Case Number: TUR1/1062/2018
17 August 2018

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DECISION ON WHETHER TO ACCEPT THE APPLICATION

The Parties:

PDAU

and

Boots Management Services Ltd

Introduction

1. PDAU (PDA Union) (the Union) submitted an application to the CAC dated 24 July 2018 that it should be recognised for collective bargaining by Boots Management Services Ltd (the Employer) for a bargaining unit comprising "The registered and pre-registration pharmacists at levels 5,6 and 7 who are employed by Boots Management Services Ltd". The CAC gave both parties notice of receipt of the application on 25 July 2018. The Employer submitted a response to the CAC dated 1 August 2018 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 Her Honour Judge Stacey as Panel Chair, and, as Members, Mr Roger Roberts and Mr Paul Talbot. The Case Manager appointed to support the Panel was Linda Lehan.

3. The CAC Panel has extended the acceptance period in this case. The initial period expired on 8 August 2018 and was extended to 17 August 2018 to allow time for the Panel to consider all the evidence before arriving at a decision.

Issues

4. The Panel is required by paragraph 15 of Schedule A1 to the Act (the Schedule) to decide whether the Union's application to the CAC is valid within the terms of paragraphs 5 to 9; is made in accordance with paragraphs 11 or 12; is admissible within the terms of paragraphs 33 to 42; and therefore should be accepted.

The Union's application

5. In its application, the Union referred to the history of its claim for recognition and its previous application to the CAC in October 2012 CAC (Case Ref TUR1/823 (2012)) and the subsequent appellate litigation concluding with the Court of Appeal judgment that the Union's application was not admissible because of the existing agreement between the Employer and the Boots Pharmacists Association (BPA) *PDAU v Boots Management Services Ltd & BPA* [2017]EWCA Civ 66, and the subsequent de-recognition of the BPA under the Part VI procedure earlier this year, which now enabled the Union to renew its application for recognition by the Employer.

6. The Union stated that it submitted a written request to the Employer on 11 June, (the day the non-independent BPA was derecognised) effective from 12 June 2018, which was declined and attached copies of both letters. The Union stated that no agreement had been reached on the bargaining unit by the end of the statutory period (10 days subsequently extended by a further 20 days). The Union stated that the last day of the extended period was Tuesday 24 July 2018.

7. The Union believed that there were circa 57,000 workers in total employed by the Employer, circa 6,890 of whom fell within the terms of the proposed bargaining unit. The Union said that circa 2,500 of the workers in the proposed bargaining unit were in membership. The Union relied on the recent de-recognition ballot of the BPA as evidence of majority likely support for recognition of the Union by the Employer since the issue of de-recognition of the

BPA was inextricably linked with recognition of the Union following the Court of Appeal's judgment. It also relied on the pledges and support demonstrated for the Union over the previous six years in its campaign for recognition by the Employer and the Union's consistently high and sustained level of membership.

8. The Union explained that it had selected the proposed bargaining unit on the basis that the workers in the bargaining unit had specific statutory, regulatory and professional responsibilities or will shortly assume these upon professional registration. Those responsibilities applied at all times, inside or outside of work, regardless of the job role. The agreement reached in 2012 between the Employer and the BPA, indicated that the Employer already viewed this group as a separate bargaining unit of workers distinct from the wider workforce and one that was compatible with a manageable collective bargaining agreement. The Union stated that the CAC had carefully considered and defined the BU covered by the BPA agreement, which meant the BU had existed for the past six years and the PDAU seeks recognition for the same population. The Union stated that it believed the proposed BU was compatible with effective management and was easily identifiable. The Union stated that it reserved the right to provide additional evidence on the BU as the application progressed.

9. The Union stated that the bargaining unit for the purposes of recognition with the Union had not been agreed with the Employer.

10. In answer to the question whether there was any existing recognition agreement which it was aware of which covered any workers in the bargaining unit the Union stated that the previous bargaining agreement between the Employer and the BPA was terminated on 11 June 2018 at the direction of the CAC.

11. The Union confirmed that it held a current certificate of independence. The Union stated that it had copied its application and supporting documents to the Employer on 25 July 2018.

