



## VICTIMISATION ON UNION GROUNDS

### Introduction

It is important to remember that cases of victimisation on union grounds are extremely rare and the majority of trade union members and reps will never be a victim of unfair treatment for their participation in union activities and training. However, if you think you have suffered a detriment for being a trade union member or for taking part in trade union activities, the law provides some protection. This guide offers advice and guidance for trade union reps around the issue of victimisation on union grounds. It may be that as a trade union rep you have requested time off to carry out trade union duties and this has been refused by your employer. You may have been disciplined or been threatened with a disciplinary sanction for carrying out trade union activities or duties in the workplace or you may feel you have suffered a detriment for being a member of a trade union. This guide will look at legal rights focusing on trade union reps as well as highlight examples of case law where victimisation complaints have been made, and what to do if you believe you have been the victim of unfair treatment for your trade union role or membership.

### What protections are there in law?

The law - Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 92) protects workers from being subjected to detriment related to trade union membership or taking part in trade union activities. Union members and representatives have some protection around being victimised or dismissed for exercising their right to time off for trade union duties as well as for work relating to their trade union role. Section 146 of the TULR(C)A92 also gives workers the right “not to suffer any detriment” by an act of deliberate omission on the part of the employer – provided that

#### Trade Union Duties v Trade Union Activities

Under TULR(C)A92 protections it is important to define what the difference is between these two things:

**Trade Union Duties** – Refers to any issues that relates to collective bargaining and individual representation – this can include pay negotiations, member disciplinary hearings or training.

**Trade Union Activities** – allows members to have ‘unpaid leave’ to take part in trade union activities like attending branch meetings or UNISON Conference. If a rep requires time off for trade union activities they should seek permission from their employer / line manager. Because the time off being requested is for ‘activities’ rather than ‘duties’ then permission might not always be granted.

Although there is no legal requirement to have one, most well-organised workplaces will have a formal time off agreement. Make sure you are aware of the Trade Union Facility Agreement which will contain all your rights to time off work.

the purpose of the omission is to prevent or deter them from joining or taking part in union activities. Detriment could mean a lot of different scenarios, but could include offering you less favourable terms and conditions than other employees, refusing to appoint you onto a permanent contract, limiting your promotional chances, and denying you training.

To be covered by these protections, the individual must be a worker (this includes permanent, fixed term, full-time, part-time and agency workers), the union needs to be independent (like UNISON) and the activities have to have been carried out at an “appropriate time” – This is defined in Section 146(2) as either outside of working hours or in working hours either agreed by the employer or set out in the agreement on time off.

UNISON has put together a comprehensive guide on [facility time](#) which sets out what rights reps have when requesting time off for trade union activities – especially when the time off relates to Health and Safety reps. Safety reps are entitled to paid time off for their duties as they are required to attend training, investigate complaints and take part in regular workplace health and safety assessments.

When a trade union rep raises a complaint under TULR(C)A92 it is for the tribunal to determine whether the action taken against a worker is in an ‘individual capacity’ and nothing to do with their trade union activities (a ‘collective issue’). In other words if a rep feels they have been a victim of unjust treatment because of activities they were involved in as part of their trade union role and they are disciplined, then this could be used as an example of victimisation on union grounds. Case study 1 below sets out how this rule works in practise:



### **FW Farnsworth Ltd v McCoid (1999) IRLR**

In this case the Court of Appeal found that the employer who took action short of dismissal against a shop steward had wrongly disciplined him ‘as an individual’ rather than on a ‘collective basis’. This meant that the employer’s actions fell within the scope of anti-victimisation provisions set out in Section 146 of TULR(C)A92 and that the employee (Mr McCoid) deserved protections under that law.

#### **Background**

Mr McCoid was a shop steward and the employer sought to derecognise Mr McCoid as a shop steward because of his conduct. Measures were taken and the shop steward was derecognised. Mr McCoid brought an Employment Tribunal claim under Section 146 of TULR(C)A92 stating that the employer had victimised him and that he should not have had the action short of dismissal taken against him from taking part in union activities and the employer should not have penalised him for doing so.

The Tribunal found in favour of Mr McCoid and agreed that the issue was a collective one rather than individual. However the employer appealed the decision and The Court of Appeal upheld the original decision and found for Mr McCoid stating that no action had been taken against the trade union as an organisation and the reasons for the employer’s actions related to Mr McCoid as an ‘individual’,

The Court of Appeal ruling went on to differentiate between ‘collective’ and ‘individual’ and stated that if Mr McCoid did not have the protection of section 146 of TULR(C)A 92 then the employer would be able to victimise him and damage his credibility at will.

