

CENTRAL ARBITRATION COMMITTEE
TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992
SCHEDULE A1 - COLLECTIVE BARGAINING: DERECOGNITION
DETERMINATION OF THE BALLOT CONSTITUENCY

The Parties:

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

and

Boots Pharmacists Association (BPA) (the Union)

&

Boots Management Services Limited (the Employer)

Introduction

1. Michael Parker & others (the Applicants), represented by the Pharmacists Defence Association Union (PDAU), 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" 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 and, for the purposes of this decision, Nigel Cookson.

3. By a decision dated 15 November 2017 the Panel accepted the Union's application. In the letters accompanying the decision the parties were invited to enter a period of negotiation with a view to reaching an agreement to end the bargaining arrangements or an agreement that the workers would withdraw the application pursuant to paragraph 142 of Schedule A1 to the Act (the Schedule).

Issues which the Panel is required to determine

4. No agreement ensued however, and the parties requested a decision from the Panel as to the composition of the balloting constituency since they could not agree who exactly was within the scope of the bargaining unit, and which workers ought therefore to receive a ballot paper to participate in the vote. The Employer considered that the bargaining unit included all employees who were registered as pharmacists and pre-registration graduates employed in the UK, regardless of job title and function, including those employed at Area Manager level and above. The Union's position was that all its members who are currently employed by the Employer should be included in the ballot. The Applicants contended that it was apparent from the collective agreement that the bargaining arrangements were in respect of pharmacists and pre-registration pharmacists working as pharmacists for the Employer, and not any other workers, or categories of workers, who happened also to be pharmacists maintaining their registration with their professional body.

5. A decision from the Panel was therefore required and the Case Manager gave notice that a hearing to determine the scope and coverage of the bargaining unit encompassed by the Union's agreement would take place. Both parties had requested that the decision be made at a hearing, rather than on paper, so that witnesses could be called and cross-examined. The purpose of the hearing was to ascertain who were "the workers constituting the bargaining unit" so that arrangements could be made for them to be balloted pursuant to paragraph 117(3) to be asked whether the bargaining arrangements should be ended.

6. The hearing was held in Birmingham on 19 January 2018 and the names of those who attended the hearing are appended to this decision. Both parties agreed that the issue was one of fact: none of the highly experienced lawyers involved in the case had been able to identify any legal authority, or academic journal article or other analysis of the point, notwithstanding their extensive research, and that general common law principles applied. It is a question of the proper construction of the agreement. The industrial relations expertise of the panel members was particularly helpful in this regard. Paragraphs 1-8 of Mr Reade's outline submission was agreed as a precise and accurate summary of the statutory provisions.

7. Although the background to the application is that the Applicants want their independent trade union to bring an application for recognition by the Employer, and that can only commence if the existing arrangements are brought to an end, that background is irrelevant for the purposes of this decision. Furthermore, the views of the Applicants and their independent trade union on their preferred bargaining unit is nothing whatsoever to do with this decision. Nor is the appropriateness of the existing bargaining unit: it does not matter if it is appropriate or not, we merely have to decide what it is. To the extent that irrelevant issues have been addressed in evidence before us, we have taken no account of them in reaching our conclusion. As succinctly put by Mr Reade - there is only one factual question: who are the workers for whom the Employer has agreed that the Union may collectively bargain? Those workers are the workers who must be balloted. It is their right, and no-one else's to determine whether the existing arrangements should be terminated as it is on their behalf that the incumbent Union is bargaining.

8. We also note that our task is determined by statute. The Union and some of its members who had provided statements to the Panel considered it to be undemocratic if they, as Union members, did not have the right to participate in a ballot that they believe could have a significant impact on their Union. The legislation provides however that only those who are currently covered by the collective bargaining arrangements may participate in a vote. If Union members are outside the scope of the bargaining arrangements they will not be allowed to vote.¹

¹ An analogy could perhaps be drawn with English citizens not taking part in a Scottish independence referendum.

