Case Number: TUR1/1033(2018)
17 July 2018

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DECISION ON WHETHER TO NULLIFY THE DECISION TO ACCEPT THE APPLICATION

The Parties:

Equality for Workers Union

and

Hamara

Introduction

1. Equality for Workers Union (the Union) submitted an application to the CAC on 26 January 2018 that it should be recognised for collective bargaining by Hamara (the Employer) for a bargaining unit comprising "employees who work in health and social care, training, healthcare, youthcare and business development (which includes catering)". The location of the proposed bargaining unit was given as the Hamara Centre, Tempest Road, Leeds LS11 6RD. The CAC gave both parties notice of receipt of the application on 29 January 2018. The Employer submitted a response to the CAC dated 31 January 2018 which was copied to the Union.

2. In accordance with S.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 Mr Barry Clarke, Chairman of the Panel, and, as Members, Mr David Bower and Ms Virginia Branney. The Case Manager appointed to support the Panel was Nigel Cookson.

Background

3. By a decision dated 12 March 2018 the Panel accepted the Union's application. That acceptance, as we shall explain, was erroneous. One of the questions that had been asked of the Union on the CAC application form was whether it had a certificate of independence. The Union (it now turns out incorrectly) had answered "Yes". The Employer did not challenge the Union's assertion. Based on this answer (as well as the results of the check of membership and support for recognition) the Panel deemed the Union's request for recognition valid, held that the application was admissible and we accepted the application.

4. The parties then entered a period of negotiation in an attempt to reach agreement on the appropriate bargaining unit. On 16 April 2018 the Employer emailed to say that it agreed that the proposed bargaining unit was an appropriate bargaining unit and the Union was asked whether it was claiming majority membership within the agreed bargaining and that it should be awarded recognition without a ballot in accordance with paragraph 22(2) of Schedule A1 to the Act. In an email also dated 16 April 2018, the Union stated that it had majority membership within the agreed bargaining unit and recognition should be granted without a ballot. The Union's email was copied to the Employer and its comments invited both on the Union's claim to majority membership and the qualifying conditions set out in paragraph 22(4) of the Schedule which, if the Panel found that one or more are satisfied, would trigger a ballot notwithstanding that the Union had majority membership in the agreed bargaining unit.

5. However, prior to the Panel arriving at a decision as to whether the Union should be awarded recognition without the need for a ballot, the Case Manager, on 8 May 2018, wrote to the Union seeking confirmation that it was in possession of a certificate of independence from the Certification Office and to provide evidence that this was the case. The Union was reminded that for a union to pursue statutory recognition it must be in possession of a certificate of independence.

6. In an email of 8 May 2018, the Union simply stated: "EFWU is on the GOV UK list of trade unions". The Union then referred the Panel to an attachment. This took the form of a certificate dated 12 February 2015 and issued by the Certification Officer under S.2(5) of the Act, which stated that the Union was entered in the list of trade unions.

7. On 10 May 2018 the Panel directed that the Case Manager write to the Union in the following terms:

> **Paragraph 6 of the Schedule to the above Act states that a request for recognition is not valid unless the union (or unions) has a certificate under section 6 that it is independent.**
>
> **The document provided by the Union is not the same as a certificate of independence but rather evidence to show that the Union's name has been entered on the Certification Officer's list of trade unions.**
>
> **The consequence is that the Union's application to the CAC proceeded on false premises because it incorrectly asserted that it had a certificate of independence for the purposes of paragraph 6 of the Schedule.**
>
> **A possible consequence is that the Panel's decision dated 12 March 2018 to accept the Union's application was issued in error. Whether the Panel decides to nullify its decision is dependent on whether the Union takes the steps outlined below.**
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> **The course of action proposed by the Panel is to stay the proceedings before the CAC under s.8(4)(b) of the Act and refer the Union to the Certification Office under s.8(5) so that it may apply for a certificate of independence. The application form and information as to the prescribed fee can be obtained from the Certification Office on 0330 109 3602.**
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> **In accordance with the Court of Appeal's decision in the *Bone*[1] case, a copy of which is enclosed, the CAC will then ask the Certification Officer to determine retrospectively whether the Union was independent as at the date of its request to the Employer for recognition in November 2017. If the Certification officer decides in favour of the Union then the stay will be lifted; the application will proceed, and the Panel will return to deliberating, among other matters, whether a ballot would be in the interests of good industrial relations.**
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> **However, if the Union has no desire to acquire a certificate of independence it should inform the CAC that this is the case within 21 days of the date of this letter so that the Panel can take the appropriate steps in order to nullify its decision to accept the application.**

