Case Number: TUR1/852/2013
16 October 2013

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:

Unite the Union

and

Paragon Labels Ltd

Introduction

1. Unite the Union (the Union) submitted an application to the CAC dated 10 September 2013 that it should be recognised for collective bargaining by Paragon Labels Ltd (the Employer) for a bargaining unit comprising "all hourly paid: non food printers – undertaking the following tasks: Make Ready Inks; Plain & Simple; Engineering; Digital; Tagging Machine; Printers Edale; Pre Press; Rewinders; Paper; Warehouse & Despatch, at Paragon Labels, Tenens Way, Boston". The CAC gave both parties notice of receipt of the application on 12 September 2013. The Employer submitted a response to the CAC dated 18 September 2013 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 Mr Chris Chapman, Chairman of the Panel, and, as Members, Mr Paul Gates and Mr Peter Martin. The Case Manager appointed to support the Panel was Nigel Cookson.

3. The Panel extended the acceptance period in this case in order to allow time for it to gather more evidence before arriving at a decision. The initial period expired on 25 September 2013 and this was subsequently extended to 18 October 2013.

Issues

4. 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

5. In its application the Union set out how it had made its first informal request for recognition to the Employer on 16 July 2013 and that the Employer replied on 25 July 2013 saying that it would consider the request and respond in full at a later date. However, no further response was received and so the Union sent the Employer a formal request on 28 August 2013 to which the Employer replied on 9 September 2013 refusing the request to meet and discuss recognition. The Union enclosed copies of the relevant letters with its application.

6. According to the Union's calculation approximately 110 workers were employed by the Employer of whom 80 were in the proposed bargaining unit. The Union was unable to confirm whether the Employer agreed with the figure as to the number of workers in the proposed bargaining unit, a unit which had not been agreed with the Employer. The Union stated that it had 51 members within the proposed bargaining unit and when asked to provide evidence that a majority of the workers in the proposed bargaining unit were likely to support recognition for collective bargaining, the Union answered "membership list as evidence, available to the CAC on request".

7. The Union explained that it had selected its proposed bargaining unit on the grounds that it reflected its membership.

8. Finally the Union confirmed that it had made no previous application in respect of this or a similar bargaining unit and there was no existing recognition agreement that covered any of the workers in the proposed bargaining unit

The Employer's response to the Union's application

9. In its response to the Union's application the Employer confirmed that it received the Union's formal request for recognition on 30 August 2013 and that it had responded on 9 September 2013 rejecting the request as procedures were already in place for communicating with the workers. A copy of this letter was attached to the response form.

10. The Employer confirmed that it had received a copy of the application form from the Union on 11 September 2013 but commented that the Union had not enclosed a copy of its supporting documents and consequently the Employer did not believe the Union's application was admissible as it had not complied with paragraph 34(b) of the Schedule. The Employer had written to the Union on 13 September 2013 requesting a copy of its supporting evidence but had not, as yet, received a response.

11. The Employer also confirmed that it had not agreed the proposed bargaining unit, either prior to its receipt of the application form or since, explaining that the Union had stated in its application that there was a total of 110 workers employed by the Employer whereas a total of 1025 workers were employed across 12 different sites. 750 of this total were hourly paid and the majority were the kind of workers in respect of whom the Union sought recognition. The Employer explained that it objected to the proposed bargaining unit arguing that the Union had not put forward any reasonable justification for its appropriateness. It was the Employer's view that such a unit was incompatible with effective management as workers at different sites could be working on the same customer order and so it would be completely unmanageable to have to negotiate and agree pay, hours and holidays on a single site or a site by site basis.

12. The Employer stated that it currently employed a total of 1025 workers over approximately 12 sites. The Employer did not agree with the Union's figure as to the number of workers in its proposed bargaining unit explaining that there were two units at Tenens Way ("the Tenens Way site") located next to each other and 115 workers were employed at

the site. Of the 115 workers, 102 were hourly paid. Within these 102 hourly paid workers were nine plate workers that did not fall within the definition of the Union's proposed bargaining unit.

13. When asked whether it disagreed with the Union's estimate of membership in the proposed bargaining unit the Employer said that the Union had not provided any evidence in support of its assertion regarding union membership and so the Employer was unable to comment.

14. When asked for its views as to whether a majority of the workers in the bargaining unit would be likely to support recognition the Employer said that in addition to having provided no evidence of its assertion regarding its membership the Union had also provided no evidence to support a suggestion that the majority of workers in the proposed bargaining unit would be likely to support union recognition.

