FACILITIES TIME: A BRIEFING FOR AEP

Contents

Introduction

This briefing first summarises the legal entitlements to paid time off for trade union duties and time off for trade union activities. Second, it deals with time off for health and safety duties. Third, it sets out the legal protections from detriment and dismissal. The fourth section deals with opportunities for legal challenge, and possible strategies of resistance.

Extracts from the relevant statutory materials are contained in the Appendix including SS 168 and 178 TULRA 1992, Reg 4 of the 1977 Safety Representatives and Safety Committee Regulations 1977 (SRSCR), the 2010 ACAS Code of Practice on Trade Union Duties and Activities (the ACAS TU Code), the HSE Code of Practice on time off for the training of safety representatives (the HSE training Code), the HSE Code of Practice on Safety representatives and Safety Committees (the HSE reps Code), and the ACAS Code on Discipline and Grievance (the ACAS D&G Code). Rights for pensions, union learning and other types of representatives are not covered specifically in this briefing although AEP may wish to bear them in mind in considering the issues in this briefing.

In line with other policies pursued by the coalition government, facility time for trade unions is under attack. In the civil service for example, from 2012/13, facility time has been cut to no more than 0.1% of the pay bill. There are proposals to reduce this still further to 0.04%. No more than 50% of time can be spent on trade union duties, unless ministerial dispensation has been granted. Virtually none has. Similar attacks are being made in the NHS and local government.

1. Trade union duties and activities

(1) Trade union duties

Union officials have a right to claim time off work and a right to be paid during the time off allowed. The rights are available only to employees who are officials of a recognised independent trade union.

The official can claim time off either to carry out certain official duties or to undergo certain training.

The following types of duties, performed by officials, qualify as trade union duties:

- "Negotiations" with the employer on matters falling within S.178(2) TULRA 1992 – see S.168 (1) (a) TULRA (see Appendix, page 14);
- Other functions on behalf of employees related to the subject matter of "negotiations", which are agreed with the employer – known as "industrial relations duties" – see S.168 (1) (b) ;
- Information and consultation on collective redundancies; and
- Information and consultation under TUPE.

In relation to the first two types of duty:

- "Negotiations" must be in relation to one or more defined matters: terms and conditions, engagement or non-engagement (or suspension) of workers, work allocation, discipline, union membership, facilities time or consultation or recognition machinery (see S.178 and Para 13 of the ACAS TU Code in the Appendix – page 13 and pages 17. Para 13 provides a detailed guide on the matters set out in S.178);

- The defined subject matter of the negotiations must be within the scope of the union's recognition;

- Negotiations means collective bargaining. That should include both the consulting and informing of members and consulting and informing the union leadership. It therefore includes the planning and preparatory stages of bargaining - union meetings to formulate strategy and tactics and such like, and meetings to decide whether to make a claim at all. It is ultimately a question of fact for the Tribunal whether the duty in question is sufficiently connected with collective bargaining to be fairly called a duty 'concerned with' negotiations; and

- Note that the second type of duty is wider than the first, but the functions must be agreed with the employer. These duties are potentially more under threat by the government's current attack on facility time and will continue to depend on the scope of recognition / facilities agreements.

(2) Training

As well as time off for performing their duties, officials may seek time off to *train* for their duties. In order to qualify, the training must both be *relevant* to the official's duties, and it must be *approved* training.

Where the official wants to go on a training course, he / she should normally give at least a few weeks' notice and should supply a copy of the prospectus or syllabus indicating the contents of the course. (See the ACAS TU Code, para 52).

Taking time off without permission cannot be recommended. The employee risks losing her/his job by taking time off without permission. If the employer refuses time off, the employee is best advised to stay at work and complain to an Employment Tribunal instead.

(3) Working hours

The statutory right is a right to time off 'during working hours'. That has a potentially limiting effect when it comes to seeking payment. A part-timer may claim as much pay for time off as a full-timer could claim in comparable circumstances (ACAS TU Code, para 19 - see page 19 below). But even a full-time employee may claim only for the hours during which she/he would otherwise have been actually at work. That can adversely impacts on shift, or other irregular, workers.

(4) Reasonable time off

Officials are not entitled to take off whatever time is *necessary* to discharge their duties. The employer must permit *reasonable* time off (see S.168 (3) TULRA), that is reasonable as to:

- the *amount* of time off taken
- the *purposes* for which time off is taken
- the *occasions* on which time off is taken (including the frequency with which it is taken)
- the *conditions* subject to which time off is allowed.

