Case Number: TUR1/889/2014

04 December 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:

Unite the Union

and

Seal Security UK Limited

Introduction

1. Unite the Union (the Union) submitted an application to the CAC dated 8 September 2014 that it should be recognised for collective bargaining by Seal Security Limited (the Employer) for a bargaining unit comprising "Security Officers and Support Officers". The locations for the bargaining unit were listed as Bloomberg LP, City Gate House, 39 – 45 Finsbury Square, London EC2A 1PQ; Bloomberg LP, Dockland Support Centre, 8 Greenwich View Place, Mill Harbour, London E14 9NN; Bloomberg LP, Silvertown Warehouse, Unit 7 – 9 Kiebeck Business Complex, London E16 2NG; and Bloomberg LP, Park House, 16 – 18 Finsbury Circus, London EC2M 7EB. The application was received by the CAC on 9 September 2014. The CAC gave both parties notice of receipt of the application on 15 September 2014. The Employer submitted a response to the CAC dated 22 September 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 Gillian Morris, as Panel Chair, and, as Members, Mr Mike Cann and Ms Bronwyn McKenna. The Case Manager appointed to support the Panel was Miss Sharmin Khan.

3. The CAC Panel has extended the acceptance period in this case on five occasions. The initial period expired on 26 September 2014. The acceptance period was extended to 10 October 2014 to allow time for a membership check to take place, for the parties to comment on the subsequent report and for the Panel to consider said comments before arriving at a decision. The acceptance period was further extended until 24 October 2014 to enable the CAC to complete the membership check; until 5 November 2014 to allow time for the Panel to consider all the evidence; and until 1 December 2014 to enable the Panel to hold a hearing and provide more time for the Panel to consider all the evidence and reach a decision. Finally the acceptance period was extended until 8 December 2014 to enable the Panel to finalise its written decision.

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.

Summary of the Union's application

5. In its application the Union stated that it had sent its formal request for recognition to the Employer in a letter dated 5 August 2014, the Employer having rejected earlier requests made in letters dated 14 and 30 April 2014 by a letter dated 13 May. The Employer responded on 13 August 2014 acknowledging receipt of the Union's letter of 5 August 2014 and stating that the Union's request would be considered at the Employer's next Senior Management meeting. In a letter to the Employer dated 22 August 2014 the Union asked when the next Senior Management meeting was due to take

place. In a further letter to the Employer dated 1 September 2014 the Union noted that it had not received a response to its letter of 22 August 2014 and informed the Employer that if it did not receive a positive response by 5 September 2014 it would be making a formal application to the CAC. A copy of the Union's letter of 5 August 2014 and subsequent correspondence between the parties was attached to the Union's application to the CAC.

6. The Union stated that there were 60 workers in the proposed bargaining unit of whom 35 were Union members. 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 stated that it had a majority of the proposed bargaining unit in membership and that a membership list could be provided to the CAC on condition that it was not copied to the Employer.

7. The Union stated that the reason for selecting the proposed bargaining unit was that all the members of the bargaining unit were employed by the Employer as Security Officers on the Bloomberg contract at the four sites listed in paragraph 1 above.

8. The Union stated that the bargaining unit had not been agreed with the Employer and 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. On 15 September 2014 the Union forwarded to the CAC by e-mail a copy of the transmission results of a nine-page fax it had sent to the Employer with the subject 'CAC application' dated 8 September 2014.

Summary of the Employer's response

9. In a response to the Union's application dated 22 September 2014 the Employer confirmed that it had received the Union's written request on 8 August 2014 and had responded by advising that the request would be discussed at the next Senior Management meeting. The Employer noted that the Union had then written to ask for the date of that meeting but stated that the addressee of the Union's letter had been on leave and that this correspondence had not been received. The Employer stated that shortly

after the addressee had returned from leave and before he had responded to the Union's letter a copy of the Union's application to the CAC had been received on 8 September 2014.

10. The Employer stated that no agreement had been reached on the proposed bargaining unit before a copy of the Union's application had been received and that no agreement or negotiations on the bargaining unit had been requested. The Employer stated that it did not agree with the proposed bargaining unit because it was not compatible with effective management and that if any bargaining unit were to be recognized this should be based on all its 65 workers, although it also said that this would make proper management oversight impossible.

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

12. The Employer stated that it employed a total of 65 people, comprising 31 Security Officers, 19 Support Officers, one Badge Administrator, five Supervisors, two Shift Managers, three Controllers, one Post Room Officer, one Assistant Contract Manager, one Site Manager and one Operations Director.

13. The Employer stated that there was no existing agreement for recognition in force covering workers in the proposed bargaining unit.

14. In answer to the question whether it disagreed with the Union's estimate of membership in the proposed bargaining unit, the Employer stated that it had been informed that recently there had been seven resignations from the Union by members who were disillusioned with the Union's attempt to force recognition.

