

CENTRAL ARBITRATION COMMITTEE
TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992
SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION
DETERMINATION OF THE BARGAINING UNIT

The Parties:

Unite the Union

and

Skanska

Introduction

1. Unite the Union (the Union) submitted an application dated 18 September 2017 to the CAC that it should be recognised for collective bargaining purposes by Skanska (the Employer) in respect of a bargaining unit comprising "General Operatives, Traffic Management, Aborist, Road Worker, Ganger, Groundman, Highways Operative, Electrician, Storeman, Overhead Lineman, Labourer, JCB Driver, Supervisor, Truck Driver and Apprentice." The location of the bargaining unit was given as "Hampshire County Council Contract – street and highways maintenance." The application was received by the CAC on 19 September 2017 and the CAC gave both parties notice of receipt of the application on 20 September 2017. The Employer submitted a response to the CAC dated 28 September 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 Gillian Morris, Panel Chair, and, as Members, Mr Simon Faiers and Mr Malcolm Wing. The Case Manager appointed to support the Panel was Kate Norgate.

3. By a decision dated 16 October 2017 the Panel accepted the Union's application. The parties then entered a period of negotiation in an attempt to reach agreement on the appropriate bargaining unit. As no agreement was reached, the parties were invited to supply the Panel with, and to exchange, written submissions relating to the question of the determination of the appropriate bargaining unit. A hearing was held on 7 December 2017 and the names of those who attended the hearing are appended to this decision. To accommodate the hearing the Panel extended the period within which it was required to determine the bargaining unit to 21 December 2017.

4. The Panel is required, by paragraph 19(2) of the Schedule to the Act, to decide whether the proposed bargaining unit is appropriate and, if found not to be appropriate, to decide in accordance with paragraph 19(3) a bargaining unit which is appropriate. Paragraph 19B(1) and (2) state that, in making those decisions, the Panel must take into account the need for the unit to be compatible with effective management and the matters listed in paragraph 19B(3) of the Schedule so far as they do not conflict with that need. The matters listed in paragraph 19B(3) are: the views of the employer and the union; existing national and local bargaining arrangements; the desirability of avoiding small fragmented bargaining units within an undertaking; the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant; and the location of workers. Paragraph 19B(4) states that in taking an employer's views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the CAC must take into account any view the employer has about any other bargaining unit that it considers would be appropriate.

Matters clarified at the beginning of the hearing

Late evidence

5. The parties were asked to supply their submissions to the CAC for the purposes of the hearing by noon on 30 November 2017. On 6 December 2017 the Employer sent supplementary submissions directly to the Union and to the CAC. The Employer also brought additional documentation to the hearing which it asked the Panel to admit. The Union brought a copy of an Employment Appeal Tribunal (EAT) decision to the hearing which it asked the Panel to admit. Prior to the start of the hearing the Case Manager sought the views of each party on

whether these materials should be admitted and reported these views to the Panel. The Union did not object to the Employer's supplementary submissions, but objected to the additional documentation, being admitted. The Employer did not object to the EAT decision produced by the Union being admitted.

6. At the beginning of the hearing the Panel Chair reminded the parties of the statement in the Case Manager's letter of 24 October 2017 informing the parties of the arrangements for a hearing in the event that they were unable to agree a bargaining unit. That letter states that "once your submission has been lodged and cross-copied new evidence will be admitted only where there are good reasons for so doing and this will be at the discretion of the Panel". The Panel Chair informed the parties that the Panel considered that the Employer's action in sending the supplementary submissions directly to the Union as well as to the CAC was incompatible with that principle. She informed the parties that the Panel was prepared to admit in evidence the Employer's supplementary submissions and the EAT decision produced by the Union as the other party had not objected to this. However the Panel had decided that the additional documentation brought by the Employer to the hearing should not be admitted given that the Union objected to its admission and there was no good reason why it could not have been submitted with the original submissions.

