Right of Trade Unions to Access Workplaces

Consultation response on behalf of Thompsons Solicitors LLP

Thompsons is the most experienced trade union, employment rights, and personal injury law firm in the country, with 19 offices across the UK. It acts only for trade unions and their members on employment and industrial relations issues.

Thompsons represents most UK trade unions and advises on the full range of employment rights issues through its specialist Trade Union Law Group and employment rights department.

Thompsons is a large employer with over 250 employees.

Section 1- Requesting and negotiating an access agreement

1A: How to apply for access and respond to a request for access

1. Do you agree access requests and responses should be made in writing

Yes, Thompsons agrees that access requests and responses should be made in writing.

2. Do you agree access requests and responses should be provided directly via email or letter?

Yes, Thompsons agrees that access requests and responses should be provided directly via email or letter to a contact within the organisation in which the Union is seeking access.

3. Do you agree access requests and responses should be made through a standardised template provided by the government?

No. We agree it would be helpful for the Government to provide a standardised template as an option. However, we do not think that it should be mandatory for applications to be made in this form. Provided the request contains the prescribed minimum information (in relation to which, see our response to question 4), applications should not be rendered invalid by virtue of not being in a prescribed form. It may not be practical in all circumstances for unions to provide information in a prescribed form and the right should not be denied by "technical traps". It should not therefore be open to employers to decline to engage with access requests or resist CAC applications on the basis that a prescribed form has not been used, despite the fact that the prescribed minimum information has been given.

4. Do you agree with the proposed information to be included in a trade union's request for access?

We consider it is reasonable for the union to supply some basic information to the employer to underpin its request for access. However, it is important the legislative requirement is framed in such a way as to make clear that inaccuracies in the information provided about the description of the group of workers and location of access do not invalidate a request. Access requests will inevitably be made by unions that are not already recognised by the employer. It is therefore likely that in many cases it will be practically impossible for the union to comprehensively describe "the group of workers" that the union is seeking access to, and in many cases, it may not be possible to provide a meaningful description of the type, nature or location of access at this early stage. It should not be permissible for an employer to entirely reject a request or resist a CAC application on the basis that the description of the workers is not sufficiently accurate.

We do not consider that unions should be required to inform employers of the number of members it has at that workplace. Trade union membership is special category personal data, and workers can face substantial prejudice if their trade union membership is disclosed to their employer. Whilst we anticipate it would ordinarily not be possible to identify individual employees in an access request (such that this information would not constitute personal data), there are scenarios where an employer would be able to identify which individuals it employs are union members, for example if a union stated that it had X members in a workplace, where X is 100% of the workforce. We do not consider that the question of existing membership levels is relevant to a determination of whether a union should be entitled to access the workplace and therefore see no reason hy it should be provided.

We consider that a union should also include their certificate of independence in the request to safeguard the process from abuse by non-qualifying associations.

5. Do you agree with the proposed information to be included in an employer's response to a trade union's access request?

Yes, Thompsons agrees with the proposed information to be included in an employer's response to a trade union's access request (although see comments further down about grounds for rejecting a request).

6. Do you agree with the proposal on how the parties should notify the CAC that an access agreement has been reached?

Yes, Thompsons agrees with the proposal on how the parties should notify the CAC that an access agreement has been reached. We also agree a template would be a helpful guide to provide this information provide it as not an unqualified requirement to provide it in that form.

7. Do you agree with the proposal on how joint notifications to the CAC of a variation of revocation of an access agreement are made?

Yes, Thompsons agrees with the proposal on how joint notifications to the CAC of a variation or revocation of an access agreement should be made.

1B: Response, negotiation, and referral to the CAC periods

8. Do you agree with the proposed time period of 5 working days for the employer to respond to the trade union's request for access?

Yes, Thompsons agrees with the proposed time period of 5 working days for the employer to respond to the trade union's request for access. If this was to be varied it should only been done so through agreement of both parties.

9. Do you agree with the proposed time period of 15 working days for the employer and trade union to negotiate the terms of an access agreement?

Thompsons considers that the proposed time period of 15 working days for the employer and trade union to negotiate the terms of an access agreement is appropriate as a default position, but is unlikely to be suitable for all negotiations, such that there should be provision for extension of this period by agreement.

