

CENTRAL ARBITRATION COMMITTEE
TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992
SCHEDULE A1 - COLLECTIVE BARGAINING: DERECOGNITION
DECISION ON WHETHER TO ACCEPT THE APPLICATION

The Parties:

Michael Parker, Rajani Patel, Sally Wiles, Gordon Finlayson, Anish Dholakia
& Kiritkumar Bhikhulal Shah (the Applicants)

and

Boots Pharmacists Association (BPA)

&

Boots Management Services Limited

Introduction

1. Michael Parker & others (the Applicants) submitted an application to the CAC dated 14 July 2017 that a secret ballot should be held to determine whether the bargaining arrangements between the BPA (the Union) and Boots Management Services Limited (the Employer) in respect of "All pharmacists registered with the General Pharmaceutical Council (GPhC) or Pharmaceutical Society of Northern Ireland (PSNI) (excluding those of Area Management status or equivalent and those more senior to them) and pre-registration Graduates, working for Boots in the UK and employed by Boots Management Services Ltd" (the bargaining unit) should be ended. The CAC gave the parties notice of receipt of the application on 31 July 2017. The Employer submitted a response to the application to the CAC dated 7 August 2017. The Union submitted a response to the application to the CAC dated 10 August 2017. The responses were cross-copied and sent to the Applicants.

2. In accordance with section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), the CAC Chairman established a Panel to deal with the case. The Panel consisted of Her Honour Judge Stacey as Chairman, and, as Members, Mr Roger Roberts and Mr Paul Talbot. The Case Manager appointed to support the Panel was Miss Sharmin Khan.

3. The Panel has extended the acceptance period on several occasions in order to allow time for the Panel to consider the evidence provided by the parties before arriving at a decision and then for the Panel to finalise its written decision. The initial period expired on 11 August 2017 and the final extension ended the acceptance period on 17 November 2017.

Issues which the Panel is required to determine

4. The Panel is required by paragraph 141 of Schedule A1 to the Act (the Schedule) to decide whether the application to the CAC is admissible within the terms of paragraphs 137 to 140 and therefore is to be accepted.

The Application

5. The covering letter to the application explained that the PDA Union would be representing the Applicants. The PDA Union (or PDAU) explained that it had been approached by a number of Boots employees who were in favour of de-recognition, but who had declined to add their name to the application for fear of intimidation by the Employer. It enclosed and referred to an IDS Employment Law Brief 1066 called “Wanted: head for parapet”. The PDAU confirmed that the application, covering letter, and supporting documentation had been copied to the Employer and the BPA by recorded delivery on 28 July 2017.

6. The application stated that the recognised Union, the Boots Pharmacists’ Association (BPA) did not have a certificate of independence. The existing bargaining unit (BU) was located over approximately 2,500 pharmacies across the UK and included a small number of employees who were located in the Nottingham Head Office. There were circa 5,500 workers in the BU of which 3,500+ favoured an end to the existing bargaining arrangements with the BPA. Many of the workers applying for de-recognition operated in isolation from others in the bargaining unit so the evidence of support for the application came primarily from the PDAU.

The PDAU estimated that it had 40% membership in the BU. In its view there was no reason to expect its members not to support the application. Its position on seeking recognition was clear in the long running high profile dispute between the Employer and the PDAU. The Court of Appeal decision (*PDAU v Boots Management Services Ltd & Secretary of State for Business, Innovation & Skills* [2017] EWCA (Civ) 66) stated that the only path to obtaining meaningful negotiation rights for the workers in the bargaining unit was for the workers to seek de-recognition of the BPA and for the workers then to support a subsequent claim for recognition by the PDAU. During the appeal, the Employer agreed that this was the process to follow.

7. The application stated that the PDAU had met the 10% membership threshold in the BU and that the CAC had previously recognised that a large proportion of the BU would prefer the anonymity of a secret ballot. Activity in the national press and feedback from PDAU members indicated that there was a culture of fear within the workplace. It was estimated that 3,500 to 4000 workers in the BU would favour an end to the existing arrangements with the BPA. It was the PDAU's view that the arrangements with the BPA were set up for the purpose of blocking the PDAU's application. However, the PDAU did not seek to usurp the wider role of the BPA. The PDAU had made proposals to the BPA Executive regarding how the BPA could remain a viable organisation in the event that the PDAU was recognised. PDAU members held a nostalgic view of the BPA so it was believed that much of the bargaining unit would support de-recognition if the future of the BPA was not under threat.

8. The PDAU put its case on behalf of the Applicants that a majority of the workers in the BU were likely to favour an end to the bargaining arrangements with the BPA. Since its application for recognition, PDAU members had indicated that they would be better represented by an independent trade union with statutory negotiating rights. Pharmacists strongly believed that the BPA was ineffective in resisting the Employer's imposition of Market Based Pay (MBP) and that if there had been a union in place with collective bargaining rights over pay hours and holiday rather than a consultative forum, the outcome would have been different. The Employer was also facing unprecedented cuts of up to 12% to its NHS income. Workers were concerned that this would mean there would be more unilateral impositions by the Employer which would erode pay and benefits and result in less favourable terms for members of the bargaining unit. Poor working conditions were highlighted in a Guardian article published in 2016 and a Patient Safety Survey of 600 pharmacists. The survey led the General Pharmaceutical Council, the statutory regulator to conduct an investigation.

The PDAU had supported members who had brought claims against the Employer in the Employment Tribunal. Both PDAU members and non- members supported the PDAU in defending the rights of workers in the bargaining unit.

9. The application also stated that the CAC's decision (TUR1/823/(2012)) dated 9 January 2014 accepting the PDAU's previous application for recognition had observed that:

“... from the information available to it and doing the best we can, the Panel concludes that a considerable proportion of those who are neither a member of the [PDA]Union or BPA – perhaps a third or half – would be likely to favour recognition of the [PDA] Union”.

This statement could equally apply to the de-recognition of the BPA by virtue of the fact that the only mechanism by which the workers in the BU could secure meaningful collective bargaining arrangements was by seeking de-recognition of the BPA as a prelude to an application for recognition of the PDAU by the Employer.

10. For evidence to demonstrate the support for de-recognition of the BPA, the PDAU had initiated a website to ask members and non -members to pledge their support. It was said in the application that in normal circumstances the site would have gone live in advance of the application however, in this case the Applicants did not want to give the Employer advance notice of its application due to the Employer's previous disingenuous tactics.

11. The supporting documents provided with the application were: an article from The Guardian newspaper, referred to above, the Boot's Patient Safety Survey, the CAC's previous acceptance decision, Current Union Membership, an Insight article on whistle blowing and the IDS Brief article already mentioned.

The Employer's response to the application

12. The Employer responded to the application on 7 August 2017 and confirmed that it had received a copy of the application on 31 July 2017. The Employer stated that there were 7,096 workers in the bargaining unit which included all pharmacists and pre-registration graduates employed in the UK.

13. The Employer addressed paragraph 139(a) of the Schedule which stated that an application is not admissible unless the Panel decides that at least 10% of the workers constituting the bargaining unit favour an end of the bargaining arrangements. The Employer contended that in contrast to paragraph 139(b) of the Schedule, which states an application is not admissible unless the CAC decides that a majority of the workers constituting the bargaining unit would be likely to favour an end of the bargaining arrangements, the test in (a) was whether 10% of the bargaining unit did favour an end to the arrangements. It was not sufficient for the CAC to decide on whether 10% were likely to favour an end to the bargaining arrangements. The 10% support had to be established by the Panel as a fact, not as a likelihood. This was not a question on which the CAC could have regard to their duty under paragraph 171 of the schedule which was to have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace. It was a question of fact that had to be decided on the evidence put forward by the workers in the bargaining unit, the Employer and the BPA. The question to be answered was not whether 10% supported recognition of the PDAU but whether there was support for de-recognition of the BPA. The two questions were not the same.

14. In the BU of 7,096 workers, this meant that at least 710 workers would need to favour an end to the bargaining arrangements. The six applicants had not provided evidence that any other workers supported its application. The point that the 10% threshold was met by the PDAU's membership alone, might show that it was *likely* that 10% favoured ending the arrangements but was insufficient to demonstrate, as a fact, that they did. It was worth noting that the workers were open to organise a petition at any time but chose not to do so until after the application was submitted.