Clarification of the Union's Proposed Bargaining Unit

7. The Employer stated that many of the job titles used by the Union in its description of the proposed bargaining unit (supervisors and apprentices apart) which may have been applicable prior to a TUPE transfer to the Employer had now been absorbed into more generic job titles. The Employer said that (supervisors and apprentices apart) the Union's proposed bargaining unit should be described as consisting of "Operatives; Grounds Maintenance Operative; Highways Maintenance Operative; Stores Person or Ganger". The Union said that it was content with this description. In answer to a question raised by the Employer, the Union confirmed that "Supervisor" in its proposed bargaining unit referred to Depot Supervisors and not merely to "gangers". It was confirmed by both parties that they were content to treat these changes in nomenclature as a clarification of the Union's proposed bargaining unit. The Panel therefore amended the Union's proposed bargaining unit to read "Operatives; Grounds Maintenance Operative; Highways Maintenance Operative; Stores Person; Ganger; Depot Supervisor and Apprentice working on the Hampshire County Council Highways Contract."

For the purposes of this decision all those with the job title “Operatives; Grounds Maintenance Operative; Highways Maintenance Operative; Stores Person and Ganger are collectively referred to as “operatives”.

Summary of the submissions made by the Union

8. The Union submitted that its proposed bargaining unit was appropriate. The Union emphasised that the test was not whether the proposed bargaining unit was the most effective or desirable only whether it was “appropriate”, and that “appropriate” for the purposes of paragraph 19(2) of the Schedule was to be determined in the sense of suitability for the purpose of collective bargaining (*Kwik Fit (GB) Ltd v CAC* [2002] ICR 1212).

9. The Union said that this unit consisted of the workers who formed the team responsible for the repair and maintenance of the streets and highways in Hampshire. The Union submitted that they were a distinct group of workers and that this was evidenced by the fact that they had TUPE- transferred from Hampshire County Council, to Balfour Beatty, then to Amey and now to the Employer. The Union explained that these workers, including the Depot Supervisors and apprentices, had been transferred as an organised grouping. The Union referred to *Eddie Stobart Ltd v Moreman* [2012] IRLR 356 where the EAT analysed the meaning of an “organised grouping” for the purposes of TUPE 2006, regulation 3(3)(a)(i). The Union submitted that there were strong parallels between the meaning of an “organised grouping” in that context and the compatibility of that group with effective management. The Union submitted that the proposed bargaining unit was clearly compatible with effective management because it had been so for some years.

10. The Union explained that the proposed bargaining unit was made up of the workers who ensured that the repair and maintenance work happened on the ground. The Union said that the workers arrive at one of five depots at 7am in the morning, are told the precise details of the work required of them by the Depot Supervisor, and then go out on the roads and do the work. The Union acknowledged that the Depot Supervisors were predominantly based in the depots but said that they were part of the team of workers making the repair and maintenance work happen. The Union said that the Depot Supervisors would also go out on the roads to monitor the work; deal with any issues; and if there were a shortage of operatives, would assist the teams on the roads. The Union stated that the whole team, including Depot Supervisors,

worked the winter maintenance rota (dealing with gritting and winter emergencies, including trees falling, road closures and floods) and would be on call to do emergency highways work (including road closures, collapsed manholes and removal of wildlife such as deer from the roads). The Union stated that the negotiation of pay for maintenance and on-call duties would necessarily include the Depot Supervisors.

11. The Union submitted that Depot Supervisors were below the level of contract leadership and the Employer's wider management team and their inclusion in the bargaining unit, below the level of Area Managers and Schemes Manager, was a logical place to draw the line. The Union referred to a document supplied by the Employer, which summarised the measures relating to the TUPE transfer from Amey to the Employer, and which set out the management structure which the Employer intended to implement. The Union said that the Depot Supervisors would historically have been called Chargehands and that they reported to the Area Managers who formed part of the management team and did not, unlike the Depot Supervisors, go out on the roads. The Union disputed the Employer's submissions that inclusion of Depot Supervisors in the bargaining unit would conflict with their role as line managers of the operatives, in particular their role in disciplinary and grievance procedures and in conducting appraisals which could impact on operatives' pay. The Union's Regional Officer stated that he had attended around seven disciplinary and grievance proceedings over the past eight or nine years and that all had been conducted by an Area Manager. The Union submitted that, even if Depot Supervisors were involved in "routine" disciplinary issues, as the Employer had stated, the Employer itself had said that they would be supported by HR and a more senior manager for serious cases. The Union also stated that appraisals had always been conducted by an Area Manager. The Union pointed out that, although the outcome of appraisals may be relevant to consideration of operatives' pay increase, it was clear from the Employer's evidence that the actual sum awarded was determined at a higher level of the organisation.

