively in the consultations and in the carrying out of their functions under the Regulations¹⁰⁹.

¹⁰⁴ Health and Safety (Consultations with Employees) Regulations 1996 Reg. 2 (1)

¹⁰⁵ *Ibidem.* Reg. 4 (1) (b).

¹⁰⁶ *Ibidem.* Reg. 6 (a) (b) (c).

¹⁰⁷ *Ibidem.* Reg. 4 (1) (a).

¹⁰⁸ *Ibidem.* Reg. 5 (1). Unless such information is subject to national security, contravening an enactment, relating to an individual who has not given consent, is against the economic interests of the establishment, or subject to legal proceedings (Reg. 5 (3) (a) to (e)).

¹⁰⁹ *Ibidem.* Reg. 5 (2) (a).

Where there are employees who are not represented by safety representatives under the 1977 Regulations, the employer must consult those employees in good time¹¹⁰ on matters relating to their health and safety at work and in particular with regard to (i) the introduction of any measure at the workplace which may substantially affect the health and safety of those employees, as for example, new machinery or a new or modified system of work, (ii) arrangements for appointing or nominating persons who are competent to assist them in complying with health and safety laws¹¹¹, (iii) any safety and health information he is required to give employees under relevant statutory provisions as, for example, risks and dangers arising from their work, measures to reduce or get rid of those dangers, and so on, (iv) the planning and organisation of health and safety training which the employer is required to provide to those employees and (v) the health and safety consequences for the employees for the introduction, as well as, the planning, of new technologies in the workplace¹¹².

When the employer consults representatives of employee safety, he must ensure that (i) each of those employees is provided with the necessary training as is reasonable in respect of his/her functions. Furthermore, the employer must meet all reasonable costs, – including travel and subsistence allowance, – for such training and (ii) he allows each representative time-off on full pay during the representative's working hours to enable him/her to fulfil his/her functions as such, or to undertake training. The employer must also provide all reasonable facilities to enable the representative to carry out his/her functions under these Regulations¹¹³. Such facilities could include a fully equipped desk with telephone and computer facilities, a notice board, a filing cabinet, a photo-copying machine, all facilities for private conversations either with the employees or the employer¹¹⁴.

¹¹⁰ There is no statutory explanation as to what "good time" means. It is submitted that the employer must allow enough time for the employees to consider the matters being raised and provide them with informed responses (Source: HSE *Consulting Employees on Health and Safety...* at p. 3).

¹¹¹ In accordance with the provisions of the Management of Health and Safety at Work Regulations 1992 Regs. 6 (1) & (7) (1) (b).

¹¹² Health and Safety (Consultations with Employees) Regulations, 1996 Reg. 3 (a) to (e).

¹¹³ *Ibidem*. Reg. 7 (1) (a) (b) and (4).

¹¹⁴ It should be noted that trade union appointed safety representatives have the same rights to paid time to undergo training and perform their statutory functions as is reasonable in the circumstances. In practice the particular trade union or the Trades Union Congress (TUC) will offer the training of safety representatives as well as meet the costs of such training.

3.2.4. Other Examples Treating the Social Dialogue Concept

Work during maternity leave

A female employee¹¹⁵ is enabled under the Work and Families Act, 2006¹¹⁶ to perform up to *ten days' "work"* during her maternity leave without losing her statutory maternity pay. Payment for time worked needs to be agreed through the social dialogue between the employer and the employee. The *raison d'être* for this provision is for the employee to keep in touch with developments which are taking place at work during her maternity leave absence. Although this does not constitute work *per se*, the employer and the employee are allowed reasonable contact during maternity leave to inform the employee of workplace issues, to study progress reports, to undertake some training, to communicate generally and to ease her eventual return to work¹¹⁷.

Ordinary and Additional Maternity Leave

Eligible employees, whether full-time, temporary or part-time and regardless of hours worked or length of service, can take up to fifty two weeks maternity leave¹¹⁸. The first twenty six weeks are known as Ordinary Maternity Leave (OML) whereas the last twenty six weeks are named Additional Maternity Leave (AML)¹¹⁹. AML applies to those employees who have given birth to their offspring born on or after 1st April, 2007. The earliest leave which can be taken is eleven weeks before the expected week of childbirth. Employees must take at least two weeks after the childbirth (or four weeks if the employee is a factory worker). The statutory maternity leave is the *minimum minimorum* allowed under British law. An entitlement for a longer maternity period may however be agreed through the social dialogue between the employer and employee or collectively through the social partners. In such a case that longer period will feature

622

¹¹⁵ All employees are workers but not all workers are employees! There is an important difference in British law between a worker and an employee. For a legal distinction and its reasoning see J. Carby-Hall, *New Frontiers of Labour Law: – Dependent and Autonomous Workers*, [in:] *Du travail Salarié au Travail Indépendent – Permanences et Mutations*. Professors B. Veneziani and U. Carabelli (eds), vol. 4 – European SOCRATES Programme, Cacucci Editore, Bari 2003, pp. 163–308, particularly pp. 246–282.

¹¹⁶ Schedule 1 para. 6 (which amends s. 35 (3) (a) of the Social Security Contributions and Benefits Act, 1992).

¹¹⁷ As, for example, job vacancies, new appointments, progress reports, new developments in the establishment, *etc.*

¹¹⁸ Work and Families Act, 2006, s. 1.

¹¹⁹ *Ibidem*. Schedule 4 Part VIII para. 7 (2) and para. 73 (1) (2). There is no qualifying period for Ordinary Maternity Leave but for Additional Maternity Leave there is a qualifying period of twenty six weeks' work in the establishment at the beginning of the fourteenth week before the expected date of childbirth.

as a term of the contract of employment of the employee. Where the social dialogue is between the social partners, that longer period will feature as a term of the collective agreement and incorporated¹²⁰ into the contract of employment.

Maternity, Parental and Paternity Leave

The Maternity and Parental Leave, *etc.* Regulations 1999¹²¹ enable the social partners to enter into an agreement for a detailed parental leave scheme set up by collective or workplace agreement incorporated into the contract of employment¹²². Such a scheme may make more beneficial provisions than those contained in the Regulations¹²³ though it cannot contradict or decrease the benefits provided by the key elements of the Regulations¹²⁴.

