Case Number: TUR1/823/ 2012

29 January 2013

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DECISION ON WHETHER PARAGRAPH 35 APPLIES TO THE APPLICATION

The parties:

The Pharmacists' Defence Association Union (PDAU)

and

Boots Management Services Limited

Introduction

1. The PDA Union (the Union) submitted an application (dated 2 October 2012) to the CAC which was received on 5 October 2012, that it should be recognised for collective bargaining by Boots Management Services Limited (the Employer) in respect of a bargaining unit that was: "To include all pharmacists registered with the General Pharmaceutical Council (excluding those of Area Management status or equivalent and more senior to them) and pre-registration Graduates, who work for Alliance Boots in the UK and are employed by Boots Management Services Ltd." The 5,500 or so workers in the proposed bargaining unit were stated by the Union to be located in the Employer's retail Stores across England, Scotland, Wales and Northern Ireland and a small number in the Employer's Head Quarters in Nottingham. The CAC gave both parties notice of receipt of the application on 8 October 2012. The Employer submitted a response to the CAC on 15 October 2012 and this was duly 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 Ms Mary Stacey as Chairman, and, as Members, Mr Roger Roberts and Mr Paul Talbot. The case manager appointed to support the Panel was Miss Sharmin Khan.

3. The Panel extended the period for it to decide if the Union's application was admissible on a number of occasions to allow time for: the parties to submit further evidence; for the CAC to hold a hearing with the parties; for the Panel to consider the parties' evidence, submissions and authorities delivered at the hearing and for the Panel to consider its decision on the paragraph 35 point raised. Time has currently been extended to 8 February 2013.

Issues which the Panel has to determine

4. The Panel is required 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; and is admissible within the terms of paragraphs 33 to 42 of Schedule A1 to the Act (the Schedule); and therefore is to be accepted.

Summary of the Union's application to the CAC

5. The Union stated that it had formally requested recognition by the Employer by letter dated 19 January 2012. Whilst the Employer did not accept the request, nor propose that ACAS be requested to assist, it had expressed itself to be willing to meet with the Union "to fully understand its request and to see whether any agreement can be reached". The Employer had also referred to "an established relationship with a listed trade union, the Boots Pharmacists Association (BPA) and work with them on matters that are specifically related to pharmacists." After an initial meeting the Union received an e-mail from the Employer's Director of Pharmacy dated 22 March 2012 in which he stated that the Employer had already a formal, productive and effective way of working with the BPA and that the Employer did not accept the proposal for formal recognition of the

PDA Union. The Union enclosed copies of all the relevant correspondences with its application.

6. The Union stated in its application that the Employer employed 55,000 workers in the UK, that 2,100 of the proposed bargaining unit of approximately 5,500 were Union members. If the CAC wished to check, the Union was content to disclose the names and addresses of its members to the CAC on the understanding that its members' details were kept confidential.

7. The Union provided several reasons to demonstrate that the majority of workers in the proposed bargaining unit were likely to support recognition for collective bargaining: it already had 35 – 40% membership within its proposed bargaining unit the vast majority of whom would support its application; the Union had recently conducted a straw poll over a period of ten days and had received 700 affirmations which included many comments supporting its stance for recognition; it was recently successful in winning claims in the Employment Tribunal for 19 of its members who had been subjected to unlawful deductions of wages by the Employer with a further 150 cases pending brought on grounds of unlawful deduction of pay and unlawful age discrimination. The Union also stated that in the fortnight following its announcement of its application, its membership had increased by 25% and was continuing to grow.

8. When asked in the CAC's application form if there was any existing recognition agreement which covered any workers in the bargaining unit, of which the Union was aware, the Union replied that it was aware that the BPA had a voluntary consultation arrangement with the Employer but that it did not believe that the agreement between the BPA and the Employer constituted an existing collective agreement as defined in the Act. The Union understood that it had more than twice as many members as the BPA.

9. The Union had originally lodged an application for recognition in February 2012, (case number TUR1/778/2012) but following representations from the Employer, the Union had then agreed a stay and withdrawal of the application whilst meetings with the

Employer took place. The claim was resubmitted on 3 October 2012 in materially identical form and allocated its current case number (TUR1/823/2012).

10. Finally, the Union confirmed that it had copied its application to the CAC and supporting documents to the Employer on 2 October 2012.

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

11. The Employer's response to the Union's claim was submitted on 16 October 2012. The Employer confirmed that it had received the Union's written request for recognition under Schedule A1 from the Union on 20 January 2012 and that it did not accept the Union's formal request. The Employer enclosed a copy of its response to the Union dated 3 February 2012 (as referred to in paragraph 5 above) which was as described by the Union. The Employer also confirmed that it had received a copy of the Union's application to the CAC from the Union at its Head Office on 5 October 2012 and by its Director of Human Resources Stores, Mr David Vallance on 8 October 2012. The Employer also enclosed a copy of the relevant correspondences for the Panel.

12. The Employer confirmed that it employed 55,342 workers as at 10 October 2012, but considered the Union had under-estimated the size of the proposed bargaining unit which comprised 6,800 workers.

13. The Employer did not have access to information relating to the Union's membership within the proposed bargaining unit. However it did not agree that the majority would be likely to support the Union's request for recognition. The Union had less than 31% membership in its proposed bargaining unit on the Employer's figures. The Employer considered that the Union's straw poll (about which there was little information) did not indicate that a majority was likely to support recognition, as it represented only 10.29% of the proposed bargaining unit. The Employer also asserted that many of the Union's members, especially pre-registration graduates, pharmacists and newly qualified pharmacists, joined the Union for reasons other than recognition such as professional indemnity insurance. Based on its "internal insights", the Employer

believed that its overall engagement with its pharmacists was high and that the working and representation arrangements that were in place worked well.

14. The Employer also stated that in any event there was an existing agreement for recognition in force covering workers in the proposed bargaining unit. It had a written recognition agreement which was entered into on 1 March 2012 with the BPA and had worked with the BPA on matters specific to the pharmacists for many years. It stated that the BPA was a listed union, but did not have a certificate of independence, and was recognised by the agreement and entitled to conduct collective bargaining. The Employer enclosed a signed copy of the partnership agreement dated 1 March 2012 for the Panel with its response to the application.

The hearing

15. In light of the Employer's response that there was an existing agreement for recognition in force covering workers in the proposed bargaining unit, both parties were invited by the Panel to submit to the CAC their comments in respect of paragraph 35 of the Schedule, by letter dated 18 October 2012. Both parties made further written submissions and to assist with its decision on the admissibility of the Union's application under paragraph 35 of the Schedule, and at the parties' request, a hearing was convened. Both parties submitted and exchanged written submissions and evidence in advance of the hearing. The Union's bundle of documents is referred to as U1 and the Employer's as E1. A full list of authorities relied on by the parties can be found at appendix 2 of this decision. The Union called Mr John Anthony Murphy, General Secretary of the Union to give evidence and the Employer called Mr David Vallance, Director of Human Resources for Stores. The names of those who attended the hearing held on 11 December 2012 on behalf of the parties are listed at appendix 1 of this decision. The hearing was confined to the application of paragraph 35 of the Schedule in the light of the dispute as to both fact and law concerning the agreement between the Employer and the BPA dated 1 March 2012 ("the Agreement").

