Case Number: DI/10/(2014)
22 May 2015

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SECTIONS 181-185 – DISCLOSURE OF INFORMATION

DECISION ON PRELIMINARY ISSUE OF WHETHER THE UNION IS RECOGNISED FOR COLLECTIVE BARGAINING

THE PARTIES:

GMB

And

Kuehne + Nagel

INTRODUCTION

1. The GMB ("the Union") submitted a complaint to the Central Arbitration Committee ("CAC") dated 5 August 2014 under section 183 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the Act"). The complaint related to an alleged failure by Kuehne + Nagel ("the Employer") to disclose information to the Union for the purposes of collective bargaining.

2. In accordance with section 263 of the Act, the Chairman of the CAC established a Panel to consider the complaint. The Panel consisted of Professor Kenny Miller, Panel Chairman, and, as members, Mr Dennis Cameron and Mrs. Maureen Chambers. The Case Manager appointed to support the Panel was Adam Goldstein until his departure from the CAC and Ms Sharmin Khan took over the role. However, for the purposes of this decision,

the Case Manager was Nigel Cookson and the Panel member was Ms Virginia Branney as Mr Cameron has retired from the CAC.

THE UNION'S COMPLAINT

3. The Union's complaint was submitted by Ms Gail Johnson, Regional Organiser, on behalf of the Union and the workers to whom the complaint related were "All staff working within the company's region known as "North 1"".

4. The Union explained that it had requested information for the purposes of negotiations upon terms and conditions of employment from the Employer on 14 July 2014 but none had been disclosed. The Union sought this information in respect of those for whom it was recognised, and for those that it was not, in order to ensure that there was parity and fairness. The specific items requested by the Union are set out in appendix two of this decision.

5. The Union explained that the Employer also recognised UNITE the Union ("UNITE") and was currently engaged in negotiations with UNITE and was providing UNITE with the information necessary. However, it was not providing the Union with that information and this substantially disadvantaged the Union in its representation of its members.

6. On 23 July 2014 the Employer responded to the Union's letter of 14 July 2014 refusing the request for the information. The Employer said that, at this point in time, the Union was not officially recognised for any forms of negotiation in North 1 and so it was unable to comply with the Union's request. However, added the Employer, as reaffirmed at the meeting with the Union on 30 June 2014, it remained committed to communicating with the Union and this included summary information on outputs from the Joint Working Party and updates on its negotiations with UNITE. Copies of the letters referred to were attached to the complaint.

THE EMPLOYER'S RESPONSE

7. The Union's complaint was forwarded to the Employer and a response dated 16 September 2014 was received from Shoosmiths Solicitors.

8. The Employer said that it did not recognise the Union for collective bargaining purposes within the North 1 region as alleged by the Union. Attached to the response were letters from the Employer to the Union dated 17 January 2013 which should have been dated 2014; a letter from the Employer to all employees in North 1 dated 17 January 2014; a letter from the Employer to the Union incorrectly dated 27 January 2013 but in fact 17 January 2014; and a letter from the Employer to the Union dated 23 July 2014. The letters referred to by the Employer were enclosed with its response.

THE PRELIMINARY ISSUE

9. Section 181(1) of the Act imposes a general duty of disclosure on an employer in the following terms:

> **An employer who recognises an independent trade union shall, for the purposes of all stages of collective bargaining about matters, and in relation to descriptions of workers, in respect of which the union is recognised by him, disclose to representatives of the union, on request, the information required by this section.**

10. The parties were in dispute as to whether the Employer recognised the Union for the purposes of collective bargaining in respect of the relevant descriptions of workers. Accordingly, the preliminary issue is whether the Employer recognises the Union for collective bargaining, as required by section 181(1) of the Act. If the Panel decides the preliminary issue in favour of the Union it will be necessary to determine the Union's substantive complaint in the usual way, including the possibility of encouraging a resolution through conciliation. If the Panel decides the preliminary issue in favour of the Employer, the Union's complaint will be dismissed.

THE PANEL'S COMMUNICATION TO THE PARTIES

11. On 25 November 2014 the parties were informed that as attempts to resolve the matter voluntarily had not, so far, been successful, the Panel would, if necessary, determine the complaint by way of a formal decision. However, before doing so, the Panel invited the Union's comments on the Employer's assertion that it did not recognise the Union for

collective bargaining purposes within the North 1 region. There followed an exchange of correspondence with both parties commenting on each other's position. One issue on which the parties explicitly agreed was that the Union was recognised for the purposes of collective bargaining in respect of the warehouse operatives from the Ex-Federation Wellington Road distribution operation. The parties failed to agree, however, that the Union was recognised in respect of the North 1 Region.

THE FIRST HEARING

12. In view of the differences between the parties, the Panel arranged a hearing which took place in Newcastle on 28 January 2015. The parties were informed that the Panel would hear and determine whether or not the Union was recognised in the North 1 Region as a discrete preliminary issue. It was only if the Panel decided in favour of the Union that it would be necessary, at a later stage, to determine the substantive application for information disclosure.

13. At the hearing the parties reached an agreement so that it was unnecessary for the Panel to determine the merits of the preliminary issue. The Employer agreed to disclose the information requested by the Union on the basis that it conceded that the Union was recognised for the purposes of collective bargaining in respect of the warehouse operatives from the Ex-Federation Wellington Road distribution operation. A timetable for the disclosure was set and the parties were reminded that it would be open to the Union to revive the complaint if full disclosure was not forthcoming within the timeframe set.

14. On 17 March 2015 the Union wrote to the CAC saying that its application was based upon an assertion that it was recognised for the whole of North 1 bargaining unit, and that the information sought applied to that whole. However, the Employer had proceeded on the basis that recognition was limited to the warehouse staff only. It was clear therefore that the CAC would need to determine the extent and scope of that recognition before any further progress can be made.

