Case Number: TUR1/1027(2017)
10 January 2018

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DECISION ON WHETHER TO ACCEPT THE APPLICATION

The Parties:

Independent Workers' Union of Great Britain (IWGB)

and

University of London

Introduction

1. The Independent Workers' Union of Great Britain (the "Union") submitted an application to the CAC dated 20 November 2017 that it should be recognised for collective bargaining by the University of London (the "University") for a bargaining unit comprising "Security Guards, Postroom Workers, AV Staff, Porters, and Receptionists working for Cordant Security and/at University of London". The CAC gave both parties notice of receipt of the application on 21 November 2017. The University submitted a response to the CAC on 27 November 2017, which was duly copied to the Union.

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 Regional Employment Judge Barry Clarke, in his capacity as a Deputy Chairman of the CAC, and, as members, Mr David Coats and Mr Roger Roberts. The Case Manager appointed to support the Panel was Nigel Cookson.

Issues

3. The Panel is required by paragraph 15 of Schedule A1 to the Act (the Schedule) to

decide whether the Union's application to the CAC is valid within the terms of paragraphs 5 to 9; is made in accordance with paragraphs 11 or 12; is admissible within the terms of paragraphs 33 to 42; and, therefore, should be accepted.

The Union's application

4. In its application form the Union stated that it had made a formal request for recognition on 31 October 2017 enclosing a copy of its letter with its application. In brief, the University refused the request on the grounds that it did not employ any workers whose job descriptions matched those given by the Union when describing its proposed bargaining unit. The Union attached a copy of its formal request for recognition and the University's reply thereto dated 7 November 2017 to its application. The University employed a total of 1300 workers with 75 workers falling in the proposed bargaining unit. The Union stated that 61 of the 75-strong proposed bargaining unit were in membership. Asked to provide evidence that a majority of workers in the bargaining unit would be likely to support recognition for collective bargaining, the Union stated that more than 50% of the workers in the bargaining unit were members of the Union.

5. When asked to provide its reasons for selecting the proposed bargaining unit, the Union explained that the workers in the bargaining unit had similar terms and conditions to each other and were working both for Cordant Security Ltd ("Cordant") and the University. The Union said that it intended to argue that an employment relationship existed between the workers and the University and must be recognised for the purpose of statutory recognition in order to give effect to the Union's collective bargaining rights under Article 11 of the European Convention of Human Rights ("ECHR"), incorporated into UK law by virtue of the Human Rights Act 1998 ("HRA"). Given the public importance of the law being interpreted compliantly with the ECHR, the Union believed it was necessary to hold a hearing where oral argument could be made.

6. When asked if there was any existing recognition agreement which covered any workers in the bargaining unit, the Union stated that there was an existing voluntary recognition agreement between Cordant[1] and Unison to which the University was not a party.

7. Finally, when asked if it had made a previous application under the Schedule for statutory recognition in respect of the same or similar bargaining unit, the Union stated "No".

The University's response to the application

8. In its response to the Union's application dated 27 November 2017, the University confirmed that it received a written request for recognition from the Union on 31 October 2017. It responded to the Union by way of email on 7 November 2017 refusing the request, a copy of this email was attached to the response. The University went on to add that it was not the employer of the workers in the proposed bargaining unit, whether jointly or otherwise. They were employed by Cordant, as the Union accepted. The University stated that it had completed the remainder of the Employer response form in order to assist the CAC as far as possible, but it had done so on this basis.

9. The University confirmed that it had received a copy of the Union's application and supporting documentation direct from the Union on 21 November 2017. The University confirmed that it employed a total of 1317 workers. It disagreed with the figure given by the Union as to the number of workers in the proposed bargaining unit stating that according to the information supplied by Cordant, there were 69 workers in the proposed bargaining unit. When asked if it disagreed with the Union's estimate of its membership in the proposed bargaining unit the University stated that as it was not the employer of the workers in the proposed bargaining unit it did not have any information to enable it to comment on the Union's estimate of membership. Asked whether it agreed the proposed bargaining unit the University stated that it was not the employer of the workers in question. However, if the workers in question were ever to be employed by the University, the proposed bargaining unit would not be appropriate as it would be inappropriate for such workers to form a separate bargaining unit from the existing bargaining unit in respect of which the University already recognised Unison.