In order to help determine what is reasonable, reference is to be made to the Code of Practice. The Code lists some of the factors to be taken into account - see paras 42 and 43 – page 20. These include the size of the organisation, the number of workers, the nature and exigencies of the production process, the need to maintain a service to the public and the need for safety and security at all times. Statutory requirements, the complexity and number of issues that are expected to be dealt with and the importance of training and preparation for meetings may also be

relevant. The Code emphasises the advantages of a written agreement on time off, in order to avoid disputes over such issues (paras 56 to 61 – see pages 21 to 22). Having been allowed time off under S.168 TULRA, the employee is entitled to be paid for it (S.169).

(5) Enforcement

An aggrieved employee may complain to an Employment Tribunal either on the grounds that the employer has failed to permit her/him to take time off, or on the grounds that, having allowed time off, the employer has refused to pay for it. The complaint must normally be presented within the period of three months beginning with the date when the failure occurred. There is no concept of a continuing act in relation to such claims.

The Tribunal may award whatever sum it 'considers just and equitable in all the circumstances *having regard to the employer's default* ... and to any loss sustained by the employee ...' (S.172 (2)). So Tribunals can award compensation for injury to health or feelings and other non-pecuniary loss as well as actual loss to the employee's pocket.

(6) Disciplinary and grievance hearings

Where a worker is summoned by his employer to a disciplinary or grievance hearing, she/he has the right to be accompanied by a fellow worker or by a trade union representative. Where the TU rep is not an employed official of the union, she / he must be certified by her / his union as being competent to accompany a worker (S.10 ERelA 1999). In the event that she/he chooses to be accompanied by a trade union official who is employed by the same employer, then the employer must permit that official to take a reasonable amount of paid time off work in order that she/he may accompany the worker concerned (SS.10 (6) and (7)). The worker concerned does

not have to be one of the official's constituents; the worker does not even have to be a union member. And the official is entitled to time off whether or not the union is recognised by the employer for the purposes of collective bargaining.

It may be tactically useful for a union to have representatives who just take on personal cases, to avoid arguments that too much time is being taken off overall. Note that most lay representatives would need to be certified as set out above, so a training programme and certification process may be needed. Consideration would need to be given as to how that would fit in with existing branch structures.

(7) Trade union activities

Union members may claim time off work to participate in the activities of their union or to consult his/her union learning representative. There is no statutory right to payment for any such time off allowed but there may be a contractual right to be paid for it. The ACAS TU Code recommends that the employer should consider paying "*in certain circumstances, for example to ensure that workplace meetings are fully representative or to ensure that employees can make use of the services of a learning representative*" (para 41 – page 20).

The rights are available to a *member* of an *independent* trade union which is *recognised* by the employer for that category of worker.

The purposes for which a member may seek time off are widely defined as "any activities" provided they are either activities of the member's own union, or activities in relation to which she/he is acting as a representative of her/his union. They may include attendance at Branch AGMs and national conferences.

2. Health and Safety

(1) Trade union duties and activities

The duties of a trade union official may well include health and safety matters. If they do, the official may have a right to paid time off work in connection with those duties (TULRA s 168 - see above). Similarly, the activities of a trade union may well include health and safety activities. If so, a union member may have a right to unpaid time off work in order to participate in those activities (TULRA s 170 - see above).

Independently of that, under the SRSCR 1977 the employer should permit a safety representative to take such time off, with pay, as is necessary to enable him either to perform his statutory functions or to undergo reasonable training. Regulation 4 is quoted in full in the attached Appendix – pages 15 to 16.

(2) Amount of time off

A safety representative is entitled to such time off as is necessary to enable him to discharge his functions. Note the use of the word necessary - not what is 'reasonable' or 'practicable', but what is 'necessary'. That implies that safety is properly to be regarded as having a high priority. So it is harder for an employer to refuse time off for health and safety duties than for trade union duties. Just as with disciplinary and grievance issues therefore, it may be advisable to have reps who carry out solely health and safety duties.