9. The Panel heard oral evidence from Dr Matthew Blain, Director of HR Operations for the Employer; Mr Dave Greer on behalf of the Union, and Paul Robinson, Chief Executive Officer of the Union was also permitted by the Panel to give some evidence, although no witness statement had been prepared in advance by him; and Mark Pitt, Assistant General Secretary (Tactical) of the PDA union, on behalf of the Applicants. A number of other witness statements were before the Panel, but as they were not called as live witnesses, to the extent that their evidence was in dispute less weight therefore could be attached to their statements. There was also an agreed bundle of documents before the Panel. Finally, we had helpful written and oral submissions from all sides.

The facts

10. Where the facts were in dispute, the Panel makes its findings of fact on the civil standard and reminds itself that the Applicants bear the burden of proof. The Panel has been chosen pursuant to s.260(3) of the Act for its experience in industrial relations². This case has a long history dating back to the Applicants' trade union's application for recognition under Part 1 of the Schedule in 2012, which is not relevant for the purposes of this decision, but for a summary of the background, the Panel refers to its decision of 15 November 2017 on whether to accept the application, and the earlier decisions of TUR1/823(2012) PDAU & Boots Management Services Ltd of 29 January 2013 and 9 January 2014.

11. In acknowledgement of its corporate roots as Boots the Chemist, the Employer encourages its employees who are registered pharmacists to retain their registration and membership of the GPhC or PSNI, regardless of whether their role requires it. The number of registered pharmacists at the various management levels at the Employer is as follows:

- Level 1 – executive directors – 1
- Level 2 – non-executive directors – 6
- Level 3 – heads of function (head office), regional managers (stores) – 9 or 10
- Level 4 – senior managers (head office), area managers (stores), regional pharmacy managers - 200

² We were particularly fortunate in our members: Mr Roberts has spent 33 years of his working life in HR and employee relations at Tesco Plc, latterly as Employment Relations Director with responsibility for 25,000 employees across 20 units and Mr Talbot as Assistant General Secretary of Unite and its predecessor trade unions for many years, has been a member of the TUC General Council for 10 years, the Government Affairs Officer for Community, is an Acas arbitration panel member, and an Employment Tribunal member.

- Level 5 – large store managers, teacher practitioners, pharmacist deployment managers, professional standards managers, “managers” (head office) - circa 271
- Level 6 – small store managers, pharmacy managers (circa 100), trainers, “assistant managers” (head office) – circa 1053
- Level 7 – store based and relief pharmacists, care services pharmacists, including advanced practitioners – 5165
- Pre-registration pharmacists (trainee pharmacists undertaking a 12 months programme under the supervision of a pharmacist, with no statutory responsibilities – 581.

12. In his witness statement Dr Blain listed the numerous roles currently occupied by employees who have retained their pharmacist registration in level 4 and above ranging from Area Manger through to Chief Pharmacist and from IT Technical Product Manager, Senior Healthcare Lawyer, Head of Care Services, to Healthcare Academy Trainer, but he accepted that it was not usually necessary for their role. Since at least July 2012 non-pharmacists have increasingly been appointed as pharmacist managers, (as is documented in the Union/Employer consultation minutes p 33.)

13. The collective agreement which sets out the collective bargaining arrangements between the Union and the Employer is entitled “Boots and the BPA in Partnership” dated 1 March 2012 (the Agreement, document PDAU 1 in the bundle). In two respects only the BPA is recognised as having collective bargaining rights:

“Under this agreement the BPA is recognised as having collective bargaining rights for the purpose of negotiation relating to facilities for its officials and the machinery for consultation in respect of the matters upon which we will consult with the BPA (which are those set out in this agreement). This agreement does not provide for collective bargaining rights on any other matters.”