The Regulations provide for a model scheme which automatically comes into effect if the social partners cannot agree on their own scheme and therefore the social dialogue fails. The key elements of the parental model scheme¹²⁵ which cannot be excluded or derogated from by collective or workforce agreement terms are firstly, that parental leave can only be taken in blocks of at least one week or multiples of a week¹²⁶ unless the child is disabled and entitled to disability living allowance. Secondly, the employee cannot take more than four weeks' parental leave in respect of an individual child during a particular year. In the third instance, the employee must give the employer twenty one days' notice of his/her intention to take parental leave. Fourthly, fathers who wish to take parental leave immediately after child birth, have to give at least twenty one days' notice before the commencement of the expected week of child birth. Fifthly,

623

¹²⁰ For an analysis and evaluation as to how a collective agreement term may be incorporated into the individual contract of employment under British law see J. Carby-Hall, *The Concept of Direct Incorporation in Great Britain*, [in:] *Estudios de Historia del Derecho Europeo*, vol. 2, *Homenaje al profesor G. Martínez Diez*. Professor Pérez Rogelio Bustamente (ed.), Editorial Complutense, Madrid 1994 at pp. 173–227.

¹²¹ (S.I., 1999, No 3312).

¹²² *Ibidem*. Reg. 16. See too Council Directive 2010/18/EU of 8th March, 2010 implementing the revised Framework Agreement on Parental Leave concluded by BUSINESS EUROPE, UEAPME, CEEP and ETUC (OJ [2010] L 68/13).

¹²³ For example by permitting parental leave after the child's fifth birthday (which is the statutory maximum age limit) or for children born or adopted before 15th December, 1999 (which is the date limit).

¹²⁴ By providing for lower age limits or a later birth or adoption date.

¹²⁵ Maternity and Parental Leave, *etc.* Regulations, 1999 Schedule 2 (Default provisions in respect of parental leave.)

¹²⁶ This means that the employee who takes any period of parental leave which is less than one week, that lesser period counts as one whole week out of the employee's thirteen week total entitlement.

employees wishing to take parental leave immediately after the placement date of an adopted child have to give to the employer twenty one days' notice before the beginning of the week in which the placement is expected to take place or as soon as is reasonable thereafter. In the sixth instance, the employer is entitled to ask for written proof of the employee's entitlement to parental leave¹²⁷. Seventhly, the employer has the prerogative of postponing a period of parental leave on birth or adoption of a child if he considers that the business would be disrupted were the employee to take leave during the period identified in the notice¹²⁸. Finally parental leave cannot be postponed by the employer for more than six months. The employer has an obligation to notify the employee in writing within seven days of receiving the employee's notice, giving the reason for that postponement and specifying the date when the parental leave will begin and end¹²⁹. Should the postponement take place past the child's fifth birthday or fifth anniversary of adoption, the employee is still entitled to take postponed parental leave as soon after the birthday or anniversary as possible.

With all those statutory standards on parental leave, the social partners will need to tread carefully, – prior to concluding their collective or workplace agreement, – during their social dialogue when discussing what is and what is not more beneficial than the statutory requirements. This social dialogue task is not an easy one!

Eurofound Research

Research carried out by Eurofound and its resultant comparative report¹³⁰ entitled "Working Conditions and Social Dialogue-UK"¹³¹ provide good examples of the steps taken by the United Kingdom social partners to implement the 2002 Directive¹³² on informing and consulting employees¹³³. Both employer¹³⁴ and trade union¹³⁵ representatives were ap-

¹²⁷ For example, proof of birth or birth certificate and in the case of adoption the date of placement for adoption.

¹²⁸ Maternity and Paternity Leave, *etc.* Regulations, 1999 Schedule 2 para. 6 (a) – (c).

¹²⁹ *Ibidem.* Schedule 2 para. (d) and (e).

¹³⁰ Source: <http://www.eurofound.europa.eu/comparative/tn0710019s/uk0710019q.htm> (Retrieved 6th August, 2014)

¹³¹ The author of this report is Andrea Broughton and the publication date is 3rd April, 2008.

¹³² Directive 2002/14/EC on national level information and consultation (OJ 2002 L80/29),

¹³³ Originally the United Kingdom, – along with Ireland, Germany and Denmark, – blocked this proposed Directive, but eventually abandoned its hostility to it and became a strong supporter of this concept when it adopted the partnership agenda. See M. Hall, *Assessing the Information and Consultation of Employees Regulations*, "Industrial Law Journal" 2005, vol. 34, pp. 103 *et seq.*

¹³⁴ The Confederation of British Industry (CBI).

¹³⁵ Namely the Trades Union Congress (TUC).

proached by Eurofound with the view to having their views on “the type, nature and quality of their social dialogue [...] in terms of its influence on working conditions”.

Confederation of British Industry

The views expressed by the CBI were that¹³⁶ “there are many examples of successful social dialogue in the UK. One area highlighted as particularly successful [...] was the establishment of the Low Pay Commission (LPC)”¹³⁷ which, *inter alia*, after its fact-finding visits to the social partners and after taking written and/or oral evidence from the social partners and others, has the function of consulting (a form of the social dialogue) employers and employees and their respective organisations on issues relating to wages.

The CBI highlighted other examples of successful social dialogue. One of these related to the employee’s right to request *flexible working* under the provisions of the then¹³⁸ Employment Rights Act, 1996. That section grants a right to a qualifying employee to apply for a change in terms and conditions of employment to facilitate child care. Appropriate Regulations deal with the conditions necessary to qualify for that right. These Regulations provide that the employees must have been continuously employed for a minimum of twenty six weeks and must be the father, mother, adopter, guardian, foster parent (or the partner of, or married to, one of those persons) of the child concerned. Employees who care for a child or children under the age of 6 or a disabled child or children below 18 years of age may request the right to work flexibly¹³⁹.

625

¹³⁶ Source: Eurofound “Working Conditions and Social Dialogue-UK” at p. 10.

¹³⁷ The LPC is an independent statutory non departmental public body set up under the National Minimum Wage Act, 1998 to advise the government on the national minimum wage. It consists of nine Commissioners (all of whom serve in an individual capacity and not as representatives of the organisations for which they work) drawn from a range of employer, employee and academic backgrounds. The LPC enjoys, since 2001, permanent status and its terms of reference include seven activities, namely, research and consultation; analysing relevant data and activity thus encouraging the Office of National Statistics (ONS) to establish estimates of the incidence of low pay; carrying out surveys of firms in low-pay sectors; consultation with employers and workers and their respective representatives; taking written and oral evidence from a wide range of organisations; and carrying out fact-finding visits throughout the UK to meet employers, workers and their respective representatives.

