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On what grounds and with what prospects of success can you Judicially Review a bargaining unit decision, post Lidl*?

***Lidl Ltd v Central Arbitration Committee and GMB. [2017] EWCA Civ 328.**

Relevant legislation.

1. TULRCA 1992: Sched A1 provides that for a trade union seeking recognition to be entitled to conduct collective bargaining on behalf of a group or groups of workers, to be able to make a request in accordance with this Part of the Schedule. In the words of Underhill LJ "the provisions of Schedule A1 to the 1992 Act are extremely complex".

2. The authoritative summary of the relevant procedure under Schedule A1 was set out by Elias J in his decision in *Kwik-fit GB Ltd v Central Arbitration Committee* and adopted by the Court of Appeal in that case in the appendix to its decision [2002] IRLR 395, 399:

> '7. The process commences with the trade union making a request for recognition from the employer. Certain conditions must be met if the request is to be treated as valid within the terms of the legislation ....
>
> 8. The employer is given 10 working days to agree the request. If the request is accepted that is the end of the matter. If it is rejected or there is no response, then the union applies for recognition. This is made pursuant to para. 11(2) ...
>
> 9. The second stage is the acceptance or otherwise of the application. The CAC must decide two questions in order to determine whether the application can be accepted ...

10. The third stage is the determination of the bargaining unit [the principal issue in that case].'

By para. 2(2) of Schedule A1:

'(2) References to the bargaining unit are to the group of workers concerned (or the groups taken together).

(3) References to the proposed bargaining unit are to the bargaining unit proposed in the request for recognition.'

Paragraph 3(3) provides:

> 'References to collective bargaining are to negotiations relating to pay, hours and holidays; but this has effect subject to subparagraph (4).'

3. Recognition therefore put simply, means recognition for the purposes of collective bargaining – defined as negotiations relating (unless otherwise agreed) to pay, hours and holidays, for workers within a "bargaining unit".

4. Any union applying for recognition must identify the proposed bargaining unit – but if it is not subject to agreement, the CAC is obliged - by para 19(2) / 19A(2)- to itself to "decide whether the proposed bargaining unit is appropriate", and if not, by para 19(3), to itself "decide a bargaining unit which is appropriate". Similar provision is made in para 19A(2) and (3).

5. Paragraph 19B applies if the CAC has to decide whether a bargaining unit is appropriate, and states:

> **"** (2) The CAC must take these matters into account—
>
> (*a*) the need for the unit to be compatible with effective management;

(*b*) the matters listed in sub-paragraph (3), so far as they do not conflict with that need.

(3) The matters are—

(*a*) the views of the employer and of the union (or unions);

(*b*) existing national and local bargaining arrangements;

(*c*) the desirability of avoiding small fragmented bargaining units within an undertaking;

(*d*) the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant;

(*e*) the location of workers.

(4) In taking an employer's views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the CAC must take into account any view the employer has about any other bargaining unit that he considers would be appropriate."

6. In paragraph 15 -16 of the *Lidl* judgment, Underhill LJ explained:

"It is worth spelling out the structure of the exercise required by paragraphs 19 (2) and 19B. The determinative question is simply whether the proposed bargaining unit is "appropriate". That term is not defined anywhere; but in considering the statutory question the CAC is obliged to take into account the matters specified in paragraph 19B (2). Among those matters the need for the unit to be compatible with effective management, as specified under (a), clearly has primacy over the sub-paragraph (3) matters (brought in via (b)). That appears from the provision that the latter are only to be taken into account "so far as they do not conflict with that need". But the considerations covered by the two heads under paragraph 19B (2) are not wholly distinct: to a considerable extent the assessment of the sub-paragraph (3) matters will feed into the assessment of the compatibility of the unit with effective management.

"It is in my view clear that that structure, adopting a broad criterion of "appropriateness", subject to specified considerations to be "taken into account", rather than setting hard-edged criteria, reflects an intention on the part of Parliament to allow full range to the expert judgement of the CAC in making decisions about bargaining units. It follows that the Court should be very cautious in entertaining legal challenges to decisions of the CAC under paragraph 19".

FACTS.

7. Lidl have 637 stores and 9 Regional Distribution Centres (RDCs). They have 18,203 employees . They recognise no trade unions from any employees in GB. "Category 6 staff" make up around 81% of the workforce, and include warehouse operatives – as well as workers in their stores and junior office staff. One regional distribution centre is at Bridgend, and there are 273 warehouse staff there. This constitutes about 1.2% of Lidl's total GB workforce, and 1.5% of Lidl's category 6 employees.

8. Absent any agreement, it was for the CAC to determine whether the proposed bargaining unit of the warehouse staff at Bridgend was an "appropriate bargaining unit".

