

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:

GMB

and

Sheffcare Limited

Introduction

1. The GMB (the Union) submitted an application to the CAC dated 26 September 2016 that it should be recognised for collective bargaining by Sheffcare Limited (the Employer) for a bargaining unit comprising “All Sheffcare employees” based at all 10 of the Employer’s premises in Sheffield, South Yorks. The CAC gave both parties notice of receipt of the application on 28 September 2016. The Employer submitted a response to the CAC dated 4 October 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 Her Honour Judge Stacey, Chair of the Panel, and, as Members, Mr David Crowe and Mr Paul Talbot. The Case Manager appointed to support the Panel was Nigel Cookson.

3. The CAC Panel has extended the acceptance period in this case. The initial period expired on 12 October 2016. The acceptance period was then extended to 28 October 2016 in

order to allow time to conduct a membership check and to allow time for the parties to comment thereon before the Panel arrived at a decision. Time was further extended to 3 November 2016 to allow for the decision to be finalised.

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 therefore 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 to the Employer on 5 September 2016 and that the Employer responded by way of a letter received by the Union on 12 September 2016. The Employer's letter was by way of acknowledgment stating that it would reply in due course but no subsequent letter was received by the Union. Copies of the Union's letter of 5 September 2016 and the Employer's letter of acknowledgement dated 12 September 2016 were attached to the application.

6. When asked whether the Union had made a previous application under the Schedule for statutory recognition for workers in the proposed bargaining unit or a similar unit the Union answered "No". The Union stated that, following receipt of the request for recognition, the Employer had not proposed that Acas should be requested to assist the parties.

7. The Union stated that the total number of workers employed by the Employer was "400 approx". It gave the same answer when asked for the number of workers in the proposed bargaining unit. When asked to state the number of Union members in the proposed bargaining unit the Union stated "Happy to send a confidential copy to CAC under separate cover upon request". The Union was asked whether the Employer agreed on the number of workers in the proposed bargaining unit but it provided no answer. When called upon 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 “info to be sent on confidential basis-separate to this application upon request.

8. The Union said it had selected the proposed bargaining unit as the bargaining unit reflected current membership adding that the bargaining unit was the same as it was when the Union was derecognised a few years previously. When asked whether the bargaining unit had been agreed with the Employer the Union answered “No”.

9. Finally, the Union stated that there was no existing recognition agreement which covered any of the workers in the bargaining unit and it confirmed that it held a current certificate of independence.

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

10. In its response to the Union’s application the Employer stated that it received the Union’s written request for recognition on 9 September 2016 and that its response to the request was only an acknowledgement; a copy of which was attached. The Employer stated that it had received a copy of the application form from the Union on 28 September 2016.

11. The Employer stated that it had not, before receiving a copy of the application form from the Union, agreed the bargaining unit with the Union and this was still the position. When asked if, following receipt of the Union’s request, it had proposed that Acas should be requested to assist, the Employer answered “No”.

12. The Employer stated that it employed a total of 457 workers. 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” adding “The application indicates “400 approx.” in the bargaining unit. The exact number is 457.”

13. The Employer said there was no existing agreement for recognition in force covering workers in the proposed bargaining unit.

14. When asked whether or not it disagreed with the Union's estimate of membership in the proposed bargaining unit the Employer stated "Regrettably the Union does not indicate the number of union members in the proposed bargaining unit, but instead offers to send a confidential copy under separate cover. The number of members (as opposed to the names of those members) is not confidential and should have been provided. So far as we are aware, there are only 71 GMB members amongst our workforce, 69 of whom pay their subscriptions via our payroll".

15. 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 stated that it did not consider that a majority of workers in the bargaining unit were likely to support recognition, for the following reasons: First, it believed that the vast majority of its employees, approximately 84%, were not members of the Union. Second, it believed that the majority of staff were happy with the existing consultation and negotiation arrangements and in particular with its "everyone matters" consultation arrangements and the Employer had had no feedback to the contrary. Third, about 10% of the workforce were members of other unions (UNISON and Unite the Union) and were not likely to support collective bargaining via a Union of which they were not members. Fourth, the Union had been actively campaigning at the Employer's premises recently in support of its recognition application and by way of membership drive. Despite this and despite local newspaper publicity, not a single employee had signed the petition so far as the Employer was aware. The petition went live about a month ago (6 September) but so far as the Employer was aware there were no signatures which indicated a lack of support for the recognition application, such that the Union would come nowhere near achieving either of the requirements if the CAC were to decide that a ballot were required.

