

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

Brake Bros Limited

Introduction

1. Unite the Union (the Union) submitted an application to the CAC on 2 December 2014 that it should be recognised for collective bargaining by Brake Bros Limited (the Employer) for a bargaining unit comprising "All Drivers and LGV Driver, all Administration Clerks, all Supervisors, all Handymen, all Team Support workers, all Warehouse Operatives/Forklift Drivers, Warehouse Administrators and all Storemen/women excluding Managers" employed at the Employer's sites in Newhouse, Uddingston and Bellshill. The CAC gave both parties notice of receipt of the application on 4 December 2014. The Employer submitted a response to the CAC dated 10 December 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 Dennis Cameron and Mrs Maureen Shaw. The Case Manager appointed to support the Panel was Nigel Cookson.

Issues

3. The Panel is required by paragraph 15 of Schedule A1 to the Act (the Schedule) to decide whether the Union's application to the CAC is valid within the terms of paragraphs 5 to 9; is made in accordance with paragraphs 11 or 12; is admissible within the terms of paragraphs 33 to 42; and therefore should be accepted.

The Union's application

4. In its application dated 2 December 2014 the Union said that it had formally requested recognition on 8 August 2014 and that the Employer responded by letter dated 19 August 2014 advising the Union that whilst it did not accept the request, it was, however, willing to negotiate. The parties duly met under the auspices of Acas on 15 September 2014 to establish whether the Employer would be willing to enter into a voluntary agreement but the Employer could not give a commitment at that juncture. Copies of both the request letter and the letter in response from the Employer were attached to the application.

5. According to the Union, there were approximately 250 workers employed by the Employer with 220 of these falling within the bargaining unit as proposed by the Union. The Union stated that it had 171 members within the proposed bargaining unit. Asked to provide evidence that a majority of the workers in the proposed bargaining unit were likely to support recognition of the Union, it said that it would supply its evidence on a confidential basis.

6. The Union's reasons for selecting the bargaining unit as detailed in paragraph 1 were that it had members within the proposed unit and, in its view, such a bargaining unit was compatible with effective management.

7. Finally, the Union confirmed that there had been a previous application in respect of 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

8. In its response dated 10 December 2014 the Employer confirmed that it had received the Union's formal request for recognition on 8 August 2014 and that it responded on 19 August 2014 refusing the request but stated that it was willing to negotiate in accordance with paragraph 10(2) of the Schedule and was agreeable to Acas assisting the parties. A copy of the Employer's letter was enclosed with its response.

9. The Employer also confirmed that it had received a copy of the application form from the Union on 4 December 2014. However, it noted, there were no supporting documents in respect of the claim that the majority of the bargaining unit would be likely to support recognition.

10. The Employer stated that no agreement had been reached as to the appropriate bargaining unit either before it had received a copy of the application form from the Union or since. It was the Employer's view that the bargaining unit was inappropriate and it set out its reasons for reaching this conclusion, one of which was that the Bellshill site had closed on 28 September 2014 and so the proposed unit of Newhouse, Uddingston and Bellshill did not exist.

11. The Employer stated that it employed a total of 7,500 workers in the UK and that the number of workers employed in the Newhouse and Uddingston sites totalled around 347. Not including managers the total on the two sites stood at 322.

12. Asked whether it agreed with the Union's estimate of membership in the proposed bargaining unit the Employer said that it believed the figure to be lower, estimating a total of 61 based on its payroll records and as shown by the email from its payroll manager dated 28 November 2014 which was attached to the response.

13. Asked to indicate its reasons why it did not consider that a majority of the workers in the bargaining unit were likely to support recognition the Employer said that it had no evidence that the majority of the workers in the bargaining unit were likely to support recognition either from the completed application or any other source.

14. The Employer was aware that membership numbers had increased significantly in June 2014 following the judgment of the CJEU in the *Lock v British Gas* case regarding holiday pay. It believed that membership had therefore been relatively short-lived and had increased because workers were seeking to lodge holiday pay claims with the Union's support and assistance. This clearly undermined any argument that the increase in membership was evidence of support for recognition for collective bargaining as the increase was either solely or principally as a result of ET claims being pursued.

