

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:

National Union of Journalists

and

BuzzFeed (UK) Limited

Introduction

1. The National Union of Journalists (the Union) submitted an application to the CAC dated 14 March 2017 that it should be recognised for collective bargaining by BuzzFeed (UK) Limited (the Employer) for a bargaining unit comprising "Editorial staff currently working at BuzzFeed UK Limited at 40 Argyll Street, 2nd Floor, London, W1F 7EB excluding senior management defined as those who manage managers". The CAC gave both parties notice of receipt of the application on 14 March 2017. The Employer submitted a response to the CAC dated 21 March 2017 which was copied to the Union.

2. In accordance with section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), the CAC Chairman established a Panel to deal with the case. The Panel consisted of Professor Lynette Harris, Chair of the Panel, and, as Members, Ms Lesley Mercer and Mr Roger Roberts. 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 28 March 2017. The acceptance period was then extended to 18 April 2017 in order to allow time to conduct a membership check and for the parties to comment thereon. Time was then extended to 3 May 2017 to allow for the Panel to consider the papers received and to finalise its 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 therefore should be accepted.

Summary of the Union's application

5. In its application to the CAC dated 14 March 2017 the Union stated that it made its formal request for recognition on 25 November 2016 and the Employer's response was to agree to an exploratory meeting so that it understood the reason for the request. Two meetings were subsequently held on 4 January 2017 and 25 January 2017. Following the second meeting the Employer had confirmed that, if the Union was recognised for collective bargaining purposes, this would be limited to pay, hours and holidays; if the Union pursued recognition, it would want a secret ballot as set out in the statutory process. In addition, the Employer said that it intended to propose the formation of an internal staff structure. A copy of the Union's formal request was enclosed with its 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. According to the Union the total number of workers employed by the Employer was 135 with 75 of this number in the proposed bargaining unit, of whom 44 were Union members. 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 that it could provide a list of its members on a confidential basis. Attached to its application was a redacted version of its membership list which had been copied to the Employer.

8. The Union stated that the reason for selecting the proposed bargaining unit was that it was compatible with effective management. The Union said that the bargaining unit had not been agreed with the Employer and that, as far as it was aware, there was no existing recognition agreement in force covering any of the workers in the proposed bargaining unit.

9. Finally, the Union confirmed that it held a current certificate of independence and stated that it had copied its application and supporting documents to the Employer on 14 March 2017.

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

10. In its response to the application dated 21 March 2017 the Employer stated that it had received the Union's formal request for recognition on 25 November 2016. It replied to the Union by way of a letter dated 9 December 2016, copy enclosed, expressing its surprise at receiving the request but that it was prepared to have exploratory discussions with the Union to discuss the issues and two meetings took place in January 2017.

11. The Employer stated that it received a copy of the application form from the Union on 14 March 2017. It confirmed that the parties had not agreed the bargaining unit before it received a copy of the application form from the Union and it did not agree the proposed bargaining unit contending that it should be larger than was currently proposed.

12. Asked whether, following receipt of the Union's request, did the Employer propose that Acas be requested to assist, it stated "No".

13. The Employer stated that it employed 133 workers with 72 in editorial roles (if senior managers were excluded the number was 70) rather than the figure given by the Union.

14. When asked whether it disagreed with the Union's estimate of membership in the proposed bargaining unit, the Employer stated that it was not in a position to agree the Union's estimate of its members in the proposed bargaining unit and called upon the figures to be verified. It had no knowledge as to who had joined the Union, or what jobs they did. It was concerned that members listed might not be current members or current employees or even in the proposed bargaining unit. The Employer also believed that some may have been 'wrongly treated' as members and had not paid subscriptions, giving examples of where it believed this was the case. Further, the number of people in the proposed bargaining unit was not agreed and there could be disagreement as to which roles should be included. This, in turn, could have an impact on the number of members in the bargaining unit.

15. Asked to give its reasons if it did not consider that a majority of the workers in the bargaining unit were likely to support recognition, the Employer stated that the Union had provided no evidence to show that this criterion was satisfied having relied entirely on membership numbers, which were disputed, and provided no evidence that the majority in the bargaining unit were likely to support recognition. On the Union's numbers, 31 of those (around 44%) in the bargaining unit were non-members and no evidence had been provided that they would support recognition. More than 25 staff in the proposed bargaining unit had informed managers that they did not support recognition of the Union. The Employer set out the key points from the 22 emails it had received of which seven had come from employees who identified themselves as Union members.

