Case Number: TUR1/1014/(2017)
18 June 2018

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DECISION ON A COMPLAINT UNDER PARAGRAPH 27B(1)

The Parties:

GMB
and
M & A Pharmachem Ltd

Introduction

1. The GMB (the Union) submitted an application to the CAC dated 21 July 2017 that it should be recognised for collective bargaining by M & A Pharmachem Ltd (the Employer). 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 as chair of the Panel who, for the purposes of this decision, was replaced with Mr Charles Wynn-Evans and, as Members, Mrs Susan Jordan and Mr David Coats. The Case Manager appointed to support the Panel was Miss Sharmin Khan.

2. By a decision dated 30 August 2017, the CAC accepted the Union's application. The parties then entered a period of negotiation by the end of which they agreed that the appropriate bargaining unit was that proposed by the Union covering:

"*All those engaged in production and packaging up to but not including first line managers at M & A Pharmachem Ltd Wigan i.e. in Manufacturing: Operatives, Senior operatives, Skilled Senior operatives and Supervisors (or line leaders with no disciplinary powers and below 1st line managers) and in Packing: Operators, Servicemen, Day supervisors (or line leaders with no disciplinary powers and below 1st line managers), Shift supervisors (or line leaders with*

no disciplinary powers and below 1st line managers) and Advanced Setters."

3. As the Union did not claim that a majority of the workers in the bargaining unit were members of the Union, and as there was consensus between the parties regarding the form of the ballot, by its letter to the parties dated 28 November 2017, the Panel directed that a workplace ballot should be held with a postal element for those workers known in advance to be absent from the workplace on the day of the ballot. With the assistance of Acas the parties were able to agree the arrangements for access to the workers for both parties during the balloting period. In accordance with paragraph 25(9) of Schedule A1 to the Act ("the Schedule"), the CAC specified the arrangements for the ballot by its letter to the parties dated 2 March 2018 in which the parties were notified that the workplace element of the ballot was to take place on 26 March 2018 and the last date for the return of postal votes was 29 March 2018. The CAC appointed Popularis Ltd as the Qualified Independent Person (QIP) to conduct the ballot.

4. This decision addresses the complaint made by the Union and the cross-complaint made by the Employer with regard to alleged unfair practices for the purposes of the Schedule, the details of which are set out below. Following the Union lodging its unfair practices claim with the CAC on 27 March 2018, in the period between 27 March 2018 and 8 May 2018, the Panel provided both parties with the opportunity to submit their full written evidence and submissions in support of their complaints to each other and the Panel and the opportunity to comment on each other's submissions and evidence in writing to the Panel. As supporting evidence, the Union included with its submissions a recording of the Employer's meeting of 16 March 2018, which the Panel then requested to be provided in transcript form for ease of reference. The Employer also provided a statement of its solicitor Mr Ben Miller and the statement of a Mr Young supporting Mr Miller's account of events.

5. The Panel considered that the complaints could be decided on the papers without the need for a hearing as the submissions and evidence from by the parties were clear and comprehensive. In addition, both sides had used the opportunity to present whatever information they wished and neither side had requested a hearing.

Relevant statutory provisions

6. On 27 March 2018, the Union clarified for the Panel that the particulars of its complaint were made under paragraph 27A(2)(d), (f) and (g) of the Schedule and on 29 March 2018 the Employer clarified that its cross-complaint was made under paragraph 27A(2)(g) of the Schedule.

7. Paragraphs 27A and B of the Schedule, insofar as they are relevant to this complaint, provide as follows:

27A(1) Each of the parties informed by the CAC under paragraph 25(9) must refrain from using any unfair practice.

(2) A party uses an unfair practice if, with a view to influencing the result of the ballot, the party-

...

(d) dismisses or threatens to dismiss a worker,

...

(f) subjects or threatens to subject a worker to any other detriment, or

(g) uses or attempts to use undue influence on a worker entitled to vote in the ballot.