8. The 21-day deadline expired with no response received from the Union. On 7 June 2018 the Panel therefore asked the Case Manager to write once more to the Union so that its intention to apply for a certificate of independence could be ascertained. The Union was warned that, unless it responded by the close of business on 15 June 2018, the Panel would assume that it did not wish to apply for a certificate of independence and the Panel would take the appropriate steps to nullify the decision to accept the Union's application.

9. On 15 June 2018 the Union responded as follows:

> **Sorry for the delay and it's EID today. We will be applying for a certificate of independence via the set channels that are in place.**

[1] **Bone v. North Essex Partnership NHS Foundation Trust** [2014] IRLR 635, discussed further below.

The Panel understood this as a concession by the Union that its presence on the Certification Officer's list of trade unions was not the same as possession of a certificate of independence.

10. On 18 June 2018, having had sight of the Union's email, the Panel directed that the Case Manager write to the Union as follows:

> **The Panel, having had sight of the aforesaid email, has directed that the Union must provide documentary confirmation to the CAC within 21 days of the date of this letter that it has applied to the Certification Officer for a certificate of independence. It is not enough for the Union to say simply that it intends to do so. Then:**
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> **• If such documentary confirmation is provided within that period, the CAC will then ask the Certification Officer, in addition, to determine retrospectively whether the Union was independent as at the date of its request to the Employer for recognition in November 2017. The next step in this case will then depend on the outcome of the Certification Officer's determination.**
>
> **• If such documentary confirmation is not provided within that period, the Panel will (for the reasons previously given) proceed to nullify its decision to accept the Union's application. It will then be a matter for the Union to decide whether to re-apply for recognition, if and when a successful application is made at a later date to the Certification Officer.**

11. The deadline for the Union to respond expired on 9 July 2018. No documentary confirmation that the Union has applied for a certificate of independence has been received.

Issue

12. The issue for the Panel to decide is whether the most appropriate step is to nullify its previous decision to accept the application. This would be on the basis that, at the time of its request for recognition to the Employer (on 7 and 15 November 2017), the Union lacked a certificate of independence, then inaccurately asserted to the CAC that it possessed one and has since failed, despite being given an ample opportunity to do so, to provide evidence that it is actively pursuing an application for such a certificate. The alternative would be to maintain a stay of the Union's application for a period of indeterminate length.

The relevant law

13. In numerous respects the Act privileges trade unions which possess a certificate of independence. This includes rights in respect of collective bargaining. Part 1 of Schedule A1

of the Act stipulates various conditions that must be met by a trade union seeking recognition to be entitled to conduct collective bargaining on behalf of a group of workers. These are expressed as circumstances in which an application is "not valid". They include, at paragraph 6 of Schedule A1, a provision that a request for recognition to the employer is not valid "unless the union … has a certificate of independence".

14. Insofar as relevant, S.2 of the Act (headed "The list of trade unions") provides:

> **(1) The Certification Officer shall keep a list of trade unions containing the names of … the organisations entitled to have their names entered in the list in accordance with this Part.**
>
> **(4) The fact that the name of an organisation is included in the list of trade unions is evidence … that the organisation is a trade union.**
>
> **(5) On the application of an organisation whose name is included in the list, the Certification Officer shall issue it with a certificate to that effect.**
>
> **(6) A document purporting to be such a certificate is evidence … that the name of the organisation is entered in the list.**

15. Insofar as relevant, S.6 (headed "Application for certificate of independence") provides:

> **(1) A trade union whose name is entered on the list of trade unions may apply to the Certification Officer for a certificate that it is independent. The application shall be made in such form and manner as the Certification Officer may require and shall be accompanied by the prescribed fee.**
>
> **(6) If he decides that the trade union is independent he shall issue a certificate accordingly; and if he decides that it is not, he shall give reasons for his decision.**

By virtue of Regulation 7 of The Certification Officer (Amendment of Fees) Regulations 2005 (SI 713/2005), the prescribed fee is currently £4,066.

