NINESTJOHNSTREET

‘Barely Recognisable’

The Case for Reform of Schedule A1 of TULR(C)A 1992

2022

www.9sjs.com
9 St John Street, Manchester, M3 4DN
DX Address: 14326 MANCHESTER 3
Tel: 0161 955 9000

Journal Article

Subject: Trade Union Statutory Recognition Procedures

Keywords: TULR(C)A 1992, Schedule A1

Cases: *The Independent Workers Union of Great Britain v The Central Arbitration Committee (Roofoods Ltd t/a Deliveroo)* [2021] EWCA Civ 952, [2022] ICR 84; *Uber v Aslam* [2021] UKSC 5, [2021] 4 All ER 209; *Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66, [2017] IRLR 355.

Introduction

Ever since the election of Margert Thatcher's first Conservative government in 1979, the steady decline in the incidence of domestic trade union membership[1] has been heralded as a matter of grave societal concern by myriad prominent labour law theorists.[2] Currently standing at a rather uninspiring 23.7%,[3] membership density is now amongst its lowest levels in our nation's history.[4] Whilst the precise political, socio-economic and cultural factors underpinning this worrying phenomenon are undoubtedly complex and multi-faceted, one theory suggests this inexorable haemorrhaging is primarily correlative to the broad difficulties historically experienced by most independent unions in embedding themselves into the industrial fabric of working environments via the use of established statutory recognition procedures.[5] A union's ability to be effective in this endeavour can be said to depend almost exclusively upon the existence of a legal and public policy framework that is sympathetic to their role as legitimate mediums for the amplification of worker voice.[6]

Measured against this yardstick, this article will seek to demonstrate that the current machinery for recognition contained within Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 92")[7] is a chronically underutilised representational failure; responsible for the wholesale frustration of collective labour rights for at least two decades. If the gradual erosion of trade union membership density unwittingly promoted by this regime is to be stemmed, urgent

1 Keith Ewing, Lord Hendy QC and Carolyn Jones, *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (IER 2016) 4.
2 Alan Bogg, 'The Death of Statutory Recognition in the United Kingdom' (2012) 54 (3) JIR 409, 412.
3 Ivan Bishop, 'Trade Union Membership: UK 1995 – 2020: Statistical Bulletin' (OGL, 27 May 2021) 5.
4 ibid.
5 Gregor Gall, 'Union Recognition in Britain: The End of Legally Induced Voluntarism?' (2012) 41 (4) ILJ 407, 428.
6 Katie Bales, Alan Bogg and Tonia Novitz, ''Voice and Choice' in Modern Working Practices: Problems with the Taylor Review' (2018) 47 (1) ILJ 46, 73.
7 See: Employment Relations Act 1999, s 1(3).

reformatory action is clearly necessary. In order to contextualise these failings and understand the need for reform however, it is first necessary to explore how this regime operates in practice.

Schedule A1

Following the inevitable collapse of the statutory recognition procedures of the 1970s,[8] the advent of Tony Blair's first New Labour government in 1997 marked an important shift in the tone of UK collective labour law policy.[9] Thitherto, the discourse had been dominated by a relational model of labour strategy known as 'collective laissez-faire' – a form of extreme voluntarism in which the state indirectly supported trade union recognition via a number of secondary initiatives, whilst carefully ensuring that the decision to recognise and/or negotiate with any given union remained a matter solely within the gift of the putative employer.[10] However, in light of the growing emphasis placed on the (fundamental)[11] rights of workers to enjoy (and governments to promote)[12] collective bargaining under an ever-increasing body of international Conventions and Charters[13] (not to mention the Human Rights Act 1998),[14] the government recognised that a more direct route to the facilitation of these rights was clearly now required. The central plank of their reform in this regard was the enactment (through the Employment Relations Act 1999) of Schedule A1 of TULRCA 92.[15]

Doubtless keen to avoid the fate of its statutory predecessors, the recognition procedure prescribed under Schedule A1 represents something of an unhappy compromise.[16] In short, its provisions essentially legislate for a union's statutory recourse to a specialist quasi-judicial body – the Central Arbitration Committee ("CAC") – in circumstances where an employer is unable (or unwilling) to reach an agreement for recognition voluntarily. Based on the broad structure of the US Wagner Act model,[17] the procedure under Schedule A1 affords the CAC substantial powers to; a) determine (in the absence of agreement) the scope of the relevant bargaining unit of workers on whose behalf the union wishes to negotiate; and b) gauge the level of support for the union's claim for recognition