## **Other protections in law for requesting time off for trade union activities**

Time off for trade union activities is also covered under other legislation, for example Section 44 of the Employment Rights Act 1996 (ERA 96) protects safety reps from suffering detriment when they are carrying out their duties as a safety rep. It is very important that if reps feel they have suffered a detriment due to their trade union activities they should speak with their branch secretary and regional officer as soon as possible. There are strict deadlines involved which must be met – any incidents outside of these time limits will not be considered by a tribunal. Case study 2 below is an example of where a claimant was out of time for some of their claim but the complaint under TULR(C) A92 was considered:

### **Yewdall v. Secretary of State for Work and Pension 2.9.05 EAT**

In this case the employment tribunal dismissed the employee's claim that he had been subjected to a detriment for his trade union activities.

#### **Background**

Mr Yewdall held many positions in his employment including health and safety officer. Over a period of 1999 – 2003, Mr Yewdall raised concerns with his employer as well as raising internal grievances about the insufficient support he was receiving from his employers when he raised issues of concern around health and safety. In 2003 he lodged three applications with the employment tribunal but only one complaint was pursued and that was under TULR(C)A92.

Mr Yewdall claimed that he had suffered a detriment (short of dismissal) with regards to his promotional opportunities and that the victimisation Mr Yewdall had been subjected to had taken a toll on his health.

As the complaints had taken place across a period of time, two of his complaints were not considered as they were deemed to be 'out of time' and one application under TULR(C)A92 was considered and dismissed. This decision was appealed (and also dismissed) - At the appeal the tribunal considered the timeline of events listed in the complaint and found they were 'out of time'. The tribunal also noted that the complaint was around suffering a detriment for 'trade union activities' however the tribunal established that Mr Yewdall was only a union member and not an official (and had never held a position as a union rep) and the complaint had arose whilst he was acting on his employer's behalf – this was not sufficient to bring a claim under Section 146 of TULR(C)A92 as he was not on the "trade union side" when he had raised his health and safety concerns.

In addition to statutory rights, to support trade union reps in their role under section 199 of the Trade Union and Labour Relations Act 1992, ACAS have drawn up a code of practice (revised January 2010). The purpose of the code is to aid and improve effectiveness of the relationship between employers and trade unions. The code states that union reps are entitled to time off where their duties are concerned with:

- Negotiations with the employer about matters which fall within section 178 (2) of the TULR(C)A 92 and for which the union is recognised for the purposes of collective bargaining by the employer;
- Any other functions on behalf of employers of the employer which are related to matters falling within Section 178 (2) TULR(C)A and which the employer has agreed the unions may perform;
- The receipt of information from the employer and consultation by the employer under Section 188 TULR(C)A related to redundancy or under Transfer of Undertakings (Protection of Employment) (TUPE) Regs 2006 that applies to employees of the employer;
- Negotiations with a view to entering into an agreement under Regulation 9 of the TUPE Regs 2006 that applies to employees of the employer;
- The performance on behalf of employees of the functions related to or connected with the making of an agreement under Reg 9 of the TUPE regs 2006.

### **European Law Protections**

European Regulations offer protections for employee reps who request time off, as Regulation 28 and 29-33 of the Transnational Information and Consultation of Employees Regulations 1999 (TICE Regs 99) makes it unlawful for employee reps to be dismissed or suffer a detriment for requesting time off for this role and protects employee reps when they are negotiating with an employer or during a dispute. The TICE Regs are particularly important where an employer has an agreement covering the European Works Council as it allows for reasonable time off during work time. The TICE Regulations and ICE (Information and Consultation of Employees) Regulations 2004 are incorporated in UK law so they will continue after EU exit unless they are revoked.

### **Trade union representatives facing disciplinary action**

Occasionally UNISON representatives can face disciplinary action in their workplace. If the rep is at fault in their work then they will face disciplinary action like every other employee. However because stewards are negotiating with managers in their role, working hard to defend terms and conditions as well as protecting the health and safety of their members, they could be viewed negatively and become unpopular with management and be the victim of unfair treatment. In some very rare occasions reps have become the target of unjust disciplinary action or are prevented from carrying out their role as a UNISON rep.

