Case Number: TUR1/909/2015
1 June 2015

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DECISION ON WHETHER TO ACCEPT THE APPLICATION

The Parties:

Unite the Union

and

Safehouse Habitats (Scotland) Ltd

Introduction

1. Unite the Union (the Union) submitted an application to the CAC on 10 April 2015 that it should be recognised for collective bargaining by Safehouse Habitats (Scotland) Ltd (the Employer) for a bargaining unit comprising the "Technician group" based at the Employer's site at Strathmore House, Charles Bowman Avenue, Claverhouse Industrial Park, Dundee. The CAC gave both parties notice of receipt of the application on 15 April 2015. The Employer submitted a response to the CAC dated 21 April 2015 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 Linda Dickens MBE, Chairman of the Panel, and, as Members, Mr Paul Gates OBE and Mrs Maureen Shaw. The Case Manager appointed to support the Panel was Nigel Cookson.

Issues

3. The Panel is required by paragraph 15 of Schedule A1 to the Act (the Schedule) to decide whether the Union's application to the CAC is valid within the terms of paragraphs 5 to 9; is made in accordance with paragraphs 11 or 12; is admissible within the terms of paragraphs 33 to 42; and therefore should be accepted.

The Union's application

4. In its application the Union said that it had written to the Employer formally requesting recognition on 26 February 2015 and that the Employer failed to respond. A copy of the request letter was attached to the application although it was dated 25 February 2015 rather than 26 February.

5. According to the Union, there were 93 workers employed by the Employer with 50 of these falling within the definition of the bargaining unit proposed by the Union. The Union stated that it had 37 members within the proposed bargaining unit. Asked to provide evidence that a majority of the workers in the proposed bargaining unit were likely to support recognition for collective bargaining, the Union said that it had held meetings with its members and they had indicated that they sought recognition and that membership had grown significantly since the Union had agreed to seek recognition for the proposed bargaining unit.

6. The Union explained that it had selected the bargaining unit on the basis that it had strong membership and that it was compatible with effective management adding that there was no evidence that effective management would be compromised by the proposed bargaining unit.

7. The Union noted there had been a previous application in respect of this bargaining unit. The Employer had claimed that it had not received a piece of information which supported the application and to avoid any doubt over the validity of the application the Union had withdrawn that one and was submitting a new application. The date of the previous application was 24 March 2015 under reference TUR1/0907/15.

8. Finally, the Union confirmed that there was no existing recognition agreement that covered any of the workers in the proposed bargaining unit.

The Employer's response to the Union's application

9. The Employer said that no written request had been received from the Union in respect of this application. It confirmed that a letter had been received on 26 February 2015 but that this was in respect of the application under reference number TUR1/0907/2015 which was subsequently withdrawn. On this basis the Employer submitted that this letter could not be relied upon as satisfying the conditions for a subsequent application. The Employer went on to explain that it had not responded to the original request for recognition as it was addressed to the Chief Executive Officer who was abroad on business followed by a period of absence due to ill health so it was not opened until 25 March 2015 following receipt of the application by post. The Employer said that if it had not been for the delay in identifying the request for recognition it would have suggested that Acas be requested to assist the parties.

10. The Employer confirmed that it had received a copy of the current application form directly from the Union on 14 April 2015. Accompanying the form was a letter dated 25 February 2015 which supported the previous application and a copy "proof of delivery" slip. The Employer further confirmed that it did not agree the proposed bargaining unit on the basis that it would hinder the effective management of the company and set out its reasons.

11. The Employer stated that it employed a total of 95 workers and that it agreed with the Union's figure as to the number of workers in the proposed bargaining unit. As for whether it agreed with the Union's estimate of membership in the proposed bargaining unit the Employer said that it had no evidence in this regard but had noted that not a single technician had approached it on the question of union recognition even though it had close contact and communications with this group of workers on a group and individual basis. When asked for its views as to whether a majority of the workers in the bargaining unit were likely to support recognition, it explained that the business had recently changed hands and that this, coupled with the well publicised difficulties in the oil and gas industry which had resulted in compulsory redundancies and consultation in relation to changes to the technicians' terms

and conditions, had unsettled the workforce and this had probably led to the application being made by the Union. However, since then the technicians had elected workplace representatives and others had communicated directly with management themselves over the changes. The Employer believed that the Union's views as to the wishes of the workers were out of date and should have been reviewed before the application was lodged.

12. The Employer confirmed that there was no existing agreement covering any of the workers in the proposed bargaining unit.