8 See: Industrial Relations Act 1971; Employment Protection Act 1975; and *Grunwick v ACAS* [1978] ICR 231 (HL) [268].
9 Keith Ewing, 'The Function of Trade Unions' (2005) 34 (1) ILJ 1, 17 – 20.
10 Ruth Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?' (2009) 72 (2) MLR 220, 221.
11 Alan Bogg, 'Taken for a ride: workers in the gig economy' (2019) 135 L.Q.R 219, 220; and *Demir and Baykara v Turkey* [2008] ECHR 1345, [2009] IRLR 766 [154].
12 ILO Convention CO98: Right to Organise and Collective Bargaining Convention (32nd Conference Session Geneva 01 July 1949), Art 4; and European Social Charter, Art 6(2).
13 ibid; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Art 11; and EU Charter of Fundamental Rights, Art 12.
14 Human Rights Act 1998, Art 11.
15 Bogg, 'The Death of Statutory Recognition' (n 2) 411.
16 David Cabrelli, *Employment Law in Context* (4th edn, OUP 2020) 41.
17 National Labour Relations Act 1935; and Alan Bogg and Tonia Novitz, 'The Politics and Law of Trade Union Recognition: Democracy, Human Rights and Pragmatism in the New Zealand and British Context' (2019) 50 (2) VUWLR 259, 266.

within that unit.[18] Providing the CAC is satisfied that the various statutory conditions for recognition have been met, the employer will then be ordered to exclusively recognise the applicant union for collective bargaining purposes.[19] To this end, the Schedule A1 procedure can perhaps best be understood as an *attempt* to ensure that a worker's fundamental (Article 11) rights to enjoy collective bargaining can still be enforced, and their voices heard, notwithstanding prevarication by their employer. The precise eligibility criteria and support thresholds under this framework, however, are somewhat complex, and are worthy of further elucidation.

In order to obtain statutory recognition, a union must first make an eligible application in writing.[20] This application must relate to an employer who employs at least 21 employees or workers,[21] and one for whom, at the time of applying, a recognition agreement is not already in existence.[22] Where the applicant union cannot satisfy either one or both of these eligibility and admissibility criteria, the application for recognition will be refused.[23] Assuming these conditions are satisfied however, a union must then demonstrate that it meets certain minimum numerical support thresholds within the proposed bargaining unit. In short, the legislation stipulates that the applicant union must enjoy a membership density of at least 10% within the proposed unit in order to proceed with its application.[24] In circumstances where the majority of those within the proposed bargaining unit are union members, recognition is usually granted automatically.[25] Where however this minimum threshold is achieved, but the union cannot benefit from automatic recognition, i.e. where membership density is <10% but >50%, the union must adduce evidence to suggest that its application enjoys majoritarian support within the proposed bargaining unit.[26] Upon satisfaction of this requirement, a formal ballot is then held to gauge the level of support for the union's proposal.[27] Here, at least 50% of the votes cast, which must comprise at least 40% of the relevant bargaining unit, must favour recognition.[28] It is convenient to note at this juncture that the conduct of such ballots is now regulated by an (almost entirely ineffectual) unfair practice regime, which was latterly inserted into Schedule A1[29] following the seminal case of *Wilson and Palmer v UK*,[30] in which the

18 Bogg (n 15).
19 Keith Ewing and Lord Hendy QC, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 (1) ILJ 23, 45.
20 Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1, s 8.
21 ibid, s 7; and Trade Union and Labour Relations (Consolidation) Act 1992 s 296.
22 ibid, s 35(1); and *National Union of Journalists, R v Central Arbitration Committee* [2005] EWCA Civ 1309, [2006] IRLR 53 [21] – [25].
23 Astra Emir, *Selwyn's Law of Employment* (21st edn, OUP 2020) 582 – 583.
24 TULRCA 92, Sch A1 (n 20), s 14(5).
25 ibid, s.22(2); and Chris Turner, *Unlocking Employment Law* (Routledge 2013) 24.3.
26 Mark Harcourt, Gregor Gall, Nisha Novell, and Margaret Wilson, 'Boosting Union Membership: Reconciling Liberal and Social Democratic Conceptions of Freedom of Association via a Default Union' (2021) 50 (3) ILJ 375, 400.
27 TULRCA 92, Sch A1 (n 20), s 23; and Bogg and Novitz, 'The Politics and Law of Trade Union Recognition (n 17) 267.
28 ibid, s 29(3).
29 See: Employment Relations Act 2004, ss 9(5), 10(1).
30 [2002] ECHR 552, [2002] IRLR 568.

