



Limitations of the right to time off for union responsibilities

Written on behalf of the TaxPayers' Alliance by

Francis Hoar, LLB

Called 2001 (Lincoln's Inn)

Summary

The briefing shows that paid facility time is only supposed to be allowed for a certain set of trade union duties. Unpaid time is allowed for more widely defined trade union activities. Public sector employees are only entitled to paid or unpaid leave for trade union duties and activities if they have requested it from their employer, and if their request is reasonable.

Many public sector bodies do not seem to be going through the kind of process envisaged by industrial relations law. Based on earlier TaxPayers' Alliance research and an analysis of industrial relations law, this briefing suggests a number of problems with how facility time is currently allocated:

- Full time trade union officials: "A permanent role for union officials makes it much harder for that employer to exercise its right to refuse permission for the official to do certain tasks; or to consider those tasks before they are completed. Further, in certain circumstances there may be no activities or duties that a full time union official would have been given permission to perform were requests made on a case by case basis. Yet employers are effectively bound to grant permission for sufficient tasks to occupy full time union officials, as they have already agreed to pay them full time to undertake union duties."
- There are numerous public sector bodies which do not monitor the amount of facility time they have allowed, which "suggests that public sector organisations fail to approach requests for union 'time off' in the manner envisaged by the legislation and the ACAS Code. Rather, they appear to delegate to trade unions the employer's right and responsibility to determine the reasonableness of such requests."

About the Author

Francis Hoar, a member of Field Court Chambers in Gray's Inn, was Called to the Bar in 2001 and practises principally in the areas of employment, commercial law (including fraud) and public law.

Francis acts for both employers and employees across the range of employment matters. He regularly advises employers on proposed redundancy settlements, redundancy claims, proposed changes of terms and conditions and associated claims, unfair dismissal, TUPE transfers and associated claims and discrimination claims; and acts for employers and employees in cases in the Employment Tribunal, the High Court and the Court of Appeal.

Francis regularly lectures on employment law. He has recently had a webinar published by the *Local Government Lawyer* on 'Pursuing and Defending Claims under the Equality Act'.

In addition to lecturing, Francis writes as an expert in legal journals and websites, including the *Modern Law Review*, the *Local Government Lawyer* and *Counsel*, and has contributed to a book on the reform of human rights law. He is also an occasional contributor, as a legal expert, to the Victoria Derbyshire show on Radio 5 Live.

Introduction

The extent of the right of trade union members to paid and unpaid time off, or ‘facility time’, is an important issue for public sector employers. In a report of November 2011, the TaxPayers’ Alliance (TPA) found that public sector employers permitted trade unions an estimated £80 million in paid staff-time in 2010-11.¹ In July 2012, the Cabinet Office issued a consultation into the means by which the indirect subsidy to trade unions might be reduced under the existing regulatory framework.² Attempts to reduce facility time have met with strident trade union opposition.³

Much of the debate has been framed in response to the large number of employees paid by public sector employers to work full time on union responsibilities. This is not a legal requirement: the law only permits employees to ‘request’ time off and requires such requests to be allowed only where the request is ‘reasonable’ and where the union work falls under defined responsibilities.

This is an important distinction – employers must be permitted to consider requests whenever union members request time-off and must be able to determine whether each request is reasonable before deciding whether to allow the request.

An employee has no right to take time off without permission, even if it would inevitably have been granted had he asked.⁴ (It should perhaps be emphasised that an exception to this is in relation to disciplinary and grievance hearings, where an employee has an absolute right to be accompanied by a union representative or fellow worker of his choice. In such cases, the employer must allow the fellow worker reasonable time off.)

ACAS issued a code of conduct in 2010, which includes comprehensive guidance to employees and employers about the extent of employees’ rights to time off for trade union responsibilities.⁵ As a guide to good practice, the Code does not have legal force. However, it may be taken into account in Employment Tribunal proceedings where it relates to any issue under dispute. The Code is particularly likely to be considered where there is a dispute between employer and employee over whether an employer’s request for time off was ‘reasonable’.

This briefing note outlines the limitations of employees’ rights to be permitted to take time-off for union duties, union activities, training activities and within grievance and disciplinary hearings and investigations. It is intended as a guide to the existing regulatory framework, particularly for public sector employers, although it will be of relevance to any employer.

The headings in this document talk about trade union ‘responsibilities’. This is not a term used in the legislation but is used generically to refer to all occasions on which employees may request paid or unpaid time-off, which fall into distinct categories with separate (although overlapping) legal requirements.