15. In answer to the question whether a majority of the workers in the proposed bargaining unit would be likely to support recognition, the Employer stated that it was confident that the majority of workers did not want Union recognition and that the Union's attempt at recognition was being driven by a few Union members who had their own agenda. The Employer stated that it respected the right of these employees to be

members of a trade union and to carry out work in this regard, but it did not consider that their views regarding recognition represented the majority of workers in the proposed bargaining unit.

16. The Employer stated that it had been approached by a number of employees who had indicated that they and a large number of their colleagues did not want the Union to represent them in collective bargaining and wanted the Employer to make their representations to the CAC. These employees had advised that there were both Union members and non-Union members who did not want recognition of the Union and that some members of the Union had recently resigned their membership in protest at the Union wanting to force recognition on the Employer against their wishes. The Employer stated that it had 31 signatures of employees in the proposed bargaining unit who opposed recognition and that there were a further three employees on long leave who could not be reached but who were not Union members and whom it believed would not want Union representation. The Employer stated that it could supply these signatures and names to the CAC on request and in confidence. The Employer further stated that it had an open-door policy and employees were free to meet with management whenever they liked. It considered that it had favourable working conditions and a harmonious working environment which was reflected by the fact that no employment grievances had ever been received by the Employer; in the past three years only two employees had been dismissed; and no employees had been dismissed in the past 12 months. The Employer stated that it reviewed pay annually and increases had been given every year since the Employer started its business in the UK in 2006. The Employer stated that in these circumstances it considered that the majority of workers were very unlikely to support recognition as they were satisfied with the direct access arrangements it provided.

17. In answer to the question whether it had received any other applications under the Schedule for statutory recognition in respect of any workers in the proposed bargaining unit, the Employer stated that a previous application had been made by the Union on 9 June 2014 but that this had been withdrawn for reasons unknown to it.

Membership and Support Check

18. 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 in the proposed bargaining unit; the number of workers in the proposed bargaining unit who had signed a petition submitted by the Union in favour of recognition and the number of workers in the proposed bargaining unit who had signed the Employer's petition not in favour of recognition. It was agreed with the parties that the Employer would supply to the Case Manager a list of the names, addresses, job titles, and dates of birth of the workers within the proposed bargaining unit, and that the Union would supply to the Case Manager a list of the names, addresses and dates of birth of its paid up members within that unit. It was also agreed that each party would supply to the Case Manager a copy of its petition together with the original petition. It was explicitly agreed with both parties that, to preserve confidentiality, the respective lists and petitions would not be copied to the other party. These arrangements were confirmed in a letter dated 26 September 2014 from the Case Manager to both parties. The Panel is satisfied that the check was conducted properly and impartially and in accordance with the agreement reached with the parties.

19. The list supplied by the Employer showed that there were 55 workers in the Union's proposed bargaining unit. The list of members supplied by the Union contained 31 names. According to the Case Manager's report, the number of Union members in the proposed bargaining unit was 30, a membership level of 54.5%.

20. The petition supplied by the Union contained 29 names and signatures. 26 of the signatories were reported as being in the proposed bargaining unit, a figure that represented 47.3% of the proposed bargaining unit. All 26 signatories were members of the Union. 13 signatories (23.6% of the proposed bargaining unit) had also signed the Employer's petition. The Union informed the Case Manager that its petition ran from 14 to 23 May 2014. The wording and format of the Union's letter/petition was as follows:

"Our ref: CES/NL/LE/107/Seal Security

Your ref:

To all Unite members employed by Seal Security Limited

Dear Colleague

Unite recognition at Seal Security

As Unite membership has now grown to more than 50% of Seal Security employees, we are now in a position to apply for statutory recognition. In order to do this, we must ascertain that our members want to see Unite recognised as the union to negotiate on your behalf on employment matters. I am therefore writing to you to ask you to vote using the tear off slip at the bottom of this letter indicating whether you want Unite to be recognised at Seal. All ballot papers will be kept by Unite and kept confidentially.

Please take a moment to vote and return the ballot paper using the enclosed pre-paid envelope by **23rd May 2014**.

Thank you for your time.

Yours sincerely,

Carolyn Simpson
Regional Officer

.....*tear here*.....

I support the proposal that Unite applies for recognition at Seal Security Limited **YES / NO**

Membership number:
....."

21. The petition supplied by the Employer contained 33 names and signatures. All 33 signatories were reported to be in the proposed bargaining unit, a figure that represented 60% of the proposed bargaining unit. Of those 33 signatories, 18 (32.7%) were not Union members; two (3.6%) were Union members who had not signed the Union's petition; and 13 (23.6%) were Union members who had also signed the Union's petition. The signatures on the Employer's petition were dated between 17 September 2014 and 26 September 2014. The wording and format of the Employer's letter/petition was as follows:

"I _____ from Seal Security UK Ltd would like to make it known that I would **not** like Unite the Union to represent us in collective bargaining.

Name: _____ Signature_____"

22. A report of the result of the membership and support check was circulated to the Panel and the parties on 15 October 2014 and the parties were invited to comment on the result.