The issues

16. Paragraph 35 precludes the admission of an application to the CAC if there is (i) a *union* which has reached (ii) a *collective agreement* between it and the relevant employer. The Union challenged the existence of either in the light of the facts and the proper meaning of each phrase when interpreted and read so as to comply with Article 11 European Convention of Human Rights (EHRC). There were therefore three issues: whether the BPA is a trade union, whether the Agreement is a collective agreement and, thirdly the scope of Article 11 ECHR in the context of collective bargaining and how it affects interpretation of the Schedule. Mr Hendy accepted that if we were to find that the BPA was a union within the meaning of s.1 of the Act and that the Agreement was a collective agreement pursuant to s.178(1) of the Act, then on the face of it, the Union's application would be blocked in a Part I application by paragraph 35 of the Schedule. However he considered it to be our duty to interpret paragraph 35 so as to give effect to Article 11 which would require us to render the Union's application admissible. He had prepared two alternative forms of words to achieve his desired effect.

The facts

17. There was minimal disagreement between the parties as to the relevant facts. To the extent that the facts were in dispute we have made findings on the balance of probabilities from the information before us and based on our experience in industrial relations pursuant to our appointment in accordance with s. 260(3) of the Act. The findings are those of us all.

18. The Employer's relationship with the BPA started in the 1970s when it was known as "the Joint Boots Pharmacists' Association (JBPA) comprising local groups of pharmacists such as the Strathclyde Boots Pharmacists, and Birmingham and District Boots Pharmacists. Over time the JBPA became an individual member's association. It was listed as a trade union in 1979 and duly changed its name to the BPA to reflect its status as an association for individual members only. Pharmacists choosing to join the BPA pay membership fees.

19. The constitution of the BPA (E1, pp 1-6) was most recently revised in 2005. Its objectives are set out in clause 2 of its rules and provide as follows:

> "(a) To regulate the relations between Boots The Chemists as employer and pharmacists as employees of Boots The Chemists, in particular:
>
> (i) To act as an officially recognised medium for representing to the management of Boots The Chemist all matters affecting the pharmacists of Boots The Chemists
>
> (ii) To foster a spirit of mutual dependence and trust between the pharmacists of Boots The Chemists and the management of Boots The Chemists
>
> (b) To provide an independent means of communication within Boots The Chemists, and outside to organisations of a similar nature.
>
> (c) To advance the status of the pharmacy profession with particular regard to employee pharmacists, and to promote the professional interests of its members." (p.2)

20. Membership is open to all registered pharmacists employed within the Boots Group and pharmacists and former pharmacists in receipt of a pension from Boots Pensions Ltd. Pre-registration pharmacy graduates employed by Boots The Chemist have free associate membership of the BPA without voting rights. In general terms, when a member's employment with the Employer ceases, so too does their BPA membership.

21. The BPA has an elected Chief Executive Officer (Peter Walker) who is not employed by Boots and an elected executive committee drawn from their membership of Boots employees some of whom are in senior pharmacist positions. It is stipulated in the rules that "The elected Executive Officers and the CEO of the Boots Pharmacists Association shall represent the members of the Association to Boots The Chemists in accordance with the Consultative Process. (see Appendix 2)" (p4). The Consultative Process at Appendix 2 is introduced as follows: "In pursuance of the Association's

Objective concerning the relations between Boots The Chemist and Boots Pharmacists' Association, as well as the Association's representative and communication roles, a mechanism, known as "The Consultative process", will be employed." (p.6 of E1). It then sets out various procedural matters concerning meetings between the executive management of the Employer and the executive officers of BPA and makes provision for, for example circulation of minutes, timings for distribution of an agenda, number of meetings per annum etc. It provides that Boots Senior Management (including the HR Director for Stores, Chief Executive Officer, Chief Operating Officer and the Pharmacy Director) meet with the BPA five times a year to consult on matters affecting pharmacists. An agenda agreed by both parties is circulated prior to each meeting and minutes are taken and circulated. Contact between Boots and the BPA occurs between meetings and Ad hoc meetings take place between meetings if required.

22. There was evidence of consultation activity between the BPA and the Employer over the years. A "Partnership and Consultative Agreement" was in place between 1997 and 1999 and an "Agreement of Understanding" entered into in 2007 and there were minutes of various consultation meetings over the years. However the Employer was absolutely clear that it had never recognised the BPA for the purposes of collective bargaining in relation to terms and conditions of employment, nor issues concerning pay, hours and holiday. It had not, did not currently do so and had no intention of doing so in the future. Its interaction with the BPA in this regard was strictly limited to consultation. The BPA does not have a certificate of independence pursuant to s.5 of the Act and it was not suggested by Mr Reade that it was an independent trade union. Mr Murphy described it as being in the pocket of management.

23. John Murphy (General Secretary of the Union) was employed as a pharmacist and then held a number of senior pharmacist positions with the Employer for 26 years until 2001. He had been a member of the BPA and between 1978 and 1988 was a member of its executive. He had become extremely frustrated by the way in which the BPA behaved and its determination to maintain cordial relationships with the Employer and its managers. He found it to be ineffectual in protecting the interests of its

membership in its desire to please the Employer. He had observed that the BPA did not wish to act like a trade union and was docile and saw itself as beholden to the Employer. The Employer did not bargain on matters with the BPA but merely granted concessions to the BPA when it suited it. If a request from the BPA was refused or not met in full, then without further discussion, the BPA accepted management diktat.

24. Some limited negotiation had taken place concerning the machinery for consultation with the BPA and facilities for its officials resulting in:

- The provision of the facility of a company lap-top and e-mail address for the BPA's CEO; funding for the BPA's publication through which the BPA communicated with all Boots' pharmacists and pre-registration graduates, BPA members and non-members alike; third party training courses for new executives of the BPA
- An invitation to the BPA to present at the Boots Divisional Pharmacy Conferences and to have BPA membership stands there.
- The facility to have BPA member subscriptions collected via payroll
- Channels through which consultation took place (it was recently agreed that the BPA's CEO would deal directly with the Heads of Regions or Divisional Director) and where meetings were held.

25. The Union is listed with the Certification Officer (CO) and received its Certificate of Independence in November 2010. It evolved from the Pharmacists Defence Association (PDA) a not for profit defence association exclusively for pharmacists, pre-registration graduates and pharmacy undergraduates, providing services and support in pharmacy regulation and developing the professional agenda for pharmacists. The Union was formed to allow for workplace representation which the PDA's constitution did not allow. The Union seeks recognition with pharmacist employers and it has over 20,000 members. In 2011 the Union dealt with over 2,000 employment incidents and enquiries of which approximately 10% -15% involved the Employer. There have been attempts by the Union to make common cause with the BPA and develop an integrated or structured relationship but has not been successful.

26. After the Union requested recognition from the Employer by reference to the statutory procedure, the Employer decided to codify its relationship with the BPA in order to block the Union's application for the CAC for recognition. The chronology of events is illuminating. The Union first sought voluntary recognition in 2011 and its request was rejected by Mr Vallance. The Union gathered strength in numbers and in January 2012 made a formal request for recognition by reference to the statutory procedure (U1, p1). After the Employer initially rejected the request and the Union lodged an application with the CAC, the Employer suggested talks and asked the Union to stay its application which it agreed to do "based on the new approach from Boots" (p.13) in February 2012. The Employer had informed the Union that it "was prepared to meet ... to discuss the PDA's request for recognition and to discuss whether any agreement between the parties can be reached" (p.19).

