CHECK-OFF ARRANGEMENTS - THE LAW

14 March 2014

Introduction

As part of a wider attack on trade unions by the Tories, check-off arrangements between trade unions and employers are under threat. This briefing note explains the legal framework relating to check-off arrangements. In relation to statute law, it looks at Sections 68 and 68A of the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRA) and S.14 *Employment Rights Act (ERA) 1996*. In relation to case law, it looks at the older case of *Williams v Butler* and the more recent case of *Hickey and Hughes v Secretary of State for Communities and Local Government* - Eric Pickles' failed attempt to end check-off arrangements in DCLG. Brief conclusions are then drawn.

Statutory provisions on check-off

The forerunner of the current Section 68 TULRA 1992 was introduced by the Thatcher government to force employers to gain the permission of individual workers before subscriptions could be deducted from pay; gave a legal right to members to stop those arrangements by direct instructions to the employer (over-turning, in part, the *Williams* principle -see below); introduced a requirement for the renewal of written permission every three years; and introduced a requirement for written notice of any increase in subscriptions to be given before that increase could be implemented. The latter two requirements were dispensed with by the Labour government in 1998.

The amended Section 68 still does not impose any legal obligation on an employer to continue check-off arrangements indefinitely. That remains a matter of agreement between the union, the employee and the employer. Under S.68 TULRA, in order for check off deductions to be lawful, the worker must have authorised the deductions in writing and not given written notice of the withdrawal of that authorisation (in time for that notice to be acted upon by the next pay date).

Section 68(3) provides that a "*worker's authorisation of the making of subscription deductions from his wages shall not give rise to any obligation on the part of the employer to the worker to maintain or continue to maintain subscription deduction arrangements*". That does not, in our

view, however, prevent check-off arrangements becoming contractual whether by way of individually enforceable provisions in collective agreements, contractual terms in the contracts of individuals, or by custom and practice. Those issues are explored in more detail below.

Section 68A TULRA gives a worker the right to make a complaint to an Employment Tribunal where check-off arrangements are in place without his / her authorisation or where that authorisation has been withdrawn in writing. Unauthorised check-off deductions might also amount to a contravention of the requirement not to make a deduction without having given the particulars required by S.8 (itemised pay statement) or S.9 (1) (standing statement of fixed deductions) of the ERA 1996; an unauthorised deduction of wages (S.13 ERA 1996); or a contravention of the requirement not to make deductions of political fund contributions in certain circumstances (SS 86(1) or 90(1) TULRA). Where the relevant authorisation has been given, S.14 (4) ERA 1996 provides that check-off deductions do not amount to an unauthorised deduction of wages. Any dismissal for exercising this statutory right is automatically unfair (S.104 ERA 1996).

Case law on check-off

Prior to S.68 TULRA 1992, if the employer and the union had agreed that employees were to send to the union both written authorisation for the deduction and notice of withdrawal of that authorisation *via the union*, the worker did not have a right to give written notice of withdrawal directly to the employer. That was what happened in *H R Williams v Butlers Ltd* in which it was held that those arrangements formed part of Mr Williams' terms and conditions of employment.

It is still something of a mystery why Mr Williams did not undertake the simple task of writing to his trade union to end check-off arrangements, rather than his employer. Nevertheless, the predecessor of S.68 TULRA was designed by the Thatcher government to over-ride any contractual provision requiring written notice to end check-off arrangements to be given via the union instead of directly to the employer; as well as imposing a requirement that the authorisation be specifically renewed every three years; and introducing a requirement for written notice of any increase in subscriptions to be given before that increase could be

implemented. The latter two requirements were dispensed with by the Labour government in 1998.

The *Hickey* case arose from attempts by Eric Pickles to end check-off arrangements in the Department of Communities and Local Government (DCLG). The three recognised trade unions, PCS, Prospect and FDA, received notification in the middle of July 2013 of the termination of check-off arrangements with effect from 1 September 2013. PCS instructed Thompsons to send a letter before action to DCLG, threatening legal action to prevent a breach of contract of the 664 PCS members affected. The Department refused to back down. Court proceedings were issued and a speedy trial was ordered which took place on 3 September 2013. Judgement was given on the same day for PCS.

The claimants in *Hickey* relied on a paragraph in the Staff Handbook which stated: "*if you are a member of one of the officially recognised trade unions, one method by which your union subscriptions can be paid is for you to ask the Department to deduct all or part of the subscription from your pay and to transfer this to the appropriate trade union ...*". This clause was "highlighted" in the Handbook and the agreement expressly provided that such highlighted terms were intended to have contractual effect.

The High Court held that "*the natural meaning of the words 'subscriptions can be paid' is that they confer a contractual entitlement to pay the subscriptions in the way described. The words 'can be paid' mean that the employee is entitled to pay in that way if he asks to do so. If the Department were entitled to discontinue the arrangement and to refuse to operate checking-off, the position would be that contrary to that language, the employee cannot pay in that way.*"

The judge also commented: "*I am not impressed by the argument that check off is only or primarily for the benefit of the union as such, rather than for its members in their capacity as employees. It seems to me that there is a real benefit to employees in the administrative convenience of not having to make their own arrangements for payments each month, or having to set up a direct debit or standing order and then change it or replace it from time to time as may be necessary. Moreover, the benefit to the union in the arrangement consists in part in the savings in time and cost in not having to undertake the administrative exercise of collecting*

payments individually from members. Any cost benefit to the union is necessarily a benefit to its members as such and in their capacity as employees. It also seems to me that an efficient and secure system of subscription collection for a union is in the interest of all its members. Each member benefits from the efficient and secure collection of dues from other members and check-off benefits each member in that way."

Both *Hickey* and *Williams* concerned situations where the check-off arrangements were held to be contractual. In *Hickey*, it was clear that the affected employees had an individual contractual right to check-off arrangements. Post-*Hickey*, it will be much harder for employers to argue that such clauses are not apt for incorporation. We also consider that where collective agreements exist, which are either expressly or impliedly incorporated into individual's contracts of employment, such arrangements will give rise to contractual rights directly enforceable by individuals. That was the case in *Williams*, where the rules relating to the check-off arrangements which required authorisation via the union for both the commencement of check-off deductions and the termination of the check-off deductions, were contained in the agreement between the trade union and the employer. S.68 (3) TULRA does not in our view prevent such arrangements becoming contractual through the incorporation of collectively agreed terms into individual contracts through custom and practice.

Conclusions

In the current political climate in which trade unions face continuing threats, some employers may see the discontinuance of check off arrangements as a way of attacking trade unions and reducing trade union membership in their workplaces. We recognise that many trade unions already rely wholly or mainly on the deduction of subscriptions by direct debit in order to avoid that threat. Where check-off arrangements are in place, trade unions may want to check the contractual position in order to decide what further action they need to take to defend their position in those workplaces.

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Head Office Briefing

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