

CENTRAL ARBITRATION COMMITTEE
TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992
SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION
DETERMINATION OF THE BARGAINING UNIT

The Parties:

RMT

and

J W Filshill Ltd

Introduction

1. RMT (the Union) submitted an application to the CAC that it should be recognised for collective bargaining by J W Filshill Ltd (the Employer) in respect of a bargaining unit comprising “All Drivers and Warehouse Staff, excluding Supervisory and Management Grades” located at Hillington Road, Glasgow, GS2 4HE. The application was received by the CAC on 1 December 2014. The CAC gave both parties notice of receipt of the application on 2 December 2014. The Employer submitted a response to the CAC dated 4 December 2014 which was copied to the Union.

3. 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 Mr Chris Chapman, chairing the Panel, and, as Members, Mrs Maureen Shaw and Mr Sandy Boyle. The Case Manager appointed to support the Panel was Linda Lehan and, for the purposes of this decision, Nigel Cookson.

3. By a decision dated 30 December 2014 the Panel accepted the Union’s application.

The parties then entered a period of negotiation in an attempt to reach agreement on the appropriate bargaining unit bargaining unit but no agreement was reached. The parties were invited to supply the Panel with, and to exchange, written submissions ahead of a hearing to determine the appropriate bargaining unit. However, at the hearing in Glasgow on 16 February 2015 after the Union had completed its submissions and the Employer had applied to admit additional evidence it became clear that there was a degree of confusion on the part of the Union and the Panel as to the composition of its proposed bargaining unit and so the hearing was adjourned to enable the Union to seek clarification in the light of the additional evidence. The hearing was relisted and held in Glasgow on 30 March 2015 and the names of those who attended this hearing are appended to this decision. In accordance with paragraph 19 of Schedule A1 to the Act (the Schedule) the Panel's task was to determine first whether the Union's proposed bargaining unit was appropriate and then, if it was found not to be so, to determine a bargaining unit that was appropriate.

Summary of the submission made by the Union

4. At the outset of the hearing the Panel Chairman invited the Union to work through the list of job titles in Fig. 1 of its written submissions, i.e. those workers within its proposed bargaining unit, and map these job titles on to the schematic interpretation of the Union's proposed bargaining unit as set out in Fig. 4.1 of the Employer's written submissions. Once the Union had completed this exercise, the Panel Chairman did the same for the job titles in Fig 2 of the Union's submissions, i.e. those workers that the Union specifically excluded from its proposed bargaining unit. The Panel Chairman reminded the Union that its proposed bargaining unit had to be defined by job title/role rather than by the name of the current incumbent.

5. The Union explained that in August 2014 it was approached by workers within the company who wished to join the Union as they had issues they had with the Employer. Since then membership had risen to 41 and the Union had represented members at disciplinary and grievance hearings. The Union believed that it had the overwhelming support of the workers in its proposed bargaining unit to be recognised for collective bargaining purposes and that this was demonstrated by the number of members and the number of workers that had signed a petition in support of recognition of the Union for collective bargaining.

6. The proposed bargaining unit put forward by its members was “All Warehouse staff and Drivers excluding Management and Supervisory Grades at JW Filshill Ltd, Hillington” and was based on information gathered from members during several collective and individual meetings and took into account information provided by the Employer through meetings and correspondence. The Union stated that it had excluded all the supervisory/management positions as they had significantly different roles, responsibilities and rewards than the workers included in its proposed bargaining unit

7. The Union said that, in its view, the structures and functions of work at Filshill helped define the proposed bargaining unit. It recognised that there was a degree of flexibility between the different job titles within the proposed bargaining unit and that, on occasion, workers from outside the proposed bargaining unit covered roles within the proposed bargaining unit. However the workers that provided the cover had substantively different roles to the workers whom they were covering for. The Union was also aware that workers from within the bargaining unit may be asked to cover for roles outside the proposed bargaining unit and this would not be an issue as the workers would either keep their existing rate or be compensated accordingly if higher rate duties were being performed. In short, there would be no loss of flexibility because of the Union’s proposed bargaining unit.