THE SECOND HEARING

15. On 1 April 2015 the Panel, being satisfied that there was no reasonable likelihood of the Union's complaint being resolved by conciliation, gave notice to the parties that a hearing to determine the preliminary issue of whether or not the Union was recognised would take place in Newcastle on 29 April 2015.

16. In addition to their written submissions the Panel requested that the parties provide additional documentation which included the Recognition Agreement with UNITE for North 1 workers; the contracts of employment for staff in North 1; any notes taken at the meeting of 13 March 2014 and the GMB Recognition Agreement at the time of transfer. The Employer, in its written submissions, explained that the majority of these documents had already been included in previous disclosure and gave the relevant page numbers in its bundle. Any of the documents not previously provided were also in its bundle save for the Union's agreement at the time of transfer as the Employer did not possess a copy. The Employer was not certain whether the reference to the meeting of 13 March 2014 related to a meeting on 13 January 2014 and in the event that this was so, produced minutes of this meeting.

17. At the outset of the hearing the Panel Chairman reiterated the two matters that the parties should address in their submissions: was the Union recognised by the Employer and, if so, was it subsequently derecognised.

SUMMARY OF THE UNION'S WRITTEN AND ORAL SUBMISSIONS

Issue 1 - Recognition in North 1

18. Originally North 1 was a geographical area operated by Scottish Courage and covered distribution sites at Washington, Cumbria and Stockton. The Union was recognised in North 1 by Scottish Courage and this recognition transferred to the Employer when it acquired the business following a transfer pursuant to the *Transfer of Undertakings (Protection of Employment) Regulations 2006* ("TUPE"). The Employer's statements suggesting a change of position were sufficient evidence to show that it accepted that, at least until recently, it did recognise the Union at North 1 for collective bargaining. However, in case this was disputed the Union submitted a number of documents which illustrated a lengthy period of

recognition. The first was from 2005 and was an agreement with Scottish Courage which recorded that negotiations were concluded with the Union with a view to binding the membership. In paragraph 6 of the agreement, the reference to the Regional Operating Agreement was to the local collective bargaining arrangements in North 1 with the Union. These clearly continued. It also noted the importance of the ongoing relationship in paragraph 8.

19. The second document dated 25 April 2006 was an example of correspondence from the Union pointing out that it was recognised and so expected to be involved in the consultation under TUPE which stated that an employer was obliged to consult with the recognised trade union (where present). The Employer's reply dated 2 May 2006 confirmed that the Union would join the consultation group. The Employer did not challenge the assertion that the Union was recognised.

20. The third comprised a note from the Employer dated 22 January 2007 which recorded formal consultations about base business costs and its goal to negotiate on pay for new starters. It also recorded that the Employer would provide all relevant information to enable collective bargaining to occur in relation to those discussions.

21. The fourth document was the 2010 Pay Deal announcement which was on company notepaper and it specifically related to North 1 Region in three separate places and also referred to the Union being recognised in Washington. This was evidence of a collectively bargained pay agreement being accepted. The signatures of those involved were also present.

22. Fifth, it relied upon a copy of the April 2011 draft Addendum to the XYZ Regional Operating Agreement which recorded agreement reached with the unions about working patterns and terms and conditions of employment, including redundancy terms. The Union was named as a signatory union and the region was identified as 'North 1'. Although the Union accepted that it was clearly a draft, it offered it as evidence of voluntary negotiations with the Union within that region at that time. If the Union was not recognised in North 1 then the draft would not refer to it.

23. Sixth, the Union provided a letter dated 6 April 2012 by way of an example of correspondence to the Union dealing with redundancy consultation. Under s.188 of the Act an employer was obliged to consult with the recognised trade union (where present).

24. Seventh, a letter of 7 September 2012 which explicitly followed on from pay negotiations with the Union. It recorded those negotiations and provided the information that the Union asked for ahead of conducting a ballot of North 1 members on the offer. The Employer was clearly awaiting the outcome of that collective bargaining process.

25. Eighth, the Union provided notes of a meeting with the Employer in relation to secondary wage negotiations on 11 December 2013.

26. Finally, the Union provided copies of the presentation slides produced by the Employer on 13 January 2014 which confirmed the Union's participation in pay negotiations in North 1 from at least February 2005. They also recorded recognition for grievance and disciplinary matters. It also noted that whilst no collective bargaining was conducted with the Union and UNITE in the same meeting, there was negotiation on separately presented pay claims. The slides also stated that the Union was not recognised nationally, which was correct, and the Union was not clear as to what the Employer was implying when it said that the UNITE Agreement took precedence. This was not a clear form of words if this was intended to be notice of derecognition.

27. The Union's position was that at the very least the Employer had implicitly recognised it through a course of dealings over seven years. In the National Union of Tailors and Garment Workers v Charles Ingram & Co Ltd [1978] 1 All ER 1271 it was held that in the absence of a written agreement an inference could be drawn from the actions of the Employer and that this would normally involve its conduct over a period of time. Such conduct could, on proper interpretation, give rise to the conclusion that the employer had recognised the union. In National Union of Gold, Silver & Allied Trades v Albury Brothers Ltd [1978] IRLR 504 the Court of Appeal said that recognition was not merely a willingness to discuss but a willingness to negotiate with a view to striking a bargain in relation to the matters set out in the statutory list.

28. It was also noted that s.178(3) of the Act said that recognition was where an employer recognised a union 'to any extent' for the purpose of collective bargaining. The Union interpreted this to mean that, unless the contrary was clearly stated, where a union was recognised for one pay round etc, it was recognised for all pay rounds etc.

29. The Union referred the Panel to **Harvey on Industrial Relations and Employment Law** at paragraph [932] for the proposition that Regulation 6(2)(a) of TUPE could be construed in such a way that any pre-existing agreement on the part of the transferee may be varied or rescinded to take account of the change brought about by the deemed recognition of the transferor's union. So, essentially, recognition of the Union transfers in the same way as before but the agreements already entered into by the Employer, the transferee, could be rescinded or varied accordingly.