14. The Agreement principally addresses various links between the Union and the Employer and issues on which the Union may be consulted. Unusually for a trade union collective agreement, it does not provide for bargaining or negotiation rights in relation to pay, hours, holidays, nor working conditions, nor terms and conditions of employment. It is described as “consultative dialogue” and the BPA is described as a “line of communication”

with “input” into various matters. The Agreement records, for example, how the input of the Union on Employer initiatives will be considered: “Where practicable, our [Boots’] aim is that any proposals submitted by the BPA will be considered by management prior to any final decisions being made by the business. The BPA will be advised of the reasons for the response to its input.”

15. In its preamble, the Agreement states 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”.

16. Facilities for officials of the Union are provided by the Employer such as access to internal mail facilities, links from the Employer’s Pharmacy Unscripted forum to the Union’s website, audio-conferencing and meeting room facilities, recruitment support in new join offer letters to registered and patient facing pharmacists, external training for the Union’s executive, paid time off for Union duties and sponsorship of Union publications and check off facilities. They have also provided support and facilities for an administration and communications officer, Alban Wood, to be seconded full time from his duties with the Employer to work on Union matters.

17. The Union’s constitution provides in clause 2 as follows:

- "(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."

18. The Union provides assistance to individual members in matters affecting them at work, such as representation at grievance and disciplinary hearings. Membership of the Union is a matter of considerable pride and commitment for a number of members, regardless of their job title and job description. Some of the statements produced on behalf of the Union from their members mentioned the Union's helpful role in pay negotiations, but it was common ground that the Union and the Employer did not negotiate on pay, hours (including overtime), holiday or pensions, and these assertions must have been based on a misunderstanding of the important distinction between consultation and negotiation. There were also a number of individual member benefits that were valued by the Union's members, such as professional indemnity insurance. Matters of consultation and individual representation and individual membership benefits, such as the Union's magazine are not within the direct scope of collective bargaining.

19. Some of the Union's witnesses' statements appeared to believe that if the Union was de-recognised for collective bargaining, it would necessarily impact on other aspects of the relationship between the Union and the Employer, which would not necessarily be the case and is a misunderstanding of the matter at issue in these proceedings and the law. As noted in paragraph 95 of our Acceptance Decision (15 November 2017) many employers have relationships -both formal recognition and/or consultative - with both non-independent staff associations and independent trade unions, and in the industrial relations experience of the Panel members it is not unusual in some sectors, such as banking.

20. An analysis of the documentation provided by both parties demonstrated that the Union's limited collective bargaining arrangements are principally concerned with the registered and pre-registration pharmacists at Levels 5, 6 and 7, and not otherwise. It is those grades of pharmacist who have the benefit of the machinery for consultation, since they will not otherwise have a mechanism for collective employee consultation, whereas those at levels 4 and above, as part of more senior management will be aware of ongoing proposals in any event in their managerial and senior employee capacity. We have carefully considered the detail of the consultation meetings summary minutes from 2012-November 2017 at pp23-33 and see that the word "pharmacist" is used to refer to the pharmacists working in pharmacist

roles, not the entire membership of the Union. There are references to pharmacist job codes (see notes of 27 November 2012 p 31, for example) and the pharmacy strategy which refers to front line patient and customer facing pharmacists. All discussions concerning reward structures and pay consultation is focused exclusively on the pharmacist grades, not managers who happen also to be pharmacists.

21. It is also apparent from the Agreement itself, that the term “pharmacist” is used to refer to those working as pharmacists, in distinction, for example to those who are the line manager of a pharmacist or a Regional Pharmacy Manager (see clause 6). It is noteworthy that the support for the Union’s communications to the Employer’s pharmacists in clause 10 of the Agreement is via delivery to store addresses where the pharmacists working as pharmacists work: there is no mention of head office, or regional offices where many of those identified by Dr Blain are likely to work. Similarly, the support provided by the Employer to the Union to recruit new members is to new-joining pharmacists (clause 7), not managers and level 4 and above employees.