27B(1) A party may complain to the CAC that another party has failed to comply with paragraph 27A.

(3) Within the decision period the CAC must decide whether the complaint is well-founded.

(4) A complaint is well-founded if-

(a) the CAC finds that the party complained against used an unfair practice, and

(b) the CAC is satisfied that the use of that practice changed or was likely to change, in the case of a worker entitled to vote in the ballot-

(i) his intention to vote or to abstain from voting,

(ii) his intention to vote in a particular way, or

(iii) how he voted.

8. With regard to the complaint against the Employer the issues for the Panel to determine were:

i) Whether the Employer had taken an action, or actions, described in any of the paragraphs 27A(2)(d), (f) and (g) of the Schedule; and, if so,

ii) Whether that action(s) or practice(s) had been used with a view to influencing the result of the ballot rendering it an unfair practice; and if so,

iii) Whether that practice changed or was likely to change the voting intention of a worker in the bargaining unit as described in paragraph 27A(4)(b).

9. With regard to the cross-complaint against the Union, the issues for the Panel to determine were:

(i) Whether the Union had taken an action, or actions, described in paragraph 27A(2)(g) of the Schedule; and, if so,

ii) Whether that action(s) or practice(s) had been used with a view to influencing the result of the ballot rendering it an unfair practice; and if so,

iii) Whether that practice changed or was likely to change the voting intention of a worker in the bargaining unit as described in paragraph 27A(4)(b).

10. In its deliberations the Panel also had regard to the 2005 statutory code of practice on access and unfair practices during recognition and derecognition ballots ("the Code") and, in particular, to paragraphs 65, 66 and 67 of the Code which provide as follows:

"65 Campaigning is inherently a partisan activity. Each party is therefore unlikely to put across a completely balanced message to the workforce, and some overstatement or

exaggeration may well occur. In general, workers will expect such behaviour and can deal with it. Also, by listening to both sides, they will be able to question and evaluate the material presented to them.

66 Campaigning should focus on the issues at stake. These will mostly concern the workplace, the performance of the union or the running of the employer's business. Sometimes, it will be legitimate to focus on the work behaviours and previous work histories of key individuals. For example, it may be pertinent to refer to the way a proprietor or a senior manager has responded to workplace grievances in the past or to the way a key union official has handled negotiations elsewhere. But campaigning about the personal lives of senior managers or union leaders usually adds nothing beneficial to the discussion of the issues and should be avoided. Personalised attacks and the denigration of individuals may also harm the long-term health of employment relations.

67 Parties, especially the employer, should take particular care if they discuss job losses or the relocation of business activity. Such statements can be seen as directly threatening the livelihoods of the workers involved, and can give rise to undue influence by implicitly threatening to harm the workers concerned. It is a fine line, therefore, to distinguish between fair comment about job prospects and intimidatory behaviour designed primarily to scare the workers to vote against recognition. In general references to job prospects are more likely to constitute fair comment if they can be clearly linked to the future economic performance of the employer with our without union recognition and are expressed in measured terms. Unsubstantiated assertions on this particularly sensitive issue should therefore be avoided. So it might be fair comment to argue that the employer's business may be run less successfully if recognition is awarded, and employment may be less secure as a result, because pay levels would rise or work would be organised less flexibly. On the other hand, statements that the employer will make redundancies simply because a union is recognised should be avoided."

Union's initial complaint

11. On 21 March 2018 by e-mail to the CAC the Union made a complaint that the Employer's conduct during a briefing it had held on 16 March 2018 with the workers in the bargaining unit was an unfair practice by reference to particular comments made by the

Employer's Solicitor during that meeting. There were two aspects of this initial complaint. First, it was contended that the Company Solicitor led the workers to believe that the Union were acting "dishonestly" and "lying", an allegation which the Union indicated that it took very seriously, that it rejected and about which it had subsequently written to the workers to set the record straight on 20 March 2018. Second, the Union was also concerned that for the Company Solicitor apparently to indicate that the Employer was in what he described as "intensive care" would lead the workers to draw an inference that the workers might be putting their job security at risk by voting for union recognition. The Union contended in effect that, as a result of the comments made at the meeting in question, the relevant workers were likely to be dissuaded from voting in favour of statutory recognition. The Union supplied a copy of its written communications to the CAC Panel.