We agree that 15 days is a reasonable period for an employer to engage with the union. If an employer fails to do so, the union should be entitled to apply to the CAC for a decision after 15 days elapses.

However, the 15-day period may be insufficient, such that it should be permissible for unions and employers to extend the negotiation period by agreement. This will be particularly useful in instances where both the employer and union have reached agreement in principle but have not yet agreed final terms. We envisage this will reduce the workload of the CAC and increase the likelihood of access agreements being reached on a voluntary basis.

10. Do you agree that there should be a limit of 25 working days for a party to request that the CAC make a decision on access following an access request being submitted?

No, we do not consider that there should be a limit of 25 working days from the date of the initial request for a party to apply to the CAC for determination. The current timeframes allow the employer a five working day response period and then provide for a further 15 working days of negotiations. If an employer and union were to use the entire allocated period, this would leave a union only 5 working days following the end of negotiations to apply to the CAC for a decision. If a union failed to do so in time, as we understand the position it would be required to begin the entire process again. This would be a significant waste of union and employer resources, as they would be required to re-negotiate a matter they had only recently sought to negotiate (without success).

We do not see any need for a 25-working day deadline for the making of a CAC application. Neither the employer nor the union would be prejudiced by a CAC application being made more than five days after the parties had failed to reach agreement. We consider that the CAC should be permitted to entertain an application provided it is satisfied that a prescribed request has been made and the negotiation period has elapsed. Imposing a short (effectively five day) window for applications to be made places an unnecessary burden on trade unions and will result in wasted resources on the part of unions and employers, who would be required to re-engage in negotiations before a CAC application could be made. We consider that unions should be entitled to apply to the CAC for a decision on access at any time up to (at least) three months after submission of the initial request (extendable by consent). We note there is currently no requirement to make an application in a prescribed timeframe within the statutory recognition process.

Section 2 – Central Arbitration Committee (CAC) determinations

2A: Circumstances where access must not be granted

1. Do you agree that employers with fewer than 21 workers should be exempt from the right of access policy?

Thompsons recognises that employers who are do not employ 21 or more workers are subject to the statutory recognition procedure set out in the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**"). However, Thompsons considers that, whilst one of the primary purposes of workplace access for unions is likely to be the pursuit of formal recognition, the right of access has benefits for workers beyond this. As noted in the Government's introduction to this consultation, in workplaces where no union is recognised and union membership is limited, "there is limited scope for trade unions to exercise their core functions, not only in facilitating collective bargaining, but also in representing and supporting workers in employment-related matters". These matters include "raising awareness of employment rights, supporting wellbeing, and helping resolve workplace issues before they escalate". These positive features of trade union presence in the workplace are equally relevant to employees of large and small organisations, whether or not the union is recognised or eligible to seek statutory recognition.

We recognise that there may be some concern that extending the right of access policy to small employers would impose a disproportionate burden on those employers. However, we note that a CAC determination on access must specify "the terms on which officials of the union are to have access" (proposed s 70ZE(3)(a) TULRCA). We consider that the CAC can mitigate the risk of access arrangements imposing a disproportionate burden on smaller employers by taking into account the size and resources of employers when setting the terms of access (Option 3 in the Consultation).

Ultimately we think Unions are best placed to determine the importance of the right of access being extended to employers who employ 21 or less workers. However we think it would be wrong for a policy decision of this nature to be made simply because it is felt

the administrative burden on smaller employers dealing with such requests would be too great.

2. Do you agree that the CAC should refuse access unless the access agreement specifies that there will be a minimum of 5 working days between when the terms of the initial access agreement are finalised and when access takes place for the first time?

No, Thompsons does not agree that the CAC should be statutorily obliged to refuse access where an access agreement does not specify that there will be a minimum of 5 working days between the terms of the initial access agreement are finalised and when access takes place for the first time. We recognise that in many circumstances such a term would be sensible. However, there may be circumstances in which urgent access is appropriate (e.g., in the event of imminent redundancies). Further, rather than requiring the CAC to reject applications that do not contain a 5 working day notice period, it would be less administratively burdensome for unions, companies and the CAC for the CAC to have a power to impose such a term when making a determination under s 70ZE(3) TULRCA. This avoids the need for unions to begin the application process again where the initial application does not contain such a clause. By granting the CAC a discretionary power in this regard, the CAC can take into account any concerns raised by employers as to preparing for first access, as well as any exceptional circumstances that make a shorter notice period appropriate (e.g. imminent redundancies).