27. The Employer had no intention of recognising the Union and used the time to prepare an agreement with the BPA which was signed by the Employer and the BPA on 1 March 2012 ("the Agreement"). The Employer met with the Union on 2 March 2012 and made no mention of the Agreement concluded with the BPA the day before. Instead, the Employer told the Union it had found the meeting useful and that it would now consider the Union's application. The Union, acting in good faith, welcomed the Employer's apparent earnestness (p.23) but the Employer then wrote rejecting the Union's request on 23 March 2012 stating that it had recognised the BPA for certain collective bargaining purposes although offered the Union the opportunity of a further meeting "to listen to your ideas, views and concerns" (p.24). This was the first time the Employer had mentioned the Agreement to the Union. The Union therefore proceeded with an application to the CAC. We agreed with Mr Murphy's analysis that the Employer had been disingenuous as the Employer had deliberately misled the Union in order to buy time to conclude arrangements with the BPA recorded in the Agreement.

28. The Agreement (pp.26-7 of U1) is entitled "Boots and the BPA in Partnership". It is common ground that the Agreement provides for consultation without any bargaining or negotiation rights in relation to pay, hours and holidays, nor working conditions, nor

terms and conditions of employment. It is described as "consultative dialogue" and the BPA is described as a "line of communication" with "input" into various matters. The Agreement records, for example, how the input of the BPA on major company initiatives will be considered: "Where practicable, our [Boots'] aim is that any proposals submitted by the BPA will be considered by management prior to any final decisions being made by the business. The BPA will be advised of the reasons for the response to its input."

29. In two respects only the BPA is recognised as having collective bargaining rights:

> "Under this agreement the BPA is recognised as having collective bargaining rights for the purpose of negotiation relating to facilities for its officials and the machinery for consultation in respect of the matters upon which we will consult with the BPA (which are those set out in this agreement). This agreement does not provide for collective bargaining rights on any other matters." (p.26)

In some cases the borderline between consultation and negotiation can be problematic: this was not such a case. The Employer was absolutely clear that beyond the two matters above, the Employer did not negotiate with the BPA.

30. Mr Vallance accepted that the effect of the Agreement was that Boots' employees had no collective bargaining rights over their pay, hours and holidays, or concerning terms and working conditions of employment. Mr Murphy correctly observed that the Agreement purports to prevent any collective bargaining of pharmacists' terms and conditions of employment by specifically precluding collective bargaining on such matters.

31. Mr Murphy was disparaging about the BPA's work and did not consider it to be a proper trade union. He gave a number of instances in which he considered the BPA had failed its membership by not seeking to negotiate or bargain collectively. For example when in 2011 the Employer had decided unilaterally to cut premium payments to long serving pharmacists for working on Sundays and Bank Holidays by 25%. Another

example was when significant changes to pension entitlements were engineered through a transfer of undertakings and the BPA did not take any action on behalf of its members to oppose the Employer's actions or lessen the impact. The Union, by contrast had challenged the Employer successfully through Employment Tribunal proceedings. In its website, the BPA does not mention its collective bargaining rights for facility time and consultation machinery, choosing rather to describe its role in collective consultation.

32. The BPA was not a party to the proceedings, but the Employer did not challenge any of Mr Murphy's evidence and chose not to cross-examine him. We broadly accepted Mr Murphy's description of the BPA's rather meek relationship with the Employer and acknowledge that the BPA may have chosen to accept management diktat and taken a strategic decision not to oppose management and to co-operate as harmoniously as possible. However we find that it is the choice and decision of the BPA to do so. Under the Agreement the BPA has the power and ability, should it chose to use it[1], to bargain collectively on facilities for its officials and the machinery for consultation with the Employer. The Consultative Process set out in Appendix 2 of the BPA's constitution does not prevent the BPA from bargaining collectively on the matters permitted under the Agreement since the process informs both the BPA's representative and communication roles and sets out a procedure which does not preclude negotiations from taking place during the meetings prescribed under the procedure. The nomenclature of Appendix 2 as a Consultative Process is not determinative of the BPA's powers within that process.

The Legislative framework

33. The statutory provisions for the recognition of trade unions by employers are contained in the Act and Schedule A1 to that Act (the Schedule) especially Part I. In summary, the consequence of a successful application by a trade union is a declaration that the union is recognised as entitled to conduct collective bargaining on behalf of a specified bargaining unit. In the absence of agreement the CAC may also specify a method to the parties by which they are to conduct collective bargaining, which has effect as if it were contained in a legally enforceable contract made by the parties. When

[1] Subject to any arguments as to whether their choice is in some way fettered by lack of independence.

statutory recognition is declared, the collective bargaining rights encompass negotiations relating to pay, hours and holidays (subject to the parties ability to agree wider matters as the subject of collective bargaining) and the definition of collective bargaining in the Act in s.178(1) does not apply (para 3(2) and (3) of the Schedule).

34. A trade union seeking statutory recognition must first make a formal request of the employer, identifying the bargaining unit it wishes the employer to recognise. If the employer does not agree, the union may make an application to the CAC and the application will be assessed in a number of stages, with the opportunity for negotiation and agreement between the parties at each stage. It is helpful to set out the summary of Elias J (as he then was) in *R v Kwik-Fit (GB) Ltd) v CAC* appended to the judgment of the Court of Appeal in that case at [2002] ICR 1212, at 1221-2:

> 6. The purpose of the legislation is to enable a trade union which is refused recognition by an employer to use the legal process to require the employer to enter into collective bargaining. Recognition means that the union should be "entitled to conduct collective bargaining on behalf of a group or workers" (paragraph 1). Collective bargaining, in turn, is defined as "negotiations relating to pay, hours and holidays", unless the parties agree to a broader range of matters (paragraph 3).
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> 7. The process commences with the trade union making a request for recognition from the employer. Certain conditions must be met if the request is to be treated as valid within the terms of the legislation. For example, it must be in writing, be made by an independent trade union and identify the proposed bargaining unit. In addition, the employer (together with any associated employer) must employ at least 21 workers (paragraphs 4 to 9).
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> 8. The employer is given 10 working days to agree the request. If the request is accepted that is the end of the matter. If it is rejected or there is no response, then the union applies for recognition. This is made pursuant to paragraph 11 (2), an important provision in this case which I set out below. (There is a variation of the procedure where the employer agrees to negotiate about the proposed recognition but those negotiations fail to bear fruit).
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> 9. The second stage is the acceptance or otherwise of the application. The CAC must decide two questions in order to determine whether the application can be accepted. First, it must be satisfied that the original request was valid in the way I have described above. Second, it must decide whether it is admissible within the meaning of paragraphs 33 to 42 (paragraph 15). The most important criterion of admissibility is that members of the union must constitute at least 10 per cent of the workers in the proposed bargaining unit, and that the CAC must be satisfied that a majority of the workers would be likely to favour recognition (paragraph 36).
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> 10. The third stage is the determination of the bargaining unit. (That, of course, is the principal issue in this case.) In accordance with the general philosophy that voluntarism is preferable to legal regulation, the CAC must try to help the parties reach agreement as to

the relevant bargaining unit. But if that is unsuccessful, then the CAC itself must determine the bargaining unit (paragraph 19 (2)). Paragraphs 19 (3) and (4) set out criteria which must be taken into account in the course of that process. I consider them in more detail below.

11. Once the CAC has determined the bargaining unit, the fourth stage depends on the outcome of that decision. If the bargaining unit determined is the same as that proposed by the union, then a ballot may have to be held. In general, a ballot will not be required if the union has a majority of the workers in the bargaining unit as members (although even then a ballot may be required if, broadly, there are doubts as to whether the majority does want the union to be recognised, or if good industrial relations makes this desirable) (paragraph 22). Otherwise a ballot will be necessary. Where no ballot is required, the CAC simply declares that the union is recognised and entitled to conduct collective bargaining.