The amount of time off to be allowed for training however, is whatever is reasonable (*Duthie v Bath and North East Somerset Council* [2003] ICR 1405, EAT). Regard is to be had to the HSE Code on the topic (pages 24 and 25). That says that a safety representative should be given basic training as soon as possible after his appointment. She / he should be given further training if she/he has special responsibilities, or if circumstances change, or if new laws are

introduced. The training facilities should be approved by the TUC or by the appointing union concerned. The union should give the employer a few weeks' notice if it wants to send a safety representative off to a training course; and it should provide the employer with a copy of the syllabus, if the employer wants one. Broadly speaking, the Code says that safety representatives should be trained to understand the law relating to health and safety, the nature and extent of hazards at work, and the employers' policies and administrative arrangements with regard to health and safety. They should also be trained to acquire appropriate skills to enable them to make effective use of the information they glean.

The safety representative is entitled to be paid for his/her time off work. As with trade union duties however, paid time off is for time spent during working hours – see 1 (3) above.

3. Protection against detriment / dismissal

The most relevant part of Section 146 of TULRA reads as follows:

"(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so….."

It is necessary therefore to show an improper *purpose* for any detriment suffered. The difficulties of showing this are illustrated by the case of *Gallacher v Department*

of Transport [1994] IRLR 231, [1994] ICR 967, CA. Gallacher was a union official. He was allowed time off work in order to carry out his union duties, which took up 80 to 100 per cent of his time. He applied for promotion. He was rejected because he had insufficient management experience. But he could not get the necessary management experience unless he abandoned or reduced his union activity, and the promotions board made comments to that effect. The *effect* of the employer's decision might have been that Gallacher was deterred from his union activity. It might even be said (as the tribunal in fact held) that the employers had *intentionally* deterred him, in that they deliberately advised him to get more management experience, knowing that that was tantamount to telling him to reduce his union commitments. But "intent" and "purpose" were not interchangeable' and it was impossible on the evidence to say that the employer's *purpose* was to deter Gallacher. They did not act *in order to* deter him.

It is also important to distinguish between action taken with an improper purpose, and action taken as a result of an official carrying out his / her duties in an improper way e.g. aggressively.

The time limit for a section 146 claim is three months. An injury to feelings award can be claimed as well as actual financial loss.

Section 152 TULRA provides protection against dismissal by reason of union membership or activities carried out at an 'appropriate time'. An application for interim relief can be made in such cases, provided that it is made within 7 days of the dismissal and the necessary certification is provided (s.161). A minimum basic award is payable in such cases. The minimum qualifying period for an ordinary unfair dismissal claim (now two years) does not apply. Strangely, an injury to feelings award cannot be claimed for a TU dismissal.

Section 153 TULRA provides similar protection against selection for redundancy by reason of union membership or activities. Again, the minimum qualifying period for an ordinary unfair dismissal claim (two years) does not apply.

Section 44 ERA 1996 protects health and safety reps / those raising health and safety concerns from detriment short of dismissal. (Note that the whistle-blowing provisions of the ERA 1996 - sections 43A to 43K - may also be engaged).

Section 100 ERA 1996 provides protection against dismissal for health and safety activities / raising health and safety concerns. (Again, section 103A – which provides protection against a dismissal in connection with whistle-blowing - may also be engaged). The minimum qualifying period for an ordinary unfair dismissal claim does not apply to such dismissals.

4. Opportunities for legal challenge / strategies for resistance

There are no easy legal solutions to these problems. Unions may find some assistance from the more favourable stance of the European Court of Human Rights to collective rights in a number of areas, the high point of which is ground-breaking decision in the Demir v Baykara case. This recognises, amongst other things, that "*the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and join trade unions for the protection of [one's] interests*" set forth in Article 11 of the Convention". It is possible to argue that were an employer to restrict facility time to such an extent that the union was not able to engage effectively in collective bargaining, Article 11 could be breached. Deciding what is an acceptable amount of facility time in any particular case will very much depend on the facts of that case however. It is probably not possible to say that a certain percentage of the pay bill must be allowed for facility time for

example. Further, the Government's current stance on human rights law is not encouraging; nor is the decision of the ECtHR in RMT v United Kingdom [2014].

One of the best guides to what is reasonable time off is the time being spent already by AEP reps on trade union duties. It might be advisable for a careful audit be undertaken by AEP of all reps to find out how much time they spend on duties and activities at the moment, and how that time might be reduced by concentrating on essential duties in future. The audit could seek to find out how much time is spent by each rep on e.g. collective bargaining, personal cases, H&S duties, training, learning rep duties etc. That could then form evidence in ET cases in relation to S.168 claims – see below.