3. Do you agree that access agreements should expire two years after they come into force?

No, Thompsons does not agree that access agreements should expire two years after they come into force.

We note the Government's rationale for this provision is that it considers agreements should remain in operation to the extent they "remain[] relevant to the workers or workplaces in question" and that it is desirable to "avoid scenarios where workplaces are covered by numerous dormant access agreements that may make it more difficult for trade unions to apply for new access agreements".

We do not consider it is a prudent use of public resources to achieve this aim by providing for automatic expiry of all agreements after two years. We note the Government accepts that this requirement will add to the CAC's workload (with ne access requests being made), but considers this increased workload manageable. Even if the increased workload is manageable, we consider a more targeted provision than automatic expiry of all agreements would be appropriate, so that CAC will not be required to devote resources to reconsidering agreements that are operative and effective every two years. This will also put unions and employers to unnecessary cost and effort.

We acknowledge the concern that unions may face barriers to accessing workplaces where a dormant agreement with another union remains in place. We consider this would

be better addressed by introducing a statutory termination scheme akin to the derecognition procedures for ending statutory recognition under Schedule A1 of TULRCA, whereby the employer or the affected workers can apply to end the existing arrangements. In practice, the affected workers are likely to be supported in this by the union now seeking recognition. Such an approach would ensure that the parties and the CAC are only put to the expense and effort of engaging in a further statutory application where there is a desire on the part of employers, unions and/or workers to vary the status quo. Where no union is seeking access and no workers are seeking to secure union access, minimal prejudice will be caused by a dormant access agreement remaining in place. Universal automatic expiry as proposed will give employers who oppose union presence an opportunity to oust a union with access every two years, notwithstanding the status of the agreement or the views of workers.

An alternative mechanism would be for access agreements to expire automatically where the union has not exercised its rights under the agreement for a prescribed period (e.g., six months). This would achieve the Government's goal of ensuring dormant agreements do not preclude active unions from accessing workplaces and impose minimal administrative burden on the CAC. It is unlikely that a union that has not exercised its access rights for six months would reapply for access upon expiry, and it would not be necessary for the CAC to make any determination except where there was a dispute between an employer and union as to whether a historic agreement remained active.

A further alternative mechanism that we consider preferable to automatic expiry in all circumstances would be for automatic expiry after a prescribed period unless unions, workers or employers notify the CAC prior to expiry that the agreement remains active. Thompsons considers this is less desirable than automatic expiry after six months of inactivity, on the basis that it would impose a positive obligation on the relevant parties to notify the CAC to keep an agreement alive (and corresponding administrative burden on the CAC). However, such an approach would nevertheless be preferable to requiring all access agreements to be renewed every two years.

We note the Government's desire to see "access agreements formed under this statutory framework helping to foster trust and dialogue between employers and trade unions", with access continuing on a less-formal, voluntary basis after the expiry of a statutory access agreement. From our experience representing trade unions and their members for over a century, Thompsons does not consider that such an outcome is likely. Whilst many employers have positive relationships with trade unions in their workplaces, the circumstances that have brought about the need for the introduction of this statutory right (low union membership and a lack of an enforceable right to access workplaces) are unlikely to dissipate solely by virtue of a union having had two years of statutory access to a workplace. By its nature, statutory access applies where an employer and a union have been unable to agree access terms on a voluntary basis, so it is not unlikely that the statutory right will be exercised in workplaces where employers are opposed to a strong union presence. There is no basis to consider that such employers' views will change by virtue of the union having had a presence on its site for two years. Whilst there are lots of examples of unions and employers enjoying positive and constructive relations, it is an unfortunate industrial reality that there is a significant imbalance of power between

employers and employees (which the Employment Rights Bill has gone some way to address), and some employers do not support the role of trade unions in seeking to redress that balance. It will take time to change that industrial reality.

4. In general, are there other circumstances under which you think that the CAC must refuse access? (This question refers to section 2A generally).

No, we do not consider there are other grounds on which the CAC should be required to refuse access, subject to our comments as regards incumbent unions, below.

