

14 October 2016

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:

Bakers Food and Allied Workers Union
(BFAWU)

and

Kettleby Foods Limited

Introduction

1. Bakers Food and Allied Workers Union (the Union) submitted an application to the CAC dated 22 June 2016 and received by the CAC on 23 June 2016, that it should be recognised for collective bargaining by Kettleby Foods Limited (the Employer) for a bargaining unit comprising “all hourly paid workers employed at 2, Samworth Way, Leicester Road, Melton Mowbray, LE13 1GA”. The Union stated “We do not seek recognition in relation to Managers.” The CAC gave both parties notice of receipt of the application on 24 June 2016. The Employer submitted a response to the CAC dated 30 June 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 consisting of Her Honour Judge Stacey, Chairman of the Panel, and as Members, Ms Gail Cartmail and Mr Rod Hastie. The Case Manager appointed to support the Panel was Miss Sharmin Khan.

3. The CAC Panel has extended the acceptance period in this case. The initial period expired on 7 July 2016. The acceptance period was then extended to 17 October 2016 in order to allow time to conduct a membership check and to allow time for the parties to comment thereon and for the Panel to arrive at a decision.

Issues

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

Summary of the Union's application

5. In its application to the CAC the Union stated that it had made its formal request for recognition in a letter dated 17 March 2016. The Employer responded on 7 April 2016 to offer negotiations. Negotiations took place after which the Employer refused the request for voluntary recognition, as communicated in the Employer's letter to the Union of 23 May 2016. Copies of the Union's letter dated 17 March 2016 and the Employer's letters of 24 March 2016, 7 April 2016 and 23 May 2016 were attached to the application. The Union stated in its application that the Employer had proposed that Acas be requested to assist, to which the Union agreed and provided the name of the Acas Advisor that was involved. The Employer's letter dated 23 May 2016 stated that it was writing to provide the Union with its formal decision and was its response to the Union's formal request for recognition dated 17 March 2016. The Employer thanked the Union for attending two constructive meetings under the auspices of Acas and stated that it had considered very carefully everything that was said in the discussions. It recognised the benefits of union membership and respected every individual's right to join a trade union and participate in union activities, but had nonetheless decided to refuse the request for recognition. It was proud of its staff consultative structure which had worked well for many years and believed that this continued to be the best approach for its business going forward. The Employer also explained that working closely together with its staff and their elected representatives, they were about to implement a change to its pay structure which would be very competitive, fit for the long term and it believed

fair across all shift patterns. It believed the changes would secure the jobs of the thousands of people it employed and benefit the communities in which it worked. The Employer stated that it was only able to achieve this by listening to its staff and responding to their feedback. It concluded the letter by stating that it acknowledged that if the majority of its staff in any confirmed bargaining unit supported recognition of the Union for collective bargaining, then the Union would have the right to apply for recognition. However, based on the reasons it provided and the information that was available to it, it was not prepared to agree voluntary recognition for the Union.

6. The Union stated that the total number of workers employed by the Employer was approximately 600 of whom approximately 500 were in its proposed bargaining unit. It stated that it had 140 members in the proposed bargaining unit. The Union did not know whether the Employer agreed with its estimate for the number of workers in the proposed bargaining unit. When asked to provide evidence that the majority of the workers in the proposed bargaining unit were likely to support recognition for collective bargaining, the Union stated that it was happy to provide evidence. Recruitment to membership of the Union had been steadily increasing throughout the period the Union had attempted to seek voluntary recognition. Additionally there had been a petition calling for recognition which had nearly 300 signatures in support.

7. The Union said it had selected the proposed bargaining unit as it was a self-contained group of workers at a single site. The Employer organised its business in this manner as a coherent whole. This was where the Union had membership and support for recognition. The Union also believed that it was compatible with effective management. When asked whether the bargaining unit had been agreed with the Employer the Union answered “No”.

8. Finally, the Union stated that there was no existing recognition agreement which covered any of the workers in the bargaining unit, that it had not made a previous application under the Schedule for statutory recognition for workers in the proposed bargaining unit or a similar unit and that it confirmed that it held a current certificate of independence.

Summary of the Employer’s response to the Union’s application

9. In its response to the Union's application the Employer stated that it received the Union's written request for recognition on 21 March 2016. The Employer stated that it responded substantively on 7 April 2016 that it did not accept the Union's request but were willing to negotiate. The Employer enclosed a copy of its letters dated 24 March 2016 and 7 April 2016. The Employer stated that it had received a copy of the application form from the Union on 24 June 2016.