16. The Employer explained that although all staff were invited to a meeting organised by the Union on 3 March 2017, this was attended by only 13 employees, 2 of whom were not in the proposed bargaining unit because they worked in admin roles. Others who went along argued against union recognition which, the Employer claimed, was further evidence of a lack of support for recognition. The Employer also understood that in February 2017 the Union surveyed its members on a number of matters including whether an application should be made

to the CAC. The results of that survey had not been produced as evidence of support for recognition.

17. Given the points made above the Employer did not accept that all members of the Union within the proposed bargaining unit would necessarily support recognition. It would also appear that, in aggregate, a majority of workers in the bargaining unit were unlikely to support recognition.

18. The Employer stated that there was no existing agreement for recognition in force covering workers in the proposed bargaining unit. Asked if it was aware of any previous application for statutory recognition made by this Trade Union in respect of this bargaining unit or a similar bargaining unit, the Employer answered "N/A". It answered likewise when asked if it had received any other applications for statutory recognition in respect of any workers in the proposed bargaining unit.

Summary of the Union's comments on the Employer's response

19. In a letter dated 28 March 2017 the Union commented on the Employer's response. It stated that it understood that the Employer was not disputing that the Union met the majority of the statutory application criteria and it was happy to clarify the remaining points of concern.

20. The Union noted that the Employer considered that there were 70 individuals with editorial roles (excluding senior managers) in the proposed bargaining unit. If the Employer wished to exclude specific posts that the Union had included in the bargaining unit the Union would be willing to discuss this at the next stage of the statutory process.

21. The Union explained it had included its redacted membership list with its application as it thought it useful to provide an indication of the number of members within the bargaining unit at the time of the application. No former members or former employees were included - contrary to the concern raised by the Employer. Those members described as "new" were simply those paying subscriptions based on the Union's new income-based model rather than the old sector-

based model and was not an indication of length of membership. However, many of the members were indeed new to the Union and this was regarded as evidence both of current support for the Union and, specifically, support for recognition. It should be noted that any list of members was of course fluid. The Union did not ask for payment in advance of joining so if any eligible employee chose to apply and was accepted into membership but subsequently paid no contributions the Union would go through its normal processes to try to identify the reason for non-payment. If a member did not inform the Union that they wished to resign the Union would, as part of that process, warn them that their membership was at risk of lapsing and, ultimately, the Union would lapse them.

22. The Employer had chosen not to share the emails it referred to in its response or how they originated so it was not possible to respond to the specifics, or the context in which comments were made. However, it was not made clear whether all employees were given the opportunity to respond or whether there were any other comments made which have not been included.

23. Comments from those not identified as members but which raised concerns about collective bargaining constituted less than 15% of the proposed bargaining unit. Taking all of these emails at face value, almost 80% of the proposed bargaining unit had not expressed concerns about collective bargaining. There may be some staff who remained unclear about recognition as shown by some of the comments and the Union wished to continue to reach out to ensure they had accurate information.

24. The Employer raised, as evidence of a lack of support for recognition, the open meeting organised by the Union on 3 March 2017. That meeting was organised specifically in response to staff who had not previously been involved in discussions. The purpose of the meeting was to answer their questions about the Union and its aim of recognition for collective bargaining. The nature of some of the questions put and the participation by managers and those outside the bargaining unit were, in the Union's view, indicative of success. The number of participants reflected concerns people had about speaking openly in front of managers. Previously held open meetings had been well attended.

25. The Employer had continued to set up its staff forum, established following the Union's request for recognition. There had been a questionable level of interest as it was not perceived as an alternative to meaningful collective bargaining.

The Employer's further comments

26. In a letter dated 5 April 2017 the Employer urged the Panel to give serious scrutiny to membership numbers claimed by the Union and claims for support for recognition.

27. It submitted that it was unclear how many workers were paid up and current members of the Union and this was not an issue that could be resolved by a numerical report comparing the Union's list of members against the list of staff in the proposed bargaining unit. The Employer then went on to set out its concerns notably that the Union was claiming as members workers that had never paid any subscriptions as well as including as members those whose subscriptions had lapsed and asked that the Union confirm the number of workers in each of these categories.

28. Further, the Employer argued that some employees were not signed up for membership in accordance with the Union's rules and contrary to the Union's claim, those that had not paid any subscriptions were not, in fact, members under the Union's rules as membership dated from the first payment of subscriptions.

