Case Number: TUR1/953(2016)
25 May 2016

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DETERMINATION OF THE BARGAINING UNIT

The Parties:

GMB

-and-

Lidl Ltd

Introduction

1. GMB (the Union) submitted an application to the CAC dated 7 March 2016 that it should be recognised for collective bargaining by Lidl Ltd (the Employer) for a bargaining unit comprising "Warehouse Operatives working in the following sections: Goods In, Goods Out & Selection" employed at the Employer's Bridgend Regional Distribution Centre, Waterton Industrial Estate, Bridgend. The application was received by the CAC on 10 March 2016 and the CAC gave both parties notice of receipt of the application on 11 March 2016. The Employer submitted a response to the CAC dated 17 March 2016 which was copied to the Union.

2. In accordance with section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), the CAC Chairman established a Panel to deal with the case. The Panel consisted of Professor Gillian Morris, the Panel Chair, and, as Members, Mr Paul Talbot and Mr Paul Wyatt. After the Chairman had appointed the Panel, Mr Talbot identified a possible conflict of interest and was replaced by Ms Judy McKnight CBE. The Case Manager appointed to support the Panel was Nigel Cookson and for the purposes of this decision, Miss Sharmin Khan.

3. By a decision dated 6 April 2016 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. As no agreement was reached, the parties were invited to supply the Panel with, and to exchange, written submissions relating to the question of the determination of the appropriate bargaining unit. The hearing was held on 11 May 2016 and the names of those who attended the hearing are appended to this decision.

4. The Panel is required, by paragraph 19(2) of Schedule A1 to the Act (the Schedule), 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 it considers would be appropriate.

Matters clarified at the beginning of the hearing

5. At the request of the Panel the Employer confirmed that it measured the performance of individual regions by reference to a set of Key Performance Indicators (KPIs). The Employer said that the KPIs for warehouses included transport cost and pallets per hour (PPH) and that the PPH was one of the key figures driving personnel cost. The Employer said that it did not collect information on personnel costs as such but that the information to calculate such costs was technically available to it if it were required.

6. At the request of the Panel the Employer explained that, although the contract for warehouse operatives stated that there were no normal hours of work, their contract specified the number of contracted hours. Warehouse employees were guaranteed, for the most part, 30

or 40 hours per week.

7. At the request of the Panel the Employer explained that disciplinary functions were conducted by Category 4 employees. In the case of Warehouse Operatives this would be the Team Manager of the warehouse, who also dealt with recruitment, and who was a level above that of the Warehouse Operatives' immediate line manager.

8. The Employer sought to put before the hearing a CAC decision and a definition from a dictionary which had not been included in its written submissions. The Employer said that it wished to include this decision having seen the cases submitted by the Union in its written submissions. The Union objected to the introduction of this new material at the hearing stage and said that it would take it some time to read the decision and consider its implications. Following a short adjournment the Panel Chair informed the parties that the Panel had concluded that this material should not be admitted. She also reminded the parties that, unlike decisions of the courts, previous CAC decisions did not have any precedent value for the Panel.

Summary of the Union's submissions

9. The Union submitted that its proposed bargaining unit was an appropriate bargaining unit. The Union submitted that it was compatible with effective management. The Union referred to the reasons why the proposed bargaining unit was not compatible with effective management which had been given by the Employer in its response to the Union's application to the CAC. These reasons were, first, that it was artificial and negligible in size compared with the Employer's business as a whole and, second, that it was artificial and unworkable to require the Employer to consult and negotiate over pay, hours of work and holidays with such a small sub-section, particularly where terms and conditions were set at a national and international level. The Union submitted that these reasons did not explain why its proposed bargaining unit was not compatible with effective management but merely why the Employer thought that this unit was undesirable. The Union submitted that in terms of management function the bargaining unit would continue to be managed in the same way and by the same line managers and would not, therefore, hinder the day-to-day operations of the Regional Distribution Centre ("RDC") or effective management. The Union stated that there were numerous examples of other companies which had structures which included both unionised