8. The Union said that there were many examples of companies working effectively, efficiently and profitably with different bargaining units for groups of workers on single sites. It gave the example of DHL, which had single site agreements with similar size workforces to the Employer’s and where there were different agreements for different groups of workers with individual bargaining for managers and supervisors.

9. The Union fundamentally believed that having collective bargaining for its proposed bargaining unit would actually bring together some of what was an already fragmented workplace and was therefore, as far as the Union and its members were concerned, an improvement on the current arrangements.

10. In summing up, the Union stated that the bargaining unit identified by its members would seem, on the evidence it had, to be a practical, workable and effective bargaining unit within the context of the Company. It reminded the Panel that it had been approached by workers to help organise in the workplace as the Employer would not listen and so issues

were not being resolved. Membership had risen from none to 42 since August 2104 and from that time the Union had been providing assistance to its members on an individual basis. The Employer split its workforce into departments and this helped identify the bargaining unit. It was at a single location and clearly defined. It was not a unit that would cause fragmentation and the Union failed to see any reason why it would cause the business any difficulty. Whilst not perfect it was perfectly effective and one that the members wanted. The Union asked the Panel to accept its proposal on these grounds and give its members the bargaining unit that they believed would work for them.

Summary of the submission made by the Employer

11. By way of background the Employer explained that it was a small family-owned wholesale distribution business serving some 1,300 customers. It employed a workforce of around 200 in Buying, Sales, Administration, Warehousing, Transport and Retail Stores. It had warehouse, distribution and Cash & Carry operations located in Hillington, Glasgow where currently 168 workers were employed and distribution points in Inverness and Durham (6 workers), two Retail Shops in Renfrew and Kirkcudbright (23 workers) and 1 Home Worker.

12. The Employer delivered ambient products to an extensive range of customers. Most were convenience store operators but it also delivered to petrol station forecourts, local authorities, including schools, universities and had various contracts including prisons and garden centres. It also traded with a number of wholesalers throughout the UK and also from its small Cash & Carry department. The product range was extensive with over 6,000 products lines and the Employer operated on a wafer thin margin in a very competitive environment.

13. The Employer did not believe the bargaining unit proposed by the Union, consisting of 65-70 workers, was an appropriate bargaining unit. It was concerned primarily that the Union was focussing on two job categories, drivers and warehouse staff, where it claimed to have membership density and its members had requested recognition, but this was not a valid criterion that the CAC could consider. Such a bargaining unit limited drivers and warehouse staff at Hillington would exclude six workers in identical or largely similar jobs at other locations in Inverness and Durham. The Employer explained how the drivers and van

assistants at Inverness and Durham operated in that an independent haulier was contracted to back haul stock from Hillington and to deliver it to its own depots in Inverness and Durham whereupon the stock would be transferred to the Employer's vehicles for onward delivery by the drivers and van assistants employed by the Employer but remotely based. There were no differences in the terms and conditions between these drivers and van assistants and the drivers and van assistants at Hillington although there were differences in pay. Further, there were 27 workers at Hillington outside the Union's proposed bargaining unit that performed overlapping tasks with those jobs inside the Union's bargaining unit as could be seen from the exercise conducted at the outset of the hearing. The principle of 'overlapping tasks' formed part of the culture and practice of flexible working within the business. Leaving out these workers would not only deny them a voice but would lead to fragmentation.

14. As for the retail outfits, they were fully functioning shops that would run trials for customers' products and that whilst there was a local store manager nominally in charge, the shops were directly managed from Hillington.

15. Identical annual pay awards had been applied to all workers with some exceptions such as the Sales Team and the culture within the business was to promote through the ranks offering career mobility. Almost all management appointments had been through progression and promotion. Many of the workers designated as "supervisors" had no additional responsibilities to the colleagues they worked alongside and were on identical terms and conditions but they would be excluded from the Union's proposed bargaining unit. The Employer was also concerned that common employment terms such as working hours and holidays applied to all workers irrespective of department and contracts reflected the right of the Employer to amend duties from time to time.