Employer's response

12. The Union's complaint was copied to the Employer. By letter dated 23 March 2018 the Employer provided to the Panel its comments in response to the Union's complaint and set out a cross-complaint about the Union's conduct. The Employer rejected the Union's complaint. In its view the comments which had been made at the meeting it held with the workers on 16 March 2018 were an appropriate, honest and accurate response to reports it had received about assertions which it understood that the Union had made to the workers. The Employer's account of events was as follows. The Union had attended the workplace on 12 March 2018 to address the workers in the bargaining unit. To provide the Union with a proper opportunity to have access to the workers management were not in the vicinity of the area where the meeting was held at the time. The Employer was careful not to ask the workers what had been said in that meeting but became aware from at least three different sources that the Union had made certain statements which it contended were incendiary and incorrect to the effect that the Employer's directors had received a £300,000 bonus at a time when no pay rises were being awarded to staff and that a £5m dividend had been paid to shareholders/the Armstrong family in the same year. The Employer considered that these assertions had caused significant upset, mistrust and discord amongst its staff. As a consequence, members of the Bargaining Unit genuinely believed the assertions which had been made to be true and also believed that the Employer's past statements about its profitability were false. The Employer maintained that the true position, as disclosed by its audited accounts, was that the dividend referred to was an accounting technicality relating to the restructuring of the group of companies in question and

that no money was paid to shareholders or the Armstrong family as had been suggested. Moreover, the £300,000 figure referred to related to remuneration ("emoluments") for directors across the group of companies of which the Employer forms part as opposed only to bonuses. The Union had relied on a third party summary of financial information rather than actual audited accounts with notes from the Employer. The Employer considered that the Union had shown a reckless disregard for the true position and acted unfairly and prejudicially to the integrity of the process when making assertions to staff which were not true and accurate and which the Union had not verified, either directly with the Employer or through an expert assessment of the Employer's filed audited accounts. The Employer considered that it was difficult to overstate the damage and prejudice caused by the Union's actions. Subsequently, the Employer had held a meeting with the workers on 16 March 2018 to address the inaccurate statements the Union was alleged to have made by explaining to the workers that the Union's assertions were untrue. The Employer also supplied to the Panel a copy of an undated letter which it had subsequently sent to the employees confirming its position on various matters including, rejecting the Union's account of bonus payments to managers and the dividend paid to shareholders. The letter also set out the Employer's view that employees were free to vote for the Union if they wished whilst also recording that the Employer would not welcome union recognition and that merely but merely voting for the Union was not going to result directly in job losses.

13. The Employer accepted that it had used the phrase "intensive care" in the meeting in question on the grounds that the statement, used metaphorically, had a strong basis in fact. The Employer had not made a profit since 2006, was experiencing a period of difficult cash flow and continued to make an underlying loss. Though the Employer had a continuing dialogue with its bankers and key financing partners, there was an existential threat to the Employer and it would have been wrong not to be plain about these facts with its workers.

14. With regard to the Union's claim that inferences would be drawn by the workers as to their future employment should recognition be obtained, the Employer stated that it had been explicit during the meeting that there was no direct correlation between a vote for the Union and job losses. However, it did consider that recognition of the Union would not be a positive step for the Company especially in view of what it regarded as unhelpful and inaccurate interjection by the Union into the discussions between the staff and management.