¹³⁸ The Employment Act 2002 introduced new rights for working parents and amended the Employment Rights Act, 1996 by inserting therein s. 80F in that Act.

¹³⁹ Flexible working includes (i) *job-sharing* (which is a form of part-time work where two, three or more workers share responsibility of one full-time vacancy. They share proportionally the pay and other benefits offered in proportion to the hours worked); (ii) *part-time work* (the prevalent sectors in which this form of flexible work features are shops,

Section 12 of the Work and Families Act, 2006 widens the scope of the existing law by allowing applicants to include persons who have caring responsibilities for adults. Thus applications for flexible working may be made for purposes of caring not only for a child but also for a person aged 18 years and over who has caring responsibilities.

hotels, restaurants, social work, financial and business services, warehouses and agriculture. Part-time workers make up to 25% of British workers with 80% being female workers (Source ACAS *Flexible Working and Work-Life Balance* at p. 6)); (iii) *term-time work* (gives employees the opportunity to reduce their hours or take time off during school holidays. This form of flexible employment is prevalent among teachers and university lecturers); (iv) *home working* (such working arrangements can be temporary or permanent); (v) *mobile work and hot desking* (Mobile workers usually receive telephone, text or e-mail messages at their homes or in their vehicles from their employers to deliver goods at a specified address or to sell wares to particular individuals. Hot desking is a growing trend whereby employees work away from their office base and on their return share desks with colleagues); (vi) *temporary working contracts* (where an employee – is working under a contract of service- or works under a contract for services – is employed for a short period of time); (vii) *fixed term contracts* (fixed for a definite period of time), sub-contracting (assigning of another establishment to perform work which needs to be done); (viii) *zero hour contracts* (consist of arrangements between the social partners or individuals where workers agree to be available for work as and when required but no particular time or hours are specified); (ix) *flextime* (this form of flexible work features mostly in sectors employing office staff below managerial level in the public and private sectors. Examples include secretaries, junior administrators and personal assistants); (x) in certain instances *piece work*; (xi) *shift working* (which is widespread in sectors of industry which run on a twenty four hour system as for example the emergency services, hospitals, newspaper production, gas, electricity and water supplies and some supermarkets which operate on a twenty four hour basis through the year); (xii) *self-rostering* (this means that employees agree amongst themselves their own shift pattern(s)); and (xiii) *shift swapping*; (xiv) *staggered hours*; (xv) *annualised hours* (for those employees who have school age children); (xvi) *compressed working week* (which means employees working additional hours on weekdays to enable them to take an additional day or half a day a week away from work) and other forms of flexible hours such as (xvii) *voluntary reduced agreed working hours* of short duration to facilitate specific events (such events as funerals and bereavements, marriages, baptisms, etc.). Each of these flexible working systems enables employees by means of the collective or individual social dialogue to achieve a satisfactory work-life balance and thus combine their work with their care duties towards children, (whether natural or adopted), the disabled, the elderly or the sick all of whom are in need of care. Also to be noted is the fact that part-time and fixed-term contracts, both of which form part of *flexible working* and indeed assist in the work-life balance concept, are provided for at European Union level. See (a) the European Framework Agreement on Part-Time Work concluded by the European social partners on 6th June 1997. Council Directive 97/81/EC (OJ [1998] L 14/9) later extended to the United Kingdom by Council Directive 98/23/EC (OJ [1998] L 131/10). Consolidated legislation OJ [1998] L 131/13 and (b) the European Framework Agreement on Fixed-Term Work concluded by the European social partners ETUC, UNICE and CEEP on 18th March, 1999. Council Directive 99/70/EC (OJ [1999] L 175/43. See too COM (99) final for the original proposal and Corrigendum OJ [1999] L 422/64.

The employer must consider this request *seriously* and give the employee reasons for any refusal. Refusals by the employer may only be made on specific grounds¹⁴⁰. Consequently, there is in practice considerable social dialogue at British workplace level on the issue of flexible working.

Flexible working arrangements can help an employee balance his/her working life with family-friendly commitments and care responsibilities as discussed briefly above. Research shows that the social dialogue on flexible working is welcomed by employers who are generally willing to enter into flexible arrangements for such arrangements can be to the employers' benefit¹⁴¹. Applications to work flexibly may be made by the employee or by a trade union representative on his/her behalf.

Flexitime, which is one of the types of flexible working, gives *some* freedom to employees to choose when to begin and when to end their working time. Flexitime is singled out because, with that form of flexible employment, there are limits to such freedom of choice for the employee. Employees must work during core hours in the "bandwidth"¹⁴² and must work a contractually agreed number of hours during the accounting period¹⁴³. Outside the core time the employee has the freedom to choose whether or not to work at the beginning and end of each day which constitute the flexible bands. The employee's freedom of choice of when to work will need to be negotiated with the employer through a collective agreement or by an individual contract of employment concluded either individually between the employee and the employer or collectively between the social partners. Furthermore, the time to be taken during lunch breaks also needs to be negotiated either collectively or individually between the employer and the employee. The collective or individual social dialogue thus features prominently in that form of flexible employment. The advantage of flexitime for the employee is that he/she has freedom within the flexible bands to choose the hours of work desired. For the employer, flexitime can enhance recruitment and staff retention and enhance equal opportunities to employees unable to work standard hours.

¹⁴⁰ Namely (i) the burden of additional costs; (ii) detrimental effect on ability to meet customer demand; (iii) inability to re-organise work among existing staff; (iv) inability to recruit additional staff; (v) detrimental impact on quality; (vi) detrimental impact on performance; (vii) insufficiency of work during the periods the employee proposes to work; (viii) planned structural changes and (ix) such other grounds the Secretary of State may specify by regulations. (s. 80 G (1) (b)) (Source: Employment Rights Act, 1996 Part VIII A. Flexible working s. 80 (F) to (I))

¹⁴¹ Taking shift work as one of numerous examples, it is advantageous to the employer in that it enables a flexible response to the peaks and troughs of demand.