and non-unionised sites which managed their business quite effectively at both a local and national level. The Union cited *R (Kwik-Fit (GB) Ltd)* v *Central Arbitration Committee* [2002] EWCA Civ 512 as showing that the fact that the Employer in question was a national company with centralised policies did not demonstrate why the bargaining unit could not 'co-exist' with effective management. The Union said that it had sought to reach a negotiated agreement with the Employer and to include Acas in these discussions but that the Employer had refused to engage in such a process. The Union said that it intended to forge a relationship with the Employer that was productive and beneficial for both parties rather than to seek to initiate a confrontational environment. During the hearing the Employer referred the Union to a leaflet which the Union had distributed to staff at Bridgend which included the words "You Are Employed Not Enslaved!!" and asked whether this language showed a non-confrontational intent. The Union said that this had been produced in a context where members were angry because they were going into work early with no finish time and were not being allowed to leave. The Union referred to the witness statement of the Operations Director of Lidl UK GmbH, the Employer's parent company, which referred to concern amongst some staff about finish times and also stated that this situation had largely been rectified through an active campaign to recruit more Warehouse Operatives at Bridgend. The Union said that its subsequent literature had not been inflammatory in nature.

10. The Union stated that the Warehouse Operatives at Bridgend had actively sought the Union out with the aim of gaining recognition. The Union stated that this group was geographically and professionally isolated from other parts of the Employer, being 70 miles from the next RDC and separate from the Employer's stores, whose staff had different job titles and different roles. The Union submitted that, although the Employer was a national company with centralised policies and procedures, there was still a significant degree of autonomy at the Bridgend RDC. The Union stated that the disciplinary and grievance processes were conducted by management on site, as were holiday allocations, and shift patterns were also run at the discretion of local managers. In addition any allocation of overtime and hours of work was at the discretion of the local management team and the hours of work clause in the contract of employment made specific reference to start and finish times being explained by the line manager. The Union submitted that the bargaining units proposed by the Employer would make it virtually impossible for any union to gain recognition.

11. In relation to the desirability of avoiding small fragmented bargaining units, the Union submitted that a bargaining unit of approximately 221 workers would not lead to this result. The Union cited *R (Cable and Wireless Services UK Ltd)* v *Central Arbitration Committee* [2008] EWHC 115 (Admin) in support of the point that numerical smallness did not of itself result in fragmentation. The Union also submitted, citing this case, that there was no evidence that to grant a group of workers collective bargaining rights would necessarily conflict with a one-company ethos because, in reality, such problems were likely to be avoided by the employer in question. The Union cited *R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee*[1], which it said had made clear that simply because a large national company operated a uniform set of policies this did not in itself mean that a single-site recognition agreement would result in fragmentation, and said that the Union itself frequently bargained on a single site within a multi-site company. The Union referred to the composition of category 6 employees within the Employer, which the Employer had said included warehouse staff, store workers, and junior office staff as well as the HR administrative staff, cleaners and maintenance team in each RDC. The Union stated that there were five different contracts within category 6. The Union also pointed to the enhanced pay rate applicable to employees working within the M25 and the night shift premium payable in five of the Employer's nine warehouses. The Union asked why its proposed bargaining unit would produce fragmentation if these differences in terms did not and submitted that these differences meant that it could no longer be said that there was 'one Lidl'.

12. The Union said that there were no existing national and local bargaining arrangements of which either the Union or its members at Bridgend RDC were aware. This meant that the proposed bargaining unit had no influence or formal method of discussing issues with the Employer on a national level.

13. The Union submitted that all the employees in the proposed bargaining unit were categorised by the Employer as Category 6 and as Warehouse Operatives. They had a common job description and all worked at the Employer's Bridgend RDC. They were subject to induction guidelines which were specific to Warehouse Operatives and were a distinct group and saw themselves as such. The Union stated that they were not with any frequency or regularity requested to work at other locations within the Employer, despite a generic clause

[1] See paragraph 9 above.

in their contract; the only occasion of which the Union was aware of any mobility was when there was a catastrophic event at Bridgend and the Warehouse Operatives were given the opportunity to work at other locations for a temporary period. The Union stated that the nearest RDC to the Bridgend RDC was some 70 miles away. The Union pointed to the CAC decision in *Unite the Union* v *Kellycare* TURI/781/2012 as showing that when workplaces were far apart they could be in separate bargaining units.