9. The CAC found that each region has its own management team, expected to deal with local problems and that regional directors have responsibility for stores and warehouse within a given region. Disciplinary and recruitment matters are dealt with by the Team Manager of a warehouse. The management structure in place therefore reflected the geographical scope of the union's proposed bargaining unit. Whilst there was a "one Lidl" culture – there were exceptions to the pay scale for category 6 workers, firstly for workers within the M25 and secondly for night workers in 5 of its 9 RDCs. However, exceptions from the national pay scale are proposed by regions, and have to be agreed by Head Office. These findings led to the conclusion that the bargaining unit – composed only of Warehouse Operatives – was consistent with effective management.

Judicial Review: authorities

10. In (*R (on the application of Kwik-Fit (GB) Ltd) v Central Arbitration Committee [2002] EWCA Civ 512, [2002] IRLR 395 at para 2*) Buxton LJ endorsed what had been said by Elias J in the High Court in that case; that

> "that the CAC was intended by Parliament to be a decision-making body in a specialist area, that is not suitable for the intervention of the courts. Judicial review, such as is sought in the present case, is therefore only available if the CAC has either acted irrationally or made an error of law".

11. The case involved a request by the TGWU that Kwik Fit recognise it for collective bargaining purposes in relation to its two London Regions. The CAC found in favour of the union; the High Court (Elias J) overturned that, but the decision was restored by the Court of Appeal. Whilst overturning the conclusion of Elias J, much of his explanation of the statutory regime was expressly endorsed. In considering the test to be applied by the CAC as to whether the bargaining unit proposed by the union is appropriate, the CAC must, under para 19B(2), take into account "the need for the unit to be compatible with effective management".

> 'The union reminded us that "compatible" means "consistent" or "able to co-exist with". That is, we are not required to decide on the most effective form of management, merely that what we decide is compatible with effectiveness. Or, to put it another way, we need to examine whether the union's proposed bargaining unit is found wanting and does conflict with effective management.'

12. A challenge, effectively, to the 'worker' status of camera men /women engaged in the Natural History Unit – was considered in *R (British Broadcasting Authority) v Central Arbitration Committee [2003] EWHC 1375 (Admin)*, *[2003] IRLR 460*. Cameramen/women were found by the High Court to be "professionals" and therefore outside the definition of "workers" in respect of whom a union can seek recognition to negotiate terms and conditions. As to the test to be applied in interfering with decisions of the CAC, relying expressly on Kwik Fit, Moses J went on:

> It is important to emphasise the restricted scope for intervention by this court. The CAC is a permanent and independent arbitration body. Originally its functions were limited to carrying out voluntary and unilateral arbitrations in the sphere of industrial relations. The Employment Relations Act 1999, which introduced the statutory recognition procedure under Schedule A1, significantly enlarged its role. Members of the CAC are appointed by the Secretary of State and are required to be 'persons experienced in industrial relations' (see s.260(3)). The chairman of the CAC establishes a three-member panel to deal with any application for recognition. Unlike employment tribunals, there is no requirement that the chairman of the panel or the other members be legally qualified. There is no equivalent to the detailed employment tribunal (Constitution and Rules of Procedure) Regulations 2001, in contrast to the employment tribunal system. There is no express power to order disclosure of documents or to require attendance of witnesses. The chairman has a discretion to sit in private but there is provision for cases where the panel is not unanimous. The panel determines its own procedure

subject to those provisions (see s.263A(7)). Paragraph 171 of Schedule A1 is important. It provides:

'In exercising its functions under this Schedule in any particular case the CAC must have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workforce, so far as having regard to that object is consistent with applying other provisions of this Schedule in the case concerned.'

It is clear, therefore, that the proceedings are intended to be informal, non-legalistic and conducive to good industrial relations rather than litigation. To that extent it is in marked contrast to the recognition procedure under the former Employment Protection Act 1975, in which applications became hopelessly bogged down with legal challenges. The process under Schedule A1 is designed to encourage a speedy momentum rather than delays. The intervals between each of the successive stages are specified and they are short. The CAC must decide whether to accept an application within 10 working days from receipt (see paragraph 15(6)(a)). There is a discretion to extend time, but reasons must be given for such an extension. Paragraphs 18 and 19 provide a period of 20 working days during which the parties have an opportunity to reach agreement in relation to the appropriate bargaining unit, after which the CAC has but 10 working days to decide an appropriate bargaining unit should there not be agreement. It is inherent within the procedure that the parties should attempt to reach agreement and only as a last resort refer to the CAC for a decision. This is quite inconsistent with a legalistic approach.

These considerations reinforce the reluctance of any court to intervene and the rare occasions when it would be appropriate to do so. It is for the expert body, the panel of the CAC, to identify whether a group of individuals concerned are undertaking to work or normally working or seeking to work in the exercise of a profession, as a matter of fact, and in the context of the statutory scheme and its purpose".