12. The position is more complex if the stipulated bargaining unit is not that proposed by the union. The CAC must then decide whether the application is invalid within the meaning of paragraphs 43 to 50 (paragraph 20). The most significant feature here is that the CAC must be satisfied in respect of the stipulated bargaining unit that the 10 per cent criterion and that relating to the likelihood of majority support are met. If not, the application will at that stage be treated as invalid. If it is valid, then the issue as to whether a ballot is required is determined in the same manner as I have outlined above.

13. Where a ballot is required it will be carried out by a qualified independent person appointed by the CAC. The employer must co-operate in the process and permit the union to have access to the workers. The CAC must make a declaration of recognition if the result is favourable; this requires both that those who vote in favour constitute a majority of those voting; and that they constitute at least 40 per cent of the workers constituting the bargaining unit (paragraph 29 (2)).

14. If the vote is against then the CAC must declare that the union is not entitled to recognition. Essentially it cannot re-apply for recognition in respect of that group of workers (or a substantially similar group) for three years (paragraph 40).

15. The consequences of the declaration in favour of recognition are that the employer is obliged to recognise the union in respect of the relevant bargaining unit. In the absence of agreement between the parties, the CAC will be required to stipulate the method by which collective bargaining can be carried out (paragraphs 30 and 31). The ultimate, and only, sanction for failure to comply is specific performance (paragraph 31 (6)).

35. This case concerns the very first stage in the process: the admissibility of a union's application for statutory recognition. The point in issue is where an employer has a relationship with another body, and the circumstances when such a relationship can preclude a union from seeking recognition from an employer through the statutory procedure. Paragraph 35 of the Schedule states, insofar as is relevant for the purposes of the application before us:

"35. - (1) An application under paragraph 11 or 12 is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is (or unions are) recognised as entitled to conduct collective bargaining on behalf of any workers falling within the relevant bargaining unit."

However, for the purposes of considering whether there is already in force a collective agreement pursuant to paragraph 35, the meaning given to collective bargaining is the definition contained in s.178 of the Act and not that contained in paragraph 3(2) & (3) of the Schedule.

36. The Schedule not only contains the recognition provisions set out in Part I discussed above, other Parts address issues such as changes affecting the bargaining unit (Part III), derecognition following a declaration of statutory recognition (Parts IV & V) and derecognition of a non-independent trade union with a voluntary recognition agreement by workers within the bargaining unit (Part VI), which is discussed further below.

37. A trade union is defined by s.1 of the Act as follows:

"1. **Meaning of "trade union".**

In this Act a "trade union" means an organisation (whether temporary or permanent)—

(a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or

(b) which consists wholly or mainly of—

(i) constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or

(ii) representatives of such constituent or affiliated organisations,

and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations."

A collective agreement is defined by s.178 as follows:

"178.— Collective agreements and collective bargaining.

(1) In this Act "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and "collective bargaining" means negotiations relating to or connected with one or more of those matters.

(2) The matters referred to above are—

(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;

(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;

(c) allocation of work or the duties of employment between workers or groups of workers;

(d) matters of discipline;

(e) a worker's membership or non-membership of a trade union;

(f) facilities for officials of trade unions; and

(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers'

associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

(3) In this Act "recognition", in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and "recognised" and other related expressions shall be construed accordingly."

38. Paragraph 3 of Part I of Schedule A1 states:

"3 (1) This paragraph applies for the purposes of this Part of this Schedule.

(2) The meaning of collective bargaining given by section 178(1) shall not apply.

(3) References to collective bargaining are to negotiations relating to pay, hours and holidays; but this has effect subject to sub-paragraph (4).

(4) If the parties agree matters as the subject of collective bargaining, references to collective bargaining are to negotiations relating to the agreed matters; and this is the case whether the agreement is made before or after the time when the CAC issues a declaration, or the parties agree, that the union is (or unions are) entitled to conduct collective bargaining on behalf of a bargaining unit.

(5) Sub-paragraph (4) does not apply in construing paragraph 31(3).

(6) Sub-paragraphs (2) to (5) do not apply in construing paragraph 35 or 44."

39. It was common ground that the obligations imposed in ss.2 and 3 Human Rights Act 1998 ("HRA") should apply to the CAC in its quasi-judicial function:

"2. - **Interpretation of Convention rights**

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) …

(c) …

(d) …

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) …

(3) …

3. – **Interpretation of legislation**

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

40. It was common ground that a Panel of the CAC does not have the power to make a declaration of incompatibility. The relevant convention right in this case is contained in Article 11 of the European Convention on Human Rights and Fundamental Freedoms (which is set out in Schedule1, Part 1 of the HRA) which provides as follows:

"Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Summary of the Union's submissions

41. Both parties' detailed and thoughtful written submissions were extremely helpful and inevitably our summary does neither justice. Our reliance on their work will however be apparent to both.

42. Mr Hendy reminded the Panel that following the case of *Demir and Baykara v Turkey* [2009] IRLR 766 of the Grand Chamber of the ECtHR the right of workers and employers and their respective organisations to bargain collectively is now firmly recognised as an essential element of Art. 11 and earlier cases such as *Swedish Engine Drivers Union v Sweden* [1976] 1 EHRR 617 ECtHR are no longer good law:

> "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' set forth in Art. 11 of the Convention, it being understood that states remain free to organise their system so as, if appropriate, to grant special status to representative trade unions." (*Demir*, para 154)

The principle of 'most representative union' is not a feature of the Schedule in UK law. It followed, Mr Hendy submitted, that a right merely to bargain collectively over facilities for trade union officials or consultation machinery neither fulfilled the scope of Art.11 nor could be sufficient to preclude the exercise of the right to bargain collectively over the wider legitimate interests of the workers concerned, such as terms and conditions of employment, pay hours and holidays.

43. A proper understanding of what is entailed in the right to bargain collectively is found in art 6(2) European Social Charter of 1961, ratified by the UK which provides that:

> "With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake...to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

In the UK (apart from Northern Ireland) the Schedule is the machinery referred to in art 6(2). Art 6(2) is informed by the supervisory body of the European Social Charter, the European Committee on Social Rights (ECSR) which has noted the obligation on contracting parties actively to promote collective agreements and, where spontaneous development of collective bargaining is not sufficient, to take positive measures to facilitate and encourage the conclusion of collective agreements.

44. Assistance is also gained from Convention 98, one of the 4 fundamental principles of the ILO (the others being Conventions 29 & 105 concerning the Elimination of all forms of Forced or Compulsory Labour, Conventions 138 & 182 concerning the Effective Abolition of Child Labour, and Conventions 100 & 111 concerning the Elimination of Discrimination in respect of Employment and Occupation). Article 4 of Convention 98, cited with approval in *Demir* provides:

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation

> of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

The right therefore to bargain collectively is to collective bargaining over terms and conditions of employment and there is no basis to restrict access by reference to an agreement with a non-independent union which specifically precludes negotiation over terms and conditions of employment. Mr Hendy therefore submitted that the Panel must construe the Schedule to give compliance to the Union's rights pursuant to Article 11 which would require us to interpolate the words "in respect of terms and conditions of employment" into paragraph 35 so that it would read:

"35. - (1) An application under paragraph 11 or 12 is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is (or unions are) recognised as entitled to conduct collective bargaining ***in respect of terms and conditions of employment*** on behalf of any workers falling within the relevant bargaining unit."

