Case Number: TUR1/888/(2014)

23 October 2014

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:

GMB

and

Tempay Ltd

Introduction

1. GMB (the Union) submitted an application to the CAC dated 11 September 2014 that it should be recognised for collective bargaining by Tempay Ltd (the Employer) for a bargaining unit comprising "Hourly paid employees on permanent contracts of at least seven hour per week, at Marks and Spencer's Distribution Depot, Stirling Road, South Marston Industrial Estate, Swindon, Wiltshire, SN3 4TT". The CAC gave the parties notice of receipt of the application on 15 September 2014. The Employer submitted a response to the application on 17 September 2014.

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 Paul Davies QC FBA, Chairman of the Panel, and, as Members, Mr Roger Roberts and Mr Paul Talbot. The case manager appointed to support the Panel was Adam Goldstein.

3. The Panel has extended the acceptance period in this case. The initial period expired on 26 September 2014. The acceptance period was extended to 17 October 2014 in order to conduct the membership and support check and to allow time for the parties to comment on the results of the check. The period was further extended to 27 October 2014 to allow time for the Panel to consider the parties comments and to prepare its written decision.

Issues which the Panel has to determine

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 should therefore be accepted.

Background

5. The Union made a previous application to the CAC for recognition by the Employer on 30 April 2014 (TUR1/871/2014). That application was not accepted by the CAC.

Summary of the Union's application

6. In its application the Union stated that it had sent its request for recognition to the Employer on 15 August 2014 and had received no response. The Union attached to its application a copy of this letter which identified the Union and the bargaining unit and stated that the request was being made under the Schedule. The Union stated in its application that the Employer, following receipt of the request for recognition, did not propose that Acas should be requested to assist.

7. There were 2,400 workers employed by the Employer, 310 of whom were in the proposed bargaining unit. There were 170 members of the Union within the proposed bargaining unit. When asked to provide evidence that the majority of the workers in the bargaining were likely to support recognition for collective bargaining the Union stated that workers had joined the Union in order to secure recognition and added that the Union was prepared to submit evidence of Union membership levels on a confidential basis.

8. The Union stated that it had proposed a bargaining unit comprising hourly paid permanently contracted workers on the site. This made industrial common sense and was fully compatible with effective management. The bargaining unit had not been agreed with the Employer.

9. The Union stated that, as far as it was aware, there was no existing recognition agreement in force covering any of the workers in the proposed bargaining unit. The Union confirmed that it held a current certificate of independence.

Summary of the Employer's response to the Union's application

10. In its response to the Union's application, the Employer stated that it had received the Union's written request for recognition on 18 August 2014 and confirmed that it had not responded to the Union's letter.

11. The Employer stated that it had received a copy of the application form on 12 September 2014 with only a copy of its letter of 15 August 2014 as supporting evidence. The Employer submitted that this was not sufficient and that evidence of membership and support could have also been provided in redacted form.

12. The Employer stated that it had not, before receiving a copy of the application from the Union, agreed the bargaining unit with the Union and that it did not agree it. The Employer stated that it employed 2,400 workers across the business with approximately 625 workers employed at the relevant site. The Employer therefore objected to the description and identification of the proposed unit and denied that it consisted of 310 workers as stated by the Union in its application. In addition, the Union had not provided any details of the 170 Union

members in the bargaining unit and, furthermore, in its application of 30 April 2014 to the CAC, the Union stated that there were 320 workers in the bargaining and that 190 of them were members of the Union. The Employer submitted that, notwithstanding the Union's failure to evidence membership, it appeared based on these numbers that membership at the site had decreased since April 2014 which was a further indicator of a lack of support for the Union.

13. The Employer stated that it could not usefully comment on the Union's membership level as the workers did not pay membership fees via deductions from payroll. Further, the workforce at the site had no permanent place of work and, as such, was transient.

