Case Number: TUR1/862/2014
24 April 2014

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DETERMINATION OF THE BARGAINING UNIT

The Parties:

Aegis the Union

and

JLT Benefit Solutions Ltd

Introduction

1. Aegis the Union (the Union) submitted an application to the CAC dated 19 December 2013 that it should be recognised for collective bargaining by JLT Benefit Solutions Ltd (the Employer) for a bargaining unit comprising "Former employees of Aegon UK who were the subject of a TUPE transfer to JLT Benefit Solutions Ltd in April 2013 and are based at 7 Lochside Avenue Edinburgh". The CAC gave both parties notice of receipt of the application on 7 January 2014. The Employer submitted a response to the CAC dated 13 January 2014 which was 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 Professor Kenny Miller, Chairman of the Panel, and, as Members, Mr Sandy Boyle and Mrs Maureen Shaw. The Case Manager appointed to support the Panel was Nigel Cookson.

3. By a decision dated 10 February 2014 the Panel accepted the Union's application. The parties then entered a period of negotiation in an attempt to reach agreement on the appropriate bargaining unit but no agreement was reached. The parties were invited to supply the Panel with, and to exchange, written submissions ahead of a hearing to determine the appropriate bargaining unit. A hearing was held in Edinburgh on 7 April 2014 and the names of those who attended the hearing are appended to this decision. In accordance with paragraph 19 of Schedule A1 to the Act (the Schedule) the Panel's task was to determine first whether the Union's proposed bargaining unit was appropriate and then, if it was found not to be so, to determine another bargaining unit that was appropriate.

Background

4. The Employer explained that it was part of the JLT Group which provided insurance, reinsurance and employee benefits related advice, brokerage and associated services. There were 14 offices throughout the UK with the Edinburgh office, which opened in October 2013, focussing on Employee Benefits, Financial Planning, Actuarial and Consulting, Pensions Administration and Health and Risk Administration.

5. There were 178 workers currently employed at the Edinburgh office, the vast majority having been the subject of transfers under the *Transfer of Undertakings (Protection of Employment) Regulations 2006* into the company – about 50 workers having transferred from HSBC in December 2009, about 40 workers from Alexander Forbes in December 2012 and about 100 workers from Aegon UK in May 2013. With workers spread across a number of sites the Employer opened the Edinburgh office at 7 Lochside Avenue so as to bring them all under one roof.

6. Pre-transfer, Aegon UK recognised the Union in respect of all 2,500 of its UK workers so that when the Aegon UK workers were transferred over, the Union's recognition in respect of these workers also transferred. The Employer subsequently gave notice under the terms of the recognition agreement and said that it sought to discuss a new agreement with the Union. The notice period expired prior to the Panel's decision that the application be accepted which was made on 10 February 2014. The Employer and the Union continued discussions, which culminated in a meeting facilitated by Acas on 21 March 2014, but no further agreement was reached.

Summary of the submission made by the Union

7. The Union submitted that Regulation 6 of TUPE specifically covered the effect of the transfer that took place in May 2013 when the workers constituting the Union's proposed bargaining unit transferred to the Employer, on trade union recognition. Regulation 6 said that trade union recognition would transfer where an organised grouping of resources of workers transferred and "maintains an identity distinct from the remainder" of the transferee's (the Employer's) undertaking. The affected workers who transferred needed, at the time of the transfer, to have maintained an identity distinct from the remainder of the undertaking. If recognition transferred, then after the transfer the Union would be deemed to have been recognised by the Employer to the same extent in respect of the affected workers.

8. The Union acknowledged that the wording of Regulation 6 was quite general and not particularly detailed and so the Union had to rely on case law to shed light on the correct interpretation. Whilst there was little case law on this point there was one case of importance, an European Court of Justice case ***Federación de Servicios Públicos de la UGT v Ayuntamiento de la Linea de la Concepción & others [2010]EUECJ C-151/09, [2010] ICR 1248***. This case shed some light on what was meant by the maintaining of "an identity distinct" from the remainder of the Employer's undertaking. In a nutshell, it said that the affected workers who transferred would be likely to have retained, at the time of the transfer, "an identity distinct" from the rest of the Employer's undertaking if they had sufficient "autonomy".