22. We noted and accepted the Employer’s evidence that from time to time an employee who was a registered pharmacist, but not with the job title or role of pharmacist, might help out on the pharmacy till at, for example Christmas, every now and then. This reminded one Panel member of times when Sir Terry Leahy would stack a Tesco shelf, or operate a till, again often in the pre-Christmas rush. Such actions did not make Sir Terry a shelf-replenishment operative, a member of the checkout staff, or part of the USDAW collective agreement. Similarly with Mr David Greer, a Level 4 manager who is the regional pharmacy manager responsible for the entire west coast of Scotland and the 140 Boots stores located across that area, who told us he sometimes helps out in a store he is visiting. He shows solidarity and support for his staff and those whom he manages by leading by example, and demonstrating that he can roll up his sleeves and help out. But his role remains that of regional manager, it does not make him a pharmacist.

23. We also noted that for some, it is a badge of pride, honour and identity to be a pharmacist, and part of an employee’s professional personality, background and hinterland. As Ms Graham, area Manager for Northumberland described “My profession makes me a pharmacist first, area manager second” as a cultural identity. It is the same with other professions such as law, academia and accountancy. It is also often the case that retention of

membership of the Union by managers is a statement of loyalty, a form of self-expression and acknowledgement of one's roots, symbolism even³. By analogy, it is often the case that the Vice-Chancellor of a university who has previously been an academic, will be proud to retain membership of the Association of University Teachers, now Universities and Colleges Union. It does not however mean that s/he is currently working as an academic or that s/he will be part of any collective bargaining arrangements, but rather that they may wish to retain union membership for other benefits or as a statement of loyalty and professional identification. That individual remains the Vice-Chancellor performing a Vice-Chancellor's role as chief executive officer of the university.

24. We are concerned with the interpretation of an agreement and the industrial relations context of the agreement. We are satisfied that notwithstanding the oral evidence to the contrary, the matters on which the Employer consults with the Union relate to pharmacists in a pharmacist role and grade, and that the collective bargaining for the machinery for consultation and the facilities for officials likewise relates to pharmacists in pharmacist grades and not all employees who happen incidentally to be registered pharmacist.

Considerations

25. Since this decision turns entirely on the facts, and because we have taken careful note of the parties' respective positions in our analysis and interpretation of the facts as explained above, we will not set out a summary of each side's submissions in this decision as to do so would be merely to duplicate. As previously mentioned there is no legal authority on this matter and in coming to our decision the panel have considered all the evidence which has been submitted and also drawn on their own considerable ER experience to arrive at the final decision.

26. The focus of attention under the Collective Agreement is to the pharmacists acting as pharmacists at grades 5, 6 and 7. The Employer and the Union's witnesses spoke of the deep bonds between them in their mutual support and the Union in particular emphasized its view that it acted on behalf of all its members and pharmacists whatever their job title or position,

³ Acknowledgement of the fundamental importance of such affiliation is reflected in Article 11 ECHR.

the issue is the scope of the Collective Agreement, not all aspects derived from all sources of the relationship. The views of the parties as to the meaning of an agreement are not determinative in interpreting an agreement, but can be a useful indication. A particular difficulty for the Panel, especially with Mr Greer and Mr Robinson's evidence, was the elision, or conflation, of all the various aspects of the Union and its role vis a vis its members and the Employer. In this decision we are concerned only with the collective bargaining aspect of the Union's relationship with the Employer under the collective agreement. To learn of the individual case work and support the Union provides to its members in individual representation, for example is of no assistance to the matter at hand. For example, Ms Graham referred to the support of the Union in times of trouble and Mr Armstrong wrongly believed that the Employer negotiated with the Union over pension entitlement: neither matter is within the collective bargain.

