EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4105432/2023 and others

Hearing held in Glasgow on 24 and 25 January 2024

Employment Judge M Whitcombe

Mr G Reddick and others	**Claimant** **Represented by:** **Mr Ruaraidh Lawson** **(Solicitor)**
Simon Community Scotland	**Respondent** **Represented by:** **Mr K McGuire** **(Advocate)**

JUDGMENT ON A PRELIMINARY ISSUE

The judgment of the Tribunal is that on 28 April 2023 (the relevant date) Unite was a trade union recognised by the respondent for the purpose of collective bargaining, in accordance with section 178(3) of the Trade Union and Labour Relations (Consolidation) Act 1992.

REASONS

Introduction

1. This hearing was concerned with voluntary trade union recognition. With one exception, the claimants are all still employed by the respondent as support workers. The exception is Mr Reddick, whose employment ended on 5 September 2022. The respondent is a charity providing advice and support

to people who are homeless, or at risk of homelessness.

2. By a claim form received by the Tribunal on 8 September 2023 the claimants complained that that the respondent had breached s.145B TULRCA 1992 by offering unlawful inducements relating to collective bargaining. At a preliminary hearing for case management held on 13 November 2023, it was agreed and ordered that the question whether Unite the Union was recognised by the respondent for the purposes of 145B TULRCA 1992 would be decided as a preliminary issue at this hearing.

3. It was common ground between the parties that the date on which the claimants must establish that Unite was recognised by the respondent is 28 April 2023, the date of the alleged inducements.

Evidence

4. The claimants called evidence from Lorna Glen, who is Unite's Regional Women and Equalities Officer (Scotland). Her role is split between equalities and industrial functions. The respondent's operation forms part of her industrial remit, which is equivalent to that of a regional officer. She took over responsibility for the respondent in August 2016.

5. The respondent called oral evidence from Lorraine McGrath (Chief Executive Officer since June 2012) and Hugh Hill (Deputy Chief Executive Officer).

6. I was provided with a joint file of documents running to 341 pages. It was made available in pdf format with appropriate bookmarks and a hyperlinked index. It was a joy to work with and I am very grateful to those involved in its preparation.

Witness credibility

7. I would not wish to overstate the importance of oral evidence in this case because it appeared to me that the most important evidence was contained in contemporaneous documents. Witnesses often offered opinions and theories about documents which predated their personal involvement in the case, but that is of relatively little value.

8. That said, Lorna Glen struck me as an honest and credible witness who was frank when her memory had faded on a particular matter, and about the fact that her knowledge might have been incomplete because of absence on three periods of maternity leave (approximately September 2017 until June 2018, December 2019 until November 2020 and April 2022 until March 2023). I nevertheless formed the view that she was doing her best to answer questions as fully as she honestly could.

9. In contrast, I had some concerns about the respondent's evidence. While the respondent's witnesses certainly gave an assured and polished performance, in a way that was also the problem. At some points they seemed doggedly determined to stay "on message" and to use certain key words to describe the situation while carefully avoiding the use of other key words. Overall, I gained the impression that their evidence was calibrated to suit the respondent's case and could not necessarily be relied on as an unvarnished and unfiltered recollection of the facts. Both of the respondent's witnesses occasionally deflected questions, answering the question they would have preferred to have been asked instead. The notes of a meeting on 31 August 2023 record Lorna Glen describing Hugh Hill's statements as "*politicians' answers*". I formed a similar impression, and the evidence of Hugh Hill and Lorraine McGrath was less credible for that reason.

10. The respondent did not call Gemma Reid, its former HR Manager, who has apparently now left the organisation. However, that would not of itself prevent her from being called as a witness, under a witness order if necessary. She was the author of several important emails but was not called to comment on

them.

Legal principles

11. I did not detect any real difference between the parties as to the applicable legal principles. I will not deal with the statutory trade union recognition scheme introduced by the Employment Relations Act 1999 as Schedule A1 to TULRCA 1992 because it has no bearing on this case.