12. The Union relied on the findings and decisions of the CAC in case ref TUR1/823/(2012) and TUR6/003/(2017) as evidence in support of its application.

The Employer's response to the Union's application

13. In its response to the application the Employer said that it had received the Union's written request on 11 June 2018 by email. The Employer stated that by way of email on 12 June 2018 the PDAU clarified that its application should be treated as being made on 12 June 2018 when Boots' existing arrangements with the BPA ceased to have effect. The Employer stated that it responded by email dated 26 June 2018 confirming that the application for recognition was not accepted but that it would be willing to discuss the Union's application as provided for under s.10(2) and (3) of the Schedule A1.

14. The Employer confirmed that it did not agree the proposed bargaining unit and would provide full reasons at the appropriate stage of proceedings.

15. When asked whether, following receipt of the Union's request, the Employer proposed that ACAS be requested to assist the Employer answered that it did not consider that it would be of assistance at the time as it was confident that meaningful conversations could have progressed between the parties. The Employer stated that they would be willing to work with ACAS if that would prove beneficial for both parties and if agreement could be reached on the composition of the bargaining unit.

16. The Employer agreed with the Union about the approximate total number of employees of 57,000 and also broadly agreed the Union's figure of the number of workers of approximately 6,890, although numbers fluctuated on a daily basis and it believed that it was currently closer to 6,900.

17. The Employer confirmed that there was currently no recognition agreement in place covering any of the workers in the proposed bargaining unit and that the CAC had terminated the previous collective agreement between Boots and the BPA on 11 June 2018.

18. Asked whether it disagreed with the Union's estimate of membership in the proposed bargaining unit and for its views as to whether a majority of the workers in the bargaining unit were likely to support recognition, the Employer stated that it accepted the estimated Union membership as approximately 2,500 but had no means of accurately assessing the same.

19. However, it did not agree with the Union's conclusion or assertion that the evidence of the history of the case and the de-recognition ballot demonstrated majority likely support for recognition of the Union by the Employer. It considered the information provided to the Panel in 2012 was too stale now to be of evidential value to assess the views of the current pharmacist workforce and the 2018 derecognition of BPA ballot was neither an answer to the question of whether recognition of the Union was supported, and in any event the ballot turnout of 40% gave no indication of the views of those who chose not to cast their vote.

Considerations

20. In deciding whether to accept the application the Panel must determine whether the admissibility and validity provisions referred to in paragraph 3 of this decision are satisfied. The Panel has considered all the evidence submitted by the parties in reaching its decision. It has also considered the Panel's previous decisions published in the earlier cases between these parties and the previous findings of fact. The primary facts in this case were not particularly in dispute, but to the extent that they were the Panel has made its findings by applying the civil standard and noting that the burden of proof lies with the Union, as claimant in the case, to satisfy the Panel that the tests have been met. Our approach to inference drawing has been first to establish what facts we have found based on the evidence and agreed facts and previous facts, and then considered what inferences, if any, can be safely drawn from such facts, bearing in mind that we have been appointed as a specialist and independent panel for our experience in industrial relations (see s.260 of the Act).

21. It is not challenged and the Panel is satisfied that the application is not rendered inadmissible by any of the provisions in paragraphs 33 to 35 and paragraphs 37 to 42 and that it was made in accordance with paragraph 12 of the Schedule. The remaining issue for the Panel to address is whether the admissibility criteria set out in paragraph 36(1) of the Schedule are met.

Paragraph 36(1)(a)

22. Paragraph 36(1)(a) of the Schedule calls for the Panel to determine whether members of the Union constitute at least 10% of the workers in the Union's proposed bargaining unit. In its application the Union said that it had circa 2,500 out of a 6890 strong

bargaining unit in membership. When invited to comment on this claim the Employer said "Boots accepts that the estimated Union membership of the proposed bargaining unit is approximately 2,500 colleagues but has no means of accurately assessing the same"

23. In light of the Union's assertion of its level of membership that is not contradicted or disputed by the Employer in its response, and on balance of probabilities on the information available, the 10% threshold has been satisfied, since in the region of 36% of the workers in the proposed bargaining unit are members of the Union. The Panel also notes that the Union's assertion of membership levels in 2012 was largely borne out on a full membership check and that its records were up to date and accurate.