29. In addition, the Employer contended that it was reasonable to assume that the 31 or more people in the proposed bargaining unit, who had elected not to join the Union, did not support the application for recognition. When this number was added to the seven people whose concerns were summarised in the Employer's Response it would appear that at least 38 employees in a proposed bargaining unit of, at most, 73 had expressed concerns. These figures suggested that a majority of the proposed bargaining unit was not likely to support union recognition for collective bargaining purposes.

30. The Employer then reiterated the point it made in paragraph 16 above regarding the low attendance of the Union's meeting of 3 March 2017 and could see no reason why the Union

should regard such a poorly attended meeting as indicative of success. It then reiterated its point, again referred to in paragraph 16 above, about the survey conducted by the Union and how the failure to release the results gave the impression that the survey did not yield substantial support for the proposal.

31. Finally, the Employer was puzzled by the Union's bald assertion that there was a "questionable level of interest" in the staff forum as this did not reflect the response it had had from staff.

32. Based on the information provided by the Union, the Employer did not believe that the application for recognition was well founded and asked that the CAC scrutinised the evidence for membership and support before deciding whether to accept the application.

The membership check

33. 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 an analysis of a number of emails referred to by the Employer in its response to the application. 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 copies of the emails referred to in its response, and that the Union would supply to the Case Manager a list of the full names and dates of birth of the paid up union members within that unit. The information from both the Union and the Employer was received by the CAC on 5 April 2017. It was explicitly agreed with both parties that, to preserve confidentiality, the respective lists and the emails would not be copied to the other party and that agreement was confirmed in a letter from the Case Manager to both parties dated 31 March 2017. The Panel is satisfied that the checks were conducted properly and impartially and in accordance with the agreement reached with the parties.

34. The list supplied by the Employer showed that there were 71¹ workers in the proposed bargaining unit. The list of members supplied by the Union contained 44 names. Three of the 44 names on the Union's list appeared under a separate sub-heading to show that their subscriptions were not up to date. All three of these names appeared on the Employer's list.

35. According to the Case Manager's report, if the three members referred to in the paragraph above were included, the number of Union members in the proposed bargaining unit was 42, a membership level of 59.15%. However, if the three were excluded, then the number of members would stand at 39 giving a membership density of 54.93%.

36. The Employer also provided 27 emails from 25 individuals that it had received on the subject of union recognition. Two of the emails were from senior managers who fell outside the Union's proposed bargaining unit and so were excluded from further scrutiny. Of the remainder, eight emails were from union members and 15 emails were from non-members. The Case Manager's report, which was copied to the parties on 10 April 2017, included the main thrust of each of these emails.

Union's comments on the result of the membership check

37. On 21 April 2017 the Union wrote that it was pleased that the report confirmed it had a majority of members within the proposed bargaining unit and agreed that it was right to exclude the three senior managers from the membership check. It explained that it was continuing its positive efforts to reach out to new members of staff as they joined and was confident that new starters would also have a view on recognition, and on membership, once the Union had had a meaningful opportunity to engage with them. It was clearly unreasonable for the Employer to assert that all those who had elected not to join as yet did not support the application.

¹ There were actually 74 workers on the Employer's list but in the covering letter it explained that it had included three senior managers who were excluded from the bargaining unit proposed by the Union. On the basis that these three workers were not in the Union's proposed bargaining unit they were excluded from the checks conducted by the case manager.

38. The Union confirmed that membership could either be completed using an online or paper form and that no application was processed without one of these. While the rules stated that members should be present at a branch meeting which confirmed their election, this was not compulsory.

39. The Union did not consider that the emails provided by the Employer were of particular significance when considered in light of the majority membership. However, the Union had recently received a number of emails which were supportive of the Union's aims and was prepared to forward these separately to the CAC on a strictly confidential basis. The Union's own analysis of the emails in the membership report showed that of the seven or eight members cited as opposing collective bargaining, three in fact said that they would want a ballot and one (now categorised as a non-member) simply said they did not consider an across the board increase would resolve pay discrepancies, which was likely to be true, but it was not an expression of opposition to collective bargaining. A further email appeared to contain an element of confusion which could be easily addressed.