13. *R (on the application of Cable & Wireless Service UK Ltd) v CAC* [2008] IRLR 425 is a further example of the High Court rejecting a challenge to the finding of the CAC relating to bargaining units. The CWU sought recognition in relation to a bargaining unit consisting of 370 workers – who were field engineers (excluding managers). They made up just 7% of the workforce. Mr Justice Collins found that it was proper for the CAC in examining whether the proposed unit was "small fragmented" to look at both elements: "it might be small ... but would not be undesirable unless also fragmented." He adds that "it is important to see whether such a unit is self-contained.

Fragmentation carries with it the notion that there is no identifiable boundary to the unit in question so that it will leave the opportunity for other such units to exist and that will be detrimental to effective management."

14. As is commented on in Harvey, there have been a few cases where an employer operated a sophisticated organisational structure which made collective bargaining difficult if not impossible. The union may be caught in Catch 22: if it confines its proposed bargaining unit to areas where it enjoys support, it will be met with the defence that the unit is incompatible with effective management; if it expands its proposal to something that is compatible with effective management, it will fail for want of sufficient support. Indeed, it seems that there is nothing to prevent a Machiavellian employer from deliberately restructuring his organisation in order to achieve that end. Examples of such sophisticated organisations include *TGWU and Linde Gas UK Ltd* (TUR1/232/02, 19 March 2003), CAC—where the 'horizontal' bargaining unit sought by the union cut across 22 'vertically'-organised production teams; *GMPU and Getty Images Ltd* (TUR1/104/01, 31 October 2001), CAC—where the proposed 'horizontal' bargaining unit cut across three, apparently separate, 'vertical' divisions of an international company, and *TSSA and First Choice Retail Ltd* (TUR1/303/03, 17 December 2003), CAC—where the company acquired a subsidiary which operated exclusively in South Wales and the South West of England and promptly divided the workers between the parent company's South Division and its North Division)

Challenge in Lidl, and outcome.

19. Lidl sought to JR the CAC decision in Lidl, arguing that an erroneous approach had been taken to para 19B(3)(c); that provision requires the CAC to take into account *"the desirability of avoiding small fragmented bargaining units within an undertaking"* when determining whether a proposed bargaining unit is compatible with effective management and, hence, appropriate. It was argued that the plural "units" included the singular, and that the CAC had erred in approaching the issue on the basis that as there was only a single bargaining unit, there could be no risk of proliferation.

20. Underhill LJ held that this was indeed the correct approach for the CAC to adopt – as "the word "fragmented" naturally connotes a whole which has been broken into parts and thus necessarily implies plurality. …. It has long been regarded as undesirable (to use the statutory term) that employers should have to negotiate in more than one forum – and, more particularly, with more than one trade union – in respect of parts of their workforce who were not essentially different".

21. As to the criticism that the CAC failed to realise that there could, in effect, be fragmentation between those within the bargaining unit and those outwith – either in Bridgend, or in other warehouses, this was a matter taken into consideration under the more general heading of compatibility with effective management.

The Future.

22. Underhill LJ warned against legal challenges based on "the nice parsing" of the constituent elements of para 19B, re-emphasising that:

> "It is in my view clear that that structure, adopting a broad criterion of "appropriateness", subject to specified considerations to be "taken into account", rather than setting hard-edged criteria, reflects an intention on the part of Parliament to allow full range to the expert judgement of the CAC in making decisions about bargaining units. It follows that the Court should be very cautious in entertaining legal challenges to decisions of the CAC under paragraph 19."

23. The requirement of the CAC to take into consideration general "compatibility with effective management", and that such diffidence will be paid to CAC decisions means that an irrationality challenge will be difficult to launch. Further, the approach to an

"error of law" which be equally difficult given the 'soft edges' of what needs to be considered.

24. To avoid acting irrationally however, the CAC must take into account relevant factors (and leave out of account irrelevant factors). Five factors are listed in para 19(B)(3) as being relevant:

— the views of the parties;

— existing national and local bargaining arrangements;

— the desirability of avoiding small fragmented bargaining units within an undertaking;

— the characteristics of the workers within the bargaining unit and of any other relevant *employees* of the employer;

— the location of the workers.

25. Another factor which has been considered relevant is the industrial consequence of the decision, showing that the above list is not exhaustive. However, irrelevant factors have included union density, the appropriateness of the applicant union and vulnerability to industrial action.

Calls for reform?

26. The Taylor report into "Good Work" calls for an extension of the Information and Consultation Regulations, with a reduction of the threshold of the number of 'workers' seeking the benefit of the regulations from 10% to 2%. This has however been received somewhat coolly by the trade union movement, which considers that unions offer a more robust way to have the voice of the worker heard. Organisations such as the IER

call for a return to sectoral level bargaining – the very presence of which would serve as a "source of persuasion and encouragement to bargain at establishment level". [Hendy and Ewing: ILJ 46; page 48.]

25. The percentage of the workforce covered by collective bargaining has fallen from in excess of 85% after the Second World War, to under 20% now – less than before the First World War. The UK has the lowest level of collective bargaining of any EU country save for Lithuania. This trend does not look set to alter.

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