Burden and standard of proof

12. The burden of proof of recognition is on the claimants. The standard of proof is the balance of probabilities.

Voluntary recognition

13. Voluntary trade union recognition is a process by which an employer accepts a trade union as being entitled to act on behalf of its workers for some specified purpose. It might cover an entire workforce, or it might be limited to defined groups of workers.

14. It is possible for a trade union to be recognised for some purposes short of full collective bargaining, for example, recognition for information and consultation rights in certain circumstances, or recognition for the purpose of representing workers at formal disciplinary or grievance hearings. If a union is recognised for the purposes of *collective bargaining*, then the agreed scope of that collective bargaining will determine the statutory rights (if any) that follow recognition.

15. The relevant statutory definition is contained in s.178(3) TULRCA 1992. However, I will set out section 178 in full because the other subsections have a bearing on the test in section 178(3).

178 Collective agreements and collective bargaining

(1) In this Act "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and "collective bargaining" means negotiations relating to or connected with one or more of those matters.

(2) The matters referred to above are—

(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;

(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;

(c) allocation of work or the duties of employment between workers or groups of workers;

(d) matters of discipline;

(e) a worker's membership or non-membership of a trade union;

(f) facilities for officials of trade unions; and

(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

(3) In this Act "recognition", in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and "recognised" and other related expressions shall be construed accordingly.

16. A trade union need only be recognised for collective bargaining in relation to one of the matters listed in section 178(2) TULRCA 1992 for it to be a recognised trade union as defined by section 178(3). Negotiation rights do not have to be comprehensive to qualify (see e.g. ***TGWU v Asda*** [2004] IRLR 836, CAC). The phrase "to any extent" in subsection (3) refers to the scope

of bargaining rights in terms of their subject matter, and not to the quality of the recognition. In other words, nothing less than *negotiating* rights will do, but negotiating rights which were limited to specific topics rather than general negotiating rights might well be sufficient.

17. Therefore, a union which is only entitled to participate in grievance or disciplinary procedures is not recognised for the purposes of collective bargaining (***USDAW v Sketchley Ltd*** [1981] ICR 644, EAT). Similarly, to meet the definition in section 178(3) TULRCA 1992 it is insufficient that the employer is willing to *consult* with a union on one of the matters listed in section 178(2). There is an important difference between *consultation* and *negotiation*. Further, the claimants must show that the employer was willing to *negotiate with a view to reaching agreement*. Negotiation implies an intention that the issue is to be settled by a bilateral agreement between the union and the employer, and not by the unilateral decision of management (with or without prior consultation).

18. That question must be approached objectively, rather than from the subjective perception of either side. An employer's subjective intention *not* to recognise the union is not conclusive against recognition (***USDAW v Sketchley Ltd*** [1981] ICR 644, EAT). The employer's willingness to negotiate might be shown by a formal written agreement conferring negotiating rights, or it might be inferred from a course of dealing between the parties. Neither written evidence, nor a lack of written evidence, is conclusive. One isolated incident of negotiation may not always be enough to show a willingness to negotiate (e.g. ***TGWU v Dyer*** [1977] IRLR 93, EAT) and the converse must be equally true.

19. The main principles are still found in ***National Union of Gold, Silver and Allied Trades v Albury Brothers Ltd*** [1979] ICR 84, CA.

    a. Recognition requires mutuality, in the sense of the employer acknowledging the role of the union for the relevant purposes and the union agreeing to that.

b. That mutuality could be express or implied.
c. If implied, the acts relied on must be clear and unequivocal, and (usually) the result of a course of conduct over a period.
d. There may be partial recognition, and so collective bargaining could be limited to just one of the topics in section 178(2) TULRCA 1992.

20. Therefore, an issue of voluntary recognition is largely determined in accordance with ordinary objective contractual principles, although any resulting agreement is highly unlikely to be a legally enforceable contract (see s.179 TULRCA 1992). It was described in ***Albury*** (above) as a mixed question of fact and law. A union is "recognised" for the purposes of TULRCA 1992 if and when an employer accepts its negotiating role or status within the organisation and accepts that it has *rights* in that regard.

