Case Number: TUR1/862/2014
23 May 2014

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DECISION ON WHETHER THE APPLICATION IS VALID FOLLOWING 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. However, no such agreement was reached in the relevant period and so the Panel had to determine the appropriate bargaining unit in this matter. A hearing was held in Edinburgh on 7 April 2014 and in a decision promulgated on 24 April 2014 the Panel determined that the appropriate bargaining unit was one comprising 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. This bargaining unit differed from that originally proposed by the Union which had been restricted to former employees of Aegon UK who were the subject of a TUPE transfer to JLT Benefit Solutions Ltd in May 2013.

Issues

4. As the determined bargaining unit differed from that proposed by the Union in its application the Panel is required by paragraph 20 of Schedule A1 to the Act (the Schedule) to decide whether the Union's application is valid or invalid within the terms of paragraphs 43 to 50 of the Schedule. The tests that the Panel must consider under these paragraphs are:-

- is there an existing recognition agreement covering any of the workers within the new bargaining unit? *(paragraph 44)*
- is there 10% union membership within the new bargaining unit? *(paragraph 45(a))*
- are the majority of the workers in the new bargaining unit likely to favour recognition? *(paragraph 45(b))*
- is there a competing application, from another union, where their proposed bargaining unit covers any workers in the new bargaining unit? *(paragraph 46)*
- has there been a previous application in respect of the new bargaining unit? *(paragraphs 47 to 49)*

5. In a letter dated 24 April 2014 the Case Manager invited the parties to make submissions on these points for consideration by the Panel.

Views of the Union

6. In an email dated 25 April 2014 the Union advised the Panel that there was a membership drive taking place and also that the majority of non former Aegon employees came from unionised workforces and it should therefore not be assumed that just because they were not members at present that they would not support the Union having recognition rights.

Views of the Employer

7. By way of a letter dated 30 April 2014 the Employer pointed out that the Union's proposed bargaining unit comprised in the region of 90 workers and that, following the determination of the bargaining unit, there were currently 179 workers in the new bargaining unit. The Employer confirmed that there was no recognition agreement covering any of the workers in the new bargaining unit and neither was there any competing application from another trade union. Furthermore, there had been no previous application for recognition to the CAC in respect of this new bargaining unit.

8. The Employer maintained that the majority of the workers in the bargaining unit were not likely to favour recognition of the Union. The Employer asserted that in its application for recognition submitted on 19 December 2013 the Union indicated that it had 95 members within the proposed bargaining unit. The Panel wishes to point out that this assertion by the Employer is inaccurate. On re-reading the Union's application it is clear that it believed that there were 95 workers in the proposed bargaining and went on to claim that **56%** of those workers were members of the Union. The Employer did not accept that membership levels were as stated by the Union and a membership check was undertaken by the CAC to confirm the actual number of members. The CAC's membership check showed that there were 47 members in the Union's proposed bargaining unit in January 2014.

9. As a result of the new enlarged bargaining unit, the Employer argued that the level of trade union membership within the actual bargaining unit will have changed and the Employer believed that between 70% and 74% of the new bargaining unit were not members of the Union. Based on membership levels alone, there was no evidence to suggest that the majority of the new bargaining unit would support recognition of the Union.

10. Further, contrary to the Union's assertions at the hearing on 7 April 2014, there was no evidence that the ex-HSBC workers were previously unionised or that because a number of the ex-Alexander Forbes workers previously worked for Aegon they would support the Union's recognition claim. It was conjecture to suggest that, based on these assertions, the majority of the new bargaining unit would support recognition.

11. In light of the above, the Employer did not consider that the majority of the new bargaining unit was likely to favour recognition and as such considered that the CAC should determine that the Union's claim was not admissible.

12. The Employer did not accept that Union membership alone should be construed as evidence of support for collective bargaining. Whilst there were members within the new bargaining unit, the Employer considered that membership levels had diminished since the last CAC membership check was undertaken and that between 70% and 74% of the new bargaining unit were not affiliated to the Union in any way and would not be supportive of collective bargaining.