¹ TaxPayers’ Alliance, *Taxpayer funding of trade unions 2011*, November 2011: lowtax.es/OLNsmr

² Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service*, July 2012: lowtax.es/Teoq71

³ Unison News Update, *Unions Under Attack*, July 2012: lowtax.es/R3ev3x

⁴ *Ryford Ltd v Drinkwater* [1996] IRLR 16, EAT

⁵ ACAS, *Time Off for Trade Union Duties and Activities, Code of Practice 3*, January 2010: lowtax.es/Q1PVdU

The right to request time off for trade union responsibilities

Exclusions

The following categories of employee do not have rights to request or be granted time-off for union responsibilities in any circumstances:

- Employees engaged overseas, other than certain employments in territorial waters or on the continental shelf (although this area is replete with difficulty and employers would be advised to take legal advice before refusing requests for time off from such employees);⁶
- Share fishermen;⁷ and
- Employees of the police services and forces.⁸

Because persons holding the office of 'constable' are not considered 'employees',⁹ they also do not have rights to time off for union (or police federation) activities. It would appear from TPA research, however, that some police authorities do permit Police Federation members 'facility time'.¹⁰ Whether time is granted to representatives of the Police Federation – and whether they should be paid – is a matter entirely within the discretion of their respective police forces.

Employees do not have the right to time off for activities that themselves constitute industrial action (although this does not include taking part in ballots over whether industrial action should be taken).¹¹ Were an employee to strike, for example, he would be entitled to do so under separate legislation (providing the legal requirements, such as balloting, were met) but would not, of course, be entitled to be paid for the duration.

Facilities

Employers are not obliged to provide facilities for union officials (save in the case of negotiations relating to TUPE – where employees may be transferred to another company – or to collective redundancies), though the Code recommends that facilities be made available to allow officials to perform their duties and to communicate effectively with their members and other union officers and officials.¹²

Union officials are obliged to protect their employer's confidential information¹³ and employers must not intrude upon or monitor the union's confidential communications.¹⁴

⁶ Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), s 285

⁷ TULR(C)A, s 284

⁸ TULR(C)A, s 280

⁹ *Metropolitan Police Comr v Lowry-Nesbit* [1999] ICR 401, EAT

¹⁰ TaxPayers' Alliance, *Taxpayer funding of trade unions 2011*, November 2011: lowtax.es/OLNsmr

¹¹ TULR(C)A, s 170 (2)

¹² ACAS Code (*supra*), para 46

¹³ *Ibid*, para 47

¹⁴ *Ibid*, paras 48 and 49

Meaning of 'time off'

Time off work is defined as requests to undertake union responsibilities (in their widest sense) during working hours.¹⁵ Employees need not make any request to undertake those responsibilities outside their normal working hours (including in circumstances where they have been requested to work by their employer – for example on overtime – but have an absolute right not to do that work). Equally, there is no obligation for employers to allow employees extra time off or pay in lieu of union work done outside their normal working hours.¹⁶

Right to request paid time off: union 'duties'

Requests may be made for time off to undertake trade union 'duties'. These must be duties of the union official making the request and must be expressly or impliedly conferred on him by the union. They cannot, for example, include attendance at an unofficial meeting where his union does not require him to attend.¹⁷ Union 'duties' include the following:

- Negotiating duties:

The duties must be concerned with collective bargaining, which includes planning and preparing for such negotiations. Negotiating must be concerned with the items listed in s 178 (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), that is:

- Terms and conditions of employment (which would include pensions, equal opportunities, learning and training needs),
- The physical working environment (including health, safety and welfare),
- Hiring and firing, termination and suspension of employment (including redundancy arrangements),
- Allocation of work (including job grading, job evaluation, flexible working arrangements, family friendly policies),
- Discipline (including disciplinary procedures, arrangements for representing union members at internal interviews or at employment tribunals),
- Union membership or non-membership (including representational rights, and induction procedures),
- Facilities for union officials, negotiating and other machinery (including grievance procedures).

- Industrial relations duties:

This does not include any action that could itself constitute industrial action (see above). To qualify as industrial relations duties, three tests must be met:

¹⁵ TULR(C)A s 169

¹⁶ *Hairsine v Kingston upon Hull City Council* [1992] IRLR 211, [1992] ICR 212, EAT

¹⁷ *Ashley v Ministry of Defence* [1984] IRLR 57, [1984] ICR 298, EAT

- They must be performed on behalf of employees of the employer concerned. Although there is no need for the duties to be performed exclusively for those employees, the official cannot perform duties for the benefit of the union if those duties are of no direct concern to his fellow employees in the firm;

- The duties must relate to some industrial relations function;¹⁸

- The function must be one which the employer has agreed to let the union perform.

