

Wiltshire Council

Annual Council

13 May 2014

Notice of Motion – Recognition of Trade Union Rights

From Councillors Jeff Osborn and Terry Chivers

Purpose of report

1. The purpose of this report is to provide information regarding the motion to be raised by Cllrs Jeff Osborn and Terry Chivers at the next full council meeting on 13 May 2014 regarding trade union recognition being included in all future tenders.

Main Considerations

2. Under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE), trade union recognition agreements transfer where the transferred group of employees maintains an "identity distinct" from the remainder of the transferee's undertaking after the transfer (regulation 6(1), TUPE).
3. The term "identity distinct" has been defined as requiring the group of transferred employees to have the power to govern itself without the direct intervention of the transferee. If the group of staff, therefore, is reorganised and fully integrated into the transferee's business on transfer, union recognition will not transfer. The transferred employees can still retain their union membership even if the trade union is not recognised.
4. There is also a statutory process, entirely separate to TUPE, where the unions, if certain conditions are met, can require an employer to recognise them for collective consultation processes. In any event, employees have a statutory right to be represented by a colleague or union representative in certain processes such as disciplinary and grievance procedures.
5. The International Labour Conventions merely state that employees should have the freedom of association to join a trade union and the right not to suffer a detriment if they do so. All employees currently have these rights by virtue of the Trade Union and Labour Relations (Consolidation) Act 1992.

Employees still have the right to join a trade union whether a union is recognised by their employer or not.

6. Section 17 of the Local Government Act 1988 (LGA 1988) requires a local authority to avoid the inclusion of “non-commercial” considerations in its tender documents. This has been much amended since 1988 to allow, for instance, inclusion of criteria related to the Equalities Act. However, it still contains as a prohibited non-commercial consideration “the terms and conditions of employment by contractors of their workers or composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces” except to the extent that it is necessary to take this into account to allow an authority to meet its duty to ensure continuous improvement in the way it exercises its functions.
7. The Public Contract Regulations 2006 (PCR) are a transposition of an EU directive and as such sit higher in the interpretative hierarchy than the 1988 Act. Regulations 23 and 45 do provide limited mandatory grounds for excluding prospective tenderers from tenders. These grounds relate generally to insolvency, criminal wrong-doing or grave professional misconduct. Matters in relation to employee/union relations are not in this list. It is very unlikely that a Court would rule that the non-recognition of unions by a private employer would amount to grave professional misconduct such as to justify exclusion from a tender.
8. Further, (and mirroring to some extent the LGA 1988 section 17 provision referred to in paragraph 6 above) regulation 30 (2) requires that evaluation of tenders is done using criteria that are “linked to the subject matter of the contract”. Regulation 30 (2) does give a list of things that are linked to the subject matter of the contract, which includes such things as “technical merit”, “running costs”, “quality” etc. There is, however, nothing in the list that makes any reference to a tenderer’s organisation of its workforce.
9. Case law shows that evaluation criteria which are not specifically in this list (or are otherwise made good evaluation criteria by other parts of the regulations, such as environmental considerations), and which go beyond a proportionate reflection of the authority's legitimate requirements in connection with the contract, are likely to be prohibited by the regulations. Requirements which are applied to economic operators' business activities as a whole, as opposed to the service, goods or works to be supplied under the contract, run a high risk of being prohibited by the regulations.
10. In terms of any future considerations to outsource staff, it would be very difficult to enforce trade union recognition for the following reasons:

- Evaluation criteria for tenders are very specific and trade union recognition is not a valid evaluation criteria.
- There is also the likelihood that requiring trade union recognition may deter some tenderers from bidding, particularly small employers or those who do not currently have a unionised workforce.
- Furthermore, it may affect the cost of any bid as there would be some additional costs for any new providers in relation to requirements to provide facilities and other financial support as outlined in any recognition agreement.

Financial implications

11. As outlined above the requirement to recognise trade unions may increase the cost of the contract and may limit the number of contractors who are prepared to bid.

Legal Implications

12. Legal considerations are set out in the body of the report.
13. The introduction of a non-commercial consideration such as is proposed is likely to be held by a Court to be prohibited by the legislation rendering the tender process unlawful.

Conclusion

14. There are already statutory processes for considering union recognition during the TUPE process and with contracting parties.
15. There is already statutory protection for employees' freedom of association to join a union and for union representation for employees within certain employment processes.
16. However, in terms of any future contracts it would not be possible within the current statutory framework to use as evaluation criteria a public commitment to recognise Trade Unions for collective bargaining purposes.

Recommendation

17. Council is asked to consider its response to the proposed motion in the light of the legal advice contained in this report.

.Ian Gibbons
Associate Director Law & Governance

Report author: Frank Cain, Head of Legal Services