This also links in with what is sometimes known as "layering" i.e. officials having more than one role. One way around this would be to have a greater division of labour within branches etc; having separate representatives for personal cases, collective bargaining, health and safety, learning rep duties etc. We accept that may be difficult to put into practice in a relatively small trade union. As discussed above (see section 1 (6) on page 5), there would also be training and certification implications although these would not be insurmountable.

We were not been able to identify any viable public law legal challenges (i.e. judicial review) to the Cabinet Office policy documents on facility time. It is unlikely that cut-backs elsewhere will do so either.

Another possible avenue of legal challenge in individual cases is if particular facilities arrangements have become incorporated into individuals' contracts of employment. This is probably unlikely, except where there are specific arrangements which apply to specific individuals.

Failing an acceptable agreement on time off, individual reps could submit ET claims. The reps would need to submit ET applications detailing each separate refusal of time off, within three months of each incident. That is costly, now the new fees regime has been introduced, although the costs could be defrayed by submitting multiple claims with other officials working for the same employer. It would also be very time-consuming. A trade union would need to think carefully about whether it wants to adopt such a strategy. Model pleadings and statements could be produced if required. Longer term, such a strategy might be difficult for the union to sustain although it will also place a strain on employers and might bring them back to the negotiating table. As the ACAS TU Code makes clear (see pages 22 to 23 below), a written agreement on time off is preferable, in order to avoid ongoing legal disputes over such issues.

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June 2014

APPENDIX – RELEVANT EXTRACTS FROM TULRA ETC

S. 168 TULRA

(1) An employer shall permit an employee ... to take time off during his working hours for the purpose of carrying out any duties of his, as such an official, concerned with—

(*a*) negotiations with the employer related to or connected with any matters falling within s 178(2) (collective bargaining) in relation to which the trade union is recognised by the employer, or

(*b*) the performance on behalf of employees of the employer of any functions related to or connected with any matters falling within that provision which the employer has agreed may be so performed by the trade union, or

(*c*) receipt of information from the employer and consultation by the employer under section 188 (redundancies) or under the Transfer of Undertakings (Protection of Employment) Regulations 2006, or

(*d*) negotiations with a view to entering an agreement under reg 9 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 that applies to employees of the employer, or

(*e*) the performance on behalf of employees of the employer of functions related to or connected with the making of an agreement under that regulation.

(2) He shall also permit such an employee to take time off during his working hours for the purpose of undergoing training in aspects of industrial relations—

(*a*) relevant to the carrying out of such duties as are mentioned in subsection (1), and

(*b*) approved by the Trades Union Congress or by the independent trade union of which he is an official.

s. 178 TULRA Collective agreements and collective bargaining

(1) In this Act "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and "collective bargaining" means negotiations relating to or connected with one or more of those matters.

(2) The matters referred to above are—

(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;

(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;

(c) allocation of work or the duties of employment between workers or groups of workers;

(d) matters of discipline;

(e) a worker's membership or non-membership of a trade union;

(f) facilities for officials of trade unions; and

(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

(3) In this Act "recognition", in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and "recognised" and other related expressions shall be construed accordingly.

Section 10 Employment Relations Act 1999 - Right to be accompanied

(1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

[(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

(a) is chosen by the worker; and

(b) is within subsection (3).

(2B) The employer must permit the worker's companion to—

(a) address the hearing in order to do any or all of the following—

(i) put the worker's case;

(ii) sum up that case;

(iii) respond on the worker's behalf to any view expressed at the hearing;

(b) confer with the worker during the hearing.

(2C) Subsection (2B) does not require the employer to permit the worker's companion to—

(a) answer questions on behalf of the worker;

(b) address the hearing if the worker indicates at it that he does not wish his companion to do so; or

(c) use the powers conferred by that subsection in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.]

(3) A person is within this subsection if he is—

(a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,

(b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or

(c) another of the employer's workers.

(4) If—

(a) a worker has a right under this section to be accompanied at a hearing,

(b) his chosen companion will not be available at the time proposed for the hearing by the employer, and

(c) the worker proposes an alternative time which satisfies subsection (5),

the employer must postpone the hearing to the time proposed by the worker.

(5) An alternative time must—

(a) be reasonable, and

(b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer.

(6) An employer shall permit a worker to take time off during working hours for the purpose of accompanying another of the employer's workers in accordance with a request under subsection (1)(b).

(7) Sections 168(3) and (4), 169 and 171 to 173 of the Trade Union and Labour Relations (Consolidation) Act 1992 (time off for carrying out trade union duties) shall apply in relation to subsection (6) above as they apply in relation to section 168(1) of that Act.

