SUMMARY

2014/62 Statutory trade union recognition scheme not incompatible with the European Convention on Human Rights (UK)

<p>A statutory trade union recognition scheme which provides that an employer can reach an agreement for collective bargaining with a non-independent trade union and thereby block an application for recognition by an independent union was not incompatible with Article 11 of the European Convention on Human Rights (the ‘Convention’). The scheme was compatible with human rights law because an employee could apply for the so-called “sweetheart” union to be de- recognised which, if effective, would clear the way for recognition of the independent union.</p>

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Background

If an employer 'recognises' a trade union in the UK, this means that the employer accepts that the union is entitled to act for the employees (or a sub-section of them) for some purpose. The purpose will vary but will be agreed between the parties in a collective agreement. Most unions would like to be recognised for the purpose of collective bargaining over pay and conditions. However, some recognition agreements merely give the union a right to consult with the employer and act as an intermediary between employer and employees rather than power to negotiate and agree terms and conditions.

Trade unions and their members have some rights even if the union is not recognised by the employer. For example, a worker has a right to be accompanied by a trade union representative at a disciplinary meeting, even if the employer does not recognise that trade union.

Many collective agreements are voluntary but there is also a statutory procedure by which a trade union can compel employer recognition provided it can show that it commands majority support amongst the workers in the relevant bargaining unit. A "bargaining unit" is the group of workers the union seeks to represent, which need not be the whole of the employer's undertaking. However, a trade union is precluded from using the statutory recognition procedure if another trade union is already recognised by the employer for the purposes of collective bargaining for that bargaining unit. This is so even though employers often voluntarily recognise more than one union in respect of the same bargaining unit.

Note that employers employing fewer than 21 workers are excluded from the statutory recognition scheme.

Facts

The Boots group of companies ('Boots') owns and runs a chain of high-street pharmacies in the UK. It has a collective agreement with a non-independent trade union, the Boots Pharmacists' Association ('BPA'). According to the BPA's constitution, its objective is to "*act as an officially recognised medium for representing to the management of Boots The Chemist all matters affecting the pharmacists of Boots*". The BPA has in the past conducted limited negotiations with Boots concerning the machinery for consultation and facilities for union officials. These negotiations resulted in (i) the BPA's chief executive officer being given a laptop computer and an email address, (ii) funding for a publication through which the BPA communicated with Boots' employees, (iii) the BPA being invited to make presentations and have stands at Boots Pharmacy conferences, (iv) enabling members' union subscriptions to be collected through the payroll, and (v) the establishment of channels through which the BPA chief executive officer would deal with Boots' management and of designated meeting places.

Boots does not recognise the BPA for the purpose of collective bargaining over pay, holidays or hours for its employees.

In view of the BPA's inability to bargain with Boots over pay, etc., and its dependency on management, it could not claim to be a truly independent union. A non-independent union, like the BPA, is sometimes called a "sweetheart union".

In 2012 the Pharmacists' Defence Association Union (the 'PDAU') applied to the Central Arbitration Committee (the 'CAC') seeking an order that Boots recognise it for collective bargaining purposes in respect of a particular group of Boots' pharmacists. The CAC is the body that determines applications for statutory union recognition made under schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'). Normally such an application is not admissible if the employer already recognises a union for the purposes of conducting collective bargaining on behalf of any of the employees in the relevant bargaining unit. The definition of collective bargaining for this purpose is very broad and includes negotiations over facilities for trade union officials and machinery for consultation; it does not have to include negotiations over pay, hours or holiday to amount to collective bargaining. Despite this, the CAC initially allowed the PDAU's application.

The CAC said that it had to construe the UK legislation in a way that was compatible with Article 11 of the Convention, which protects the right to freedom of assembly and association with others, including the right to form trade unions. The European Court of Human Rights held in the case of *Demir and another* v *Turkey [2009] IRLR 766* that an essential element of Article 11 was the right to bargain collectively. The CAC held that a right merely to bargain over facilities for trade union officials and arrangements for consultation was not 'collective bargaining' within the meaning of Article 11.

In order to construe TULRCA in this way, the CAC decided that the legislation had to be read *as though* it said that a recognition application would only be blocked by a collective agreement with another union under which the union is entitled to conduct collective bargaining in respect of pay, hours and holidays.