absence of restrictions on an employer's ability to influence the result of such ballots was found to be a latent breach of the UK's obligations under Article 11 of the European Convention on Human Rights ("ECHR").[31] Only upon the satisfaction of these various eligibility / admissibility criteria and support thresholds, will formal recognition be realised, and a legally binding bargaining procedure agreement imposed.[32]

Accordingly, the functional legitimacy of the Schedule A1 procedure can thus be said to depend upon a series of democratically-enabled preference aggregations,[33] which collectively determine whether a union should be afforded what has recently been characterised as: a '*seat at the [negotiating] table*'.[34] As Bogg & Novitz candidly observe, the logic underpinning this statutory-voluntary hybrid model of representational labour relations is simple; "*workers get collective bargaining only if this is what workers want*."[35] Indeed, there is certainly a superficial attraction to the simplistic dignity of a model that seeks to address the historic inequality of bargaining power inherent in any given employment relationship[36] by appearing to place notions of democratic choice and the amplification of worker voice at the forefront of its operational machinery. However, beneath this veneer of fairness and inclusivity lie a number of serious deficiencies, which, when taken together, threaten to fatally undermine this regime's ability to facilitate the enjoyment of collective bargaining rights. It is to these systemic difficulties that this article now turns.

A Flawed Regime?

Evocatively described by Collins as a game of snakes and ladders with more snakes than ladders,[37] the most outwardly apparent of Schedule A1's legislative deficiencies concerns its narrow applicative scope. As recently highlighted by Underhill LJ's characteristically self-assured decision regarding the employment status of Deliveroo couriers,[38] only those deemed to be either 'employees' or 'workers' as defined by the relevant statutes (here s.296(1) TULRCA 92)[39] qualify for protection under the current recognition procedure.[40] Whilst a detailed consideration of the minutiae of these statutory concepts is beyond the scope of this article, it is sufficient to note for our purposes that

31 *Kostal UK Ltd v Dunkley* [2021] UKSC47, [2022] IRLR 66 [20].
32 Bogg and Novitz, 'Trade Union Recognition' (n 17) 266.
33 ibid.
34 *Kostal UK Ltd v Dunkley* (n 31) [54], [58].
35 Bogg and Novitz, 'Trade Union Recognition' (n 32); and Bogg, 'The Death of Statutory Recognition' (n 15).
36 Ewing, Hendy QC and Jones, *A Manifesto for Labour Law* (n 1) 1.
37 Hugh Collins, Keith Ewing, and Aileen McColgan, *Labour Law* (2nd edn, CUP 2019) 588.
38 *The Independent Workers Union of Great Britain v The Central Arbitration Committee (Roofoods Ltd t/a Deliveroo)* [2021] EWCA Civ 952, [2022] ICR 84.
39 See also: Employment Rights Act 1996, ss 230(1), 230(3), National Minimum Wage Act 1998, ss 54(1), 54(3), The Working Time Regulations 1998, r 2(1); and Equality Act 2010, s 83(2)(a).
40 *National Union of Professional Foster Carers v The Certification Officer* [2021] EWCA Civ 548, [2021] IRLR 588 [1] – [3], [18].

the restrictive approach mandated by this (arguably incorrect)[41] interpretation of Schedule A1's provisions, operates to prevent vast swathes of our contemporary workforce[42] – and in some cases entire sectors – from accessing this, and many other,[43] crucial employment protections; often against an industrial backdrop of employers ill-disposed to voluntary recognition. To this end, it is certainly no coincidence that the industries most typically associated with these so-called 'self-employed contractors' are also those where instances of poor working conditions, long hours, and low rates of pay continue to prevail with alarming regularity. Ironically then, it is these same workers who are statutorily excluded from the scope of the recognition framework, who would likely benefit most from its protections.