30. To summarise, the Union considered that there was clear evidence of recognition by both the Employer and its predecessor companies. They had negotiated with the Union with a view to reaching agreement and whilst this had sometimes been against the background of some strained relationships with UNITE, it had nevertheless occurred, and that was enough.

Issue 2 - Derecognition

31. The Union understood that once recognition had occurred, an employer could only withdraw recognition formally. It could not argue that it did not mean to recognise the Union and so pass it off as a one-off event or mistake, or to seek to sideline or minimise it for some immediately expedient reason. The Union referred to this as the 'no back-tracking rule' and relied on the CAC's decision in GMB & Methodist Homes Association (TUR1/766/2011, 6 January 2012*)* on this point in its reference to the need for any derecognition to be by 'proper processes'.

32. The Employer had suggested that the 2005 Scottish Courage agreement was evidence of derecognition but this was nonsense as clearly no trade union was going to agree to derecognition. In any event, it was a document which evidenced negotiations with the Union about pay and conditions leading to an agreement that bound the members concerned. As noted above, the reference to the Regional Operating Agreement was to the local collective bargaining arrangements in North 1 with the Union, and these clearly continued. It also

noted the importance of the ongoing relationship. If the Employer genuinely believed that this ended recognition how did it account for the later material and why in particular would it insert a reference to the recognition in North 1 in the 2011 draft addendum to the XYZ Regional Operating Agreement? Logically of course, even if that document was a statement of derecognition, which the Union did not accept, the Employer subsequently re-recognised the Union by its later course of dealings.

33. Commenting on the documents attached to the Employer's Response of 16 September 2014, the Union considered that they were not particularly probative and must be read within the context in which they were written which was at a time that UNITE was making it known to the Employer that it was unhappy that the Union was recognised and involved in negotiations. The Employer had been operating for some time whereby negotiations with the two unions were held separately on the basis that what UNITE did not see, it would not grieve over.

34. In the Union's view, any move by an employer to derecognise a union must be done in a straightforward way that left no room for doubt at all that that was what was happening. In the context of unfair dismissal the current EAT thinking was that euphemisms were to be avoided (Celebi v Compass Group UK and Ireland Ltd (trading as Scolarest UKEAT/0032/10/LA). It seemed to the Union that in a forum such as the CAC, this should also be the touchstone and part of the 'proper processes' referred to earlier.

35. The letter of 17 January 2014 did not meet that standard. Nowhere did it clearly state that its intent was derecognition. The Employer used the euphemism "*…moving forward all bargaining in relation to pay, terms and conditions will be negotiated with Unite*". As it always negotiated with UNITE this was nothing new. Similarly, its reference to "*…employees who are GMB members can still be represented by you/your representatives on employment related matters (e.g. grievance and disciplinary)*" was utterly vague; s.178 of the Act was a list of 'employment related matters' such as engagement, physical conditions, allocation of work, trade union membership etc. Indeed, as the 2014 slides acknowledged, the Union was recognised for disciplinary and grievance matters. Nor could the letter to members of the same date be held to derecognise the Union. To accept it as one would be a very unsatisfactory way to conduct industrial relations.

36. The letter of 27 January 2014 again muddied the waters. The context was of negotiations with the Union out of sight of UNITE. This letter clearly confirmed that there were no issues with the Union and that the Employer would 'maintain the relationship and continue to communicate with [the Union] on any key issues affecting the business'. As the relationship was one of collective bargaining this passage was ambiguous.

37. The letter of 23 July 2014 was similarly ambiguous. Even though it again referred to maintaining the relationship it also said that the Union was not *officially* recognised for 'any forms of negotiation in North 1'. This appeared to acknowledge the somewhat 'under the counter' status quo position that existed. The scope was also at odds with previous statements, however as the 17 January 2014 letter was clear in saying that "…*GMB members can still be represented by you/your representatives on employment related matters (e.g. grievance and disciplinary).*"

38. This contextual issue was confused further by the fact that the Employer continued to deduct Union contributions from members, (check-off), and forward them to the Union; it recognised Union Shop Stewards, and granted time off with pay for training and Union meetings. Furthermore, as its letter to employees dated 17 January 2014 said, the Employer would continue to collectively bargaining for the four warehouse staff within the same bargaining unit. Even more confusingly, at Acas on 19 November 2014, the Employer suggested that the Union was not recognised as far back as 2005 despite the evidence to the contrary.

39. In answer to questions from the Panel about the processes in place at the time that the unions co-operated the Union said it agreed with the Employer's explanation but added that it frequently took the lead in negotiations involving the unions and the Employer and that one of its signatories was first on the list of union side signatories to the 2010 Pay levels Addendum was evidence of such primacy. Indeed, some meetings were only attended by the Union and the Employer with no UNITE representative on hand. As for the annual pay round, both unions would meet and come up with a joint claim. The two unions would then ballot their respective membership on the subsequent offer and the votes would be counted. For the offer to be accepted both Unions had to vote in the same way. Since 2013 the Union had met with the Employer to discuss issues such as shift patterns and boundary changes. Carlisle was an example of where the Employer had encountered problems when changes

were introduced and the Employer's attitude was "send the Union down there and get it sorted". Discussions over the allocation of work were, in the Union's view, negotiations under s.178 and further evidence that the Union continued to be recognised by the Employer. S.178 defines a collective agreement as "any agreement or arrangement made by or on behalf of" a union and employer "relating to one or more of the matters" and so was not limited to negotiations in respect of pay or contracts of employment. The Employer had continued to talk to the Union over many matters and this was still ongoing. On this basis, according to the terms of s.178, the Union remained recognised.

40. Taken as a whole, the correspondence provided by the Employer was ambiguous and inconsistent and could not meet the straightforward standards expected of documents which dealt with such a fundamental issue as derecognition. It is therefore the Union's overall position that it had longstanding recognition which continued, despite the evident recent attempts by the Employer to back-track from that position.