12. The Union said that apprentices were simply junior members of the team who worked out on the road with the operatives and did not rotate round other parts of the Employer's business. The Union said that they had TUPE-transferred to the Employer from Amey and, as such, were part of the same group as the operatives. The Union said that if the Employer recruited new apprentices in the future on a central basis then it was possible that these could be outside the bargaining unit but those who transferred, at the very least, should be included.

13. The Union stated that if the workers in the Union's proposed bargaining unit were split in any other way there would be a real risk of fragmentation. In particular, if the Depot Supervisors were excluded from the proposed bargaining unit there would be allegations of differing treatment and significant loss of management time in negotiating generic issues with separate groups. The Union stated that the existing contractual arrangements were highly fragmented and, as the Employer had conceded, "a mess", with workers in the proposed bargaining unit variously on NJC terms and conditions, CIJC terms and conditions and Amey (TUPE transferred) conditions. The Union submitted that the Employer had managed with these arrangements up to now and that dealing with those in its proposed bargaining unit as a single group would present the opportunity to streamline the arrangements and make them more efficient. The Union said that there were no bargaining arrangements in place. The Union said that all the workers in the proposed bargaining unit were based in five depots; worked on the roads or in the depots ensuring that road maintenance happened; worked the same shift patterns; were potentially on the winter maintenance and on-call rota; and were subject to the same employee handbooks and policies. The Union referred to the role profile for a Depot Supervisor which included, in the list of qualifications, "CSCS". The Union said that there was only one CSCS card which was held by both operatives and Depot Supervisors. The Union also stated that some operatives held the New Roads and Street Works Act (supervisor) qualification which Depot Supervisors were required to have.

14. The Union submitted that, in all the circumstances, the proposed bargaining unit was appropriate.

Summary of the submissions made by the Employer

15. The Employer objected to the Union's inclusion of Depot Supervisors and apprentices within the proposed bargaining unit and submitted that the Union's proposed bargaining unit was not appropriate. The Employer acknowledged that a substantial proportion of those working on the Hampshire County Council ("HCC") Highways Contract (including all the apprentices) had TUPE-transferred from Amey and that a proportion had earlier continuous service when employed by Balfour and before that by HCC. However the Employer said that the group transferred from Amey was not confined to those within the Union's proposed bargaining unit and had included an Area Manager as well as staff from other areas such as

administration and finance. The Employer submitted that *Eddie Stobart Ltd v Moreman* (see paragraph 9 above) was not relevant to this case.

16. The Employer said that there were eight Depot Supervisors and six apprentices working on the HCC Highways Contract. The Employer said that none of the current apprentices, all of whom had transferred from Amey, had more than a year left to complete their apprenticeship. In answer to questions from the Panel the Employer explained that, for historical reasons and as result of the successive transfers, staff in the Union's proposed bargaining unit worked under a variety of contractual arrangements. Operatives were paid hourly, and the majority (but not all) worked a 39- hour week. Holiday entitlements ranged from 22 to 34 days. Some operatives were paid monthly, others weekly. Depot Supervisors were paid a salary (one weekly, the others monthly); one worked a 39- hour week, the remainder worked a 45- hour week. One Depot Supervisor was entitled to 23 days' holiday, the remainder were entitled to 24. Both operatives and Depot Supervisors were entitled to overtime pay, calculated by reference to their derived hourly rate, but Depot Supervisors worked overtime only by agreement and would not receive overtime pay if they exceeded their core hours by a small amount. The Employer said that winter maintenance and on-call duties were voluntary for all staff, including operatives, who had been TUPE-transferred. Volunteers received a weekly stand-by payment for making themselves available plus a multiple of the derived hourly rate for hours worked.