¹⁴² The "bandwidth" comprises flexible bands which are 800 hours to 1000 hours and 1600 hours to 1800 hours, flexible lunch breaks from 1200 hours to 1400 hours and core time which is 1000 hours to 1200 hours and 1400 hours to 1600 hours.

¹⁴³ An "accounting period" consists normally of four weeks.

Overtime work which can form part of the collective or individual social dialogue and which is also an aspect of flexible work means working additional hours to the normal working hours. Overtime work is beneficial to employers at times when bottlenecks in production, when fluctuations in demand and where labour shortages occur. Overtime makes for economic sense to employers in that it is cheaper to pay overtime occasionally than to recruit full-time staff.

Another example of successful social dialogue cited by the CBI was the establishment of the Women and Work Commission¹⁴⁴ set up by the British government to examine the problem of the gender gap and other matters affecting women's employment.

The CBI has expressed its views on the operation of the British social dialogue as follows¹⁴⁵ "our view is that social partnership is working very well in the UK. We have a voluntary approach and often involve not only the social partners themselves but also other experts, such as academics. CBI members believe that social partnership should be considered on an issue by issue basis; not all issues are appropriate for social partnership".

Trades Union Congress

628 The TUC expressed their views on the social dialogue in the fields of learning, skills development and training as areas in which social dialogue can be influential. Eurofound refers to the TUC publication entitled "The Learning Curve"¹⁴⁶ and looks at how partnership at the workplace between employers and trade union representatives boosts training and skills. In the Foreword to this publication the then TUC General Secretary Brendan Barber said that the case studies in that publication "demonstrate how unions can add value in a range of ways, from the establishment of learning centres and the shaping of apprenticeship programmes to the promotion of a learning culture in the workplace".

According to the UK Labour Force Survey 2003, union members receive more training than non-union members. A total of 39% of union workers were involved in some kind of training compared to 26% of non-union members. This research also shows that the volume of training on offer to employees also increases if training is subject to *negotiation* between the social partners rather than *consultation*. Almost 40% of workplaces where training was subject to negotiation organise an average of five or more training days a year. This compares with fewer than 25% of workplaces where training is a subject of consultation only and thus not subject to negotiations, i.e. the social dialogue on training!

¹⁴⁴ This Commission comprises members from employer and employee representatives.

¹⁴⁵ Source: Eurofound "Working Conditions and Social Dialogue-UK" at p. 11.

¹⁴⁶ <http://www.unionlearn.org.uk/files/publications/documents/55.pdf> (Retrieved on 11th August, 2014).

The aforementioned TUC publication which includes three workplace case studies concludes in showing how learning agreements between management and unions can add significant value to an organisation by establishing workplace learning centres, paid time-off to learn and support for union learning representatives.

Joint Initiatives

Eurofound mentions also a joint CBI, TUC, the Department of Business, Enterprise and Regulatory Reform (BERR) and the Department of Innovation, Universities and Skills (DIUS)¹⁴⁷ initiative in the area of training and skills development. This initiative took place in the context of the British government's commitment to look at the possible inclusion of skills as a topic of bargaining (therefore social dialogue) in the UK's statutory recognition procedure. A guide to best workplace dialogue over training with the aim of developing best practice was published. The TUC posited that this "project is important and effective training and skills strategy is central to lasting business success and workplace development. An effective strategy rarely works in practice without fully engaging the workforce and its representatives in its design and delivery"¹⁴⁸.

Furthermore the British social partners have worked together to implement the European Union social partner agreements on stress at work¹⁴⁹ implemented by means of a guide document¹⁵⁰ and telework¹⁵¹

¹⁴⁷ Both these latter being government departments.

¹⁴⁸ See too the additional information given on this initiative at <http://www.tuc.org.uk/skills/tuc-13420-f0.cfm> (Retrieved on 11th August, 2014).

¹⁴⁹ See J. Carby-Hall, *The Work-Life Balance Concept* in a book of conference papers given at the University of Santiago de Compostela international conference in April 2014, scheduled for publication by ADAPT Labour Studies Book Series and Cambridge Scholars Publishing in 2015. The chapter treats not only various aspects of stress at the workplace but also other issues some of which are treated in this text, namely flexible working in its various forms, time-off for care duties, the social dialogue by means of the collective and workforce agreements, etc.

¹⁵⁰ <http://www.hse.gov.uk/stress/eurostress.pdf> (Retrieved 11th August, 2014). See the Health and Safety Executive publication entitled *How to Tackle Work Related Stress-A guide to employers making the management standards work* (2009).

¹⁵¹ At European level see the inter sectoral social partners' agreement (namely UNICE/UEAPME/ECPE/ETUC) of July 2002 on telework. This agreement was the first "autonomous agreement" implemented at national level by collective agreement rather through legally binding measures which emanate from a Directive (Dir. 91/533.EEC). This telework agreement falls exactly within the Lisbon priorities. Telework is defined by the agreement as "a form of organising and/or performing work, using information technology in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from these premises on a regular basis". Telework is *voluntary* both on the employer's side and the employee's side.

implemented by means of a Code of Conduct¹⁵². The British social partners worked as well on the implementation in the United Kingdom of the EU framework agreement on violence at work¹⁵³ which very much forms part of the social dialogue¹⁵⁴.

There have also been some CBI and TUC joint statements on such issues as managed migration in the United Kingdom¹⁵⁵ and a two-tier workforce.

Numerous other examples of successful social dialogue in the United Kingdom are reported in the Eurofound Report. Parameters of space do not allow for more than a *very* brief mention of some of these¹⁵⁶. In the health and safety field, Eurofound mentions the HSE qualitative research on stress management¹⁵⁷ involving successful social dialogue (mainly in the public sector), in partnership with trade unions. Examples of a successful partnership approach to the social dialogue include Stockton Borough Council, London Electricity and BAE Systems Aero structures. In the field of the social dialogue influencing working conditions generally¹⁵⁸, the Incomes Data Services (IDS) case study-based research mentioned the successful social dialogue which took place in the Royal Mail Group, Birmingham City Council, the Involvement and Participation Association, TurbCo, H.P. Bulmer, the London Underground and others.