Withdrawal of voluntary recognition

21. There is nothing in law to prevent an employer from changing its mind and withdrawing voluntary recognition at any time. Any contract can be terminated, and a recognition agreement is unlikely to be a binding contract anyway (***Associated British Ports v Palmer, Associated Newspapers Ltd v Wilson*** [1995] ICR 406, HL).

22. This is not a case in which the respondent argues that it used *express* words of derecognition. So far as *implied* derecognition is concerned, the authorities suggest that it should not easily be inferred. It requires clear and explicit language, or it might be inferred from clear and unequivocal conduct (see ***GMB and Kuehne & Nagel*** (D1/10/2014, 22 May 2015, CAC) and the reliance on an analogy with ***TGWU v Dyer*** [1977] IRLR 93, EAT). In practice, proving that a failure to bargain collectively amounted to derecognition might be difficult (see e.g. Harvey Section NI, Labour Relations, G(5) **916.02**).

23. Mr McGuire also relied on the CAC decision in ***Unite v Rettig (UK) Ltd***, which contains the phrase "withered on the vine". I am not prepared to adopt that

phrase as an alternative to the principles already set out above, especially given that the CAC in ***Rettig (UK) Ltd*** referred without disapproval to many of the same authorities, including ***GMB and Kuehne & Nagel*** (D1/10/2014, 22 May 2015, CAC) and ***TGWU v Dyer*** [1977] IRLR 93, EAT. A decision of the CAC is not binding on me but, even if it were, my reading of ***Rettig*** is that panel Chair James Tayler intended the phrase "withered on the vine" to be shorthand for the principles in the preceding paragraph of this judgment, rather than a replacement for them or a gloss on them.

24. Helpfully, in his oral submissions Mr McGuire accepted that for there to be implied derecognition the evidence would have to show nothing less than clear and unequivocal conduct consistent with that conclusion.

Facts

25. My decision is based on the following relevant facts. I will deal only with the relevant facts since it is not the purpose of these reasons to record every piece of evidence heard or every submission made. Where facts were in dispute I made my findings on the balance of probabilities, in other words, a "more likely than not" basis.

A written recognition agreement?

26. A key dispute of fact in this case was whether a written recognition agreement was ever concluded between the respondent and Unite. The claimants' position was that one was, and that it was the unsigned document included at page 114 of the joint file of documentary evidence for this hearing. In contrast, the respondent's position was the document was no more than an unsigned draft, presumably circulated for discussion, but never agreed.

27. On 24 August 2009 a meeting took place between Unite and the respondent. None of the witnesses who gave oral evidence at this hearing were present. Unite were represented primarily by Willie McGonagle, Regional Industrial

Officer, and the respondent was represented by Lynne Carr, then Acting Chief Executive and Audrey McTaggart, HR Manager.

28. The minutes contain several paragraphs headed "*Recognition Agreement*", underlined and in bold. The minutes record that Willie McGonagle had circulated a draft of a "*widely-used Recognition Agreement*", which could be altered to suit the respondent's needs. He undertook to forward a copy in electronic format to Lynne Carr. I infer that at least part of the reason was so that Lynne Carr could amend it. There was some discussion of the appropriate number of employee representatives and how they would be elected. The concluding action point was "*Draft Recognition Agreement to go to October Board meeting*", against the initials "LC", which I find to be a reference to Lynne Carr, the then Acting Chief Executive.

29. Lorraine McGrath accepted in cross-examination that there was an intention to enter into a recognition agreement at this time.

30. The corresponding meeting of the Board of Directors appears to have been held on 13 October 2009. Lynne Carr, by then described as "*Outgoing Acting CEO*", was present as was her replacement as Acting CEO Dorothy Robertson. At point 6.5 the minutes say, "***Union Recognition Agreement:*** *Unite have sent us the latest version of the agreement template. Lynne Carr has amended this to include [the respondent's] procedures which will go to the JNC. The Board approved the terms of the agreement.*"

31. I find that to be compelling evidence that the respondent's board approved the terms of a written recognition agreement on 13 October 2009.