9. The Union maintained that it was clear that the proposed bargaining unit retained its autonomy at the time of the transfer and this remained the case for some time after as post-transfer the ex-Aegon workers continued to work at their former Edinburgh location, dealing solely with Aegon customers.

10. The Union believed, anecdotally, that the group retained operational management responsibility over the affected workers, such as the power to organise, relatively freely and independently, to give orders and instructions, to allocate tasks to the affected workers without necessarily direct intervention from senior management. Whilst the Employer would have assumed ultimate managerial authority, the key was whether the affected workers had retained post-transfer an element of managerial operational control. In addition, the group

constituting the Union's proposed bargaining unit retained separate contractual terms and conditions that were significantly different to those of the other workers employed by the Employer.

11. As well as the protection afforded by TUPE, the Union relied upon ongoing recognition rights by way of the agreement it had with Aegon UK. This agreement contained a clause that stated that it was an agreement between Aegon UK and its "successors in title". This clause was inserted to ensure that if Regulation 6 did not apply, then recognition would be granted by way of the agreement itself. In addition, it conferred upon the "successor in title" a system to regularise the process of negotiation and consultation. Aegon UK and the Union made the Employer aware that it was a "successor in title", and presumably it would, by way of the due diligence process it was obliged to carry out, be aware of this requirement and all that it entailed. The Employer confirmed that it recognised the agreement and this was acknowledged in the Panel's decision of 10 February 2014.

12. The Union believed that the bargaining unit was defined by way of TUPE and was subsequently accepted by the Employer in accepting the "successors in title" clause. Indeed, at no time during discussions with the Employer was the bargaining unit ever challenged or given as a reason for withdrawing or giving notice under the agreement.

13. There were no national or local bargaining arrangements in force. Reference was made in the Panel's decision of 10 February 2014 to a Business Partnership Forum in Edinburgh but the Union believed that this was formed as an alternative to having to recognise the Union. There was no mention of it in the Employer's last Annual Report. In any event it was a consultative body designed so as to get the Employer's message over to the workers and was clearly not a collective bargaining forum.

14. As previously stated, the contracts of the ex-Aegon workers significantly differed to those of the other workers employed by the Employer. This meant that these workers were different and the Employer had to consider this in its dealings with them and so clearly the infrastructure to do so must already be in place. Therefore there should be no additional burden other than that that already existed.

15. If the Panel viewed the undertaking as being the Edinburgh Lochside location then the proposed bargaining unit constituted more than half the workforce as a number of the 200 or so workers on the site carried out different duties to those in the proposed bargaining unit.

16. Since the TUPE transfer a further 100 or so workers had been moved into the Lochside premises - not all of these were involved in work similar to that carried out by the workers in the proposed bargaining unit. Having spoken with a number of its members, the Union had been advised that the "new" staff relied heavily on those members' expertise and knowledge.

17. The Union explained that its ethos had always been one of working together with its members' employer. As a union it was non-confrontational, non-political and capable of bringing a superb range of benefits to its members and the employer, such as Union Learn. The Employer had had the opportunity to see this in action but chose not to take it and it had squandered the opportunity to see how a modern union and employer could work together to benefit both parties. The Union had worked successfully with companies such as Scottish Equitable, Aegon UK, Aegon Global Technologies, Kames Capital, Origen, Serco, Oce and HS Admin and in over 30 years, not one day had been lost to industrial dispute.

18. The Union believed that from April 2013 to October 2013, Regulation 6 of TUPE should have taken care of the need for it to pursue a statutory application for recognition. The Union firmly believed that the CAC Panel should agree to its proposed bargaining unit and that recognition should be granted without the need for a ballot.

19. Referring to the Employer's organisation chart the Union commented that this was the position now but it was not the position at the time of the transfer. When the ex-Aegon workers transferred in May 2013 they were the only workers at the Lochside location and so maintained their economic entity. The Union referred the Panel to the Law Society report of ***de la Línea*** in support of its submission. It was the Union's view that it should have had statutory recognition from day one. The Union had had the "successor in law" clause added to cover this very situation.