2B: Circumstances where it is reasonable for access not to be granted

5. Do you agree that the presence of a recognised union representing the group of workers to which the union is seeking access be considered a reasonable basis for the CAC to refuse access to another union?

We consider that there will be circumstances it would be reasonable for the CAC to decline to order access where an independent union already actively represents the workers to which a later application relates. However we feel unions themselves will be better placed to advise on how precisely any refusal to grant access on this basis should operate.

6. Do you agree that an access application that would require an employer to allocate more resources than is necessary to fulfil the agreement (e.g., constructing new meeting places or implementing new IT systems) should be regarded as a reasonable basis for the CAC to refuse access?

We do not agree that the fact an application would require an employer to allocate more resources than necessary to fulfil the agreement (e.g. constructing new meeting places or implementing new IT systems) would be a reasonable basis for the CAC to refuse access. As a preliminary point, it is not clear what is meant by "more resources than is necessary". The nature of this statutory provision is that it imposes an obligation, where certain criteria are met, on employers to facilitate access. It will inevitably be necessary for employers to allocate some resource to fulfil its obligations – be that by allowing the union to use an existing space or granting digital access. It is unclear at what point the allocation of resources to fulfil the agreement becomes more than "necessary".

Further and more crucially, we consider that concerns about employers being required to allocate (unreasonable) resources to fulfilling access agreements is relevant not to the question of whether access should be granted at all, but rather to the question of the terms on which it should be allocated. This accords with the fifth access principle set out at the proposed s 70ZF(1)(e) TULRCA: access should be refused entirely only where it is reasonable in all the circumstances to do so. Where there are well-founded concerns about the impact that facilitating access would have on an employer's business (e.g., the cost of implementing a new IT system or constructing a meeting place), it may nevertheless

be possible to design bespoke access arrangements that sidestep such concerns. For example, in smaller workplaces that cannot physically accommodate union meetings, access could take place offsite. Alternatively, in the case of a large, well-resourced employer, the CAC could determine that it is appropriate for them to implement a new function on their intranet to allow digital access. We consider that it would be preferable for the employer's ability to provide resources for access to be a relevant factor for the CAC when determining access applications and setting out the terms of such access, rather than a basis on which to refuse access outright. We consider the current proposal is open to abuse, insofar as it provides a route for employers to resist any form of access by presenting a case that it would struggle to facilitate this. It will be difficult for a union without access to a workplace to challenge any case put forward by an employer, and employers would have an incentive to structure workplaces / computer systems in a way that makes union access impractical. Our alternative proposal ensures that such arguments can limit the scope and terms of access, without fully depriving workers of their right to communicate with unions at work.

7. Do you agree that weekly access (physical, digital, or both) be included as a 'model' term in access agreements, to help support regular engagement between trade unions and workers?

Thompsons considers that it would be preferable for the model/default access agreement term to provide for a flexible access right with a guaranteed minimum amount of access over the course of a reference period (e.g., a right for the union to access the workplace for X hours per month). We do not consider that it is in unions', employers' or workers' interests for the CAC to prescribe that access must take place on a weekly basis. There will be periods in which more frequent communication is beneficial for workers and unions (e.g., during pay negotiations), but there may also be periods where weekly access is not required or practical. Incorporating flexibility (but with appropriate caveats to avoid abuse) will assist both unions and employers.

A requirement for access to take place weekly also risks putting a union in breach of an access agreement should it be unable to attend a workplace for any reason during its term. Further, it is likely that in practice employers would want to provide weekly access at the same time every week. This would be of limited value to workers and unions in workplaces where staff operate on different shift patterns. To ensure an effective right to access, it is preferable that CAC standard terms prescribe a minimum amount of access, but that the parties have scope to agree an appropriate timetable for that access (subject to caveats as to the minimum duration of an access visit etc).