Furthermore, even where these vulnerable segments of the labour market are able to successfully establish 'worker status,' as was famously held to be the case for Uber drivers in the landmark decision of the UK Supreme Court in *Uber v Aslam,*[44] broad logistical difficulties remain in establishing the necessary support thresholds for recognition across such a disparate category of workers.[45] Primarily, this problem stems from the highly individualistic nature of many contemporary working arrangements (particularly those in the gig-economy), which, when combined with the technologically enabled geographical and temporal fragmentation of normative working patterns across any given employer, often renders a union unable to speak with the cohesive authority necessary to establish the organisational unity of purpose required to meet the representational recognition thresholds. Put another way, the disparity in working circumstances enjoyed by this unique class of labour makes them a particularly difficult group to unionise. The dispiriting consequence of this lack of unanimity is to effectively force these workers into resorting to an increasingly diverse range of (usually online) platforms as unofficial vehicles for social cohesion and amplification of worker voice; platforms which the employer is under no obligation to recognise.[46]

These problems are aggravated still further by the inherent structural vulnerabilities of the Unfair Practice regime.[47] By legislating to prevent managerial indiscretion *solely* upon the occasion of a CAC-mandated ballot,[48] this procedure has been almost-universally condemned as failing

41 *IWGB v CAC* (n 38) [86].
42 See also: *Vining v London Borough of Wandsworth* [2017] EWCA Civ 1092, [2017] IRLR 1140.
43 Employment Rights Act 1996, ss 1, 71, 86(1), 94(1), 135(1); The Flexible Working Regulations 2014, r 3; The Maternity and Parental Leave etc Regulations 1999, r 4, 13; Equality Act 2010, s 41; National Minimum Wage Act 1998, s 1; and Working Time Regulations 1988, s 13(1).
44 [2021] UKSC 5, [2021] 4 All ER 209.
45 Tammy Katsabian, 'Collective Action in the Digital Reality: the Case of Platform-Based Workers' (2021) 84 (5) MLR 1005, 1012 – 1013.
46 ibid 1020.
47 Bogg, 'The Death of Statutory Recognition' (n 2) 415.
48 TULRCA 92, Sch A1 (n 20), ss 27A – 27D.

to preserve the representational legitimacy of an application process which takes on average approximately 24 weeks to complete,[49] and one which extends far beyond the narrow confines envisaged under this framework.[50] Outside of these prescribed periods then, an employer is unconstrained; seemingly at liberty to pressurise unsuspecting workers into voting against an application for recognition, or abstaining from doing so altogether, thereby increasing the probability that a union's claim of majoritarian support will be defeated long before any balloting procedure is even contemplated.[51] Moreover, save for a more general right not to suffer a detriment and/or be dismissed for Schedule A1-related activities,[52] individual workers do not benefit from any additional protections under this procedure, with any remedy for breaching its provisions (usually automatic recognition) vesting exclusively in the applicant union.[53] Absent these safeguards, it is frankly unrealistic to expect many pragmatically-minded workers to risk provoking the wrath of their employers by voting against their wishes.[54] This particularly so when contextualised into an industrial landscape where bitterly partisan employer-led campaigns against recognition are relatively commonplace. Somewhat predictably, this lack of procedural and individual protections in the Unfair Practice jurisdictional framework again operates to the benefit of unscrupulous employers, in whose capitalistic interests it is to ensure that conceptions of worker voice continue to reverberate in isolation.

Furthermore, although self-evidently problematic for all workers, these lacunas are especially pernicious when applied to those engaged in atypical ways of working, who are almost universally found in precarious employment, and whose fissured organisational voice can hardly withstand such further dilutionary strategies. When combined with the equally uncomfortable acknowledgement that many industries habitually engage less than 21 individuals at any given time,[55] the operational shortcomings of the Schedule A1 eligibility criteria and support thresholds become ever more pronounced. The prospect of achieving statutory recognition under these circumstances then, is vanishingly small.

