

Towards a 'legislatively-prompted voluntarism'?: the impact of the UK Information and Consultation of Employees Regulations

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Background

The UK Information and Consultation of Employees (ICE) Regulations implementing the EU Directive have applied since April 2005. They constitute a significant change in the context within which employers develop information and consultation (I&C) practices. The Regulations establish a statutory framework giving employees the right to be informed and consulted on a range of business and employment issues. While such rights have long been entrenched in legislation in many continental European countries they represent a radical innovation in a traditionally 'voluntarist' country such as the UK, both in providing a legislative framework for universal representation rights and in conferring those rights on employees, with no formal role for trade unions. The Directive was initially opposed by the UK government and employers as representing an unwelcome intrusion of law into activities that should be settled by voluntary agreement and only half-heartedly welcomed by unions who feared the rights might be used by employers to further marginalise the union role. Unusually, once it appeared inevitable that the UK would be required to implement the Directive, the Trades Union Congress (TUC) and the employers' body (CBI) worked as Social Partners to agree the form of the Regulations. The legislation allows employers considerable flexibility of response and is a prime example of 'reflexive' employment law (Barnard and Deakin 2000:341).

Commentators were divided as to the likely impact. We suggested that their main impact might be 'legislatively-prompted voluntarism' (Hall and Terry, 2004: 226), with the new legislation driving the spread of voluntary agreements, either in advance of its enactment or as a consequence of the deployment by employees of the 'trigger mechanisms' contained in the legislation, leading to organisation-specific I&C agreements rather than the 'standard provisions' contained in the legislation and available in the event of failure to agree between the parties involved. Others were more pessimistic and, following Kelly (1996), suggested that legislation would be used by employers to further weaken trade unions.

The evidence

(i) Quantitative

Evidence on the impact of the Regulations on UK undertakings is patchy. The Workplace Employment Relations Survey (WERS 2004) showed that the prospect of the ICE Regulations had not resulted in an upturn in the use of joint consultative committees (JCCs) (Kersley et al, 2006), suggesting that the first variant of legislatively-prompted voluntarism had not been realised. However, more recent surveys indicate that the Regulations have prompted both increases in the presence of JCCs (CBI, 2006) and modifications to existing arrangements (IRS, 2006; LRD, 2006), particularly in the UK operations of multinational companies (Edwards et al, 2007). The last of these reports that changes have usually taken the form of providing representation for groups of non-union employees and, given that these are

taking place within large organisations with a significant propensity to recognise trade unions for some employees, it is reasonable to suggest that they may be witnessing the growth of consultative representation structures for non-union employees within partially-unionised organisations. The data do not indicate whether they take the form of freestanding non-union representation running in parallel to existing union bodies or whether the two are integrated in some way. Other recent survey evidence (Charlwood and Terry, 2007) confirms the growing significance of 'hybrid' arrangements combining union and non-union representation on the same I&C body and cautiously suggests that they may be both more viable than 'pure' union or non-union systems and more effective in providing advantage to employees and employers (see also Willman et al., 2007).

Much of the research suggests that employers are the lead actors initiating the review, modification and introduction of I&C arrangements (Hall, 2006) despite the fact that the formal rights to trigger implementation of the Regulations lies with employees. The reasons for this are explored more fully below but they reflect, among other things, trade unions' generally suspicious and defensive approach (Hall and Terry, 2004: 224-5), based on a concern that the introduction of workforce-wide I&C arrangements could undermine or marginalise them through the dilution of the traditional 'single channel' of union representation of employees.

(ii) Qualitative

Our case study research¹ was commissioned in 2006 by the UK Government in association with the Advisory, Conciliation and Arbitration Service (Acas) and the Chartered Institute for Personnel and Development (CIPD) to evaluate the impact of the Regulations on private sector organisations. Interviews with managers and employee representatives and union officials, where relevant, were conducted in 25 organisations where we had prior information that interesting I&C developments were taking place; they were selected to be of interest not to be a representative sample of the UK private sector. One year later telephone updates are undertaken and final case visits take place two years after the first visit. Employee surveys are conducted at each stage.