Summary of the Employer's submissions

14 The Employer explained that it was a service company which supplied staff to its parent company Lidl UK GmBH, a company registered in Germany, which operates 637 supermarket stores and associated support functions within England, Scotland and Wales. The Employer said that as of 26 April 2016 it employed 18,203 employees to operate the stores and support functions; no staff were directly employed by Lidl UK GmbH. Lidl UK GmBH is, in turn, a subsidiary of Lidl Stiftung & Co KG ("Lidl International") which operates in 26 countries in Europe (plus further countries outside Europe) and which makes important and strategic decisions for the Lidl group throughout Europe. The Employer said that decisions on pay, hours and holidays are taken by Lidl International following submissions by Lidl GmbH UK.[2] The Employer said that all employees are categorised, worldwide, according to their job specification, there being eight principal categories. The Employer said that it had a central vision based on set policies and procedures which worked successfully throughout the UK and Europe.

15. The Employer stated that its UK operation was co-ordinated from its Head Office in Wimbledon but day-to day operational functions were divided into nine major geographical distribution areas, each with its own administrative, warehouse and distribution centre. Bridgend was one of these nine RDCs. Each RDC has its own HR function but this is purely administrative and does not set policy or take decisions. The Employer said that a Regional Director was responsible for the stores and warehouse within in a given region, supported by (amongst others) a Head of Logistics, Heads of Sales and a Head of Administration. Area Managers (category 4 employees, responsible for 4-6 stores), report into the Heads of Sales; Warehouse Team Managers are also category 4. Warehouse staff are category 6 employees, a

[2] See further paragraph 17 below.

category which also includes stores workers and junior office staff and, at 14,675 employees, makes up 81% of the workforce. The HR administrative staff, cleaners and maintenance team within each RDC are also category 6.

16. The Employer said that it was a national business; all its policies and procedures were set out at a national level and all its warehouses were treated and required to perform in the same way. The Employer said that the local data for each RDC was known to the management team within the region, which was expected to act on their own initiative to deal with local problems. The performance of individual regions was judged on a set of common KPIs, which were calculated by its management accounts team at Head Office. Lidl UK GmbH collated the KPI figures and submitted a single set of KPIs covering all nine RDCs to Lidl International. The Employer said that it did not measure the profitability of individual regions or that of individual warehouses or stores and did not know this information; profitability was worked out for the whole of the UK. The Employer said that the only published information on profitability was that of Employer itself (as filed at Companies House) which always showed a small profit because, as a service company, it charged a small premium on the cost of employing and providing staff. The only other profitability figure known within the UK was the consolidated result of Lidl International.

17. The Employer said that it paid a basic salary package (plus pension) together with some benefits such as healthcare, depending on seniority, to all its employees and that it did not operate a bonus policy or have any share or incentive schemes. The Employer said that standard rates of pay for all employees enabled simpler and more efficient payroll processes. Pay was reviewed on a UK (not local or regional) basis. Lidl UK GmbH was required to submit remuneration proposals to Lidl International in December of each year. These proposals were based upon a review conducted by the Employer's HR department. Once all 26 European countries had submitted their remuneration proposals, the requests from each country were discussed, normally by the executive board of Lidl International and each country's Managing Director and Administration Director. After discussion, and often after a number of revised proposals going back and forth at international level, the annual pay plan for each country was set. The Employer said that mid-year changes occurred rarely but could happen based on group decisions; for example, the Lidl International board had wanted it to be the first UK supermarket chain to commit to paying the living wage and this was discussed, agreed and implemented within three or four weeks. In relation to hours, the

Employer explained that it calculated the number of hours needed at each RDC centrally for each year. The annual plan was completed in November for the year commencing 1 March so the hours required were set up 17 months in advance. It was then for each RDC to allocate those hours amongst staff, whereupon rotas for the staff were published two weeks in advance. The Employer said that in practice there was little variation from week to week because most warehouse employees were on 30-40 hour a week contracts and the number of pallets to be delivered was reasonably regular and predictable. The Employer said that it had a small bank of casual staff to help with any shortfall. The Employer said that the regions had little discretion to alter hours because they were budgeted a specific number although there was an understanding that a marginal discrepancy between budgeted hours and actual hours would be retrospectively approved if justified. The Employer said that although overtime was compulsory under employment contracts, in practice it tried to agree overtime with staff. The Employer said that dissatisfaction among some Warehouse Operatives at Bridgend who felt that they were being asked to work more hours than they wanted, which was due to issues around replacing employees who had left, had now been largely rectified. The Employer said that holiday provisions were identical for all category 6 employees and that it used bespoke time and attendance/operational software which was used across the whole of Europe.