15. The statement that there were workers who had approached the PDAU to support de-recognition but declined to sign their names to the application because of intimidation, was not a demonstration that 10% of the bargaining unit had approached the PDAU. There was no evidence to support this statement. In any event it was strongly rejected by the Employer that fear was a factor. Any worker was open to join any union of his or her choosing. It was conceded by the PDAU during the proceedings before the High court and the Court of Appeal that there was no suggestion that the Employer would take any action against workers who supported the application. In any event, it was for the workers to establish the 10% support. The Panel could not properly infer that this test was met from either the Applicants or the

PDAU's assertions. The only evidence submitted was newspaper articles and an unsupported assertion from member feedback. This was not a proper basis on which the CAC could find that this test was met.

16. In accordance with paragraph 139(b), the Applicants needed to show that 3,548 workers would be likely to favour an end to the arrangements. The evidence showed that a majority of the workers in the bargaining unit were content with the status quo. The response to the Employer's Colleague Engagement Survey indicated that a majority of workers in the bargaining unit were content with the current arrangements. The Employer provided the percentage figure established in its engagement survey in May 2017, which was completed anonymously by 64% of pharmacists, 56% of which provided a positive response and 25% who provided a neutral response. A majority indicated that they would "recommend Boots as a great place to work" and that they felt "good about working for Boots right now".

17. The PDAU's membership figures established at the time of the CAC's decision to accept the PDAU's application for recognition (9 January 2014) and its current membership figures showed there had been no change to their membership levels. This was despite the widespread knowledge of the PDAU's campaign over the last 5 years. BPA membership had also remained static standing last year at 1,372 (plus 650 pre-registration members). The Panel in the CAC's acceptance decision concluded that members of the BPA were unlikely to also be members of the PDAU and assumed that BPA members would not support de-recognition. The PDAU's membership figure if accurate made up only 31.8% of the bargaining unit. It was not accepted that all these members would be in favour of recognition of the PDAU. There were many reasons as to why an individual might join the PDAU, for instance the PDAU offered professional indemnity insurance. Becoming a member of the PDAU was a free add on and there were benefits such as representation and legal advice.

18. It could not be assumed that support for recognition for the PDAU meant support for de-recognition of the BPA. Neither was there evidence to suggest that workers who were not members of either union would support the de-recognition application. There had been improvements since the Employee Engagement Survey and the PDAU's application for recognition to the CAC in 2013. Not only was it possible that views had changed but staff turnover meant the workers in the current bargaining unit had changed. The views of workers in 2013 could not be relied on as an indication of current views. The CAC's acceptance

decision was 4 years out of date.

19. There was no evidence to show that Market Based Pay would not have been introduced if the PDAU had had collective bargaining rights. It was introduced in 2015 to retain talent and to maintain business performance and patient and customer care. The Employer contended that it remained ahead of the competition in average pay increases in the market. There had been no formal grievance lodged since the introduction of it.

20. The Guardian articles relied on by the applicants were not supporting evidence, they did not relate to collective bargaining and pay, hours and holiday. The original article was an expression from two workers who were then employees of Boots. Those who wrote in response to the article may have been invited to respond by their trade union. None of the views were verified. The articles themselves were more than 12 months old after which there had been no increase in the PDAU's membership. It would be improper to attach any weight to the articles as evidence of the likely support of workers for the de recognition of the BPA.

21. The Patient Safety Survey upon which the applicants also relied on was completed by less than 7% of the bargaining unit: a proportion of survey respondents were locums and not in the bargaining unit. The survey was generic to the pharmacy profession and was also completed by pharmacists employed by other large pharmacy chains. The focus of the survey was patient safety, not pay hours and holiday. This was not evidence of likely support for de-recognition of the BPA.

22. The supporting documents provided with the Employer's response to the application included 1. PDAU & Boots Management Services Ltd Membership and support check; 2. Colleague Engagement Survey – May 201; 3. Harvey on Industrial Relations and Employment Law at para [1666] and [181.01]; 4. PPP in brief February 2016.

The Union's response to the application

23. The BPA provided a response to the application on 10 August 2017 stating that it fully understood the issues facing community pharmacists. The CEO of the BPA was an independent management consultant with long standing experience in leadership for community pharmacy, including small independent chains and large multiples. The BPA was

a listed trade union and its executive was elected from and by the membership. The executive represented all job roles within Boots UK stores and its support functions. It had a wealth of external knowledge with a member of the Royal Pharmaceutical Society, English Pharmacy Board and a Chief Officer of a Local Pharmaceutical Community amongst its executive. The BPA had 1,256 members of which 360 were associate pre-registration graduate members. The BPA had easy access to the Boots UK senior management team with whom it met with at least five times a year. The BPA regularly consulted with its members and represented their views on matters of importance to them. In the last year the BPA had consulted on Boots UK initiatives such as Pharmacist Strategy and Pharmacist Reward. The BPA's vision was to champion the role and contribution of Boots Pharmacists in Boots UK and community pharmacy. BPA Members also benefitted from access to an independent legal advice line and from legal defence insurance.

24. The BPA confirmed it received notification and a copy of the application from the PDAU on behalf of the workers on 29 July 2017 which in its view was a breach of clause 1.2 of the CAC's "Guide for the parties Part VI of Schedule A1 de-recognition where a union is not independent" document. The notification should have come from the workers not the union representing them.

25. The BPA contended that the application did not meet the requirements of either limb of paragraph 139(a) and (b) of the Schedule on the following grounds. Firstly, BPA membership was drawn from all pharmacist roles in Boots UK. Boots employed 7,096 pharmacists and preregistration graduates. The question was about the de-recognition of the BPA and it was unfair to exclude any roles within the BU. All the evidence provided by the PDAU on behalf of the workers was historical evidence that had been presented in January 2014 to the CAC as part of the PDAU's application for recognition (CAC case ref. TUR1/823/2012). It was unfair and inappropriate for the CAC to consider that membership of the PDAU was indicative in itself of support for recognition of the PDAU by Boots UK. The BPA's internal research indicated that 20% of BPA members were also members of the PDAU. It was also unfair to assume that support for recognition of the PDAU back in 2013 indicated support for de-recognition of the BPA. If the question of de-recognition of the BPA was put back then, the response may have been different. The BPA noted the degree of scrutiny applied to the PDAU's pledges in 2013 and called for the PDAU's current pledges to be either subject to the same scrutiny or disregarded. In its view, there was nothing in the enclosures provided

with the application that was an indication that a majority of the current bargaining unit would support the de-recognition of the BPA. Finally despite all the publicity, the BPA's internal measurement of member role satisfaction had increased.

26. Enclosed with the BPA's response (enclosure B) was a copy of the results of its recent surveys. The BPA had established via these surveys that over 80% of its members would recommend membership of the BPA. On pharmacist role satisfaction, the BPA's internal measures showed a seven percentage point increase year on year in a challenging year for pharmacy. The consultative arrangements were in place for many years to the benefit of its members and all pharmacists in Boots UK, a recent example of which was the agreement with Boots that the 12% pharmacy remuneration funding cuts in England would not be addressed through reductions to work load driven pay roll in Boots stores (Enclosure A).

27. Finally, the BPA disagreed with the Applicants that more of the BU would support the de-recognition application if the future of the BPA was not threatened. The BPA also refuted that the BPA/Employer agreement was set up to block the PDAU's application for recognition. The continuation of the BPA's agreement with the Employer was vital to its existence. The BPA referred to the Certification Officer's decision of 20 May 2013:

"...it is more likely that the actions of the BPA in this regard were to protect its own position. It could have reasoned that if the PDA gained statutory recognition it may lose members and its own existence may be threatened."

28. However, despite the wide publicity about the PDAU's campaign, membership of the BPA was on the rise. In conclusion the BPA's belief was that de-recognition would not be in the interest of Boots Pharmacists and would threaten the continuing existence and good work of the BPA.

Applicants' further evidence

29. On 11 September 2017, further evidence was submitted by the Applicants, the bundle included 33 Appendices. A summary of only the additional points raised by the Applicants follow.

30. The Applicants had to rely on their union to provide the communications and evidence needed for the application as face to face methods were not possible as there was 2,350 pharmacies across the UK most of which had one pharmacist on duty at one time. The Employer had the advantage in contacting the workers with its management infrastructure and cascading networks. Since the application the Employer had started a communication exercise in support of the BPA highlighting BPA communications to every worker in the bargaining unit (Appendix 1-3).

31. The PDAU's website for pledges of support went live on 28 July 2017 and the screen shots were provided (Appendix 4 and 5). The personal information of each worker was captured including their GPhC or PSNI registration number i.e. the unique code by which both the Employer and the Union could identify the individuals. The IP address of the computer submitting any pledge was also captured so that unusual activity or multiple pledges could be identified. The two statements appearing on the pledge page which respondents were asked to confirm by tick box were:

“I confirm my support to end the recognition of the Boots Pharmacists’ Association with Boots Management Services Ltd.”

and

“I confirm my support for the recognition of the PDA Union by Boots Management Services Ltd.”