15. Finally, the Employer was not aware of any previous application in respect of this or a similar bargaining unit by this or any other trade union and there was no existing agreement for recognition in force that covered workers in the proposed bargaining unit.

The Membership Check

16. To assist the determination of two of the admissibility criteria specified in the Schedule, namely, whether 10% of the workers in the proposed bargaining unit are members of the union (paragraph 36(1)(a)) and whether a majority of the workers in the proposed bargaining unit would be likely to favour recognition of the union as entitled to conduct collective bargaining on behalf of the bargaining unit (paragraph 36(1)(b)), the Panel proposed an independent check of the level of union membership within the proposed bargaining unit. It was agreed with the parties that the Employer would supply to the Case Manager a list of the full names, dates of birth and job titles of the workers within the proposed bargaining unit and that the Union would supply to the Case Manager a list of its paid up members within that unit, including dates of birth. It was explicitly agreed with both parties that, to preserve confidentiality, the respective lists would not be copied to the other party. These arrangements were confirmed in a letter dated 20 September 2013 from the Case Manager to both parties. The information from both the Union and the Employer was

received by the CAC on 24 September 2013. The Panel is satisfied that the check was conducted properly and impartially and in accordance with the agreement reached with the parties.

17. The Union provided a spreadsheet with the details of 51 members within the proposed bargaining unit and the Employer provided a list of 102 hourly paid workers. The Employer also included with its list an explanation as to how it believed the Union had defined the workers' roles, explaining in its covering letter that it believed that 88 of the 102 hourly paid workers fell within the definition of the Union's proposed bargaining unit.

18. The comparison conducted by the Case Manager was against the 88 workers. Excluded were 14 hourly paid workers annotated by the Employer as being "undefined" by the Union in its description of the proposed bargaining unit. The 14 "undefined" workers fulfilled various roles in the "Plates" Department, the role of "Reworker" in the "Rewinds" Department and role of Technical Support in the Technical Department.

19. According to the Case Manager's report, the number of Union members in the 88 strong proposed bargaining unit was 49, a membership level of 55.68%. A report of the result of the membership check was circulated to the Panel and the parties on 25 September 2013 and the parties were invited to comment thereon. Annexed to the report was a list of the job titles by department and how the Employer believed the Union had defined the job title.

Union's comments on the results of the membership check

20. In a letter dated 30 September 2013 the Union commented on the tests in paragraph 36. First, it believed it had shown that its membership was in excess of 10% in the relevant bargaining unit. Second, the reason workers joined the Union was their wish to be represented for collective bargaining. The large increase in membership was a direct result of re-organisation by the firm in 2013 and these workers felt that collective bargaining by a recognised trade union would have improved outcomes for them

21. It considered the figure of 88 given by the Employer was closer to the figure of 80 that the Union had given in its application. In regard to the 14 "undefined" hourly paid

workers the Union explained that the workers in the "Plates" Department did not form part of its proposed bargaining unit as the Union considered that they were managed from the Studio in Spalding and simply occupied space at Tenens Way. The Union also did not include "Technical'/Technical Support" workers in the bargaining unit as it was a stand alone department. The Union also considered that any "Rewinds/Reworker" workers included in the 14 "undefined" should not be in the bargaining unit.

Employer's comments on the results of the membership check

22. In a letter dated 30 September 2013 the Employer noted that 14 of the hourly paid workers at the Tenens Way site had not been included in the membership report. In its statutory request the Union defined the proposed bargaining unit as:

"All hourly paid; non-Food Printers - Make Ready Inks - Plain and Simple - Engineering - Digital - Tagging Machine - Printers Edale - Pre Press - Rewinders - Paper - Warehouse - Despatch, at Paragon Labels, Tenens Way, Boston."

The Employer understood this to mean all hourly paid workers at the Tenens Way site, which included workers in the departments listed (e.g. non-Food Printers, Make Ready Inks and Plain and Simple). This would, therefore, include all hourly paid workers (i.e. the 14 workers excluded from the membership report).