Summary of the parties' comments on the membership and support check

23. In a letter to the CAC and the Employer dated 17 October 2014 the Union stated that it was clear that it had at least 10 per cent of the workers constituting the proposed bargaining unit in membership as required by paragraph 36(1)(a) of the Schedule. The Union submitted that the requirement of paragraph 36(1)(b) - 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 – was also met. The Union noted that 13 of its members had signed the Employer's petition and the Union strongly asserted that they had done so because they had been intimidated. The Union stated that members had informed it that they had signed the Employer's petition because they were told that, if they did not, they would not get any further work and/or that the Union should ignore their signature on the Employer's petition. The Union asked the Panel to note that a number of its members were on zero-hours contracts and were therefore particularly vulnerable to intimidatory tactics by the Employer. In addition, a number were of Nepalese origin and they were more likely to be intimidated into signing the Employer's petition due to language difficulties and less awareness of their legal rights. The Union asked the Panel to take these matters, and its long experience of such applications, into account to conclude that were there to be a fair and lawful ballot of those in the proposed bargaining unit, free of intimidation by the Employer, a majority would be likely to favour recognition.

24. In its letter to the CAC dated 20 October 2014, the Employer accepted that the Union had more than the 10% membership in the proposed bargaining unit required by paragraph 36(1)(a) of the Schedule. However, the Employer submitted that it was clear from the report that only 13 (23.6%) of its employees in the proposed bargaining unit

now favoured recognition and that 35 (63.6%) were opposed (including two employees who had been abroad and unable to sign the petition). The Employer submitted that the data showed that, between May and September 2014, 13 employees had changed their views after consultation with their colleagues who were opposed to recognition and had signed the "form" against recognition. The Employer stated that the "ballot" against Union recognition was not carried out by management but by employees who were opposed to Union recognition.

25. In a further letter to the CAC dated 21 October 2014 the Employer responded to the comments made by the Union in its letter of 17 October 2014 summarised in paragraph 23 above. The Employer reiterated that management had taken no part in the gathering of signatures for the petition opposed to recognition and so there could be no question of any threats or intimidating tactics by management. The Employer stated that it had been very careful throughout to ensure its employees had a free choice. The Employer stated that it had submitted the signatures on behalf of the Officers opposed to the recognition of the Union after it had asked the CAC Case Manager how this group of workers could have a voice in the process. After being advised that they could submit a counter petition through the Employer, the Employer had done this on their behalf. The Employer said that it had a very clear policy that did not tolerate any form of harassment or intimidation of any of its employees at any time.

26. The Employer refuted the Union's assertion that its Officers of Nepalese Origin were vulnerable and had language difficulties and less awareness of their legal rights. The Employer submitted that it was "ludicrous" for the Union to suggest that, when being advised of their right to join and support the Union, its Nepalese employees were able to understand but when being advised by their colleagues, often in their own language, of their right to oppose recognition they were considered by the Union to be vulnerable and ill- informed. The Employer stated that in the four months since the Union conducted its "ballot" many employees had consulted and debated with their colleagues regarding Union recognition and after having been given a more balanced perspective than that offered by the Union, 13 Union members had changed their views. The Employer stated that a few had continued to support recognition but all had been allowed to make their

choice freely. The Employer affirmed that the allegations made by the Union that any of its Officers were threatened or intimidated in any way were simply false and entirely without merit.

27. In a letter to the CAC dated 23 October 2014 the Union stated that it had received a letter from a Union member who confirmed that he was pressurized into signing the Employer's petition against his will and a list compiled by a Union representative of nine members who said that they had been forced to sign the Employer's petition by a manager. The Union stated that it would send these documents to the Case Manager if she could confirm that they would not be sent to the Employer.

28. The Panel decided to hold a hearing in order to assist it to decide whether the Union's application should be accepted. In advance of the hearing the parties were invited to provide and exchange written submissions and these were received and exchanged in 13 November 2014. The hearing took place on 21 November 2014 and the names of those who attended are appended to this decision.

29. In a letter to the CAC dated 7 November 2014 the Employer stated that employees, including Union members, had provided it with individual written statements confirming that they had not been subject to any intimidation by the Employer. The Employer asked the CAC to accept this evidence on the basis that it would not be disclosed to the Union because the signatories had said that they feared intimidation or victimisation from the Union if their names were disclosed. In a letter to the Employer dated 10 November 2014, which was copied to the Union, the Case Manager asked the Employer to note that the CAC could not accept evidence from one party on the basis that it would not be shown to the other party. The Case Manager also confirmed that the CAC had taken no action with regard to the Union's letter of 23 October 2014 referred to in paragraph 27 above

Matters clarified at the commencement of the hearing

30. Both parties confirmed that the sole issue in dispute was whether the admissibility test set out in paragraph 36(1)(b) of the Schedule had been satisfied, namely whether the

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 Union confirmed that it agreed that the three controllers, one badge administrator and one post room officer were included in the bargaining unit.

