

CENTRAL ARBITRATION COMMITTEE
TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992
SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION
DECISION ON WHETHER THE APPLICATION IS VALID FOLLOWING
DETERMINATION OF THE BARGAINING UNIT

The Parties:

Unite the Union

and

The College of Law

Introduction

1. Unite the Union, formally known as Amicus, and hereafter referred to as the Union, submitted an application to the CAC dated 19 March 2007 that it should be recognised for collective bargaining by The College of Law (the Employer) in respect of a bargaining unit comprising “all tutors at the Birmingham Branch”. The location of the bargaining unit was given as “The College of Law, 133 Great Hampton Street, Birmingham, B18 6QA”. The CAC gave both parties notice of receipt of the application on 19 March 2007. The Employer submitted a response to the CAC dated 29 March 2007, 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 Roy Lewis, Chairman of the Panel, and, as Members, Mr Bob Hill and Ms Bronwyn McKenna. The Case Manager appointed to support the Panel was Sarah Kendall and for the purposes of this decision, Nigel Cookson.

3. By a decision dated 16 April 2007 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. However, no agreement was reached and so the parties were informed that a hearing would take place at which the bargaining unit would be determined. The parties were duly invited to supply the Panel with, and to exchange, written submissions relating to the question of the determination of the appropriate bargaining unit and a hearing was held in London on 18 June 2007.

4. In a decision promulgated on 4 July 2007, the Panel decided that the appropriate bargaining unit should be one that comprised all tutors (Lecturers, Senior Lecturers, Principal Lecturers and Associate Professors) employed by the College of Law, excluding Directors and Deputy Directors. This bargaining unit differed from that originally proposed by the Union by the inclusion of tutors based at sites in addition to Birmingham.

Issues

5. As the determined bargaining unit differed from that originally proposed by the Union in its application, the Panel is required by paragraph 20 of the Schedule A1 to the Act (the Schedule) to determine whether the Union's application is valid or invalid within the terms of paragraphs 43 to 50. To this end both parties were invited, by way of letter dated 4 July 2007, to supply the Panel with written submissions relating to the validity tests.

Union's submissions

6. In a letter dated 10 July 2007 the Union stated that there was no existing recognition agreement covering any of the workers within the new bargaining unit. There was no competing application to the CAC from any other union, where the proposed bargaining unit covered any workers within the determined bargaining unit, nor had there been a previous application in respect of the determined bargaining unit.

7. The Union submitted that 44% of the workers in the determined bargaining unit were in membership and it was prepared to provide details of its membership to the CAC on a confidential basis.

8. The Union considered that a majority of the proposed bargaining unit would be likely to favour recognition and that the test in paragraph 36(1)(b), by which it must have meant paragraph 45(b), was made out. The Union held this view having regard to the high proportion of Union members in the determined bargaining unit.

Employer's submissions

9. In a letter dated 11 July 2007 the Employer confirmed that there was no existing recognition agreement covering any of the workers in the determined bargaining unit and that it was not aware of any competing application from any other union. In addition, it was not aware of any previous application in respect of the determined bargaining unit.

10. The Employer conceded that it was likely that the Union had, as members, at least 10% of the workers in the bargaining unit in view of the Acas membership check undertaken in February 2007. This was an Acas-conducted membership check of a College-wide bargaining unit that calculated Union membership to be 33.9%. As to whether the majority of the workers in the determined bargaining unit would be likely to favour recognition, the Employer said that it did not believe that the majority of tutors would be supportive of collective bargaining and that, notwithstanding the level of Union membership, the majority of workers did not wish their terms and conditions to be the subject of collective bargaining by a trade union. The Employer believed that trade union membership levels at all of the College of Law sites remained at just over 30% and was static. It added that many of the tutors had been members of the Union for some time and their membership in itself did not necessarily support the fact that they were in favour of collective bargaining. The Employer was aware of an earlier petition that had been circulated claiming additional support for recognition but it had no knowledge of how signatures were obtained and over what period of time. In the circumstances, in the absence of tangible evidence that the majority of workers would be likely to favour recognition, the application should not proceed.

Membership and support check

11. Having considered the submissions received from the parties, and to assist the determination of the two admissibility tests under paragraph 45(a) and 45(b) of the Schedule, namely whether 10% of the workers in the determined bargaining unit are members of the Union and whether a majority of the workers in this bargaining unit are likely to favour recognition of the Union, the Panel instructed the Case Manager to carry out checks on the level of union membership within the bargaining unit.