13. When asked if it was aware of any previous application under the Schedule by the Union in respect of this or a similar bargaining unit the Employer did not answer although it had referred to the earlier application under reference number TUR1/0907/2015 earlier in its response.

14. The Employer did not contend that the Union's application failed to meet any of the other admissibility or validity criteria.

Union's comments on the Employer's response

15. The Employer's response was copied to the Union and its comments invited. In an email dated 28 April 2015 the Union said that the current application recorded a total of 96 workers employed by the Employer on information it had supplied in respect of the previous application which was withdrawn. The proposed bargaining unit included both categories of technician which in total numbered 50.

16. The Union believed there was no evidence the effective management of the business would be compromised by the proposed bargaining unit.

17. The Union noted that the Employer was dealing with the proposed bargaining unit as a group in relation to changes to terms and conditions of employment. This further supported its application in regard to the clearly identifiable unit.

18. Finally, the Union had held regular meetings with its members to discuss the Employer's proposed changes to terms and conditions and at these meetings there had been a strong desire for recognition.

The Membership Check

19. To assist the determination of two of the admissibility criteria specified in the Schedule, namely, whether 10% of the workers in the proposed bargaining unit are members of the union (paragraph 36(1)(a)) and whether a majority of the workers in the proposed bargaining unit would be likely to favour recognition of the union as entitled to conduct collective bargaining on behalf of the bargaining unit (paragraph 36(1)(b)), the Panel proposed an independent check of the level of union membership within the proposed bargaining unit. It was agreed with the parties that the Employer would supply to the Case Manager a list of the workers within the proposed bargaining unit and that the Union would supply to the Case Manager a list of paid up members within that unit. It was explicitly agreed with both parties that, to preserve confidentiality, the respective lists would not be copied to the other party and that agreement was confirmed in a letter from the Case Manager to both parties dated 30 April 2015. The Union's list of members was received by the CAC on 1 May 2015 and the list of workers was received from the Employer on 6 May 2015. The Panel is satisfied that the check was conducted properly and impartially and in accordance with the agreement reached with the parties.

20. The Employer provided a list with 50 names, dates of birth and job titles and the Union provided a list with 35 names confirming in its covering email that it was a list of paid up members as employed by the Employer.

21. According to the Case Manager's report, the number of Union members in the proposed bargaining unit was 34, a membership level of 68%. A report of the result of the membership check was circulated to the Panel and the parties on 6 May 2015 and the parties were invited to comment.

Union's comments on the results of the membership check

22. The Union, in an email dated 15 May 2015, said that it was happy with the content of the report and made no further comment.

Employer's comments on the results of the membership check

23. On 15 May 2015 the Employer commented in detail on the results of the membership check. Firstly, it acknowledged the CAC's conclusion that 38[1] workers in the proposed bargaining unit were currently members of the Union and so agreed that paragraph 36(1)(a) was made out.

24. However, the Employer did not agree that paragraph 36(1)(b) was made out. , The Employer stated that, importantly and significantly, it did not know what was said to the workers at the time they became members and noted that the Union offered its members many benefits such as the provision of legal advice and representation for Employment Tribunal claims and accidents suffered at work, which did not involve any element of Union recognition. Workers interest in the Union was fleeting and temporary, and was a direct response to the difficult and uncertain environment at that time, which had now passed.

25. The Union became active within the workforce around the time of compulsory redundancies in September and October 2014 which took place around the time of a change in ownership which could well have made workers more apprehensive about the future and brought about their interest in the Union. However, the Employer was now genuinely of the view that the workers now have considerable faith in the new management structure.

26. Finally, the Employer set out that there had just been a consultation to change the terms and conditions of employment of the workers which involved consultation with elected employee representatives during which period it became increasingly clear that a significant number preferred to engage in one to one consultations as opposed to allowing their elected representatives to negotiate on their behalf. It was at this time that the Employer became aware of the increasing dissatisfaction with the Union over a number of issues, from the

[1] The correct number as established by the Case Manager's report was 34.

Union trying to pursue other agendas as well as concern about the advice that the Union gave about the terms and conditions consultation process. Complaints were also received that workers felt pressurised to join the Union.

27. The Employer had attempted to obtain the workers' views on recognition but, due to the nature of their duties, communication was difficult. However, it had discussed the issue with the elected employee representatives' who confirmed that the workers had been receptive to the Union due to their concerns over the redundancies and subsequent changes to terms and conditions of employment, as well as the bleak outlook for the oil and gas industry. But since then, the workers' views of the Union had cooled since its initial involvement in late 2014.