20. When asked by the Panel Chairman as to its views on the changing nature of its proposed bargaining unit in that as workers leave and retire it would be a ever diminishing

unit, the Union said that it failed to understand the Employer's case that it was not appropriate to recognise half of the total Lochside workforce and questioned why it was more acceptable to have 173 workers in the bargaining unit as in its mind, there was no difference.

21. When asked why it opposed the alternative bargaining unit put forward by the Employer, the Union explained that it had put forward its proposed bargaining unit and that it was not up to the Employer to derecognise the Union. When asked for its views on Regulation 6(2)(b) of TUPE and the Employer's right to rescind the agreement, the Union argued that ***de la Línea*** prevented it from doing so. After hearing the Employer's views, the Union once again referred to ***de la Línea*** which it claimed supported its case that the proposed bargaining unit was a separate entity at the time of the transfer. If the Union had statutory rights it could not be derecognised. In response to the Chairman of the Panel citing Regulation 6(2)(b) and the Employer pointing out the termination clause within the agreement itself, the Union once again referred the Panel to ***de la Línea***.

22. The Union's case was that at the point of transfer in May 2013 the proposed bargaining unit formed a separate entity and therefore should have had statutory recognition rights. At the time the transfer took place the Employer did not have the right to terminate the agreement because of the ***de la Línea*** case.

23. Addressing the Employer's proposed bargaining unit, the Union argued that its members within the proposed bargaining unit would probably support recognition of the Union and it believed that non-members in the proposed bargaining unit would also support it on the basis that they would be getting a "free bus". In addition, the ex HSBC workers were unionised at one point so there was a probability that most of these workers would vote yes and as for the remaining ex-Alexander Forbes workers, a number of these worked for Aegon and some were in membership, so they would probably vote in favour of the Union. As this clearly exceeded 40% in favour of recognition the Union questioned the need for a ballot. Why, it questioned, did the Employer not offer recognition for that bargaining unit and save the Union having to pursue the statutory process.

24. When asked if its claim that contracts differed significantly referred to the contracts of the ex-Aegon workers that transferred or to all of the workers based in Edinburgh the Union confirmed that it was referring to the ex-Aegon workers who still had contracts that were

distinct from the colleagues that they worked alongside. It gave examples such as the enhanced redundancy policy which saw the ex-Aegon workers receive one months pay per year and this was protected until January 2015. For the other workers in the office it was statutory redundancy entitlement only.

25. Questioned by the Panel as to the differences the Union saw as a result of the harmonisation process undertaken by the Employer, the Union said that, as far as it was concerned, the contracts were still the same as before adding that its members were worried that when terms were fully harmonised, the Employer would reduce their number and they would then lose out in terms of redundancy.

26. After hearing the Employer's submissions the Union admitted that it now was confused as on the one hand the Union thought it had been derecognised because it had offered training to workers in the Edinburgh office. However, the Union contended that it was now clear that the Employer did not want the Union but went through the process pretending until such time as thought right to terminate the agreement without consultation. The Union believed its members had the right to recognition. The Union had good employer relations and gave examples of its involvement with the Skipton Building Society. It was a well organised and modern union. Yet the Employer's case seemed to be that it could not make changes if the Union was recognised. This was simply not true. Whilst it was recognised workers had been moved to different areas and the Union did not take issue with this. There had been a major change from a product provider to a service provider so the Union could not understand the reluctance. The Union believed that up to the time it was derecognised it had had a good relationship with the Employer.

27. Finally, the Union commented that it would probably be quite happy with the Employer's proposed bargaining unit but was concerned that pressure may be applied to workers not to join the Union or not to vote in any subsequent ballot.

Summary of the submission made by the Employer

28. The Employer submitted that the bargaining unit proposed by the Union was not an appropriate bargaining unit and put forward an alternative which consisted "*all JLT employees based at the Edinburgh location with the exception of Head of UK Administration*

Operations, Portfolio Owner of the Insured Book of business, Operations Director and Directors". The roles excluded by the Employer were those with responsibility for national teams or were within the Executive broadband or were filled by individuals identified as one of the Employer's Top 50 Executives, the Employer taking the view that it was not appropriate for the salaries of these workers to be determined by collective bargaining.