Research on the first 13 case study organisations has now been completed; that on a further 12 smaller organisations continues. The results presented below are based largely on the first data set. The key findings can be briefly summarised:

- The dominant actor is management. No instances have been found of employees using their rights to trigger reform and trade union initiative is extremely rare. Managers interviewed cite a range of reasons for their initiative among which the need for effective consultation at a time of organisational change or crisis was the most frequent; in four cases management was keen to avoid union recognition and the creation of non-union I&C arrangements provided a further dimension to an ongoing strategy. Such managerial dominance is unsurprising at a time when only 15 per cent of private sector workplaces (employing some 32 per cent of the workforce) recognise trade unions in respect of at least some of their employees (Kersley et al, 2006: 120) and private sector union membership hovers around 16 per cent. Employees in non-union workplaces may be unaware of their new rights (employers are under no obligation to inform them) and suspicious unions may be reluctant to invoke them for fear that they might be used to

¹ The report of the findings of the first year of research in 13 organisations was published in 2007 (Hall et al 2007) and that in a further 8 in 2008 (Hall et al 2008). The final report on the first 13 organisations should be available by the time of the conference.

weaken unions' existing role. The union officers we interviewed had a minimal knowledge of the Regulations and the lay employee representatives were, in the main, totally ignorant, or had been until they received training.

- The form of agreement has been largely set by management and overwhelmingly takes a form which exploits opportunities to operate outside a framework of legal enforceability of I&C rights. In line with UK employers' hostility to legal intervention in industrial relations and the Labour government's preference for 'light touch' regulation, the UK law was drafted in a way that explicitly allowed for the use of 'pre-existing agreements' (PEAs) to operate without legal enforceability provided they meet the general criteria laid down in the Regulations and receive the assent of interested parties. In fact only a small proportion of our cases went through the formal procedures required for a PEA; others received more or less formal assent of employee representatives or were introduced unilaterally by management. The opportunities formally available in such circumstances to challenge the absence of proper procedures were not used, even in cases where unions were unhappy with aspects of the new arrangements. While this might suggest the persistence of a form of 'voluntarism' in the sense of being outwith the law, it is very much 'unilateral voluntarism' rather than an outcome reflecting the active assent of all parties.
- In unionised organisations the typical structure is a 'hybrid' body involving both union and non-union representatives. Unions usually obtain guarantees to protect collective bargaining arrangements, especially with regard to pay, although in some instances the hybrid bodies deal with pay-related issues. This is a development of particular significance, quantitatively (see above) as well as qualitatively. Trade unions are characteristically suspicious of such arrangements as they provide clear evidence of their loss of representative monopoly and demonstrate to employees the possibility of representation without the cost of union membership. Conversely they provide unions and their representatives with the opportunity to demonstrate to non-union counterparts the advantages to be gained from union membership through such things as training and legal resources to back up representative responsibilities. Over the two years of the study some of the formal differentiation between union-based collective bargaining and universal consultation has started to blur and we have heard reported improvements in working relationships between union and non-union representatives to the apparent satisfaction of all. None has been accompanied by any perceptible decline in union membership in the organisations concerned, nor any growth.

In non-union organisations the picture is more mixed but in at least one case where union avoidance was an explicit part of managerial strategy the I&C arrangements introduced were strong and robust, coming close to 'non-union collective bargaining' on the grounds, as advanced by managers, that to be effective in keeping unions out they had to be seen by employees as providing benefits equivalent to union membership.

- Only rarely is the law cited as a major driver of change and its wording has only a marginal influence in shaping the form and content of new arrangements. While some managers argued that their companies always adopted best practice HR approaches that included at least conformity to all legal requirements all claimed, in effect, that the reforms to I&C arrangements owed little or nothing to legal prompting. Given the timing of the changes observed and the widespread awareness of the existence of the Regulations, in particular among HR managers, there may be some disingenuousness in

this claim, in particular given UK managers' reluctance to concede a role to the law in such matters. However, the Regulations did to some extent shape the design of the I&C arrangements and, significantly, provided the basis for obtaining top management commitment to the proposed new arrangements.

- Of the original 13 case study companies one had ceased trading after two years. Of the remaining 12 (one of which had both a unionised and a non-unionised site and is therefore treated as two organisations), five were found to have I&C bodies that are the forum for what can be termed 'active consultation'. This embraces regular information and consultation on 'strategic' organisational issues (e.g. restructuring) as envisaged by the ICE Regulations' standard provisions, a proactive approach in this respect by management and a degree of employee influence over outcomes, in some cases extending to 'consultation with a view to reaching agreement'. Of these five two were non-union and actively pursuing union avoidance while the others recognised unions for some of their employees. In six organisations, the I&C bodies are used by management primarily for 'communications' purposes and as a forum for progressing staff concerns, typically centring mainly on HR issues and/or relatively minor 'housekeeping' matters. In the remaining two organisations the I&C bodies have fallen into disuse essentially as a consequence of lack of managerial support.

Discussion

The discussion focuses around two critical linked issues: the success of the legislation in developing a response that might be described as 'legislatively-prompted voluntarism' and the growing significance of so-called 'hybrid' representative structures increasingly characteristic of structures of indirect representation within the UK.