17. The Employer submitted that the Union's proposed bargaining unit was not compatible with effective management because it was inappropriate to include within that unit those who were effectively the managers of the operatives and responsible for taking disciplinary action against them as well as ensuring appropriate attendance, efficiency and productivity levels. The Employer said that Depot Supervisors were not engaged in operational duties on a day-to-day basis as the Union had contended; rather, their function was to support the gangs with supervision and planning and the provision of materials and equipment. The Employer said that Depot Supervisors also allocated overtime work to operatives and were responsible for productivity and budgetary control. The Employer said that Depot Supervisors met the Operations Manager on a weekly basis and would also meet clients. The Employer said that, unlike operatives, Depot Supervisors were given their own individual telephone, computer and car or van and submitted that there was a substantial and significant difference in the nature, type and level of responsibility between the two categories, Depot Supervisors being properly

described as junior managers. The Employer stated that winter maintenance and on-call duties were open on a voluntary basis to all Highways staff, not only operatives and Depot Supervisors. The Employer said that it wanted to create a different culture from that which had previously been in place whereby there was a greater separation between the operational and supervisory roles and supervisors were more engaged in supervisory duties.

18. The Employer said that operatives' appraisals were usually conducted by Depot Supervisors and had only been done by an Area Manager when there was no Depot Supervisor available. The Employer said that the size of the "pot" available for wage increases was decided at national level within the company; this would then be applied at the level of each individual contract held by the company. The Employer said that the outcome of the appraisal process would generate a recommendation in relation to pay which would then be taken into account when an operative's pay increase was being considered. The Employer submitted that for this reason there was a possible conflict of interest if Depot Supervisors were in the same bargaining unit as those they were appraising. In answer to a question from the Panel the Employer confirmed that the actual amount or percentage of any pay increase awarded to an individual was determined at a higher level of the organisation and not by Depot Supervisors themselves. The Employer said that Depot Supervisors were authorised to conduct on their own "routine" disciplinary and grievance procedures affecting operatives although more serious issues were likely to be dealt with differently. The Employer submitted that the role of Depot Supervisors in the disciplinary process, like their role in appraisals and allocating overtime, would create a conflict of interest were they to be in the same bargaining unit as the operatives.

19. The Employer submitted that operatives and Depot Supervisors required different qualifications. Operatives, unlike Depot Supervisors, required specialist training in using mechanical equipment. For their part, Depot Supervisors needed to be competent in using general Microsoft tools and a New Roads and Street Works Act (supervisor) qualification. The Employer contended that it was obvious that the CSCS card referred to by the Union (see paragraph 13 above) did not indicate parity of role. The Employer said that Depot Supervisors, unlike operatives, had the opportunity to negotiate their own salary, albeit within a salary band, whereas for operatives there was merely a skilled and an unskilled hourly rate and little opportunity to move between the two.

20. The Employer submitted that it would be incompatible with effective management to include apprentices within the bargaining unit. The Employer denied that apprentices were simply junior members of the team as submitted by the Union although it acknowledged that they did not work in rotating placements on and off the HCC Highways Contract. The Employer said that apprentices were recruited at a national level by a central early careers team on specific apprentice contracts linked to training agreements. The Employer said that such apprentices were entitled to time off for training; a nationally set rate of pay; designated pay uplifts at the ends of years one and two if their performance was satisfactory ; and that they were eligible to take part in other activities such as the Duke of Edinburgh award scheme. The Employer said that including apprentices on the HCC Highways Contract within the bargaining unit would cut across this national system and that this would not be to anyone's advantage.

21. The Employer did not agree with the Union that excluding workers from the Union's proposed bargaining unit posed a real risk of fragmentation and significant loss of management time in negotiating generic issues with separate groups. The Employer submitted that differential treatment for the three distinct groups of apprentices, operatives and Depot Supervisors was consistent with the different grades, responsibilities and nature of the roles carried out by these groups. The Employer submitted that differentiation in this way would not lead to significant loss of management time; on the contrary, it would enable, for example, HCC highways apprentices to be treated (appropriately) as part of the Employer's centrally administered group of apprentices, which would save time. The Employer agreed, when asked by the Union, that currently arrangements regarding pay, hours and holidays for workers within the Union's proposed bargaining unit were "a bit of a mess" but did not accept that the creation of that unit would streamline contractual arrangements in the way the Union had suggested. The Employer contended that its own proposed bargaining unit, consisting solely of operatives, underscored the fact that its position regarding Depot Supervisors and apprentices was based on legitimate concerns and objections rather than general opposition to there any bargaining unit whatsoever. The Employer agreed to a bargaining unit comprising roles located across five depots but maintained that Depot Supervisors were predominantly depot based rather than working alongside the operatives, out maintaining roads.