29. The Union's proposed bargaining unit was based on workers previously employed by Aegon UK and who were previously subject to a collective agreement with the Union which applied throughout Aegon UK. However, the Union's proposal did not acknowledge the fact that the workers were now employed by the Employer nor did it take into account matters such as the terms and conditions of employment applicable to workers both inside and outside of the proposed bargaining unit. Such a unit would also result in fragmentation of the Edinburgh office from an operational standpoint and in terms of the management of this part of the business.

30. Collective bargaining limited to the Union's proposed bargaining unit could result in divergent terms and conditions between workers working alongside each other performing the same or similar roles. This ran contrary to the ethos within the business and could create unnecessary divisions, which was wholly incompatible with effective management. This ethos was introduced so that workers would take responsibility and ownership of issues, identify opportunities and become client, not function focussed.

31. When it responded to the Union's application, the Employer had considered a number of potential bargaining units, including whether a national bargaining unit would be appropriate. Whilst it could have proposed a bargaining unit on a national scale, it had attempted to approach its considerations in a logical manner and was therefore willing to accept a division between its Edinburgh office and the other offices carrying out similar work for the purposes of determining a bargaining unit. However, it did not accept that this accurately reflected the way in which its business operated in practice but nonetheless, it preferred this option to one that would divide the Edinburgh office.

32. The effect of paragraph 19(B) of the Schedule was that any bargaining unit had to be compatible with the Employer's operations. The category of workers that fell within the Union's proposed bargaining unit was too narrow and was therefore incompatible with

effective management, taking into consideration the manner in which the Employer conducted its business.

33. The workers in Edinburgh were originally geographically segregated in a number of different locations. The integration of the teams in one location, with one management structure and consistent terms and conditions formed part of the Employer's strategy to enable better customer performance. The primary driver of the move being the increase in headcount with the location chosen as it was thought it would best suit the workers concerned. The creation of the Edinburgh Office sought to integrate all workers together and create a dynamic and responsive culture in which workers knew each other and understood each others' positions and job roles.

34. All workers, including those within the Edinburgh Office, were represented by a UK wide information and consultation body known as the Business Partnership Forum which consisted of nominated representatives from each region. Meetings were held quarterly and were attended by the Employer's CEO, an HR Business Partner and the Internal Communications Manager as well as the elected representatives. Contrary to the Union's assertion, this was not a recent phenomenon set up to counter the Union's campaign for recognition but had been in place for a while.

35. The terms and conditions applicable nationally throughout the business, included the staff employed at the Edinburgh office, were determined in accordance with the broadband of each job role. Nationally set terms and conditions covered matters such as notice periods, job titles and pay reviews. In addition, the majority of the applicable policies and procedures were determined at Group level.

36. As a result of the varying terms and conditions it inherited, the Employer undertook harmonisation exercises. The first, in September 2011, saw a Group-wide benefit modernisation exercise undertaken which resulted in the ex-HSBC workers now located in the Edinburgh Office amending their terms and conditions and benefits, save for a few protected terms. Similarly, in May 2013 a second smaller scale harmonisation of terms and conditions in the Edinburgh Office took place to ensure consistency with the ex-Alexander Forbes workers. Again, save for a few protected terms this resulted in ex-Alexander Forbes workers harmonising terms in line with the Employer's national terms and conditions and

benefits. Following these exercises, any future changes to pay, hours and holiday will be made on an Edinburgh office wide basis. Having divergent terms and conditions between ex-Aegon workers and the remainder of the Edinburgh office was not compatible with effective management.

37. Prior to the May 2013 transfer, the Employer conducted a comparison exercise whereby it identified its equivalent terms and conditions for each of the ex-Aegon terms and conditions. Generally speaking, save where the Employer's terms were more beneficial, the ex-Aegon workers retained their Aegon terms and conditions in accordance with the TUPE Regulations. As a result of this exercise, the terms and conditions of the ex-Aegon workers were a mixture of Aegon terms and conditions and the Employer's. It was the case that some terms and conditions differed because of TUPE, but some were the same and some had been harmonised through validation. The Employer urged the Panel to look at the facts, see what it had inherited and have a mind to what it wanted to achieve moving forward.

