



Fair share *or hot air?*

Fair share agreements – where unions receive payments from non-members in lieu of collective negotiating activities – could be unlawful according to a recent judgment. Danielle Ingham reports

In recent years, there has been an increase in the number of so-called 'fair share agreements' in unionised workplaces. These agreements are commonly sought by trade unions that have exclusive negotiating rights in respect of a workforce, or substantial parts of it. In these situations, the trade union will often spend time, energy and resources negotiating benefits on behalf of the whole workforce, even though not all employees will be members of their union, so not all pay membership subscriptions.

In the current economic climate, such negotiating clout can be extremely beneficial for employees seeking to protect their pay, conditions and job security. Against this background, the ideal solution for trade unions wanting to avoid non-union members having a 'free ride' emerged in the form of fair share agreements. Under such agreements, employers make a deduction – known as a 'fair share fee' – directly from the salary of every employee who benefits from union representation, regardless of whether they are members of the trade union. Union members continue to pay their membership subscriptions as usual, less the amount of the fair share fee already deducted from their salary.

That was until recently, when a significant employment tribunal decision delivered a body blow to trade unions on this issue by ruling that fair share agreements are unlawful.

The employee in this case, Mr Samuels, started working for London Bus Services (LBS) in 2004. He had been a member of the Transport and General Workers Union (which later became Unite) since 1996, but ended his union membership in 2007. However, as LBS had been operating a fair share agreement with the union since 2006, Samuels continued to pay a fair share fee of £1.85 per week, deducted directly from his salary by LBS, even

though he had ceased to be a member of the union. After an internal complaint to LBS was rejected, Samuels decided to take the next step and challenge the operation of the fair share agreement before an employment tribunal.

The tribunal's key task was to consider whether the deduction of the fair share fee



was attributable to the fact that Samuels was not a member of the trade union. It concluded that it was, as the fair share agreement was aimed at preventing 'free riders' from benefiting from union representation without being members of the union. It was therefore not the same as a membership subscription, which came with all the benefits of union membership.

The legislation which regulates trade union activities protects employees from being subjected to detriments on the ground that they are not members of a trade union, primarily to prevent employees from feeling pressurised into joining a union. Deductions made from salary that are specifically attributable to an employee's non-union status are capable of amounting to detriments. On this basis, the tribunal held that Samuels had been subjected to an unlawful detriment and awarded him compensation

to reimburse the fair share fees he had paid since leaving the union in 2007. As it was LBS which had made the deductions, the company was responsible for paying the award.

What is the implication of this decision for fair share agreements? As this is the first case on this issue, it is not automatically binding on future cases. However, the decision will be persuasive in future cases and could provide a steer as to the direction which may be taken by employment tribunals in future. Given that the valuable income collected by trade unions through fair share fees is under threat, it is not surprising that Unite has already indicated that it will appeal the decision. However, if the appeal is unsuccessful, trade unions will have to face up to the unwelcome truth that the use of fair share agreements and the deduction of fair share fees will be unlawful. Given the current trend for declining union membership, this is unlikely to go down well.

Employers who are already operating fair share agreements with their recognised trade unions should, therefore, follow developments in this area closely. Aside from the potential union unrest, there is also the possibility of a wave of claims from employees following Samuels' lead and looking to recoup their previous fair share fee deductions. Employers should therefore check carefully the terms of their existing agreements to ensure that they are covered by an indemnity from their trade unions in the event of any fair share fee deductions being found unlawful. Employers who are in the midst of negotiating the introduction of a fair share agreement would also be well advised to wait and see what the next few months bring before reaching an agreement with their trade unions on this issue.

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