14. The Employer disputed that a majority of the workers in the bargaining unit were likely to support recognition. The Union had been trying to force recognition and the previous approach to the CAC had been unsuccessful. The Employer had tried to meet with the Union on a without prejudice basis to discuss matters but, on each occasion, the Union had either ignored or refused the Employer's request. The Union had sought to hold a protest at the Site on 13 August 2014 which the Employer submitted constituted industrial action and to be unlawful having not been arranged in accordance with the applicable legislation. The Employer stated that the protest went ahead but was not attended by a single worker from Tempay based on the site and this fact was highly relevant to the Union's assertion that it had the support of workers. The Employer continued that, since the protest, the Union had attempted to force recognition by requesting its representative be afforded "the usual facilities" and by requesting that the Union represent aggrieved employees at meetings, whilst the actual right under the Acas Code was trade union accompaniment. The Employer was dealing with the grievances in accordance with the Acas Code. The Union had sent a letter dated 15 September 2014 referring to a collective grievance on behalf of 76 individuals and the Employer was in the process of dealing with this. Here the Union had, again, sought to gain involvement and potentially force recognition. The Employer stated that, on one occasion, a senior Union representative at a grievance meeting had made "threatening and intimidating comments to a manager from Tempay which led to a formal complaint being made." The Employer considered this to be "indicative of the manner in which GMB appears to be handling itself in relation to the Site."

15. The Employer confirmed that, following receipt of the Union's request, it did not propose that Acas be requested to assist.

16. The Employer confirmed that there was no existing agreement for recognition in force covering workers in the proposed bargaining unit. The Employer added that it believed that there was a recognition agreement and a harmonious relationship between Wincanton (who employed full time workers at the site) and Unite. Wincanton's workers worked directly alongside Tempay Limited's worker at the site.

Correspondence regarding the size of the bargaining unit

17. In order to prepare for a membership and support check, the case manager sought further clarification from the parties about the size of the Union's proposed bargaining unit. The parties were in disagreement about the size of the bargaining unit (the Union thinking it to be about three quarters of the size indicated by the Employer). It proved impossible to resolve this disagreement ahead of the support check but, in the event, it was unnecessary to do so for the purposes of the acceptance decision (see below).

Summary of other submissions from the parties

Employer's e-mail of 23 September 2014

18 The Employer's representative stated in an e-mail of 23 September 2014 that the Union was proposing to run a protest on 26 September 2014, similar to that on 13 August 2014. The Employer submitted that the Union had not taken the proper steps to organise the action and stated that the Union appeared to be exerting pressure rather than seeking to engage in the CAC procedure.

Other points from Union's e-mail of 24 September 2014

19. The Union, in an e-mail of 24 September 2014, disputed the Employer's statement in its response that the workforce had no permanent place of work and were transient. The Union stated that, aside from a small number of Tempay employees who may still have

worked at more that one site, the majority had worked on the same site for more than two years, had never worked anywhere else and did not expect to work anywhere else. In the e-mail the Union also challenged the Employer's assertion that it had tried to meet the Union. The Union stated that the Employer was given the opportunity to meet and discuss the recognition request but had made no contact. The Union also pointed to the protests that the Employer had referred to in its response. The Union stated that these protests were about the use of the Swedish derogation and the pay differential of over £2 per hour between those employed by Wincanton and those employed by Tempay.

Employer's e-mail of 6 October 2014 and Union's response

20. The Employer sent an e-mail dated 6 October 2014 referring to the collective grievance (see paragraph 14 above) in which the Union had sent the Employer a list of 76 names. The Employer had written to all employees on the list with the outcome of the grievance and details on how to appeal. The Employer had learnt that one employee on the list (who was not named) had stated that they had not signed the list and that the signature on the list was not in fact his own. This led the Employer to conclude that:

> On the face of it, it would appear that some of the information on the collective grievance provided by GMB has been fabricated, and obviously if this turns out to be the case it is a very serious matter.