15. The Employer confirmed that it had not received any other applications under Schedule A1 from other trade unions for statutory recognition in respect of the bargaining unit as currently proposed although there had been a previous application made by the Union in respect of a similar bargaining unit. Finally, the Employer confirmed that there was no existing agreement for recognition in force that covered any of the workers in the proposed bargaining unit.

The Membership & Support 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 workers within the proposed bargaining unit and that the Union would supply to the Case Manager a list of paid up members within that unit and its petition in support of recognition. The information from the Union was received by the CAC on 16 December 2014 and the information from the Employer was received by the CAC on 18 December 2014. It was explicitly agreed with both parties that, to preserve confidentiality, the respective lists and the petition would not be copied to the other party and that agreement was confirmed in a letter from the Case Manager to both parties dated 16 December 2014. 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 172 members. The information provided included the method of payment of subscriptions, the date of joining and current financial status. Seventy of the 172 members were annotated as paying subscriptions via check off and 102 members were annotated as paying by direct debit. Ninety-six of the 102 members paying by direct debit were noted as being “Fully Paid”, five were annotated “New Member” and one as “Unfinancial”. The dates given in the “Date of Joining” column ranged between 1995 and 2014 with a total of 18 members having joined at various times before 2014. The Union also provided a petition which consisted of 147 names/signatures spread over 24 pages. Each page of the petition was headed:

Unite the Union

Petition for Statutory Recognition at Brake Bros Food Services

We the undersigned employees at Brake Bros Food Services support the recognition of our union Unite for collective bargaining for our terms and conditions of employment including pay, hours of work and holidays. Given that the majority of workers on site are now Unite members.

All bar one of the entries on the petition were dated between 14 August 2014 and 30 September 2014 with the remaining signature dated 20.04.14.

18. The Employer provided two spreadsheets – one for the Glasgow depot and one for the Newhouse depot. The Glasgow list had 83 names and the Newhouse list 246 although one name had been listed twice which brought the total to 245 for the Newhouse list and a combined total of 328 for both. Although the description of the Union’s proposed bargaining unit excluded managers it was noted that 30 workers on the Newhouse list and seven workers on the Glasgow list had the designation “manager” in their job title as provided by the Employer. These workers were included in the checks that were conducted.

19. According to the Case Manager's report, the number of Union members in the proposed bargaining unit was 164, a membership level of 50%. The check of the Union's petition established that 139 workers within the proposed bargaining unit had signed the Union's petition. One hundred and twenty of the signatories were members of the Union

representing 36.58% of the workers in the proposed bargaining unit and 19, representing 5.79% of the workers in the proposed bargaining unit, were non-union members. A report of the result of the membership check was circulated to the Panel and the parties on 19 December 2014 and the parties were invited to comment thereon.

Union's comments on the results of the membership & support check

20. The Union, in an email dated 22 December 2014, confirmed that managers were not part of the Union's proposed Bargaining Unit as detailed in both in its correspondence to the Employer dated 8 August 2014 and its formal application to the CAC dated 2 December 2014.

21. The Union submitted that if the Employer agreed or the Panel declared the proposed Bargaining Unit appropriate, then the Union would be entitled to conclude that it had more than 50% of membership in the proposed bargaining unit.

Employer's comments on the results of the membership & support check

22. In a letter dated 6 January 2014 the Employer submitted that the validity of the petition, given its age (in terms of signatures going back to April 2014 and August 2014) and the wording that was used, was undermined in terms of the admissibility requirements under paragraph 36 of the Schedule.

23. The Employer argued that the petition was misleading in a number of respects. Firstly it incorrectly asserted that the majority of "workers on site" were now Unite members. If managers were included (and on the assumption none were members) then 44.9% of workers on site were Union members. This was not the majority of workers on site. If managers were excluded, the proportion of members using the report's collated figures would be 50%. Again, this was not the majority of workers, but exactly half. This assertion that the majority of workers on site were Union members may have influenced workers considering whether to sign the petition or not, to ultimately sign the petition to ensure the majority's perceived will was complied with. This assertion, and its potential impact, was compounded by the wording of the petition which appeared to link membership directly to supporting recognition.