27. Dr Blain's assertion on behalf of the Employer that the Union was recognised for a wide range of roles occupied by pharmacists as set out in his statement crumbled under cross-examination. He eventually explained why he was unable to answer Mr Hendy's questions: the HR Director for Stores who had been responsible for working with the Union had left, and the new one had not yet started. He was therefore unable to comment on the role of the Union in collective bargaining with the Employer as it was outside his remit and knowledge in his role as Director of HR Operations.

28. Dr Blain was also unable to identify any collective bargaining, or point to any occasion on which union facilities had been of any specific relevance to managers at level 4 and above. Likewise, he was unable to point to consultative machinery relating to managers at level 4 and above. It is not disputed that in consulting on behalf of patient facing pharmacists, level 4 managers and above have occasionally benefitted from the outcome, but it was through a side-wind or knock-on effect, and was not evidence of level 4 and above employees being in the bargaining unit.

29. Mr Reade advanced the argument that since the Collective Agreement refers to consultation on all matters of mutual interest between the Union and the Employer, it must follow that that the facilities for officials and consultation machinery envelops the entire interests of the Union vis a vis the Employer. The Panel however concludes that that would be too broad, nebulous an interpretation. Such an interpretation would be fraught with other,

consequential difficulties too – what of retired members and pensioners? What of the non-member pharmacist current employees? What of deferred pensioner members? In industrial relations terms it would be unworkable.

30. In light of all the evidence before us, the reference in the written recognition agreement and the practice of the parties to the Union representing Pharmacists and Pre-Registration Graduates, refers to Pharmacists and Pre-Registration Graduates whose job is that of pharmacist, not those employees who happen also to be pharmacists but who now perform other functions, with different job titles and job descriptions. Pharmacists working as pharmacists are engaged at levels 5, 6 and 7, but not levels 4 and above. Those individuals such as Mr Armstrong who is now a Senior Pharmacy Operations Manager performs the role of an operations manager, he is not working as a pharmacist. The discussion of major business initiatives with the Union was about the impact on the pharmacist grades of levels 5, 6 and 7, not the impact on senior management.

31. As a footnote we mention that we were shown the draft of a document being worked on by the Union and the Employer entitled “Boots and BPA shared objectives”. We have not recorded it in our findings of fact since it is not yet agreed, Dr Blain was unfamiliar with the progress, it was not referred to in any witness statements, the document had not been disclosed to the Applicants and Mr Hendy understandably objected to reliance being placed on a document he had not seen. For the sake of completeness, in case it becomes relevant in due course, if we had permitted it to be added to the bundle, it would not have altered our conclusion. It too is primarily focussed on pharmacists employed as pharmacists.

Decision

32. For the reasons given above, the Panel’s decision is that the workers for whom the Employer and the Union have agreed that the Union may collectively bargain is the registered and pre-registration pharmacists at levels 5, 6 and 7 who are employed by the Employer. It is those workers only who must be balloted and asked whether they wish the bargaining arrangements should be ended pursuant to paragraph 117 of the Schedule.

Panel

Her Honour Judge Stacey, Chairman of the Panel

Mr Roger Roberts

Mr Paul Talbot

16 February 2018

Appendix

Names of those who attended the hearing on 19 January 2018:

For the Applicants:

John Hendy QC	-	Counsel
Mark Pitt	-	Assistant General Secretary, PDA Union
Deborah Franks	-	PDA Union Solicitor
Mark Koziol	-	Assistant General Secretary, PDA Union
John Murphy	-	General Secretary, PDA Union
Paul Day	-	Union Officer
Michael Radcliffe	-	Union Consultant

For the Union:

Paul Robinson	-	CEO, Boots Pharmacist Association
Khuran Ahmad	-	Chair, Boots Pharmacist Association
David Greer	-	Executive Member, Boots Pharmacist Association

For the Employer:

David Reade QC	-	Counsel
Martin Palmer	-	Counsel
Ben Horner	-	Deputy General Counsel, Boots
Dr Matthew Blain	-	Boots Management Services Ltd