10. The Employer stated that before receiving a copy of the application form from the Union, it had not agreed the bargaining unit with the Union. The Employer then answered "Yes" when in the next question of the CAC's Employer's response questionnaire, it was asked if it agreed with the Union's proposed bargaining unit.

11. When asked if, following receipt of the Union's request, it had proposed that Acas should be requested to assist, the Employer answered "Yes" and provided the details of the Acas Advisor that was involved.

12. The Employer stated that it employed a total of 655 workers. When asked whether it agreed with the number of workers in the proposed bargaining unit as defined in the Union's application the Employer answered "No", stating that the Union's figure was approximate and that the proposed bargaining unit had 554 employed within it.

13. When asked to indicate the reasons why it disagreed with the Union's membership in the proposed bargaining unit, the Employer stated that the Union's statements about its level of membership were inconsistent and figures stated by the Union were without foundation. The Union had stated in its application to the CAC that its membership had steadily increased. However, its members in the proposed bargaining unit had significantly decreased. The proposed bargaining unit was in excess of 500 employees. The Union had advised Acas on 10 and 17 March 2016 that it had approximately 50%+ of the production workers at Kettleby (the Employer included with its response a copy of the e-mail exchange with Acas informing it of these figures). On 12 June the Union at its national conference stated that it had recruited 190 new members at Kettleby Foods.

14. When asked to give reasons if it did not believe that a majority of workers in the bargaining unit were likely to support recognition, the Employer cited again the Union's inconsistent statements regarding its membership and that a majority of workers did not support recognition irrespective of Union membership as evidenced by a statement signed by union members. The Employer attached a copy of a redacted statement dated 29 June 2016.

15. Finally, the Employer stated there was no existing agreement for recognition in force covering workers in the proposed bargaining unit and that it was not aware of any previous application under the Schedule for statutory recognition by the Union in respect of this or a similar bargaining unit.

The membership and support check

16. 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 are 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 independent checks of the level of union membership in the proposed bargaining unit and the number of workers in that unit who had signed the Union's petition in support of recognition and the Employer's petition not in favour of recognition. It was agreed with the parties that the Employer would supply to the Case Manager a list of the full names, addresses, dates of birth and job titles of workers within the proposed bargaining unit, and a copy of its petition and that the Union would supply to the Case Manager a list of the full names, addresses and dates of birth of the paid up union members within that unit and a copy of the petition. The information from both parties was received by the CAC by 14 July 2016. It was explicitly agreed with both parties that in order to preserve confidentiality, the respective lists and the petitions would not be copied to the other party and that agreement was confirmed in a letter from the Case Manager to both parties dated 12 July 2016. The Panel is satisfied that the checks were conducted properly and impartially and in accordance with the agreement reached with the parties. The results of the checks are reported below in paragraphs 34 to 52 below.

The Union's complaint to the CAC

17. Before the CAC had completed and issued the Case Manager's membership and support check to the parties, the Union, by e-mail to the CAC (and copying in the Employer) on 22 July 2016, informed the Panel that it had concerns which it felt was relevant to the membership and support check. It submitted a six page statement from Mr G. Atwall, the Union's Regional Officer which detailed the Union's concerns about the methods used by the Employer in the compilation of its petition and "independent statements". The Union's submission was copied to the Employer who in turn responded with their own statements on 26 July 2016. A summary of the complaint and the Employer's response follow.

Summary of Mr G. Atwall's statement

18. Mr Atwall stated that the Employer was direct in opposing recognition of the Union. The Employer was responsible for misinformation and scaremongering through a series of anti-union staff briefings by management including a video presentation where groups of 20 – 30 staff were met by Mr S. Flude, the Managing Director and Mr. A. Szokalski, the Production Director who presented a one-sided view containing information that was exaggerated and inflammatory. The Union was not informed that these presentations would be taking place and was not permitted to attend to provide an alternative view. The Union was not permitted to provide any literature in response. The Union had possession of a recording of one of the presentations which it was happy to provide to the CAC if the Panel thought it would be useful. Mr. Atwall provided examples of statements made in the presentations in his statement for the Panel. Mr Atwall felt that the content of the Employer's presentations coupled with the Employer's response to the application in which it had stated that the figures by the Union were "probably fabricated without any foundation in fact", suggested that there was a broad script and strategy that the Employer was using and not ad libs on the day of the presentations. All of this was evidence of the level of the Employer's anti-union rhetoric. The Union was severely disadvantaged by not having access to the work force in order to put its case to the workers and to rebut allegations made by the Employer.