SUMMARY OF THE EMPLOYER'S WRITTEN AND ORAL SUBMISSIONS

41. In opening the Employer made clear its position that this was a dispute between UNITE and the Union and not a matter for the CAC. The Union claimed, in its letter of 17 March 2015, to be recognised for fleet employees for the North 1 area but this was not the case as UNITE was recognised in respect of these employees and had been since before the 2005 transfer that had brought them across to the company.

42. As the Employer did not accept that the Union was recognised in relation to the fleet employees for the purpose of pay and benefits in North 1, it was under no obligation to provide the information requested by the Union.

43. As already stated, the Employer had always accepted that the Union remained recognised for the Warehouse operatives transferred from the Ex-Federation Wellington Road distribution operation to the Washington Distribution Centre. These employees refused the UNITE based contracts which were accepted by the fleet employees and the Union remained recognised for these workers. The information requested by the Union in respect of the warehouse employees was provided on 26 February 2015.

Issue 1 - Recognition in North 1

44. North 1 was a geographical area operated by the Employer's business covering distribution sites at Washington, Carlisle (Cumbria) and Stockton. At the time of the transfer of the fleet employees and warehouse operatives to Scottish Courage there was already a recognition agreement with UNITE for all employees in North 1.

45. The Employer could not comment on the relationship between Scottish Courage and the Union in 2005 and it had not seen a copy of any agreement between the Union and any of its predecessors. However, the documents produced by the Union clearly showed that its agreement for consultation on the transfer only related to the Washington site. As Regulation 6(2)(b) of TUPE provided, the agreement for recognition was varied by the Employer and the Union. The February 2005 agreement incorporated this variation, demonstrating that the Union agreed to sign up to the existing UNITE agreements including the National Recognition and Procedural Agreement and the Regional Operating Agreement. The new terms offered employees more flexibility for higher salaries and the employees were notified at the time that the UNITE agreement had been entered into by the Union. Commenting on the Union's reference to **Harvey** on the construction of Regulation 6(2)(b) the Employer pointed out that the extract provided had not been updated to take account of the Supreme Court judgment in the matter of Parkwood Leisure Ltd v Alemo-Herron & Ors [2011] UKSC 26 which set in stone the transferor's agreement at the moment of transfer but left it open to negotiation post transfer.

46. The Union was included in consultation after the transfer in 2005 but only in conjunction with UNITE and as part of these UNITE overarching agreements and only in relation to Washington. This agreement specifically excluded the warehouse operatives from the Ex-Federation Wellington Road distribution operation who had always fallen outside the general North 1 negotiation process. These employees remained on Federation terms and conditions of employment with different pay rates and a different pay review date. The pay negotiations for these employees were held separately from the fleet consultation.

47. The Union was able to represent its members in relation to disciplinary and grievance issues in Washington, which, in any event, was a legal requirement. The agreement with UNITE dated 2011 clearly stated it related to part time working hours only and further, given

it was with UNITE alone, demonstrated its position as the predominant union in partnership with the Employer. As for the draft Addendum to the XYZ Regional Operations Agreement, referred to by the Union, this was only in draft form and so clearly could not be relied upon.

48. In response to a question from the Panel the Employer explained that, at the time the unions were co-operating, they would discuss pay claims and submit a joint claim. Representatives from both unions would meet and negotiate, behind closed doors, and an offer would be put to members by the two unions followed by a ballot with each union balloting its own members. Votes were counted independently and, in essence, there had to be "yes" votes from both unions.

49. In 2012, the Union was consulted over redundancies and it was accepted that in the same year, pay review figures and an explanation of the same were provided to the Union. This information was given whilst the unions were co-operating with each other. However, they could not agree on the 2012 pay offer despite the Employer's encouragement. UNITE took industrial action over this pay claim and the Union did not and this caused a rift in their relationship. UNITE specifically objected to the Union being involved in the 2013 pay negotiations, refused to share a table with the Union and threatened further industrial action. The Employer did attempt to run parallel talks between 2013 and 2014 but then had no alternative but to inform the Union that, in relation to pay, it was unable to continue discussions. This decision, the Employer argued, was clearly set out in letters to the Union dated 17 January 2014 (mistakenly dated 2013), to its members in letters dated 17 January 2014 and was re-iterated in a letter dated 27 January 2014.

50. Unfortunately, the unions were unable to continue to co-operate. In the 2013 pay review, the Union was presented with the final offer and an explanation of the method of calculation. This proved unsatisfactory to the Union as it wanted to negotiate and ballot its members. As such, the pay offer was withdrawn from the table as the Employer was not able to continue discussion with the Union as a Regional Operating Agreement was already in place with UNITE.

51. It was stated in January 2014 that the Union would have recognition rights for employment related rights other than pay, terms and conditions such as disciplinary and grievance and this was clearly set out to the Union. However, it continued to request

information which was outside this scope. The Employer responded on 23 July 2014 refusing the request for information and clarifying once again that the Union was "not officially recognised for any form of negotiation in North 1". The Employer confirmed this by stating that the Union did "not have any negotiating rights in North 1". In order to maintain links with the Union, the Employer did agree to keep it updated concerning negotiations on pay, terms and conditions which were held with UNITE. However, this did not amount to recognition.

52. It is the Employer's position that the Union's involvement transferred across under TUPE but on the agreed basis that it was included under the UNITE agreements only in relation to Washington. The Union was, with the consent of UNITE, invited to pay negotiations. Warehouse operatives from the ex-Federation Wellington Road distribution operation had always fallen outside the general North 1 negotiation process and were a unique group for whom the Union always remained recognised.

53. Given that in 2005 the Union agreed to abide by the UNITE agreement, issues of implying recognition were irrelevant. The extent of negotiation was clear and accepted by all until the Union and UNITE were unable to operate under the agreed arrangements.