16. Finally, when asked whether it was aware of any previous application under the Schedule for statutory recognition by the Union in respect of this or a similar bargaining unit or whether it

had received any other applications under the Schedule for recognition in respect of any of the workers in the proposed bargaining unit the Employer responded “Not applicable”.

The Union’s comments on the Employer’s response

17. The Employer’s response was copied to the Union and its comments invited. In a letter dated 10 October 2016 the Union stated that it agreed the exact number of workers in the bargaining unit was 457 saying that its estimate was based on information it had on record however the Employer’s number would be factual.

18. The Union also stated that it was entitled to actively campaign on behalf of Union recognition. An online and paper based petition had been launched in respect of gaining union recognition. Copies of the petition and signatures to date could be provided to the CAC or Acas on a confidential basis upon request.

The membership and support 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 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. It was agreed with the parties that the Employer would supply to the Case Manager a list of the full names, dates of birth and job titles of workers within the proposed bargaining unit, and that the Union would supply to the Case Manager a list of the full names of its paid up union members within that unit and a copy of the petition. The information from both the Union and the Employer was received by the CAC on 14 October 2016. It was explicitly agreed with both parties that, to preserve confidentiality, the respective lists and the petition would not be copied to the other party and that agreement was confirmed in a letter from the Case Manager to both parties dated 14 October 2016. The Panel is

satisfied that the checks were conducted properly and impartially and in accordance with the agreement reached with the parties.

20. The list supplied by the Employer showed that there were 454 workers in the proposed bargaining unit. The list of members supplied by the Union contained 83 names. According to the Case Manager's report the number of Union members in the proposed bargaining unit was 78, a membership level of 17.18%.

21. The Union also provided a petition running over 16 sheets of A4 and bearing 54 signatures dated between 22 September 2016 and 6 October 2016. Each page of the petition, on GMB headed paper, carried the following proposition:

Petition

We want GMB@SHEFFCARE

GMB trade union is asking Sheffcare Ltd to recognise us for collective bargaining. We have to show the Central Arbitration Committee that a majority of workers at Sheffcare Ltd support our application. If you do support us, please sign the petition.

I support recognition of GMB trade union as entitled to conduct collective bargaining on pay, hours and holidays on behalf of workers at Sheffcare Ltd.

The petition is open to everyone that works for Sheffcare, whether you are a GMB member or not. Unity and strength and the more members we have the more power we have.

Please return completed petitions in the pre-paid envelope attached.

22. The Case Manager's report showed that the petition was signed by 48 workers in the proposed bargaining unit, a figure which represents 10.57% of the bargaining unit. Of those 48 signatories 16 were members of the Union (3.52% of the proposed bargaining unit) and 32 were non-members (7.05% of the proposed bargaining unit).

23. A report of the result of the membership and support check was circulated to the Panel and the parties on 17 October 2016 and the parties were invited to comment on the results by no later than 21 October 2016.

Parties' comments on the result of the membership check

24. In a letter dated 18 October 2016 the Union stated that it currently had 17.18 per cent of Union members in the bargaining unit which was in excess of the 10 per cent requirement. As for whether a majority of the workers in the proposed bargaining unit would be likely to favour recognition of the Union the Union stated that the petition which was submitted was still in the early stages, yet 32 non-members had signed it. The Union was confident a ballot conducted independently would be in favour of the Union being recognised. Currently the Union had no access to the workplaces; petitions had been signed by the Union standing outside the premises at shift change times. Clearly, the Union submitted, care homes were staffed 24 hours a day, 7 days a week and it had been unable to access all staff on the Employer's sites. The vast majority the Union had approached to date had signed the petition.

25. In a letter dated 20 October 2016 the Employer said that the CAC should reject the Union's application as inadmissible under Section 36(1)(b) of the Schedule on the basis that a majority of the workers in the relevant bargaining unit were unlikely to favour recognition of the Union for collective bargaining.

26. The Employer assumed that the information provided by the Union about the number of workers in membership (stated to be 83 out of a total work force of 454) was correct and that there were 48 genuine signatories to the Union's online petition. It was clear that, despite the best efforts of the Union to encourage members and non-members to sign the petition, only 10.57% of the workers in the bargaining unit had signed the petition. This indicated that there was an extremely low probability of the Union being able to satisfy the CAC that a majority of workers were in favour of recognition.

27. The Employer found it somewhat surprising that nowhere near all of the Union members had signed the petition, only 16 out of 83 members, which was under 20% of the members. This indicated that more than 80% of the members of the Union who worked for the Employer were not in favour of recognition, but were content with the current arrangements, i.e. they wished to

be members of the Union but did not wish to have recognition of the union for collective bargaining.