38. Regarding pay, the Employer explained that all annual salary increases were determined by company performance. In addition, each department was provided with a bonus pot, the size of which was also determined by the company's performance. How the bonus pot was distributed was determined by individual performance with Senior Management and HR reviewing each request received from the Team Heads. Those deemed high performers on the basis of appraisals and/or whose salary was below market rate were prioritised for bonus awards with different bonus awards available depending upon which broadband they were in.

39. All workers within the Edinburgh Office were managed, performance reviewed and rewarded in a consistent and similar way. Objectives were consistent with role types, regardless of the identity of a worker's previous employer and the use of the same HR system ensured consistency across the business as a whole.

40. All workers within the Edinburgh office were monthly paid and were graded into one of three broadbands: Associate, Principal or Executive. There were salary ranges applicable to each of these broadbands. As part of the transfer of the ex-Aegon workers, it was agreed that a validation exercise would be conducted whereby each of the members of the Union's proposed bargaining unit were allocated to one of these broadbands.

41. Regarding hours, the Employer explained that workers both within and outside of the Union's proposed bargaining unit were employed to work the full time equivalent of 35 hours per week, Monday to Friday.

42. As regards holidays, the workers within the Union's proposed bargaining unit had aligned their holiday year with those outside of the proposed bargaining unit. The individual holiday entitlement for those within the Union's proposed bargaining unit could not be amended following the transfer, therefore those workers within and outside of the Union's proposed bargaining unit had differing individual entitlements.

43. The Employer was concerned that the Union's proposed bargaining unit could result in reduced cooperation and an unnecessary division between those that were subject to collective bargaining and those outside of the bargaining unit. It was very likely that members of the same team, holding the same job and working on the same contracts would be differentiated and separated from each other. The Employer referred the Panel to its organisation chart within its submissions which showed the spread of ex-Aegon workers across the various functions and how they now worked on the same contracts as the ex-HSBC and ex-Alexander Forbes workers. Whilst it was difficult to assess the potential impact of fragmented bargaining on the specific work undertaken in the Edinburgh office, having a separate approach to terms and conditions would be at odds with achieving fairness and consistency and would not promote efficient working practices. In this regard, the Employer referred the Panel to its general obligation under paragraph 171 of the Schedule which provided that in exercising its functions, the CAC must have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, so far as having regard to that object being consistent with other provisions of the Schedule.

44. The Employer had worked hard to ensure that a high level of integration was achieved across the different groups of workers within the Edinburgh office. This was highlighted by the harmonisation exercises undertaken, the fact that ex-Aegon workers were now working on non-Aegon work and the use of consistent performance objectives across all teams regardless of a workers' original employer. In addition to the integration work already carried out, the Employer's future plans would only be achieved if the office operated as a fully integrated workforce. The Employer's strategy was to grow the business organically, meaning that there would be a greater requirement for flexibility such as the movement of

workers between teams and a need for workers to take on more client facing roles. In order to deliver its strategy it was vital that the Employer could engage consistently with workers in all areas including reward, management and performance. Adopting the bargaining unit proposed by the Union would undermine the work carried out to date and create a barrier so introducing segregation within a workforce which would only be required to become further integrated over time.

45. It was wrong that the Union had selected its proposed bargaining unit purely on the basis of a TUPE transfer in May 2013. It was not a cohesive group of workers. The Employer questioned whether the Union would have proposed such a unit if it was not for the transfer. The Union had not explained what would happen to the bargaining unit as workers retired or resigned their employment and the bargaining unit diminished over time. Any difference between the terms and conditions of the workers in the Edinburgh office was a result of TUPE protected rights following the transfer and should not be the basis for determining an appropriate bargaining unit.