28. The Employer stated that the workers were not clear about what recognition would entail and did not seem to appreciate that, should it be granted, the Union would have the right to conduct collective bargaining over pay, hours of work and holidays. They did clearly express a wish and desire to, in some way, formalise the current situation whereby employee representatives of the technicians are informed of important matters impacting upon the business, but to still allow individual consultation and negotiation should a technician want that.

29. In the Employer's view, it was significant that neither employee representative nor workers themselves had expressed a desire for union recognition and the Employer would argue that it was these representatives, rather than the Union, that had an up-to-date and accurate understanding of the technicians' views on Union recognition.

Employer's comments on the validity of the request

30. Also on 15 May 2015, the Employer commented on the validity of the Union's formal request for recognition. It agreed that the Union did send it a request in respect of the first application, which was subsequently withdrawn. However, the Union did not send a further request in respect of its second application, which was the current application before the CAC.

31. The Employer submitted that an intrinsic and necessary part of the application was the request set out at paragraph 4 of the Schedule. It was only if agreement could not be reached between the employer and the union that an application may be made to the CAC.

32. Here, the Union withdrew its first application and so the CAC was not able to take any further steps under the Schedule. If the CAC could not take any further steps, then any fresh application by the Union must start from scratch. In those circumstances any fresh application must, in order to be valid, include a fresh request. The Employer referred to the case of *RMT and Thales Rail Signalling Solutions Ltd ((TUR1/773/2012) 22 February 2012*, in particular paragraph 31;

> **"The Panel notes that there is nothing in the Schedule that requires a union to submit a fresh request to the employer prior to making a further application to the CAC unless the CAC had decided in relation to the first application that the initial request was not valid. The Panel has examined the request of 21 November 2011 and is satisfied that the Union made a valid request to the Employer within the terms of paragraphs 5 to 9 of the Schedule".**

33. The Employer submitted that the Schedule did not envisage the request "surviving" the withdrawal of an application. In particular, paragraph 17(2) confirmed that the CAC could not take any further action upon an application once it had been withdrawn. The natural reading of this paragraph was that a fresh application, starting from scratch, must then be commenced. A fresh request must be made for a fresh CAC application, as paragraph 4(1) made clear.

34. The Employer could not find any reference at all to the original request having to be remade if "The CAC had decided in relation to the first application that the initial request was not valid". Indeed, it submitted, if the original request could survive the withdrawal of its accompanying application, the Schedule would have set out the circumstances in which it would survive and the circumstances in which it would not.

35. If the CAC's current position was to be accepted, then a request made in March 2012 for a CAC application that was subsequently withdrawn, could then be used as a "request" for a subsequent application in March 2015 – assuming only that the CAC did not find the March 2012 request valid.

36. The Employer submitted that such an approach was not only disallowed by the clear wording of the legislation, but was also against the spirit of the legislation which emphasised the initial voluntary part of the formal recognition process.

37. The Employer further noted Research Papers enclosed with its comments, both of which clearly set out the statutory procedure to be followed. Neither document made any mention of the request surviving the initial CAC application. Indeed, the Employer had not been able to find any reference, save for the case which was sent to it by the CAC Case Manager referred to above.

38. Although the CAC did have some discretion to determine its own proceedings, this did not apply to the issue of the request. For all these reasons the Employer submitted that the CAC did not have the jurisdiction to consider the current application and so it must be rejected.

Union's final comments

39. The Employer's comments on the membership check and its submissions on the validity of the request were forwarded to the Union and its comments invited both in general and specifically on the question as to whether a majority of the workers in the proposed bargaining unit were likely to support recognition of the Union for collective bargaining purposes.

40. In an email dated 21 May 2015 the Union said that it did not wish to make general comment but in relation to recognition it would say that the majority of its members joined when the Union offered to seek recognition on their behalf so that any future proposed changes to terms and conditions would be collectively negotiated. In subsequent meetings the subject of recognition was raised by members as a priority and no members indicated otherwise.

41. The Union submitted that with 68% membership within the proposed bargaining unit and with its membership having indicated support for recognition, the application met the tests set out in paragraph 36(1)(a) and 36(1)(b) of the Schedule. The Union did not accept the

Employer's submission that its members did not seek the advantages of collective bargaining and no evidence in support of this assertion had been produced by the Employer.

Considerations

42. In determining whether to accept the application the Panel must decide whether the admissibility and validity provisions referred to in paragraph 3 of this decision are satisfied. The Panel has considered all the evidence submitted by the parties in reaching its decision.