12. It was agreed with the parties that the Employer would supply to the Case Manager a list of the names of workers within the determined bargaining unit, and that the Union would supply to the Case Manager a list its members within that unit to enable comparisons to be undertaken. It was explicitly agreed with the parties that, to preserve confidentiality, the respective lists would not be copied to the other party. These arrangements were confirmed in a letter dated 18 July 2007 from the Case Manager to both parties. The information from both the Union and the Employer was received by the CAC on 20 July 2007. The Panel is satisfied that the checks were conducted properly and impartially and in accordance with the agreement reached with the parties.

13. No additional checks were carried out by the Case Manager to verify the information supplied by the parties.

14. The list supplied by the Employer showed that there were 304 workers in the determined bargaining unit. The list of members supplied by the Union contained 194 names. According to the Case Manager's report, the number of Union members in the bargaining unit was 126, a membership level of 41.45%.

15. A report of the result of the check of the level of Union membership was circulated to the Panel and the parties on 24 July 2007.

Views of the Union

16. In a letter dated 25 July 2007 the Union, by way of comment on the Case Managers report, noted that the total number of workers in the bargaining unit had increased from 292 to 304 since March 2007. Whilst the Union acknowledged that the changes were probably due to new starters it would, it submitted, be grateful if the CAC could confirm or seek confirmation from the Employer, that no visiting lecturers had been included in the bargaining unit numbers.

17. In addressing the tests in paragraph 45(a) and (b) the Union observed that the report had established a membership level in the bargaining unit of 41.45%, which satisfied the 10% membership requirement and also provided compelling evidence that the majority of the bargaining unit would support recognition of the Union. The level of membership had significantly improved from 33% in February 2007, when Acas had conducted a check of Union membership across the College of Law as a whole. The Union considered that it would be successful in the event that a ballot was called. In the circumstances the Union requested that the CAC accept the application and move on to determine whether a ballot was required.

Views of the Employer

18. In a letter dated 27 July 2007 the Employer noted that the membership report indicated that the proportion of Union members in the bargaining unit was 41.45%, whereas the Union claimed to have had 194 members in the determined bargaining unit. 68 people whose names appeared on the Union's list were found not to be in the determined bargaining unit and the actual number of names common to both lists was 126.

19. The Employer was concerned that the Union appeared to have made no effort to provide accurate information about its membership amongst the tutor population. It submitted that the information that the Union had provided was grossly inaccurate. The Employer noted that the membership report also provided no evidence that the claimed members amongst the tutor population were up to date with their membership fees. In view of the inaccurate information provided by the Union the Employer

argued that it should be incumbent upon the Union to demonstrate that the individuals it claimed to be in membership were fully paid up to date and continued to regard themselves as members of the Union.

20. In respect of the findings of the membership report it was the case that, according to the Employer, the Union was considerably short of demonstrating majority membership amongst the tutor population. A total of 59% of the tutors were not members of the Union despite the fact that the Union had been actively recruiting for well over 18 months.

21. The Employer did not believe that the CAC could reasonably infer from the level of actual membership that the majority of workers would be likely to favour recognition. The Employer considered that it was for the Union to produce tangible evidence that the majority of workers wished the Union to be recognised for collective bargaining. The Union should be required to demonstrate, on the balance of probabilities, that the majority of workers in the bargaining unit would be likely to favour recognition. In the absence of such evidence the Employer contended that it had failed to demonstrate that the majority of the workers would be likely to favour recognition as required by the Schedule.

The Union's rejoinder

22. By a letter dated 1 August 2007 the Union responded to the points made by the Employer in its letter of 27 July 2007. It was, the Union explained, disappointed that the Employer was querying the basis of the figures provided by the Union as it believed that the data it supplied was accurate and submitted in good faith. The Union pointed out that the information was supplied in similar terms to Acas in February 2007 by both parties, and at that time the Employer did not query or challenge the Union's data.

23. The Union explained further that it had supplied the CAC with details of all the members held on its database under the Employer's known workplace codes. Clearly, if there was an erroneous entry (the Union was confident that this had not happened as it believed and confirmed that the information it supplied was correct)

then the Case Manager's cross check against the Employer's own data ensured that only those workers held on the Union's database, and shown as working within the Employer's own identified occupational group, would be counted as being within the defined bargaining group and also as members of the Union.

24. The Union's letter referred to the Employer's request that the Union demonstrate that the individuals claimed as members amongst the tutors were full paid up to date and continued to regard themselves as Union members. A further check had been made by the Union as to whether any members at the date in question were out of compliance. It had found that there were none. The information supplied to the CAC showed those members in compliance and their payment method. These were DD for direct debit, PA for annual amount (yearly contributions), CD for credit card payments and EX for any member who was excused contributions covered in rule such as sickness or maternity leave.