13. In this regard, the Employer agreed with the recent CAC decision in the case of *Unite the Union v E&M Horsburgh Limited* handed down on 3 April 2014. In this case, which the Employer believed to be similar to the present case, the Panel had stated that in circumstances where union membership stood at 22.4%, and the Panel had "not been provided with any evidence as to the views of the remaining 77.6% of the bargaining unit who [were] not members of the union..... it must rely on the figures of membership density alone". Accordingly, "the low level of union density and the absence of any other evidence supporting the application" led the CAC to conclude that the Union had failed to satisfy the admissibility test concerning the majority's likely support for union recognition in that case.

14. The Employer believed that, at best, the Union's membership was static but that it may in fact have decreased since the last membership check was conducted. If the Union was claiming to have recruited new members from amongst the new bargaining unit, the Employer would not accept this proposition. This would need to be verified by the CAC.

The membership check

15. To assist in the determination of two of the validity tests specified in the Schedule, namely, whether 10% of the workers in the new bargaining unit were members of the union (paragraph 45(a)) and whether a majority of the workers in the new bargaining unit would be likely to favour recognition of the union as entitled to conduct collective bargaining on behalf of the bargaining unit (paragraph 45(b)), the Panel proposed an independent check of the level of union membership within the new bargaining unit. The Employer agreed to supply to the Case Manager a list of the names and addresses of the workers in the determined bargaining unit and the Union agreed to supply to the Case Manager a list of the names and addresses of the paid up union members within that unit. It was explicitly agreed with both parties that, to preserve confidentiality, the respective lists would not be copied to the other party and that agreement was confirmed in a letter from the Case Manager to both parties dated 2 May 2014. The Union's list of its members in the determined bargaining unit was received by the CAC on 6 May 2014 and the Employer's list of the workers in the determined bargaining unit was received by the CAC on 9 May 2014. The Panel is satisfied that the check was conducted properly and impartially and in accordance with the agreement reached with the parties.

16. The list supplied by the Employer indicated that there were 170 workers in the bargaining unit as determined by the Panel. The list of members supplied by the Union contained 50 names. According to the Case Manager’s report, the number of Union members in the proposed bargaining unit was 44, a membership level of 25.88%.

17. A report of the result of the membership check was circulated to the Panel and the parties on 12 May 2014 and the parties were invited to comment on the result by no later than noon on 16 May 2014.

Union's comments on the result of the membership check

18. The Union elected not to comment on the results of the membership check.

Employer's comments on the result of the membership check

19. In a letter dated 16 May 2014 the Employer said that it was evident from the membership report that the Union had in the region of 44 members out of a total bargaining unit of 170 people. The proportion of union members in the bargaining unit was therefore 25.88%. It was not clear from the membership report whether or not all 44 members were in fact fully paid up with their membership contributions. The Employer did, however, note that membership had dropped since the last membership report was circulated by the CAC on 27 January 2014. At that time membership was confirmed at 47 members and therefore the density of trade union members within the Edinburgh office had dropped by 3 people.

20. In the circumstances the Employer continued to maintain that the majority of the workers in the bargaining unit were not likely to favour recognition of the Union. The membership data confirmed that there was declining support for the Union and the Employer noted that the Union had failed to submit any other evidence of the views of the remaining 74% of the bargaining unit who are not members. It also noted that the Union had claimed in its email dated 25 April 2014 that there was a membership drive taking place and that the majority of the non former Aegon workers came from unionised work places. It was clear from the CAC's own report that any membership drive had failed to secure any additional new members given that membership had dropped. Furthermore, the Employer could confirm that the former Alexander Forbes workers were not previously unionised as the Union claimed and no evidence of any recognition agreement for the former HSBC staff that transferred to JLT could be found. In fact, as part of due diligence that was undertaken the Employer could confirm that it was advised by HSBC "that trade union's (sic) were not recognised for the transferring workers". In the circumstances, the information provided by the Union was factually incorrect.

21. In light of the above and the CAC case law referenced in its letter dated 30 April 2014, the Employer submitted that the Panel had simply not been provided with any evidence as to the views of the remaining 74% of the bargaining unit who are not members of the union. The low level of union density and the absence of any other evidence should, so the Employer believed, lead the CAC to conclude that the Union had failed to satisfy the admissibility tests in this case.