The Employer continued that it appreciated "that the grievances being raised in conjunction with GMB are not relevant for the purposes of the membership test, but I want to bring this to your attention…" further stating that it was important to raise this issue as information was due to be provided by the Union for the purposes of the membership test. The Union responded by way of an e-mail dated 16 October 2014 stating that the Employer was incorrect in any assumption that any information was "fabricated". The Union continued that the Employer had had ample opportunity to write to the employees formally and invite them to a grievance hearing which it had not done. The Union stated that it was open to discuss the issues with the Employer on behalf of members and concluded that it did "not think the employer should waste the valuable time of the CAC in this regard but should engage directly with the GMB."

The membership check

21. 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 and support within the proposed bargaining unit. It was agreed that the Employer would supply to the case manager a list of the names, dates of birth and job titles of the workers within the proposed bargaining unit indicating the name of the employer, the place of employment, and the type of contract. The Union agreed to supply (1) a list of its members within that unit including full name, date of birth, date of joining, date paid up to and confirmation of membership status and (2) a copy of the survey responses signed by workers in the proposed bargaining unit in favour of recognition. 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 2 October 2014 from the case manager to both parties.

22. The information from the Employer was received on 6 October 2014. The information from the Union was received by the CAC on 7 October 2014. The survey included the following statement:

> **I would like the GMB trade union to be able to negotiate collective agreements with Tempay on pay and other terms and conditions of employment on behalf of me and my colleagues**

Only those survey responses where the participant had indicated a "Yes" to the above statement in the appropriate box were included in the CAC's check. The Panel is satisfied that this check was conducted properly and impartially and in accordance with the agreement reached with the parties.

23. The Employer provided a list of 569 workers in the Union's proposed bargaining unit. The list of members supplied by the Union contained 198 names. According to the case

manager's report, the number of Union members in the proposed bargaining unit was 194, a membership level of 34.09%. The Union supplied a total of 304 affirmative survey responses of which 296 were on the Employer's list. The proportion of workers in the proposed bargaining unit indicating support for the Union's survey was 52%. Affirmative survey responses from Union members constituted 29.35% of the bargaining unit and affirmative survey response from non-members constituted 22.65% of the bargaining unit.

24. A report of the result of the check was circulated to the Panel and the parties on 10 October 2014 and the parties were invited to comment on the report.

Summary of the Union's comment on the membership and support check

25. The Union commented by way of an e-mail dated 16 October 2014 that its application should be accepted because it satisfied both tests at paragraph 36(1) of the Schedule. The Union turned to each of the tests as follows:

Paragraph 36(1)(a)
The Union stated that it had provided a 194 names of members who were on the Employers list (34.09%), well in excess of the 57 (10%) required. The Union had therefore passed this test.

Paragraph 36(1)(b)
The Union had provided a petition with 296 names on the Employer's list (53%) which included 129 non-members. The Union had therefore passed this test.

Summary of the Employer's comment on the membership and support check

26. In an e-mail dated 16 October 2014 the Employer noted that the report indicated that around 34% of the bargaining unit was in membership of the Union and that around 52% had indicated support for recognition but the Employer submitted it had concerns over the figures and made points as follows.

1. The Employer repeated its point about the collective grievance adding that some people on the collective grievance list were no longer employed by the Employer and had not been for some time and that "several" people (the number was not specified) had told the Employer that they were no longer members of the Union and that at least one signature on the collective grievance list had been forged. The Employer therefore had, "some concerns that the information collated by the GMB and which has formed the result of the membership test may not be completely reliable".

2. The Employer again cited the Union's demonstrations and stated that, at the demonstration in September (as with the August demonstration), no employee of the Tempay Ltd had attended. The Employer suggested that this was "symptomatic" of the feeling amongst workers in relation to recognition of the GMB.

3. The Employer stated that the workers in the bargaining unit were on assignment and had no fixed place of work. Therefore the numbers could fluctuate and so, even if the Union's information was accurate, the figures from the check may not have been indicative of actual support.

Considerations

27. In deciding whether to accept the application, the Panel must determine whether the validity and admissibility provisions referred to in paragraph 4 above are satisfied.