- Collective redundancies and transfer of undertakings:

Union officials may request time off work to receive information and consult about collective redundancies¹⁹ or where there is a proposed transfer of employees.²⁰ Similar regulations permit employees to request time off to receive information and consult where there is an insolvency rescue package which may entail the sale of a part of a business.²¹

- Training in Industrial Relations:

Union officials may request paid time off to undergo training in their duties (as set out above) in relation to industrial relations. This must be relevant training: it must relate to responsibilities an official is likely to have now or in the future;²² but not, for example, aimed at a more senior union official.²³ The course must also be approved either by the TUC or by the official's union. However, that the TUC or the official's union considers the course relevant is not conclusive proof that it is.²⁴

- Disciplinary and Grievance hearings:

Wherever he is required to attend a disciplinary or grievance hearing, a worker has an absolute right to be accompanied by a fellow worker or by a trade union official certified by his union to have the appropriate training or experience.²⁵ If the fellow worker is not a union official, the employer must allow him to attend. If a union representative, the employer may only insist that he is certified (as above) and must allow union representatives to accompany the worker even if he is not their 'constituent' (eg, he comes from another part of the business or from elsewhere). In both cases, the fellow worker or union official must be paid for the reasonable time they spend on the case and must not suffer a detriment as a result of doing so.²⁶

Right to request paid time off: Union Learning Representatives

Another union member entitled to request and, where reasonable, be granted paid time off is a Union Learning Representative (ULR). ULRs must be elected or appointed to be a ULR in accordance

¹⁸ TULR(C)A 1992 ss 168 (1) (b) and 178(2)

¹⁹ TULR(C)A 1992 s 188

²⁰ Transfer of Undertakings and Protection of Employment Regulations SI 2006/246

²¹ TULR(C)A 1992 s 168 (1) (d) and (e)

²² *Young v Carr Fasteners Ltd* [1979] IRLR 420, [1979] ICR 844, EAT

²³ *Menzies v Smith & McLaurin Ltd* [1980] IRLR 180, EAT

²⁴ *Ministry of Defence v Crook and Irving* [1982] IRLR 488, EAT

²⁵ Employment Rights Act 1999 (ERA), s 10

²⁶ ERA, ss 10 (3) (b) and 12 (1) (b)

with the rules of his union,²⁷ be accredited to his employer²⁸ and must have had sufficient training, unless claiming time off to receive such training.²⁹

So far as training is concerned, the union must inform the employer that the potential ULR is about to receive training and, unless that training is received within six months, that worker will not be entitled to time off to train. The union must also give notice when sufficient training has been received.³⁰

A trained ULR has the right to request time off in order to train fellow union members in one of these four categories:

- analysing learning or training needs;
- providing information and advice about learning or training matters;
- arranging and supporting learning or training, and
- promoting the value of learning or training.³¹

A ULR (or a worker receiving training to be a ULR) has the same right to be paid for time off granted by an employer as a union official conducting union duties (see above).³² The law in relation to requesting permission is also applied in the same way.³³

Right to request unpaid time off: union activities

Any member of a trade union may request unpaid leave in order to engage in union activities. These are widely defined but include: participatory activities such as attending workplace meetings, consulting union officials, voting in union ballots (including strike ballots) and voting in union elections; and representative activities, such as attending branch, area, regional or national committees of the union, being a delegate to the union's annual conference, or meeting full-time union officials to discuss workplace business.³⁴ Time off for representative activities can only be requested by official representatives.

Also under this category, union members may request reasonable unpaid time off to consult UTLs, but only where the UTL is fully trained and accredited and would also be entitled to take time off.³⁵

²⁷ TULR(C)A 1992 s 168A(11)

²⁸ TULR(C)A 1992, s 168A (4) (a)

²⁹ TULR(C)A 1992, s 168 (4) (b)

³⁰ TULR(C)A 1992, ss 168A (4) and (5)

³¹ TULR(C)A 1992, s 168A (2)

³² TULR(C)A 1992, s 169

³³ TULR(C)A 1992, s 173 (1)

³⁴ ACAS Code, paras 37 and 38

³⁵ TULR(C)A 1992, ss 170 (2B), (2C) and (3)

Right to refuse request where it is unreasonable

Introduction: employer only required to allow reasonable requests

As has been set out, employees may not take time off unless and until they have been given permission. If an employer does not give permission, they may not take it upon themselves to take the time off anyway, although they would be entitled to compensation (through the Employment Tribunal) if the employer should not have refused their request.