630

Joint regulation of terms and conditions also features in the Eurofound Report. A survey on employee representative structures which engage in social dialogue and collective bargaining with management is mentioned in the Eurofound Report. The survey asked managers whether they normally negotiated with, consulted or informed union and non-union representatives over a set of twelve terms and conditions of employment¹⁵⁹. The results of the survey make for interesting reading! Also in-

¹⁵² <http://www.cbi.orh.uk/pdf/teleworkbrief.pdf> (Retrieved 11th August, 2014).

¹⁵³ See J. Carby-Hall, *The ILO, EU and British Laws and Policies on Violence at work* E-Journal of International and Comparative Labour Studies vol. 3 No 2 May/June 2014. http://www.adapt.it/EJCLS/index.php/ejcls_adapt/article/view/214.

¹⁵⁴ http://ec.europa.eu/employment_social/news/2007/apr/harassment_violence_at_work_en.pdf (Retrieved on 11th August, 2014).

¹⁵⁵ http://www.employingmigrantworkers.org.uk/why/6_11_0.html (Retrieved on 11th August, 2014).

¹⁵⁶ The reader who wishes to have detailed knowledge on the British social dialogue is strongly recommended to read the report entitled *Working Conditions and Social Dialogue – UK*. <http://www.eurofound.europa.eu/comparative/tn0710019s/uk0710019q.htm> Therein will be found references (not given here) which are invaluable to the researcher or to the person who wishes to carry out an in-depth study on the subject.

¹⁵⁷ *Ibidem*, pp. 5 and 6. *Beacons of Excellence in Stress Prevention*.

¹⁵⁸ *Ibidem*, pp. 7 to 9.

¹⁵⁹ Namely pay, hours, holidays, pensions, staff selection, training, grievance procedures, disciplinary procedures, staffing plans, equal opportunities and health and safety. *Ibidem*, p. 2.

teresting is the debate about the influence of the social dialogue between employers and employee representatives as reflected in a number of articles¹⁶⁰. In that Report will also be found references to research carried out on the potential effect of trade union presence on training in British workplaces¹⁶¹.

A survey which examined the range of employee representative structures which engage in British social dialogue and collective bargaining with management include (a) recognised trade unions in the workshop, (b) the presence of staff associations, (c) joint consultative committees and stand-alone non-union representatives¹⁶².

British Works Councils et al.

A works council¹⁶³ may be defined as a group representing employers and employees in a company which meets to discuss matters of common interest relating to business policy, the running of the business, plant, factory, shop and other establishment which is not covered by regular trade union agreements. The works council is enabled to have a social dialogue through information, consultation and negotiations with management about working conditions, wages, grievances, disciplinary matters, and other issues relating to the establishment. The British works councils have hitherto (until recently in 2008) been *ad hoc* bodies set up by the social partners on a voluntary basis and are quite unlike works councils which are regulated by legislation in other European countries such as, *inter alia*, France¹⁶⁴ and particularly Austria, Germany¹⁶⁵ and Norway¹⁶⁶.

631

¹⁶⁰ *Ibidem*, pp. 3 and 4. These articles, each of which makes for interesting (though not bedtime!) reading, are cited in the Report.

¹⁶¹ *Ibidem*, pp. 4 and 5.

¹⁶² *Ibidem*, p. 1.

¹⁶³ It is not intended to treat the European Works Council (under the European Works Councils Directive Dir. 94/45/EC (as amended by Dir. 97/74/EC (OJ [1997] L 10/20 and consolidated by directive 2009/38/EC) which plays an important role in the social dialogue field. On that topic the reader may find the discussion in J. Carby-Hall, *The Legally Enforceable/Non-Enforceable European Collective Agreement. – A Discussion Paper, “Managerial Law”* 1999, vol. 41, No 4 [MCB University Press of some interest]. See too by the same author, *The Rule of Law vs. The European Works Council, “Managerial Law”* 1998, vol. 40, No 4 [MCB University Press]. The discussion in this chapter is more modest in that it will only focus on the role of the British works council in its social dialogue context.

¹⁶⁴ Comités d’entreprise, Comités Central d’Entreprise or Comités de Groupe for example.

¹⁶⁵ Betriebsrat.

¹⁶⁶ Arbejdsmiljøtvalget and works councils where 100 or more employees are employed, both of which are compulsory.

Resulting from the eventual¹⁶⁷ adoption by the United Kingdom of Directive 2002/14/EC on national level information and consultation¹⁶⁸, this Directive was implemented in the United Kingdom by the Information and Consultation of Employees Regulations, 2004¹⁶⁹. These Regulations represent a *major* development on works councils in British labour law.

Since 6th April, 2008, all employers in the United Kingdom who employ 50 or more staff *could*¹⁷⁰ be compelled to form a works council upon the employees' demand. The procedure for the formation of a British works council is twofold. It may be initiated either by the employer or by a "valid" number of employees in the establishment. The word "valid" means that at least fifteen employees who form at least 10 per cent of the workforce have to request to the employer for the setting up of a works council¹⁷¹. A formal request may be made by the employees requesting details from the employer of the workforce to enable them to calculate the 50 employee/10 per cent statutory requirements¹⁷² for the purposes of the Regulations. Within six months of the request having been made the social partners need to conclude a formal agreement on how their works council will be operated. Although there are a number of prescribed matters to be met regarding the formal agreement, – namely an obligation by the employer to inform the employees on the undertaking's *economic situation*, to inform and consult the employees on *business prospects* and to inform and consult with a *view to reaching an agreement*, – the social partners have freedom to negotiate the *modus operandi* of the works council.

Where the social partners are unable to reach formal agreement, a statutory procedure is provided for by the Regulations. Thus, if the employer fails to initiate such request within the stipulated six month period, as above, made by the "valid" number of employees, the "standard information and consultation provision" specified in the Regulations will automatically apply¹⁷³. The employer must inform and consult the elected¹⁷⁴ information and consultation representatives under these standard provisions, on (a) any recent or probable *development* of the undertaking's

¹⁶⁷ For this Directive has had a tortuous, turbulent and long history.

¹⁶⁸ OJ [2002] L80/29. See Catherine Barnard *EC Employment Law* (2006) (3rd Edn) OUP at pp. 732–735 where she discusses the turbulent background of Directive 2002/14/EC on national level information and consultation prior to its adoption.

¹⁶⁹ 2004, No 3426.

¹⁷⁰ "Could" because the establishment of a works council is *not automatic*.