28. Having considered the documentation provided by both parties the Panel is satisfied that the Union's request to the Employer was valid within the terms of paragraphs 5 to 9 of the Schedule and that the application was made in accordance with paragraph 11. The Panel is satisfied that the application is not rendered inadmissible by any of the provisions in paragraphs 33 to 35 and paragraphs 37 to 42 of the Schedule. The remaining issues for the Panel to decide are whether the admissibility criteria contained in paragraph 36(1)(a) and paragraph 36(1)(b) are met.

29. Before looking at each of these criteria in detail, the Panel notes the Employer's criticism of the data produced by the Union in support of its claim. These arguments derived in large part from the Employer's analysis of the persons named in the collective grievance list. This list, of course, was not part of the data supplied to the case manager by the Union for the purpose of the support check. We are asked to use these unsubstantiated allegations in relation to the collective grievance list as general evidence of slackness on the part of the Union in compiling the lists supplied to the case manager. We are unable to do so. First, only small numbers of workers are alleged to have been irregularly included in the collective grievance list, so that the impact of a similar mistake in relation to the data provided by the Union would also be small. Second, we were provided with no evidence that this or any larger level of inaccuracy had infected the data actually supplied to the case manager. Third, the support check could not have suffered from one of the defects identified by the Employer (that 'some' workers who had not been employed by the Employer 'for some time' were included by the Union) since the denominator in the percentages calculated by the case manager consists of the list of employees supplied by the Employer. Any worker not on the Employer's list is automatically excluded from the case manager's calculation, even if his or her name appears on the Union's list. The Employer also submitted that fluctuating numbers at the Site could make the results of the CAC's check unreliable. The Panel observes that numbers employed by an employer will, in all cases, tend to change over time. The check however is intended to provide a picture of membership and support at a given time. The Panel does not consider that the Employer has advanced a convincing case to undermine the check's result. The Panel further notes the Employer's points about the Union's attempting to "force" recognition through protests and a collective grievance and about "threatening and intimidating comments" made at a grievance meeting. However, we have not seen any specific, verifiable evidence about the manner in which the Union has conducted its campaign for recognition that would lead us to doubt the figures produced for the case manager's check.

Paragraph 36(1)(a)

30. Under paragraph 36(1)(a) of the Schedule an application is not admissible unless the Panel decides that members of the union constitute at least 10% of the workers in the proposed bargaining unit. The membership check conducted by the case manager, described in paragraphs 21-24 above, showed that 34.09% of the workers in the proposed bargaining

unit were members of the Union. The Panel has not been provided with any evidence leading it to doubt these figures. The Panel has therefore decided 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)

31. Under paragraph 36(1)(b) of the Schedule an application is not admissible unless the Panel decides that 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. At this stage the Panel does not have to establish (on the balance of probabilities) that a majority of the proposed bargaining unit does support recognition of the Union; only (on the balance of probabilities) that a majority would be likely to do so (ie presumably, if recognition were in fact ordered). We have concluded that the evidence in this case passes that test. The membership level indicated by the check was 34.09%. Members of the union cannot be unaware of the Union's campaign for recognition in this case and so their maintenance of their membership can be taken as evidence of support for that goal. In addition the Union provided evidence in the form of completed surveys in which support for recognition was indicated. In particular, the Panel observes that the non Union members who had indicated support for recognition in the survey equates to 22.65% of the bargaining unit. The Panel considers that, in addition to the membership density shown by the check, the survey results indicate sufficient support for recognition beyond the Union's members to satisfy this test. As indicated above, the Panel takes the view that it has not been supplied with evidence which contradicts these conclusions. The Panel concludes that the test at 36(1)(b) of the Schedule is met.

Decision

32. For the reasons given in paragraphs 27-31 above the Panel's decision is that the application is accepted by the CAC.

Panel

Professor Paul Davies QC FBA, Chairman of the Panel
Mr Roger Roberts
Mr Paul Talbot

23 October 2014