18. The Employer contended that the bargaining unit proposed by the Union was not appropriate. In deciding the question of appropriateness, the Employer contended that the starting point was "the object of encouraging and promoting fair and efficient practices and arrangements in the workplace" as set out in paragraph 171 of the Schedule. Against that background, the primary question was "the need for the unit to be compatible with effective management". The Employer emphasised that that the Schedule referred to the need (not desirability) for compatibility with effective management and contended that "promoting...efficient practices" was the standard against which that must be judged. The Employer referred to paragraph 3(3) of the Schedule, which states that "references to collective bargaining are to negotiations relating to pay, hours *and* holidays" (emphasis added), and contended that if a proposed bargaining unit was not compatible with effective management for any of three core topics, then there would not be effective bargaining in respect of "pay, hours and holidays", and thus the bargaining unit would not be appropriate. The Employer cited *British Airline Pilots' Association v JET2.COM Ltd* [2015] IRLR 543 in which Supperstone J had held that the scope of negotiations extended only to contractual matters on pay, hours and holidays and that it did not extend to associated matters which fell

outside the strict contractual terms (such as, in that case, rotas). The Employer said that all the matters to which the Union had referred in its submission as being subject to local autonomy (holiday allocations, shift patterns, allocation of overtime and hours of work, together with disciplinary and grievance processes) were outside the core topics of collective bargaining as defined in this case.

19. The Employer said that as at 26 April 2016 the proposed bargaining unit comprised 223 employees out of a total workforce of 18,203, equivalent to 1.2%. The Employer said that its principal argument was that this unit was too small to be compatible with effective management. It was both a statistically insignificant group of the workforce and an artificial one given, for example, that all category 6 employees worked under the same terms and conditions of employment. The Employer explained that there were five contracts for category 6 employees, including a contract for Warehouse Operatives, but said that each of these five contracts was materially the same as the others apart from job title; small variations on the required notice periods; and the absence of a probationary clause in the temporary contract. Thus, for example, all five contracts had the same clause covering analysis of till data, even though Warehouse Operatives would never have reason to go near a till. The Employer said that this was all part of the 'one Lidl' culture and, importantly, enabled the Employer to move employees quickly from warehouses to stores to head office without any need to change their terms and conditions. The Employer said that setting one warehouse apart would restrict movement of personnel between the regions or between the warehouse and the stores within one region. In answer to a question from the Panel the Employer said that around five to ten Warehouse Operatives at Bridgend had transferred from the warehouse to its stores in the last six months but that this had been done at the request of the employee concerned. The Employer confirmed that balancing staff between the warehouse and the stores did not happen with any regularity either on a daily or a weekly basis.

20. The Employer emphasised that it did not set the pay or holidays for its employees, which were set by Lidl International in discussion with Lidl UK GmbH (see paragraph 17 above). The Employer said that ultimately the parent company could pay no heed to the results of any negotiations between the Employer and the Union and it was not compatible with effective management of the Employer to be placed in a position where it was at risk of industrial action over matters over which it had no control. The Employer contended that, although the same point would apply to a wider bargaining unit, this would be to a lesser