40. Of the emails from non-members, one appeared angry at not being involved in initial discussions. There may well have been practical reasons for this although it would not have been the Union's intention to upset any individual. One person was afraid that recognition would create division. Again, this was a concern that the Union would be happy to address. The Union had plenty of examples of where it worked positively to improve workplace cultures. Two emails simply said they were not involved with the Union without expressing a view on recognition either way and one opposed the proposed bargaining unit. It was also noted that the Union had not received an explanation of the context or when these emails were gathered.

41. Whilst not directly relevant, the Union did not expect the meeting of 3 March 2017 to have more than ten or so participants as it was known that staff most opposed to the Union would, and indeed did, attend and people were aware that by attending this particular meeting they risked making their support known to those that opposed the Union and who would then pass on this information to the Employer, which indeed was the case. The Union was pleased however that those in the office who had said they wanted an evening to express their views

directly to organisers did attend. Larger numbers of staff had attended meetings explicitly kept confidential from the Employer.

42. The survey referred to by the Employer was part of a normal ongoing process of engagement using a range of methods and covering a range of issues. Finally, it was early days for the staff council but already concerns were developing about the Employer being the ultimate arbiter of how it operated.

Employer's comments on the result of the membership check

43. In a letter dated 21 April 2017 the Employer noted that the Union had identified three members whose subscriptions were not up to date but it was not clear from the report what this meant. The evidence suggested that the Union considered members up to date even when they were in arrears of more than a month or two. The Employer contended that any workers who were in arrears should not be counted and the Union asked to clarify how many members were in arrears and for how many months.

44. As already stated, the Union's rules provided that membership dated from the first payment of subscriptions but it was not clear whether the list of members included any who had never paid a subscription. Leaving aside the issue of arrears, the Employer contended that those in this category should not be counted as members and the Union should confirm the number so that they could be excluded from the calculations of union density. The result of further exclusions would, of course, be a further drop in the proportion of members in the bargaining unit.

45. The Employer noted that three workers who met the Union's definition of "senior managers" and were, therefore, not included in the Union's proposed bargaining unit, had been excluded from the calculations for the purpose of the membership and support check. Whilst accepting that the editor-in-chief would be excluded, the Employer contended that the other two managers, who were journalists, should be included in the check on the basis that they would, inevitably, be included in a bargaining unit comprising editorial staff.

46. In addition, the Employer observed that excluding the three members in arrears, there were 39 members of the Union in the proposed bargaining unit – a proportion of 54.93%. The Employer contended that any presumption that union membership equated to support for recognition could be rebutted by evidence to the contrary. Here, if the eight members that had voiced concerns were deducted from the figure of 39 members (to show the percentage of members in the proposed bargaining unit who could reasonably be assumed to favour union recognition) the percentage dropped from 54.93% to 43.66%. This, coupled with the fact that the remaining 32 workers in the bargaining unit had not joined the Union - in spite of a recruitment drive spanning several months - of itself demonstrated that a majority of the proposed bargaining unit would not be likely to favour union recognition for collective bargaining purposes even before the other evidence was considered.

47. In addition to the emails from 25 workers provided already the Employer had received a further email from a worker who expressed the view that they did not want the Union to go ahead without fair debate on what it could achieve, and how it could impact the business and employees.

48. Finally, the Employer again reiterated the points about the poorly attended meeting on 3 March 2017 and the failure of the Union to publish the results of its survey as being indicative that the majority of workers in the bargaining unit were not likely to favour union recognition for the purposes of collective bargaining.

Considerations

49. 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.

50. 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 in that before the end of the first period as defined in paragraph 10(6) of the Schedule the Employer refused the request but indicated a willingness to negotiate. This triggered the second period of 20 working days as defined in paragraph 10(7) of the Schedule which is set aside for the parties to conduct negotiations with a view to agreeing a bargaining unit and that the Union is to be recognised as entitled to conduct collective bargaining on behalf of the unit. However, no such agreement was reached. 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)

51. 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 (described in paragraphs 33 to 36 above) showed that 59.15% of the workers in the proposed bargaining unit are members of the Union if the three members in arrears were included in the calculation. If these workers were excluded then membership would stand at 54.93%. 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, irrespective of whether those in arrears are included or not, 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)

52. Under paragraph 36(1)(b) of the Schedule, an application is not admissible unless the Panel is satisfied 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. In this case the check conducted by the Case Manager showed that membership stood between 59.15% and 54.93% depending on whether the three members

identified by the Union as being in arrears were included or not. The Union relied on its strength of membership as evidence that a majority would be likely to favour recognition for collective bargaining. It explained that a number of its members had only recently joined the Union and this showed their support for the Union's campaign for recognition. The Union explained its process for taking on new members and how an individual would have to complete an application form, whether it be a paper version or on-line, and how it would pursue those that signed up for membership but subsequently failed to pay any subscriptions due.