32. By 8 September 2017, 1,017 pledges of support of both statements were received from pharmacists and pre-registration graduates who identified themselves as employees of Boots. A copy of the comments pledged was included in the bundle (Appendix 6). Strong support was established including comments from current BPA members. This was achieved even though there was a lack of awareness and when 20% of the BU would be taking their summer holidays. The pledges were received within six weeks of the launch of the campaign. 437 of the pledges (Appendix 7) were from non-Boots pharmacists, (the total number of pledges thus being 1,454) whose comments were valid as they either had recent experiences of working for the Employer or were self-employed working on a locum basis for the Employer. 40% of the e-mails sent to workers remained unopened. The actual spreadsheet of the pledges and

comments were not submitted to the CAC so as not to have them cross copied to the Employer and the BPA.

33. Other evidence demonstrating that a majority of the BU was likely to favour de-recognition of the BPA was the Boots Pharmacy unscripted forum on which the topic of de-recognition featured. At the time of submission there were 300 comments (Appendices 8 – 22), most of which were in support of de-recognition of the BPA and recognition of the PDAU. The forum thread was viewed more than 13, 378 times. There was a lack of comments from workers who opposed de-recognition of the BPA, indicating there was no desire for the status quo to be maintained as argued by the Employer. Posting comments in support of BPA would be favoured by the Employer, there was no deterrent for workers who wanted to express this view. Conversely, there would be many workers who would be reluctant to express support for de-recognition for fear of consequences. The culture of fear was apparent as 70% said that they feared the consequences which stopped them from closing the pharmacy on patient safety grounds (Appendix 23). It was also noted that the BPA executive had chosen not to actively engage in the debate or answer questions put on the forum.

34. There was widespread dissatisfaction expressed about pharmacists not receiving a pay rise in years and the Employer's Market Based Pay (MBP) scheme which imposed capped salaries of longer serving workers who were paid above a market rate, which was unilaterally defined by the Employer. This was the most popular thread of discussion before the issue of de-recognition. The Employer had a track record for removing employee benefits and capping pay to meet profit targets. The Employer had consistently cut employee benefits including premium pay and sick pay. Sources said that despite the Employer's assurances, workers were put under pressure to take on increased workloads without additional resource for remuneration or recognition. The Employer's wishes to increase profits in the face of falling NHS income meant employee benefits and wages was a target for more cuts. The lack of grievances lodged about these issue demonstrated an overwhelming sense of powerlessness the workers in the BU felt, not that there was a sense of satisfaction amongst the workforce as had been argued by the Employer. There was dissatisfaction amongst the workers about the currently recognised union being unwilling to tackle the Employer on matters of importance like these to the workers.

35. The Applicants did not accept the argument that PDAU membership had remained the

same. The graph provided (at Appendix 24) compared membership levels for the BPA and PDAU from 2012 to 2016. BPA membership had been steadily decreasing since 2012. PDAU membership reached 2,317 in 2012 but dipped in 2013 when it was clear that the Employer was resistant to the PDAU application for recognition and some members did not renew their membership for this reason. However PDAU membership was recovering and increasing. As of 31 August 2017 the PDAU had 2,432 members. Neither was the Employer's point that workers joined the PDAU for reasons other than recognition accepted. The Employer used the example that members joined for professional indemnity insurance but there were other providers of this, including the BPA.

36. The figures provided by the BPA in respect of its membership were inflated because ex-employees and retirees were included. The BPA should have identified the number of its members that were currently employed by Boots. It was the Applicants' understanding that there was a level of seniority above which pharmacists were ineligible to join the BPA. Eligibility of the BPA membership was relevant to the accuracy of the BU figures declared by the Employer. Workers had approached the PDAU about difficulties when trying to terminate their BPA membership since the launch of the de-recognition campaign on 28 July 2017. Boots Payroll was declining to accept employees' requests to end check-off deductions and BPA members had to give 3 months' notice in writing to the Chief Executive of the BPA. Two employees had expressed their frustration at the hurdles they faced when trying to cancel their subscription and the appreciation they felt for the PDAU for trying to help them, in e-mails dated 8 and 22 August 2017. All pre-registration graduates were automatically joined as BPA members without their informed consent. The BPA also encouraged its current members to get new joiners by offering a £25 as an incentive. However BPA membership was still in steady decline despite the Employer's promotion of the BPA at every opportunity.

37. The Employer's figures in respect of the size of the BU were inconsistent. The Employer's reference to the Colleague Engagement Survey suggested that the bargaining unit consisted of only 5,506 not 7,096 as also stated by the Employer, a difference of 1,590 workers leaving a question of how the Employer was defining the BU as covered by the BPA recognition agreement. The survey itself established that the third priority when asked "What one thing do you think would make Boots a better place to work" was "recognition and reward" which were matters that would be covered by a collective bargaining agreement. The survey compared results from pharmacists to the rest of the workforce. It was notable that for every

response under “Colleague Engagement”, pharmacists reported significantly lower scores than other colleagues did, registering only slight improvements since last year. This indicated that pharmacists were a discreet bargaining unit and in need of a collective bargaining agreement and proper representation.

38. The Employer’s resistance to PDAU recognition was an opposition to independent unions at Boots. The American Pharmacist Walgreens bought 45% of Boots in 2012 and now owned 100% of it. In 2013 Walgreens set out its philosophy towards unions (Appendix 33):

“Our philosophy

Walgreens feels very strongly that labour unions do not serve the best interest of our individual employees or the company as a whole. We are proud of the fact that more than 99% of your fellow employees agree with the company and have determined to remain union free.”

39. Walgreens’ website also listed the top 10 reasons why Walgreens asked its workers to say “No” to unions. The website was removed after being brought to the attention of the CAC in 2012. The website was inaccessible now but this was still the corporate philosophy, the sentiments of which were expressed on the company’s website and the Employer’s messages about the de-recognition and recognition process.

40. In conclusion, despite great efforts from the BPA executive and the Employer working in close partnership to increase membership, their membership had declined which was a clear indication that workers who no longer wished to be represent by the union under the current arrangements would support de-recognition. The BPA and the Employer had a history of collaborating to block an independent trade union from being recognised.

41. There was sufficient and persuasive evidence to demonstrate that at least 10% of the workers in the bargaining unit favoured an end to the bargaining arrangements with the BPA and the majority would be likely to favour an end to the current bargaining arrangements. To promote good industrial relations and to conclude a long running dispute for all parties, the Applicants’ called for the matter to be decided once and for all through an independent ballot. If the Employer was correct in its assertions then it had nothing to fear from the democratic process.

Employer's response to Applicants' further evidence

42. The Employer stated that the bargaining unit for which the BPA was recognised was for “all pharmacists and pre- registration graduates employed by the Employer in the UK” clarifying that as at 13 September 2017 the number of workers in the bargaining unit was 7,157. This figure was taken from the Employer's internal employee database, an anonymised copy of which was enclosed for the Panel. The conclusion that there was a discrepancy in the figures was incorrect. The extract from the Colleague Engagement survey covered store-based pharmacists but did not include Store/General Managers (many of whom were also pharmacists) and various other pharmacists in other positions.

43. To meet the test that 10% of the bargaining unit favoured an end to the bargaining arrangements the Applicants would need to show that 716 workers were in favour of this. The Applicants set up a website to receive pledges to show evidence of the required support. Between 28 July 2017 and 8 September 2017 the PDAU stated that 1,017 pledges of support were received, which would seem to indicate that this test has been met. However there were issues with the pledges as evidence. Firstly, the PDAU would not have been able to verify whether the pledges were all from Boots' employees as it did not have access to the GPhC or PSNI numbers of Boots employees. The respondents self – identified themselves as such. Secondly, anyone was able to access the website whether part of the BU or not. The pledges were pre-selected to support every requirement of the pledge too. If the CAC were to request it, the Employer would be able to provide the information it needed on a confidential basis to verify who was behind each pledge of support. Thirdly though the PDAU stated the IP addresses of the computers submitting a pledge helped identify unusual activity or multiple pledges, there were no actual instructions on the website that individuals should not vote more than once and there did not appear to be a mechanism on the website to stop individuals voting more than once. It was unclear whether the information the PDAU had gathered indicated any unusual activity or whether there were any instances of multiple voting identified. To address these points the Employer asked the CAC to verify the accuracy of the PDAU's evidence by carrying out a check.