The CAC's decision cleared the way for the complex statutory recognition procedure (which might include a secret ballot) to be started, but it did not grant the PDAU an immediate right to recognition. However, before the statutory procedure could be continued, Boots applied for judicial review of the CAC's decision.

Following the judicial review, the High Court held that, although the CAC was right that collective bargaining *"is meaningless if it does not engage in some meaningful way with the terms and conditions of employment"*, still the CAC had been wrong to read additional words into the

legislation because it had completely changed its meaning. The court therefore overturned the decision of the CAC. This decision would prevent the PDAU from continuing with a statutory recognition application, so the court also gave the PDAU leave to apply for a declaration under the Human Rights Act 1998 ('HRA') that the statutory trade union recognition scheme was incompatible with the Convention.

The HRA incorporates the Convention into UK domestic law. It provides that, if a court is satisfied that a piece of legislation is incompatible with a Convention right, it can make a declaration of incompatibility. A declaration of incompatibility would not make the legislation invalid but it would prompt the Government to amend the law. Individuals still have the right to present a petition directly to the European Court of Human Rights where they believe their Convention rights have been infringed. This right exists in addition to the rights under the HRA but is expensive and slow. The PDAU needed to be given leave to apply for a declaration of incompatibility because it had not originally sought this declaration (having initially won its case). The court had therefore not heard any arguments from either party on this point and, in addition, is prohibited from making such a declaration unless notice had been given to the Crown that such an order was sought.

The PDAU accordingly applied for a declaration of incompatibility.

Judgment

The High Court declined to make a declaration of incompatibility. It accepted that the meaning of 'collective bargaining' in the relevant section of the legislation could not be read in a manner that was compatible with Article 11. However, it suggested that the issue could be overcome by the provisions within TULRCA permitting a worker to apply to the CAC for statutory de-recognition of the BPA. If such an application succeeded, it would clear the way for the PDAU to apply for recognition which would safeguard its rights.

The court did not think that it was a problem that the application for de- recognition would have to be made by a worker and there was no way for it to be made by the PDAU. The court thought that it was unlikely that the union would not be able to find a single person willing to risk making the application. It considered the fact that a worker might fear reprisals but it pointed out that they did have statutory protection from detriment in connection with a de-recognition application.

Commentary

Assuming the PDAU could find a worker to make the application, the CAC would still need to be satisfied that at least 10% of the workers in the bargaining unit wanted to end the current

arrangement. However, the PDAU would need support in the bargaining unit in order to achieve statutory recognition in any event. To obtain statutory recognition the CAC must be satisfied that, either, a majority of the workers in the union's proposed bargaining unit are members of the union, or, that the union has won majority support for recognition in a secret ballot of workers within the bargaining unit and that majority constituted at least 40% of those entitled to vote.

If the court had made a declaration of incompatibility the Government would have come under pressure to change the statutory recognition procedure. The court's decision has made it less likely that there will be any change to the law in the near future.

However, this decision may be something of a Pyrrhic victory for the employer. It suggests that the UK law merely allows statutory recognition of an independent trade union to be delayed through the use of sweetheart arrangements rather than avoided altogether.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): One of the criticisms of Dutch law on collective bargaining is that it empowers unions that are not truly representative. Less than 20% of the Dutch workforce are members of a union. In the private sector this percentage is considerably lower. In fact, there are many organisations where no employees, or only a tiny fraction of the employees are union members. This fact does not deter unions from negotiating collective agreements that are binding on all of the employees in those organisations. As a rule, this works out well for both the employers (who do not need to negotiate with each individual employee) and the employees in question. For this reason, the system, although perhaps not always democratic, works quite well and almost everyone is satisfied. However, there have been cases where an employer entered into a collective agreement with a 'sweetheart' union or, even worse, a 'yellow' union, to the detriment of staff. Such cases elicit criticism about the fact that Dutch law lacks a requirement for unions to have a mandate from the workforce they claim to represent. There is no independent body such as the British CAC that can order an employer to "recognise" a union or to "derecognise" a sweetheart union and there is no secret ballot. In theory, this is a weakness of the Dutch system. However, the case reported above makes one wonder whether the British system, which allows considerable opportunity for employers to delay, if not block independent unions from forcing them to the bargaining table, is much better in practice.

Subject: Fundamental rights; unions

Parties: Boots Management Services Ltd - v - Central Arbitration Committee and others

Court: High Court

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