25. Despite a turnover of staff the Union had a larger number and higher percentage of members than when the membership check was conducted by Acas in February 2007. There was 41.45% membership in the bargaining unit which satisfied the 10% membership requirement and also indicated that it was likely that the majority of the bargaining unit would support recognition of the Union.

Considerations

26. The Panel is satisfied on the evidence available that the application is valid in terms of the tests laid down in paragraphs 44 and 46 to 49 of the Schedule, namely that there is no existing recognition agreement in force covering any of the workers in the determined bargaining unit, that there is no competing application and that there has been no previous application to the CAC in respect of the determined bargaining unit. The remaining tests to be considered by the Panel are whether, in accordance with paragraphs 45(a) and (b) of the Schedule, 10% of the workers constituting the determined bargaining unit are members of the union and that a majority of those workers would be likely to favour recognition of the union as entitled to conduct collective bargaining on behalf of the bargaining unit.

27. In respect of the first test of whether union members constitute at least 10% of the workers in the bargaining unit, the Case Manager's check conducted on 24 July 2007 established that 41.45% of the workers in the determined bargaining unit were members of the Union. The Case Manager's report thus shows that the Union's membership in the determined bargaining unit easily satisfies the 10% test set out in paragraph 45(a).

28. The second issue for the Panel to consider is whether, pursuant to paragraph 45(b), a majority of workers constituting the bargaining unit would be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit. Whilst the Employer, in its submissions of 11 July 2007 made reference to a petition being undertaken by the Union, no such evidence was adduced by the Union. Rather, the Union relied upon arguments based on its membership level of 41.45% of the workers in the determined bargaining unit in order to demonstrate that the test was satisfied.

29. The Employer challenged whether the claimed level of membership was reliable for the purposes of the likely support test. The Employer posed the question of how 68 names were included on the Union's list of members but subsequently found not to be in the determined bargaining unit. It also queried whether those Union members identified as being in the determined bargaining unit were paid up to date with their membership fees and whether these individuals continued to regard themselves as members of the Union. The Union responded to the points made by the Employer by way of its letter dated 1 August 2007. Included within this letter were the following two points which the Panel finds persuasive. First, the Union confirmed that, according to its own records, its members were in compliance and up to date. Second, even if there had been any erroneous entries, the Case Manager's cross check of the Union's membership against the Employer's own figures for the number of workers in the determined bargaining unit ensured that only those tutors listed by the Employer were counted for the purposes of the Case Manager's calculation of Union membership.

30. The test under paragraph 45(b) is whether a majority of workers constituting the bargaining unit *would be likely* to favour recognition of the Union as entitled to

conduct collective bargaining (emphasis added). It is not a simple arithmetical test. The test is a question of likelihood in the light of all the circumstances rather than a mathematical certainty.

31. The Panel regards a union's membership as indicative of support for recognition. Notwithstanding the increasingly wide range of services currently offered by trade unions, in the absence of evidence to the contrary, an individual who has joined a trade union is, generally speaking, likely to be in favour of the union negotiating with the employer on pay, hours and holidays. Having said this, the Panel does not equate non-membership with an automatic lack of support for recognition. Where a union is not recognised by an employer there are a number of reasons why an individual may be likely to support recognition of a trade union but hold back from actually becoming a member. Some individuals may not wish to pay subscriptions to a union that is not recognised in the workplace but are prepared to do so when recognition is secured. Others may believe, however wrongly, that the employer would be concerned if it was known that they were union members. Out of the 178 workers in the bargaining unit who are not members of the Union, at least 27 (15.17% of existing non-members), and probably more, would be likely to favour recognition of the Union, which would bring support for recognition above 50%. In this connection, the Panel also notes the increase in Union membership College-wide from 33.9% in February 2007 to 41.45% in July 2007.

32. Therefore, for the reasons given, the Panel accepts that the level of Union membership does provide, in the absence of evidence to the contrary, an indication of the views of the workers in the determined bargaining unit. Further, the Panel concludes that there would be enough support among non-members within the bargaining unit for it to conclude that a majority of the workers in the proposed bargaining unit would be likely to favour recognition of the Union.

33. Accordingly, the Panel is satisfied that the majority of workers constituting the determined bargaining unit would be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit and therefore the test set out in paragraph 45(b) is satisfied.

Decision

34. The decision of the Panel is that the application is valid for the purposes of paragraph 20 of the Schedule and the CAC must proceed with the application.

Panel

Professor Roy Lewis

Mr Bob Hill

Ms Bronwyn McKenna

16 August 2007