44. To demonstrate that the majority of the bargaining unit were likely to favour an end to the bargaining arrangements, the Applicants would need to demonstrate that at least 3,579

would be likely to favour. As the PDAU did not have majority or near majority membership within the bargaining unit it was even more important that the Applicants could provide compelling evidence of support to the Panel so that it could decide on the probative value of each item of evidence. The information submitted by the PDAU in support of the Applicant's application was insufficient.

45. The PDAU could not manage to demonstrate even 50% support from within its own membership. Beyond the 1,017 who had allegedly pledged support there were unlikely to be significantly more workers in support and the additional evidence submitted by the Applicants did not suggest otherwise. The 437 pledges received from non-Boots employees had no probative value as to the likely votes in support of de-recognition. There was no evidence to show that these non-Boots employees would have recent experience of working in Boots. The explanation that the low response rate was due to the holiday period was rejected by the Employer. In its view individuals would not have been away for the whole six week period. It was unlikely that any worker would have taken more than two weeks of annual leave. Taking annual leave would not have inhibited anyone from submitting a pledge. There was access to the website by smart phones, tablets and web browsers. Furthermore it was unreasonable to assert that there was widespread lack of awareness about the de-recognition process. The issue had been ongoing since 2012. It was widely publicised and debated over that whole period. There were articles on the issue that the PDAU had submitted as evidence. There were 8 relevant articles in the Chemist & Druggist and The Pharmaceutical Journal from 31 July 2017 to 12 September 2017. The PDAU had been sending regular e-mails which the Panel had seen, newsletters and even cold calling members of the bargaining unit about the issue. As already submitted by the Applicants there was a popular discussion on the unscripted forum. That 40% of e-mails were unopened and 62 out of 97 PDAU members stating they were unaware of the application for de-recognition was not meaningful evidence that there was a lack of knowledge about the issue. Unopened e-mails could be taken as apathy rather than a lack of awareness. There was just as much chance that a worker might delete an e-mail because it was not interested in de-recognition or did not support de-recognition as they were to have just forgotten to open it. It was worth noting also that the PDAU sent several similarly worded e-mails to its members throughout the relevant period asking them to pledge their support. It could be the case that 100% of the recipients chose only to open 60% of those e-mails once they understood the message from the first 3 or 4 similarly worded e-mails they had opened. The Employer believed that almost all who supported de-recognition could have pledged it and

therefore the pledges represented the most likely and accurate level of support.

46. The Applicants' survey was not of probative value either. 97 respondents was a small proportion, less than 4% of the BU and was not a representative sample. It was not clear how the survey was carried out, or why only 97 individuals were asked, how the participants were selected, or what question the individuals were asked. It would be improper for the Panel to place any weight on this piece of evidence as likely support for de-recognition of the BPA.

47. Any comments on the PDAU's pledge website would have inevitably been from the individuals who also voted as part of the pledge, therefore these comments did not demonstrate any support in addition to the alleged 1,017 votes in support of the pledge and did not support the likelihood that a majority of the BU was in favour of de-recognition. In respect of the e-mail thread that was submitted by the Applicants, only 29 people had made the 300 comments which was a representative of just 0.4% of the BU. 67.3% of the comments were posted by just four people which was not at all suggestive of likely majority support. It was also highly likely that the individuals were part of the 1,017 who supported the pledge. This should not be considered as additional support.

48. The Employer strongly rejected that employees were reluctant to express their view out of the fear of consequences. It had consistently made clear that it respected the right of its workers to join any union of their choosing. It had not and would not take any action against any worker who supported the application for de-recognition. There were robust policies in place to ensure that no worker was subject to negative consequences for voicing opinions. There was a confidential hotline (In Touch) and the Group Code of Conduct and Business Ethics expressly stated that no punishment or retaliation occurs against anyone for raising a concern in good faith.

49. In relation to the "culture of fear" point, a survey of pharmacists the PDAU had carried out in June 2017 was referred to. In an e-mail exchange on 5 September 2017 with the Employer's Chief Pharmacist, the PDAU's Director of Services stated of the survey "that this survey is not a rigorous academic piece of research". The Applicants asserted that of 207 pharmacists surveyed 144 responded to say they had contemplated closing the pharmacy but did not out of fear of consequences. This was about 6% of the pharmacists in the BU and it was not clear what these consequences would be. It could have been the fear of breaching the NHS contract, or turning away patients and in doing so breaching the GPhC standards to put

patient care first. There was a standard operating procedure for closing the pharmacy available to all pharmacists to use without fear of reprisal. It was accepted by the Employer that there will be times when the pharmacist needs to make a decision and close the pharmacy. There was guidance on the appropriate way to do so in the Standard Operating Procedures called “Assuming the duties and change-over of the Responsible Pharmacist (RP)”.

50. The Colleague Engagement Survey was an annual anonymous survey conducted by an independent third party called ORC. The purpose of the survey was to allow workers to express good, bad and indifferent feelings as a snapshot in time to inform of the areas the Employer should be addressing. The Applicants’ case highlighted the lower scoring entries but 83% of the pharmacists who responded relieved that the Employer took patient safety seriously which was an increase of 7% since 2016. The Employer listed and provided the a copy of the full survey results and submitted that none of the anonymous responses when viewed as a whole indicated that there was a culture of fear in the BU.

51. The Employer maintained its argument that both the PDAU and the BPA’s membership remained stable. The PDAU did have a dip that it recovered from but there had not been a significant increase in membership levels since 2012. It was likely that only a small percentage of workers were members of both unions and it could be therefore be assumed that a majority of BPA members will not support de-recognition. The allegation that Pre-registration Pharmacists were automatic members of the BPA was false. They were given associate members status and as such did not pay fees and were not included in the numbers in respect of BPA membership. Membership of the BPA was voluntary. But every February, however, the Employer understood that all pharmacy graduates were given free membership of the PDAU at university before hundreds of them were placed with the Employer, demonstrating that the PDAU figures were less about the desire to seek de-recognition of the BPA and more to do with the pre-registration pharmacists being existing members when placed with the Employer. The Employer provided the BPA’s membership levels: from 1,372 members in 2012 to 1,261 members in 2017. There was only one e-mail from a member who was having difficulty ceasing their membership to do with obvious reasons i.e. the external payroll provider not accepting instructions from the employee. The Applicants have also been able to provide an e-mail from someone who had no difficulty in cancelling his/her membership. The evidence did not support the assertion. Furthermore the £25 voucher incentive was not an unusual practice. The PDAU itself offered a raft of benefits to attract members. It did not in any way

suggest likely support for de-recognition of the BPA.

52. The Employer explained its Market Based Pay strategy. MBP was a common approach to paying workers fairly across many leading organisations. Companies look at the salaries paid externally and fix a “market position” based on this. Where workers are under the market position, their reward is adjusted at a faster rate each year compared with other workers, ensuring that the reward system was fair competitive and affordable over the long term. MBP ensured a sustainable position for the Employer and the worker. Only 2.4 % of the BU did not receive a pay increase in 2016 and only 1.7% of the BU did not receive a raise due to being above the market range since MBP was introduced in 2015. The Employer refuted the Applicants’ case that there was an overwhelming sense of powerlessness in the BU. The majority of the BU had consistently received pay increases since the introduction of MBP. The Employer listed for the CAC the pay and benefits its pharmacists received from annual bonuses and pension contributions to holidays and sick pay and having 100% of GPhC registration fees reimbursed. In addition, following feedback in 2017 the Employer unilaterally enhanced its maternity and adoption pay packages.

53. The Employer’s remaining submissions concerned the issues surrounding the Guardian Article, why pharmacists joined the PDAU, cuts in NHS income and the patient safety survey, BPA membership and opposition to independent unions.

54. The Employer did not have a copy of the article in advance. The Guardian’s later follow up article contained untrue statements which the Guardian then agreed to withdraw and apologised for. This was not as a result of sustained or intense pressure.

55. The Employer maintained its view that there were reasons other than de-recognition or recognition as to why a pharmacist was a PDAU member. It was due to pre-employment enrolment or the some 20 listed benefits offered on its website. It was correct that the BPA too offered legal advice but it did not offer indemnity insurance which in the Employer’s view, would be needed more and more as it witnessed pharmacists moving to a “portfolio” type career. The PDAU had submitted no evidence to support the assertion that pharmacists had joined the PDAU for specific interests in union activities and not rather to avail themselves of the range of benefits that were associated with PDA membership.