Issue 2 - Derecognition

54. Since the breakdown of the relationship between the two unions, the Employer had been clear with the Union as to its status within the organisation. In the meeting on 13 January 2014 the Union was clearly informed that, given the irretrievable breakdown in relationship between the Union and UNITE, the Employer would negotiate only with UNITE for the purposes of recognition for pay, terms and conditions and this could clearly be seen from the last few entries in the minutes of the meeting.

55. This was repeated in writing to the Union on 17 January 2014 (mistakenly dated 2013) which stated that, as UNITE and the Union were not able to reconcile, the Employer would have to take action and that "moving forward all bargaining in relation to pay, terms and conditions will be negotiated by UNITE". All employees were informed on the same date that "with exception of the four Warehouse ex-Federation employees, all negotiations in relation to terms and conditions, at this point will be negotiated with Unite".

56. When the Union refused to accept this the Employer wrote on 27 January 2014 stating "at this point all bargaining in relation to pay and terms and conditions would go through UNITE".

57. It was clear in January 2014 that the Union was no longer party to negotiations in relation to pay, terms and conditions. It was in no way unambiguous having been clearly explained, both in person and in writing. The Employer had been utterly clear and consistent in its behaviour since January 2014. This had been clearly explained on a number of occasions to the Union and it was disingenuous of the Union to suggest there was any confusion about the position. However, if it was the case that the unions were jointly recognised then the January letters clearly terminated that agreement and the Union was derecognised as from January 2014.

58. The Union has argued that if it was derecognised, the fact that the Employer continued to engage in discussions implied that it continued to be recognised. However, the truth of the matter was that the Union had a large membership within North 1 as well as partial recognition, so clearly the Employer would communicate with it. The Employer referred to the case of Working Links v PCSU UKEAT/0305/12/RN which looked at a similar situation and the EAT decided it did not amount to recognition. If the Union argued it was recognised, it had to be clearly recognised. The Union had been invited to sit in on pay negotiations at the invitation of UNITE. The Employer had not directly negotiated solely with the Union for employees in North 1 but it simply had an amicable relationship with the Union because of its membership. Otherwise the Employer would stop talking to the Union altogether.

59. The issues in relation to recognition for other purposes such as grievances and disciplinary were irrelevant to the information requested, which was purely connected with pay. However, to fully address the issues raised by the Union, when it was unwilling to accept that it was not party to the negotiations for pay purposes, a further meeting was held on 30 June 2014. At this meeting the Employer made it clear again that the Union was not recognised for any forms of negotiation. This was confirmed by letter on 23 July 2014. As was their statutory right, the Employer continued to allow the Union's officials to represent employees at disciplinary hearings and grievance meetings, where appropriate.

60. The Employer did continue to negotiate separately with the Union in relation to the ex- Federation Wellington Road Warehouse operatives as was agreed in 2005 with both the Union and UNITE. No parties had sought to change this approach. The Employer had attempted to retain a level of cordiality with all of the Union's members.

61. It is wholly clear that the Union was aware from 2005 that it was included in pay negotiations in partnership with UNITE. The unions were not able to maintain that partnership. UNITE had the collective agreement for North 1 which included Washington and that, at the request of UNITE, the Union was excluded from the 2013 pay negotiations in December 2013 and formally notified and reminded of this on numerous occasions.

62. There was no evidence that the Union was ever recognised for pay negotiation purposes other than at the invitation of UNITE to sit in on the UNITE negotiations. It was for the Union to show clear and unequivocal evidence that it was recognised as a stand alone negotiation body which it could not (National Union of Gold, Silver and Allied Trades v Albury Bros Ltd [1977] IRLR 173).

63. It was clear in January 2014 that the Union was no longer party to negotiations in relation to pay, terms and conditions. It was in no way unambiguous having been clearly explained both in person and in writing. The Employer was committed to keeping the Union informed as regards the progress of the pay offer and took it through the presentation but it was not an invitation to take the offer back to its members. The Employer had been utterly clear and consistent in its behaviour since January 2014 and had not assumed a continuing duty towards the Union in relation to pay or otherwise (National Union of Tailors and Garment Workers v Charles Ingram & Co Limited [1978] 1All ER 1271). Even if there had been past negotiations in conjunction with UNITE these would not of itself prove a future duty existed (Transport and General Workers' Union v Dyer [1977] IRLR 93 EAT). This has been clearly explained on a number of occasions to the Union.

THE PANEL'S ANALYSIS

THE LAW

64. According to section 181(1) of the Act, which is set out at paragraph 9 above, an employer is under a duty to disclose the requisite information for the purposes of all stages of collective bargaining about matters, and in relation to descriptions of workers, in respect of which a union is recognised. By virtue of section 178(3) of the Act, "recognition" means the recognition of a union by an employer "to any extent for the purpose of collective bargaining". Section 178(1) defines a "collective agreement" as "any agreement or arrangement made by or on behalf of" a union and employer "relating to one or more of the matters" listed in section 178(2). The matters listed in section 178(2) being:

> **(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;**
> **(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;**
> **(c) allocation of work or the duties of employment between workers or groups of workers;**
> **(d) matters of discipline;**
> **(e) a worker's membership or non-membership of a trade union;**
> **(f) facilities for officials of trade unions; and**
> **(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.**

65. Section 178(1) then defines "collective bargaining" as "negotiations relating to or connected with one or more of those matters" specified in the list. It follows that under the Act a recognised trade union is one that is recognised by the employer to any extent for the purposes of negotiations connected with any of the matters listed above.

66. Other provisions that have been referred to by the parties are contained in the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Regulation 6 deems that trade union recognition is transferred in respect of transferred employees, unless the agreement for recognition is varied or rescinded.

THE PANEL'S CONSIDERATIONS

67. The Panel has carefully considered the submissions made by both parties, in writing and orally, and would thank Mr Johnson and Ms Rome for the manner in which they advanced their respective cases. We have also considered the authorities referred to by the parties and these have been of assistance in our deliberations.