16. The Employer stated that the Union's bargaining unit concentrated only on areas where its membership was strong, which was a narrow focus and not a consideration the Panel could take into account. Union negotiations restricted to Hillington-only drivers and warehouse workers would be incompatible with effective management by creating other de facto units that would not be represented in union negotiations. This would be unfair. In addition, the Union's proposed bargaining unit carried a high risk of fragmentation across the company by segregating workers who interacted closely and performed comparable roles for similar pay, and on common terms of employment into small groups. The Employer was

firmly of the view that its approach to pay, holidays and working hours should include all of the workers in the Company but exclude Senior Management. It believed that effective management of the business was achieved by adopting a “One Company” principle in respect of its operation aligning working hours, holidays and rewards and its aim was for the entire workforce to contribute fully to the success of the business by attaining greater skills and common positive behaviour. If the Employer had to negotiate with the Union on pay, hours and holidays in respect of its proposed bargaining unit and make separate decisions in respect to other categories of worker it would create a split and so break the “One Company” principle and this, it argued, was not compatible with effective management.

17. The Employer said it treated all of its workers fairly and consistently with the same main conditions of employment such as being subject to the same policy and procedures for sick pay; enjoying the same benefits regarding annual holiday entitlements; receiving the same annual wage review; being required to clock in and out: being paid weekly (the exception being sales staff, Executives and some Senior Managers); working the same number of working hours (excluding a few part time staff) and receiving the same annual bonus payment at the end of each year (excluding sales and Executive Staff). There was a common Employee Handbook which set out the rules, procedures and ways of working that applied to all workers including disciplinary, grievance and dismissal policies. All vacancies were advertised internally in the same fashion as advertised elsewhere with the Employer having consistently adopted a policy of job progression and promotion from within and existing staff are encouraged to apply. Indeed, virtually every senior position had been filled “through the ranks” and the Employer was proud of the family nature of its business with 75% of the workforce having in excess of five years service.

18. Over the last 4½ years the Employer had been rolling out a standard hours scheme and whilst the drivers at Hillington were now on this scheme, those based out of Inverness and Durham had yet to be assimilated. Logistics had prevented the scheme being fully rolled out - Hillington worked on a roller cage system which could be managed by a single driver and Inverness and Durham still worked on pallets which required a driver and a van assistant.

19. Career mobility and progression for all workers ensured that there was a cross-over of knowledge and experience across departments, enabling them to remain an effective and

flexible business despite its small size. This reflected the transferable skills from one role to another and emphasised the interdependent nature of each area of the business. Career progression would become difficult to manage with the Union's proposed bargaining unit in place. The Employer submitted that it had witnessed the onset of disharmony within the workforce since the application had been lodged and that this was affecting the performance of the business.

20. The Employer put forward four alternative bargaining units which it believed to be more logical and sensible bargaining unit options than that proposed by the Union. All four were compatible with effective management and would encourage fair and efficient practices and arrangements in the workplace.

21. The first of the four bargaining units suggested by the Employer, and its preferred option, was one comprising "All Employees at all Company locations" and would cover 191 workers. This proposal would appropriately represent the "One Company" principle used throughout all locations and successfully met the criteria set out in paragraph 19B of the Schedule. It included all workers across all business functions and reinforced integrated workflow; included workers performing in identical and similar roles; included workers with no power to negotiate on pay, hours and holidays; was not based on membership density and was a manageable bargaining unit. It reflected similar terms and conditions; supported flexible work practices; supported workforce mobility and supported career paths and was compatible with effective management. It would avoid fragmented units both at Hillington and at all other locations.

22. If the preferred option was not deemed appropriate the Employer asked the Panel to consider three further options. Its second option was a bargaining unit encompassing "All Employees at all Company Locations except Managers" which would comprise 179 workers. This proposal included all workers in all locations with the exception of Senior Management and Managers that reported directly to them. The rationale behind this proposal was that under a unionised workplace the second tier of management would potentially become involved in the negotiations on pay, hours and holidays. This bargaining unit would have similar characteristics to the preferred option save that it would only cover the majority of staff and would maintain a high degree of the "One Company" principle.