Employer's cross-complaint

15. The Employer's cross-complaint was based on the statement in the Code that "*active campaigning needs to be responsible or it can lead to the use of unfair practices which distort the balloting process, increase workplace friction and can sour employment relations*". The Employer stated that the Union had been irresponsible in its dealings with the workers in the bargaining unit to such an extent that it had "impeached" the integrity of the process. The Union had exerted undue influence over the workers by undermining the trust and confidence between the Employer and its workers by making false assertions and compounding those assertions through repetition. The Employer also took issue with the Union writing to the workers, without first giving it the opportunity to comment on the Union's allegations, in terms it considered to be wholly inappropriate and, on its case, in so doing, promoting a distorted and inaccurate version of the meeting it had held on the 16 March 2018 and imputing without substantiation or proper rational basis that its solicitors had advised that the Employer had acted wrongfully in its communications and that the Bargaining Unit had been advised to lodge claims for "injury to feeling" as a result of "detriment". The Employer also contended that the Union was unable to properly identify facts or provide a legal basis for its suggestion that there had been actionable conduct or detriment caused by the Employer. This type of language and associated allegations were contended to be the hallmarks of an unfair practice, which it believed the Union had designed to promote the prospect of Union recognition at the expense of the ability of the workers to make a proper informed decision. Again the Employer contended that the Union had lied to the Bargaining Unit about directors' bonuses and shareholder dividend payments and also argued that the Union had acted unlawfully in seeking to present the management case against recognition.

Union complaint

16. The Union lodged its unfair practices complaint on 27 March 2018 to which were attached particulars of its complaint. In these particulars the Union reiterated that at the meeting of 16 March 2018 the Company Solicitor, Ben Miller, had met the workers without any union representatives and accused the Union of "lies" and acting in an underhand way with regard to the information the Union had acquired in relation to the bonus and dividend issues described above and which the Union had acquired through Credit Safe, described by the Union as an independent, objective third party which provides financial information. The Union also

complained about Mr Miller saying that the Employer was on "life support" and that a vote for the Union was "unplugging the respirator". These particulars made two specific complaints:-

- Complaint 1 – by its use of unwarranted inflammatory and critical language to describe the Union's analysis of financial information the Employer was alleged to have used or attempted to use undue influence on the workers in the bargaining unit by undermining the trust and confidence the workers are entitled to have in their trade union and the information which it passes on to workers in good faith.

- Complaint 2 – the Employer's reference to a vote for the Union "unplugging the respirator" was argued to represent a threat to the workers on the basis that it suggested that a vote for the Union would have a detrimental effect on the prospects of the business. The only proper construction of Mr Miller's comments was that recognition would put the Company in financial peril leading to the workers losing their jobs and/or being put to further detriment financially. The Union contended that such crude language and stark threats constituted an attempt to use undue influence on a worker entitled to vote in the ballot by threatening his or her own financial security and livelihood in his or her job.

The Employer's response and submissions

17. The Employer provided its response to the Union's complaint dated 5 April 2018. In its particulars of response, the Employer acknowledged that it had held the meeting on 16 March 2018 for the purpose of presenting its case against recognition of the Union. It did not understand the point made by the Union that its representatives were not at this meeting as the Union had been allowed similar access previously. The Employer contended that the Union's submission could not be taken as an accurate distillation of the verbal presentations made at that meeting. The Employer had chosen carefully what to say at that meeting following reports that it had received from staff about the factual content of the Union's access meeting. The Union had cherry picked certain words and phrases and had presented them out of context to the Panel. In its totality the Union's case was nothing more than a complaint that the Company had attempted to correct what, in its view, were a series of scandalous and prejudicial inaccuracies which it repeated. Neither of the matters raised by the Union constituted material

upon which a complaint of unfair practice could reasonably be sustained.

18. The Employer provided the Panel with the details of the bonus and dividend figures shared by the Union with the workers and explained why it thought the Union's interpretation was incorrect. The Employer also described the Company's poor financial situation. It admitted that it had warned the workers about the parlous state of the Company's finances and that the phrase "life support" had been used but this again was metaphorical. In isolation this was accurate given that the Company sat within the specialist support department of the bank who had the power to appoint administrators at the time of their choosing. The verbal presentations were a balanced, objective and candid view of the situation. It had been explicit that the workers were free to vote whichever way they wished and that there was no direct link between the Union recognition and job losses. It was entitled to make the statement that the Union's involvement would be distracting, unhelpful and make the Company's task at hand more difficult.