46. In response to the Union's reference to ***de la Linea*** the Employer pointed out that this case was one that looked at an entity transferring. The Employer contended that the correct approach was to consider Regulation 6(1) which referred to a group of employees retaining a distinct identity after the point of transfer. The Employer did continue to recognise the Union after the transfer but took the view that at a point in time an employer was entitled, under the Regulations, to terminate an historic agreement. Paragraph 5 of the agreement between the Union and Aegon stated that it was binding in honour only and paragraph 29 contained a termination clause with a six month notice period. This agreement covered all of Aegon's workers whereas the Union's proposed bargaining unit had never been a discrete bargaining unit in itself. Under Regulation 6(2)(b) of TUPE the Employer was entitled to rescind the agreement and duly gave notice in accordance with its terms. The CAC accepted, as stated in its decision of 10 February 2014, that the agreement was no longer extant and the hearing today was to determine the appropriate bargaining unit. It was not about whether the Employer should have continued to have honoured the agreement after the transfer.

47. Commenting on the Union's claim that it should have had statutory recognition at the time of the transfer, the Employer submitted that the Union must distinguish between voluntary and statutory recognition and that whilst the parties were currently working through

the statutory recognition process, prior to its termination there had been a voluntary agreement in place. Prior to the transfer it was the case that if Aegon had wanted to terminate the agreement then it could have done so by given the requisite six months notice. Recognition of the Union was derived from the agreement, which was entirely voluntary. Agreements were voluntary unless they specifically stated that they were legally enforceable. The ***de la Línea*** case referred to by the Union dealt with the transfer of an agreement under TUPE. Whether or not ex-Aegon workers retained a distinct entity after the transfer, the agreement was terminated in accordance with the terms of that agreement. The question the CAC had to determine was whether the Union's proposed bargaining unit was appropriate and ***de la Línea*** was not relevant to the facts in this case.

48. As to why it did not agree to recognise the Union outside the statutory process the Employer submitted that it respected the fact that the law gave the Union the right to activate the statutory process. The Employer believed that the process should be followed and it would respect the outcome but if recognition was to be declared, it must take account of how the bargaining unit was managed.

Considerations

49. The Panel is required, by paragraph 19(2) of the Schedule, to decide whether the proposed bargaining unit is appropriate and, if found not to be appropriate, to decide in accordance with paragraph 19(3) a bargaining unit which is appropriate. Paragraph 19B(1) and (2) state that, in making those decisions, the Panel must take into account the need for the unit to be compatible with effective management and the matters listed in paragraph 19B(3) of the Schedule so far as they do not conflict with that need. The matters listed in paragraph 19B(3) are: the views of the employer and the union; existing national and local bargaining arrangements; the desirability of avoiding small fragmented bargaining units within an undertaking; the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant; and the location of workers. Paragraph 19B(4) states that in taking an employer's views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the CAC must take into account any view the employer has about any other bargaining unit that it considers would be appropriate.

50. The Panel must also have regard to paragraph 171 of the Schedule which provides that "[i]n exercising functions under this Schedule in any particular case the CAC must have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, so far as having regard to that object is consistent with applying other provisions of this Schedule in the case concerned." We have reached our decision after full and detailed consideration of written and oral submissions and the evidence before us and responses to questions addressed to the parties during the course of the hearing.

51. The Union has put forward a proposed bargaining unit that comprises workers that at one time were employed by Aegon UK but are now employed, following a TUPE transfer, by JLT Benefit Solutions, the Employer. These workers account for approximately half of the total number of workers that are now based at 7 Lochside Avenue near Edinburgh Airport. Prior to the transfer the ex-Aegon workers were based at a different location on Lochside Avenue but were, along with the ex-HSBC and ex-Alexander Forbes workers, brought under one roof in October 2013 when the Employer combined its Edinburgh offices into one location. The Union initially argued that at the time of the transfer the ex-Aegon workers formed an economic entity which preserved its autonomy and so the pre-existing collective bargaining agreement between Aegon UK and the Union was protected in accordance with the TUPE Regulations as interpreted by ***de la Línea***. Accordingly, the Employer, as the transferee, did not have authority to terminate the agreement. When the jurisdiction of the CAC in statutory recognition cases was explained to the Union it continued to base its arguments as to its case for a bargaining unit limited to the ex-Aegon workers on the situation as it was at the time of the transfer.