extent because Lidl UK GmbH and Lidl International would be more willing to enter into direct negotiations with a union representing what they regarded as a statistically significant group of employees of a subsidiary. The Employer submitted that if the bargaining unit comprised only 1.2% of employees – leaving 98.8% outside the bargaining unit – these parent companies were likely to be able to ignore the existence of the recognition agreement with impunity. The Employer said that it was "verging on absurd" to suggest that it was compatible with effective management to carve out 223 employees in a particular warehouse and treat them differently; in addition, the absence of profitability data for each region made pay bargaining at a regional level incompatible with effective management. The Employer also suggested that the absence of regional information pertaining to the allocation of capital expenditure within Bridgend, or the return on capital investment, would place the Employer in *prima facie* breach of the Acas Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purposes. In relation to hours, the Employer said that it would not be compatible with effective management to remove Bridgend from the UK national plan and allow its management to decide itself what hours to allocate to Warehouse Operatives. The Employer said that, insofar as the Union may argue that there was room to negotiate over matters such as overtime, it would not be compatible with the 'one Lidl' approach to management to have separate contractual provision for 223 of the 14,675 category 6 employees, all of whom had the same contractual provision governing overtime. The Employer submitted that negotiation on allocation of hours between individuals and the production of rotas would lie outside the contractual provisions on hours and would therefore be outside the scope of statutory recognition. The Employer said that it would not be compatible with effective management to give 223 employees in Bridgend different contractual holiday entitlements from other category 6 staff. It would also remove the Employer's ability to move staff freely between roles and regions and would require the Employer to re-haul/re-programme its bespoke software at a European level which (if could be done) would be disproportionately expensive and not compatible with effective management.

21. The Employer said that a key point in its submission that the Union's proposed bargaining unit was not compatible with effective management was the policy of 'one Lidl', a strong culture of one organisation with a single set of rules and an exceptionally flat management structure. The Employer said that the standardisation and the lack of deviation from that standard upon which its culture was based allowed costs and prices to be kept

exceptionally low and that they could not be kept so low without its model of very simple and standardised decision-making. This model meant that the concept of effective management was very different in the Employer than in, say, Tesco. The Employer contended that its 'one-company' approach to pay distinguished it from the Employer in *Cable and Wireless*, a case on which the Union had relied (see paragraph 11 above), and that the fact that other companies may have granted single-site recognition did not mean that it was compatible with effective management. The Employer submitted that any bargaining unit which was not compatible with the 'one Lidl' approach was neither efficient nor compatible with effective management. The Employer said that if its flat management structure had to start dealing with negotiations in individual regions, or individual groups of employees within those regions, it would distract senior Head Office management from their fundamental role of growing the company and would involve a disproportionate amount of time, effort and energy. The Employer said that the recruitment brochure which the Union was passing round to Warehouse Operatives at Bridgend suggested that the Union would be able to achieve things it could not achieve if the proposed bargaining unit were to be accepted and that this would almost certainly lead to disgruntlement within the workforce, a further reason why the proposed bargaining unit was not compatible with effective management.

22. The Employer said that all category 6 employees were paid the "living wage" set by the Living Wage Foundation, subject to increases for length of service. In line with its commitment to being a living wage employer, employees who worked within the M25 received an enhanced rate. Apart from this the only regional variation was that night shift premiums (an additional £1 for each hour worked between 11.00pm and 5.00 am) were paid in five of the nine warehouses, including Bridgend. The Employer said that this was because those five warehouses were in the middle of large retail parks and it proved necessary to offer enhanced rates to recruit and retain night staff due to market conditions. The Employer said that the region requested the premium from Head Office and it was discussed and deployed as required. The Employer said that the decision was taken nationally not locally. In answer to a question from the Panel the Employer explained that the enhanced rate for workers within the M25 and the night shift premium took the form of an additional payment on its software.

23. The Employer acknowledged that any selection in a bargaining unit resulted in fragmentation and that fragmentation was not necessarily incompatible with effective