32. Lorraine McGrath also accepted in cross-examination that the narrative in the ET3 was incorrect because of an "*oversight*" on her part, and that a recognition agreement of some sort had been approved by the respondent's board.

33. The likelihood is that the agreement which the board approved was either the draft agreement at page 114 of the joint file, or certainly something in substantially similar terms, including an amendment to specify some procedures which would fall within the negotiating remit of the JNC (Joint Negotiating Committee), as noted in the board minutes. That amendment is most likely what became "Appendix 1", which is described on page 115 (paragraph 4 "Scope" (a)(i)) as '*Procedures relating to terms and conditions of employment.*' Appendix 1 cannot now be found by either side, but its purpose and scope is clear enough and the description is consistent with the nature of the amendment noted in the board minutes on 13 October 2009.

34. On behalf of the respondent, Mr McGuire submitted that there is insufficient evidence that the document at page 114 is a copy of the document referred to in minutes dating from 2009. My finding is that while it is certainly *possible* that the respondent's board approved an entirely different draft written agreement on 13 October 2009, that is highly unlikely. Both sides subsequently found themselves to be in possession of substantially the same unsigned draft. There is no other cogent explanation for why both sides should be in possession of substantially the same draft, yet no other document which might be an alternative candidate for the version approved by the board on 13 October 2009. Appendix 1, though lost, appears to have covered precisely those matters which the Acting CEO wished to specify by amendment. I fully accept that there are several uncertainties, but I need only be concerned with the balance of probabilities.

35. For those reasons, I find that the most likely scenario is that page 114 was provisionally agreed between the respondent and Unite on 24 August 2009, subject only to (a) amendment to flesh out the procedures relating to terms and conditions of employment which would be the concern of the JNC, and (b) the approval of the respondent's board. The likelihood is that the amendment resulted in Appendix 1. The board duly approved the amended draft on 13 October 2009. From that date an express, written, recognition agreement existed between the respondent and Unite.

36. In those circumstances I am not concerned by the fact that page 114 was neither dated nor signed. There is sufficient alternative evidence that it was agreed by the respondent and by Unite. I am not concerned by the fact that Appendix 1 is missing either. Its scope and purpose were clear enough and they match the nature of the amendment described in the board minutes.

Subsequent conduct

37. I will not make findings on every document in which the words “recognition” or “recognised” were used. Many such references were relied on by Mr Lawson but sometimes the “recognition” in question was recognition for the purposes of information, consultation, or the representation of members. Sometimes the references were ambiguous. The preliminary issue in this case turns on bargaining or negotiating rights, and so the possibility of recognition for other purposes takes matters no further.

38. Since both sides relied for different purposes on inferences to be drawn from conduct since 2009, I need to set out several events from that lengthy period.

No express termination or repudiation

39. First, there is no evidence of express repudiation or termination of the written recognition agreement prior to the relevant date of 28 April 2023. Mr McGuire accepted that in submissions and in cross-examination Mr Hill accepted that there was nothing in the joint file of documents to show that the respondent had ever disputed that it recognised Unite for the purposes of collective bargaining at any point from 2009 until 11 July 2023 (which is after the relevant date for present purposes). He went on to accept that it would not have been open to management to undertake formal derecognition without first gaining board approval. There was none.

Other conduct

40. On 14 July 2010 Willie McGonigle (the spelling of whose name varies in the documents), the then Unite Regional Officer, twice referred without challenge to the existence of a recognition agreement, under which Unite was recognised for collective bargaining. The context appears to have been a discussion of the relevance of statutory recognition procedure, which Mr McGonigle said was "not needed" because a recognition agreement was in place. The respondent's Acting CEO and HR Manager were present but did not challenge that view of the relationship.

41. "Joint Consultative Committee" meetings took place at which there is little evidence of bargaining. For example, the meetings on 13 May 2015 and 16 December 2015 were consultative in nature. However, I note the name of the committee. The "Joint Negotiating Committee" referred to in the written recognition agreement and the board minutes approving it had a different name and a different purpose. As the names would suggest, the JCC was for consultation whereas the JNC was for negotiation. There is no evidence that the JNC met in 2015.