23. Paragraph 2(3) of the Schedule states that the proposed bargaining unit is the bargaining unit proposed in the statutory request for recognition (i.e. the bargaining unit set out above). However, in question 14 of its application the Union defined the proposed bargaining unit as:

"***All hourly paid: non food printers - undertaking the following tasks:*** **Make Ready Inks; Plain & Simple; Engineering; Digital; Tagging Machine; Printers Edale; Pre Press; Rewinders; Paper; Warehouse & Despatch, at Paragon Labels, Tenens Way, Boston."** (Emphasis added)

The Employer understood this to mean all hourly paid non-food printers that only worked in the departments listed (i.e. none of the other hourly paid workers at the Tenens Way site should be included). It was to be noted that there were no exclusive non-food printers. The large majority of the 102 hourly paid workers worked solely on food work, with a small

proportion working on both non-food and food work (which included non-food printing). This proposed bargaining unit was, therefore, entirely different from the bargaining unit in the Union's statutory request for recognition. As the Union appeared to have included a modified bargaining unit in its application form the Employer believed that the application was not admissible and, on this basis, should be dismissed.

24. It went on to argue that if the CAC were to find that all hourly paid workers should be included in the proposed bargaining unit (as according to its statutory request), the Union would not have over 50% union membership in the bargaining unit. The Employer would, therefore, dispute that the Union would have the required support for union recognition.

25. Notwithstanding the above, on the current figures provided in the membership report, the Employer did not admit the fact that all union members would favour recognition and asked the Union to provide evidence to support this point.

Union's comments on the Employer's letter

26. In a letter dated 3 October 2013 the Union commented on the points raised by the Employer. It repeated its point that the 14 workers noted as "undefined" on the Employer's list provided for the membership check should not be included in the bargaining unit.

27. First, it was the Union's view that "Plates" was managed by and under the direction of the studio which was located at the Employer's site in Spalding. "Plates" simply occupied space at Tenens Way. The Union also excluded workers in the Technical department as they serviced all or a large proportion of the Employer's sites across the country and did not operate under the day to day management at Tenens Way.

28. Second, the Union did not consider that the bargaining unit in the formal request letter of 28 August 2013 was different to that set out in the application. In the request letter the proposed bargaining unit was described "All hourly paid; non-Food Printers" and the Union then listed the job descriptions within that unit. The Union had proposed the same bargaining unit in the application but had added the words "undertaking the following tasks" to add clarity and not to amend the bargaining unit proposed in the request letter in any way. The

Union had clearly not included the 14 "undefined" workers' departments, for example "Plates", in its proposed bargaining unit.

Employer's comments on the Union's letter

29. In a letter dated 8 October 2013 the Employer explained that it had provided a full list of the hourly paid workers at the Tenens Way site as at 24 September 2013 and that based on the Union's description of the bargaining unit and on the job description of the workers at the site, 88 workers fell within the proposed bargaining unit, not "closer to the figure of 80" as the Union claimed.

30. The Union said that it had excluded "Plate" workers and "Technical/Technical Support" from its proposed bargaining unit because they were managed off-site. However, in reality, all of the workers were centrally managed. As for the "Rewinds/Reworkers" contained in the 14 undefined, the Union did not give any reason for their exclusion. The Employer believed that all these workers should be included as part of the bargaining unit as they were hourly paid workers based at the Tenens Way site.

31. The Union had described its proposed bargaining unit "All hourly paid; non-Food Printers" and then listed the job descriptions within that unit suggesting that "All hourly paid; non-Food Printers" was a generic heading. However, the Union then went on to say that "Non-Food Printers" was not a generic heading covering all of the listed job descriptions, but was instead a department or area.

32. As previously stated, there were no purely non-food printers based at the Tenens Way site and only a small number of workers performed both non-food and food work. If the proposed bargaining unit was limited solely to non-food printers (rather than non-food printers being just one sub category under the generic heading ‘All hourly paid’), then this would mean that only a very small number of workers would be included in the bargaining unit.

33. Therefore, despite the Union's suggestion to the contrary, it remained the Employer's position that the proposed bargaining unit in the statutory request for recognition was

different to the proposed bargaining unit in its application. In attempting to justify how the two definitions were the same, the Union had in fact highlighted the differences and made the position even more unclear.

Considerations

34. In deciding whether to accept the application the Panel must decide whether the admissibility and validity provisions referred to in paragraph 4 of this decision are satisfied. The Panel has considered all the evidence submitted by the parties in reaching its decision.

35. The Panel is satisfied that the Union, in its letter dated 28 August 2013, made a valid request to the Employer within the terms specified in paragraphs 5 to 9 of the Schedule to recognise it for collective bargaining in respect of the bargaining unit as described in paragraph 1 of this decision.