19. A hostile environment was created by the Employer by its actions against workers who were actively promoting recognition of the Union. One worker was dismissed on spurious grounds

and that worker was pursuing his rights to protection from unfair dismissal. Another worker had had disciplinary proceedings initiated on the grounds that he/she had approached the media. The Employer had displayed on the notice board that one of the “KCT/Work Council members” had been to the media and was being disciplined. Mr Atwall had attended the hearing for this individual and the proceedings were ceased. Mr Atwall provided the names of these individuals in his statement to the Panel. It was felt that the initiation of the disciplinary proceedings served as a way of a warning to other staff.

20. The Employer’s petition was produced by the Employer, not the staff. The Union understood that workers were confronted by a manager who had a list of all employee names who had then secured individuals to sign the list. Some workers were asked 3 – 4 times and eventually taken to the office to sign. In particular, the Union was concerned that the petition was run on the shop floor where workers were forced to sign without an explanation. Some employees spoke English as a second language and signed thinking that they were signing in support of Union recognition.

21. The “independent statements” provided by the Employer to the CAC arose from a hostile and intimidatory environment. The independent statements were drafted by the Employer and workers were approached at the presentations and by managers individually to get them signed there and then. The pressure on staff in these circumstances and against this background was great. The Union was being approached by members to discuss their membership saying that they would lose their jobs if the Union was recognised.

22. The Union enclosed a copy of a pro-forma statement that it understood the Employer had circulated to workers for signing. The statement expressed that the signatory had decided to leave the Union, to stop paying Union membership and that he/she did not wish for the Union to be recognised. The Union also enclosed a copy of the wording of a statement which expressed concerns and provided examples of intimidation of staff during the Union’s application for recognition. The statement also expressed support for recognition of the Union. The Union offered to share 12 signed versions of the statement that it had received from workers on a confidential basis with the CAC.

23. On 26 July 2016 the Employer, by e-mail to the CAC, stated that it refuted the Union's allegations and enclosed a responding statement from Mr S. Flude, the Managing Director and Mr. A. Szokalski, the Production Director in which the Union's allegations were refuted in their entirety. The Employer stated that the allegations were denied, but even so, at this stage, the Union's submissions were insufficient to amount to a finding that the Employer had failed to comply with its duty to refrain from unfair practices.

Main points of Ms S. Flude's statement

24. The Union's allegation that there is a "hostile and intimidatory environment" was strongly refuted. Any actions taken by employees were at their own free will. Excerpts from social media accounts were included at appendix 1 of Mr Flude's statement. Mr Flude stated that any encouragement to boycott the Employer's products via social media did not resonate with its hard working employees.

25. The briefings referred to in Mr Atwall's statement were not out of the ordinary. These briefings took place quarterly. The Employer had a close relationship with its employees. Employees had asked for more information given the Union's demonstration outside of the site on 26 June 2016 and the ongoing recognition process. The normal business update was given then there was a Q & A session on the Union's request for recognition. Collective Bargaining was explained and the Employer's Power Point presentation was attached at appendix 2. The Employer did not invite outside bodies to briefings. It was not a one sided view. Any information given at the briefings was obtained from social media accounts that were freely accessible to the general public. Details of these accounts were provided to the Panel in the statement. It was explained that unions, and in particular BFAWU, provided other services such as Credit Union, insurance etc. that staff may find useful. It was made clear that it did not ever refuse union representation in grievance or disciplinary hearings and reminded that they were involved in the recent changes to terms and conditions. It was explained in the Q & A session that recognition of the Union would mean significant changes i.e. that management would have to negotiate with the Union and not the staff directly.

26. There was no anti-union rhetoric. Employees' rights to join a union was referred to a number of times in the briefings. Management were fully trained in employee rights and union membership. Mr Flude informed employees that members of his own family were union members. Mr Flude invited the CAC to hear the recording of the briefing so that the entire contents could be heard by the Panel. A number of employees at all levels of the company were invited to share their experience of unions at the briefings. Both good and bad experiences were discussed. A number of workers had stated that the pressure on the business to bring on unacceptable union demands had led to a decline in customer service and eventually termination of their contracts with key retail customers.

27. Access was given to the Union by allowing it to leaflet outside the Employer's site for the past four months. A range of these leaflets were provided to the Panel at appendix 3 many of which, Mr Flude stated contained inflammatory statements. It was understood that the Union had no right of access to the staff until a decision had been made by the CAC. The Employer would comply with all the requirements once such a decision was made.