56. The Applicants’ also had no evidence to support their assertion that undue pressure was

being put on workers due to the cuts in NHS income. Despite a difficult economic climate the employer had increased the number of pharmacists by 430 since September 2015. An additional 1000 support staff had joined the Employer since August 2016. Resources were already increasing so it would be improper to place any weight on this aspect of the Applicants' representations.

57. The conclusions reached by the PDAU in relation to the Patient Safety Survey were simply untrue. Research undertaken by Chemist and Druggist Magazine (the link was provided) published on 14 March 2017 stated that: 5.4% of all UK pharmacies inspected in the period from 2013 to 2016 were rated poor whereas only 0.87% of Boots pharmacies had received a similar rating to date and 17.11% of all UK pharmacies inspected in the period from 2013 to 2016 were rated "good" whereas 36.76% of Boots pharmacies have received a similar rating to date.

58. Finally, the approach taken to independent unions in the USA by an associated company in 2013 was irrelevant and should be given no weight when assessing likely support for de-recognition of the BPA by members of the BU. The Employer and its associated companies in the UK and the republic of Ireland already voluntarily recognised USDAW and Unite alongside their European Works Council and local Works Councils. It was incorrect to assert that there was a blanket opposition to independent unions within the Employer's group.

59. In conclusion, the Applicants had failed to demonstrate that a majority of the BU were likely to favour an end to the Employer's bargaining arrangements with the BPA having secured an alleged 1,017 pledges of support within a BU of 7,157 workers after a 40 day campaign involving email, text, telephone, pharmacy media and online discussion forum activity. It was still not proven that all the pledges came from pharmacists who were employees of the Employer. The Employer respectfully requested that the CAC carefully scrutinised these to determine that the 10% was actually met. In light of the disruption that would be caused by further campaigning and ballot the Employer also respectfully asked the CAC to declare that the statutory test for calling a ballot was not met and the application should be dismissed.

Union's response to Applicants' further evidence

60. The application was for de-recognition of the BPA but much of the activity from the Applicants' representatives from the outset was an attempt to turn the issue into a debate about recognition of the PDAU. Pledges were being sought both in support of de-recognition and in support of recognition of the PDAU. The BPA asked the Panel to consider whether there was a conflict of interest when the Applicants' support was from a union seeking recognition by the Employer.

61. The Applicants were relying heavily on the unscripted forum thread. The high level of interest was noted but it was also noted that only 29 people had contributed to the debate. Therefore no conclusions of support for de-recognition could be drawn from this evidence. The BPA echoed the Employer's point that only 1,017 individuals from a BU over 7,000 had indicated their support. The Applicants were contradictory in its view regarding how aware the workers were about de-recognition. It had stated that the campaign was undertaken during peak holiday time and that 40% of their e-mails were unopened but it is also known that the PDAU was given access to the wider BU through the Pharmacy unscripted forum which the PDAU cited was viewed more than 13,378 times.

62. The BPA had not itself engaged in the debate within the thread other than to provide factual information and updates as to progress of the much delayed process which had extended the time for which the Applicants' representatives had to gain pledges of support. The fact that less than 15% of the BU had chosen to indicate their support demonstrated a very low level of support for the application for de-recognition.

63. The pledges were a demonstration that the Applicants' representatives, the PDAU had only been able to mobilise less than half of its membership on the issue. The pledges were only 14.3% of the BU despite the PDAU having over 40 days to collect the pledges. This only supported the BPA's original statement in response to the application that it was unfair and inappropriate to assume membership of the PDAU was indicative in itself of support for the application.

64. The BPA contended that its members' survey showed that 20% of its members had portfolio careers. Only these members needed professional indemnity insurance. Many of its members were members of the PDAU because of the competitive nature of its professional indemnity product. The BPA was close to launching its own comparable product for its own

members' portfolio careers.

65. The BPA confirmed its membership figures. It had 1,261 members of whom five were retired and five were honorary members so its current employees within the BU as full paying members were 1,251. This figure did not include the pre-registration graduates who had accepted Associate Membership which would give the BPA a membership level of 1,565. Both the BPA and the PDAU gave free associate membership to pre-registration graduates. It was worth clarifying whether the PDAU membership within Boots UK included pre- registration graduates.

66. The BPA represented the interests of its pharmacists and pre-registration graduates within and outside Boots (Appendix 2). Pharmacists occupied roles throughout the stores, field and support functions from pre-registration graduate to director level. There was no ineligibility criteria for membership of the BPA for pre- registration graduates or pharmacists. Cancellation details were clearly stated on the application form (Appendix 3 & 4). Check off deductions commenced two or three months after joining the organisation and were dependent on the date of joining and the Boots UK internal payroll cut off dates. The same two to three-month delay applied to termination of membership for the same reasons. However, benefits started from the date of receipt by the BPA of the application form until the payment stopped e.g. a member with a joining date of 1 January 2017 who gave notice to leave on 31 December 2017 would only pay 12 months membership fees and receive up to 15 months of membership benefits. With regard to the anonymous e-mails the PDAU had received from workers having trouble with ceasing their membership, without details the BPA could not investigate these and therefore these e-mails should be inadmissible as evidence. The BPA refuted that some of the BPA membership was retained because of hurdles in their being able to stop their subscriptions.

67. The BPA provided a graph (Appendix 5) showing in its view a moderate steady decline in membership between 2014 and 2016. Peak levels of membership was achieved in 2014. There was a decline in 2015 due to a head count reduction in support, office and field roles, followed by a voluntary redundancy programme in the Support Office. At the start of 2017 members who had taken voluntary redundancy continued to leave. However membership levels had now recovered with 56 new members taking its current membership level to 1,261.

68. In response to feedback, over 80% of its members would recommend membership of the BPA to their colleagues. The BPA executives have decided to trial a Refer a Friend

Scheme. Uptake of this initiative was low and was going to be reviewed at the end of the financial year. Despite the uncertainty created by the current de-recognition application, the BPA membership had grown since the start of the process and this could be considered to be an endorsement of the current working arrangements between Boots UK and the BPA.

69. It took exception to the remark that the BPA and Boots senior management had a proven history of collaborating and using underhand tactics to block an independent union from being recognised. The BPA had a series of agreements over the last 41 years, culminating in the current agreement which was provided at Appendix 2 and was signed in 2012. The decision dated 20 May 2013 of the Certification Officer, Mr Cockburn stated that:

“it is more likely that the actions of the BPA in this regard were to protect its own position. It could have reasoned that if the PDA gained statutory recognition it may lose members and its own existence may be threatened.”

70. In conclusion the current BPA recognition agreement best served the interest of all Boots’ pharmacists as it involved the BPA on a consultative basis when any major business initiatives was being proposed, including Significant Organisational change, significant changes to working practices, changes to terms and conditions and the ability to respond to Boots Pay proposals. Feedback from members was that over a third considered that the ability of the BPA to influence company strategy as being most valued reason for membership (Appendix 6). The Applicants had failed to demonstrate anywhere close to the level of support to indicate that a majority of the BU would vote in favour of the de-recognition of the BPA. Therefore it was unreasonable to proceed any further with the application and would avoid the requirement of a costly and time consuming ballot of the BU.

71. The supporting documents provided with the BPA’s submission in response to the Applicants’ further evidence included 6 Appendices including 1. Professional Counsellor, 2. Boots and BPA Partnership, 3. BPA Application form (paper), 4. BPA Application Form (online), 5. BPA membership graph, 6. BPA membership Survey (most valued Benefits).

Considerations

72. In deciding whether to accept the application the Panel must determine whether the

admissibility provisions referred to in paragraph 4 above are satisfied. The Panel has considered carefully the submissions of the parties and the supporting documentation in reaching its decision. The Panel did not consider a hearing was necessary and neither did either party suggest it. As is clear from the summary above, both parties had ample opportunity to make submissions and submit any information they considered relevant to the Panel's considerations. They quite rightly availed themselves of that opportunity and responded to the other side's representations in a number of cycles. The primary facts were largely not in dispute, and such as they were would not have been assisted by oral evidence, the difference between the parties focusing more on the interpretation of those facts.

73. The Panel also decided it was not necessary to have a full membership and support check in a bargaining unit of this size and given the extensive information provided by the parties. It would be disproportionate and involve excessive delay. It is for the Panel to consider the information placed before it and to consider whether the Applicants have satisfied us to the civil standard that the application is admissible, so as to enable the case to proceed to the next step in the procedure.

