CAC accepts application for derecognition of union

■ **Parker and ors v Boots Pharmacists Association and anor, Central Arbitration Committee**

Trade unions

The Central Arbitration Committee rules that an application by a group of pharmacists to end the existing collective bargaining arrangements between their employer and a non-independent trade union was admissible. Pledges of support from members of a rival union, and the membership density of that union, showed that at least 10% of workers in the bargaining unit supported the application for derecognition. The CAC further holds that a majority of workers who do not belong to either union would also be likely to favour an end to the collective bargaining arrangements.

Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 contains a statutory procedure under which a trade union can apply for a declaration from the Central Arbitration Committee (CAC) requiring an employer to recognise it for collective bargaining purposes. In general, the statutory scheme will not interfere with any existing voluntary recognition arrangement between the employer and another union. However, there is some provision for ending existing arrangements where the union recognised by the employer is not 'independent' – i.e. it does not have a certificate of independence issued by the Certification Officer. Non-independent unions are sometimes referred to as 'sweetheart' unions, and employers usually only agree to a limited degree of consultation within the meaning of S.178 TULR(C)A, excluding any negotiation over terms of employment such as pay, hours and holidays.

Part VI of Schedule A1 provides that, in circumstances where the employer has entered into voluntary bargaining arrangements involving a non-independent union, one or more individuals in the bargaining unit (the group of employees covered by the arrangements) may bypass their employer and the non-independent union by applying directly to the CAC to end the arrangements: i.e. to have the union derecognised – para 137(1). Such an application will only be treated as admissible if at least 10% of the workers in the bargaining unit favour an end of the bargaining arrangements, and a majority of workers in the bargaining unit would be likely to favour an end of the bargaining arrangements – para 139(1)(a) and (b).

Although Part VI has been in force since 2000, the case below is the first occasion on which the CAC has considered an application for derecognition under these provisions.

Union blocked by existing agreement

The Pharmacists' Defence Association Union (PDAU) was granted a certificate of independence by the Certification Officer in 2011. The following year, it applied to the CAC seeking recognition for collective bargaining purposes in respect of a group of pharmacists employed by BMS Ltd.

BMS Ltd argued that the CAC should not accept the application because the bargaining unit was covered by an established relationship with a trade union, BPA, which was listed with the Certification Officer but did not have a certificate of independence. BMS Ltd did not recognise BPA for collective bargaining purposes in relation to pay, hours or holidays, and had no intention of doing so. BPA's role was limited to consultation on

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on matters such as facilities and the machinery for negotiation. Its relationship with BMS Ltd had been put on a formal basis in March 2012 when BMS Ltd realised that PDAU would seek statutory recognition.

The CAC accepted that a literal interpretation of para 35(1) of Schedule A1 would prevent PDAU's application, since BPA was already recognised for a form of collective bargaining that fell within the definition of that term in S.178 TULR(C)A. However, in light of its view that to prevent an independent union from seeking statutory recognition where no other union had collective bargaining rights for pay, hours and holidays would infringe Article 11 of the European Convention on Human Rights, the CAC interpreted para 35(1) purposively so that it would enable PDAU's recognition application to proceed (see Brief 969).

Derecognition application

The CAC's decision was successfully challenged by way of judicial review in the High Court (Briefs 991 and 1009). On appeal, the Court of Appeal held that the statutory scheme did not breach Article 11 because it provides for a worker to apply for a non-independent union to be derecognised, which meant that there was a reasonably practicable route whereby PDAU's recognition could be achieved if the majority of workers wanted it (see Brief 1066).

Taking their cue from the Court of Appeal's decision, P and five other pharmacists employed by BMS Ltd made an application under para

137(1) of Schedule A1 to end the collective bargaining arrangements between their employer and BPA. BMS Ltd and BPA contested the application: they argued that there was less than 10% support for derecognising BPA among the workers constituting the bargaining unit; and that less than half of the bargaining unit would be likely to favour derecognition.

The CAC noted that BPA's membership included some registered pharmacists who were employed by BMS Ltd as area or more senior managers. It took the view that such individuals would not form part of the bargaining unit, but since BMS Ltd had not provided figures excluding this cohort, it decided the application on the basis of a bargaining unit of 7,157 workers.