42. However, the meeting on 12 July 2017 *did* involve the JNC. The use of the title "Joint Negotiating Committee" or "JNC" reflects the terminology of the written recognition agreement considered above. However, I find that while there is evidence of information, consultation and collaboration, there is no evidence of negotiation or bargaining on 12 July 2017.

43. An undated letter from Gemma Reid (HR Manager) to a Unite Regional Officer, probably sent between September 2017 and June 2018, asks Unite to submit its pay claim on behalf of members via the "*Joint Negotiating Committee as detailed in the recognition agreement.*" I regard this as clear evidence that HR believed that a recognition agreement was in place and that its procedures must be applied.

44. The meeting on 16 January 2018 was simply called "*Union Meeting Minutes*". However, it is clear that Unite had made a "*pay claim*". Hugh Hill replied by asserting that the respondent had never had a pay claim before, but even if that is correct, he did not state that it was inappropriate, or that the respondent would refuse to discuss it. He did not argue that Unite had no standing to make a pay claim. On the contrary, he undertook to take it to the board. I regard that as evidence that the respondent was prepared to begin a process of negotiation, which would be consistent with Gemma Reid's statement (above).

45. On 28 September 2018 Lorna Glen asserted in an email to Gemma Reid (then the respondent's HR Manager) that "*JNCs are part of our recognition agreement*". There is no evidence that Gemma Reid or any other officer of the respondent replied denying that there was any such recognition agreement or asserting that the Joint Negotiating Committee was defunct. That is most likely because they accepted that JNCs were established and that they were one aspect of a recognition agreement between the respondent and Unite.

46. On 25 April 2019 Unite made a "*pay claim*" for 2019/2020. Lorna Glen asked for it to be considered at "*the next JNC meeting*". The substantive reply came from Gemma Reid on 6 August 2019, following a JNC meeting. I infer from the fact that Gemma Reid was content to refer to the meeting as a "JNC" that she regarded it as a process of negotiation.

47. Gemma Reid's letter gave detailed reasons why the respondent felt unable to offer the terms requested by Unite in the pay claim and sought to justify the respondent's position. The respondent had modelled and costed the pay claim. It said that it "*understood the role of Unite in raising this claim on behalf of their members*". Overall, I regard this exchange as reflecting a process of negotiation, albeit one in which Unite made little headway on behalf of staff. The respondent engaged with the detail of the pay claim, costed it, and gave lengthy reasons why it was not prepared to offer it. The exchange went further

than the mere provision of information. It was not simply a "no", it was a reasoned "no" following a detailed examination of the pay claim. An agreement had also been reached that an official response would be given in time for discussion at a Unite branch meeting in August 2019. That also suggests an iterative process in which the respondent hoped to secure the agreement of Unite and its members to the respondent's position.

48. Lorna Glen's expression of disappointment on 13 August 2019 included a paragraph which said, "*I'm further concerned that this undermines the principles of our recognition agreement…*". Gemma Reid's reply does not dispute that a recognition agreement existed. That is most likely because she knew and accepted that a recognition agreement existed. This was not the first such exchange.

49. On 10 April 2020 Hugh Hill wrote to Unite representatives in a slightly combative email. He characterised the activities of certain Unite representatives as unacceptable, threatening to raise the matter more formally with Unite "*calling into question our current working arrangement*". Later in the same email Hugh Hill returns to that theme, saying, "*I am sure that would allow your reps to be providing more accurate support to members and avoid wasted energy and time being put into raising inaccuracies, which serve to only undermine the* ***recognition agreement relationship*** *we currently have.*" The emphasis is added. I give much more weight to the unguarded words used by Hugh Hill in that email than to the tightly controlled language of his oral evidence to this Tribunal. He understood what a recognition agreement was and he described the relationship in those terms. In his oral evidence Hugh Hill said that he had simply been using the sort of language that Unite used, and that he did so carelessly. I do not find that explanation to be at all convincing, since he understood the significance of the term and was using it to make his point that Unite representatives were, in his view, behaving inappropriately.