Regulation 4 SRSCR 1977

4 Functions of safety representatives

(1) In addition to his function under section 2(4) of the 1974 Act to represent the employees in consultations with the employer under section 2(6) of the 1974 Act (which requires every employer to consult safety representatives with a view to the making and maintenance of arrangements which will enable him and his employees to cooperate effectively in promoting and developing measures to ensure the health and safety at work of the employees and in checking the effectiveness of such measures), each safety representative shall have the following functions—

(*a*) to investigate potential hazards and dangerous occurrences at the workplace (whether or not they are drawn to his attention by the employees he represents) and to examine the causes of accidents at the workplace;

(*b*) to investigate complaints by any employee he represents relating to that employee's health, safety or welfare at work;

(*c*) to make representations to the employer on matters arising out of sub-paragraphs (*a*) and (*b*) above;

(*d*) to make representations to the employer on general matters affecting the health, safety or welfare at work of the employees at the workplace;

(*e*) to carry out inspections in accordance with Regulations 5, 6 and 7 below;

(*f*) to represent the employees he was appointed to represent in consultations at the workplace with inspectors of the Health and Safety Executive and of any other enforcing authority;

(*g*) to receive information from inspectors in accordance with section 28(2) of the 1974 Act; and

(*h*) to attend meetings of safety committees where he attends in his capacity as a safety representative in connection with any of the above functions;

but, without prejudice to sections 7 and 8 of the 1974 Act, no function given to a safety representative by this paragraph shall be construed as imposing any duty on him.

(2) An employer shall permit a safety representative to take such time off with pay during the employee's working hours as shall be necessary for the purposes of—

(*a*) performing his functions under section 2(4) of the 1974 Act and paragraph (1)(*a*) to (*h*) above;

(*b*) undergoing such training in aspects of those functions as may be reasonable in all the circumstances having regard to any relevant provisions of a code of practice relating to time off for training approved for the time being by the Health and Safety Commission under section 16 of the 1974 Act.

In this paragraph 'with pay' means with pay in accordance with [Schedule 2] to these Regulations.

EXTRACTS FROM ACAS CODE OF PRACTICE ON TIME OFF FOR TRADE UNION DUTIES AND ACTIVITIES [2010]

12. **Subject to the recognition or other agreement, trade union** representatives **should be allowed to take reasonable time off for duties concerned with negotiations or, where their employer has agreed, for duties concerned with other functions related to or connected with** the subjects of collective bargaining.

13. **The subjects connected with collective bargaining may include one or more of the following:**

(*a*) **terms and conditions of employment, or the physical conditions in which workers are required to work.** Examples could include:

- pay
- hours of work
- holidays and holiday pay
- sick pay arrangements
- pensions
- learning and training
- equality and diversity
- notice periods
- the working environment
- operation of digital equipment and other machinery;

(*b*) **engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers.** Examples could include:

- recruitment and selection policies
- human resource planning
- redundancy and dismissal arrangements;

(*c*) **allocation of work or the duties of employment as between workers or groups of workers.** Examples could include:

- job grading
- job evaluation
- job descriptions
- flexible working practices
- family friendly policies;

(*d*) **matters of discipline.** Examples could include:

- disciplinary procedures
- arrangements for representing or accompanying employees at internal interviews
- arrangements for appearing on behalf of trade union members, or as witnesses, before agreed outside appeal bodies or employment tribunals;

(*e*) **trade union membership or non-membership**. Examples could include:

- representational arrangements
- any union involvement in the induction of new workers;

(*f*) **facilities for trade union representatives**. Examples could include any agreed arrangements for the provision of:

- accommodation
- equipment
- names of new workers to the union;

(*g*) **machinery for negotiation or consultation and other procedures**. Examples could include arrangements for:

- collective bargaining at the employer and/or multi-employer level
- grievance procedures
- joint consultation
- communicating with members

- communicating with other representatives and union full-time officers concerned with collective bargaining with the employer.

14. The duties of a representative of a recognised trade union must be connected with or related to negotiations or the performance of functions both in time and subject matter. Reasonable time off may be sought, for example, to:

- prepare for negotiations, including attending relevant meetings
- inform members of progress and outcomes
- prepare for meetings with the employer about matters for which the trade union has only representational rights.