Validity of the request

43. The Union made a formal request for recognition to the Employer by letter dated 25 February 2015, seeking discussions to obtain a Union recognition agreement. On 26 March 2015 the Union made an application (number 0907) to the CAC under paragraph 11 of the Schedule in respect of the identified bargaining unit. This application was withdrawn on 10 April 2015 before the CAC had determined whether to accept it. An email from the Union, which was copied to the Employer, stated it 'would like to withdraw and submit a new application'. The Employer had noted in its response to the first application that a supporting document referred to in the application had not been copied to it by the Union (as required by paragraph 34(b)) although it had been sent with the application to the CAC. The one page document in question concerned detail on union membership which the Union had not wished the Employer to see. Having withdrawn the original application, the Union submitted a new application for the identified bargaining unit a few days later on 14 April 2015 (number 0909, the one we are dealing with here) without this supporting document or reference being made to it.

44. The validity of the current application is challenged by the Employer on the grounds that no request for recognition has been made as required by paragraph 4(1). The question of whether a request letter can 'survive' a withdrawn application is seen by the Employer as a fundamental issue which goes to the jurisdiction of the CAC, and the Employer submits the CAC did not have the jurisdiction to consider the current application and must reject it.

45. We have given careful detailed consideration to the Employer's submission and supporting materials and taken full account of all the evidence before us. We do not accept that we have no jurisdiction to consider the current application and it is our view that the application is valid under paragraph 4(1) by virtue of the request letter to the Employer of 25 February 2015. A fresh formal request letter to the Employer is not required for this application to fulfil the validity requirements of the Schedule. We indicate below the considerations leading to this view.

46. The withdrawal of the first application, in the circumstances described above, led to the CAC ceasing to deal with the original application (0907) but that did not invalidate or cancel the Union's request for recognition made in the letter to the Employer of 25 February 2015. Nor has the Union withdrawn that formal request for recognition. Indeed it was in pursuit of recognition as requested in that letter that it made the current application, designed to overcome an error in the first one. Contrary to the statement in the Employer's submission on this point, a request is not made 'in respect of an application'. Rather, application to the CAC may follow a formal request for recognition where no voluntary agreement is reached.

47. The letter of 25 February 2015 fulfils the requirements of paragraph 8 (being in writing, identifying the union and the bargaining unit and making reference to the Schedule). There is clear evidence in the form of a signed proof of delivery slip that the request was received by the Employer on 26 February 2015 (fulfilling the requirement of paragraph 5). Other validity tests in paragraphs 5 – 9 are also met.

48. We are aware that the Case Manager drew the parties' attention to an earlier CAC decision where the Panel considered whether the Schedule required a union to submit a fresh request to the Employer prior to making a further application to the CAC (it held it did not). We do not attach undue weight to this decision since each case is decided by the CAC on its merits and we are not bound by decisions of other Panels. However our approach in this case is consistent with it and with the approach taken by the CAC in a number of cases over the years where a union has realised it made an error in its application (for example, some discrepancy in the description of the proposed bargaining unit in the application compared with the request letter, or – as here – including confidential membership information). This may be drawn to the attention of the union by the CAC, or may be realised by the union when

the employer responds. The union then wishes to amend its application to correct the error. In such cases a union can withdraw the original application and submit a fresh, correct one. To avoid confusion a new application number is assigned. Where a new application has been submitted remedying the error and the first one withdrawn the CAC has been consistent in its interpretation of the Schedule and accepted the request letter as satisfying the requirements of paragraph 4(1) in respect of the validity of the new replacement application. (The fact of a prior withdrawn application will not necessarily be noted in the acceptance decision.)

49. The Employer submits that the Schedule must be read as requiring a fresh request to be made otherwise a request made in 2012 followed by an application which is withdrawn could be used in relation to an application made in 2015. Although we consider this an unlikely scenario, it is nevertheless possible that a valid application to the CAC might be made some considerable time after the formal request to the employer for recognition was made, and where the original application had been withdrawn. A request could remain 'live' for example where an original application was withdrawn prior to the CAC determining its validity/acceptance in circumstances where the parties had agreed to try to reach a voluntary agreement but where, after a lengthy period during which meetings took place, the negotiation ultimately failed, at which point a new application to the CAC was made. It is the experience of the Panel that negotiations for a voluntary recognition agreement can take a long time, particularly if there is disagreement concerning the appropriate bargaining unit.

50. In further support of its argument the Employer submits that not requiring a fresh request letter would be 'against the spirit of the legislation which emphasises the initial voluntary part of the formal recognition process'. An emphasis on opportunities for voluntary agreement runs through the Schedule, as is noted in the Research Paper on the legislation provided as part of the Employer's evidence where it is stated: 'The function of these procedures is to allow the widest scope for voluntary agreement between unions and employers at the same time as providing a comprehensive process to fall back on when agreement is not forthcoming'[2].