28. Mr Flude did not wish to comment on the disciplinary proceedings referred to by Mr Atwall. However a copy of the notice was attached at appendix 4 for the Panel. The case was investigated according to the Employer's procedure and no further action was needed. The dismissal referred to by Mr Atwall was in no way connected with union activity and the individual concerned had posted a video on Facebook expressing this.

29. The petition was collected by production operatives and team leaders, none of whom were management. Mr Flude was not aware of anyone being taken to the office by team leaders and production operatives.

30. A number of employees had English as a second language but their understanding was excellent. They operated in English all day every day. It was assumed that the Union did not have these issues with their petition and did not have interpreters available.

31. There was a confidential hotline that was available 24/7 for employees feeling intimidated or bullied the number for which was clearly advertised around the building, Mr Flude had not been informed of any calls to this line.

32. Finally Mr Flude referred the Panel to a number of accusations and abuse it had been subjected to personally also on social media and provided the Panel with copies of the relevant letters at appendix 7.

Main points of Mr A. Szokalski's statement

33. Mr Szokalski confirmed that he, in conjunction with Mr Flude, had undertaken a number of staff briefings on 30 June 2016 and 1 July 2016 and had been recorded without his permission. With regard to his quoting of Mr Atwall at the briefing (listed in Mr Atwall's statement see paragraph 18 above), Mr Szokalski clarified that this was a result of statements made by Mr Atwall at a meeting with senior management and Acas on 16 May 2016 which was recounted for him by Mr Flude who was present at that meeting. Mr Flude had authorised Mr Szokalski to include it in his comments in the presentation. Any other statements were referred to after obtaining excerpts from Social Media when preparing the briefing (copies of which were attached for the Panel at appendix 1 of Mr Szokalski's statement). Mr Szokalski's statement mainly recounted for the Panel examples of, in his view, Social Media attacks by the Union on Public Social Media accounts on the Company and the founder of the Samworth Brothers and as evidence of the Union's encouragement to boycott company products.

Results of the Case Manger's membership and support check

34. The list supplied by the Employer showed that there were 539 workers in the proposed bargaining unit. The list of members supplied by the Union contained 137 names. According to the Case Manager's report the number of Union members in the proposed bargaining unit was 132, a membership level of 24.5%, one of whom had signed a statement (included in the information submitted by the Employer) that they had ceased their Union membership.

The Union's petition

35. The Union's petition was 26 pages and each page was headed with the statement:

“We would like Bakers Food and Allied Workers Union to represent us on all terms and conditions at Kettleby Foods, 3 Samworth Way, Leicester Road, LE13 1GA, Melton Mowbray.”

36. In the table beneath the statement signatories provided their full name and date. The earliest date was 18 March 2016 and the most recent was 10 June 2016. Underneath the table of signatories was the following further statement:

“This information will be treated in the strictest confidence and **will** be available to the CAC.”

37. The Case Manager's checks established that there were 412 signatures on the Union's petition of which 360 were legible and in the proposed bargaining unit i.e. 66.8% of the proposed bargaining unit. Of these, 116 i.e. 21.5% of the proposed bargaining unit were Union members and included the individual who had signed a statement (as submitted by the Employer) that they had ceased their union membership. 244 of the 360 signatures i.e. 45.3% of the proposed bargaining unit were non-Union members.

The Employer's petition

38. The Employer's petition was 63 pages contained in two parts. The first was a number of pages containing hand written and typed statements which were not identical to each other. Each page/statement was signed by one worker at a time. The second part was a 32 page petition with each page containing an identical statement underneath which was a table containing multiple signatures. The first seven pages were hand written statements signed by individuals who had also printed their name and address in the top right hand corner of the page. The hand written statements were not identical. Two were undated and contained **Statement A:**

“Isigned a blank piece of paper when we had issues with T & Cs for the union to help us with collective bargaining. I no longer want the union to represent me in collective bargaining.”

39. Three were undated and contained **Statement B:**

“I..... signed a blank piece of paper of the union when we were going through the T & Cs process. I no longer want the Union to represent me in collective bargaining.”

40. One was dated 12 July 2016 and contained **statement C:**

**“I.....signed a blank piece of paper in favour of union to represent me in collective bargaining.
I no longer want the union to represent me in collective bargaining.”**

41. One was dated 12 July 2016 and contained **Statement D:**

“I.....signed a blank piece of paper for the union to represent me in collective bargaining when we were going through the terms and conditions. I am happy with the new proposal and do not want the union to represent me in collective bargaining.”

42. The next 24 pages of the petition were typed statements signed by individuals who had inserted their name and address in the relevant spaces. The typed statements were not identical.