Payment for time off for trade union duties

18. **An employer who permits union representatives time off for trade union duties must pay them for the time off taken. The employer must pay either the amount that the union representative would have earned had they worked during the time off taken or, where earnings vary with the work done, an amount calculated by reference to the average hourly earnings for the work they are employed to do.**

The calculation of pay for the time taken for trade union duties should be undertaken with due regard to the type of payment system applying to the union representative including, as appropriate, shift premia, performance related pay, bonuses and commission earnings. Where pay is linked to the achievement of performance targets it may be necessary to adjust such targets to take account of the reduced time the representative has to achieve the desired performance.

19. **There is no statutory requirement to pay for time off where the duty is carried out at a time when the union representative would not otherwise have been at work unless the union representative works flexible hours, such as night shift, but needs to perform representative duties during normal hours. Staff who work part time will be entitled to be paid if staff who work full time would be entitled to be paid. In all cases the amount of time off must be reasonable.**

41.**There is no statutory requirement that union members or representatives be paid for time off taken on trade union <u>activities</u>**. Nevertheless employers may want to consider payment in certain circumstances, for example to ensure that workplace meetings are fully representative or to ensure that employees have access to services provided by Union Learning Representatives.

Section 4
The responsibilities of employers and trade unions

Employers, trade unions, union representatives and line managers should work together to ensure that time off provisions, including training, operate effectively and for mutual benefit. Union representatives need to be able to communicate with management, each other, their trade union and employees. To do so they need to be able to use appropriate communication media and other facilities.

General considerations

42. **The amount and frequency of time off should be reasonable in all the circumstances.** Although the statutory provisions apply to all employers without exception as to size and type of business or service, trade unions should be aware of the wide variety of difficulties and operational requirements to be taken into account when seeking or agreeing arrangements for time off, for example:

— the size of the organisation and the number of workers

— the production process

— the need to maintain a service to the public

— the need for safety and security at all times.

43. Employers in turn should have in mind the difficulties for trade union representatives and members in ensuring effective representation and communications with, for example:

— shift workers

— part-time workers

— home workers

— teleworkers or workers not working in a fixed location

— those employed at dispersed locations

— workers with particular domestic commitments including those on leave for reasons of maternity, paternity or care responsibilities

— workers with special needs such as disabilities or language requirements.

52. In addition, union representatives who request paid time off to undergo relevant training should:

— give at least a few weeks' notice to management of nominations for training courses

— provide details of the contents of the training course.

Section 5
Agreements on time off

To take account of the wide variety of circumstances and problems which can arise, there can be positive advantages for employers and trade unions in establishing agreements on time off in ways that reflect their own situations. It should be borne in mind, however, that the absence of a formal agreement on time off does not in itself deny an individual any statutory entitlement. Nor does any agreement supersede statutory entitlement to time off.

56. A formal agreement can help to:

— provide clear guidelines against which applications for time off can be determined

— establish realistic expectations on the part of union representatives and managers

— avoid misunderstanding

— facilitate better planning

— ensure fair and reasonable treatment.

57. Agreements should specify:

— the amount of time off permitted recognising that this will vary according the fluctuations in demand on the union representatives' role

— the occasions on which time off can be taken including meetings with management, meetings with other union representatives, time needed to prepare for meetings, communicating with members and their trade union, time to undertake e-learning if appropriate and to attend approved training events

— in what circumstances time off will be paid

— arrangements for taking time off at short notice

— how pay is to be calculated

— to whom time off will be paid

— the facilities and equipment to be provided and limits to their use, if any

— arrangements for ensuring confidentiality of communications involving union representatives. These should include agreed rules on the use of data and the exceptional cases where monitoring may be necessary, for example in cases of

suspected illegal use, specifying the circumstances where such monitoring may be undertaken and the means by which it is to be done, for example by company IT or security personnel

— the role of line managers in granting permission to legitimate requests for time off and, where appropriate and practical, ensuring that adequate cover or work load reductions are provided

— the procedure for requesting time off

— the procedure for resolving grievances about time off.

58. In addition, it would be sensible for agreements to make clear:

— arrangements for the appropriate payment to be made when time off relates in part to union duties and in part to union activities

— how and in what circumstances payment might be made to shift and part time employees undertaking trade union duties outside their normal working hours.

59. Agreements for time off and other facilities for union representation should be consistent with wider agreements which deal with such matters as constituencies, number of representatives and the election of officials.

60. The operation of time off agreements or arrangements should be jointly reviewed by the parties from time to time.

61. In smaller organisations, it might be thought more appropriate for employers and unions to reach understandings about how requests for time off are to be made; and more broadly to agree flexible arrangements which can accommodate their particular circumstances.