Union's response to cross-complaint

19. The Union provided its particulars of response to the Employer's cross-complaint on 9 April 2018. The Union understood the Employer's complaint solely to concern the actions of the Union's own employees rather than individuals in the bargaining unit. Nonetheless, the Employer had offered no specifics to the Panel as to the identity of the individuals who were seeking to exercise undue influence upon the workers, it struggled to understand the complaint made against it and felt that the complaint could not be upheld.

20. The Union denied that any of the Union's representatives or officers were at the workplace on 12 March 2018 with the intention of addressing workers in the bargaining unit as alleged by the Employer. Rather, attendance and contact was limited to the displaying of notices. The actual date of the meeting the Employer referred to between the Union and the workers in the bargaining unit took place on 26 February 2018. The incorrect date provided by the Employer was material because the actual meeting date predated the start of the balloting period on 5 March 2018 and during which the Union's attendance and contact was limited to the displaying of notices.

21. The Union accepted that it addressed the bargaining unit on 26 February 2018 but rejected the Employer's argument that it had provided incorrect information and that it had sought to exercise undue influence over the workers. On the contrary, it argued that it had behaved appropriately and professionally by carrying out its duties to advise and inform the workers in the bargaining unit. The information which had been shared by the Union and challenged by the Employer as being false was derived from a profit and loss report that the Union had obtained from Credit Safe, an independent third party that provided financial information. This information appeared to show that the Employer's directors had received £300,000 in emoluments and that a £5 million dividend had been paid. It was standard and good practice, for a union to take the reasonable and prudent step of researching the company with which it was seeking recognition, so that the workers could be properly informed about the financial state of the company in question. As far as the Union was concerned this was due diligence on its part and it was quite right and proper that the Union should pass this information to workers in the Bargaining Unit. The Employer's suggestion that it was the Union's responsibility to investigate further information that was provided by professional financial advisers was misconceived - the Union are not professional accountants or auditors and the Union was fully entitled to accept the professional advice it had received from an independent third party. It was clear from the Employer's own submissions to the Panel – noting that the dividend in question was a purely accounting technicality as a result of the restructuring of the group and transfer of assets - that the financial position of the business was very complicated. The Union maintained that it was acting appropriately when sharing the information it obtained from a professional accounts service and it was not the fault of the Union if the Company's financial state had a detrimental effect on staff morale. Moreover, the Union contended that it was not the case that the Union was passing wildly inaccurate figures or somehow "shooting in the dark" given the references in the Employer's letter to the Panel of 23 March 2018 to dividend that had been made of £5 million and total remuneration to directors of around £300,000. The Union maintained that the word bonuses was not used at any time over this period - rather the Union's employees used the words "emoluments" and "dividends".

22. The Union also contended in its particulars of response to the Employer's cross-complaint that the Employer's letter to the workers referred to in its cross-complaint to the Panel – and referred to above - demonstrated that the Employer was putting undue pressure on the Bargaining Unit to vote against recognition. Two specific statements made in that letter

were relied upon by the Union:-

"What this company cannot have is an outside organisation sowing mistrust between management and staff and giving a misleading impression of the financial benefits derived from M & A by the directors and shareholders."

This statement was argued as being deliberately calculated to portray the Union in as unfavourable a light as possible to baselessly attack its credibility.

"Unless the union are volunteering to staff packing lines, I simply don't believe they can help the position, only harm it…voting for the Union is not going to directly result in job –losses, but it will, we believe, add a layer of distraction and conflict that is dangerous at a time when the business is fighting for its future.".