Even where the necessary degree of harmonious majoritarian support has organically coalesced around a prospective union seeking recognition notwithstanding any obfuscation by the employer however, there exists a further significant impediment to a union's application for recognition. Paying homage to its voluntaristic predecessors, the significance attributed to an employer's freedom to avoid the statutory procedure by voluntarily recognising a union of their choosing for

49 Cabrelli, *Employment Law* (n 16) [41].
50 Harcourt, Gall, Novell, and Wilson, 'Boosting Union Membership' (n 26) 376.
51 Alan Bogg, 'The Mouse that Never Roared: Unfair Practices and Union Recognition' (2009) 38 (4) ILJ 390, 392.
52 TULRCA 92, Sch A1 (n 20), ss 156(1), 161(1).
53 ibid, ss 27C(3)(a), 27D(3).
54 Alan Bogg, "Individualism' and 'Collectivism' in Collective Labour Law' (2017) 46 (1) ILJ 72, 100.
55 See: *UNITE the Union v United Kingdom* [2016] ECHR 1150, [2017] IRLR 438 [65].

collective bargaining purposes, is undeniably one of the key hallmarks of Schedule A1's tenure at the avant-garde of domestic labour policy.[56] Known as the 'shadow effect,'[57] this deliberate structural preferment of voluntary action seeks to encourage the parties to reach a recognition agreement 'under the shadow of the law.'[58] Only then in what was recently described by the Supreme Court as 'a matter of last resort,'[59] should the statutory procedure be invoked. Given these overtly voluntaristic tendencies, it is perhaps unsurprising to learn that this regime expressly prohibits the admissibility of any statutory applications in circumstances where, in the eyes of Schedule A1, an infinitely more preferable bi-lateral agreement is already in situ. Regrettably, this theoretically well-intentioned exclusion has deeply profound ramifications in practice.

First identified by Ewing at the time of legislative enactment,[60] the regressive practice of tactical voluntary recognition is arguably Schedule A1's greatest downfall. By creating a complete bar to the admissibility of any statutory application where a voluntary agreement exists,[61] this approach implicitly provides employers with a powerful incentive to enter into an exclusive and tightly circumscribed bargaining agreement with its (usually non-independent) union of choice, which almost ubiquitously relates to an extremely narrowly defined range of periphery bargaining topics.[62] Subsequently, an employer is then able to prevent any unwelcome application for statutory recognition from a competing, independent union, whose representative worker demographic, objectives, and bargaining activities will almost invariably cause an appreciably greater degree of friction vis-à-vis the employer's business interests than their tokenistic, non-independent counterparts. Exposing once again the complete inadequacy of the normative control measures underpinning this framework, this strategy has most recently been adopted by both Uber[63] and Hermes[64] in their decisions to recognise a union (the GMB) whom, although independent, is generally perceived to be more conciliatory in its approach than its IWGB and ADCU contemporaries. Following recognition, Uber have since sought to conclude a collective bargaining

56 Ruth Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 (3) ILJ 236, 264; and Lord Wedderburn, 'Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition' (2000) 29 (1) ILJ 38, 39.

57 Gregor Gall, 'Twenty Years of the Third Statutory Union Recognition Procedure in Britain: Outcomes and Impact' (2020) 49 (4) ILJ 657, 661.

58 Alan Bogg and Keith Ewing, 'Collective Bargaining and Individual Contracts in Costel v Dunkley: A Wilson and Palmer for the Twenty-First Century?' (2020) 49 (3) ILJ 430, 441.

59 *Kostal UK Ltd v Dunkley* (n 31) [21].

60 Alan Bogg and Ruth Dukes, 'Article 11 ECHR and the Right to Collective Bargaining: *Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66' (2017) 46 (4) ILJ 543.

61 See: TULRCA 92, Sch A1 (n 22).

62 Zoe Adams, Catherine Barnard, Simon Deakin and Fraser Butlin, *Deakin & Morris' Labour Law* (7th edn, Hart Publishing 2021) 814.

63 GMB, 'Uber and GMB strike historic union deal for 70,000 drivers' (*GMB,* 26 May 2021) <https://www.gmb.org.uk/news/uber-and-gmb-strike-historic-union-deal-70000-uk-drivers> accessed 29 December 2021.