Alternatively, the same effect could be achieved by interpolation into s.1 of the Act as follows:

"1(a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations ***by, for the purposes of paragraph 35 of Schedule A1, collective bargaining over at least terms and conditions of employment***;"

45. Without such interpolation there is a lacuna in contravention of Art.11 and it is our duty to interpret the provisions in accordance with the suggested wording. *Ghaidan* [2004] 2 AC 557 should leave us in no doubt as to the onerous nature of our obligation and the width of our powers of construction. In response to Mr Reade's point that the Union could perfectly well seek, via its members who are workers within the proposed bargaining unit, to knock out the collective agreement using Part VI, (derecognition of a

non-independent union) and then issue a fresh claim, he submitted that it was not an effective alternative method for the Union. Nor did he consider Part IV to be apt.

46. Mr Hendy also submitted that in any event the BPA was not a trade union within the definition of s.1 of the Act since its principal purposes did not include the regulation of relations between workers and their employer if one considered the meaning of the term in its correct historical context. Restraint of trade was a defining feature of trade unions, requiring the statutory protection that was eventually afforded to them, and the paradigm restraint of trade in the context of trade unions is in fixing conditions of employment collectively. It is implicit therefore that the regulation of relations is achieved by bargaining with the power of a united body for higher wages and shorter hours and so on. The CAC must consider the facts and decide if the organisation in question is a trade union and a listing with the Certification Officer is not determinative (see *BECTU & City Screen* TUR1/309, 10 December 2003). On the facts in this case, in light of the BPA's constitution and its actual activities vis-à-vis the Employer, its objectives, its means of achieving them in Rule 5(f) and the history of its engagement with the Employer demonstrated it was not a trade union. It has never and has never intended to carry out collective bargaining regulating terms and conditions of employment and cannot therefore be a trade union.

47. The third strand to Mr Hendy's submission was that the Agreement is not a collective agreement within the meaning of s.178 of the Act. He accepted that it was not a sham – he conceded that it was in force, but considered it failed to satisfy the definition of s.178 as it required there to be negotiations about specific matters, mere consultation would not suffice. Recognition for collective bargaining required clear evidence as per Sir David Cairns in *National Union of Gold etc Trades v Albury Bros.* [1978] IRLR 504 CA at paragraph 23 "the acts relied on must be clear and unequivocal and usually involve a course of conduct over a period of time." The Master of the Rolls held (at para 15:

> "As I said at the beginning, an act of recognition is such an important matter involving such serious consequences on both sides, both for the employers and

the union, that it should not be held to be established unless the evidence is clear upon it, either by agreement or actual conduct clearly showing recognition."

The burden was on the Employer to prove the existence of collective bargaining, since it was the Employer who was seeking to rely on its Agreement with the BPA to thwart the Union's application for recognition, and they had failed to discharge their burden.

Summary of the Employer's submissions

48. Mr Reade submitted that the BPA was clearly a trade union by its constitution and its activities, consistent with its registration with the Certification Officer which, in relation to its members in Scotland at least, was of itself sufficient evidence that the BPA was a trade union. The Agreement was a collective agreement within the wide definition of s.178 since bargaining was permitted on the matters listed in sub clause s.178(2)(f) & (g) and the document was not a sham. On the face of the statute therefore the Agreement with the BPA barred the Union's application.

49. Mr Reade readily accepted Mr Hendy's propositions concerning the extremely strong interpretive obligation imposed by HRA to ensure UK law complies with ECHR which is binding on organs such as the CAC. It was also common ground that the same approach to construction is to be used for interpreting ECHR obligations and EU obligations (such as interpreting CJEU judgments and EU Directives with direct effect), so assistance is gained from not only *Ghaidan* but also, for example *Litster* ([1990]1 AC 546) and more recently the judgment of Underhill J *Coleman v Attridge Law (no.2)*([2009] UKEAT 71) EAT. However he submitted that there was no need to strain the ordinary and natural meaning of the language since the statutory provisions were not in breach of Article 11. *Demir* did not support the interpretation contended for.

50. Whilst *Demir* firmly establishes the essential Article 11 right to bargain collectively with an employer, it is not an absolute right, since it provides member states with a large margin of appreciation, provided that the right is not restricted in such a way as to render it "devoid of substance" (*Demir* para 141). The rights of the workers in the

proposed bargaining unit are not devoid of substance and the UK government is acting within its margin of appreciation in the statutory recognition scheme set out in the Schedule and the Union's claim is not admissible. Furthermore, the Schedule makes provision in Part VI for a collective agreement by a non-independent trade union to be de-recognised and the Union's members could trigger these provisions and, if successful could thus open the way for a future application.

Considerations and conclusions

Is the BPA a trade union?

51. The Panel is satisfied that the BPA is a trade union within the meaning of s.1 of the Act. We did not accept the Union's submission that its principal purposes did not include the regulation of relations between workers and the Employer – it is expressly stated in its objectives in its constitution and it has power to do more than consult, should it choose to use that power. Mr Murphy's frustration with the BPA was its self-restraint and chosen strategy not to seek to negotiate robustly with the Employer, not its lack of capacity. Should therefore the BPA executive choose to do so, they could choose to seek to regulate relations with the Employer in a way more akin to the way in which the Union would seek to do. The Agreement was not a sham, meetings took place and the Consultative Process described in Appendix 2 does not preclude negotiations as part of the procedure. Notwithstanding its title, the Consultative Process refers to "relations between the BPA and the Employer" as well as its representation and communication roles, and does not preclude a collective bargaining relationship as well as a consulting role. In other words it describes a process that does not have to be limited to consultation. The first objective of the BPA in clause 2(a) is to regulate relations between the Employer and the BPA, as would be expected in a trade union constitution.

52. Furthermore pursuant to ss.2 and 3 of the Act, the Certification Officer (CO) has listed the BPA as a trade union which is evidence that he is satisfied that the BPA is a union (and in Scotland, where some members of the Union's proposed bargaining unit

are based, it is sufficient evidence[2]). Listing by the CO is therefore a highly relevant factor which we take into account – something of a rebuttable presumption - and there was insufficient evidence to rebut that presumption to show that the BPA was not a trade union, on the facts in this case. The facts before us were in marked contrast, for example to those in the CAC judgment *BECTU & City Screen*. The BPA falls within the statutory definition of a trade union. The Employer has a long standing relationship with the BPA going back several decades and the BPA has members and it is not an artificial organisation as is sometimes seen in these cases.

Is the Agreement a Collective Agreement?

53. The Panel is satisfied that the Agreement is a collective agreement within the meaning of s.178(1) since it covers the matters listed in s.178(2)(f)&(g) and was made between the Employer and the BPA. It is clear from the wording of s.178(1) that an agreement that relates to even just one of the matters listed in s.178(2) is sufficient for the agreement to come within the definition of a collective agreement. The wording of the Agreement was clear, indeed appeared to be taken from the Act itself since it contained the wording of s178(2)(f)&(g).

54. In addition to the agreement there was evidence of activity and some limited negotiation on facilities for BPA officials and machinery for consultation prior to the signing of the Agreement. Mr Vallance accepted that the scope of the Agreement was narrow, but a literal reading of s.178 merely requires that collective bargaining (as defined in that section) should exist, rather than setting some minimum standard for its exact scope. The wording of the Agreement is similar to the facts in the CAC judgment in *Unite & DSG Retail Ltd* TUR1/567/2007 where a panel found there to be a collective agreement in force in respect of one or more workers in the union's proposed bargaining unit, thus barring the union's claim.

[2] Both Counsel frankly admitted that they did not quite understand what the term "sufficient evidence" meant. Nor does the Panel; especially as elsewhere in the Act other matters, such as a certificate of independence (s.8), are taken to amount to "conclusive evidence." Thankfully understanding the correct interpretation is neither conclusive nor sufficient to affect the decision in this case.