50. On 21 September 2021 Lorraine McGrath emailed Gemma Reid, copied to

Hugh Hill, referring to the unsigned recognition agreement the respondent had discovered in its files saying, "*which whilst unsigned does appear to be the one we work to.*" Lorraine McGrath's explanation of her words in cross-examination was that "*we used it as a guide to what a recognition agreement would look like if there was one*". I found that to be an unconvincing attempt to deny the obvious meaning of the words she used at the time. Further, the statement in Lorraine McGrath's email of 21 September 2021 directly contradicted Hugh Hill's oral evidence to this Tribunal that there was "*no framework to work to*". The credibility of the respondent's witnesses was undermined by their inconsistency on this important point.

51. On 25 November 2021 Unite once again made a pay claim. I do not accept Mr McGuire's submission that the respondent's reaction to it was neither bargaining nor negotiation. In an email dated 25 January 2022 Hugh Hill effectively made a counter-offer, saying, "*we gave [the pay claim] careful consideration and modelled a number of scenarios*" and, "*I trust the **offer** we are making will be **acceptable** to your members*" (emphasis added). It was an offer, not the unilateral imposition of an increase, and it was done with a view to reaching agreement. The view of the union's members would otherwise have been irrelevant. The email concluded, "*We look forward to meeting with you on the 8th of February to discuss further.*" That shows an openness to further discussion.

52. Lorraine McGrath's letter of 9 February 2022 notes that Unite was "*willing to recommend acceptance*" of the offer. Unite members were duly balloted and on 1 March 2022 Lorna Glen indicated that the result of the ballot was that Unite members accepted the offer. I do not accept Mr McGuire's submission that this pay award was "imposed", and I note that the case put by him in cross-examination of Lorna Glen was that "*this is the only evidence of a pay claim where there was consultation and agreement*".

53. On 8 February 2022 Gemma Reid emailed Hugh Hill to alert him to the fact that Lorna Glen "*wants to discuss updating the recognition agreement.*" If the

HR Manager believed that there was no such agreement in place, then I would have expected her to say so when briefing another senior manager. There is no evidence that Hugh Hill replied to the effect that there was no such agreement to update.

54. On the same date, Gemma Reid emailed David Strathearn of the respondent to similar effect. Once again, there is no suggestion in her email that she doubted whether there really was a recognition agreement in place.

55. On 15 February 2023 Hugh Hill notified Unite of a pay "*offer*". He sought Unite's "*response*", saying also, "*I trust the offer we are making will be acceptable and welcomed by your members*". I regard that as the language of someone commencing a process of negotiation.

56. On 16 March 2023 Lorna Glen sought a "JNC" meeting to discuss the respondent's pay proposal.

57. On 21 April 2023 Lorna Glen informed Hugh Hill that a ballot of Unite members had rejected the respondent's pay offer.

58. Once the different stages of the process are understood, it is difficult to regard it as one in which the respondent simply notified Unite of a pay award that it would implement regardless of Unite's position. It was presented as an opening offer in a negotiation and was discussed at a Joint Negotiating Committee. It went to ballot and was rejected. The fact that the respondent then chose to implement its offer unilaterally does not change the fact that there had been a process of negotiation with a view to reaching agreement.

59. On 27 April 2023 Lorna Glen said during a pay discussion, "*you have undermined our recognition agreement by pushing that pay rise through*". Hugh Hill spoke next and did not dispute the existence of a recognition agreement.

60. The respondent's Governance Manual including a "Staff Consultation Policy" was never implemented, but the language used in the draft is nevertheless revealing. It stated that the respondent would "*disclose information for collective bargaining purposes to the recognised trade union representatives…*". The respondent's evidence was that they engaged external specialists to draft policies and handbooks in collaboration with their employed HR professionals, so it would be surprising if that terminology were used inaccurately.