36. Paragraph 15(2)(b) requires the Panel to decide whether the application is made in accordance with paragraphs 11 or 12 of the Schedule. In this case the application was made in accordance with Paragraph 11 in that, before the expiry of the first period of 10 working days starting with the day after that on which the Employer received the request for recognition, the Employer informed the Union that it did not accept the request.

37. Paragraph 11(2) of the Schedule states that when an employer informs the union that it does not accept the request, a union may apply to the CAC to decide whether the proposed bargaining unit is appropriate and whether the union has the support of a majority of the workers constituting the appropriate bargaining unit. Paragraph 2(3) of the Schedule states that references to the "proposed bargaining unit" are to "the bargaining unit proposed in the request for recognition". Therefore paragraph 11(2) permits a union to apply to the CAC to decide whether the bargaining unit proposed in the request for recognition is appropriate.

38. In the present case the Employer is arguing that the bargaining unit proposed in the request for recognition of 28 August 2013 differs from that set out in its application to the CAC and so the Union has not applied to the CAC to decide whether the bargaining unit

proposed in the request for recognition is appropriate in accordance with the terms of paragraph 11(2).

39. The question for the Panel to decide is whether the bargaining unit described in the formal request for recognition dated 28 August 2013 is the same as that set out in the Union's application to the CAC. If the answer to this question is in the affirmative then the Panel can move on to consider fully the remaining matters listed in paragraph 15 of the Schedule. However, if the Panel finds that there is a difference between the bargaining unit in the request and the one in the application, then the application must fail at this hurdle.

40. In approaching this task the Panel must be careful to separate the strands of the Employer's arguments. It is clear from the Employer's submissions that it did not believe that the Union's proposed bargaining unit was an appropriate bargaining unit and has, in brief, set out its reasons for reaching such a conclusion. However, at this stage of the statutory process the Panel is not required to determine the appropriateness of the proposed bargaining unit. This will be for the next stage of the statutory process. What is of import at this stage is the correct identification of the proposed bargaining unit as it is against this unit that the statutory tests are applied in order to determine whether or not the application is accepted.

41. In its statutory request the Union defined the proposed bargaining unit as:

"All hourly paid; non-Food Printers - Make Ready Inks - Plain and Simple - Engineering - Digital - Tagging Machine - Printers Edale - Pre Press - Rewinders - Paper - Warehouse - Despatch, at Paragon Labels, Tenens Way, Boston."

Whereas in answer to question 14 on its application to the CAC the Union defined the proposed bargaining unit as:

"All hourly paid: non food printers - undertaking the following tasks: Make Ready Inks; Plain & Simple; Engineering; Digital; Tagging Machine; Printers Edale; Pre Press; Rewinders; Paper; Warehouse & Despatch, at Paragon Labels, Tenens Way, Boston."

The difference between the two definitions being the insertion of "**undertaking the following tasks**" in the version appearing on the application.

42. The Employer argued that the second definition resulted in a different bargaining unit to the first on the grounds that it limited the bargaining unit to only those non-food printers working in the departments listed. It explained that the large majority of the 102 hourly paid workers on the site worked solely on food work, with only a small proportion working on both non-food and food work.

43. When called upon to explain why the definitions differed the Union said that it had added the words to clarify the bargaining unit proposed in the request letter rather than to amend the unit in any way.

44. Having considered the parties' submissions on this point we are of the mind that there has been no change in the bargaining unit proposed by the Union. In our view the Union's intention was indeed to clarify the proposed bargaining unit but that it inadvertently inserted the offending term before the first colon rather than after and that it was a simple clerical slip, rather than an attempt to redefine the proposed bargaining unit, that resulted in its appearance after "non-Food Printers", which the Union intended to be the first category in the list of categories of workers in its proposed bargaining unit.

45. The argument between the parties over the workers described as "Plate", "Technical/Technical Support" and "Rewinds/Reworkers" in the list of the 14 "undefined" workers and whether or not they should be included in the proposed bargaining unit is, in the Panel's view, one that goes to the appropriateness of the proposed bargaining unit rather than the definition of the proposed bargaining unit and so is not a matter than we need to decide at this point in time.

46. Having decided that the bargaining unit described in the formal request for recognition dated 28 August 2013 is the same as that set out in the Union’s application to the CAC the Panel can now move on to consider the remaining matters in paragraph 15 of the Schedule.

47. The Panel is satisfied that the application is not rendered inadmissible by any of the provisions in paragraphs 33 and 35 and paragraphs 37 to 42. The remaining issues are whether the admissibility criteria set out in paragraphs 34 and 36(1) of the Schedule are met.