22. The Employer submitted that only a bargaining unit excluding Depot Supervisors and apprentices would be compatible with effective management.

Considerations

23. The Panel is required, by paragraph 19(2) of the Schedule to the Act, to decide whether the proposed bargaining unit is appropriate and, if found not to be appropriate, to decide in accordance with paragraph 19(3) a bargaining unit which is appropriate. Paragraph 19B(1) and (2) state that, in making those decisions, the Panel must take into account the need for the unit to be compatible with effective management and the matters listed in paragraph 19B(3) of the Schedule so far as they do not conflict with that need. The matters listed in paragraph 19B(3) are: the views of the employer and the union; existing national and local bargaining arrangements; the desirability of avoiding small fragmented bargaining units within an undertaking; the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant; and the location of workers. Paragraph 19B(4) states that in taking an employer's views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the CAC must take into account any view the employer has about any other bargaining unit that it considers would be appropriate. The Panel must also have regard to paragraph 171 of the Schedule which provides that "[i]n exercising functions under this Schedule in any particular case the CAC must have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, so far as having regard to that object is consistent with applying other provisions of this Schedule in the case concerned." The Panel's decision has been taken after a full and detailed consideration of the views of both parties as expressed in their written submissions and amplified at the hearing.

24. The Panel's first responsibility is to decide, in accordance with paragraph 19(2) of the Schedule, whether the Union's proposed bargaining unit is appropriate. The Panel considers that the Union's proposed bargaining unit is not compatible with effective management as it includes apprentices. The Employer explained that in general it recruits apprentices on a national basis and that they are employed on the basis of a national pay scheme. The Employer contended that it would not be in anyone's interest to remove apprentices employed on the HCC Highways Contract from the national scheme and the Union itself acknowledged that there may be a case for removing from its proposed bargaining unit new apprentices who had been centrally recruited. The Panel concurs with the view that it would not be compatible with effective management to include within the bargaining unit apprentices who are employed on pay and conditions which are determined at a national level within the organization.

25. Having decided that the Union's proposed bargaining unit is not appropriate the Panel's next responsibility is to decide a bargaining unit which is appropriate. The Panel has determined that a bargaining unit consisting of "Operatives; Grounds Maintenance Operative; Highways Maintenance Operative; Stores Person; Ganger; Depot Supervisor; and Apprentices who transferred to Skanska under TUPE, working on the Hampshire County Council Highways Contract" is an appropriate bargaining unit. The Panel considers that this bargaining unit is compatible with effective management based on the roles and responsibilities currently in place. The Panel notes that Depot Supervisors are on salaries whereas other workers within this bargaining unit are hourly paid but in the Panel's experience it is not a barrier to effective management to have workers who have different arrangements of this nature in the same bargaining unit. The Panel also notes the Employer's evidence that the rates for operatives are essentially limited to two categories, skilled and unskilled, whereas Depot Supervisors have the opportunity to negotiate their own salary within a wider band. However it is not unusual in the Panel's experience for differences of this nature to be accommodated within a single bargaining unit. The Panel also notes that Depot Supervisors, like operatives, are eligible for overtime payments albeit that the circumstance in which Depot Supervisors would receive such payments are more restricted. The Panel notes that all staff who volunteer for winter maintenance and on-call duties receive both a fixed-sum for being on stand-by together with a multiple of their derived hourly rate for doing the work. The Panel does not consider that the fact that such arrangements are not confined to member of the bargaining unit prevents that unit from being compatible with effective management. The Panel notes that the current provisions relating to hours of work and holiday entitlements vary considerably among workers in this bargaining unit but such variation exists within, as well as between, the individual categories and is a consequence of successive TUPE transfers rather than any principled distinction between them.