5. HEALTH AND SAFETY COMMISSION CODE OF PRACTICE: TIME OFF FOR THE TRAINING OF SAFETY REPRESENTATIVES (1978)

Preface

This document sets out a Code of Practice, which has been approved by the Health and Safety Commission, relating to the time off with pay which a safety representative is to be permitted to take during his working hours for the purpose of undergoing training approved by the TUC or by independent unions. It should be read in conjunction with the Safety Representatives and Safety Committees Regulations 1977, with particular reference to Regulation 4, which sets out the functions of a safety representative and the time off for training necessary to perform these functions.

The Advisory, Conciliation and Arbitration Service has also prepared a Code of Practice on Time Off for trade union duties and activities generally under Section 57 of the Employment Protection Act. However, this Code, approved by the Health and Safety Commission, is concerned with time off for training of safety representatives appointed under the Regulations.

Issues which may arise are covered by paragraph 3 of the Code of Practice on Safety Representatives approved by the Health and Safety Commission. The Schedule to the Regulations deals with the computation of pay for the time off allowed. Regulation 11 contains provisions as to reference of complaints to industrial tribunals about time off and the payment to be made.

To complement training approved by the TUC or by independent unions for safety representatives, an employer should make such arrangements as are necessary to provide training in the technical hazards of the workplace and relevant precautions on safe methods of work, and on his organisation and arrangements for health and safety.

Code of Practice

1. The function of safety representatives appointed by recognised trade unions as set out in Section 2(4) of the Health and Safety at Work etc Act 1974 is to represent employees in consultations with employers about health and safety matters. Regulations 4(1) of the Safety Representatives and Safety Committees Regulations (SI 1977/500) prescribes other functions of safety representatives appointed under those Regulations.

2. Under Regulations 4(2)*(b)* of those Regulations the employer has a duty to permit those safety representatives such time off with pay during the employee's working hours as shall be necessary for the purpose of 'undergoing such training in aspects of those functions as may be reasonable in all the circumstances'.

3. As soon as possible after their appointment safety representatives should be permitted time off with pay to attend basic training facilities approved by the TUC or by the independent union or unions which appointed the safety representatives. Further training, similarly approved, should be undertaken where the safety representative has special responsibilities or where such training is necessary to meet changes in circumstances or relevant legislation.

4. With regard to the length of training required, this cannot be rigidly prescribed, but basic training should take into account the function of safety representatives placed on them by the Regulations. In particular, basic training should provide an understanding of the role of safety representatives, of safety committees, and of trade union policies and practices in relation to:

(a) the legal requirements relating to the health and safety of persons at work, particularly the group or class of persons they directly represent;

(b) the nature and extent of workplace hazards, and the measures necessary to eliminate or minimise them;

(c) the health and safety policy of employers, and organisation and arrangements for fulfilling those policies.

Additionally, safety representatives will need to acquire new skills in order to carry out their functions, including safety inspections, and in using basic sources of legal and official information and information provided by or through the employer on health and safety matters.

5. Trade unions are responsible for appointing safety representatives and when the trade union wishes a safety representative to receive training relevant to his functions it should inform management of the course it has approved and supply a copy of the syllabus, indicating its contents, if the employer asks for it. It should normally give at least a few weeks' notice of the safety representatives it has nominated for attendance. The number of safety representatives attending training courses at any one time should be that which is reasonable in the circumstances, bearing in mind such factors as the availability of relevant courses and the occupational requirements of the employer. Unions and management should endeavour to reach agreement on the appropriate numbers and arrangements and refer any problems which may arise to the relevant agreed procedures.

4. HEALTH AND SAFETY COMMISSION CODE OF PRACTICE: SAFETY REPRESENTATIVES AND SAFETY COMMITTEES (1978)

Editorial note: This Code of Practice was issued under s 16 of the Health and Safety at Work etc Act 1974, and came into force on 1 October 1978. It should be read in conjunction with the Safety Representatives and Safety Committees Regulations 1977 SI 1977/500, which it complements and the Code following this Code. Note that whilst by section 17 of the HSW Act the provisions of this and the following Code are admissible in evidence in *criminal* proceedings, there is no equivalent provision requiring *employment tribunals* to have regard to any relevant provision of the Code, notwithstanding that complaints of breach of the 1977 Regulations are within the tribunals' jurisdiction, and in contrast to the requirement that is imposed on tribunals hearing complaints of failure to permit or pay for time off for trade union duties or activities brought under TULRA 1992 ss 168–170 to have regard to the equivalent ACAS Code.