The implication of this statement on the part of the Employer was argued by the Union to be that a vote for the Union would indirectly lead to job losses and that the financial security of the Company was being put at risk by voting for the Union:

Parties' views on the admissibility of the Union's recording as evidence

23. The parties made representations to the Panel as to whether the recording made of the relevant meeting should be admissible and considered by the Panel. For clarification, the Employer stated in its e-mail to the CAC dated 19 April 2018 that the recording was of only one of two meetings held, the content of which were subtly different, particularly where different questions were asked and answered. The witness statements that had been submitted to the Panel by the Employer covered the composite content of both meetings. The matters referred to in those statements were not in the transcript provided by the Union.

24. The Employer argued that, if what was on the CD was a recording of a meeting with one of the shifts, it ought not to be admissible, that it was unreasonable and unfair conduct on the part of the Union and that it amplified its complaint of unfair practices by the Union.

25. The Employer considered that the position stated in the guidance ought to apply to the

Union which stated:

"Employers should respect the privacy of access meetings. Paragraph 26(4D) of Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 therefore provides that the employer or any representative of his must not attend an access meeting unless invited to do so. Likewise, the employer must not use the union's unwillingness to allow him or his representative to attend as a reason to refuse an access meeting unless it is reasonable to do so. The employer must not record or otherwise be informed of the proceedings of a meeting unless it is reasonable for him to do so."

In its view a premeditated, deliberate attempt to record a private meeting of this nature without permission was unreasonable, unfair and inadmissible.

26. In response the Union stated that the sole legal point which appeared to be being made by the Employer was in relation to Paragraph 26(4D) of the Schedule which provided that:
"(4D) Without prejudice to the generality of the second duty imposed by this paragraph, an employer is to be taken to have failed to comply with that duty if—

(a) he refuses a request for a meeting between the union (or unions) and any or all of the workers constituting the bargaining unit to be held in the absence of the employer or any representative of his (other than one who has been invited to attend the meeting) and it is not reasonable in the circumstances for him to do so,

(b) he or a representative of his attends such a meeting without having been invited to do so,

(c) he seeks to record or otherwise be informed of the proceedings at any such meeting and it is not reasonable in the circumstances for him to do so, or

(d) he refuses to give an undertaking that he will not seek to record or otherwise be informed of the proceedings at any such meeting unless it is reasonable in the circumstances for him to do either of those things."

27. The Union disputed the Employer's contention that the requirement imposed upon the

Employer not to record meetings the workforce had with the Union ought to apply to the Union as well. The Union argued that this contention was wholly wrong in law. The Union considered that, if Parliament had intended the same ban on recordings to be applied to the workforce and/or the Union, it would have so provided. On its analysis, the provisions of the legislation were drafted to reflect the imbalance in bargaining power between the workforce and the employer and the potential vulnerability workers faced at the hands of their employer when going through a recognition process.

28. The Union also argued that the Employer had provided no reasons as to why the recording of the Employer's own meeting which in its view accurately portrayed what was said to the workforce was unreasonable, unfair and inadmissible. It was also noted by the Union that the Employer had not contested the accuracy of the recording at any stage. It was difficult to see the basis on which the recording could possibly amount to an unfair practice. The Union asked the Panel to evaluate the recording and attach what weight it would to its evidential value.

29. Noting that the admissibility of the recording is a matter separate from whether it's being made constituted an unfair practice, the Panel concluded that it would take account of the transcript of the recording of the meeting in question on the basis that the Panel is not bound by any strict rules of evidence, there had been no challenge to the accuracy of the recording or the transcript by the Employer, and the transcript could be of material assistance in demonstrating the context in which the various statements complained of were made.