Time-off for mixed purposes

Time off may be requested for 'mixed' purposes, for example where a union representative attends a meeting or conference where he exercises union 'duties' (eg his representative functions) but also engages in union 'activities' (for example, a discussion about government policy or whether industrial action should be contemplated). In those circumstances, the employer should firstly decide whether it is reasonable to permit time off for either function.

If the employee is permitted to take time off, the employer and employee should agree how much time off is for union 'duties' and should be paid; and how much is for 'activities' and should not.³⁶

Assessing reasonableness

The Employment Tribunal has held that an employer's refusal will only be unreasonable if it is not 'within the band of reasonable responses' to such a request.³⁷ Thus, it will only find against an employer if 'no reasonable employer' could have refused the request in similar circumstances; or if the reasons for the refusal were clearly unfair.

In determining whether a request is reasonable, the employer is entitled to take into account four considerations:³⁸

- 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.

The ACAS Code has an important role in assessing reasonableness, as employers (and Employment Tribunals, where it is asked to reconcile disputes) must have regard to it when deciding upon a request.³⁹

Some factors listed by the Code are: 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 matters of health and safety.⁴⁰ Employers must also take into account the difficulties a union representative

³⁶ *RHP Bearings Ltd v Brookes* [1979] IRLR 452 EAT; *Beal v Beecham Group Ltd* [1982] 3 All ER 280, CA

³⁷ *Ministry of Defence v Crook and Irving* [1982] IRLR 488, EAT

³⁸ TULR(C)A 1992, s 168 (3)

³⁹ TULR(C)A 1992, s 168 (3)

⁴⁰ ACAS Code, para 42

may have in doing his duties, for example due to the shift patterns of employees he represents.⁴¹ However, the employer is entitled to take into account how much time the official has already been granted.⁴²

Another important consideration in relation to requests by Union Learning Representatives is whether or not the employer has in place similar training for employees. This is recognised by the ACAS Code, which says that:

“Many employers have in place well established training and development programmes for their employees. Union Learning Representatives should liaise with their employers to ensure that their respective training activities complement one another and that the scope for duplication is minimised.” (At para 17.)

It is likely to be reasonable for an employer to refuse a request by a ULR to set up a training programme where it duplicates an established programme run by the employer.

Examples

The following are examples of circumstances in which it was found to be reasonable to refuse requests for time off.

- An employee asked for ten days off to prepare a union magazine. In itself that might have been reasonable, but not where the employee already enjoyed 12 weeks' leave a year (albeit unconnected to her trade union membership), partly paid and partly unpaid.⁴³
- It was reasonable to refuse a request where an employee requested to attend an unofficial shop stewards' meeting, attendance at which is not expressly or impliedly required by his union.⁴⁴
- It was reasonable to refuse a teacher time off to attend a lobby of Parliament organised by his union to protest about an Education Bill. The Employment Appeals Tribunal held that the activity was too far removed from the employment relationship.⁴⁵ (This decision has been criticised for having purported to find that the lobby was not a trade union activity.⁴⁶ However, there is no doubt that this is a proper consideration for whether it is reasonable to grant time off, even if the lobby could have been considered a trade union 'activity'.)
- An employer was entitled to refuse a request for time off to attend a course on job security when the employee's union was already involved in negotiating a redundancy agreement. The course was held not relevant because it was too wide and general for the purpose and, in any event, it was designed for more senior union officials.⁴⁷

⁴¹ ACAS Code, para 43

⁴² ACAS Code, para 55

⁴³ *Wignall v British Gas Corporation* [1984] IRLR 493, [1984] ICR 716, EAT

⁴⁴ *Ashley v Ministry of Defence* [1984] IRLR 57, [1984] ICR 298, EAT

⁴⁵ *Luce v London Borough of Bexley* [1990] IRLR 422, [1990] ICR 591, EAT

⁴⁶ By the editors of *Hervey on Industrial Relations* ((2012) NI, 8, F (2))