Matters agreed between the parties during the hearing

31. The Union stated that three members had resigned from the Union since the membership and support check discussed in paragraphs 18-21 above, although one individual had since joined, making a total of 28 Union members. The Employer did not dispute this figure.

Summary of the Union's submissions

32. The Union stated that since it had first sought recognition at the Employer its members had felt intimidated and harassed and its membership had declined by eight as a result. The Union's Regional Officer, Ms Simpson, said that she had written to the Employer on 1 August 2014 stating that it had been brought to her attention by a number of Union members that they were being questioned in what was perceived by them to be an intimidatory way by certain members of management; asking that this should cease; and stating that whether or not a person was a member of a union was immaterial to their employment. This letter had followed telephone calls and e-mails from members to the Union's Membership Services Administrator, Ms Luxford, (who was also Ms Simpson's secretary and the first point of contact for members) complaining that they were being threatened by repeated requests to reveal information about their union membership. Ms Simpson had also written a letter headed "Intimidation and harassment by management" to Union members at the Employer the same day. In that letter she had suggested that being asked about Union membership showed that the Employer was "scared" about its staff getting a voice and representation when needed and had asked members to recruit a colleague "to frighten them even more!!" In answer to a question by the Employer Ms Simpson said that the phrase "to frighten them even more!!" was 'tongue in cheek' and was not meant to be taken literally. The Union denied the Employer's suggestion in its

letter of 7 November 2014 (see paragraph 29 above) that the Union would intimidate any worker. In a statement which was attached to the Union's written submission, Ms Luxford said that she had taken a number of telephone calls from members wanting to resign from the union as they felt under too much pressure to remain as members. At the hearing Ms Luxford explained that these members had told her that they were resigning for 'personal reasons' or that they just did not want to be members any longer and that it was her interpretation that they felt pressurised.

33. The Union stated that its members had signed the Employer's petition referred to in paragraph 21 above as a result of intimidation. In the statement referred to in paragraph 32 above, Ms Luxford said that she had taken a number of telephone calls from members employed by the Employer in which members had reported that the Employer was forcing them to sign a petition drawn up by the Employer stating that they did not want the Union to be recognised. Ms Luxford stated that the employees felt threatened by this and had signed under duress/coercion and some, who were typically on zero-hours contracts, had been threatened with no work in future if they did not sign. Ms Luxford also stated that members were further intimidated by being called into a room one at a time, and by not being allowed to leave the room until they had signed the 'counter petition'. Referring to its letter to the CAC of 23 October 2014 (see paragraph 27 above) the Union stated that it had not wished to disclose the names of the nine members on the list compiled by a Union representative who said that they had been forced to sign the Employer's petition by a manager, or the author of the letter from the individual member, for fear that those individuals would be subjected to reprisals by the Employer.

34. Following questioning by the Employer Ms. Luxford said that 'a handful' of members (she guessed five or six) had contacted her directly to say that members were being forced or put under pressure to sign the Employer's petition, although she did not know how many of these members had actually signed it. She also referred to the letter from the individual member to Ms Simpson stating that he had been pressurised into signing the Employer's petition against his will. Ms Luxford said that the remainder of her information had come from the Union representative. Ms Luxford said that the words in her statement that members had signed the Employer's petition under

"duress/coercion" were her own. She did not know who within the Employer had exercised the pressure on members and said it could have been anyone, but she said that the Union representative had told her that the shift manager who had been involved in organising the petition had told members in Nepalese that they would be lucky to get one or two days' work and asked them how they would pay their mortgage. In answer to the Employer's statement that the Union representative did not speak Nepalese Ms Luxford said that members would have told him what had been said. The Union said that it was not aware of anyone having suffered a reduction in shifts or any other detriment for not signing the Employer's petition and said that had they suffered any such detriment the Union would have been told. Ms Luxford said that the information in her statement that members were not allowed to leave the room until they had signed the 'counter petition' had come from the Union representative. She could not recall the date when she had been told this. With reference to her letter to the CAC and the Employer of 17 October 2014, referred to in paragraph 23 above, Ms Simpson reiterated her belief that the 13 union members had signed the Employer's petition because they had been intimidated into doing so. She said that she could not recall when she was told about this by Ms Luxford and could not say why it had taken her a month to raise the issue but said that she would have reacted as soon as she could.

35. The Union said that 10 of the 35 employees who had signed individual written statements dated 4 November – 12 November 2014 opposing recognition (see paragraph 44 below) were Union members. Ms Simpson said that none of these members had complained to the Union that these statements were not legitimate and that she had, therefore, to take them at face value. Ms Luxford confirmed that no individual members had contacted the Union in the last two weeks to say that they had been forced to sign hand-written statements. She initially said that the Union representative had told her that there had been hand-written statements from individuals stating that they did not support recognition but that he had not said anything further. However later in her evidence she said that the Union representative had told her that employees had 'had' to write a statement and that in her opinion they had been forced to do so. Ms Luxford said that she

had told Ms Simpson about this but could not remember when, and as far as she knew Ms Simpson had not gone back to the Union representative about this matter.