¹⁷¹ Information and Consultation of Employees Regulations 2004 (S. I. 2004, No 3426) implementing Directive 2002/14/EC.

¹⁷² *Ibidem*. Regs. 4 and 5.

¹⁷³ *Ibidem*. Reg. 20 (1) (a) to (c).

¹⁷⁴ *Ibidem*. Reg. 19. One representative in every 50 employees or part thereof, but with a minimum of 2 representatives and a maximum of 25.

activities and its *economic* situation; (b) the situation, structure and probable development of employment within the undertaking and anticipatory measures envisaged, in particular where there is a *threat to employment* and (c) decisions regarding *substantial changes* in the workplace organisation or on contractual relations, for example collective redundancies, transfers of undertakings, takeover bids, *etc.* The effect of the standard information and consultation provision in the British Regulations is such as to create a *rapprochement* with those European countries such as Germany which have a pedigree of binding legislation on information and consultation.

Where there are already formal arrangements in place where British employers inform and consult employees, it would be advisable for employers to check whether these “arrangements” constitute a works council for the purposes of the Regulations. Where in the case of pre-existing arrangements the employees request a works council, the employer has the obligation to *ratify* the existing formal arrangement. Pre-existing agreements must be in writing, cover all employees in the undertaking, set out how information and consultation is disseminated to employees and/or their representatives and be approved by the employees themselves¹⁷⁵.

In cases where neither the employer takes the initiative to form, with the consent of the employees, a works council and where the employees themselves do not request a works council to be formed, there is no obligation on the employer to take any action and the statutory “standard information and consultation provision” would obviously not apply.

Other British employee representative organisations which voluntarily engage in social dialogue (apart from trade unions) and which derive from collective agreements include (a) *staff associations*, (b) *joint consultative committees* consisting of representatives of management and workers whose dialogue includes work organisation, employment matters, the future of the undertaking, current plans, financial and production matters and (c) *stand-alone non-union representatives* which are but rarely found in the United Kingdom. Joint consultation committees (JCCs) are established on a voluntary basis with employees drawn from recognised trade unions in the public sector but they are generally viewed as rather insubstantial forums with limited influence. JCCs were present at higher level only in 53 per cent of public sector workers in 2004 and declined to 48 per cent in 2011¹⁷⁶. *Employee Forums* (EF) and *Joint Working Parties* (JWC)

¹⁷⁵ *Ibidem*. Reg. 8 (1) (a) to (d).

¹⁷⁶ Source: B. Van Wanrooy, H. Bawley, H. Bryson, J. Forth, S. Freeth, L. Stokes and S. Wood (2013) The 2011 Workplace Employment Relations Study. http://www.gov.uk/government/uploads/attachment_data/file/68684/13-535-the-2011-workplace-employment-relations-study-first-findings.pdf (Retrieved 20th August, 2014).

are other voluntary organisations which are used for consulting purposes. JWCs are similar to JCCs but are generally set up to suggest ways of resolving *specific* issues affecting the undertaking, as for example, changes in working practices or staff turnover.

At one time there existed some social dialogue element through *statutory wage regulation* in industries in which collective bargaining machinery for regulating wages did not exist, or if it did exist it was not adequate, or could not be made adequate, to maintain a reasonable standard of wage levels for workmen, necessitating legislation to step in¹⁷⁷, that legislation has since been repealed and is therefore of historic interest only.

4. And by way of an Epitome, the Effectiveness of the Social Dialogue in the United Kingdom

4.1. The research in this chapter has produced an impressive array of evidence to show that the British social dialogue carried out between the employer and the employees themselves or the trade union acting as their representative plays an important role in shaping the British social partners' working relations. Having defined the term "social dialogue"¹⁷⁸ and how it is understood in the United Kingdom¹⁷⁹ and having examined briefly its historical background¹⁸⁰, the substantive elements of the British social dialogue were treated. These substantive elements consisted of collective bargaining¹⁸¹, the legally unenforceable collective agreement¹⁸² "à l'anglaise"; an alternative system of representation by means of direct information and consultation to employees in cases relating to transfers of undertakings¹⁸³, collective redundancies¹⁸⁴ and con-

634

¹⁷⁷ For a detailed study see J.R. Carby-Hall, *Principles of Industrial Law*, Charles Knight & Co. Ltd. London 1969. Ch. 9 entitled *Statutory Wage Regulation* at pp. 159–175; Ch. 10 entitled *Fair Wages Resolutions* at pp. 176–178 and Ch. 11 entitled the *Law Against Truck* at pp. 179–190. Therein will be found a discussion and a full bibliography on the fragmented, primitive and poorly developed social dialogue element which took place then under the, now repealed, Wages Councils Act, 1959, the Agricultural Wages Act, 1948, the Road Haulage Wages Act, 1938, a variety of Wages Regulation Orders, the Holiday With Pay Act, 1938, the now repealed Fair Wages Resolutions of 1891, 1909 and 1946 and the laws against truck.

¹⁷⁸ See p. 602 *supra*.

¹⁷⁹ See pp. 605–610 *supra*.

¹⁸⁰ See pp. 602–604 *supra*.

¹⁸¹ See p. 608 *supra*.

¹⁸² See pp. 608–610 *supra*.

¹⁸³ See pp. 610–615 *supra*.

¹⁸⁴ See pp. 615–618 *supra*.

sultation in matters of health, safety and welfare at work¹⁸⁵, in situations where either the trade union is not recognised by the employer or where the employer does recognise a trade union but his latter has not appointed representatives for social dialogue purposes or there are employees who do not belong to a trade union and the recognised trade union does not agree to represent them. A myriad of examples which treat the social dialogue concept then followed with a discussion and analysis on work during maternity leave¹⁸⁶, ordinary and additional maternity leave¹⁸⁷, maternity, parental and paternity leave¹⁸⁸, Eurofound research which includes the social dialogue as understood and operated by the Confederation of British Industry (CBI)¹⁸⁹, the Trades Union Congress (TUC)¹⁹⁰ and their joint initiatives¹⁹¹ and finally the social dialogue operative through British work councils and similar organisations¹⁹². The list appears complete and the reader may well be tempted to give an accolade to the successive British governments for developing the social dialogue so completely and so effectively.