74. The Panel also reminds itself that the Schedule anticipates that a decision on admissibility will be speedy – pursuant to para 141(6) the acceptance period is 10 days from the date of receipt of the application by the CAC, unless, as here the period is extended by the Panel under para 141(6)(b). Unfortunately however, in this case it was not possible to reach a decision within the expected 10 day period since both sides wished for more time to present information and detailed submissions to the Panel and subsequently to respond to each other's submissions, followed by further submissions. The Panel also needed time to consider, reach and draft its decision.

75. This is the first case to come before the CAC under the current legislation (which has now been in force for 17 years) for the ending of bargaining arrangements between a non-independent union and an employer under Part VI. In many respects the structure of Part VI is similar to other Parts of the union recognition provisions – requiring, inter alia, support from 10% of the bargaining unit, and demonstration of likely majority support, for the aim of the application – be it recognition or de-recognition of a particular trade union by a specific employer for collective bargaining as set out in either a tailor-made agreement or the default statutory provisions. In Part VI the provision is contained in paragraph 139. In this case the

tests in para 139 are the only contested issues at the admissibility stage. The Panel formally records that it is satisfied that the application is not rendered inadmissible by any of the remaining provisions concerning admissibility in paragraphs 137, 138 and 140 of the Schedule.

76. This case has a considerable history. In very brief summary, it started in 2012 with an application for recognition brought under Part I of the Schedule by the independent union, PDAU, the Applicants' trade union for pharmacists employed by Boots¹. The Employer sought to rely on an agreement with a non-independent union, BPA, to resist the application as the CAC cannot consider an application where there is already a recognition agreement in place with a different union. The PDAU saw it as the Employer entering "into a token recognition agreement with a tame in-house trade union in order to avoid having to deal with an independent union".² The CAC Panel did not consider the terms of the Employer's agreement with the BPA were sufficient to block the PDAU's application and in 2014 the PDAU application was duly accepted. At that point in time the PDAU had demonstrated sufficient support and likely support for recognition of them by the Employer within the proposed bargaining unit to satisfy the statutory tests as set out in the Panel's acceptance decision of 9 January 2014.

77. It was subsequently found by the High Court, upheld in the Court of Appeal, that the Employer's agreement with the BPA was effective to prevent the PDAU from proceeding with a claim for recognition. At the risk of oversimplification, although the Employer's agreement with the BPA did not extend to the recognition rights for pay, hours and holidays provided for in the Schedule, since it included negotiating rights solely "for the purpose of negotiation relating to facilities for its officials and the machinery for consultation", it was sufficient to come within the collective bargaining definition of s.178 TULR(C)A, thereby precluding an application for recognition by another trade union. The Court of Appeal observed that if the PDAU and its members wished to pursue collective bargaining rights with the Employer for pharmacists employed by them, the correct procedure was first to obtain an end to the Employer's arrangements with the BPA under the Part VI procedure, and if successful, then to apply for recognition. Hence this application. The Panel refers to the succinct history set out in paragraphs 19-25 of the Judgment of Underhill LJ in *PDAU v Boots Management Services Ltd*

¹ TUR1/823/(2012)

² Para 1 *PDAU v Boots & SofS BIS* [2017]EWCA Civ 66

& *SofS for BIS* [2017] EWCA Civ 66.

The bargaining unit encompassed by the BPA bargaining arrangements

78. This is therefore a particularly unusual and interesting case, since all sides agree that the BPA's entitlement to conduct collective bargaining with the Employer is very limited indeed, and possibly of benefit to the BPA, rather than the workers.³ For the PDAU to be able to commence an application for recognition for pay, hours and holiday it is necessary for the BPA to be de-recognised "as having collective bargaining rights for the purposes of negotiation relating to facilities for its officials and the machinery for consultation in respect of the matters upon which" the Employer has decided to consult. The BPA agreement specifically "does not provide for collective bargaining rights on any other matters."⁴

79. In the preamble to the agreement, the "Boots and the BPA in Partnership" agreement explains that the BPA represents the interests of its pharmacists and pre-registration graduates within and outside Boots and is the voice of the employee pharmacist to the company and the profession. The consultation provisions provide that the Employer will involve the BPA on a consultative basis when any major business initiative affecting pharmacists is being proposed, in seeking feedback from pharmacists on more general employment conditions, and on "matters of mutual interest between Boots and BPA". The Panel refers to its finding in the earlier decision⁵ concerning the agreement between the Employer and the BPA.

80. The bargaining unit could therefore be seen as a little imprecise and hard to identify. Although the parties were largely agreed, there was an issue between them: the Applicants described the bargaining unit in their application form as all registered pharmacists and pre-registration graduates, excluding those of Area Management status or equivalent and those more senior to them, employed by the Employer in the UK, whilst the Employer described it as "all pharmacists and pre-registration graduates employed by the Employer in the UK." The BPA agreed with the Employer.

81. The difference therefore was whether area managers and above were included. BPA's constitution provides in clause 2 as follows:

³ See footnote 1 of the Judgment of the Court of Appeal.

⁴ Boots & BPA agreement, referred to in para 29 CAC decision 29 January 2013

⁵ CAC Panel's decision of 29 January 2013 TUR1/823/2012 paras 17-32

- “(a) To regulate the relations between Boots The Chemist as employer and pharmacists as employees of Boots The Chemist, in particular:
 - (i) To act as an officially recognized medium for representing to the management of Boots The Chemist all matters affecting the pharmacists of Boots The Chemist
 - (ii) To foster a spirit of mutual dependence and trust between the pharmacists of Boots The Chemist and the management of Boots The Chemist
- (b) To provide an independent means of communication within Boots The Chemist and outside to organisations of a similar nature.
- (c) To advance the status of the pharmacy profession with particular regard to employee pharmacists, and to promote the professional interests of its members.

82. The Panel’s initial view therefore is that it appears from the agreement and the constitution of the BPA that it seeks to consult on behalf of the employee pharmacists qua pharmacists. Examples of consultation initiatives provided by the BPA to the Panel related specifically and exclusively to pharmacists working as pharmacists for the Employer, such as the Pharmacy Strategy and Pharmacy Reward. It is a matter of common sense too – the employee pharmacists who would otherwise not be privy to, or have input into, for example, major business initiatives. Management structures would be available for managers to be informed and involved.

83. The fact that some area, and more senior managers may also be registered pharmacists is somewhat beside the point – the role of the BPA is in relation to employee pharmacists in their capacity or job title of pharmacist. It is immaterial that pharmacists who climb the management ladder are able to retain membership of the BPA and their professional body. In the agreement it appears that the Employer has decided to consult on matters for the rank and file pharmacist employees. The Panel noted that the parties agreed that pre-registration graduates were included and we have not needed to decide the point.

84. The Panel therefore considers that area managers and above do not fall within the definition of the bargaining unit, but have considered the acceptance issues on the basis of the figures in the Employer’s assessment of the bargaining unit, since the Employer has not provided the figures of the bargaining unit without the managers.

Paragraph 139(1) (a)

85. Under paragraph 139(1)(a) of the Schedule an application is not admissible unless the Panel decides that at least 10% of the workers constituting the bargaining unit favour an end of the bargaining arrangements. There is some uncertainty about the size of the bargaining unit, some of which may relate to whether area managers and above are included or excluded. The figures range from the Applicants' initial perception that there were 5,500 pharmacists employed, to the most recent figures provided by the Employer which state that the bargaining unit comprises 7,157 workers (an increase from 7,096 when they submitted their first response to the application). The Panel also notes the facts found as at 9 January 2014, recorded in the Panel's acceptance decision when a full membership and support check was conducted when 6,891 workers were identified as being in the bargaining unit⁶. In the Applicants' final submissions of 22 September 2017 they suggested the bargaining unit had been overstated by the Employer and was in the region of 6,200, a figure taken from the Employer's website. In summary, neither side accepted the other's figures. Out of an abundance of caution because it is not possible to identify the precise number (which is not essential at this stage of the proceedings) as a working hypothesis for the purposes of admissibility only, the Panel has used the Employer's figure of 7,157. Should it come to a ballot, a more precise exercise will be required, with up to date information.

86. The Applicants have provided information which the CAC finds to be broadly reliable that 1,017 individuals who are current employees of the Employer have pledged their support to end the recognition of the BPA, which is 14.2%⁷ of the presumed numbers in the bargaining unit. The Panel noted the Employer and BPA's concern that without a detailed cross-check against the names of workers in the bargaining unit the figures were not necessarily reliable. However the detailed information provided by the PDAU explaining its methodology and its ready acceptance that 437 ex-Boots employees had participated in the pledge inspired confidence in the integrity of the exercise. So too does their confirmation that any duplicates have been weeded out, and that a similar internal membership check methodology has been adopted as had occurred in 2013.