55. Mr Murphy, as set out in our facts above, was dismissive of the BPA's approach to negotiation, which he described as consisting of modest and occasional requests by the BPA and an unquestioning acceptance of the Employer's response without any follow through. That may or may not be the BPA's chosen approach to negotiations (it was not a party to these proceedings and not present to defend itself), but the Agreement does not prevent negotiation on the two matters permitted – it is up to the BPA how they choose to conduct their negotiations, rather than the consequence of the wording of the Agreement.

56. It was also readily apparent to us that the Agreement was in force, as required by paragraph 35. As per Buxton LJ in *R(NUJ) v CAC* [2006] ICR 1 "All that the CAC was looking for, and all that it needed to look for, was an earnest desire to work within the agreement, not evidence that any of its specific provisions had been carried out." (para 25).

57. It was common ground that the proposed bargaining unit includes workers within the Agreement since it includes pharmacists and pre-registration graduates employed by the Employer. The scope of the Agreement therefore overlaps with the bargaining unit proposed by the Union and paragraph 35 of the Schedule is potentially in play.

58. In the industrial relations expertise of the Panel (for which they were appointed as members of the CAC) negotiations on issues directly relevant to trade union members, such as pay, hours and holiday, working conditions and terms and conditions of employment is central to the meaning of collective bargaining, as articulated in ILO Convention 154, ESC 6(2) and elsewhere. As the term is generally understood by both employers and trade unions and their members, negotiations about the machinery for consultation would not generally be considered, per se, to amount to collective bargaining. Nor, by itself, would negotiations for facilities for trade union officials[3], such as whether a general secretary is given a new computer by the employer. Facilities for union officials enable and facilitate effective collective bargaining, but it is an adjunct of and an aid to collective bargaining itself. It can also be important for other trade union

[3] That also brings its own risks of domination and control by an employer where a non-independent union is concerned.

functions, quite unconnected to collective bargaining, such as representing individual members in grievance and disciplinary hearings. The right to bargain about consultation machinery is, by definition, self-limiting to *consultative* machinery and consultation rights are quite different to bargaining rights.

59. Whilst the definition in s.178 is drafted so that many matters such as those set out in s.178(2)(f)&(g) are caught by the definition of collective bargaining, the history of the drafting of that section and its expansive remit lay in need for a wide definition to provide trade unions with appropriate immunity, given the restraint of trade arguments deployed so effectively in the courts in the 19th and early 20th century.

Article 11

60. It was common ground that "the Schedule must be construed to give proper effect to the 'essential' Article 11 'right to bargain collectively with the employer'" (*Netjets Management Ltd v CAC & Skyshare* [2012] IRLR 986 at para 42, Supperstone J). Whilst in that case, it was held that it was neither necessary nor appropriate to consider this right in detail, the court found that:

> "The reality is that if the Union cannot bargain collectively with the Claimant in relation to their pay, hours and holidays in Great Britain they will not be able to exercise their Article 11 right. In my view the Union's construction of the Schedule gives effect to the Article 11 "right to bargain collectively with the employer", whereas the Claimant's construction does not."

The principle established in *Demir* is therefore not limited to the facts specific to that case, as is evident from *Netjets.*

61. *Netjets* was concerned with territorial jurisdiction and whether a trade union for pilots with international connections to the UK could bring a recognition application under the Schedule. Our subject matter was more parochial concerning paragraph 35. It is commonly understood that the purpose of paragraph 35 is to prevent the CAC from being

drawn into disputes between unions[4]. However this is not a case where different unions are competing with each other to negotiate on pay, hours and holidays with the employer – neither BPA nor the Union has that facility. The facts therefore are distinguishable from *R(NUJ) v CAC* above. In that case the employer – Mirror Group Newspapers had chosen to recognise the British Association of Journalists (BAJ) for collective bargaining on pay, hours and holiday in the bargaining unit concerned and not the National Union of Journalists (NUJ). The NUJ was a far more representative trade union – BAJ had at most one member in the proposed bargaining unit whereas NUJ had considerable support. Paragraph 35 was however effective to block the NUJ application. The NUJ's challenge to the decision failed in the Court of Appeal since, at that time (pre-*Demir)* it was not thought that the right to bargain collectively fell within the rights guaranteed by article 11. Mr Reade accepted that *R(NUJ) v CAC* was no longer good law in light of *Demir*.

62. But in any event, this case is not about representivity - whether the Union or the BPA has more members - nor is it about the relative merits or de-merits of the negotiating style of the BPA and the Union: neither body has rights concerning collective bargaining in the sense in which that term is understood by the industrial relations expertise of the Panel. This case is therefore distinguished on its facts from *R(NUJ)*.

63. What therefore is the scope of Article 11 in light of *Demir* in the collective bargaining context and how does it apply to the facts before the Panel? The facts in *Demir* are somewhat different to this case as Mr Reade stressed. At the risk of over simplification, Mr Demir was a member of a Turkish trade union of civil servants, Tum Bel Sen, which had entered into a collective agreement with a municipal council concerning all aspects of working conditions, and as a result of collective bargaining the union members received various pay rises and other benefits. The municipal council then failed to fulfil some of its obligations under the collective agreement and bargaining arrangements. Legal proceedings ensued in which the union, Tum Bel Sen was successful at first instance. On appeal, the Court of Cassation held that under Turkish law a trade union of civil servants had no authority to enter into collective agreements, the collective

[4] As he made clear in his book 'The Law of Industrial Action and Trade Union Recognition' 2nd edition by Mr Reade, John Bowers QC and Michael Duggan, OUP 2011, E 18.20, p. 235.

agreement was therefore annulled and the workers who had benefitted from the pay rises achieved through collective bargaining were ordered to repay them to the municipal council. It was against this background that the Grand Chamber of ECtHR held that the right to bargain collectively with the employer had, 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' in Article 11 ECHR.

64. Mr Reade accepted that it is no longer assumed that other forms of trade union representation would be sufficient as a replacement for collective bargaining post *Demir*[5]. But we could not leap to a conclusion that the Schedule should be interpreted purposively to enable the Union to progress its claim. The point in *Demir* was that the municipal council wanted to recognise Tum Bel Sen and they were prevented from doing so. Here the Employer did not want to recognise the Union and under both Article.11 and, by operation of paragraph 35, they did not have to. Article 11 confers a wide margin of appreciation to member states as to the means of compliance provided that it is not restricted in such a way as to render it "devoid of substance."[6] In principle, Mr Reade submitted, it is perfectly proper for contracting states such as the UK to limit collective bargaining rights to recognised trade unions, thereby excluding non-recognised unions from the bargaining table. The justification in *R(NUJ)* was that even in this situation the majority union's freedoms and those of its members were preserved, including the right to take industrial action or to take steps to do all they can to push for voluntary recognition.

65. Mr Hendy submitted that the principle had been established by *Demir*, the wording of the judgment was clear as succinctly set out in paragraph 154 – "the right to bargain collectively with the employer has, in principle, become one of the essential elements of.... Art 11" (as re-iterated throughout the judgment) and, therefore, without a purposive reading of the Schedule, the Union's claim for recognition was inadmissible

[5] See also para 23.11 Of 'The Law of Industrial Action and Trade Union Recognition'(supra)
[6] The reference for the quotation is cited as para 141 of *Demir*, but the words do not seem to appear in that paragraph although the Panel does not disagree with the principle. Paragraph 141 deals with the background and evolution of the case law and the frequently expressed entitlement of trade unions to be heard and to strive for the protection of their members' interests pursuant to Article 11.

which amounted to an infringement of Article 11. The qualification at 11(2) does not bite, since whilst member states remain free to organise their own system, they cannot do so in a way which denies the possibility of collective bargaining on core employment issues of the workers concerned.