[1] See TUR1/1026/17 IWGB & Cordant Security.

10. When asked whether there was an existing agreement for recognition in force covering workers in the proposed bargaining unit, the University stated that there was such an agreement which came into effect on 23 September 2011. The University understood that the original parties to the agreement were Balfour Beatty Workplace Ltd ("BBW") and Unison. The University also understood that the relevant workers employed by BBW became employed by Cofely Workplace Ltd when Cofely acquired BBW and that they thereafter transferred to Cordant, in both cases under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). The University understood that the recognition agreement also applied to Cofely and thereafter Cordant. The University further understood that, under this agreement, Unison was recognised by Cordant and was entitled to conduct collective bargaining with Cordant on behalf of all the workers in the proposed bargaining unit.

11. When asked to give reasons if it did not consider that a majority of workers in the proposed bargaining unit would be likely to support recognition of the Union, the University refereed to the previous answer above.

12. Asked whether it was aware of a previous application under the Schedule for statutory recognition for the same or similar bargaining unit, the University stated that it understood the Union had made an application for recognition in respect of this or a similar bargaining unit in 2015. The relevant CAC reference was TUR1/914/2015.

Union's comments on the University's response

13. The Employer's response was copied to the Union and its comments invited. By way of detailed submissions dated 11 December 2017, written by John Hendy QC and largely transcribed below, the Union stated the University's central objection was that it was "not the employer of the workers in the proposed bargaining unit, whether jointly or otherwise". The Union accepted that this was a fundamental point of contention between the parties and suggested that there should be a hearing of it as a preliminary issue.

14. The Union accepted that there were employment contracts between the workers in the proposed bargaining unit and Cordant. It was submitted that this did not preclude the University, for the purposes of an application for statutory recognition, being an additional

"employer" of those workers within the meaning of section 296(2) of the Act. The reality, according to the Union, was that the University was a *de facto* employer of these workers in that it substantially determined their terms and conditions with Cordant, in particular in relation to pay, hours and holidays. It was, of course, in relation to the terms and conditions of employment that the Union sought recognition to bargain collectively.

15. The Union's contentions were based on the HRA. The University was a public authority to which section 6 HRA applied. Even if it were not, section 3 HRA required that section 296(2) of the Act and the Schedule be construed in accordance with Article 11 of the ECHR (see *R. (on the application of Boots Management Services Ltd) v Central Arbitration Committee* [2017] EWCA Civ 66; [2017] I.R.L.R. 355 and *LB Wandsworth v SoS for Business, Innovation and Skills* [2017] EWCA Civ 1092). The Union argued that the capacity of the CAC (and other courts) to interpret legislation in accordance with section 3 HRA was wide (*Swift v Robertson* [2014] 1 WLR 3428 SC; *USA v Nolan* [2015] 3 WLR 1105 SC). It contended that Section 296(2) was capable of being construed pursuant to section 3 HRA in a manner drawing on section 43K(1)(a)(ii) Employment Rights Act 1996 ("ERA") to include as an employer an entity which "substantially determines" the terms and conditions of the workers in respect of whom recognition is sought.

16. The Union contended that the common law requires that employment relations must be examined in a "purposive" way so as to discover, from all the circumstances, the reality of the relationship (*Autoclenz v Belcher* [2011] UKSC 41; [2011] I.C.R. 1157; [2011] I.R.L.R. 820; *R (Unison) v Lord Chancellor* [2017] UKSC 51; [2017] I.C.R. 1037; [2017] I.R.L.R. 911; applied in *Uber BV v Aslam* UKEAT/0056/17/DA). In this examination, the relative imbalance in the "bargaining power of the parties" must be taken in to account. According to the Union, nothing could be better evidence of the lack of bargaining power between the workers in the proposed bargaining unit on the one hand and the direct and the *de facto* employers on the other than the fact that the workers were refused bargaining at all with the *de facto* employer which substantially determined their terms and conditions.

17. The Unison case also required, as a matter of common law, the upholding of the rule of law (which includes international law) and access to the courts (here the CAC) to enforce rights, in particular fundamental rights. According to the Union, these common law

principles were wholly consonant with the section 3 interpretative duty in the limited circumstances of this case.