8. Please describe any other terms that you think should be regarded as 'model' terms.

We consider that it is preferable for model terms to be optional "best practice" terms set out in statutory guidance, to ensure that employers, unions and the CAC have

flexibility to ensure that access agreements are appropriate for the particular workplace(s) to which they relate. It would be appropriate for model terms to provide for the following:

- A right for union access and communications under an access agreement (physical and digital) to take place privately and without employer interference.
- A duty for employers to disclose to an accessing union how it ordinarily communicates with its workforce (digitally and physically).
- Flexibility in frequency and timing of access to accommodate employees' working patterns (e.g., the union should not be required to attend at the same time/day every week if that would prevent it from communicating with the entire workforce).
- (Subject to how frequency of access is to be calculated, as per question 7), a minimum length for physical access visits, save where the union agrees to reduce this, to ensure that the agreement cannot be frustrated by, for example, allowing a union frequent access but for such short periods that it cannot effectively conduct its business.
- Appropriate release arrangements for employed union representatives who will conduct meetings / be responsible for digital communications under an access agreement.

9. Do you agree that access agreements include a commitment from the union to provide at least two working days' notice to the employer before access takes place?

We consider that generally two working days' notice would be an appropriate notice period for physical access, but that there should be a carve out to provide for scenarios where access is urgent, such as where there is a threat of imminent redundancy. In such cases, employers should be required to facilitate access following receipt of notice.

We consider that two days' notice would be appropriate for digital meetings (e.g., via Teams), but for written digital access (such as intranet posts, email communications, etc) we do not consider that there is any need for a notice period. We consider there would be no discernible legitimate benefit in imposing a requirement on unions to notify an employer two days in advance that they intend to send written correspondence to employees.

10. Are there any further matters to which you think the CAC must have regard when making determinations on access? If so, what are they? For example, you might want to suggest practical, legal, or workplace-specific considerations that haven't already been covered.

No.

Section 3 – Maximum value of fines and how the value of fines for breaches are determined

1: Maximum value of the fine

1. **Which of the following options do you consider most appropriate for setting the maximum value of the fine?**

   Option 1: A fixed maximum fine of £75,000
   Option 2: A two-stage system: £75,000 for initial breach and up to £150,000 for repeated breaches
   Neither of these options

   The maximum fines under both options are likely to be too low to act as a meaningful deterrent to larger employers who wish to obstruct union access. We would rule out option 1 on that basis alone. We understand that the proposal under Option 2 is that the higher fine of £150,000 can be imposed for each further breach of an access agreement, and is not a maximum, cumulative cap for all breaches. If £150,000 is the maximum fine that can be imposed in relation to all breaches of an access agreement, employers will have no incentive to cease breaching an access agreement where they have already been fined. The enabling Regulations should make clear that £150,000 is the maximum fine for each further upheld breach, rather than a cumulative total, and that where the CAC rules in one complaint that there have been multiple breaches, it should be empowered to issue a fine of up to £150,000 in relation to each one.

   Financial penalties may deter some employers from seeking to frustrate access rights, but there may be cases where employers consider that paying it is preferable to allowing a union to access its workforce (particularly employers who are considering taking steps to degrade workers' terms and conditions or impose redundancies). Further, it will only be possible for the CAC to impose any penalty after a union has brought a complaint to it (at its own expense) and the complaint has been fully considered. The CAC will likely only be able to impose a fine of £75,000 in the first instance. Option 2 therefore (although much better than option 1) remains a weak enforcement mechanism. We consider it is not unlikely that some employers will simply accept the risk of receiving a relatively low fine at a later date rather than facilitate access, particularly where a union is close to achieving recognition or otherwise appears to be supporting workers in a way that an employer considers threatening.

   We do not consider that purely financial remedies of the type proposed in the consultation will compel compliance with access agreements. It is an unfortunate reality that some employers are opposed to union representation in the workplace. Whilst many employers engage positively with trade unions, there are employers who devote significant financial resources to preventing union activity amongst their workforce. Under the proposed regime, employers with sufficient funds will simply be able to buy their way out of compliance with access arrangements.. Therefore, to try and counter that insofar as is possible, the level of fine should be increased further for repeat offenders who commit breaches of access agreements.

2: Matters the CAC must consider when deciding value of fines

2. Do you agree with the proposed matters the CAC must consider when determining fines?

Yes, we agree with the proposed matters the CAC must consider when determining fines. However, we consider that the CAC should also be required to consider "all the circumstances" via a catch all provision, to ensure that it has sufficient flexibility to set fines appropriately depending on the facts of a given case.

Thompsons LLP December 2025