[2] House of Commons Library Research Paper 04/03 *The Employment Relations Bill* 7 January 2004 at page 3.

51. The purpose of paragraph 4(1) is to ensure that an employer is not taken by surprise by an application being made to the CAC, allowing the opportunity for negotiations for a voluntary recognition agreement to be offered which could make such an application unnecessary. A time period is specified (paragraph 10) following receipt by the employer of the request letter which must elapse before a union can apply to the CAC. This is to allow the employer time to reply to the union to accept or refuse the request or to offer to engage in negotiations, with or without the assistance of Acas.

52. In this case the Employer did not respond to the Union before the end of the specified period allowing the Union to apply under paragraph 11(1)(a). The Employer tells us that the request letter was not opened on receipt, awaiting the return of the Chief Executive from leave and that, had this not have been the case, it 'would have taken up the opportunity to invite Acas to assist'. The Employer argues that a fresh request letter would have provided an opportunity to involve Acas and avoid the need for the second application. The Panel find it surprising that, in a company of around 100 employees, no proper arrangements were in place to deal with non-personal mail addressed to the Chief Executive Officer in his absence. However, even given the late opening of the letter, the Panel consider that the Employer still had opportunities to offer to engage in negotiations to reach a voluntary agreement, and a fresh request for recognition was not necessary to request or accept assistance from Acas. The Employer had the opportunity to contact the Union direct to offer negotiations once the request letter was opened but did not do so.

53. The Panel is satisfied, for the reasons above, that the Union made a valid request to the Employer within the terms specified in paragraphs 5 to 9 of the Schedule to recognise it for collective bargaining in respect of the bargaining unit as described in paragraph 1 of this decision.

54. The Panel is also satisfied that the application is not rendered inadmissible by any of the provisions in paragraphs 33 to 35 and paragraphs 37 to 42 and that it was made in accordance with paragraph 11 of the Schedule in that before the end of the first period the Employer failed to respond to the request.

55. The remaining issues are whether the admissibility criteria set out in paragraph 36 of the Schedule are met. In accordance with paragraph 36(1)(a) and (b), the Panel must determine whether members of the Union constitute at least 10% of the workers in the proposed bargaining unit, and whether a majority of the workers constituting the proposed bargaining unit would be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit.

Paragraph 36(1)(a)

56. The membership check shows 68% of the workers constituting the proposed bargaining unit are members of the Union. When asked, the Employer accepted that the test under Paragraph 36(1)(a) is met. The Panel is satisfied therefore that members of the Union constitute at least 10% of the workers in the proposed bargaining unit.

Paragraph 36(1)(b)

57. The Employer argues that the fact of union membership cannot be taken to indicate support for recognition of the Union for collective bargaining. It suggests they may have been attracted to membership for other benefits. No evidence to support this view, which is contested by the Union, has been provided. Further, as noted above, the Employer submitted detailed information concerning events at the company which it argues indicate that interest in the Union arose in a particular context which has now changed in key respects, as has the way in which the Employer consults with its technicians. It argues that because of these recent changes the workers in the bargaining unit have changed their views on the desirability of collective bargaining since their initial involvement with the Union in 2014. The Union contends that both at the outset, when it requested recognition from the Employer, and in subsequent meetings union members have expressed a desire for the Union to pursue recognition for collective bargaining. The Panel has been given no evidence to support these statements by the parties concerning the views of the technicians.

58. At this stage in the process however it is not necessary for the CAC to be satisfied that a majority of the bargaining unit is *actually* in support of recognition for collective

bargaining. Rather it must assess the *likelihood* that this would be the case. The test of actual support comes later in a ballot, if appropriate.

59. In the absence of evidence to the contrary the Panel accepts the level of Union membership as shown in the membership check provides an indicator of the likely degree of support for recognition of the Union for collective bargaining. In this case more than two-thirds of the workers in the bargaining unit have joined the Union. This high level of membership allows for majority support even if there are some workers who may have joined the Union but do not want it to be recognised by the Employer for collective bargaining.

60. For the reasons given above the Panel is satisfied that, on balance, a majority of the workers in the proposed bargaining unit would be likely to support recognition of the Union and the test set out in paragraph 36(1)(b) is therefore met.

Decision

61. For the reasons given above, the Panel's decision is that the application is accepted by the CAC.

Panel

Professor Linda Dickens MBE, Chairman of the Panel
Mr Paul Gates OBE
Mrs Maureen Shaw

1 June 2015