24. The wording may have misled workers to believe that, as the majority were now Union members, supporting recognition was the inevitable conclusion and therefore signing the petition was simply confirmation of this. As the majority of workers were not Union members firstly and given the fact recognition was not the inevitable consequence of the majority of workers being members, it was the Employer's view that the petition should not be relied upon or, at best, should be given limited weight.

25. In terms of the age of the petition, the majority of the signatures were obtained at the height of workers' interest in bringing holiday pay claims with the support of the Union and potentially this could have influenced a worker into signing the petition. The Employer did not know whether support of a recognition request was required as one of the terms of membership or indeed a condition of the Union offering support in a tribunal claim for holiday pay.

26. It was clear that the interest in becoming a member of the Union had been driven by the holiday pay claims and the support offered by the Union in relation to those claims. This view was supported by the finding in the Case Manager's report that only 18 members (of the 172 set out in the Union's spreadsheet) had joined before 2014. The validity of the petition was therefore undermined in the Employer's view and the weight and value to be attached to it significantly reduced.

27. It was noted that the proportion of workers that had signed the petition was only 42.37%. As noted above, this support was misleading given the wording of the petition firstly and secondly it fell almost 9% below what would be required to constitute the majority of the workers being likely to favour recognition of the Union. The application was therefore not admissible.

28. In terms of the overall accuracy of the information provided by the Union, it was noted that 70 members were described as paying contributions through payroll. However the payroll information held by the Employer showed that in December, only 57 members paid their monthly contributions this way. The mismatch of information in this regard raised a question as to the accuracy of the information provided.

Considerations

29. In determining whether to accept the application the Panel must decide whether the admissibility and validity provisions referred to in paragraph 3 of this decision are satisfied. The Panel has considered all the evidence submitted by the parties in reaching its decision. The Panel is satisfied that the Union 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.

30. The Panel is also satisfied that the application is not rendered inadmissible by any of the provisions in paragraphs 33 to 35 and paragraphs 37 to 42. The earlier application referred to by both parties did not render this application inadmissible under paragraph 39 as that application had not been accepted by the CAC, it having been withdrawn before any decision was taken by the Panel. The Panel is also satisfied that the application was made in accordance with paragraph 12 of the Schedule in that, before the expiry of the first period of 10 working days, the Employer informed the Union that whilst it did not accept the Union's request nonetheless it indicated a willingness to negotiate. However, no agreement was subsequently reached within the prescribed period of 20 working days.

31. The remaining issues are whether the admissibility criteria set out in paragraph 36 of the Schedule are met. In accordance with paragraph 36(1)(a) and (b), the Panel must determine whether members of the Union constitute at least 10% of the workers in the proposed bargaining unit, and 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.

Paragraph 36(1)(a)

32. The membership check conducted by the Case Manager showed that the number of Union members in the proposed bargaining unit was 164, a membership level of 50%. The Union, in its comments on the check, said that the 37 managers included on the Employer's list were not in its proposed bargaining unit and so, on this basis, the density of Union membership would be higher than that established by the Case Manager's comparison – 328

workers less the 37 managers gives a proposed bargaining unit of 291. Assuming that none of the managers were members of the Union, based on the lower figure of 291, Union membership would equate to 56%. The Employer, in its comments on the check, queried the accuracy of the information supplied by the Union on the grounds that the Union's list showed 70 of its members paid subscriptions through payroll whereas the payroll information it held showed that only 57 members had paid their December 2014 monthly contributions by this method. However, even setting aside the 102 members that paid subscriptions by direct debit (96 of whom were noted as being "fully paid"), the density of union membership based purely on the 57 members as paying through its payroll in December 2014, and whom the Employer fully accepts as being in membership, would be in excess of the 10% required under paragraph 36(1)(a) irrespective of whether it was based on a 328 (17%) or 291 (19%) strong bargaining unit.