management. However the Employer contended that in the case of the proposed bargaining unit there was a form of 'double segmentation' which compounded fragmentation and made it not efficient or compatible with effective management. The Employer said that if the CAC agreed that the proposed bargaining unit was not appropriate, then the Employer proposed four alternative bargaining units, listed in descending order of suitability: (a) all employees nationally; (b) all category 6 employees nationally; (c) all warehouse operatives within the nine UK Regional Distribution Centres and (d) all category 6 employees within the Bridgend region. The Employer said that the Union's proposed bargaining unit compounded both job description and location; it was not just Warehouse Operatives (the employer's proposal (c), which would cover 13.4% of the workforce) or just category 6 employees within the Bridgend region (proposal (d))[3] but a combination which left 98.8% of staff outside the bargaining unit. Moreover it did not even cover all workers in the Bridgend RDC as it excluded employees in category 5 and above and the 39 other category 6 employees (cleaners, administrative and other support staff) based in that RDC. The Employer said that this level of splitting-up the workforce had been rejected by the CAC in *Unite the Union* v *Kellycare*[4]. The Employer said that *Kwik-Fit*[5] had involved a bargaining unit defined by reference to geography; *Cable and Wireless*[6] a unit defined by reference to job description; and stated that the CAC had not accepted a split based on both geography and job title together as the proposed bargaining unit involved. The Employer said that if it wanted to make changes to the pay, hours and holidays of Warehouse Operatives, the proposed bargaining unit would mean either different treatment for the Bridgend Warehouse Operatives or having to deal/negotiate with nine regional groups of Warehouse Operatives. Neither of those situations was efficient or compatible with effective management. The Employer said that the Union had not said why its proposed bargaining unit would be compatible with effective management whereas the Employer had pointed to a multitude of reasons why it was not.

24. The Employer said that there were no existing national or local bargaining arrangements. The only union recognised within the group was in Spain, where there was a national recognition agreement covering all employees. In answer to a question from the

[3] In answer to a question from the Panel the Employer stated that there were approximately 40 stores in South Wales, the nearest of which was one mile from the Bridgend warehouse. In its written evidence the Employer stated that there were 60 stores in the region supplied from the Bridgend RDC.
[4] See paragraph 13 above.
[5] See paragraph 11 above.
[6] See paragraph 11 above.

Panel the Employer said that there was no staff representative group within the Employer. The Employer said at the hearing that there were staff representatives on Health and Safety Committees but it did not know how these representatives were chosen. The Employer explained that it employed a Personnel Welfare Co-ordinator within each region whose job was to support employees and help resolve concerns where employees did not want to approach their manager or use the formal procedures, or to act as a bridge for employees who wished to remain anonymous.

25. With reference to the desirability of avoiding small fragmented bargaining units within an undertaking, the Employer reiterated that the Union's proposed bargaining unit covered just 1.2% of the Employer's 18,203 employees and just 1.5% of the Employer's 14,675 category 6 employees in the UK, leaving 98.8% of the workforce, and 98.5% of the category 6 employees, outside the proposed bargaining unit. The Employer said that there was a genuine single status as regards the terms and conditions of employment of category 6 employees, which would be destroyed if the proposed bargaining unit were to be adopted. The Employer said that the proposed bargaining unit would result in local fragmentation within the Bridgend RDC, leading to tension between the 223 Warehouse Operatives and, first, the 39 other category 6 employees employed in the Bridgend RDC and second, the 957 other category 6 employees costed to the Bridgend RDC (mainly store employees in the Bridgend area), all of whom were currently employed on the same terms and conditions. The Employer also submitted that the proposed bargaining unit resulted in national (as well as local) fragmentation; different terms for Warehouse Operatives at Bridgend RDC would cause tension between them and the remainder of the 2,443 Warehouse Operatives in the other eight regions (the Bridgend Warehouse Operatives representing just 9.1 % of all the Warehouse Operatives). The Employer submitted that the logical consequence of the Union's position was that the Employer could end up recognising a substantial and unworkable number of bargaining units, each competing with one another, including: nine separate bargaining units for the Warehouse Operatives in each of the nine regional RDCs; nine further bargaining units, for the other category 6 employees within the RDCs; at least nine (and possibly 637) further bargaining units, either one for the stores within each of the nine regions, or even one for each of the 637 stores; and one for the category 6 employees in head office in Wimbledon. If the net were spread wider than category 6 employees, there could be scope for more applications for recognition.