23. The third option was for a bargaining unit covering “All staff in Transport, Picking, Tobacco, Warehouse and Retail Shops Excluding Managers” and this would comprise 140 workers. This proposal included all workers in all locations with the exception of Senior Management, Managers that reported directly to them, some Assistant Managers and all office based functions. The rationale behind this proposal was skill sharing. As previously stated, the functions carried out at the Retail Stores were very similar to that carried out in the warehouse. As this proposal was skill centred the assistant managers that performed very similar roles to those with whom they worked have been included. This proposal excluded managers that reported directly to senior management; assistant managers that had limited overlap with other staff functions; all workers in Finance and Administration; all workers in Buying and in Sales. Whilst sharing some characteristics with the Employer’s preferred option nonetheless such a bargaining unit as this would be detrimental to the “One Company” principle as it excluded workers with similar terms and conditions; limited support of flexible work practices; limited support of workforce mobility and support for career paths; was not compatible with effective management; and would create fragmented bargaining units at Hillington.

24. The final option put forward by the Employer was for a bargaining unit comprising “All Employees at all Company Locations Directly Managed by Hillington” and would comprise 168 workers. This proposal included all workers in all locations with the exception of Senior Management and Retail Outlets. The rationale behind this proposal was identifying all the parts of the business that were directly managed at Hillington rather than having an onsite management resource. Both the retail outlets had managers that dealt with the day to day running of the stores but had no authority regarding negotiations for pay or holidays. This proposal excluded other locations run by the centralised “One Company” management principle; excluded staff across similar business functions; excluded staff performing in identical and similar roles; excluded certain areas of the workflow of business and excluded staff with no power to negotiate on pay, hours and holidays. However, the Employer believed such a bargaining unit would be detrimental to the “One Company” principle and would not be compatible with effective management though it would limit the creation of other fragmented bargaining units within the undertaking.

25. The Employer summed up by stating that it was aware that it may have to change management style to cope with the demands of a unionised workforce and had also included

amongst the four options one that protected its “One Company” principle whilst recognising the exclusion of management. At present the same terms and conditions relating to pay, hours worked and holidays applied to all workers with support offered to any worker in times of hardship. Discretionary rules applied during absence but decisions taken were based on fairness across the workforce. The Employer’s preference was to avoid exclusion and to have a bargaining unit which applied to all of its workers, including supervisors, many of whom were on the same terms and conditions as the rest of the workforce, thus reducing the amount of management time that a fragmented bargaining unit, such as proposed by the Union, would incur. The Employer, in commending its submissions to the Panel, argued that its preferred option was an appropriate bargaining unit as it was compatible with effective management, unlike the Union’s proposal, and it was one that did not conflict with the matters set out in paragraph 19B.

Considerations

26. The Panel is required, by paragraph 19(2) of the Schedule to the Act, to decide whether the Union’s proposed bargaining unit is appropriate and, if found not to be appropriate, to decide in accordance with paragraph 19(3) a bargaining unit which is appropriate. Paragraph 19B(1) and (2) state that, in making those decisions, the Panel must take into account the need for the unit to be compatible with effective management and the matters listed in paragraph 19B(3) of the Schedule so far as they do not conflict with that need. The matters listed in paragraph 19B(3) are: the views of the employer and the union; existing national and local bargaining arrangements; the desirability of avoiding small fragmented bargaining units within an undertaking; the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant; and the location of workers. Paragraph 19B(4) states that in taking an employer’s views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the CAC must take into account any view the employer has about any other bargaining unit that he considers would be appropriate. The Panel must also have regard to paragraph 171 of the Schedule which provides that “[i]n exercising functions under this Schedule in any particular case the CAC must have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, so far as having regard to that object is consistent with applying other provisions of this Schedule in the case concerned.” We have reached our decision after full and detailed

consideration of written and oral submissions and the evidence before us and responses to questions addressed to the parties at the hearing.

27. We are indebted to the Employer for its well documented bundle which contains schematics for the various options it put forward as well as tables showing how they compared. They have been of great assistance to the Panel in its deliberations. We also thank the Union for its help in the exercise conducted at the start of the hearing and which gave the Panel a clearer understanding of the Union's proposed bargaining unit.