⁶ CAC Panel's decision of 9 January 2014 TUR1/823/2012

⁷ The Employer submitted that this may not be precisely arithmetically accurate, but even with a margin of error the figure is significantly in excess of 10%.

87. The Employer and BPA raised the issue of the wording of the pledge which they considered did not precisely mirror the statutory test since it asked for pledges from those who both supported de-recognition of the BPA and recognition of the PDAU. The Panel did not find this to be compelling. It set a higher hurdle than that required by the Schedule, since those who wanted to end the current collective bargaining arrangements but not replace them with recognition of PDAU would not have signed it, and the Applicants only needed confirmation of the former. The wording of the pledge demonstrates the intertwined nature of the two issues on the facts of this case. The Panel therefore accepts that those who signed the pledges want the bargaining arrangements with BPA to end.

88. The Applicants rely not only on those who have taken active steps to sign the pledge, but also their consistently high, and rising levels of membership as evidence of support for de-recognition of the BPA.

89. The parties' respective positions have been set out in full above – the Employer and BPA submitting that membership of the PDAU is not evidence of support for de-recognition of the BPA and the Applicants asserting that it does. The Panel finds that given the active campaigning for recognition by the PDAU, the blocking effect of the BPA agreement and the history of the case and the structure of the legislation, on the facts in this case, membership of the PDAU is evidence of support for recognition by its members, whether or not they have also signed the pledge. The PDAU has vigorously pursued its aim to achieve recognition by the Employer and it has maintained consistently strong levels of membership within the bargaining unit since it launched its recognition campaign. They are still increasing in spite of the slow progress, demonstrating tenacity and commitment. We noted in the Panel's decision of 9 January 2014⁸ that membership of PDAU had increased exponentially since the PDAU announced its intention to seek recognition rights growing from 1,258 in January 2011 to 2387 in October 2012 and that membership levels within the bargaining unit had remained at between 2,200-2,400 until January 2014. In that period PDAU has continued its campaign for recognition through the courts and whilst it has done so, the membership levels have been maintained. It now stands at 2,432 which is 31.8% of the bargaining unit, adopting the Employer's disputed figure of the size of the bargaining unit.

⁸ Para 24

90. There are a number of reasons why we conclude that the membership figures of the PDAU are cogent evidence of support for de-recognition of the BPA. Firstly it is well known within the Boots community that the Employer's agreement with the BPA is preventing the PDAU from applying for recognition rights. The de-recognition of the BPA is therefore a prerequisite to an application by the PDAU. Secondly, the PDAU has clearly communicated its policy to obtain recognition for its members employed by Boots. Its members will know that a considerable part of their membership dues and the energy and focus of their union are being expended on the recognition campaign. It is therefore noteworthy that the PDAU has sustained significant membership levels of pharmacists within this 5 year period. Membership levels have continued to climb since 2014 from 1938 (excluding the pre-registration graduates) in 2014, to 2057 in 2015 and 2170 in 2016 and now 2432.

91. Many trade unions often offer services beyond representation and negotiation rights and both the BPA and the PDAU are no different in this regard. But the Panel accepts that the main reason why individuals join trade unions is for representation and negotiation rights with their employer. The Employer suggested that it believed that the PDAU's indemnity insurance offer attracted membership. But it was only a suggestion. We had no evidence, for example, as to comparability of indemnity insurance rates from third party, non-union providers to the membership rates of the PDAU. Neither the Employer or the BPA put forward cogent evidence to rebut the presumption that a worker joins a union for reasons other than the obvious one of collective bargaining on the central matters of pay, hours and holiday.

92. We do not accept the Employer and BPA submissions that the PDAU members who did not sign the pledge can be taken not to support the application. The pledge ran for just 6 weeks over the summer holiday period and we conclude that membership of the PDAU is, in broad terms, evidence of support for de-recognition of BPA, for the reasons set out above.

93. We therefore conclude that the evidence provided by the Applicants consisting of the pledges of 14.2% and the PDAU union membership density of 31.8% establish that at least 10% of the workers in the current bargaining unit favour an end to the collective recognition arrangements between the BPA and the Employer. The test under paragraph 139(1)(a) has therefore been met.

Paragraph 139(1) (b)

94. Under paragraph 139(1) (b) of the Schedule an application is not admissible unless the CAC decides that a majority of the workers constituting the bargaining unit would be likely to favour an end of the bargaining arrangements. It is an inherently less precise exercise as the Panel is being invited to consider what the workers of a bargaining unit would say, if asked the question about the existing bargaining arrangements. We are being asked to look into the minds of the workers in the bargaining unit and to make inferences from the information available. The background is that in bringing this application, the PDAU's objective is to ultimately obtain collective bargaining rights over the pharmacists' pay, hours and holidays. The BPA agreement with the employer excludes them from these areas of bargaining, since the application is only admissible if the CAC decides that a majority of workers in the bargaining unit are likely to favour an end of the BPA bargaining arrangements. The application, if successful, would not of itself mean an end to the BPA. Future relationships would be a matter for the parties to resolve in recognition of the new set of circumstances.

95. It is relevant that the aims of the BPA and the PDAU are very different – this is not a straight fight between two similar unions seeking similar rights vis-à-vis an employer. The BPA is not an independent trade union, but seeks to be a close ally of the Employer in the manner of a traditional staff association. By definition a union that is not independent, is dependent upon the employer of the workers in its membership. In this case the BPA is involved only with Boots pharmacists – there is a clue in its full name: The Boots Pharmacists' Association. The PDAU, on the other hand, vaunts its independence and its experience and representation of pharmacists in the UK wherever they are employed. As a matter of industrial relations, the roles of the BPA and the PDAU are not necessarily mutually exclusive and many employers have relationships with both non-independent staff associations and independent trade unions. The PDAU acknowledges the different roles they may each play. The BPA explained that it believed 20% of its members were also members of the PDAU, which would further illustrate the point.

96. In this case the current arrangements are with a non-independent trade union that is favoured by the Employer – they were historically referred to as “sweetheart unions” in

industrial relations vocabulary – the sexist overtone of the language revealing the inequality of power and dependency of the union concerned, and the term alluding to its privileged status, so that workers would feel safe, or even favoured, for joining the union. The Employer is outwardly and overtly supportive of the BPA and encourages pharmacists to join – it acts as a recruiting sergeant. The BPA/Employer agreement expressly provides support to the BPA to recruit new members by including reference to the BPA in their offer letter to new joining pharmacists and a BPA application form. The Employer has undertaken to publicise and create links to the BPA website where possible. The Employer also supports the BPA by providing address labels to the BPA and enables the BPA to put communications through the internal mail system for delivery and the Employer undertakes the task of putting any such communications in envelopes, addressing them and sending them out for BPA (see clauses 7 & 10 of the agreement). As a consequence, the Panel considers that there is less to be gleaned or inferred by membership of the BPA than can be said of membership of the PDAU. Membership of the BPA does not necessarily equate to support for the collective bargaining arrangements currently in place.

97. In contrast, the Employer has been vocal in its opposition to the PDAU in the UK, and the US parent company towards independent unions generally. The Employer is right to note that it continues to honour recognition agreements with shop floor unions, but that is not an answer to its opposition to its pharmacists being collectively bargained for by an independent trade union. The Panel acknowledges that it is a climate in which it is harder for workers to express their views openly in support of de-recognition of the BPA and recognition by the PDAU. They are not competing on a level playing field. The PDAU does not have access to Boots pharmacist employees in the same way that the BPA does. Many of the pharmacists work alone in small stores, across the 2,500 or so branches of Boots around the country.

98. Against that background let us consider the data concerning membership of the PDAU and the BPA and what can be gleaned from it in terms of likely support for an end to the collective bargaining arrangements between the BPA and the PDAU. The Applicants provided comparative membership data for the PDAU and the BPA, at Appendix 24 to its further submissions, which did not appear to be significantly in dispute between the parties⁹. The

⁹ It would appear that the data excludes pre-registration graduate figures for both organisations, which provides a fair comparison, since like is being compared with like. The pre-registration graduates of both organisations should be included in the statistical analysis since the parties agree that they are in the

PDAU current membership is 2,432¹⁰ - the highest it has ever been and rising, and the BPA 1,613¹¹ or 1,616¹².