26. The Employer submitted that the characteristics of the workers in the proposed bargaining unit were indistinguishable, from a practical and legal point of view, from the characteristics of the Warehouse Operatives at the other eight RDCs. The Employer also submitted that, with one *caveat*, the characteristics of the 223 workers in the proposed bargaining unit were indistinguishable from the other 14,229 category 6 employees employed at the other RDCs and stores up and down the country. The only practical difference between the Warehouse Operatives and the other category 6 employees was the job description, i.e. goods in, goods out and selection. However there were real similarities: store workers were responsible for (amongst other things) stacking shelves and picking out of date stock from the shelves and arranging for its dispatch, and there was little difference, if any, between that and what the Warehouse Operatives did. The Employer also submitted that the job description was a matter which fell outside the core topic of pay, hours and holidays. The Employer submitted that insofar as "characteristics" includes the culture of the workplace, corporate values and principles were shared throughout the company and were applied and encouraged amongst all staff, irrespective of role or location.

27. The Employer acknowledged that the workers in the proposed bargaining unit were self-contained in the sense they were all based at the Bridgend RDC. However the Employer stated that the Union was not seeking recognition for all the employees at the Bridgend RDC, nor even all the category 6 employees based at Bridgend; rather it wished to cherry-pick, and was excluding (amongst others) administrative staff working at that location. The Employer also pointed out that the bulk of the category 6 employees costed to the Bridgend RDC, i.e. the 996 category 6 employees costed to the RDC who fell outside the 223 in the proposed bargaining unit, were excluded. From a management perspective, the proposed bargaining unit covered only 18% (223 of 1,219) of the category 6 employees costed to Bridgend. The Employer submitted that recognising a union for the purpose of negotiating for those 18% of local employees was not compatible with efficient practices or effective management and this was even more the case when bearing in mind that there were nine otherwise identical regions. The Employer said that the Bridgend warehouse was no more isolated than any warehouse in any region.

28. The Employer commented further on the four bargaining units which it proposed (see paragraph 23 above). The Employer submitted that "All Employees Nationally" (proposal (a)) was the most practical and most effective bargaining unit given that management

revolved around the 'one Lidl' concept and in the light of the flat management structure and standard contracts of employment. The Employer also submitted that since all important decisions were taken at an international level, by Lidl International in Germany, then "collective consultation" with the workforce as a whole had the greatest chance of influencing the parent company. The Employer submitted that "All Category 6 Employees" (proposal (b)) was also a practical bargaining unit which would be compatible with effective management, although not to the same degree as proposal (a). Category 6 employees represented 81% of the workforce nationally and their terms and conditions were identical as far as the core topics of pay, hours and holiday were concerned. The Employer submitted that if over 50% of category 6 employees wanted the Employer to "consult" with a union on pay, hours and holidays, it would be able to have meaningful negotiations with a recognised union and Lidl International would take more notice of a UK negotiation covering 81% of the workforce than it would of a local negotiation covering just 1.2%. The Employer submitted that "All Warehouse Operatives within the nine UK Regional Distribution Centres" (proposal (c)) was undesirable but a more sensible solution, and less incompatible with effective management, than the bargaining unit proposed by the Union. "All Category 6 Employees within the Bridgend Region" (proposal (d)) was the Employer's least preferred option as it was incompatible with effective management for the same reasons as the Union's proposed bargaining unit but if the CAC took a different view, it was less unworkable than that proposed by the Union.

29. The Employer submitted, in conclusion, that the Union's proposed bargaining unit was not appropriate. The Employer stated that a bargaining unit which covered just 1.2% of the workforce would deprive the Employer of the operational efficiency it needed to act quickly and maintain its position as the UK's (and Europe's) leading low-cost supermarket. The Employer submitted that there was no credible distinguishing factor which allowed the Union to separate out goods in, goods out and selection warehouse staff at the Bridgend RDC, who were employed on the same terms and conditions as all other category 6 employees in the RDC; all category 6 employees in the Bridgend stores; all category 6 employees in the other eight RDCs; and which represented just 1.5% of the 14,675 category 6 employees in the UK. The Employer invited the CAC to select either of its alternative proposed bargaining units (a) or (b) as set out in paragraph 28 above.

Considerations

30. The Panel is required, by paragraph 19(2) of the Schedule to the Act, to decide whether the 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 it 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." The Panel's decision has been taken after a full and detailed consideration of the views of both parties as expressed in their written submissions and amplified at the hearing.