4.2. “*Les apparences sont trompeuses*” however! The fact remains that, unlike other European countries, the United Kingdom has never historically had a social dialogue pedigree *per se*. The British social dialogue has historically always been voluntary. If the British social dialogue concept has developed, it is mainly due to European Union policies and legislation and their influence on Member States. The developments which have taken place in the field of the social dialogue are thus comparatively recent¹⁹³. It is mainly thanks to the European Union that the British social dialogue has made significant strides in the direction of that concept.

¹⁸⁵ See pp. 618–621 *supra*.

¹⁸⁶ See p. 622 *supra*.

¹⁸⁷ See pp. 622–623 *supra*.

¹⁸⁸ See pp. 623–625 *supra*.

¹⁸⁹ See pp. 625–628 *supra*.

¹⁹⁰ See pp. 628–629 *supra*.

¹⁹¹ See pp. 629–631 *supra*.

¹⁹² See pp. 631–634 *supra*.

¹⁹³ Examples abound, some of which have been mentioned in this chapter. These include the Collective Redundancies Directive 75/129/EEC (OJ 1975 L48.29), as amended by Directive 92/56/EC (OJ 1992 L245/3); and Consolidated by Directive 98/59/EC (OJ 1998 L225/16); the Transfer of Undertakings Directive 77/187/EEC (OJ 1977 L6/26) as amended by Directive 98/50/EC (OJ 1998 L210/88) and Directive 2001/23/EC (OJ 2001 L82/16); Framework Directive on Health and Safety 89/391/EEC (OJ 1989 L183/1); Parental Leave Directive 96/34/EC (OJ 1996 L145/4) as amended by Directive 97/75/EC (OJ 1998 L10/24) and consolidated (OJ 1998 L10/11); the Directive on National Level Information and Consultation 2002/14 (OJ 2002 L80/29); *etc.*

4.3. The reader needs to bear in mind the fact that one of the most important features of the British social dialogue is collective bargaining. Yet collective bargaining levels as well as their structures suffered an important decline in recent years¹⁹⁴. The number of unionised workers in the private sector is very low compared to the number of workers in the public sector¹⁹⁵. As a consequence there has also been a decline in the number of concluded collective agreements thus affecting the social dialogue concept. Furthermore trade unions have little or no say in the current British coalition government's decision-making process. A TUC publication in 2010 summed up the situation admirably when it stated¹⁹⁶

First, after a period of relative stability in union density, it is in decline once again. And only have unions found it increasingly difficult to organize new workplaces, they have also suffered substantial declines in the organized parts of the private and public sectors. Second, collective bargaining coverage appears to be in terminal decline due, in large part, to employers' moving away from it as a method of pay determination in the face of intensified product market competition. Third, there is very little statutory support for the role of trade unions. In contrast to countries such as France, unions in Britain get little or no financial support from the government and they are largely excluded from institutions such as the unemployment insurance system which in other countries provides them with a vital role in institutions which are of profound importance to many workers. Despite a recent innovation in statutory recognition procedures, there is little that unions can do to require employers to allow them access to the workplace for organising purposes.

¹⁹⁴ See pp. 602–604 *supra*. Although this decline has stabilised in recent years.

¹⁹⁵ In the public sector an important majority, namely some 86.4%, of establishments recognise trade unions for collective bargaining purposes with collective agreements concluded at national/sector levels. In the private sector on the other hand there is only a 16.1% trade union recognition and representation rate with collective agreements concluded at either enterprise or company levels (Source: Department of Business Innovation and Skills *Trade Union Membership 2012*, "Statistical Bulletin", May 2013). With regard to negotiation on pay levels, in the public sector some 63.7% of the workforce is covered by social dialogue through collective bargaining and collective agreements whereas in the private sector there is virtually (because some collective bargaining resulting in the conclusion of collective agreements to the tune of 16% takes place) no social dialogue on pay resulting in a collective agreement. Pay increases remain the prerogative of the employer. Pay rises are thus discretionary. Source: S. Pereira, *Collective Agreements and Wages in the New Earnings Survey* (2004) Economic Trends 612. Office of National Statistics.

¹⁹⁶ Source: A. Bryson and J. Forth, *Union Organisation and the Quality of Employment Relations* (2010) TUC. <http://www.tuc.org.uk/sites/default/files/extras/unionorganisation-report.pdf> (Retrieved 3rd December, 2013).

4.4. This research shows that the social dialogue concept as operative in the United Kingdom, – although restrained somewhat by government policies necessitated by the economic climate and particularly by political ideology, – has an important impact on the range of areas examined herein, namely health and safety at work, collective redundancies, transfers of undertakings collective bargaining and collective agreements, various aspects of maternity leave and parental and paternity leave, flexible working¹⁹⁷, the provision of training¹⁹⁸, works councils¹⁹⁹ and so on.

Although there are in some areas statutory obligations, – many of which are European Union inspired, – imposed on the social partners which require the social partners to enter into a social dialogue, the British social dialogue continues to remain voluntary in nature in many other areas which are not regulated by legislation.

4.5. British employers are beginning to recognise the benefits which the social dialogue concept can bring to their enterprises. These benefits include higher levels of workforce motivation and contentment through joint problem solving which spell increased productivity, increased efficiency and increased quality of workmanship. The social dialogue encourages a stronger commitment by the employees to implementing workplace policies in that they (the employees) were actively involved in agreeing these policies. Social dialogue helps create co-operation and trust between the social partners who talk and listen to each other thus gaining a better understanding of each other's views. Social dialogue results in better management decisions being taken in that they are based on the input and experience on a range of people including employees who have extensive knowledge of their own job and of the business. Furthermore social dialogue in the health and safety field spells for a healthier and safer workplace whose employees can assist the employer identify hazards, assess risks and develop ways to control or remove risks.

4.6. A weakness in the British social dialogue concept is apparent in that most of the instances where the social dialogue operates is carried out in practice in the public sector as for example some British local authorities, large utility companies and other large companies which include multinationals. In the private sector however, the social dialogue is either weak or non-existent. Statistics²⁰⁰ on wage negotiations in the public sector show that four out of five of the public workforce and four out of five

¹⁹⁷ See pp. 605–606 *supra*.

¹⁹⁸ See p. 621 *supra*.

¹⁹⁹ See pp. 631–634 *supra*.