68. The facts of this case are that in 2005, Scottish Courage Distribution and Federation Brewery were integrated. Before integration, Scottish Courage (or Scottish and Newcastle as it was at the time) recognised the TGWU, which subsequently became UNITE. The Union was recognised for Fleet and Warehouse Operatives at the Federation Brewery. The Union reached an agreement in February 2005 with Scottish Courage that covered the Fleet Operatives transfer to the site at Washington, where they continue to be employed today. This agreement confirmed that the Fleet Operatives would transfer on the terms and conditions contained in the regional operating Agreement relating to the North 1 Region. Clause 6 of the agreement stated that:

> **"6. The GMB will sign up to the following Company agreements**
>
> **The Agreement on national Ways of Working and Standard terms and Conditions**
>
> **The National Recognition and Procedural Agreement[1]**
>
> **The Regional Operating Agreement"**

69. At the same time, as well as the Fleet Operatives, a number of Warehouse Operatives were also transferred to the Washington site from the ex-Federation Brewery, Wellington Road distribution operation. Some, or all, of these workers refused to move over to the new contracts in the way that the Fleet Operatives did. They remained on their original contracts under which the Union was the recognised union. This number has fallen over time until only three remain today and they steadfastly hold true to their original contracts. It is accepted by the Employer that the Union was recognised in respect of these workers and this recognition continues today. This was the main reason, so the Employer submitted, as to why it has continued dialogue with the Union since 2005. However, the Employer also engaged with the Union in respect of the workers in the wider North 1 region. It said it did so because UNITE had voluntarily permitted the Union a seat at the bargaining table. As long as the two

[1] This is the national agreement with UNITE.

unions co-operated the tripartite relationship was deemed a success. However, when the two unions fell out in 2013 UNITE flexed its muscles and informed the Employer that it was no longer prepared to sit around the same table as the Union. The Employer, not wishing to take sides, tried its best to accommodate both unions but this proved difficult; especially when a UNITE official travelled to Newcastle and threatened the Employer that the matter would escalate into a national dispute if it continued to allow the Union a say over North 1.

70. Simply put, the Employer's case is that at no time had it recognised the Union in respect of North 1 but, in the alternative, if the Panel found against it, then its communications with the Union in January 2014, expressed both orally and in writing, were tantamount to a derecognition.

71. Conversely, it is the Union's case that the written evidence and by its course of action, shows that the Employer accorded the Union recognition for the North 1 region along with UNITE and that the documents the Employer relies upon as a purported derecognition are no such thing.

Issue 1 - Recognition in North 1

72. The question we must answer first is whether there is sufficient evidence, either in writing or established by the course of events, to persuade us that the Union was recognised for the workers in the North 1 region as it claims.

73. In considering this question we found the following helpful. First, the matter of National Union of Gold, Silver & Allied Trades v Albury Brothers Ltd [1978] IRLR 504 to which both parties referred. In paragraph 11 Lord Denning MR observed:

> **"A recognition issue is a most important matter for industry; and therefore an employer is not to be held to have recognised a trade union unless the evidence is clear. Sometimes there is an actual agreement of recognition. Sometimes there is an implied agreement of recognition. But at all events there must be something sufficiently clear and distinct by conduct or otherwise so that one can say, 'They have mutually recognised one another, the trade union and the employers, for the purposes of collective bargaining."**

Lord Justice Eveleigh held at paragraph 19:

> **"…it seems to me that recognition entails accepting a trade union to some extent as the representative of the employees for the purpose of carrying on negotiations in relation to or connected with one or more of the matters set out in s29(1) of the 1974 Act [now TULR(C)A Section 178(2)]. Thus it entails not merely a willingness to discuss but also to negotiate in relation to one or more such matters. That is to say, to negotiate with a view to striking a bargain…"**

Second, and equally as informative, were the words of Lord McDonald in Transport and General Workers Union v Andrew Dyer [1977] IRLR 93 in which he held:

> **"8. We agree with the appellants that recognition need not necessarily involve some formal act on the part of an employer, and that it can inferred from his actings and those of the union.**
> **…**
> **9. Where agreement is to be inferred from actings these must be clear and unequivocal, usually though not necessarily, involving a course of conduct over a period of time."**

74. In the absence of a written agreement we must draw upon the evidence presented by the parties to see whether, in the words of Lord Denning, there is "something sufficiently clear and distinct by conduct or otherwise" for us to reach a conclusion one way or the other.

75. First we look at those documents that, in our view, imply recognition of the Union by the Employer over and above the recognition accorded in respect of the ex-Federation Washington Road warehouse operatives.

76. In 2010 the Employer, UNITE and the Union signed up to a Pay Level Addendum. This was headed:

Pay levels Addendum

Addendum to the Agreement between Kuehne + Nagel Drinks Logistics and the UNITE and GMB covering Fleet and Warehouse Operatives in North 1 Region.

This would infer that the two unions were deemed to be jointly recognised by the Employer in respect of North 1 although further in the agreement it said:

> **"The document expressly excludes the 6 Warehouse Operatives who transferred from the ex Federation Wellington Road distribution operation on 28th February 2005 under the provisions of the TUPE legislation.**

The GMB trade Union enjoys recognition in Washington only."

77. This is clearly at odds with the Employer's submission that the Union's recognition was limited to the ex Federation Wellington Road operatives and implies recognition did extend to the Washington distribution centre but not the entire North 1 region.