64 GMB, 'Hermes and GMB in groundbreaking gig economy deal' (*GMB,* 04 February 2019) <https://www.gmb.org.uk/news/hermes-gmb-groundbreaking-gig-economy-deal> accessed 29 December 2021.

agreement with the GMB on a fairly limited range of issues,[65] which, helpfully for them, does not extend to the issue of a driver's wages.[66]

But perhaps the most graphic illustration of the damage caused by this manipulatory technique can be found in another of Underhill LJ's restrictive employer-centric judgements in the case of *PDAU v Boots,*[67] where it was held that such manoeuvring, although evidently undesirable, was nonetheless permissible.[68] According to Underhill LJ, the fact that Schedule A1 explicitly provides for a statutory procedure for derecognition,[69] which can, at least in theory, be utilised to oust the offending union from its position of relative entitlement, is sufficient to safeguard the Article 11 rights of both the applicant union and its members, thereby providing a legitimate route for their voices to (eventually) be heard.[70] The feasibility of these confidently articulated protections becomes dubious however, when one considers the practical barriers to achieving derecognition.

In summary, the procedure for derecognition broadly mirrors that for recognition set out above.[71] An application must first be made,[72] followed by a determination of whether a critical mass of support within the relevant bargaining unit can been attained.[73] The crucial weaknesses in the process however, pertain to the somewhat unrealistic stipulation that the originating application must be made by a member of the bargaining unit whose interests are currently (and usually nominally) represented by the incumbent union;[74] and the arguably prejudicial position of the union seeking recognition, who does not enjoy a similarly privileged right to an open channel of communication with the bargaining group, as do the employer and/or incumbent union. The pre-existing risk of distortion of voting intent on account of the inhospitable and unsterile voting conditions experienced by these workers (discussed above in the context of the Unfair Practice regime), would obviously be magnified considerably by this monopolistic and unilateral bias in the dissemination of information, as would the hesitancy felt by an individual worker in taking the bold steps required to initiate any derecognition process. When combined with the sociologically potent

65 App Drivers & Couriers Union, 'ADCU's Aslam and Farrar respond to reports of recognition agreement between Uber and GMB Union' (*ADCU*) <https://www.adcu.org.uk/news-posts/uber-gmb-union> accessed 29 December 2021.

66 Peter Guest, 'We're all fighting the giant': Gig workers around the world are finally organizing' (*rest of world,* 21 September 2021) <https://restofworld.org/2021/gig-workers-around-the-world-are-finally-organizing/> accessed 29 December 2021.

67 [2017] EWCA Civ 66, [2017] IRLR 355.

68 Bogg and Dukes, 'Article 11 ECHR and the Right to Collective Bargaining' (n 60) 544.

69 See: TULRCA, Sch A1 (n 20), Part IV.

70 *PDAU v Boots* (n 67) [56], [62].

71 Michael Doherty, 'When you Ain't Got Nothin', you Got Nothin to Lose….Union Recognition Laws, Voluntarism and the Anglo Model' (2013) 42 (4) ILJ 369, 372.

72 TULRCA, Sch A1 (n 20), ss 104(1), 112(1).

73 ibid, ss 110(1), 114(1).

74 ibid, s 112(1).

influence of so-called 'adaptive preferences' (a tendency to maintain the status quo when faced with an uncertain or difficult decision), which inevitably also favours the further entrenchment of the incumbent non-independent union,[75] it becomes painfully apparent that, notwithstanding its eventual deployment in *Boots* (after a 5 year legal battle),[76] this counter-intuitive model of supposedly democratic preference aggregation is extremely unlikely to result in derecognition in the vast majority of cases.[77] Accordingly, by explicitly permitting the employer to dominate the conceptual narrative of collective labour law, the statutory preferment of voluntary recognition acts to further relegate notions of democratic worker voice into ever greater regulatory obscurity. As Deakin and Morris pointedly observe, such strategies serve as a pertinent reminder that democratic choice does not always equate to democratic voice.[78]