99. It is noteworthy that the BPA membership has not increased over the period, which they acknowledge is in steady, gentle decline – reducing from 1,372 full members in 2014 to 1,253 in 2016. As set out in the Panel’s earlier decision, historically the arrangements between the BPA and the Employer were consultative only and did not include any aspect of collective bargaining until the BPA and the Employer formed the agreement in response to the PDAU’s recognition request. It is therefore interesting to note that the effect of the BPA/employer agreement did not coincide with an increase in membership, but a decline. If the workers in the bargaining unit had been supportive of the new BPA/employer agreement one would expect it to have sounded in increased membership of the BPA, not the reverse. Similarly, if the workers in the bargaining unit had been hostile to moves by the PDAU to obtain recognition, one would expect membership of the BPA to have grown as a direct response. Neither has happened.

100. BPA membership remains at consistently less than that of the PDAU. The PDAU has approximately one third of the bargaining unit in membership and the BPA approximately 22.5%, with at least half of the bargaining unit being member of neither organisation (given the dual membership statistic provided by the BPA that 20% of its members were also PDAU members).

101. We have already stated that membership of the PDAU is evidence of support for the ending of bargaining arrangements between the BPA and the Employer. But in relation to those workers who have joined a union there are two further questions: are members of the BPA likely to favour the continuation of the bargaining arrangements with the Employer; and what can be gleaned from those who are members of both (assuming BPA’s figures are accurate,

bargaining unit, but provided there is consistency as between the comparative figures it is sufficient. If there were to be arguments as to whether pre-registration graduates should be included as they do not pay membership dues for either union until they register, the numbers do not affect the outcome of this decision. Furthermore it is a point that can be equally made against by union by the other: thus cancelling each other out.

¹⁰ As accepted by Boots in their submissions of 18 September 2017. Appendix 24 places the number at 2170 which we understand to exclude the pre-registration graduate members who ought to be included, which would explain the difference in numbers.

¹¹ The figure has been calculated by adding 360 pre-registration graduate members to the figure of 1,253 in Appendix 24 provided by the Applicants.

¹² BPA submitted on 10 August 2017 that it had 1,256 full members and 360 preregistration graduate members

which PDAU disputes, as PDAU considers dual membership to account for less than 20% of BPA's membership)?

102. Taking the dual membership question first, given the imbalance between the two organisations in their access to the workforce to recruit and retain members, choosing to join the PDAU, an independent union, requires more effort and commitment than joining the BPA. The BPA raised the issue of the PDAU recruiting members at universities amongst the undergraduate pharmacist cohort, but given the financial pressures on recent graduates the Panel concludes that undergraduates recruited on a low or even no-fee undergraduate basis would be astute to notice once registered that monthly fees were being incurred, and the BPA too does not charge membership fees for pre-registration graduates. Those who have chosen to join both organisations are, we find, more likely to want full recognition rights for the PDAU and therefore for the very limited bargaining rights on facilities for BPA officials, and the machinery for consultation to be removed to enable PDAU to make an application for full bargaining rights. They may also value other aspects of their BPA membership and the services and benefits that either dovetail, or do not stand in the way, of the PDAU's recognition claim. We therefore conclude that even if some of the 2,432 PDAU members are also members of the BPA, that they are likely to support the ending of the current status quo of bargaining arrangements, to enable the PDAU to make a claim.

103. As for the 80%, of the BPA members who are not members of the PDAU, we accept that as evidence that some of them support the status quo and do not support an end to the current arrangements. Given the BPA's favoured status, the ease of joining with the Employer's encouragement to join BPA, it does not suggest equivalent strength of support for the BPA/Employer collective bargaining arrangements, as PDAU membership demonstrates support for change, and de-recognition of the BPA.

104. That leaves us with the 30-50% who are members of neither union. What would they be likely to support? Both sides relied on various articles and surveys about the general state of employee satisfaction, and social media fora such as Unscripted Pharmacy.

105. We have treated the newspaper articles and various survey data with a degree of caution. Although we do not have strict rules of evidence in CAC hearings and generally speaking consider whatever information the parties choose to put before us, we always have an

eye to accuracy, likelihood of impartiality and relevance and each piece of evidence is carefully weighed. But a press article is of limited evidential value when the Panel has little information about the sources and the material used which forms the journalist's views. Similarly, those who contribute to online debates and post comments on websites may, or may not, be representative of the wider constituency. None of the surveys were academic rigorous pieces of research. Much of the information before us was inevitably anecdotal and impressionistic - the difficulty with any survey is that it is only as good as the views of those who have chosen to express an opinion. Our task is to decide what members of the bargaining unit would think.

106. Similarly with the unscripted pharmacy website forum, there are clearly a number of vocal critics of the Employer and its industrial relations who are willing to make their views known repeatedly. They do not necessarily speak for the silent majority, but they do demonstrate levels of concern and discontent within the workforce, which may well influence the quieter ones. The Employer argues that majority of the workers in the bargaining unit were content with the status quo and by implication do not want collective bargaining. To support this they refer to their Colleague Engagement Survey of May 2017 where responses, inter alia, indicated 'Boots as a great place to work'. The latter assertion however does not necessarily support the former. The Panel take the view that engaging in collective bargaining over pay and conditions whilst maintaining a good working environment and relationship with employees are entirely compatible ends. It is not conclusive that every contributor who considered Boots a great place to work did not also think there was room for improvement that could be achieved by collective bargaining. However we agree with the Employer and the BPA that some of them would like the maintenance of the status quo.

107. We agree with the Applicants' submissions that whilst some may be agnostic to the PDAU and others not supportive, in light of the Employer's open support and encouragement of membership of the BPA, in general terms non-members of the BPA are less likely to be supportive of the BPA and its recognition arrangement with the PDAU, than vice versa. When an application form to join the BPA is sent by the Employer as part of an offer of employment letter to a new recruit, it can be inferred that most of those who choose not to join the BPA, do not support the BPA. The psychological pressure to join in those circumstances is quite considerable for the newly recruited employee wanting to make a good impression on her or his new employer.

108. The Panel also views the BPA declining membership as significant – those who have voted with their feet and cancelled their subscriptions – of whom we know there are a growing number, are likely to favour an end to the current bargaining arrangements by their active steps to cease being members of the BPA¹³.

109. In the industrial relations experience of the Panel for which we were appointed to the CAC we conclude that there are those who support recognition by an independent trade union, but who choose not to show their hand when the Employer makes known it does not support the union, those who support a union but prefer not to join for parsimonious reasons, and those who wait to see the way the wind is blowing. With the BPA membership in decline and the PDAU on the rise, the direction of travel appears to be in the PDAU's favour at present.

110. Drawing the strands together, we are satisfied that in general terms the PDAU members of 31.8% of the bargaining unit support the de-recognition of the BPA for collective bargaining, (including those who may also be members of BPA). We further find that most of the workers who are members of neither organisation would also be likely to support an ending of the two matters that are collectively bargained for by the BPA. Assuming the accuracy of the figures presented by each of the parties and that 20% of the BPA's 1,616 total members are also PDAU members and therefore included in their 2,432 members, the total number of workers who are members of neither union are 3,432 which is 48% of the bargaining unit. The Applicants therefore need only satisfy the Panel that at least 18.2% of the members of neither organisation would be likely to support the ending of the BPA collective bargaining arrangements and they have comfortably achieved that on the information before us. The Panel is therefore satisfied that a majority of the workers in the bargaining unit, even on the Employer and the BPA's very wide definition of the bargaining unit would be likely to favour an ending to the current collective bargaining arrangements.

111. In summary, our reasons are the sustained high level of membership of the PDAU in an unfavourable climate which on the facts in this case can be taken to mean a desire for the BPA to be de-recognised; the lower, and reducing levels of membership of the non-independent

¹³ Although some of those who cease being members of BPA may have left the Employer, rather than remained employees but cancelled their subscriptions. We were not given the staff turnover figures, but note that if the Employer's figures are accurate then pharmacist numbers are increasing so there is no question of the workforce shrinkage as an explanation of reduced membership levels.

BPA; the silence of those who have chosen not to join the BPA, in spite of the active encouragement of both the BPA and the Employer; the vocal and influential support of activists and social media commentators; the underlying industrial relations issues that are being expressed on various fora; and, the very limited scope and reach of the current arrangements that do not extend to pay, hours and holidays and which are preventing an independent union from seeking recognition; together lead us to conclude that a majority would be likely to support the ending of the current collective bargaining arrangements.

Decision

112. For the reasons given above, the Panel's decision is that the application is admissible.

Panel

Her Honour Judge Stacey, Chairman of the Panel

Mr Roger Roberts

Mr Paul Talbot

15 November 2017