66. Mr Reade did not disagree with Mr Hendy's careful submission by reference to *Demir,* ESCR and ILO Convention 98(4) that collective bargaining refers to "collective bargaining in respect of their [the union members'] conditions of employment, including wages" (para 147 *Demir),* the wording of Article 6(2) ESC: "negotiations...with a view to the regulations of terms and conditions of employment by means of collective agreements". The ILO Collective Bargaining Convention 154(2) ILO also refers to negotiations for "(a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations." He accepted that Article 6(2) ESC applies, but argued for a different interpretation.

67. The Panel agrees with Mr Hendy's submission that a right merely to bargain collectively over facilities for trade union officials and consultation machinery - the full extent of the bargaining rights under the Agreement - does not, on the face of it, amount to collective bargaining within the meaning of the EHRC, ILO and EU source material and jurisprudence since it expressly excludes bargaining on matters to do with any of working conditions, terms of employment, hours, pay and holiday.

68. One reason why the narrow point before us on largely agreed facts has caused so much difficulty is that different definitions of collective bargaining are used in the Schedule depending on the context in which the phrase is used. Paragraph 3 of the Schedule, which applies for the purposes of an application for recognition under Part I is set out above. Mr Reade readily accepted that the interplay between s.178 and paragraph 3 results in an asymmetry that enables an employer to prevent an independent union from seeking recognition on pay, hours and holidays because the employer has recognised a non-independent, so-called sweetheart, union on quite different and separate matters - the

secondary and peripheral issues of machinery for consultation and facilities for union officials and specifically excluded negotiation on pay, hours and holiday even with the non-independent union. The shifting definition calls to mind Lord Atkins' invocation of Alice in Wonderland in his dissenting judgment in *Liversidge v Anderson* [1942] AC 206[7].

69. But Mr Reade submitted that the operation of paragraph 35 did not deny the Union its article 11 rights: it would only be an initial prevention - the Union could, via its members, trigger the derecognition procedure in either Part IV or Part VI to disapply the Agreement, and the Schedule was not therefore an absolute bar for the Union and its members. It followed that collective bargaining rights could not be said to be "devoid of substance" since following a successful Part IV or VI application, the Union could then apply under Part I having first knocked the Agreement out of the way. The Schedule therefore sensibly sought to prevent the CAC from adjudicating on inter union disputes by the operation of paragraph 35, but not to deny unions and their members their Article 11 rights.

70. Part IV can be dealt with swiftly – it only applies where there has been a statutory declaration of recognition and therefore has no relevance to this case since no such declaration has been issued.

71. Part VI, "Derecognition where Union not independent" applies in the following circumstances:

> "134 (1)This Part of this Schedule applies if—
>
> (a)an employer and a union (or unions) have agreed that the union is (or unions are) recognised as entitled to conduct collective bargaining on behalf of a group or groups of workers, and

[7] I know of only one authority which might justify the suggested method of construction: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'" (*Through the Looking Glass*, c vi)

(b)the union does not have (or none of the unions has) a certificate under section 6 that it is independent.

(2)In such a case references in this Part of this Schedule to the bargaining arrangements are to—

(a)the parties' agreement mentioned in sub-paragraph (1)(a), and

(b)any agreement between the parties as to the method by which they will conduct collective bargaining.

135 In this Part of this Schedule—

(a)references to the parties are to the employer and the union (or unions);

(b)references to the bargaining unit are to the group of workers referred to in paragraph 134(1)(a) (or the groups taken together).

136 The meaning of collective bargaining given by section 178(1) shall not apply in relation to this Part of this Schedule."

Although paragraph 136 states that collective bargaining does not have the meaning given to it by s.178, it does not provide an alternative definition. Common sense would suggest it is intended to bear the meaning of paragraph 3(3).

72. If Part VI applies, the workers covered by the collective agreement can apply to the CAC to end the bargaining arrangements. Having done so, an independent union can apply under Part I without fear of paragraph 35 rendering its application inadmissible.

73. It follows therefore that since, for the purposes of Part VI the s.178 definition does not apply, Part VI has no application where there is an agreement, such as the Agreement in this case, which covers matters which are only considered to amount to collective bargaining under s.178, but which would not amount to collective bargaining under a statutory recognition claim. If Part VI has no application, it means that the Agreement covering only matters in s.178(2)(f)&(g) cannot be dislodged by the Union members in the proposed bargaining unit, to enable the Union to bring a Part I claim. The Union is in a classic Catch 22: because the BPA Agreement does not cover pay, hours

and holiday, the Union members cannot apply for the BPA to be derecognised so that the Union can then apply for recognition on pay, hours and holidays.

74. The workers in the proposed bargaining unit are therefore denied the opportunity for an independent trade union to bargain collectively on their behalf in relation to pay, hours and holiday under the statutory procedure. We also know that the reason why the Employer formalised its arrangement with the BPA in the Agreement was in order to block the Union's request for recognition under the statutory procedure without conferring those rights on any other union (whether independent or not).

75. Mr Reade's final submission was that "Article 11 does not guarantee the absolute right of the Union and its members to conduct collective bargaining with the Employer." However, that is not what the Schedule provides for. The Schedule is the machinery adopted by the UK by which the Union must be heard and be enabled to strive for the protection of its members' interests in accordance with the right to bargain collectively afforded by Article 11. Mr Hendy's argument is merely that the Schedule cannot be an absolute bar to the Union to seek recognition under the machinery the UK government has put in place to afford workers and their unions their rights under ECHR Article 11 and ESC 6(2).

76. The Panel concludes that the prohibition on an independent union from seeking recognition under the statutory procedure, where no other union (whether independent or otherwise) has collective bargaining rights for at least pay, hours and holidays, is an infringement of Article 11. Since the machinery is in place to ask for, or strive, for recognition, the Union must not be de-barred from entering the process. Whether their application will ultimately be successful is an entirely different question, but they cannot be shut out of the process altogether at this stage. The rights and freedoms of the Employer are therefore not infringed by the Union being allowed to strive for recognition under the statute. It is not permissible in our view, for the Employer to cherry pick two matters in the expansive definition of collective bargaining set out in s.178(2), which do not, per se, amount to collective bargaining either in the UK industrial relations context or our international obligations, in order to block the Union's claim. We are especially

mindful that the provisions should be construed strictly where a non-independent union is concerned given the risk of interference and domination as expressed in Article 98(2) ILO Convention on the Right to Organise and Collective Bargaining.

77. We therefore agree with Mr Hendy's argument: A right merely to bargain collectively over facilities for trade union officials or consultation machinery cannot fulfill the scope of article 11 or be sufficient to preclude the exercise of the right to collective bargaining over the wider (legitimate) interests of the workers concerned. The earlier CAC decision in *Unite & DSG Retail Ltd* is of no assistance since it pre-dated the ECtHR judgment in *Demir*. The Union must be permitted to be a striver for recognition under the statutory process where no other union has recognition rights (as those are properly understood in this context). The Panel therefore concludes that a literal interpretation of paragraph 35 interferes with the Union's rights under Article 11(1), for the reasons set out above.