UNISON reps should contact their branch secretary if they think that they are experiencing victimisation. Some disciplinary procedures will set out the action that needs to be taken before an employer lodges formal disciplinary proceedings against a UNISON rep.

[UNISON's model disciplinary agreement](#) sets out that the full-time UNISON official should be contacted and made aware of the issue before a UNISON rep is disciplined. This practice is also recommended by the ACAS code of practice on disciplinary and grievance procedures. In some cases the branch secretary or regional official can deal directly with the employer and resolve the issue, but in some cases it may need to be referred for legal advice.

## **Have I been the victim of unfair treatment for trade union activities (collective issue) or am I being disciplined / harassed on an individual issue?**

As discussed in case study 1 as a rep you need to determine if the unfair treatment you have been subjected to is as a result of your trade union activities (collective issue) or whether the issue has occurred due to an individual issue between you and the employer— for example a performance management issue or misconduct. Union reps need to be aware that they are subject to the same disciplinary procedures as every other member of staff and there are no special privileges. If a rep has contravened any of their employer's policies they will be subjected to the disciplinary process and TULR(C)A 92 will offer no protections on individual employment issues.

## **What should I do if I have submitted a grievance regarding victimisation on union grounds?**

If a UNISON rep has submitted a grievance to their employer due to victimisation and feel they have been treated unjustly then the Branch Secretary will need to deal directly with the employer and inform their regional official.

## **Dismissal on the grounds of trade union activities**

Dismissal on the grounds of trade union membership or activities is extremely rare, and they are often complex cases to take to a tribunal. Section 103 of the Employment Rights Act 1996 it makes it automatically unfair to dismiss someone who is performing (or proposing to perform) any functions or activities of an employee representative or a candidate for such office.

If you are a union rep and are dismissed this is also covered by Section 152 of TULR(C)A92 and there is no qualifying period of employment required before a claim can be brought by an employee and interim relief may be ordered.

A Tribunal will look at if the union rep:

- 'had taken part' or 'proposed to take part' in activities of an independent trade union at an appropriate time;
- 'Activities' given a wider meaning including taking part in union meetings and recruitment activities;
- The employer's express or implied consent is necessary if 'appropriate time' is during working hours;
- Protected activities are greater if a rep is acting on the authority of the union<sup>1</sup>

Where a tribunal finds that a dismissal is due to trade union activities or membership, the tribunal may order that the employee is entitled to have their job reinstatement and in some cases compensation may be payable.

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<sup>1</sup> Update on Trade Union Victimisation, Dr Alan Bogg, Oxford University - 2009

## **What shall I do if I think I have suffered a detriment due to my trade union activities?**

### **1. Report to your Branch Secretary/Regional Officer**

As mentioned previously in this guide it is important that if a UNISON rep feels they have suffered a detriment for their trade union involvement they should get in contact with their branch secretary as soon as possible. The branch secretary will also need to seek legal advice and support from their regional officer/legal officer. If there is a legal case to bring then the legal officer may need to bring a claim of 'interim relief' (if appropriate) and this must be done within 7 days.

### **2. Don't leave it too long to report**

It is important that reps do not leave it too long before reporting any incidents and it is equally as important that they receive the advice and support they need. There are tight (three months less one day) legal deadlines that need to be adhered to if there is a legal case, so reps should be mindful of this when they report any incidents.

### **3. Keep a diary of events**

It is important to keep a detailed diary of events and any supporting documents / evidence, just in case there is a legal case to bring against an employer.

### **4. Don't worry - Cases of victimisation are rare**

Being a UNISON rep is an extremely positive, productive and rewarding role and cases of victimisation are rare. This is because, in most cases, reps work hard to build good relationships with their employers through local and national bargaining structures. If cases do occur UNISON branches are equipped to support reps in their roles and offer advice and guidance on any issues that may be worrying reps.

### **5. Contact Bargaining Support**

Bargaining Support can offer advice on workplace issues that are concerned with terms and conditions including advice on negotiating a disciplinary agreement with your employer. We can also put you in touch with unison officers with specific expertise in other areas like campaigning and health and safety. If you have any concerns or require further information email [bsg@unison.co.uk](mailto:bsg@unison.co.uk)

## **Further Information**

[UNISON Facility Time Guide](#)

[ACAS Code of Practice on requesting time of union activities](#)

[Organising for Health and Safety Guide](#)

[UNISON Representation Guide](#)

[UNISON's model disciplinary agreement](#)

[ACAS code of practice of disciplinary and grievance](#)