1. *Legislatively-prompted voluntarism?*

As noted above, managers ascribed little or no significance to the Regulations in explaining reasons for the modification of their I&C arrangements or the introduction of new ones. However the influence of the Regulations (and management's awareness of their existence) was in many cases reflected in the wording of the constitutions of the new I&C arrangements. However, in many cases actual practice was rarely in line with the spirit of the legislation, at least as reflected in the 'standard provisions' available through legal enforcement in the event of failure to agree a PEA or locally-negotiated agreement. The standard provisions accurately reflect what might be called a 'strong' interpretation of information and consultation taken more or less directly from the originating EU Directive. They include, for example, a requirement to consult 'with a view to reaching agreement' on 'decisions likely to lead to substantial changes in work organisation or in contractual relations', a form of words far stronger than that associated with the traditional meaning of consultation in the UK, which has conventionally presumed ultimate employer prerogative. The same standard provisions also specify aspects of what is meant by consultation, including giving employee representatives the right to meet management at the appropriate level and to be given a reasoned response to any opinion they may express. Only three companies described consultation as being 'with a view to reaching agreement', even though they were not legally required to do so under 'voluntary' arrangements. Of these one had a very strong trade union presence and a second a public sector history (although now in the private) with a strong

tradition of consultation. However, the third was non-union and was pursuing a union avoidance strategy. All the other companies described consultation in 'weaker' terms ('the exchange of views and establishment of dialogue') and only five indicated that consultation should take place before final decision.

Thus, even if it might be claimed that circumstantial evidence suggests that the promulgation of the Regulations may have encouraged some organisations to overhaul their I&C arrangements or to introduce new ones, there is no evidence that what might be described as the spirit of the legislation in prompting effective consultation, at least by inference from the standard provisions, has permeated the design of the arrangements. Nor has this been affected by the presence or absence of trade unions who in most cases where they were present exerted little or no influence over the wording of I&C agreements and, despite formal involvement in some cases, little interest in doing so. The innovations we investigated owed more to what might be called 'employer-induced voluntarism' than to what might have been expected from the idea of 'legislatively-prompted voluntarism', namely local agreements reflecting both the needs of the specific organisations and the active involvement and assent in their design of employers, employees and, where found, trade unions. Instead managers shaped the agreements to suit their preferences – in particular for avoidance of legal intervention and for 'light-touch' consultation – rather than to follow the intention of the Directive. The Regulations were more contextual than catalytic in the design of the new arrangements.

Despite that, as noted above, at the end of two years' research we found that five of the remaining 12 companies were engaged in 'active consultation' conforming in many ways to the spirit of the Directive. However, far from being prompted to do so by legal requirements, this behaviour reflects managerial strategy (including union avoidance), a high level of formal and informal commitment to the process and in some cases strong and effective employee organisation, not always union-based. Importantly, however, all were going through considerable organisational change; while this does not emerge as a sufficient condition for effective consultation (the companies where I&C arrangements died were also experiencing turbulent change as were four of the six where the consultative body was used for communication purposes) it does suggest that at least some organisations act on the basis that good consultation can facilitate effective change management.

2. *'Hybrid' representation*

In around half of our cases trade unions are recognised yet have to coexist with non-union representatives on 'hybrid' bodies. This development appears to have significantly predated the implementation of the Regulations; WERS 2004 found that over half of organisations with JCCs where unions had a presence operated 'hybrids' but arguably it may be facilitating them, thus raising the question of whether the Regulations are encouraging a form of institutional metamorphosis (Charlwood and Terry, 2007) towards novel but stable organisational forms or are being used by employers to minimise or eradicate the union in the workplace as predicted by Kelly in which case union representation would over time be displaced by non-union representation and hybrids would cease to exist.

As noted above the emergence of hybrid forms presents a profound challenge for UK trade unions historically dependent upon monopoly control of channels of indirect employee representation via employer recognition and collective bargaining. In several of our case study companies the prospect of having to sit alongside non-union representatives was the most problematic issue confronted by the representatives of recognised unions. Following government refusal to draft the Regulations in a form that might provide protection for existing union representation within any new arrangements unions had to seek what guarantees they could within the new framework; this usually took the form of 'ring-fencing' existing collective bargaining arrangements over pay and, more or less tightly, excluding pay determination from the remit of the hybrid I&C bodies. In practice this distinction may be less than clear-cut and sustainable; several I&C constitutions allow for consultation over pay-related issues (pay structures, appraisal systems). In any case the essential informality of much workplace level industrial relations activity and the blurring in UK usage of the concepts of 'negotiation' and consultation may well render the separation ineffective; as committees come to work effectively there may be little appetite to instruct non-union representatives to leave when pay and other 'negotiable' issues come up.