²⁰⁰ Source: Workplace Employment Relations Survey, 2004.

of the public sector workplaces were covered by collective bargaining. In the private sector however only 26% of the workforce were covered by collective pay negotiations and only 14% of workplaces were unionised.

4.7. The Eurofound research entitled *Working Conditions and Social Dialogue – UK*²⁰¹ talked of the effect of the social dialogue on flexible working arrangements. It stated that “practices such as reduced working hours, the ability to change shift patterns, flexitime, job-sharing, home working, term-time working, compressed hours, annualised hours and zero hours were most common in larger workplaces, in the public sector and in workplaces where a union was recognised. However, it should be borne in mind that trade unions are more likely to be present in larger workplaces and in the public sector”. The Eurofound survey stated also that “workplaces with a recognised union were more likely to have enhanced leave arrangements in place to support employees with caring responsibilities (in addition to the statutory requirements)”. This shows that in establishments where trade unions are recognised by the employer, the social dialogue is more effective than in establishments where collective bargaining is either weak or non-existent.

638

4.8. An important effect and “spin-off” of the social dialogue is that some of its aspects contribute significantly, – whether individually or collectively, – towards the work-life balance concept now well recognised at international, European and national levels to be of serious concern. In this chapter the discussion focuses on various areas in which the social dialogue operates, as for example maternity, paternity and parental leave, the working time laws or those relating to atypical employment, *etc.* These areas which cover the social dialogue also play a parallel and significant role in fostering the work-life balance notion. It may therefore be said that there is a duality of functions, namely the social dialogue as well as the work-life balance in those areas. It is mainly (though not necessarily entirely) thanks to European Union laws that the social dialogue and work-life balance concept has developed in the United Kingdom. The European Union Charter of Fundamental Rights focuses on an important aspect of the work-family life balance and provides as follows²⁰²:

To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to be paid maternity leave and to parental leave following the birth or adoption of a child.

²⁰¹ *Ibidem*, p. 3.

²⁰² Article 33 (2).

Another aspect which reconciles the social dialogue with the work-family life balance is the Directive on Parental Leave and its absorption in British law which, as has already been discussed²⁰³, gives rights to working parents to enjoy time off for domestic reasons. Yet a further two Directives namely the Directive on Part-Time Work and the Directive on Fixed Term Work²⁰⁴ as well as the social partners' agreement on telework²⁰⁵ each give protection to atypical workers, who are mainly female, and who seek through the social dialogue a balance between their work and their family commitments.

The equal opportunities pillar of the Luxembourg Employment Guidelines have been recognised under the heading "Reconciling work and family life" where the Council stated that²⁰⁶ "policies on career breaks, parental leave and part-time work, as well as flexible working arrangements which serve the interests of both employers and employees, are of particular importance to women and men. Implementation of the various Directives and social partner agreements in this area should be accelerated and monitored regularly. There must be an adequate provision of good quality care for children and other dependants in order to support women's and men's entry and continued participation in the labour market. An equal sharing of family responsibilities is crucial in this respect".

4.9. Although accused at one time by the "father" of the social dialogue Jacques Delors, of the United Kingdom wanting an "Europe à la carte" by reason of all its opt-outs²⁰⁷, in the field of the social dialogue there are no such opt-outs. The United Kingdom has welcomed and embraced wholeheartedly the social dialogue concept initiated by the European Union legislation in the numerous areas examined above and furthermore European legislation has the effect of encouraging the other areas in which this dialogue operates on a voluntary basis. Although there is room for improvement, the British social dialogue with its amalgam of compulsory

²⁰³ See pp. 623–624 *supra*.

²⁰⁴ See footnote 140 *supra*.

²⁰⁵ See pp. 629–630 *supra*.

²⁰⁶ Council Resolution, 15th December 1997 on the Employment Guidelines (OJ [1998] C30/1) as amended by Council Resolution, 22nd February 1999 on the Employment Guidelines (OJ [1999] C69/2).

²⁰⁷ Particularly in the area of working time legislation. See J. Carby-Hall, *Opt Outs and Variations in Working Time – British Style*, [in:] *Le Travail Humain au Carrefour du Droit et de la Sociologie – Hommage au Professeur Nikitas Aliprantis*. Professors Ch. Mestre, C. Sachs Durand and M. Stocks (eds), Presses Universitaires de Strasbourg, Strasbourg 2014 at pp. 53–71. See too J.R. Carby-Hall, *Working Time: The British Experience*, [in:] *Regnare Gubernare Administrare*, vol. 1, *In honour of Professor zw., dr hab. Jerzy Malec*, Professors S. Grodziski and A. Dziadzio (eds), Oficyna Wydawnicza AFM, Kraków 2012, at pp. 367–395.

and voluntary aspects operates in a satisfactory and an effective manner, albeit not in the same manner in which other European Union countries' social dialogues operate!

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Dialog społeczny w Zjednoczonym Królestwie i jego efektywność

Streszczenie

W pierwszej kolejności celem tego tekstu jest zdefiniowanie określenia „dialog społeczny”. Po tych rozważaniach następuje historyczny wywód ukazujący genezę i rozwój koncepcji owego dialogu. Brytyjskie rozumienie dialogu społecznego jest następnie analizowane poprzez rozważenie jego składników, zróżnicowanych znaczeń, rokowań zbiorowych i umów zbiorowych w brytyjskim stylu, różnych aspektów informowania i konsultacji między partnerami społecznymi w sferze transferów przedsiębiorstw, zwolnień grupowych, konsultacji bhp, pracy w czasie urlopu macierzyńskiego, zwykłych i dodatkowych urlopów macierzyńskich, urlopów rodzicielskich i ojcowskich. W dalszej kolejności rozpatrywane są postawy różnych graczy, a mianowicie: Konfederacji Przemysłu Brytyjskiego (CBI), Kongresu Związków Zawodowych (TUC) oraz wspólnych przedsięwzięć (*joint ventures*) tworzonych przez TUC, CBI i rządowe departamenty Innowacji, Uniwersytetów i Umiejętności (DIUS) oraz Biznesu, Przedsiębiorstw i Reformy Regulacyjnej. Ukazane tu zostały także brytyjskie rady zakładowe i im podobne organy. Opracowanie kończą uwagi dotyczące efektywności brytyjskiego dialogu społecznego.

Tłumaczenie z języka angielskiego – Zbigniew Hajn