1. The Safety Representatives and Safety Committees Regulations 1977 concern safety representatives appointed in accordance with Section 2(4) of the Act and cover:

(a) prescribed cases in which recognised trade unions may appoint safety representatives from amongst the employees;

(b) prescribed functions of safety representatives.

Section 2(6) of the Act requires an employer to consult with safety representatives with a view to the making and maintenance of arrangements which will enable him and his employees to cooperate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures. Under section 2(4) safety representatives are required to represent the employees in those consultations.

2. This Code of Practice has been approved by the Health and Safety Commission with the consent of the Secretary of State. It relates to the requirements placed on safety representatives by section 2(4) of the Act and on employers by the Regulations and takes effect on the date the Regulations come into operation.

3. The employer, the recognised trade unions concerned and safety representatives should make full and proper use of the existing agreed industrial relations machinery to reach the degree of agreement necessary to achieve the purpose of the Regulations and in order to resolve any differences.

Interpretation

4.

(a) In this Code, 'the 1974 Act' means the Health and Safety at Work etc Act 1974 and 'the Regulations' mean the Safety Representatives and Safety Committees Regulations 1977;

(b) words and expressions which are defined in the Act or in the Regulations have the same meaning in this Code unless the context requires otherwise.

Functions of safety representatives

5. In order to fulfil their functions under section 2(4) of the Act safety representatives should:

(a) take all reasonable practical steps to keep themselves informed of:

(i) the legal requirements relating to the health and safety of persons at work, particularly the group or groups of persons they directly represent,

(ii) the particular hazards of the workplace and the measures deemed necessary to eliminate or minimise the risk deriving from these hazards, and

(iii) the health and safety policy of their employer and the organisation and arrangements for fulfilling that policy;

(b) encourage cooperation between their employer and his employees in promoting and developing essential measures to ensure the health and safety of employees and in checking the effectiveness of these measures;

(c) bring to the employer's notice normally in writing any unsafe or unhealthy conditions or working practices or unsatisfactory arrangements for welfare at work which come to their attention whether on an inspection or day to day observation. The report does not imply that all other conditions and working practices are safe and healthy or that the welfare arrangements are satisfactory in all other respects.

Making a written report does not preclude the bringing of such matters to the attention of the employer or his representative by a direct oral approach in the first instance, particularly in situations where speedy remedial action is necessary. It will also be appropriate for minor matters to be the subject of direct oral discussion without the need for a formal written approach.

Information to be provided by employers

6. The Regulations require employers to make information within their knowledge available to safety representatives necessary to enable them to fulfil their functions. Such information should include:

(a) information about the plans and performance of their undertaking and any changes proposed insofar as they affect the health and safety at work of their employees;

(b) information of a technical nature about hazards to health and safety and precautions deemed necessary to eliminate or minimise them, in respect of machinery, plant, equipment, processes, systems of work and substances in use at work, including any relevant information provided by consultants or designers or by the manufacturer, importer or supplier of any article or substance used, or proposed to be used, at work by their employees;

(c) information which the employer keeps relating to the occurrence of any accident, dangerous occurrence or notifiable industrial disease and any statistical records relating to such accidents, dangerous occurrences or cases of notifiable industrial disease;

(d) any other information specifically related to matters affecting the health and safety at work of his employees, including the results of any measurements taken by the employer or persons acting on his behalf in the course of checking the effectiveness of his health and safety arrangements;

(e) information on articles or substances which an employer issues to homeworkers.

EXTRACTS FROM ACAS CODE ON DISCIPLINE AND GRIEVANCE

Allow the employee to be accompanied at the meeting

13. Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- a formal warning being issued; or
- the taking of some other disciplinary action; or
- the confirmation of a warning or some other disciplinary action (appeal hearings).

14. The chosen companion may be a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker.

15. To exercise the statutory right to be accompanied workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case. However, it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location if someone suitable and willing was available on site.

16. The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case.

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[Note - the same comments appear at paragraphs 34 to 37 in relation to grievances]

Special cases

29. Where disciplinary action is being considered against an employee who is a trade union representative the normal disciplinary procedure should be followed. Depending on the circumstances, however, it is advisable to discuss the matter at an early stage with an official employed by the union, after obtaining the employee's agreement.