Hybrid bodies enjoy one clear-cut advantage over union-only bodies, at least in organisations, increasingly common, where union membership is low and declining, even among recognised employee groups: they are democratically representative of the entire workforce and their views cannot therefore be dismissed by employers as only echoing the opinions of a few. Provided that they can maintain internal unity (and we have found few examples where they do not) this can be a significant source of strength as representatives learn to deploy it. In addition it may be the case (although this is not clear from our research data) that the non-union members of such hybrid bodies represent managerial or other 'white-collar' grades characteristically not recognised for bargaining. This can constitute a significant injection of expertise on matters that are (or should be) subject to consultation which, added to the greater experience of trade union representatives in acting as collective agents and their access to external union resources, could make them formidable employee representative bodies. The collectivisation of non-union employees, if only in the first instance for electoral purposes, may itself be a significant development. In one of the hybrid cases there is clear evidence of the union 'colonising' the consultative body and becoming the dominant force with better trained representatives who have access to external union advice. It is one of five cases exhibiting the characteristics of 'active consultation'.

The risks, at least for unions, are clear and have been summarised above. Several of the unions in our case studies were aware of the risks and nervous about the emergence of hybrids. So far there is agreement among them that those fears have not been realised, but that is not to say that hybrids may not come to act as agents of union marginalisation. But within the UK unions are being in many organisations, marginalised anyway, with declining membership and, in many cases, declining influence as bargaining agents. The 2004 WERS revealed that effective negotiation on all issues is found in less than half of workplaces where unions are recognised. Even on pay, negotiation is only identified in 48 per cent of cases (Kersey et al, 2006: 153). On some important issues such as training, staffing plans and performance

appraisal, a majority of workplaces provide unions with, at best, information and in many cases, with nothing.

Conclusions

Our findings suggest that minimalist, flexible implementation of legislative intent as evidenced in the transposition of the EU Directive into UK law is unlikely to be sufficient to offset UK managers' strong organisational and professional preference for unilateralism in matters affecting employment and employment regulation. Legislation that lays no formal obligations on employers and provides avenues through which employers can come into formal compliance with legal requirements without being subject to legal scrutiny appears too weak to prompt many employers into action at all and where it does it appears to stimulate developments that owe all, or nearly all, to unilateral managerial design and intent. Although our case study sample is by no means representative of the UK private sector it is perhaps significant that most of the managerial respondents indicated that their organisations were already committed to the principle of employee involvement, often including formal machinery for consultation, and legislative prompting, if it occurred at all, promoted review and extension rather than dramatic innovation.

Government enthusiasm for the extension of information and consultation has been clear; the website of BERR and its predecessor Department of Trade and Industry have promoted and advocated the adoption of the principles contained in the Regulations. ACAS, independent of government but part of state-funded support for good employment relations, has been similarly supportive, providing advice and training for organisations and employees looking to improve their I&C arrangements. As an employer, the state remains formally committed to the principle of extensive employee consultation, usually through trade unions. But none of this has been enough to stimulate widespread employee take-up so far. The state no longer acts as a 'model employer' to be emulated by the private sector at a time when the ideologies of the free market and the competitive benefits of employer prerogative are deeply embedded.

Perhaps more puzzling has been the profound reluctance of trade unions to investigate the possibility of using the Regulations as a tool for organising or recruiting members. Similarly the reluctance of unions in our case studies to become involved in the detailed design of the I&C provisions appears odd. Overall their role appears to have been that of seeking guarantees for collective bargaining arrangements and leaving the rest to management. While it is clear that unions would have preferred the law to have made provision for the protection of their existing role, their indifference to the existence of the Regulations at a time when their traditional strength is seeping away requires analysis. Indeed, there is at least one example, that of the union Amicus (now part of Unite), using the legal rights to considerable organisational and tactical effect in response to the refusal of the company Macmillan Publishers to reach an agreement under the Regulations. Even though unions as such have no formal role within the legal provisions it is possible to use them as a tactical device to engage employee support.

If, as has been suggested, unions require strong legal/organisational guarantees before they feel able to initiate universal employee I&C rights it is likely they will have a long wait, both because any foreseeable UK government is unlikely to grant such guarantees and because such guarantees are, in general, not core to the legislative approach favoured by the European Union. As a result, although the emphasis in the Regulations is on agreed I&C arrangements or adherence to minimum standards, if employees and unions are reluctant to initiate the Regulations' procedures, the scope

for unilateral managerial action – or doing nothing – remains wide. The evidence suggests that, while the Regulations have had some influence this has not so much been ‘legislatively-prompted voluntarism’ as ‘legislatively-prompted unilateralism’. Union indifference and employee weakness leaves the way open for employers to make such use of what are intended to be fundamental rights for employees to suit a managerial rather than an employee agenda.

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