Considerations

22. The Panel is required to determine whether the Union's application is valid or invalid within the terms of paragraphs 43 to 50 of the Schedule. In reaching its decision the Panel has taken into account the submissions of both parties and all the other evidence before it. On the evidence available, the Panel is satisfied that there is no existing recognition agreement covering any of the workers within the determined bargaining unit; that there is no competing application from another union; and that there has been no previous application in respect of the determined bargaining unit. The remaining issues for the Panel to decide are whether the validity criteria contained in paragraphs 45(a) and 45(b) are met.

Paragraph 45(a)

23. Under paragraph 45(a) of the Schedule an application is invalid unless the Panel decides that members of the union constitute at least 10% of the workers in the agreed bargaining unit.

24. The membership check conducted by the Case Manager showed that 25.88% of the workers in the determined bargaining unit were members of the Union. As stated earlier, the Panel is satisfied that the check was conducted properly and impartially and in accordance with the agreement reached with the parties. The Panel has therefore decided that members of the Union constitute at least 10% of the workers in the determined bargaining unit as required by paragraph 45(a) of the Schedule.

Paragraph 45(b)

25. Under paragraph 45(b) of the Schedule, an application is invalid unless the Panel decides that a majority of the workers constituting the new bargaining unit would be likely to favour recognition of the union as entitled to conduct collective bargaining on behalf of the bargaining unit. In this case the level of Union membership in the determined bargaining unit has been established as being 25.88%. However, no further evidence of support for recognition was adduced by the Union. In its submissions the Union made two brief points. First, it said that a membership drive had been undertaken. Second, it said that the majority of workers that had transferred from employers other than Aegon had come from unionised

workforces and so it was wrong, the Union submitted, to assume that the non-members within the determined bargaining unit would not support recognition.

26. Countering the Union's arguments the Employer first said that at best, the level of Union membership was static but it may in fact have decreased since the last membership check was conducted. The Union's claim that it had recruited new members from amongst the determined bargaining unit was not one that was supported by the results of the check conducted by the Case Manager. As for the Union's second point, there was no evidence that the ex-HSBC workers were previously unionised nor was there any evidence that those of the ex-Alexander Forbes workers that had previously worked for Aegon would support the Union's claim. In the Employer's view it was conjecture to suggest that the majority of the new bargaining unit would support recognition.

27. When the Panel was considering whether or not to accept the application in February 2014 we had to address the question of likely support for recognition, as set out in paragraph 36(1)(b), in respect of the proposed bargaining unit. Having considered the parties' submissions we made the point in our decision promulgated 10 February 2014 that, in the absence of any evidence to the contrary, we had formed the view that trade union membership could be taken as a legitimate indicator of likely support for recognition explaining that we felt that workers that had taken the step of joining a union and committing to paying subscriptions were more likely than not to support a union in its request to be recognised as entitled to conduct collective bargaining on their behalf. We believe that the conclusion we reached in respect of paragraph 36(1)(b) applies equally to the test under paragraph 45(b).

28. However, since that time we have determined the appropriate bargaining unit in this case and it is significantly larger that the bargaining unit as originally proposed by the Union. The Union did have half of the proposed bargaining unit in membership but with the bargaining unit having doubled in size to 170, there are now only a quarter of the determined bargaining unit in membership. In other words, three-quarters of the workers in the new bargaining unit are not members of the Union and they have given no indication whatsoever as to whether or not they would favour recognition of the Union. We accept that it is probable that a number of these workers would support the Union but there is no evidence at all as to whether this would push the degree of support for the Union anywhere close to the

majority level so as to satisfy the requirements of this test. We have to make our decision based on the evidence before us and in this case the only evidence we have are the figures set out in the Case Manager's report.

29. For that reason, on the basis of the evidence before it, the Panel has decided that a majority of the workers in the determined bargaining unit would not be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit and the test in paragraph 45(b) of the Schedule is not satisfied.

Decision

30. For the reasons given above, the Panel's decision is that the application is invalid and the CAC is therefore not proceeding with the application.

Panel

Professor Kenny Miller, Chairman of the Panel
Mr Sandy Boyle
Mrs Maureen Shaw

23 May 2014