16. Insofar as relevant, S.8 (headed "Conclusive effect of Certification Officer's decision") provides as follows:

> **(1) A certificate of independence which is in force is conclusive evidence for all purposes that a trade union is independent; and a refusal, withdrawal or cancellation of a certificate of independence, entered on the record, is conclusive evidence for all purposes that a trade union is not independent.**

> **(4) If in any proceedings before … the Central Arbitration Committee … a question arises whether a trade union is independent and there is no certificate of independence in force … —**
>
> **(a) that question shall not be decided in those proceedings, and**
> **(b) the proceedings shall instead be stayed … until a certificate of independence has been issued or refused by the Certification Officer.**
>
> **(5) The body before whom the proceedings are stayed … may refer the question of the independence of the trade union to the Certification Officer who shall proceed in accordance with section 6 as on an application by that trade union.**

It can therefore be seen that, unlike the mandatory terms of S.8(4), S.8(5) is cast in discretionary terms. S.8(4) mandates a stay of the proceedings while a decision from the Certification Officer is awaited on whether a trade union is independent ("the proceedings *shall* instead be stayed"); but S.8(5) bestows upon the CAC a discretion of whether to make the reference itself to the Certification Officer or instead leave it to a trade union to do so ("*may* refer the question"). The section is silent as to the form that reference should take and, in particular, whether a fee would be payable in the circumstances of such a reference.

17. The Court of Appeal's judgment in the case of **Bone v North Essex Partnership NHS Foundation Trust** [2014] IRLR 635 provides some guidance in this area. Mr Bone was an NHS employee who became involved with the Workers of England Trade Union (WEU), which his NHS Trust employer did not recognise. He brought a successful claim before an Employment Tribunal contending that he had been subjected to detriments on grounds related to his trade union activities, contrary to S.146 of the Act. It is relevant to note that the alleged detriments occurred between 2009 and 2011. As with the Schedule A1 recognition scheme, S.146 privileges *independent* trade unions. When the Trust appealed to the Employment Appeal Tribunal, it transpired that, like the Union in the instant case before the CAC, the WEU was on the list maintained by the Certification Officer for the purposes of S.2 but lacked a certificate of independence under S.6. The EAT adjourned the appeal so that the WEU could apply to the Certification Officer for a certificate of independence. The Certification Officer granted that application and issued a certificate of independence on 27 June 2013. When the case returned to the EAT, it decided that the Employment Tribunal lacked jurisdiction to deal with the S.146 claim because, in essence, the certificate was only granted in 2013 and so was not appropriate evidence that the WEU was an independent trade union at the time of the detriments between 2009 and 2011.

18. On Mr Bone's appeal to the Court of Appeal, two issues arose. The first issue was whether the absence of a certificate of independence operated as a jurisdictional bar for bringing a claim under S.146. The second issue was whether the certificate dated 27 June 2013 was conclusive evidence that the WEU was independent during the earlier period.

19. In reaching its decision, the Court of Appeal noted (at paragraphs 38 and 39 of its judgment) that Section 8(1) contained two important provisions: that a certificate of independence was conclusive evidence that the named trade union was independent; and that a refusal, withdrawal or cancellation of such a certificate was conclusive evidence that the trade union is not independent. But the Court noted what S.8(1) omitted to say: it did not say that, in the absence of a refusal, withdrawal or cancellation, the lack of a certificate was evidence that a union was *not* independent.

20. The Court also examined (at paragraphs 43 and 44 of its judgment) the terms of S.8(4) and S.8(5):

> **The effect of these provisions is as follows. If, in the course of litigation, there is a dispute as to whether a trade union is independent, the court or tribunal shall not decide that question. Instead the union concerned, alternatively the court or tribunal, shall refer that question to the Certification Officer.**
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> **Again it is important to note what the section does not say. Section 8(4) does not say that this procedure must be followed in any event. That would be an unjustifiable waste of resources. Instead the section only requires this procedure to be followed '*if … a question arises whether a trade union is independent*'. In other words, the statute requires a reference to the Certification Officer if there is a dispute as to whether the union satisfies the criteria in S.5. It does not require such a reference if it is common ground that the union does, alternatively does not, satisfy those criteria.**

21. The Court also noted (at paragraph 46 of its judgment) that paragraph 6 of Schedule A1 was cast in different terms to S.146: rather than simply requiring a trade union to be independent, the former stipulates expressly that a certificate of independence *is* required.