36. The Union criticised a letter dated 27 June 2014 and headed 'Campaign for union recognition agreement by Unite the Union' which had been sent by the Employer to its workers. This contained the statement "[w]e are concerned that the union has no interest in the service we deliver to our client, which could stand between us". The Union said that the Employer could not know that as it had never contacted the Union and, on the contrary, it was in the Union's interests that the highest standards of service delivery were maintained. The Union also criticised the description in that document of the Union's letters as "aggressive" and the Employer acknowledged at the hearing that, although it had other dealings with the Union during that period, probably the letters themselves had not been aggressive. The Employer stated that its letter of 27 June 2014 had explained that it had not agreed to voluntary recognition because it believed that union recognition was a matter that employees should decide. The Union submitted that the Employer was clearly hostile to recognition, and that the letter went on to say why recognition was not needed; put only a one-sided view of the matter; and demonstrated that the Employer was happy for individuals to join trade unions as long as they did not combine for collective bargaining purposes. The Union stated that the Employer had not attempted to establish a dialogue with it and it was clear that the Employer had misconceptions about what recognition would mean. The Union said that it had not organised a second petition because it was in regular contact with its members and with the Union representative at the Employer and it was satisfied that all its members supported recognition.

37. The Union directed the Panel to the headnote of the judgment of the European Court of Human Rights in *Demir and another* v *Turkey* [2009] IRLR 766 which states that "the right to bargain collectively with the employer has, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of one's interests". The Union submitted that "likely to" in paragraph 36(1)(b) of the Schedule should be interpreted bearing in mind this ruling and in order to give effect to the right to collective bargaining. The Union submitted that the Panel should follow the

decision of the House of Lords in *SCA Packaging Ltd* v *Boyle and Equality and Human Rights Commission* [2009] IRLR 746 that "likely to" means "could well happen" rather than "probable" or "more likely than not". The Union submitted that *Boyle* was directly relevant because the finding of disability in that case was a threshold test; so too was the test in paragraph 36(1)(b). The Union submitted that paragraph 36(1)(b) did not require it to show that a majority would be likely to favour recognition in a ballot; such a test would require a higher standard at the eligibility stage than would be required in a ballot itself (a majority of those voting but only 40% of the bargaining unit). The Union submitted that the appropriate question for the Panel was whether it "could well happen" that the Union, once it got access to the workforce, might convince at least 50% of the bargaining unit to adopt a "benign stance", whether or not they would actually vote for recognition.

38. The Union submitted that the membership level within the bargaining unit would normally be sufficient for the application to be accepted without question. The Union submitted that the Panel should ask itself whether it was more likely that the 13 members who had signed both the Union's petition and the Employer's petition had done so because the Employer had put all sides of the argument for and against recognition to those members and allowed them to make an entirely free choice or that the Employer had put a one-sided view at the same time as intimidating both members and non-members into signing its petition. The Union submitted that the latter was the case and that the evidence put forward by the Employer to suggest that Union members did not favour recognition was totally unreliable. The Union also submitted that it was likely that non-members had also signed the petition because they were fearful for their jobs rather than because they had any firm views on the Union's application and that there was no reliable evidence that non-union members were unlikely to favour recognition.

39. The Union acknowledged that members may not have said that they signed the individual statements because they felt intimidated but said that it could still have been the case that they did so feel; as workers on zero-hours contracts they were particularly vulnerable and a threat did not have to be carried out for people to feel intimidated. The Union submitted that the Panel did not have to decide whether individuals had been

intimidated; it was sufficient that this could well have happened because of the inequality of bargaining power between the parties. The Union submitted that it was unbelievable that employees would join the Union for collateral benefits such as insurance policies rather than to address the balance of power with their Employer. The Union submitted that a majority of the workers in the proposed bargaining unit would be likely to favour recognition and that acceptance of the Union's application would enable a fair and democratic process to be initiated to give those in the bargaining unit a real choice, free of any intimidatory or other unlawful tactics by the Employer.

Summary of the Employer's submissions

40. The Employer submitted that, based on the available evidence, the majority of the workers constituting the proposed bargaining unit would not be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the proposed bargaining unit. The Employer submitted that the petition of members conducted in the period 17-26 September 2014 had shown that 33 of the 55 individuals who were part of the proposed bargaining unit had indicated that they did not want the Union to be recognised and a further two employees who were on holiday at the time had also completed forms confirming that they opposed recognition on their return. The Employer submitted that this evidence suggested that 63.6% of the proposed bargaining unit did not favour recognition. The Employer said that it had been open to the Union to conduct a petition in September 2014 but the Union had chosen instead to rely on an out-of-date petition that had been conducted for the purposes of its first application to the CAC.