33. As mentioned above, the Panel is satisfied that the check of membership was conducted properly and impartially and in accordance with the agreement reached with the parties. The Panel therefore finds that members of the Union 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)

34. The test in paragraph 36(1)(b) is for the Panel to assess majority likely support. "Likely" support, by its very nature being a somewhat speculative exercise rather than a precise analysis as to the views of the workers' in the proposed bargaining unit on the subject of trade union recognition. In arriving at its decision the Panel must rely on the evidence put to it by the parties as well as giving weight to the parties' conflicting arguments as to how the evidence should be construed. As far as the case at hand is concerned, the Union relies upon both its membership and its petition as evidence that a majority of the workers in the proposed bargaining unit would be likely to support recognition of the Union. The Employer has not put forward any evidence of its own as regards likely support but has clearly set out its views as to what it believes should be the correct interpretation of the evidence adduced by the Union as well as the veracity of both its membership list and petition.

35. According to the Employer the validity of the petition was undermined when it came to the admissibility requirements because of its age and the wording that was used. It said that the Union was wrong to assert that the majority of “workers on site” were now Unite members as the true figure would be 44% of workers in membership if managers were included or 50% if they were excluded. As a consequence of the Union’s false claim to majority membership, workers were misled to believe that supporting recognition was the inevitable conclusion and so signed the petition accordingly.

36. The Panel does not accept the Employer’s argument that workers felt compelled to sign the petition because it stated that the majority of workers were in membership and so inferred recognition of the Union was inevitable. We are not persuaded that this was the reason why workers did elect to sign the petition. Neither do we believe that the Union misled the workers in its claim to majority membership but take the view that the Union made this claim out of genuine belief on its part as to its level of membership. In its application the Union said that there were a total of 250 workers on the sites with 220 of these in the proposed bargaining unit and it had 171 in membership. Even on the Employer’s figures given in its response to the application (347 workers in total with 322 in the proposed bargaining unit) the Union could be forgiven for making the assumption that it had majority membership. Even now after the membership check has been conducted the Panel has to make an assumption as to the actual number of workers in the Union’s proposed bargaining unit giving that the Employer included managers on the list it provided and so, in our view, the petition is not devalued simply because the Union did the same. Nor are we persuaded that the petition is out of date. The vast majority of the signatures were gathered in a 6 week period at the time that the Union formally requested recognition of the Employer and in our view, still hold currency.

37. The Employer also argued that the majority of the signatures on the petition were obtained at the height of workers’ interest in bringing holiday pay claims with the support of the Union and potentially this could have influenced a worker into signing the petition or becoming a member if assistance was dependent on membership. It submitted that this position was supported by the Case Manager’s report which confirmed that only 18 members of the 172 members on the Union’s list had joined before 2014. The validity of the petition

was therefore undermined in the Employer's view and the weight and value to be attached to it significantly reduced.

38. In the Panel's view the Employer has not provided any evidence to support its assertion that workers either became members or signed the petition because of the Union offering assistance on holiday pay claims. Even if the offer of assistance did result in increased membership it does not follow that those signing up would not be in favour of the Union being recognised. The Union's offer of assistance in holiday pay claims and its quest for recognition are not mutually exclusive.

39. Finally, the Employer had noted that only 42.37% of workers had signed the petition, a figure which fell short of a majority of the workers in the proposed bargaining unit being likely to favour recognition of the Union. However, as we said in paragraph 34 above, the test under paragraph 36(1)(b) is a test of *likely* support rather than a question of whether the Union has the support of a definite mathematical majority within the proposed bargaining unit. Excluding the managers, and on the assumption that no manager had signed the petition, the proportion of petition signatories would rise to 47.76% based on a 291 strong bargaining unit.

40. The Panel is satisfied that the level of support shown by the petition, when taken with the degree of Union membership, demonstrates that on the balance of probabilities and in the absence of any persuasive evidence to the contrary, a majority of the workers in the proposed bargaining unit would be likely to support recognition of the Union and the test set out in paragraph 36(1)(b) is therefore met.

Decision

41. For the reasons given above, the Panel's decision is that the application is accepted by the CAC.

Panel

Professor Kenny Miller, Chairman of the Panel

Mr Dennis Cameron

Mrs Maureen Shaw

19 January 2015