22. In respect of the first issue, the Court of Appeal decided that the absence of a certificate of independence did *not* operate as a jurisdictional bar for bringing a claim under S.146; it can be inferred from the foregoing paragraph that, if the Court of Appeal had been looking solely at paragraph 6 of Schedule A1, it would have reached a different decision. In respect of the second issue, the Court of Appeal decided that a certificate of independence

could have retrospective effect for a "reasonable period" before the date of the certificate. If a particular court or tribunal needed to know whether a trade union was independent in the more distant past, it could formulate a historic question under S.8(5) and the Certification Officer would have to answer that question on the basis of the available evidence.

23. We finalise our summary of the law by mentioning the CAC's general duty under paragraph 171 of Schedule A1:

> **In 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.**

Considerations

24. Drawing the threads together, we note the following:

(a) The Union in this case lacked a certificate of independence at the time of its request to the Employer for recognition;

(b) The Union now appears to accept that it lacked a certificate of independence at the material time and that its inclusion on the Certification Officer's list was immaterial to this point;

(c) The possession of a certificate of independence is a prerequisite to a request to an employer for recognition and the lack of one means that such a request is not valid – it is therefore fatal to an application to the CAC for statutory recognition;

(d) Although the CAC was prepared to stay the proceedings so that the Union could apply to the Certification Officer for a certificate of independence, the CAC was under no obligation to make that reference itself. In any event, we were hesitant to make such a reference if it meant that the Union had to fund the prescribed fee – that was something for the Union, not us, to decide;

(e) The CAC has no power to grant a certificate of independence itself, nor can it make findings about whether a particular union is independent at the material time;

(f) The CAC has explained the correct position to the Union and given it an opportunity to apply to the Certification Officer for a certificate of independence (including asking for confirmation of its retrospectivity); and

(g) Despite staying the proceedings and giving the Union a period of two months to apply to the Certification Officer (the period between 10 May 2018 and 9 July 2018, which included two extensions to its deadlines), the Union has provided no evidence that it has done so. The Case Manager's independent enquiries of the Certification Officer confirm that, as at today's date, no such application has been received.

25. In those circumstances, the Panel considers that no purpose is served by continuing a stay of the proceedings. Indeed, we have not been asked for a further stay by the Union. A further stay of indeterminate length would mean that the Union and its members in the proposed bargaining unit would face continuing uncertainty and the Employer might feel constrained in reaching decisions on matters that might otherwise have been the subject of collective bargaining. Such an uncertain position would, in our judgment, run contrary to the CAC's general duty to have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace.

26. The question remains: what should be done in relation to our previous decision dated 12 March 2018 to accept the Union's application? This decision was reached on false premises. It clearly cannot stand. We have informed the parties in prior correspondence that our intended approach, if the Union took no steps to pursue an application for a certificate of independence, was to nullify our previous decision and we have received no submissions that it is outside our powers to do so. We proceed accordingly.

27. We recognise that, in the unusual circumstances of this case, there may be uncertainty relating to the Union's position. Without seeking in any way to bind a subsequent panel, and recognising that the parties have been given no opportunity to address us on this point, we

offer only a provisional view. If our previous decision to accept the application is a nullity, and the application is to be treated as having never been made, it ought to follow in principle that the three-year bar set out in paragraph 39 of Schedule A1 (which precludes a fresh application for recognition in respect of the same or substantially the same bargaining unit) would not operate. That would mean that the Union is free to apply to the Certification Officer for a certificate of independence at its leisure. If the Certification Officer granted a certificate (and we make no comment on whether a certificate should or should not be granted), the Union would be free to make a fresh request to the Employer for recognition without waiting three years to do so.

Decision

28. For the reasons given above, the Panel hereby nullifies our decision made on 12 March 2018.

Panel

Mr Barry Clarke, Chairman of the Panel
Mr David Bower
Ms Virginia Branney

17 July 2018