Paragraph 36(1)(b)

24. The test in paragraph 36(1)(b) is whether a majority of the workers constituting the proposed bargaining unit would be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit. It is a test that requires a CAC panel to draw inferences from the evidence and submissions before it of the likely views of the workers in the proposed bargaining unit, whether they have yet been expressed or not. The Schedule anticipates that the acceptance decision in a Part I application will be made within 10 working days starting with the day after that on which the CAC receives the application (paragraph 15(6) of the Schedule). It is inevitably a somewhat imprecise exercise. Furthermore, the acceptance stage of a CAC claim is a threshold test before an application may be considered further in greater detail. Only if an application is accepted will a Panel then consider in greater detail issues concerning the appropriate bargaining unit and whether the Union's application is in fact supported by a majority of the members in the bargaining unit, or if a majority of the workers in the bargaining unit are members of the Union.

25. This case has a considerable history. The Union first sought recognition in October 2012 and demonstrated sufficient Union membership levels and majority likely support as at January 2014 following a detailed membership and support check and on a consistently rising membership base (see decision of the CAC in case number TUR1/823/(2012) 9 January 2014, Decision on whether to Accept the Application).

26. Following the Court of Appeal's judgment of 2017 that the CAC had erred in accepting the Union's application whilst an agreement existed between the Employer and BPA, Union members supported by the Union initiated the de-recognition procedure in respect of a non-independent union, such as the BPA under Part VI of the Schedule (see TUR6/003/(2017) and the decisions made in that case). The sole purpose of the de-recognition application was to enable the Union to make a recognition application since it was prohibited from doing so whilst the agreement between BPA and the Employer remained in force. The Union accurately described the de-recognition campaign as synonymous with the Union's recognition claim and the material produced by all three parties to the de-recognition process – the Employer, the BPA and the Union made that abundantly clear in its campaign literature that was evidenced before the Panel at the time. The de-recognition ballot was inextricably entwined and connected to the Union's claim for recognition by the Employer.

27. In its decision on Whether to Accept the Application for De-Recognition of 15 November 2017, the CAC Panel found for the reasons set out in its decision and based on the evidence before it, that the Applicants had shown that at least 10% of the bargaining unit favoured an end to the bargaining arrangements with BPA and that a majority of the bargaining unit would be likely to do so, pursuant to paragraph 139 of the Part VI procedure in Schedule A1. The Panel conducted a detailed analysis of the evidence from a variety of sources, such as membership data, pledges, the declining pattern of BPA membership against rising membership levels of the Union notwithstanding the privileged access to the workforce and advantages enjoyed by the BPA as is explained in our judgment in that case.

28. Following acceptance of the de-recognition application, the balloting constituency required determination, which, given the parties understandable desire to be represented by their counsel of choice and the availability of the Panel, necessitated a further delay. Once that had been identified, a secret ballot was conducted under the auspices of a prescribed balloting agency, Kanto Elect as a Qualified Independent Person (QIP) in accordance with the regulations. 2826 workers, representing 86.63% of the workers in the bargaining unit who voted, supported the proposal that the BPA should be de-recognised and its bargaining arrangements with the Employer ended. Out of 6890 workers eligible to vote, 3308 ballot papers had been returned and 46 ballot papers were found to be spoilt. 436 workers, representing 13.37% of those voting, had voted to reject the de-recognition proposal. The proportion of workers constituting the bargaining unit who supported the proposal that BPA

be de-recognised therefore was 41.02%. The BPA was duly declared de-recognised by the CAC since a majority of the workers voting and at least 40% of the workers constituting the bargaining unit supported derecognition. Bargaining arrangements were brought to an end on 11 June 2018, thus paving the way for the Union's recognition application. The Union made its request for recognition by the Employer as required by the Schedule on the same day.