43. 11 contained **Statement E**, nine of which were undated, and two that were dated 5 and 8 July 2016:

“I..... of.....an hourly paid employee at Kettleby Foods, write to confirm that I have voluntarily collected the signatures on the attached petition from my colleagues at Kettleby Foods, 2 Samworths Way, Melton Mowbray LE 13 1 GA. I along with my colleagues do not wish to see Union recognition of BFAWU for the purposes of Collective Bargaining at Kettleby Foods.”

44. 11 contained **Statement F**, 10 of which were dated 5 July 2016 and one dated 7 July 2016:

“I,.....of.....wish to independently make the following statement. I am employed by Kettleby Foods at 2 Samworth Way, Melton Mowbray, Leicestershire, LE13 1GA. I am hourly paid and my job title isI am a member of BFAWU and I joined the union around.....

I joined for personal reasons. However, I do not wish for BFAWU to be recognised at Kettleby Foods for the purposes of collective bargaining.

I also do not believe that the majority of my hourly paid colleagues wish for BFAWU to be recognised at Kettleby Foods for the purposes of collective bargaining

Signed.....

Date.....”

45. Nine of the signatories of statement F above inserted that they joined the Union around April 2016 and two of the signatories inserted that they joined the Union around February 2016.

46. Three of the signatories of statement F were also signatories of the hand written statements, Statements A – D above and one was also a signatory of statement E above.

47. Two contained **Statement G** which were both dated 5 July 2016:

“I,, of.....wish to independently make the following statement:

I am employed by Kettleby Foods at 2 Samworth Way, Melton Mowbray, Leicestershire, LE13 1GA.

I am hourly paid and my job title is

I joined BFAWU around, however I have since decided to leave and stopped paying membership fees around

I do not wish for BFAWU to be recognised at Kettleby Foods for the purposes of collective bargaining.

Signed.....

Date:-”

48. Both signatories of statement G inserted that they joined the Union around April 2016, 1 of which inserted that they stopped paying membership fees around June 2016. The other signatory left this blank and was also a signatory of statement E above.

49. The final 32 pages of the Employer’s petition contained **Statement H** at the top of each page:

“We the undersigned are hourly paid employees at Kettleby Foods at 2 Samworth Way, Leicestershire Road, Melton Mowbray LE13 1GA.

I do not believe that the union BFAWU should be recognised at Kettleby Foods for the purpose of Collective Bargaining.”

50. Beneath the statement on each page was a table with columns headed “Name”, “Position”

and “Signature”.

51. Six of the signatures of Statement H were dated 5 July 2016 and two were dated 12 July 2016. The remaining signatures were undated.

52. The Case Managers checks established the following results:

a)	Number of workers in the proposed bargaining unit on the list provided by the Employer:	539
b)	Number of names/signatures on the Employer’s petition not in favour of recognition of the Union for the purposes of collective bargaining.	301
c)	Number of names/signatures on the Employer’s petition not appearing on the Employer’s list:	11
d)	Number of names/signatures on the Employer’s petition that were unreadable or duplicates	22
e)	Number of names/signatures on the Employer’s Petition common to the Employer’s list: (i.e. sum of g + i + k below)	268
f)	Proportion of workers in the proposed bargaining unit who have signed the Employer’s petition	49.7%
g)	Number of names/signatures on the Employer’s petition in the proposed bargaining unit, who are non- Union Members and have not signed the Union’s petition	91
h)	Proportion of workers in the proposed bargaining unit who have signed the Employer’s petition, who are non-Union members and have not signed the Union’s petition	16.9%
i)	Number of names/signatures on the Employer’s petition in the proposed bargaining unit, who are Union members and have not signed the Union’s petition	4
j)	Proportion of workers in the proposed bargaining unit who have signed the Employer’s petition, who are Union members and have not signed the Union’s petition.	0.8%
k)	Number of names/signatures on the Employer’s petition in the	173

proposed bargaining unit and who have signed the Union's petition

l)	Proportion of workers in the proposed bargaining unit who have signed the Employer's petition and the Union's petition	32%
m)	Number of names/signatures on the Employer's petition and the Union's petition, who are non – Union members	142
n)	Proportion of workers in the proposed bargaining unit who have signed the Employer's petition and the Union's petition who are non-Union members	26.3%
o)	Number of names/signatures on the Employer's petition and the Union's petition who are Union members	31
p)	Proportion of workers in the proposed bargaining unit who have signed the Employer's petition and the Union's petition who are Union members	5.7%

Parties' comments on the results of the membership & support check

53. The report of the results of the membership and support check was initially circulated to the Panel and to the parties for comment on 19 August 2016. Both parties submitted their responding comments to the CAC on 30 August 2016. However, the parties were informed that the Case Manager had, in error, not included the dates of the signatures on the Union's petition on the report and therefore the report would be re-issued, with this information included. The report was re-issued to the Panel and parties on 7 September 2016. On 12 September 2016 the parties were invited by the Panel to submit any final comments in respect of the admissibility of the application. The Union and the Employer submitted their final comments to the CAC on 20 and 21 September 2016 respectively. A summary of the parties' submissions to the Panel between the 30 August 2016 and 21 September 2016 follows.