Parties' views on paragraphs 65 and 66 of the Code

30. When invited by the Panel specifically to comment on paragraphs 65 and 66 of the Code, in its Further Submissions dated 4 May 2018 the Union stated that the comments made by the Employer during the meeting on 16 March 2018 went well beyond an "overstatement" or comments which merely "exaggerate" a certain situation. The Union argued that it was a calculated and deliberate attempt by the Employer to heighten anxiety and to cause distress to workers and to cause them anguish over their future job security if the Union were to be recognised. The Employer presented no facts, figures or evidence to the workers but made bald assertions that by voting for Union recognition the Employer would be placed in financial peril. The Union argued that the Employer's comments were unsubstantiated scare tactics deployed by the Employer. Personal comments were also made by the Employer which went

against the spirit of the guidance provided by the Code. It was averred that the comments made by the Employer in relation to salaries of Union employees were unfair and contrary to the guidance provided by the Code which sought to preserve the long-term health of employment relations and to focus campaigning on the issues at stake.

31. In this regard, the Employer stated that it was inappropriate for the Union to raise the issue of directors' bonuses and mislead the workforce on the issue. The workforce genuinely believed that the Union's false statements were true. There was a large difference between legitimate (partisan) commentary and the promulgation of incorrect assertions designed to mislead an audience by denigrating the most senior employee of the Company. In another context, remarks made by the Union might well have been defamatory and actionable.

Panel Considerations

32. The Panel considered carefully all the evidence and submissions made by the parties regarding their conduct during the balloting period including, in particular, both parties' written submissions and the supporting evidence provided (which included written communications to the workers relating to the relevant meetings from both parties, the Union's transcript of the Employer's meeting with the workers held on 16 March 2018 and the Employer's witness statements of two of the individuals who attended for the Employer at the meeting of 16 March 2018).

33. In reaching its decision the Panel took specific account of paragraphs 65, 66 and 67 of the Code which in effect recognise that campaigning is inherently a partisan activity with each party unlikely to put across a completely balanced message and in which some overstatement or exaggeration may well occur. The Code also indicates that in general workers will expect such behaviour and can deal with it and that campaigning should focus amongst other things on the performance of the union or the running of the employer's business.

34. The Panel considered the specific statements made by each party in the context of the meeting in question, their written communications and the wider recognition process rather than only assessing the statements complained of in isolation. For the Panel to be able properly to assess the propriety of each party's conduct against the standards required under the Schedule and the Code entails consideration of the implications of what is said and not just the

explicit words used. In the industrial relations experience of the Panel, campaigning can be robust and forceful and the parties often have to tolerate activities that would fail to pass a "civility" test but still fall short of an unfair practice for the purposes of the Schedule.

35. The parties had expressed very different views about the recording of the meeting held on 16 March 2018. Whilst this was not part of the Employer's original cross-complaint set out in its letter of 23 March 2018, the Panel in any event addressed whether this recording constituted an unfair practice given the Employer's later criticisms of the Union's behaviour. For the Union or its members to make such a recording is not a breach of the express terms of the Code as the prohibition on recording of proceedings only applies to employers not unions. Whilst the Panel concluded that to make such a recording did not of itself constitute or contribute to the commission of an unfair practice on the part of the Union, the Panel was nonetheless of the view that for the Union or someone on its behalf to record the Employer's meeting apparently covertly was not consistent with good industrial relations.

36. In terms of the parties' complaints against each other, in summary the Panel concluded that the Employer reacted very strongly to what it saw as deliberate or at the very least reckless misrepresentation by the Union of its financial position. Likewise the Union reacted very strongly to the accusation that it had made false statements about the Employer's financial position and the Employer's contentions about the potentially deleterious effect of trade union recognition on the prospects for the Employer's business. In the Panel's view, both parties engaged in robust campaigning, the statements or alleged statements about which they now complain were addressed in detail by both parties in the course of the campaign and the conduct of neither the Union nor the Employer met the threshold of an unfair practice for the purposes of the Schedule, despite the forceful nature of the way in which both parties' expressed themselves in the cut and thrust of the debate about recognition ahead of the statutory ballot. Whilst the parties expressed themselves vigorously in a situation where views were held strongly about the merits and demerits of trade union recognition and its potential impact on the operation of the Employer's business, the Panel does not accept that either party strayed into the territory of unfair practice.