52. Contrariwise, the Employer argued that the Union's proposed bargaining unit was not compatible with effective management and proposed an alternative unit comprising those workers employed at the Edinburgh Office save for those in the Executive broadband and/or those with responsibility for national teams and/or individuals identified as one of the Employer's Top 50 Executives. It set out reasoned arguments as to why such a bargaining unit was appropriate, explaining that it had taken a pragmatic approach to the Union's application and the statutory process which was why, for example, it had not proposed a national bargaining unit. Its stated major concern was to avoid the division of the Edinburgh office along the lines as proposed by the Union.

53. In our view the Union has misconstrued the statutory provisions set out in both the Schedule and the TUPE Regulations in setting out its case and we would make the point that it is not for the CAC to determine whether or not the Employer acted within the terms of the TUPE Regulations in terminating the agreement that it inherited through the transfer of the ex-Aegon workers as such a decision is outside our jurisdiction. What is accepted by the parties is that the Union is no longer recognised by the Employer for the purposes of collective bargaining.

54. Neither is ***de la Línea*** relevant to the matters which we must consider in reaching our decision as this was a case where a trade union was claiming that the failure of a transferee local authority to recognise as employee representatives, certain employees, who had been elected as representatives of the employees of the transferor prior to the transfer of services to the local authority breached Article 6 of the *Acquired Rights Directive.* The case essentially concerned whether the circumstances of the return of services from various outsourcing businesses back to the local authority constituted a relevant transfer so that the provisions of Article 6 (preservation of status and functions of employee representatives) applied. So the Court considered whether there was an identifiable economic entity capable of transfer under Article 1 and the degree of autonomy which was preserved for that entity under Article 6. The case did not address the legal status of recognition agreements post transfer but concerned the special rights of employee representatives set out in Article 6.

55. Turning to the question as to whether the Union's proposed bargaining unit is an appropriate bargaining unit and so compatible with effective management we must examine the proposal set against the matters in paragraph 19B(3) as listed above. In doing so we must consider matters as they stand today and, contrary to the Union's submission, not how they stood back in May 2013 at the time the transfer took place. First, the Panel has taken into account the views of the parties as summarised in this decision. Second, there are no existing bargaining arrangements in place that cover any of the workers in the Union's proposed bargaining unit. Third, the Panel considered whether the Union's proposed bargaining unit would give rise to small fragmented bargaining units. We are aided in our consideration on this point by the analysis of Collins J in the matter of ***R (Cable & Wireless Services U.K. Limited) & Central Arbitration Committee & The Communication Workers Union [2008] EWHC 115 (Admin).*** Addressing the desirability of avoiding such units he said:

However, it is obvious that the real problem is the risk of proliferation which is likely to result from the creation of one such unit. Hence it is important to see whether such a unit is self-contained. Fragmentation carries with it the notion that there is no obvious identifiable boundary to the unit in question so that it will leave the opportunity for other such units to exist and that will be detrimental to effective management.

56. Since the transfer took place in May 2013 the ex-Aegon workers have moved office albeit by only a few doors, but they are no longer the sole occupiers of the office whereas they had been in sole occupation before the transfer. They were subsequently joined in the new office by other workers also subject to TUPE transfers so that today there are, more or less, double the number of workers – 178 according to the chart included in the Employer's submissions compared to circa 90 ex-Aegon workers, sharing the same workspace. The evidence adduced by the Employer showed that the ex-Aegon workers now work on a spread of portfolios and they work alongside ex-HSBC and ex-Alexander Forbes workers so that now, to the casual observer on the premises, the three groups would be indistinguishable.

57. In our view a bargaining unit limited to ex-Aegon could lead to the establishment of other such bargaining units within the Edinburgh office with the worst case scenario, no doubt as far as the Employer is concerned, being the possibility of it having to negotiate for each set of workers – the ex-Aegon, ex-HSBC and ex-Alexander Forbes – separately, which would certainly be to the detriment of effective management and would run counter to its course of harmonisation upon which it has embarked. There may well be a fourth category of worker to add to this list as new recruits into the office would be recruited on the Employer's terms and conditions.