41. The Employer said that it had sent a letter to all employees to advise them of the Union's campaign for recognition on 27 June 2014 following the first application by the Union to the CAC (withdrawn on 27 June 2014). In this letter the Employer had invited any member of staff who wanted more information about the Union's campaign to contact it. The Employer said that as a result of this letter approximately seven or eight staff had contacted it to say that they did not want the Union to be recognised and had asked what they needed to do to oppose recognition. The Employer said that it had

encouraged staff to have an open dialogue with each other to discuss the merits of dealing with the Employer directly or through the Union. The Employer stated that in the period 17-26 September 2014, following the Union's second application, a petition had been carried out by members of its staff to reject recognition. The Employer submitted that this petition was far more recent than the Union's petition, conducted in May 2014. The Employer emphasised that in May the Employer had not yet explained to its employees its own misgivings about recognition of the Union, which it did in its letter of 27 June 2014, although this letter also referred to the right of each employee to be a union member and stated that recognition was a matter of employees' choice even though the Employer did not favour it. The Employer accepted that this letter set out only its own position on recognition but said that the Union also had every opportunity to make its case. At the hearing the Employer's Director of Operations, Mr Rigby, said that he did not consider it inappropriate to ask an individual if he or she was a union member but that when had he received the Union's letter of 1 August 2014 (see paragraph 32 above) he had said to the other managers that if they had been asking employees about their union membership they should stop. The Employer stated that it preferred to deal directly with each of its employees rather than through a trade union and reiterated the benefits of its current arrangements summarised in paragraph 16 above. Mr Rigby submitted that union recognition would make direct communication with the workforce more difficult and that the Union, as a third party, would not have the same interest in the success of the business as the Employer itself. He said that he appreciated that unions could be useful in larger organisations but that they had no role in one which was small and tight-knit although he agreed that there was a right to collective bargaining if the majority wanted it and that he would respect that if they did.

42. The Employer stated that it wished to ensure that staff felt comfortable coming to their own view on whether to reject recognition and that, for this reason, the management team did not direct or manage the petition. The Employer stated that it understood that the petition was led by one Shift Manager and four Security Officers. The Employer refuted the allegations that any individual worker had been intimidated into signing the petition. The Employer exhibited a statement by the Shift Manager concerned, Mr Sahi,

in which he denied that he had threatened anyone that their hours would be reduced if they did not sign the petition or had made any other threat and stated that, when discussing recognition, he had respected the decision of those who continued to support it. In this statement Ms Sahi also explained that he had no involvement in the allocation of work, which was the responsibility of the Assistant Contract Manager or, in his absence, the Contract Manager. The Employer stated that its management team, who alone could hire and dismiss workers, consisted of the Director of Operations/Contract Manager, the Assistant Contract Manager and the Site Manager.

43. The Employer stated that all its workers were engaged on zero-hours contracts to give it and its workers flexibility and that it allocated work in a fair way between workers. The Employer explained that the Security Officers worked as part of a core team and were allocated work based on fixed rosters with a fixed shift pattern whereas the Support Officers carried out work where there was a resource shortage and did not have a fixed pattern of work although in practice their income since the Employer was formed in 2006 had usually matched and on occasions exceeded the annual income of Security Officers. The Employer stated that the work rosters were placed on notice boards each Wednesday for the following week; any worker was able, therefore, to review the shift allocation of all workers and any unusual reduction in, or cessation of, the hours of a particular worker would be clear to all. The Employer stated that it had not received any grievances from workers about shift allocations or otherwise and had not threatened any workers that their shifts would be reduced if they supported the Union's campaign for recognition. The Employer stated that 33 of the workers in the proposed bargaining unit were of Nepalese origin and that all were fluent English speakers. It reiterated its refutation of the Union's allegation that its Nepalese workers had difficulties in understanding English and their legal rights made in its letter of 21 October 2014 (see paragraph 26 above). In answer to a question from the Panel the Employer confirmed that its Nepalese workers all had leave to remain in the UK.

44. The Employer submitted that the Panel should place no weight upon the Union's allegations of intimidation, which were based merely on assertion and hearsay. However the Employer stated that in order to rebut this allegation as far as it was possible to do so

the Employer had obtained, again without intimidation, short statements from the 35 employees who had signed the September 2014 petition to indicate that they remained opposed to recognition and that they had reached this decision of their own free will. These individual signed statements were attached to the Employer's submissions and were dated between 4 November 2014 and 12 November 2014. The precise wording of these statements varied but they all confirmed that the individual in question did not want the Union to be recognised and had reached this decision of their own free will. The Employer said that having received the Case Manager's letter of 10 November 2014 (see paragraph 29 above) it had decided to include these statements in its evidence for the hearing. The process by which these statements were obtained is summarised below.