78. The Union then referred the Panel to the draft Addendum to XYZ Regional Operation Agreement dated April 2011. The Employer urged caution as the document was only a draft and we do not know if it was ever implemented; at least we have not been furnished with a final version. Under the part of the draft that deals with definitions and abbreviations it reads:

"The Company	**KN Drinks Logistics Ltd**
The Union	**Unite the Union**
	GMB (North 1 only)"

79. Next is a letter from the Employer to the Union dated 6 April 2012 following on from meetings between the parties in March and April of that year. It opened as follows:

"… I am writing to confirm the detail of the issues we discussed and the Company interpretation of the GMB position with regard to the need for headcount reduction at Washington, Cleveland and Cumbria"

Having set out the area that the Employer had looked at in order to minimise the need for compulsory redundancies it went on to say:

"The company offered the opportunity that if a nil salary increase was applied for 2012 this would save 3 permanent roles. It is our understanding from the meeting that you do not wish to pursue this opportunity to retain these 3 roles and wish to press ahead with your pay claim."

The letter concludes:

"Currently we are still in the position that if nothing else changes the formal proposal is that there will be a need for 8 compulsory redundancies across North 1, comprising 8 fleet… should

you wish to reconsider your position concerning the three potential compulsory redundancies referred too above please do let me know"

80. This letter is striking in that the Employer is consulting the Union on planned redundancies that only affect the fleet operatives with no mention made of the ex-Federation Wellington Road distribution operatives, the only workers, according to the Employer, in respect of whom the Union is recognised.

81. In the Employer's letter to the Union on 7 September 2012 which was further to a meeting on 6 September 2012 in connection with "this year's wage negotiations" the Employer ends its letter setting out the "proposals in order that a ballot could take place with your members". The two proposals being:

"Option 1: Increase of 2.99% on basic pay, however there would be 4 redundancies.
Option 2: Nil Pay Increase in 2012 which would mean no compulsory job losses this year and indeed the 3 fleet jobs will be red circled for future Tamar calculations."

82. If the Employer is correct and the Union is not recognised for North 1 then we have a circumstance in which the Union was being asked to ballot its members over a possible pay rise the ramification of which could be at least three workers in the UNITE bargaining unit facing redundancy.

83. We then have the written record of the discussion that took place on 11 December 2013 between the Employer and the Union. This was the first meeting that the Employer had with only the Union in attendance after the two unions had fallen out. It was held as a result of the Employer having received a copy of the Union's pay claim and concluded with the Employer saying:

"Thanks for the adjournment we feel at this point that we would ask you not to take anything back to your members at this stage and this is due to the situation between the <u>two union groups within North 1</u>" (emphasis added)

It is clear that the language used by the Employer demonstrates its belief that both unions represent the workers in the North 1 region. It is difficult to draw any other conclusion.

84. Next we had the slides from the presentation that the Employer gave to the Union on 13 January 2014. Following on from the slide that shows the Employer's relationship with UNITE on a national basis is the slide representing UNITE's relationship with the Union. The slide makes clear that, from February 2005, pay negotiations were between the Employer and "Unite and GMB" as was the agreement over the Pay Addendum. Clearly, the Employer views the Union as acting jointly with UNITE in respect of negotiations for North 1.

85. In addition, the minutes of the meeting between the Employer and the Union on 13 January 2014 recorded Danny Clayton, the current Regional Operations Manager for North East KN Drinks Logistics, as admitting the part played by the Union when he used phrases like:

> **"At a local level the Company has met jointly with Unite and the GMB on pay and reference is made to this in the Pay Addendums"**
> **"From 2005 until 2012 Unite and the GMB negotiated jointly with the Company, relationships were maintained and it worked well"**
> **"From 2005 to 2012 you [GMB] have actively been involved in negotiations"**

Danny Clayton's colleague, Una McLellan, currently the HR Advisor for Scotland and North East KN Drinks Logistics, in the same meeting comments:

> **"Previously though it was a joint claim"**

86. Again, the Panel finds that the language used by the Employer to describe the tripartite relationship would, in our view, leave a casual observer in no doubt that the Employer viewed UNITE and the Union as being on a level footing.

87. Whilst there is some written evidence to support the conclusion that the Union is recognised by the Employer for the North 1 region, as set out above, the Panel finds that there appears to be clear and unequivocal evidence of recognition through a course of conduct over a number of years, from 2005 until 2013. It was clear, for example, from the evidence presented at the hearing that the role of the Union's stewards was more than mere observers. The evidence we heard, and, importantly, which was not contradicted by the Employer, was that the Union's stewards played a full and equal part in the bargaining meetings (often taking the lead) and were recognised as such by the Employer and submitted joint claims

along with UNITE. We also heard that since the falling out between the unions the Employer had met with the Union to discuss issues including shift patterns and boundary changes and how the Employer would use the Union's shop steward as a "fireman" to go elsewhere in the region, the example given was to Carlisle, and sort out problems the Employer had encountered when it had sought to introduce these changes. We were told that the Employer's view was "send the union down there and get it sorted" with "the union" referring to the GMB and not to UNITE. The allocation of work or the duties of employment are matters that fall under s.178 and are further evidence that the Union continued to be recognised by the Employer.

88. The Employer says that it was UNITE that allowed the Union to the table in the first place, and this we do not dispute. However, once it had taken its seat it is the manner in which the Employer treats the Union that becomes central to our determination.

89. From the comments made at the hearing the Union's involvement amounted to taking part in negotiations, and this is supported by the written evidence above, and there appeared, on the face of it, to be no distinction between UNITE representatives and those of the Union. Crucially, in our view, the evidence shows that the Employer continued to negotiate with the Union after the split with UNITE on matters unconnected with the ex Federation Wellington Road operatives. Indeed, it is difficult not to arrive at the conclusion that the Employer's relationship with the Union is a far more amicable one than its relationship with UNITE.