28. This is a most unusual case in that as well as considering the bargaining unit proposed by the Union, which is now clear in our mind, we have had four alternative bargaining units suggested by the Employer. In considering the submissions put forward by the parties we must ensure that we do not embark upon a beauty contest to find the most appropriate bargaining unit out of the five tabled by the parties so as to reach our decision based solely on the statutory criteria set out in the Schedule.

29. Our starting point, as always, must be the bargaining unit proposed by the Union. There was some difficulty in this case in identifying the bargaining unit proposed by the Union, mainly because it was reliant on information passed to it by its members rather than on first-hand knowledge as to the various roles and responsibilities within the company and how they knitted together. This was why the mapping exercise we undertook at the start of the hearing was so important as it made it easier not only for the Panel but also the Employer to clearly distinguish the posts that the Union sought to include in its proposed bargaining unit and those that it sought to exclude.

30. The exercise established that the Union sought to include workers designated by the following terms: Cash and Carry, Marshalls, Van Assistants and LGV drivers (although only those based at Hillington), Order Pickers, Warehouse Replenishment, Goods Returns, Ancillary, Shed D/Goods In Goods In and Booked in/Missed Sales. The parties disagreed as to whether the Cashier fulfilled the role of Goods In/Missed Sales but, without evidence to the contrary, we must accede to the Employer's submission on this point. All other workers were to be excluded including all managers, supervisors, those engaged in the Retail Shops and those engaged at other locations such as the drivers and van assistants at Inverness and Durham. Roles at Hillington that were to be excluded included all assistant managers,

routing clerks, transport clerk, Cash & Carry/Replenishing/Picking, Bulk Order Picker, 2nd Order Picker, and one worker in each of the following areas: Warehouse Replenishment, Goods Returns Clerk, Ancillary, Cashier, Booked In/Missed Sales and Marshall and two workers labelled Order Pickers.

31. We deal first with the workers the Union sought to exclude. We are persuaded that it is right that senior management, managers and assistant managers be excluded from the appropriate bargaining unit. Their terms and conditions differ significantly from the workers for whom they are responsible as do their characteristics and, in the case of senior management, it is widely accepted that those that will be negotiating on the part of the Employer should not form part of the bargaining unit in respect of whose terms are being negotiated. We are also persuaded that the LGV drivers and van assistants based elsewhere be excluded on the basis that there are subtle differences between those categories of workers and the LGV drivers and van assistants based at Hillington. The fact that they have yet to be assimilated into the Employer's standard hours scheme highlights these differences. They also operate in a slightly different fashion given that they are still operating two man deliveries by pallet rather than the single man delivery by roller cage, as at Hillington. We are also of the view that it would be right to exclude those workers employed in the Employer's two retail outlets as the roles they fulfil are conspicuously different to the rest of the roles within the warehouse and distribution centre. For the same reason we believe it appropriate to exclude those workers in Finance and Administration, Buying and Sales and Marketing. In our view, workers in these categories also possess clearly different characteristics to the drivers and warehouse workers at Hillington, not least of which is the application of the annual pay award.

32. This brings us to the nub of the Union's proposed bargaining unit and those workers that fall within the Transport and Warehouse functions at Hillington. The Union's bargaining unit specifically excludes Supervisors but no evidence has been brought forward to demonstrate that a specific designation of Supervisor exists. No such job title was identifiable from the Employer's organogram and no information was provided by the Union to substantiate that these staff had significantly different roles, responsibilities and pay to those of other workers included in the proposed bargaining unit. The major difficulty that the Panel has with the Union's proposal is that, as clearly shown by the exercise conducted at the start of the hearing, it excludes workers with the exact same job title with no evidence having

been put to the Panel to suggest that these workers have different duties that distinguish them from those workers the Union seeks to include. The Panel cannot see any rationale for the inclusion of some workers but the exclusion of others within the Transport and Warehouse functions at Hillington.

33. As part of its deliberations, the Panel must consider whether the Union's proposed bargaining unit would give rise to small fragmented bargaining units within the undertaking. On this point we are greatly assisted by the interpretation provided by Collins J in the matter of *R (Cable & Wireless Services U.K. Limited) & Central Arbitration Committee & The Communication Workers Union [2008] EWHC 115 (Admin)*. When considering the desirability of avoiding such units he observed:

“However, it is obvious that the real problem is the risk of proliferation which is likely to result from the creation of one such unit. Hence it is important to see whether such a unit is self-contained. Fragmentation carries with it the notion that there is no obvious identifiable boundary to the unit in question so that it will leave the opportunity for other such units to exist and that will be detrimental to effective management.”