78. Is it a justified interference under 11(2) ECHR? The issue is tantalisingly addressed in Mr Reade's book: "This [*Demir]* change of approach does not mean that a restriction on the right to collective bargaining cannot be justified – it can, and might well be, under Article 11(2). However, as noted above in *Tum Haber Sen and Cinar v Turkey* (2008) 46 EHRR 374 (and also on the facts of *Demir and Baykara*), the ECtHR's approach to Art 11(2) in narrower than in the earlier cases" and early authorities may no longer be reliable indicators.[8]"

79. The Panel reminds itself of the wording of 11(2):

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

[8] 23.12 at p.288 'The law of Industrial Action and Trade Union Recognition (supra)

The interference must therefore be prescribed by law, pursue one or more of the legitimate aims and be necessary in a democratic society to fulfill such aims. It is not apparent to us how barring the Union from seeking statutory recognition at the first stage in the recognition process prior to any consideration of the appropriateness of the proposed bargaining unit, prior to assessing whether there is likely majority support for Union recognition and before any considerations about a ballot to seek the workers views on the matter, is necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Mr Reade did not advance evidence of any specific circumstances that could justify the infringement.

80. Can we construe the Schedule so as to give effect to the Convention right? We note that in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 the House of Lords held that the legislation in question (whether enacted before or after the Human Rights Act) must be given a Convention compliant meaning, subject only to the modified meaning remaining consistent with the fundamental features of the legislative scheme. Although not listed in the authorities both counsel were familiar with *Coleman v Attridge Law (no 2)* and considered it applicable and a further useful authority. S. 3 HRA 1998 also makes it clear that the statute, in this case the Schedule, must be interpreted in accordance with Article 11 “in so far as it is possible to do so”.

81. We conclude that there is nothing "impossible" about amending or adding words to the provisions of the Schedule or the Act so as to enable the Union to make a request for recognition under the statutory scheme. Of course such an addition would alter the meaning of the Schedule – if it did not, it would not need to be done but, as the speeches in **Ghaidan** make clear, that is not in itself impermissible (see, e.g., *per* Lord Nicholls at paras. 32-33). To cite Underhill J in *Coleman*: “The real question is whether it would do so in a manner which is not "compatible with the underlying thrust of the legislation" (*per* Lord Nicholls at para. 33) or which is "inconsistent with the scheme of the legislation or its general principles" (*per* Lord Rodger at para. 121). In **Ghaidan** the majority were prepared to interpret the words "wife or husband" in Schedule 1 of the **Rent Act 1977** as extending to same-sex partners. That was plainly not the intention of

Parliament when the act was enacted, nor does it correspond to the actual meaning of the words, however liberally construed; but the implication was necessary in order to give effect to Convention rights and it went "with the grain of the legislation" (in Lord Rodger's phrase)."

82. So here, we are simply ironing out a wrinkle, rectifying a perplexing anomaly, and not proposing to alter the wording in a way which is incompatible with the underlying thrust of the legislation. We propose a modified version of Mr Hendy's wording as follows:

"35. - (1) An application under paragraph 11 or 12 is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is (or unions are) recognised as entitled to conduct collective bargaining ***in respect of pay, hours and holidays*** on behalf of any workers falling within the relevant bargaining unit."

We have not adopted the wider formulation of: *"in respect of terms and conditions of employment"* suggested since it is not necessary on the facts of this case for us to decide the issue.

Remaining statutory admissibility tests

83. The Employer did not contest the validity of the application within the terms of paragraphs 5 to 9 of the Schedule, nor argue that the application was not made in accordance with paragraph 11 or 12. The Panel was satisfied that the Union's formal 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 34 and paragraphs 37 to 42 of the Schedule.

84. The terms of paragraph 36 of the Schedule require the Panel to be satisfied that the Union has at least 10% membership within the proposed bargaining unit. On the basis of the Union's membership figures this threshold would appear to have been met. However in order to decide on whether the majority of the proposed bargaining unit

would be likely to favour recognition of the Union for the purposes of collective bargaining on their behalf in accordance with paragraph 36(1)(b), the Panel shall conduct a membership and support check to understand better the Union's level of support.

Decision

85. The Panel therefore concludes that the application is not rendered inadmissible by operation of paragraph 35 as set out above and accordingly the Case Manager shall conduct a membership and support check so that the Panel can decide whether to accept the Union's application in accordance with paragraph 36 of the Schedule.

Panel

Ms Mary Stacey – Panel Chairman

Mr Roger Roberts

Mr Paul Talbot

29 January 2013

Appendix 1 - Names of those who attended the hearing

Attendees for the Union

Mr John Hendy QC	–	
Ms Orla Sheils	–	Union Solicitor
Mr Mike Radcliffe	–	Union Consultant
Mr John Murphy	–	General Secretary
Mr Mark Kozial	–	Assistant General Secretary
Mr Mark Pitt	–	Assistant General Secretary

Attendees for the Employer

Mr David Reade QC	-	
Mr David Vallance	-	Director of Human Resources for Stores
Mr Jonny Morton	-	Head of Policy & Reward
Ms Victoria Butler	-	Boots Legal Department

Appendix 2 –

List of Parties' Authorities for CAC hearing held on 11 December 2012

1. Union's List of authorities

1	Human Rights Act 1998
	English Cases
2	Hilton v Eckersley [1855] 6EL 781
3	Hornby v Close [1867] QB 153
4	Osborne v Amalgamated Society of Railway Servants [1907] 1 Ch
5	Midland Cold Storage v Turner & Others [1972] ICR 231
6	National Union of Gold, Silver & Allied Trades v Albury Brothers Ltd [1978] IRLR 504
7	British Association of Advisers and Lecturers in Physical Education v National Union of Teachers [1986] IRLR 497
8	Boddington v Lawton [1994] ICR 478
9	R v Lambert [2001] UKHL 37
10	R v Kansal [2002] 2 AC 69
11	Ghaidan [2004] 2 AC 557
12	Ullah [2004] 2 AC 323
13	R v CAC [2006] ICR 1
14	Netjets Management Ltd v Central Arbitration Committee [2012] IRLR 986
	CAC Cases
15	TGWU v W Jordan (Cereals Ltd) TUR1/258/2003
16	BECTU v City Screen Ltd TUR1/309/2003
17	TGWU v ASDA [2004] IRLR 836
18	Amicus – AEEU v Magellan Aerospace TUR1/324/2003
19	GMB v Clark Door Ltd TUR1/543/2006
20	UCATT v Swift Plant Hire TUR1/537/2006
21	Amicus v Texol Technical Solutions PLC TUR1/555/2007
22	Unite the Union v GDF Suez Teesside Ltd TUR1/737/2010
23	Unite the Union v DHL Supply Chain TUR1/758/2011
	ECHR Cases
24	Wilson & NUJ v UK [2002] IRLR 568
25	Demir v Turkey [2009] IRLR 766
	ESC Material
26	European Social Charter, Turin, 18.X.1961
27	CCSR Conclusions I
28	ECSR Digest 2008

	ILO Material
29	C098 Right to Organise and Collective Bargaining Convention, 1949 (No 98)
30	C154 Collective Bargaining Convention, 1981 (No 154)
31	R091 Collective Agreements Recommendation, 1951 (No 91)
32	Observation (CEACR) – adopted 2008, published 98th ILC session (2009)
33	ILO CEACR General Survey 2012
	EU Material
34	Charter of Fundamental Rights of the European Union
35	Article 6 (Treaty on European Union)

2. **Employer's List of authorities**

1	TGWU v Jordan Cereals TUR1/258/2003 CAC
2	BAALPE v NUT [1986] IRLR 497 CA
3	Unite v DSG Retail Ltd TUR1/567/2007
4	TGWU v Asda [2004] IRLR 836
5	UCATT v Swift Plant Hire TUR 1/537/06 CAC
6	R (on the application of NUJ) v CAC [2005] ICR 493 CA
7	Demir and Baykara v Turkey [2009] IRLR 766