Conclusion

Somewhat lamentably then, notwithstanding its relative longevity, the inaccessible and systemically flawed provisions of Schedule A1, which have repeatedly been found to be in contravention of numerous international labour standards,[79] have resulted in the regimes' near-total abandonment in practice[80] – where it has enjoyed a meagre 1179 applications in its near 22-year history.[81] Quite apart from exposing just how dramatically this recognition mechanism is failing to measure up to its democratic mandate, this virtual obsolescence in the use of the statutory machinery invariably also results in a corresponding reduction in trade union presence across the majority of employers. This lack of presence in turn acts as a significant hindrance to a union's recruitment efforts, thus contributing to the persistent decline in their global membership base more generally.[82] In order to halt (and hopefully reverse) these destructive and worrying trends and allow the statutory recognition procedure to truly be an effective medium for the promotion of worker voice, urgent and widespread sectoral reform is clearly necessary. A detailed consideration of the precise nature and scope of any reform in this post-pandemic Brexit age, whose remit would undoubtedly seek to include a combination of the sensible and proportionate regulatorily-orientated measures proposed in the IER's 2016 Manifesto for Labour Law,[83] and possibly even the implementation of a union

75 Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Bloomsbury 2009) 201.
76 Collins, Ewing, and McColgan, *Labour Law* (n 37) 614.
77 Bogg and Dukes, 'Article 11 ECHR and the Right to Collective Bargaining' (n 60) 546.
78 Adams, Barnard, Deakin and Butlin, *Deakin & Morris' Labour Law* (n 62) 808.
79 Doherty, 'When you Ain't Got Nothin' (n 70) 371; and Bogg, 'The Mouse that Never Roared' (n 51) 392.
80 Gall, 'Union Recognition in Britain' (n 5) 421.
81 Central Arbitration Committee, 'Central Arbitration Committee Annual Report 2020 – 2021' (CAC 08 July 2021) 6.
82 Bales, Bogg and Novitz, 'Voice and Choice' (n 6) 73.
83 Ewing, Hendy QC and Jones, *A Manifesto for Labour Law* (n 1) 63 – 66.

default model;[84] as well as the political, social, and economic feasibility of such reform,[85] are all analytical enquiries perhaps best left for another time.

84 Mark Harcourt, Gregor Gall, Rinu Vimal Kumar and Richard Croucher, 'A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation' (2019) 48 (1) ILJ 66, 70.

85 Harcourt, Gall, Novell, and Wilson, 'Boosting Union Membership' (n 26) 403.

Table of Statute

UK Statute

Employment Protection Act 1975

Employment Relations Act 1999

Employment Relations Act 2004

Employment Rights Act 1996

Equality Act 2010

Flexible Working Regulations 2014

Human Rights Act 1998

Industrial Relations Act 1971

Maternity and Parental Leave etc Regulations 1999

National Minimum Wage Act 1998

Trade Union and Labour Relations (Consolidation) Act 1992

Working Time Regulations 1998

International Statute

Convention for the Protection of Human Rights and Fundamental Freedoms

EU Charter of Fundamental Rights

European Social Charter

ILO Convention CO98: Right to Organise and Collective Bargaining Convention

National Labour Relations Act 1935

Table of Cases

UK Cases

Grunwick v ACAS [1978] ICR 231 (HL)

Kostal UK Ltd v Dunkley [2021] UKSC47, [2022] IRLR 66

National Union of Journalists, R v Central Arbitration Committee [2005] EWCA Civ 1309, [2006] IRLR

National Union of Professional Foster Carers v The Certification Officer [2021] EWCA Civ 548, [2021] IRLR 588

Pharmacists' Defence Association Union v Boots Management Services Ltd [2017] EWCA Civ 66, [2017] IRLR 355

The Independent Workers Union of Great Britain v The Central Arbitration Committee (Roofoods Ltd t/a Deliveroo) [2021] EWCA Civ 952, [2022] ICR 84

Uber v Aslam [2021] UKSC 5, [2021] 4 All ER 209

Vining v London Borough of Wandsworth [2017] EWCA Civ 1092, [2017] IRLR 1140

EU Cases

Demir and Baykara v Turkey [2008] ECHR 1345, [2009] IRLR 766

UNITE the Union v United Kingdom [2016] ECHR 1150, [2017] IRLR 438

Wilson and Palmer v UK [2002] ECHR 552, [2002] IRLR 568

Bibliography

Books

Adams Z, Barnard C, Deakin S and Butlin F, *Deakin & Morris' Labour Law* (7th edn, Hart Publishing 2021)