Issue 2 - Derecognition

90. The Panel would argue, as Lord McDonald observed in Dyer, that if clear and unequivocal evidence is required to establish recognition, the same test should be applied for the opposite side of the coin, derecognition. Therefore derecognition should be not be easily inferred but requires clear and explicit language de-recognising the union for all matters in s.178. This is something we do not have here. The thrust of the Employer's communications regarding future negotiations is to say that "moving forward all bargaining in relation to pay, terms and conditions will be negotiated with UNITE". It did not explicitly derecognise the Union and, at, best, only dealt with some of the matters listed as items for collective bargaining in s.178. In addition, given that the Employer expressed a desire to maintain a relationship with the Union, there is a risk that the Employer might still bargain with the

Union over other matters in s.178 and there is evidence of this very fact as regards shift arrangements where, in our view, the Employer did more than just discuss. This would constitute negotiations connected with the allocation of work under s.178(2)(c). In addition, as far as we are aware, the Union's stewards still have access to facilities. The nearest the Employer came to derecognising the Union is in the letter of 23 July 2014. But this letter, when referring to North 1, said that the Union was:

> **"… at this point in time, …not officially recognised"**

Not officially recognised is not the same as not being recognised in one shape or form and our view is that, phrased in this way, it is still not explicit enough to constitute de-recognition for all of the matters listed in s.178(2). The term "officially recognised" is open to interpretation and the Union has already claimed recognition through a course of actions over the years rather then a written "official" agreement.

91. Elsewhere the Employer has claimed that its letter of 17 January 2014 clearly set out its intention when it stated that:

> **"…moving forward all bargaining in relation to pay, terms and conditions will be negotiated with Unite".**

But, as pointed out by the Union, the Employer has always negotiated with UNITE so this was not a change in the status quo and again, cannot be said to show clear intent of derecognition. In the same letter the Employer went on to add:

> **"…employees who are GMB members can still be represented by you/your representatives on employment related matters (e.g. grievance and disciplinary)".**

92. It is unclear as to what the Employer intended by the term "employment related matters" but s.178 sets out a list of matters which constitute a collective agreement and, as pointed out by the Union, clearly these matters are "employment related matters".

93. The Employer's letter of 27 January 2014 was equally as unclear. This said that:

"at this point all bargaining in relation to pay and terms and conditions would go through Unite; employees can still be represented by you on ER issues."

94. In our view, if it had been the Employer's intention to derecognise the Union then it should have done so in the clearest of terms and addressed explicitly all of the matters that are listed in s.178(2) not just pay and terms and conditions. What is telling is that the word "derecognise" or any variation thereof was not used in any of the Employer's correspondence to the Union post the 2013 rift in the relationship between the two unions. On balance we find that the correspondence admitted before us is not conclusive evidence that the Union was derecognised.

95. Finally, on the point of the original TUPE transfer, the Union presented us in the course of its submissions with an extract from **Harvey** on the construction of Regulation 6 of TUPE which supported its view that the agreement open to variation following a transfer was not the agreement held by the incoming union but the agreement with the union as recognised by the transferee and that this allowed the agreement to take account of the change in circumstances "brought by the deemed recognition of the transferor's union". Whilst we found this line of argument novel we were not persuaded that this is the correct construction of Regulation 6 which, in our mind, refers to the agreement held by the transferor and not by the transferee. In countering the Union's submission on this point the Employer also correctly pointed out **Harvey** had not been updated to reflect Alemo-Herron which established the static rather than the dynamic approach at the time of the transfer.

THE PANEL'S DECISION ON THE PRELIMINARY ISSUE

96. The Panel has arrived at the conclusion that the Employer recognised the Union for the purposes of collective bargaining in respect of employees engaged at the distribution sites that together form the North 1 Region and that there is no conclusive evidence to show that the Union has been subsequently derecognised.

97. Accordingly, in the light of the available evidence and on the balance of probabilities, the Panel decides as follows:

The Union is recognised by the Employer for the purposes of collective bargaining about matters, and in relation to descriptions of workers, in respect of which it has sought information from the Employer under section 181(1) of the Act.

PANEL

Professor Kenny Miller - Panel Chairman
Ms. Virginia Branney
Mrs. Maureen Chambers

22 May 2015

Appendix 1

Names of those who attended the hearing on 29 April 2015:

For the Union

Gail Johnson	-	GMB Regional Organiser
Colin Smith	-	GMB Senior Organiser
Neil Johnson	-	Solicitor (Thompsons)
Malcolm Green	-	GMB Shop Steward/Branch Secretary

For the Employer

Paula S Rome	-	Solicitor (Shoosmiths LLP)
Danny Clayton	-	Regional Operations Manager - North East KN Drinks Logistics
Carl Stimpson	-	Regional Operations Manager - North KN Drinks Logistics
Una McLellan	-	HR Advisor – Scotland and North East KN Drinks Logistics
Joanne Sparks	-	HR Business Partner Primary KN Drinks Logistics

Appendix 2

The information requested by the Union in its letter of 14 July 2015 was as follows:

Pay and benefits information

1. the principles and structure of payment systems;
2. job evaluation systems and grading criteria;
3. earnings and hours analysed according to work-group, grade, plant, sex, out-workers and homeworkers, department or division, giving, where appropriate, distributions and make-up of pay showing any additions to basic rate or salary;
4. total pay bill;
5. the total amount paid for agency staff;
6. details of fringe benefits and non-wage labour costs.

Conditions of service

7. policies on recruitment, redeployment, redundancy, training, equal opportunity, and promotion;
8. appraisal systems;
9. health, welfare and safety matters.

Manpower

10. numbers employed analysed according to grade, department, location, age and sex;
11. labour turnover;
12. absenteeism;
13. overtime and short time; manning standards;
14. planned changes in work methods, materials, equipment or organisation;
15. available manpower plans;
16. investment plans.

Performance

17. productivity and efficiency data;
18. savings from increase productivity and output;
19. return on capital invested;
20. sales and state of order book.

Financial

21. cost structures;
22. gross and net profits;
23. sources of earnings;
24. assets;
25. liabilities;
26. allocation of profits;
27. details of government financial assistance;
28. transfer prices;
29. loans to parent or subsidiary companies and interest charged.