53. The Employer raised a number of issues that it said countered the Union's claim that membership alone was indicative of support for recognition. The Employer had argued that a number of people were being wrongly treated as members and that the Union was including workers that were no longer in the bargaining unit or even employed by the Employer. However, the membership check established the number of members currently in the bargaining unit leaving out any members whose names did not appear on the Employer's list of current workers.

54. The Employer argued that the poorly attended meeting that the Union held on 3 March 2017 showed a lack of support for the Union's campaign. Countering this point however, the Union reasoned that the low attendance was down to members being aware that managers would be present and there was a risk that the identity of those members attending, as well as the views expressed, could become known to the Employer.

55. In the Panel's view little evidentiary weight can be placed on the attendance figures for such a meeting where workers may be reluctant to advertise either their membership of the Union or views on recognition in what they may perceive to be a possibly hostile environment.

56. The Employer also relies upon a number of emails as demonstrating a lack of support for recognition. At the time that the membership check was conducted 25 individuals in the bargaining unit had emailed the Employer expressing various views on the Union and its campaign. Of this number eight were identified as being from Union members and 15 emails were identified as being from non-members. The Employer argued that it was reasonable to

assume that those who had not joined the Union did not support its application for recognition, and this numbered either 29 or 32 workers depending whether those in arrears are included or not. When this figure was added to the number of Union members that had contacted the Employer by email expressing a view on the Union or on recognition, it would total 37 or 40 workers which would, in a 71 strong bargaining unit, represent the views of the majority of the workers.

57. The Union, commenting on the emails, questioned the context which gave rise to them, and asked whether the views of all of the workers had been sought or whether any email that supported the Union had been suppressed. The Union provided an analysis of the emails, which is set out in paragraphs 39 and 40 above, which showed that it was not strictly accurate to describe the emails, in toto, as opposing recognition of the Union. A number of the emails expressed confusion on the part of the author without giving an indication either way as to their views on union recognition and collective bargaining. A number emails simply stated that the author believed a ballot should be held to determine the issue and again, no indication as to the author's view on recognition and collective bargaining was forthcoming. Two emails stated that the authors were not involved in the Union but failed to give an indication as to the authors' views on union recognition. The total number of emails in which the author clearly stated opposition to union recognition and collective bargaining was at best five from Union members and nine from non-members. That is 14 emails received by the Employer out of a total of 71 if each worker had indeed been canvassed for their views.

58. The question that the Panel must address now is whether, on balance, the Union would be supported by its members in its campaign to gain recognition for collective bargaining purposes and the Panel believes that it is likely that this would be the case.

59. At this initial stage of the statutory process the assessment that the Panel must make is one of likely support rather than a strict arithmetical measure – one of theoretical rather than concrete support – and it is the Panel's experience of industrial relations that leads us to the conclusion that workers ordinarily join a union for collective bargaining purposes and one, if not the, main characteristic of union membership is collective representation on the issues of pay,

hours and holidays. The degree to which the strength of the Union's support is eroded by the five emails from members informing the Employer of their opposition to the Union being recognised is, in our view, not of significant value to undermine the Union's case. Even if these five members were to be subtracted from the total number of members, membership density would stand at between 52.11% and 47.8%, depending on whether the three in arrears are included or not.

60. The Panel next considered whether it would, on balance, be likely that any non-members would also support recognition of the Union. The pool of non-members in this case totals between 29 and 32 members depending on whether the three in arrears are included or not. Nine of these non-members gave a clear indication to the Employer that they did not support recognition of the Union and, even if these emails were taken at face value, this would leave between 20 and 23 non-members that had either not expressed a view or not expressed a clear view against recognition of the Union. The Panel concluded, based on its experience, that the level of membership already achieved by the Union without the benefit of recognition was significant, and indicative of the likelihood that there would be further support for recognition from among the pool of non-members who had not yet expressed a view.

61. Having given the matter careful consideration the Panel takes the view that it is more likely than not that the majority of 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. Accordingly, the test set out in paragraph 36(1)(b) is satisfied.

Decision

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

Panel

Professor Lynette Harris, Panel Chair

Ms Lesley Mercer

Mr Roger Roberts

3 May 2017