31. The Panel's first responsibility is to decide, in accordance with paragraph 19(2) of the Schedule, whether the Union's proposed bargaining unit is appropriate. The Panel notes that it cannot reject the Union's proposed bargaining unit because it feels that a different unit would be more appropriate nor, in considering whether it is compatible with effective management, can it consider whether it is the most effective or desirable unit in that context.[7]

32. The Panel considers that the Union's proposed bargaining unit is compatible with effective management. The Employer's operation is divided into nine major geographical areas, each of which has its own Regional Distribution Centre, of which Bridgend is one.

[7] *R* (*Cable and Wireless Services UK Ltd* v *Central Arbitration Committee* [2008] EWHC 115 (Admin), Collins J at [9].

Each region has its own management team which is expected to deal with local problems. A Regional Director has responsibility for the stores and warehouse within a given region, supported (by (amongst others) a Head of Logistics, Heads of Sales and a Head of Administration. Disciplinary and recruitment matters are dealt with by the Team Manager of the warehouse. There is a management structure in place, therefore, which reflects the geographical scope of the Union's proposed bargaining unit.

33. The Employer emphasised to us the importance of the 'One Lidl' culture and the principles of standardization to its operation, exemplified in the fact that there is a single pay scale applicable to all its category 6 workers. However the Employer informed us of two exceptions to this principle: an enhanced rate for employees who work within the M25, in line with the Employer's commitment to being a living wage employer, and a night shift premium paid in five of its nine warehouses, including Bridgend, due to market forces in those areas. It is evident, therefore, that the Employer is able to accommodate additional allowances within its structures and payroll systems.

34. The Panel appreciates that the scope of regional management for unilateral action can be limited. In relation to the night shift premium we were told that a region requests the premium from Head Office and that the decision to pay it is taken nationally not locally. However this does not obviate the fact that it is consistent with the Employer's current practice for the request to make an additional payment to be initiated at regional level. The Employer confirmed to us that, although it is not its current practice to compile information on personnel costs for an individual warehouse separately the information was technically available to enable it to do so. We understand that there is currently little discretion to alter hours at regional level and that the holiday provisions are currently standard for all category 6 staff. We also understand that current software systems are standardised. Any alteration to the existing terms on hours and holidays would require the consent of both parties to the collective bargaining process. In the event that the parties were to negotiate changes to hours or holidays we would expect that the Employer would adapt its software systems to implement these changes.

35. In relation to the roles within the Union's proposed bargaining unit, the Panel notes that Warehouse Operatives are treated as a distinct group with a separate contract. Although the Employer's written evidence emphasised the importance of its ability to transfer

Warehouse Operatives to stores, we were told in oral evidence that this had occurred only at the request of the individual concerned. We consider therefore that a bargaining unit composed only of Warehouse Operatives is consistent with effective management.

36. 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. The Panel does not consider that there are any existing national or local bargaining arrangements in this case. In relation to the desirability of avoiding small fragmented bargaining units within an undertaking, the Union's proposed bargaining unit would be the sole existing bargaining unit within the Employer's undertaking and there is no evidence of any current demand elsewhere. As far as the characteristics of workers are concerned, the Panel notes that Warehouse Operatives are treated as a distinct group with a separate contract and are easily identifiable. All the workers in the proposed bargaining unit are based at a single location. The Panel is satisfied that its decision is consistent with the object set out in paragraph 171 of the Schedule.

Decision

37. The Panel's decision is that the appropriate bargaining unit is that proposed by the Union, namely "Warehouse Operatives working in the following sections: Goods In, Goods Out & Selection". The location of the bargaining unit is the Employer's Bridgend Regional Distribution Centre, Waterton Industrial Estate, Bridgend.

Panel

Professor Gillian Morris, Panel Chair
Ms Judy McKnight CBE
Mr Paul Wyatt

25 May 2016

Appendix

Names of those who attended the hearing on 11 May 2016:

For the Union

Mervyn Burnett	-	GMB Senior Organiser
Lorraine Gaskell	-	GMB Organiser

For the Employer

Daniel Barnett	–	Counsel
Michael Creamore	–	Solicitor, Gregsons Solicitors
Joanna Brewer	–	Head of Department - HR Lidl Ltd.
Chris Walker	–	Operations Director - Lidl Ltd