34. When looking at the Union's proposed bargaining unit in these terms it is plain to the Panel that it would face the risk of proliferation as it is not a clear self contained unit. The edges of the Union's proposed bargaining unit are decidedly blurred with no obvious justification for the inclusion of some workers at the expense of others when both are defined by the same job designation. On this basis we reach the conclusion that the Union's proposed bargaining unit is not an appropriate bargaining unit.

35. Having reached this conclusion we must now consider the alternatives put to us by the Employer as required by the terms of paragraph 19B(4) of the Schedule which states:

“In taking an employer's views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the CAC must take into account any view the employer has about any other bargaining unit that he considers would be appropriate.”

The Employer was forthright in its views, not only as to the deficiencies of the Union's

proposed bargaining unit, but also as to the benefits, as well as the disadvantages, of the various alternatives that it put forward. It made plain that its preferred option was one that extended to all of the workers in the company save for senior management. The other options excluded various categories of workers with the second option excluding senior managers and managers, the third option excluding senior management, managers, finance and admin, buying and sales and the fourth option excluding senior management and retail.

36. When considering the Union's proposed bargaining unit we concluded that it was right that senior management were excluded. However, we also took the view that it was appropriate that managers also be excluded and this is a position that we do not resile from. Excluding managers would remove the Employer's preferred option, option one, from the table. We also concluded that it was appropriate that assistant managers be excluded and this would remove option two from the equation. Option three does remove senior managers and managers but leaves in assistant managers and retail which are roles that we deemed appropriate to exclude. Finally, option four includes a number of managers, finance & admin and buying and sales, categories which we thought should be excluded. Having concluded that none of the alternative bargaining units put forward by the Employer are appropriate, it falls to the Panel to identify a bargaining unit of its own motion.

37. The bargaining unit we have identified as an appropriate bargaining unit is one including all workers employed at the Hillington site with the exception of senior managers, managers and assistant managers, finance & admin, buying and sales. This also excludes those engaged in retail as well as drivers and van assistants located at sites other than at Hillington. In effect it is the Employer's option three, defined as all staff in Transport, Picking, Tobacco and Warehouse but we have also excluded retail and assistant managers in addition to managers and senior management.

38. In arriving at our decision the Panel has considered the matters listed in paragraph 19B(3) of the Schedule, so far as they do not conflict with the need for the unit to be compatible with effective management. The views of the Employer and the Union, as described earlier in this decision, have been fully considered and the Panel is satisfied that there are no existing national or local bargaining arrangements that apply in this case.

Decision

39. The appropriate bargaining unit in this matter is "all staff employed in Transport, Picking, Tobacco and Warehouse at the Hillington site with the exception of senior managers, managers and assistant managers". For the avoidance of doubt this excludes those staff employed in finance, buying, sales, retail and drivers and van assistants at sites other than Hillington.

40. As the appropriate bargaining unit differs from the proposed bargaining unit, the Panel will proceed under paragraph 20(2) of the Schedule to decide if the application is invalid with the terms of paragraphs 43 to 50.

Panel

Mr Chris Chapman, Chairman of the Panel

Mrs Maureen Shaw

Mr Sandy Boyle

17 April 2015

Appendix

Names of those who attended the hearing on 30 March 2015:

For the Union

| | | |
|---------------|---|---|
| Donald Graham | - | RMT Organiser Recruitment and Retention |
| Gordon Martin | - | RMT Regional Organiser Scotland & N Ireland |

For the Employer

| | | |
|-----------------|---|--|
| Simon Hannah | - | Managing Director |
| Fraser Harrison | - | Company Secretary |
| Susan Stirling | - | Finance and Office Manager |
| Andrew Allison | - | Operations and Systems Manager |
| Martin Stephens | - | Wright Johnston & Mackenzie LLP Solicitors |