Summary of the Union's submissions to the Panel

54. The Union noted that the minimum membership level of 10% was established. The Union provided a table of results demonstrating the figures established by the Case Manager's report according to its reading, showing that of the proposed bargaining unit: 34.7% were signatories of

the Union's petition only; 17.6% were signatories of the Employer's petition only; 32.1% were signatories of both petitions (equivocal) and 15.6% did not express a preference.

55. The Union did not consider that the Employer's petition could be taken at face value referring again to the Union's Regional Officer's statement submitted to the Panel on 22 July 2016 (see paragraph 17 above) that there was a climate of anti-union intimidation. Unlike the Union, aside from one paragraph in the statement of the Managing Director, the Employer had not provided any details to the Panel as to how its petition signatures were obtained. At the very least the workers' perception was that there was undue influence even if the Employer did not intend to exert undue influence. Workers had reported feeling obliged to sign a petition or a letter of support produced to them at work for fear of repercussions if they did not and where they were interviewed individually or asked to sign in the presence of their team Leaders.

56. The Union also considered that the Employer's evidence should be discounted on the basis that the Union had not been given formal access to the workers, as confirmed in the statement of the Managing Director and referred the Panel to a previous CAC decision, Amicus and Teconex Ltd TUR1/318/03 13 January 2004.

57. The Union contended that the Panel only needed to be satisfied that a majority was likely to favour recognition, not necessarily that a majority would actually vote in favour of recognition if a ballot was held. If the figures were taken at face value then it was the Union's case that:

58. The sum of the 173 that could be safely taken to oppose recognition and the 95 who only signed the Employer's position was still less than half of the 539 in the proposed bargaining unit. The CAC was therefore required to consider the position in the round.

59. Of those expressing unequivocal preference, 2:1 were in favour of securing recognition of the Union i.e. 34.7% versus 17.6%. If this was a reasonable proxy for the privately held preferences more generally then two thirds of the proposed bargaining unit were likely to favour recognition. In other words 360 individuals were likely to favour recognition.

60. A majority of the proposed bargaining unit of 539 was 270 and there was evidence that 187 were definitely in favour of recognition of the Union. Therefore the question for the Panel was whether, on the balance of probabilities, another 83 were likely to favour recognition. The Union suggested that 12 Union members who had not expressed a preference could be assumed to favour recognition. In the absence of evidence of the contrary it was reasonable to infer that trade union members usually favour collective bargaining. The Union referred the Panel to CATU & Industrial Agricultural Engineers TUR1/358/04 10 June 2004 and Amicus & Paddock Fabrications Ltd TUR1/378/04 13 July 2004 which chimed with the assumption that underpinned the approach taken by paragraph 22(2) of the Schedule. If the Panel agreed with this, then only a further 71 supporters would be required for a majority.

61. There were 245 who had either not expressed a preference or an equivocal one. Just 28.9% of these would be required for the Union to have a majority which was significantly less than the 2:1 ratio suggested in the report. It was reasonable to assume that on the balance of probabilities this degree of support would be likely.

62. In CATU & Industrial Agricultural Engineers TUR1/358/04 6 September 2004 the CAC was satisfied with a membership level of 34.43% which was maintained against an anti-union campaign which was similar to this case, where the BFAWU had 34.7% also against an anti-union campaign, the vigour of which was demonstrated by the witness statements submitted by both parties to the Panel in this case.

63. The Union also mentioned the reference made to workers signing blank pieces of paper which implied that there was an allegation of some sharp practice. If it was being alleged by the Employer that the Union had obtained signatures and then added pro-recognition wording without the individuals' knowledge, then the Union denied this. It did not ever ask members to sign blank sheets of paper, and the CAC could see that the Union's petition was not prepared in this manner.

Summary of the Employer's submissions to the Panel

64. The Employer acknowledged that the Union had met the test at paragraph 36(1)(a) of the Schedule that at least 10% of the workers constituting the relevant bargaining unit were Union

members with 24.5%. However in its view, the Union had not proved a case that the second limb of the test had been met.