28. There was an interesting statistic at Section 7(i) of the case Manager's report, namely that 32 of the 48 signatories to the petition which appeared to be genuine were not members of the Union. This was two thirds of the signatories. The Employer found it odd that there were individuals, apparently 32 of them, who wanted the Union to negotiate on their behalf, but did not want to join the Union and were not willing to pay union subscriptions.

29. Only a tiny proportion, 3.52%, of the workers in the bargaining unit were Union members who had signed the petition. The Employer would suggest that this figure would have to be at or above 50% for the application to proceed. For the reasons given, the Employer requested that the CAC rejected the application for recognition as inadmissible.

Considerations

30. 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.

31. 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 11 in that before the end of the "first period" which is defined in paragraph 10(6) of the Schedule as "the period of 10 working days starting with the day after that on which the employer receives the request for recognition", the Employer, whilst acknowledging receipt of the request in its letter of 12 September 2016, failed to respond to the substantive matter of the request for recognition either at that time or subsequently. Furthermore the Panel is 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)

32. 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 17.18% 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. The Panel has therefore decided 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.

Paragraph 36(1)(b)

33. 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. The check conducted by the Case Manager showed that a total of 10.57% of the workers in the proposed bargaining unit had signed the Union's petition in support of recognition. The Employer, in its comments on the results of the Case Manager's report, has argued that this degree of support was not sufficient for the CAC to consider this test satisfied. The Employer also questioned the strength of desire for recognition amongst Union members given the small proportion of the total, some 3.52%, that had signed the Union's petition. The total support demonstrated by a combination of those who are members of the Union and those who have signed a petition in support of recognition of the Union is 24.23%.

34. We remind ourselves that it is for the Union to satisfy the Panel on the balance of probabilities that its application should be accepted by the CAC and that it has met the threshold tests. We are expected to make the assessment quickly: the period for acceptance is 10 working

days from the day after the date of receipt by the CAC of the Union's application, unless the Panel extends time. The majority likely support test is inherently somewhat speculative – inviting us to anticipate correctly how individuals might vote in an election where, as here, a majority of the members of the proposed bargaining unit are not members of the Union. It is therefore an art similar to psephology, which, to put it politely, has in recent times had a chequered history of accurately predicting election results.

35. In this case we extended the acceptance period in order for the Case Manager to conduct a membership and support check (the Report) which has been extremely helpful. Its results are not in dispute and demonstrable support for the Union through both commitment by membership and from signing a petition runs at just under half of 50% of the workers in the proposed bargaining unit. Our task is to assess whether the visible part exposed by the Report hints at hidden support lying, iceberg fashion, below the waterline: in the language of the psephologist, the shy or embarrassed Union supporter.¹

36. The Union's comments on the Report seek to address the limited apparent support in two ways. Firstly it states that it is in the early stages of gathering names and recruiting members. Secondly that its access to the workers is limited – at this stage of the process it has no right of access to campaign within the workplace, and its activities outside the factory gates, as it were, is hindered given the 24 hour a day 7 day a week nature of the business: the shift pattern means that it is not easy to talk to workers on their way to or from work. The Employer meanwhile urges us not only to recognise that support falls a long way short of majority likely support, but that Union membership cannot be taken to equate to support for recognition when so few Union members have signed the petition. It submits that it follows that likely support is therefore less than the combined total of Union members and non-Union member petition signatories.

37. We conclude that the fact of Union membership is sufficient on the facts of this case, to demonstrate support for recognition of the Union by the Employer. We also conclude that there is likely to be considerably more support than is demonstrated by those who made the effort to sign the petition. However, we do not conclude from the relatively low figures of both Union

¹ To plagiarise the terms Shy Tory and Embarrassed Brexiteer

membership and petition signatories that there is sufficient evidence before us to conclude that there is majority likely support in this case. If, as suggested by the Union it is still in the early phase of gathering support, its application is premature. Absent any other evidence to suggest that there is more support or why it might be elusive or hidden at this stage, the gap between 24.23% and more than 50% is too great. Accordingly the acceptance test set out at paragraph 36 (1)(b) has not been met by the Union in this case. The Union is required to meet all the threshold tests in order for its application to be accepted.

Decision

38. For the reasons given above, the Panel's decision is that the application is not accepted by the CAC.

Panel

Her Honour Judge Stacey, Panel Chair

Mr David Crowe

Mr Paul Talbot.

3 November 2016