18. The promotion of collective bargaining between workers and employers, including *de facto* employers, was a requirement both of ILO Convention 98 and European Social Charter, Article 6, both of which had been ratified (for decades) by the UK. The Union stated that the right to bargain collectively was an essential element of Article 11 (*Demir and Baykara v Turkey* (2009) 48 EHRR 54) and so the margin of appreciation open to the State to restrict the meaning of "employer" in a way which abridged that right was narrow. The Union noted that, whilst the right to strike may be permissibly constrained in relation to secondary action (*RMT v UK* (2015) 60 EHRR 10) by reason only of its adverse impact on multiple third parties, that factor did not apply in relation to collective bargaining since entitlement to bargain collectively with a *de facto* employer would have no significant impact on any wide class of third parties.

19. Unlike secondary action, the State had not sought, *via the Act,* to prohibit collective bargaining with a *de facto* employer; it had merely failed expressly to provide for an enforceable right to assert it in the Schedule. The Union therefore contended that the Schedule could be read HRA-compliantly so as to confer this right. Unless the Schedule was so compliantly-read however, and unlike the case of *Unite v UK* ((2016) 63 EHRR SE7; [2017] I.R.L.R. 438), it would be a legal impossibility for the workers in the proposed bargaining unit to enter into any form of legally binding collective bargaining agreement with their *de facto* employer. Because of the doctrine of privity of contract in English law, absent a read-in provision to the Schedule or the implication of contractual relations between the workers in the bargaining unit and the University, the terms of any collective agreement between the Union and the University could not be legally enforceable. The failure to read the Schedule so as to enable the workers in question to collectively bargain with their *de facto* employer would therefore engage the State's negative ECHR obligations.

20. The Union contended that the concept of a worker being employed by two employers, one of whom is a *de facto* employer, was a concept well-established in discrete areas of UK law, such as in tort (*Viasystems (Tyneside) Ltd v Thermal Transfer Northern* [2005] EWCA Civ 1151) and, in particular, in relation to employers' liability cases (*McArdle v Andmac Roofing* [1967] 1 W.L.R. 356; *Morris v Breaveglen* [1993] I.C.R. 766; [1993] I.R.L.R. 350;

Nelhams v Sandells Maintenance Ltd [1996] P.I.Q.R. P52; *Ceva Logistics Ltd v Lynch* [2011] EWCA Civ 188; [2011] I.C.R. 746). The concept had not yet featured in CAC jurisprudence, although in *NUJ and Chartered Institute of Environmental Health/ Chadwick House Group* TUR1/685 [2009] the CAC declared a bargaining unit consisting of two employers though both were direct employers of some of the workers in the unit (neither was thus a *de facto* employer).

21. In Canada, the Union explained, the concept of joint employer was found not only in tort law (*Sinclair v Dover Engineering Services Ltd* (1988) 49 DLR (4th) 297; *Downtown Eatery (1993) Ltd v Ontario* (2001) 8 CCEL (3d) 186) but also in the law relating to collective bargaining: *Point-Claire (city) v Quebec (Labour court)* [1997] 1SCR 1015 (end-user of agency worker recognised as *de facto* employer). In the USA in recognition cases, the National Labour Relations Board had accepted for thirty years *de facto* employers as joint employers (joint with the employer under the contracts of employment, e.g. *NRLB v Browning-Ferris Industries (BFI)* 691 F.2d 1117 (3d circuit)).

22. The Union accepted that the point at issue between the parties was novel for the CAC but said that its public importance could not be underestimated.

23. As to the University's other points, it was accepted that there was a recognition agreement between Cordant and Unison. The relevance of this agreement to any future recognition agreement with the Union in respect of these workers was currently the subject of separate proceedings before the same CAC panel.

Considerations

24. Paragraph 2(4) of the Schedule provides: "References to the employer are to the employer of the workers constituting the bargaining unit concerned". Paragraph 4(1) states that the union or unions seeking recognition "must make a request for recognition to the employer". Paragraph 5 states that "The request is not valid unless it is received by the employer."

25. Paragraph 11 provides that if, following receipt of the request, the employer either fails to respond before the end of the first period or within the same period informs the union

that it does not accept the request, without indicating a willingness to negotiate, then the Union may apply to the CAC to decide whether the proposed bargaining unit is appropriate and whether the union (or unions) has the support of a majority of the workers constituting the appropriate bargaining unit.