37. With regard to the nature of the statements made about bonuses and dividends, the Union acknowledged that it had indicated to the bargaining unit that the Employer's directors received £300,000 in emoluments and that a £5 million dividend was paid. Indeed in its letter

to the workers of 20 March 2018 clarifying the position the Union made explicit reference to emoluments – as opposed to bonuses - and dividends as shown in the Credit Safe Profit and Loss Statement. Nonetheless, the Employer had understood that the Union had, in addition to dividend payments, referred not to the emoluments received by directors but to bonuses. As its position was that the £300,000 figure related to emoluments not bonuses and the dividend in question did not actually involve cash payments to shareholders, the Employer sought to clarify the position in its memorandum to staff and the briefing given by Mr Miller in the relevant meeting

38. In the Panel's view the Employer's allegations that the Union had lied may have been intemperate - not least in retrospect given that the Union appears to have referred to £300,000 of emoluments, rather than referring to bonuses as the Employer alleged, and in light of the fact the dividend payment was a technical matter which needed further explanation. However, the Panel does not consider that the Employer's comments, whilst intemperate, strayed into the territory of unfair practice.

39. So far as the Employer's comments about the Employer being in intensive care and related matters are concerned, the Panel considered it important to note that the Employer confirmed in its letter to the bargaining unit that employees were free to vote for the union if they wished, that the Employer thought that recognising the Union was the wrong thing for the business and stated explicitly that *"[v]oting for the Union is not going to directly result in job-losses".* In this context, taking the communications and evidence in the round, the Panel does not accept that the Employer made threats to employees of detrimental treatment or sought to use undue influence. This constituted, in the Panel's assessment, vigorous campaigning about the merits of trade union recognition rather than a threat of job losses or detrimental treatment. The Employer did not threaten job losses contrary to paragraph 67 of the Code and was entitled, both in the letter to employees and the presentation to staff, to address recognition in the context of the Employer's wider financial position.

40. So far as the Employer's cross-complaint against the Union is concerned, the parties might have benefited from a direct dialogue to avoid any misunderstanding about the nature of the payments made to directors and dividends paid but this did not occur. The Panel was not satisfied that the Union acted inappropriately in communicating with its members based on the information which it had obtained from Credit Safe, even if that information in the event

needed further clarification and explanation. To rely on that information was not in the view of the Panel inappropriate, reckless or in any way redolent of an unfair practice. The Panel does not accept that the Union deliberately misinterpreted or misrepresented the financial information in question. The Union had presented the financial position as it understood it to which the Employer reacted strongly by accusing the Union of lying. For the Union to respond to that accusation in its letter of 20 March 2018 in the way that it did not constitute an unfair practice or contribute to any unfair practice as it sought to explain and justify the position which it had taken based on the information that it had obtained.

41. Even if the Panel had found that either party had engaged in an unfair practice, it would not have upheld either party's complaints on the basis that the Panel was not in any event satisfied that the use of the alleged unfair practices changed or was likely to change, in the case of a worker entitled to vote in the ballot, his intention to vote or to abstain from voting his intention to vote in a particular way, or how he or she voted. Whilst assertions have been made by both parties to this effect, the Panel was not satisfied, by reference to direct evidence from those affected or otherwise, that there was sufficient evidence that the alleged unfair practices, even if they had been established, had or were likely to have any effect on the outcome of the ballot, not least given the vigorous exchanges of views communicated during the balloting process.

Decision

42. The Panel's decision is that neither party has used an unfair practice as defined in paragraph 27A of the Schedule. The Panel is not satisfied that, even had such alleged unfair practices been established, such alleged unfair practice had or was likely to have any effect on the outcome of the ballot as required by paragraph 27B(4)(b) of the Schedule. Both parties' complaints are therefore dismissed.

Panel

Mr Charles Wynn-Evans – Panel Chair

Mrs Susan Jordan

Mr David Coats

18 June 2018