65. The report showed that 173 people signed both petitions which was 32% of the proposed bargaining unit. These names could not be reliably be proven by the Union as likely to support union recognition and should be discounted by the Panel. Once deducted, only 34.7% would be likely to favour recognition of the Union for the purposes of paragraph 36(1)(b). These statistics were sufficient to satisfy the Panel that the application was dismissed as a matter of law.

66. In the alternative, the Employer cited some six previous CAC cases to show that there are cases where counter petition evidence from the Employer has been introduced and shown that a majority of workers would not support recognition. In such cases it was for the Panel to carefully consider all of the available evidence as to whether the majority were likely to favour recognition. The Employer reminded the Panel of the circumstances in which both the Union's and the Employer's evidence was obtained, in order to assess its probative value.

67. To the best of the Employer's knowledge the Union's petition was obtained when the Employer was in the process of conducting internal consultations with its workers in respect of new terms and conditions, which were causing controversy. The Employer acknowledged that initially the proposals were met with some opposition from workers, but with consultation with the elected representatives, the final revised terms and conditions were approved and every worker in the proposed bargaining unit signed up to them. This process was concluded by the time, in July 2016, when employees began to obtain signatures for what is described in the CAC's report as the Employer's petition but was not collated by the Employer but by employees who were responding to a strong feeling against union recognition by July/August 2016. The fact that 173 workers had changed their minds demonstrated the waning support for the Union but the Union incorrectly claimed that 50% of the proposed bargaining unit had become members of the Union. The timing of the 173 signatures suggested that there remained a satisfaction with the internal collective consultation process.

68. The Employer submitted that any such assumption by the Union that 2:1 of the unequivocal preferences were in favour of recognition of the Union and any presumption that new members

would be in favour of recognition was rebutted when taking into account the bitterness of the dispute around new terms and conditions that took place in and around February 2016 which was resolved through collective consultation by July 2016, and the confusing statement on the Union's petition in indicating union representation of all terms and conditions.

69. The Employer argued that the statement to which signatories of the Union signed up to was confusing. The statement indicated union representation to "all terms and conditions" which filed to focus the reader on the key question of support for recognition of the union for the statutory purpose specially when taking into account the context in which the Union's signatures were being obtained. The true extent of the actual support for recognition was uncertain. BALPA and Ryanair Ltd TIR1/70/01 25 May 2001 the CAC noted that workers indicating general support for the Union did not necessarily mean that they supported recognition for the purposes of collective bargaining.

70. Once in receipt of the Case Managers re-issued report and a copy of the Union's comments dated 30 August 2016, the Employer considered that with the knowledge that the Union's petition showed that the earliest signature was dated 18 March 2016 and the most recent signature was 10 June 2016, it was even more critical for it to have sight of the Union's petition. It felt it was put at a disadvantage if it was unable to comment on the pattern of dates and the format of the Union's petition.

71. The Employer re-iterated that the Union's allegations with regard to undue pressure were unfounded and refuted, urging the Panel to consider the statements of the Managing and Operations Director. It was demonstrated that that pressure was not exerted and the statements were freely given to the Employer. The Employer requested an oral hearing to demonstrate this. The Employer referred the Panel again to the appendices to the statements which showed the Union's negative and vitriolic campaign against the Employer over a period of over 6 months.

72. In conclusion, the Union was not in a position to show a near majority let alone an overall majority support from workers. It could not be said that 34.7% would even be enough to create a "bandwagon effect" particularly as membership and support was waning and not increasing, and this was despite the Union's recent negative campaign against the Employer. In its view the Union's application should be dismissed.

Union's response to the Employer's submissions

73. Timing of the Union's petition – The Union's petition was started at the time when the Union started the process for recognition with the CAC and also when its members requested Union recognition on site. The petition was signed on site and at various meetings when the Union explained the CAC route and the benefits of collective bargaining. There was not fear of Union recognition but rather of losing their jobs since the Employer's representations against recognition, and a BFAWU member being dismissed and another going through a grievance procedure for being bullied. There was a strong turnout to a recent meeting but information was being distributed differently now. Instead of the usual official leaflet with details of the meeting, information was now being passed through trusted Union members without the Employer's knowledge, as workers were still concerned with any repercussions from the Employer.

74. The Employer had not produced any evidence that the wording of the Union's petition was confusing. It stated "We would like Bakers Food and Allied Workers Union to represent us on all terms and conditions at Kettleby Foods..." which was a single message, clearly and concisely put. In its view the straightforward meaning of these everyday words was that the BFAWU desired to undertake collective bargaining in their behalf.