Paragraph 34

48. In its response to the application the Employer argued that the application was inadmissible as the Union had not complied with the terms of paragraph 34(b) which states:

> **34. An application under paragraph 11 or 12 is not admissible unless the union gives (or unions give) to the employer-**
>
> **(a) notice of the application, and**
>
> **(b) a copy of the application and any documents supporting it.**

As the Union had included copies of its informal and formal requests for recognition and the Employer's response thereto the Panel was not clear as to what supporting documents the Employer was referring to. If it was the case that the Employer was referring to evidence in support of the Union's assertion as to its membership level and its support for recognition the Panel takes the view that it is perfectly reasonable that a union may make reference on its application form to documentary evidence such as a membership list or perhaps a petition in support of it being recognised which it chooses not to attach to the form.

49. This view is fully in line with the CAC's own guidance on this issue as set out in paragraph 3.9 of the "Guide for the Parties". It is repeated in the notes accompanying the blank application form in the section headed "Confidential Information" wherein a union is advised that it should not provide confidential information or documents unless it is prepared for them to be copied to the employer. An explanation then follows as to how, if an employer challenged a union's level of membership and/or whether the majority of workers in the bargaining unit were likely to favour recognition of the union, the CAC could, as in this case, undertake a statistical check in which the evidence would be provided only to a CAC Case Manager on a confidential basis and would not be exchanged between the parties.

50. It is the Panel's finding that the application is not rendered inadmissible in terms of paragraph 34 of the Schedule.

Paragraph 36

51. In accordance with paragraph 36(1)(a) and (b) of the Schedule, the Panel must determine whether members of the Union constitute at least 10% of the workers in the Union's proposed bargaining unit, and whether a majority of the workers constituting the Union's proposed bargaining unit would be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit.

Paragraph 36(1)(a)

52. The membership check conducted by the Case Manager showed that 55.68% of the workers in the proposed bargaining unit were members of the Union. In its comments on the Case Manager's report the Employer did not contest this finding although, as stated above, it did argue that in its view the comparison should have been made against the 102 workers strong bargaining unit rather than the 88 strong unit. The Panel is satisfied that the check of membership was conducted properly and impartially and in accordance with the agreement reached with the parties.

53. The Panel, having established above that the Case Manager's check was conducted against the correct size bargaining unit, finds that members of the Union do constitute at least 10% of the workers in the proposed bargaining unit as required by paragraph 36(1)(a) of the Schedule.

Paragraph 36(1)(b)

54. As stated above, the check conducted by the Case Manager established that the level of Union membership within the proposed bargaining unit is 55.68%. The Union relied on this finding alone as evidence that the majority of workers in the proposed bargaining unit would be likely to favour recognition. Conversely, the Employer, setting aside its disagreement as to the number of workers in the proposed bargaining unit, said that it did not admit the fact that all union members would favour recognition and it called upon the Union to provide evidence to support its case.

55. When considering the question as to whether a majority of the workers constituting the proposed bargaining unit would be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit, the Panel would remind itself that this is not a test of actual support but of "likely" support, which by its very nature is speculative rather than definitive.

56. The question the Panel must ask itself is whether the density of Union membership within the proposed bargaining unit is sufficient evidence that this test is satisfied. In the absence of any evidence to the contrary, the Panel is of the view that membership of a union can be taken as a legitimate indicator of likely support for recognition. It is also the case that non-membership should not automatically be assumed to indicate opposition to collective bargaining on the part of those workers that have not joined the Union.

57. In this case there are 49 Union members in the proposed bargaining unit of 88 workers, a membership density of 55.68%. On the assumption that Union members would more likely than not favour recognition of the Union the Panel has come to the conclusion that, on balance, a majority of the workers in the proposed bargaining unit would be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit as required by paragraph 36(1)(b) of the Schedule.

58. The Panel has noted the Employer's comments on this test. However, whilst not sharing the view that union members would be more likely than not to support recognition of the Union, it did not put forward any evidence to support its view to the contrary. The Panel must reach its decision based on the evidence before it and in this case it is satisfied that the test set out in paragraph 36(1)(b) is met.

Decision

59. The Panel is satisfied that the application is valid within the terms of paragraphs 5 to 9, is made in accordance to with paragraph 11 and is admissible within the terms of paragraphs 33 to 42 of the Schedule. The application is therefore accepted by the CAC.

Panel

Mr Chris Chapman, Chairman of the Panel

Mr Paul Gates

Mr Peter Martin

16 October 2013