Bogg A, *The Democratic Aspects of Trade Union Recognition* (Bloomsbury 2009)

Cabrelli D, *Employment Law in Context* (4th edn, OUP 2020)

Collins H, Ewing K, and McColgan A, *Labour Law* (2nd edn, CUP 2019)

Emir A, *Selwyn's Law of Employment* (21st edn, OUP 2020)

Ewing K, Hendy L and Jones C, *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (IER 2016)

Turner C, *Unlocking Employment Law* (Routledge 2013)

Journal Articles

Bales K, Bogg A and Novitz T, ''Voice and Choice' in Modern Working Practices: Problems with the Taylor Review' (2018) 47 (1) ILJ 46

Bogg A, "Individualism' and 'Collectivism' in Collective Labour Law' (2017) 46 (1) ILJ 72

Bogg A, 'Taken for a ride: workers in the gig economy' (2019) 135 L.Q.R 219

Bogg A, 'The Death of Statutory Recognition in the United Kingdom' (2012) 54 (3) JIR 409

Bogg A, 'The Mouse that Never Roared: Unfair Practices and Union Recognition' (2009) 38 (4) ILJ 390

Bogg A and Dukes R, 'Article 11 ECHR and the Right to Collective Bargaining: *Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66' (2017) 46 (4) ILJ 543

Bogg A and Ewing K, 'Collective Bargaining and Individual Contracts in Costel v Dunkley: A Wilson and Palmer for the Twenty-First Century?' (2020) 49 (3) ILJ 430

Bogg A and Novitz T, 'The Politics and Law of Trade Union Recognition: Democracy, Human Rights and Pragmatism in the New Zealand and British Context' (2019) 50 (2) VUWLR 259

Doherty M, 'When you Ain't Got Nothin', you Got Nothin to Lose….Union Recognition Laws, Voluntarism and the Anglo Model' (2013) 42 (4) ILJ 369

Dukes R, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?' (2009) 72 (2) MLR 220

Dukes R, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 (3) ILJ 236

Ewing K, 'The Function of Trade Unions' (2005) 34 (1) ILJ 1

Ewing K and Hendy L, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 (1) ILJ 23

Gall G, 'Twenty Years of the Third Statutory Union Recognition Procedure in Britain: Outcomes and Impact' (2020) 49 (4) ILJ 657

Gall G, 'Union Recognition in Britain: The End of Legally Induced Voluntarism?' (2012) 41 (4) ILJ 407

Harcourt M, Gall G, Novell N, and Wilson M, 'Boosting Union Membership: Reconciling Liberal and Social Democratic Conceptions of Freedom of Association via a Default Union' (2021) 50 (3) ILJ 375

Harcourt M, Gall G, Vimal Kumar R and Croucher R, 'A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation' (2019) 48 (1) ILJ 66

Katsabian T, 'Collective Action in the Digital Reality: the Case of Platform-Based Workers' (2021) 84 (5) MLR 1005

Wedderburn L, 'Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition' (2000) 29 (1) ILJ 38

Reports

Bishop I, 'Trade Union Membership: UK 1995 – 2020: Statistical Bulletin' (OGL, 27 May 2021)

Central Arbitration Committee, 'Central Arbitration Committee Annual Report 2020 – 2021' (CAC 08 July 2021)

Websites

App Drivers & Couriers Union, 'ADCU's Aslam and Farrar respond to reports of recognition agreement between Uber and GMB Union' (*ADCU*) <https://www.adcu.org.uk/news-posts/uber-gmb-union> accessed 29 December 2021

GMB, 'Hermes and GMB in groundbreaking gig economy deal' (*GMB,* 04 February 2019) <https://www.gmb.org.uk/news/hermes-gmb-groundbreaking-gig-economy-deal> accessed 29 December 2021

GMB, 'Uber and GMB strike historic union deal for 70,000 drivers' (*GMB,* 26 May 2021) <https://www.gmb.org.uk/news/uber-and-gmb-strike-historic-union-deal-70000-uk-drivers> accessed 29 December 2021

Guest P, 'We're all fighting the giant': Gig workers around the world are finally organizing' (*rest of world,* 21 September 2021) <https://restofworld.org/2021/gig-workers-around-the-world-are-finally-organizing/> accessed 29 December 2021