26. The Panel notes the Employer's submission that the inclusion of Depot Supervisors within the bargaining unit would create a conflict of interest owing to their managerial roles, in particular in relation to pay, the allocation of overtime and discipline. However the Panel does not regard these roles as incompatible with effective management. The Panel understands that it is current practice for appraisals to be conducted by Depot Supervisors when available and that the performance rating given to an individual operative can play a significant role in determining whether he or she receives a pay increase and, if so, the amount. . However the Employer explained that the specific amount that any individual would receive was determined

at a higher level of the organization. The parties gave differing accounts of the role which Depot Supervisors had played in the disciplinary and grievance procedures in the past but the Employer acknowledged that a serious disciplinary matter was likely to be dealt with in a different way from those which were less serious. Again, the Panel does not consider that the role of Depot Supervisors in what the Employer described as “routine” disciplinary matters makes their inclusion in the bargaining unit incompatible with effective management.

27. The Panel considers that it is compatible with effective management to include within the bargaining unit apprentices who transferred to the Employer from Amey. These apprentices are outside the national-level arrangements which the Employer has in place for apprentices which it has itself recruited and the arguments for excluding them from the BU recorded in paragraph 24 above do not apply. The Employer explained that these apprentices are in their second year and, as such, the existence of this category within the organization is time-limited. However the Panel’s decision is based on the facts as they stand at the time of the decision and the Panel does not consider that the temporary nature of this category is itself a ground for excluding them from the bargaining unit.

28. The Panel has considered the matters listed in paragraph 19B(3) of the Schedule, so far as they do not conflict with the need for the unit to be compatible with effective management. The views of the Employer and the Union, as described earlier in this decision, have been fully considered. The Panel does not consider that there are any existing national or local bargaining arrangements in this case. The bargaining unit does not avoid completely the risk of small fragmented bargaining units within the undertaking because it does not cover all categories of staff working on the HCC Highways Contract (an outcome for which neither party argued) but it carries less risk of fragmentation than that proposed by the Employer. As far as the characteristics of workers are concerned, the Panel notes the differences in roles and responsibilities between Depot Supervisors and other employees within the bargaining unit and that Depot Supervisors are salaried whereas operatives and apprentices who transferred are hourly paid. The Panel also notes that Depot Supervisors and operatives may hold different qualifications: in particular, all Depot Supervisors are required to hold a New Roads and Street Works Act (supervisor) qualification whereas the qualifications held by operatives may vary according to their specialist function. The Panel further notes that Depot Supervisors, unlike operatives and apprentices, have their own company telephone, computer and car or van. However the Panel does not consider that these differences are sufficient to prevent their co-

existence within a single bargaining unit in this case. All the workers in the bargaining unit are located at one of five sites. The Panel is satisfied that its decision is consistent with the object set out in paragraph 171 of the Schedule.

Decision

29. The Panel's decision is that the appropriate bargaining unit is “Operatives; Grounds Maintenance Operative; Highways Maintenance Operative; Stores Person; Ganger; Depot Supervisor; and Apprentices who transferred to Skanska under TUPE, working on the Hampshire County Council Highways Contract” .

30. As the appropriate bargaining unit differs from the proposed bargaining unit, the Panel will proceed under paragraph 20(2) of the Schedule to decide if the application is invalid within the terms of paragraphs 43 to 50 of the Schedule.

Panel

Professor Gillian Morris, Chairman of the Panel

Mr Simon Faiers

Mr Malcolm Wing

19 December 2017

Appendix

Names of those who attended the hearing:

For the Union

Sarah Fraser Butlin - Barrister
Malcolm Bonnett - Unite Regional Officer
Mark Nolan - Unite Representative, Skanska

For the Employer

David Bryden - Solicitor
Nadia Motraghi - Barrister
Matthew Riches - Business Director, Skanska Hampshire Highways
Jill Taylor - HR Business Partner, Skanska Highways, Central and East
Kenna Taylor - Associate HR Business Partner, Skanska Hampshire Highways