75. The Employer had not explained why it felt the CAC's membership and support check was unreliable. It was not argued by the Employer on what grounds they needed to test the veracity of the Union's petition signatures. It was not the CAC's approach as a matter of course to disclose the petition as it was not its approach to disclose the Employer's list of names and job categories for those in the proposed bargaining unit. The Union noted though that this was just guidance and that there were no provisions in the 1992 Act compelling the CAC to take this approach

Considerations

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

77. The Panel is satisfied that the Union made a valid request to the Employer for recognition within the terms of paragraphs 5 to 9 of the Schedule and that its application was made in accordance with paragraph 12(2). 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 of the Schedule. The remaining issues for the Panel to decide are whether the admissibility criteria set out in paragraph 36(1)(a) and paragraph 36(1)(b) are met.

Paragraph 36(1)(a)

78. Under paragraph 36(1)(a) of the Schedule an application is not admissible unless the Panel decides that members of the Union constitute at least 10% of the workers in the proposed bargaining unit. The membership check conducted by the Case Manager showed that 24.5% of the workers in the proposed bargaining unit were members of the Union. As previously stated, the Panel is satisfied that this check was conducted properly and impartially and in accordance with the arrangements agreed with the parties. On the membership check evidence before us, the Panel is satisfied that members of the Union constitute at least 10% of the workers in the proposed bargaining unit as required by paragraph 36(1)(a) of the Schedule. We are conscious that the many and frequent representations provided by the parties has delayed matters, but even allowing for some slippage in support as contended for by the Employer, the 10% threshold requirement has been comfortably reached.

Paragraph 36(1)(b)

79. Under paragraph 36(1)(b) of the Schedule, an application is not admissible unless the Panel decides that a majority of the workers constituting the proposed bargaining unit would be likely to favour recognition of the union as entitled to conduct collective bargaining on behalf of the bargaining unit. It is an exercise the statutory scheme anticipates can be conducted within a short period of time from receipt of an application by a Union and is inevitably a broad brush exercise intended eliminate cases where there is little demonstrable support for recognition by the Union making the application. Paragraph 36 (1)(b) is inherently speculative requiring an assessment of likelihood of support.

80. In this case, regrettably, there have been a number of delays due to the size of the proposed bargaining unit and both the amount and frequency of the additional material supplied by both sides, which the Panel has considered carefully. We remind ourselves however that the check conducted by the Case Manager demonstrated support of 66.8% of the workers in the proposed bargaining unit from Union membership and the signing of the Union's petition in support of recognition. Even if one considers that this was conducted some little while ago, it is an impressive demonstration of support.

81. The Employer has sought to undermine the results of the membership check with its petitions seeking to show that 49.7% of the workers in the proposed bargaining unit would prefer not to be recognised. Clearly both figures cannot be accurate: assuming the signatures are authentic (and no-one has suggested otherwise) some workers must have signed both petitions in support of conflicting propositions. The Employer has also argued that some Union members were very satisfied with the work of the Union within existing representation arrangements, in the recent discussions on changed terms and conditions and now consider they no longer support the Union. The Union has argued that its success in the terms and conditions exercise has demonstrated the benefits of Union membership and encouraged support. But where workers have signed both petitions, we do not know which one they support. Both sides have made allegations as to how the names were collected and hinted at inappropriate pressure.

82. In deference to the parties we have set out their respective positions in some detail above, and reflected the granular approach they both took at this first stage of a recognition application. However, if one steps back from the wealth of detail provided by both sides and the membership check itself and asks the question "Is a majority of the proposed bargaining unit likely to favour recognition by the Union?" then the answer is yes. The membership and support check demonstrated just shy of 70% support, and the Employer could not demonstrate less than majority support with its petition. On the evidence put forward and on the assessment of likelihood in the industrial relations experience and expertise for which the Panel was appointed the Panel concludes and is satisfied that it is likely on the balance of probabilities that a majority of the workers would favour recognition of the union as entitled to conduct collective bargaining on behalf of the bargaining unit.

83. It was neither necessary nor desirable to hold a hearing, as requested by the Employer to determine the matter at this stage of an application – both parties had had the opportunity to make written representations and submit evidence to the Panel, which they have used to full effect. The holding of a hearing would have caused a delay disproportionate to the issues and contrary to the intention of the statute.

Decision

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

Panel

Her Honour Judge Stacey - Chairman of the Panel

Ms Gail Cartmail

Mr Rod Hastie

14 October 2016