45. Mr Rigby said that it had been the Employer's policy not to approach staff members about union recognition and that he had no reason to believe that the Assistant Contract Manager or Site Manager had done so. However, Mr Rigby said that, after having receiving the Union's letter of 17 October 2014, he wanted to ask employees individually whether they had been harassed and whether they were still opposed to recognition. In answer to questions from the Panel, Mr Rigby explained that he had asked employees when they were at work to come to see him individually. He had said to them that allegations had been made about intimidation and had asked them whether they had experienced intimidation; whether they were aware of anyone else experiencing intimidation; and whether they wanted to change their position on union recognition. He said that none of them said that they had experienced any intimidation or were aware of anyone else having done so and that they all said that they were opposed to union recognition. Mr Rigby said that having asked these questions and received these answers he then asked employees if they would put this in writing and said that he would prefer this to be hand-written so it was clear that it had been written by the individual in question. Mr Rigby said that he had no pre-prepared text but informed employees verbally that he would like the statement to confirm that the individual was employed by the Employer; the individual's position on union recognition; and whether they had been intimidated/that they were acting on their own free will. The majority of these statements had been written at the desk in his office and submitted to him although three employees

had been seen by the Assistant Contract Manager. Mr Rigby said that he had not asked employees whether they were union members during this process. Mr Rigby said that the signatures to the early statements had been witnessed by another employee who came into the room once the statement had been drafted but that signatories had wanted particular witnesses whom they trusted which was difficult to arrange because of shift patterns so the subsequent statements were not signed by a witness. Mr Rigby said that normally he addressed employee briefings once a month but that employees could see him when they wanted.

46. The Employer submitted that the Union's argument that "likely to" in paragraph 36(1)(b) should be interpreted as "could well happen" was wrong. The Employer said that it was made clear in *SCA Packaging Ltd* v *Boyle and Equality and Human Rights Commission* [2009] IRLR 746 that the meaning of "likely" depended on its context, which in that case was the Disability Discrimination Act 1995. The Employer submitted that there was no hint in that case that the interpretation given there should be read across to other statutes and that the correct interpretation of "likely to" in the context of paragraph 36(1)(b) was whether it was 'more likely than not'.

47. The Employer submitted that the Union's allegations of intimidation in relation to the Employer's petition were lacking in precision (they did not, for example, specify the nature of the intimidation, when it had occurred, and whether those alleged to have been intimidated had actually signed the petition) and that Ms. Simpson had acknowledged that the individual written statements should be taken at face value. The Employer said that Ms Luxford had initially said only that the Union representative had told her that individual statements had been signed although she had subsequently said that he had told her that employees had 'had' to sign. The Employer said that it would have been odd if individuals had been forced to sign but had not communicated this to the Union and that by that stage, those employees would have known that the 17 union members who had not signed the Employer's petition had suffered no adverse consequences as a result. The Employer said that it was understandable that employees would have fresh discussions about recognition between May and September and entirely plausible that union members, having heard the views of their colleagues and the Employer's case,

would change their minds over that period; indeed one signatory to an individual statement expressly stated that he had previously been in favour of recognition but had now changed his mind. The Employer submitted that the Panel would require a proper evidential basis to ignore the Employer's petition and the 35 individual written statements and that such evidence did not exist in this case.

Considerations

48. In determining whether to accept the application the Panel must decide whether the admissibility and validity provisions referred to in paragraph 4 above are satisfied. The Panel has considered carefully the submissions of both parties and all the evidence in reaching its decision.

49. The Panel is satisfied that the Union made a valid request to the Employer within the terms of paragraphs 5 to 9 of the Schedule and that its application was made in accordance with paragraph 11. Furthermore, 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.

Paragraph 36(1)(a)

50. 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.

51. The membership check conducted by the Case Manager (described in paragraphs 18-21 above) showed that 30 of the 55 workers in the proposed bargaining unit (54.5%) were members of the Union. As stated in paragraph 18 above, the Panel is satisfied that this check was conducted properly and impartially and in accordance with the arrangements agreed with the parties. At the hearing the Union reported that its membership level now stood at 28, representing 50.9% of the workers in the proposed

bargaining unit. The Employer did not dispute this figure. 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)

52. 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. For the reasons given in the previous paragraph the level of union membership is 50.9%. The Panel considers that, in the absence of evidence to the contrary, union membership provides a legitimate indicator of the views of the workers in the proposed bargaining unit as to whether they would be likely to favour recognition of the Union. In this case the Employer submitted two items which it contended constituted evidence to the contrary. The first was the petition referred to in paragraph 21 above, which was included in the Case Manager's support check. This check showed that 33 of the 55 workers in the proposed bargaining unit (60%) had signed a petition stating that they would not like the Union to represent them in collective bargaining. The Case Manager's report stated that 15 of these workers were members of the Union: of these 15, 13 (23.6% of the workers in the proposed bargaining unit) had signed both this petition and the Union's petition referred to in paragraph 20 above; two (3.6%) had signed only this petition. The second item submitted by the employer consisted of the 35 signed statements from individual workers referred to in paragraphs 44 and 45 above. The precise wording of these statements varied but they all confirmed that the individual in question did not want the Union to be recognised and had reached this decision of their own free will. The Union stated at the hearing that 10 of these statements were from Union members.