Evidence of 10% support

To support P's application, PDAU had collected 1,017 pledges from current employees of BMS Ltd indicating that they supported both ending the recognition agreement with BPA and entering into a recognition agreement with PDAU. The CAC accepted that all those who signed the pledge, 14.2% of the workers in the bargaining unit, wished to see an end to the bargaining arrangements with BPA.

The CAC also considered that PDAU's membership figure of 2,432 (31.8% of the bargaining unit) was cogent evidence of support for derecognition. It was well known within BMS Ltd that the agreement with BPA was preventing recognition of PDAU, and members of the latter union could be presumed to have joined for the obvious reason of wanting collective bargaining on the central matters of pay, hours and holiday. In light of the pledges of 14.2% of the bargaining unit and PDAU's membership density of 31.8%, the CAC concluded that at least 10% of the bargaining unit favoured derecognition. The test under paragraph 139(1)(a) had therefore been met.

Majority support likely

As to the likely majority support threshold imposed by para 139(1)(b), the CAC looked at the membership figures for each union, taking into account that BMS Ltd supported BPA and encouraged workers to join, while it had been vocal in its opposition to PDAU. It considered it likely that the entirety of PDAU's membership – 31.8% of the bargaining unit – would support derecognition. The CAC thought there was 'less to be gleaned or inferred' from BPA's membership figures. It had regard, among other things, to the fact that PDAU's growing membership was consistently higher than BPA's, and that BPA's membership had continued to decline even when it became recognised for collective bargaining a few years earlier, which suggested that BPA membership did not necessarily equate to support for the status quo.

The answer to whether there was likely to be majority support hinged on those who were members of neither union. The CAC observed that, in its industrial experience, there are those who support recognition by an independent trade union but who choose not to show their hand when the employer makes it known that it does not support the union, those who support a union but prefer not to join for parsimonious reasons, and those who wait to see which way the wind is blowing. With BPA's membership in decline and PDAU's on the rise, the direction of travel appeared to be in the latter's favour. It therefore concluded that most of the workers who are members of neither union would also be likely to support an ending of the two matters that are collectively bargained for by BPA. Combining this group with PDAU's membership, the CAC concluded that a majority of the bargaining unit would be likely to support the ending of the current collective bargaining arrangements. The application was therefore deemed admissible.

Comment

The CAC's decision that the application is admissible does not automatically result in the end of the collective bargaining arrangements between BPA and BMS Ltd. Instead, para 142 requires that the CAC assist the employer, union and workers in negotiating with a view to either ending the bargaining arrangements or withdrawing the application. In this regard, PDAU met with the employer, on behalf of the workers who made the application, on 12 December 2017. As no agreement was reached, a secret ballot on derecognition will need to be held in accordance with the provisions of para 117.

On 19 January 2018 there was a hearing at which the CAC had to decide which pharmacists within BMS Ltd will be eligible to vote in the ballot. BMS Ltd, BPA and PDAU all gave evidence. According to a press release on PDAU's website, BMS Ltd and BPA argued that all pharmacists regardless of seniority or job role are covered by the recognition agreement with BPA and should get a vote to decide whether BPA should be derecognised. This would include company directors and regional/area managers who are pharmacists, as well as regional HR partners, senior healthcare lawyers, assistant marketing managers and IT technical product managers who also happen to be pharmacists.

The applicants and PDAU believe that the scope of the agreement between BMS Ltd and BPA is confined to pharmacists who work exclusively or routinely in patient-facing roles as part of their job. The CAC will issue a written decision in due course.

Case references

Parker and ors v Boots Pharmacists Association and anor. Central Arbitration Committee, 15.11.17 (TUR6/003/2017).

Pharmacists' Defence Association Union v Boots Management Services Ltd. Central Arbitration Committee, 2013 IRLR 262.

Pharmacists' Defence Association Union v Boots Management Services Ltd and anor. Court of Appeal, 2017 IRLR 355.

R (on the application of Boots Management Services Ltd) v Central Arbitration Committee and ors. High Court (Admin), 2014 IRLR 887.

R (on the application of Boots Management Services Ltd) v Central Arbitration Committee and anor. High Court (Admin), 2014 IRLR 278.