26. The issue for the Panel to determine is whether the application in this case has been made in respect of the "employer" of the workers in the proposed bargaining unit and, therefore, whether the Union's application is admissible under paragraph 11. In reaching our decision the Panel has considered carefully the written submissions of the parties.

27. Simply put, the facts in this case are that the workers in the Union's proposed bargaining unit are employed at various sites of the University of London fulfilling ancillary functions such as security and porterage. These workers are engaged under contracts of employment by Cordant, Cordant having taken over their contracts from Cofely who in turn had taken them over from BBW. In its submissions, the Union readily accepted that there were contracts of employment between the workers in the proposed bargaining unit and Cordant – which we might call the *de jure* employer. However, the Union argued that the existence of these contracts should not preclude the University, for the purposes of an application for statutory recognition, being a *de facto* employer of the workers on the grounds that the University substantially determined their terms and conditions with Cordant, specifically pay, hours and holidays.

28. Purely for the purposes of determining the admissibility of this application, let us suppose that the Union is correct in its factual assertion that the University has, in practice, substantially determined the terms of the workers' contracts of employment with Cordant insofar as pay, hours and holidays are concerned. We proceed on that basis without implying that the Union's assertion is correct and without further analysis of the meaning of "substantially determines" (in which regard, see the Court of Appeal's judgment in *Day v Lewisham & Greenwich NHS Trust and Health Education England* [2017] I.R.L.R. 623).

29. The Schedule itself does not provide a more precise definition of "employer" other than that found in paragraph 2, which is set out above. However, "employer" is defined, in

relation to a worker[2], in section 296(2) of the Act. It is coupled with the definition of "worker" in section 296(1). The two definitions must be read together. The latter makes clear that, in the absence of a contract of employment, what is required is "*any other contract* whereby [the worker] undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his" (emphasis added). It follows that, for the Union's case to succeed, there must still be a contract between each individual worker in the bargaining unit on the one hand and the University on the other hand. That is an absolute requirement. However, there is no such contract in this case. On the face of it, that is fatal to the Union's application.

30. The Union has not proposed any wording that might be "read into" section 296 to enable it to give effect to the Union's Article 11 rights. From the Union's submission, and its reference to Section 43K(1)(a)(ii) ERA, it would appear to require a further limb to section 296(1), extending the definition of a "worker" to include an individual who works "for a person who in practice substantially determines the terms of his contract with a different employer". It would also appear to require an amendment to section 296(2) to confirm that it may be possible to have one or more "employers" (include joint employers) for each worker.

31. Section 43K(1)(a)(ii) ERA provides an extended definition of "worker" and "employer" for the purposes of Part IVA ERA only. As the EAT noted in *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] I.R.L.R. 742, it was specifically designed to secure whistleblowing protection for workers in health services in England, Scotland and Wales. A mechanism for identifying two or more employers (such as an employment agency and an end user) operates to enhance protection for whistleblowers. In a collective bargaining context, such an approach would not just be novel, as the Union accepts; it would transform the statutory machinery for collective bargaining and run counter to the CAC's general duty under paragraph 171 of the Schedule. An acceptance that this application is admissible would go entirely against "fair and efficient practices and arrangements" because it could lead to a situation where the same workers in the same bargaining unit had one trade union in respect of their *de facto* employer (which, in this sort of case, would be the end user in an outsourcing arrangement) and another trade union in

[2] Paragraph 1 of the Schedule states that an application to the CAC can only be made in respect of a group or groups of workers.

respect of what we might call the *de jure* employer (the actual employer to whom the service provision has been outsourced). Far from creating fair and efficient practices, this would be a recipe for chaotic workplace relationships.

32. The CAC is a creature of statute and it must apply the statute. In the Panel's view, such an expansion to the definition of "worker" and "employer" is a matter for Parliament. In respect of the Union's contention that section 296 of the Act is incompatible with the Union's Article 11 rights, it is a matter for the High Court.

Decision

33. The Panel is satisfied that that the University of London is not the employer of the workers in the Union's proposed bargaining unit and the Union's application to the CAC is therefore not admissible.

Panel

Regional Employment Judge Barry Clarke, Chairman of the Panel
Mr David Coats
Mr Roger Roberts

10 January 2018