61. Mr McGuire also relied on the respondent's statement at a meeting on 30 August 2023 that "*that agreement is not recognised by us*". However, this is irrelevant to the question I have to decide because it post-dates the alleged inducements. It was agreed that the relevant date for the purposes of this hearing was 28 April 2023.

62. The respondent's witnesses gave slightly vague but uncontradicted oral evidence of changes in terms and conditions which had been implemented over the years without any negotiation with Unite. That may be so, but all the examples were of changes which would have been to the clear benefit of employees. It is easy to understand why in those circumstances neither the staff nor Unite would see much strategic advantage in objecting to the lack of consultation.

Conclusions

Express, written recognition agreement

63. For the reasons set out above in the "facts" section, I am satisfied on the balance of probabilities that the respondent entered into an express, written recognition agreement with Unite in October 2009. It was expressly recognition for the purposes of collective bargaining and clause 4 defined the "Scope".

Subject matter/scope

64. The defined subject matter of that agreement engaged several of the bargaining topics set out in s.178(2) TULRCA 1992:

a. s.178(2)(a), terms and conditions of employment – clause 4(a)(i) and Appendix 1 "Procedures relating to terms and conditions of employment…", also 4(b) pay scales;

b. s.178(2)(b), engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers – clause 4(a)(v) "Staffing levels" and (xii) "Job Security and Redundancy";

c. s.178(2)(c), allocation of work, or duties of employment, between workers – clause 4(a)(vi) Job Descriptions and Job Content and (vii) "Work Practices";

d. s.178(2)(f), facilities for union officials – clause 4(x) "Facilities for Union Representation";

e. s.178(2)(g), machinery for negotiation or consultation, including recognition – clause 4(xi) "Any changes to this Agreement".

65. The agreement plainly conferred bargaining rights as s.178(3) requires, and not just other rights of interest to a trade union and its members, such as rights to information, consultation, or representation.

a. Clause 2 "General Principles and Objectives" said in terms that both parties intended to "*resolve by collective bargaining or joint consultation matters affecting employees within the scope of this agreement.*" There would be at least 4 meetings a year of the "Joint Negotiating Committee".

b. Clause 3 recorded that the respondent recognised Unite as having "*sole collective bargaining rights for employees*".

66. On that basis, recognition for the purpose of collective bargaining is established from 2009. The next issue is therefore whether the respondent ever terminated that agreement and derecognised Unite for the purposes of collective bargaining.

Express derecognition

67. There were no express words of termination or repudiation at any time prior to the relevant date. By the end of the hearing, this was common ground.

Implied derecognition through conduct

68. The respondent relied on implied derecognition through conduct, accepting that the evidence would have to be clear and unequivocal for the argument to succeed. As the authors of Harvey note, it may be difficult to show derecognition solely from a failure to bargain collectively on a particular occasion.

69. I find that the pattern of behaviour from 2009 to 2023 was too mixed and inconsistent to amount to the necessary clear and unequivocal evidence of derecognition by conduct. There was certainly some evidence of a failure to bargain collectively in particular years, but there was also evidence (including recent evidence) of a process which did amount to bargaining, in that it was a negotiation with a view to reaching agreement. There were also several occasions on which the respondent failed to challenge assertions by Unite that a recognition agreement existed and several occasions on which the respondent's HR Manager acknowledged that one existed. Finally, I find that there is evidence of both Lorraine McGrath and Hugh Hill referring to the existence of a recognition agreement. I found their attempts to suggest otherwise unconvincing.

70. In my judgment, the weight of the evidence of conduct suggests the existence of an agreement to recognise Unite for the purposes of collective bargaining, but that is not in fact the test. There was certainly no clear and unequivocal evidence of *derecognition*.

71. Therefore, I find that on the relevant date Unite was recognised by the

respondent for the purposes of collective bargaining. The test in section 178(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 was satisfied on 28 April 2023. Unite was an independent recognised trade union on that date for the purposes of s.145B(1) of the Act and the complaints brought by the claimants in these proceedings.

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Employment Judge M Whitcombe

Date of Judgment
15 February 2024

Entered in register
and copied to parties **16 February 2024**