58. Fourth, we have considered the characteristics of the workers falling within the proposed bargaining unit as well as those workers likewise employed at the Edinburgh office but outside its parameters. The difficulty for the Union is that since the transfer and the move to the new office, the landscape has been fundamentally changed. At the time of the transfer the ex-Aegon workers were in a separate location working on the same portfolios that they were pre-transfer. But, and it is a crucial but, since that time these workers have been subsumed into a new office along with other workers who were likewise subject to TUPE transfers. The ex-Aegon workers now work alongside colleagues not previously employed

by Aegon and most of the separate teams within the office are composed of workers whose employment with the Employer is derived from the various TUPE transfers already discussed. They sit side by side, day by day, working towards the same goal. This is the picture as it is now, the time that the Panel has to decide the appropriate bargaining unit.

59. The Union has argued that their terms and conditions render the ex-Aegon workers a distinct cohort within the office. It submitted that these workers had retained separate contractual terms and conditions that were significantly different to those of the other workers employed by the Employer and gave by way of an example their enhanced redundancy payments. When asked whether it thought the harmonisation process had made any differences to the workers in the proposed bargaining unit, the Union opined that their contracts were still the same but we heard from the Employer that it had made changes where it was possible to do so and that it was the TUPE Regulations and the protection they afforded the transferred workers that prevented further harmonisation. This should not form the basis for the determination of an appropriate bargaining unit, so the Employer urged.

60. Having considered the submissions from both sides we are persuaded by the Employer's argument that it would not be proper to determine the appropriate bargaining unit based on the identity of a previous employer. We continue to be concerned about the longer term sustainability of the Union's proposed bargaining unit because no worker new to the office could ever become a member of that unit and over time its constituency would be eroded to such a degree that it would eventually dissolve altogether. We also, initially, had some reservations as to whether the Employer had made sufficient progress with its harmonisation programme to establish a clearly identifiable and cohesive unit. However, we were sufficiently reassured by reference to the chart included with its submissions showing the consolidation of terms and conditions so as to conclude that the Employer's alternative bargaining unit was appropriate. It was important to note that the protection provided by the TUPE Regulations was a significant factor in there being different terms and conditions across the Edinburgh office. However, in our view any characteristics that did distinguish these groups of workers would also lessen over time as the Employer continues its process of harmonisation.

61. The final consideration is the location of the workers. In this case the workers in the Union's proposed bargaining unit and the Employer's alternative are all based at the one location in Lochside Avenue, Edinburgh.

62. The Panel finds that for the reasons given above, the Union's proposed bargaining unit is not an appropriate bargaining unit. It is clear to the Panel that the appropriate bargaining unit in this case would be one that comprised all of the workers based in the same location. We accept the Employer's arguments as to the exclusion of those workers in senior roles for the reason it gave. A bargaining unit that encompassed those workers in the Associate and Principal broadbands that are based in the Edinburgh office was a bargaining unit in our view that is compatible with effective management. It comprises workers working alongside each other as members of the same team, carrying out the same job on the same contract and did not differentiate because of the identity of the workers' pre-transfer employer. This bargaining unit is a self-contained unit with a clear identifiable boundary. It would avoid the possibility of other fragmented units and it is not a bargaining unit that is timebound, as was that proposed by the Union. Whilst not a factor we took into account, we did note that the Union, at the conclusion of its submissions, indicated that it would be content with such a unit.

Decision

63. The appropriate bargaining unit in this matter is "all JLT employees based at the Edinburgh location with the exception of Head of UK Administration Operations, Portfolio Owner of the Insured Book of business, Operations Director and Directors".

64. As the appropriate bargaining unit differs from the proposed bargaining unit, the Panel will proceed under paragraph 20(2) of the Schedule to decide if the application is invalid with the terms of paragraphs 43 to 50.

Panel

Professor Kenny Miller, Chairman of the Panel

Mr Sandy Boyle

Mrs Maureen Shaw

24 April 2014

Appendix

Names of those who attended the hearing on 7 April 2014:

For the Union

Brian Linn	-	General Secretary, Aegis the Union

For the Employer

Thomas Player	-	Partner, Eversheds LLP
Holly Short	-	Senior Associate, Eversheds LLP
Anita Walters	-	HR Business Partner, JLT Management Services Ltd
Malcolm Paul	-	Chairman, JLT Employee Benefits Scotland
Rose Djalo	-	Solicitor/Legal Adviser, JLT Management Services Ltd