29. During the balloting period the Union had considerable concerns about the accuracy of the Employer's records and was concerned by the number of its members who reported that they had not received a ballot paper. The Panel had to extend the balloting period to enable duplicate ballot papers to be dispatched to those who had not received a ballot paper and the Union reserved its position pending the ballot result and raised concerns about the Employer's compliance with its duties during the balloting period. In light of the ballot result the Panel and the CAC was not required to investigate further or make findings in relation to any election irregularities. Prior to and during the balloting period all parties had agreed access arrangements to enable them to inform the balloting constituency of their views and explain the purpose of the ballot.

30. The Employer accepts that the Union made it clear throughout its derecognition campaign that derecognition of the BPA was a necessary precondition of the Union's application for recognition as a consequence of the Court of Appeal judgment and that the derecognition process was simply a necessary step in the process of achieving the Union's desire for recognition. The proposed bargaining unit in this case is identical to the balloting constituency in the de-recognition ballot which took place two months ago, and is therefore reliable and contemporaneous evidence.

31. In light of the particular background and history in this case, the Panel concludes that the workers who voted for de-recognition of the BPA did so as support for the Union's application for recognition. No other explanation has been proffered by the Employer, and nor can the Panel think of one. Why else would they have taken the trouble to vote to end the extremely limited bargaining arrangements with BPA[1], other than to pave the way for a recognition application by the Union?

[1] Issues concerning the scope and extent of the bargaining arrangements between the BPA and the Employer are discussed at length in the Panel's previous decisions in the 2012 application.

32. Conversely, the Panel accepts that the 13.37% who voted to retain the BPA arrangements do not favour recognition of the Union by the Employer.

33. What, then, is to be made of views of the 58.98% of the bargaining unit who did not take part in the de-recognition ballot, the silent majority, or the known unknowns, to adopt the Rumsfeldian terminology? What can be gleaned from their silence? Here the Employer submits that their silence speaks of their not favouring recognition and the Union asserts the contrary.

34. A number of points arise regularly for consideration in cases of this type and the unusual wording of the Schedule which requires the Panel, using its industrial relations expertise, to fathom likely support from those who have, so far remained silent and not expressed a view. Prior to recognition, a Union has limited access to the workforce, whilst the Employer has unfettered access to its workers. Some individuals support trade union recognition, but are reluctant publicly to declare their support, especially where relations as here between the Union and the Employer have been strained over the recent past and the Employer has made known its objection and resistance to recognition of the Union, as has been discussed in the previous decisions referred to above. The Panel concludes that the fact of around 36% Union membership - which is a level that has been sustained and grown over the past few years in an unwelcoming environment - is evidence of strength and determination. Individuals have been willing to pay regular membership fees at a time when their Union does not have collective bargaining. In the industrial relations expertise of the Panel there are likely to be many others who wish to obtain the benefits of the Union, and recognition if achieved, without paying the membership fees.

35. It is remarkable that the Union has retained such levels of support over the past nearly 6 years when it could be said that little has been achieved in that period. It speaks of a commitment and level of support that has been undeterred by the frustrations and set backs of the process.

36. Bearing in mind the opposition to the Union by the Employer, in contrast to the Employer's vocal support of the BPA, the Panel conclude that those who chose not to take part in the derecognition ballot cannot be said to oppose recognition of the Union by the Employer,

but that a substantial number, considerably more than the 8.02% of the proposed bargaining unit required, would be likely to favour recognition by the Union.

37. At the same time the support and membership of the BPA has declined as set out in the CAC's decisions in both 2014 and 2017, notwithstanding the support of the BPA by the Employer.

38. The Panel is therefore satisfied that the Union has shown from the combination of its high levels of Union membership, the de-recognition ballot results, and given the history set out in the previous findings of the Panel in the previous linked cases, that a majority of the proposed bargaining unit would be likely to favour recognition by the Employer of the Union.

39. For the reasons given above the Panel is satisfied that, on the balance of probabilities, a majority of the workers in the proposed bargaining unit would be likely to support recognition of the Union and the test set out in paragraph 36(1)(b) is therefore met.

Decision

40. For the reasons given above, the Panel's decision is that the application is accepted by the CAC.

Panel

Her Honour Judge Stacey, Panel Chair
Mr Roger Roberts
Mr Paul Talbot

17 August 2018