⁴⁷ *Menzies v Smith & McLaurin Ltd* [1980] IRLR 180, EAT

Full time union officials

The practice of permitting trade union officials to work full time on union business is one that appears to have arisen in ad hoc arrangements between employees (and especially public sector organisations) and trade unions. It is not required – or even mentioned – in the legislation or in the ACAS Code, although the latter does advise about the desirability of agreements between employers and trade unions concerning practical arrangements for time-off and related requests.⁴⁸

In certain circumstances, it might be argued that it is more convenient for a union representative to work full time on his responsibilities. This is not, however, the view of the Cabinet Office, which argues that:⁴⁹

“We believe for a trade union representative to function effectively and be able adequately to represent the views of employees, it is necessary for them to be actively involved in the work of their department or agency. Representatives currently in receipt of 100% facility time do not benefit from business skills that would be acquired from carrying out a Civil Service role. Equally, they are not delivering their primary function, that of an employee delivering a Civil Service job.”

There is another potential problem for employers, which is the risk that a permanent role for union officials makes it difficult or impossible for that employer to exercise its right to refuse permission for the official to do certain tasks; or to consider those tasks before they are completed. Further, in certain circumstances there may be no activities or duties that a full time union official would have been given permission to perform were requests made on a case by case basis.

Yet employers are effectively bound to grant permission for sufficient tasks to occupy full time union officials, as they have already agreed to pay them full time to undertake union duties.

This concern is borne out by evidence that many public sector employees do not monitor the work done by the union staff whose salaries they pay. The TPA’s recent research found that 257 public sector organisations kept no record of the time taken off by staff to carry out union duties.⁵⁰

This research also suggests that public sector organisations fail to approach requests for union ‘time off’ in the manner envisaged by the legislation and the ACAS Code. Rather, they appear to delegate to trade unions the employer’s right and responsibility to determine the reasonableness of such requests. How could the employer make such a decision where it takes no steps to find out what its union officials even do?

This approach – although not itself unlawful – gives power to trade unions that Parliament did not envisage or permit when giving their members the right to reasonable time off to perform their responsibilities. It might also be argued that it amounts to a dereliction of their duty to their council tax payers or to taxpayers generally (although this is perhaps a political matter.)

Whether or not that is the case, no trade union has the right to insist on any more than reasonable consideration of its members’ requests for time-off to undertake their responsibilities.

⁴⁸ ACAS Code, Section 5

⁴⁹ Cabinet Office Consultation, Proposal 2

⁵⁰ TaxPayers’ Alliance, *Taxpayer funding of trade unions 2011*, November 2011: lowtax.es/OLNsmr

Thus, employers may, if they see fit, end the practice of permitting certain employees to work for a trade union for the whole – or a substantial portion – of their working year. Obviously, where such arrangements are withdrawn reasonable notice to trades unions should be given and new arrangements made regarding requests for time-off. Although there is no requirement to do this, failure to allow the union notice or time to adjust to new circumstances might be found to be an unreasonable refusal to permit time-off: for example where a union representative paid to work for his union has a reasonable expectation of time off to do particular duties in the short term. It might also lead to the risk of industrial action.

Employers also have an absolute right to restrict or refuse access to facilities for union members, save where they are engaged in negotiating collective redundancy agreements or the transfer of employees to different organisations. Of course, as the ACAS Code sets out, it will often be reasonable for employers to permit such facilities in order to permit unions to carry out their responsibilities (widely defined).

Yet it is also reasonable for employers to review whether they are being more generous than they need be in their provision of office space and other facilities.

Finally, where employers do permit individual union officials to work full or part time on union responsibilities, they are fully entitled to require that officials seek their permission before engaging in any particular duty or activity. Even if this is not done, without monitoring the officials' output employers will be unable to review whether their officials are allowed more time-off than is reasonable.

Conclusion

Employers have important legal responsibilities to their employees to permit them adequate representation by their trade union. As has been seen, there are strict requirements that, when not met, can lead to expensive litigation in the Employment Tribunal; and are there to ensure good industrial relations.

Yet it appears that many public sector employers have not approached union 'facility' time in the manner envisaged by industrial relations law. Rather than arbitrating over individual requests for time off (as the law envisages), many have delegated those responsibilities to full time union officials.

Public sector employers moving away from paying full time union representatives should not expect to do so without opposition. But, as public officials, they have a duty to ensure that their expenditure is adequately accounted for and spread fairly. Quite apart from their clear legal right to require union members to request permission before taking time off, their duty is not only to their employees but to those receiving – and paying for – their services.