53. In correspondence with the CAC and the Employer prior to the hearing the Union submitted that the Union members who had signed the Employer's petition had done so because they were intimidated. At the hearing the Union stated that the information that

members had been intimidated came both from the Union representative and directly in telephone calls from 'a handful' of members although the Union was unable to say precisely how many members; how many of these individuals had actually signed the petition; and who had applied the pressure to sign. The Union said that it did not know of any members having suffered any actual disadvantage, such as having their hours cut, and that had this happened, the Union would have known, although it also submitted that individuals could be intimidated even if a threat was not carried out. In relation to the statements provided by individual workers the Union's Regional Officer acknowledged that there was no reason not to take these at face value. The evidence from the Union's Membership Services Administrator, summarised at paragraph 35 above, was less clear. She initially said that the Union representative had told her merely that there had been hand-written statements but later indicated that he had told her that members had 'had' to write a statement. However she was unable to give any further details although she confirmed that no individual members had contacted her directly to say that they had been forced to write a statement.

54. The Panel appreciates that workers who are employed on zero-hours contracts who are invited to a meeting with the Director of Operations of the kind described in paragraph 45 above could potentially feel under pressure to sign statements confirming their opposition to union recognition. However, the Director of Operations gave a detailed account at the hearing of the process which was followed and the Panel received no compelling evidence from either party to support the contention that these statements should not, in this case, be taken at face value. The Panel notes the Union's allegation that a number of its members had been forced into signing the Employer's petition. However the Union's evidence in relation to this allegation was lacking in precision as to the source, nature and extent of this pressure. The Union's evidence in this case was insufficient to persuade the Panel that the totality of the Employer's evidence should be discounted.

55. The Panel notes that a majority of the workers in the proposed bargaining unit are members of the Union (28 out of 55) and that the level of membership has remained

relatively stable. However the Employer has submitted evidence, which the Panel considers credible, that 35 workers in the proposed bargaining unit (60%) are opposed to Union recognition. The Union itself confirmed that 10 of its members had signed individual statements opposing recognition in November 2014. In the light of this evidence the Panel does not consider it appropriate to conclude that the level of Union membership alone is a legitimate indicator of the views of Union members as to whether they would be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit.

56. In addition to the level of Union membership the Union also relied upon the petition with signatures dating from 14-23 May 2014, described in paragraph 20 above, which indicated that 47.3% of the workers in the bargaining unit favoured recognition. However the Panel also has before it two items of evidence from the Employer, the petition with signatures dating from 17- 26 September 2014 and the individual statements dated 4 -12 November 2014, which indicate that 60% of the workers in the proposed bargaining unit do not favour recognition. The Panel has concluded that the evidence before it is not sufficient to support a decision 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 as required by paragraph 36(1)(b).

57. In reaching its decision the Panel has noted the submission by the Union that it should interpret "likely" in paragraph 36(1)(b) as meaning "could well happen" following *SCA Packaging Ltd* v *Boyle and Equality and Human Rights Commission* and to give effect to the right to collective bargaining guaranteed by Article 11 of the European Convention of Human Rights (see paragraph 37 above). The Panel finds that, even applying this interpretation of "likely to", it is not persuaded that the evidence before it is sufficient to satisfy the requirements of paragraph 36(1)(b). The Panel has not found it necessary or appropriate, therefore, to decide whether the Union's submissions relating to the interpretation of paragraph 36(1)(b) or those of the Employer are to be preferred. Finally the Panel notes the Union's submission that the Employer had failed to present

the workforce with a balanced picture of the advantages and disadvantages of union recognition but had set out only the case against it. However the Panel also notes that there is no obligation on an Employer (or, indeed a Union) to do anything more than put forward its own position.

58. On the basis of the evidence before it, the Panel has decided that, on the balance of probabilities, a majority of the workers in the proposed bargaining unit would not 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.

Decision

59. For the reasons given in paragraphs 52-58 above, the Panel's decision is that the application is not accepted by the CAC.

Panel

Professor Gillian Morris - CAC Deputy Chairman

Mr Mike Cann

Ms Bronwyn McKenna

04 December 2014

Appendix

Names of those who attended the hearing on 21 November 2014

For the Union

Andrew James	-	Thompsons Solicitors, Solicitor for Unite the Union
Carolyn Simpson	-	Regional Officer for Unite the Union
Natasha Luxford	-	Membership Services Administrator for Unite the Union

For the Employer

Mr Saul Margo	-	Outer Temple Chambers, Counsel for Seal Security Ltd
Ms Shona Watson	-	Solicitor (trainee), Taylor Wessing LLP
Mr David Eisenhauer	-	Company President, Seal Security Ltd
Mr Stephen Rigby	-	Director of Operations, Seal Security Ltd