Case Ref No: IC-40/2008

THE INDUSTRIAL COURT

THE TRADE UNION AND LABOUR RELATIONS (NORTHERN IRELAND) ORDER 1995 (AS INSERTED BY ARTICLE 3 OF THE EMPLOYMENT RELATIONS (NORTHERN IRELAND) ORDER 1999)

SCHEDULE 1A – COLLECTIVE BARGAINING: RECOGNITION

DECISION ON WHETHER TO ARRANGE FOR THE HOLDING OF A BALLOT AND THE FORM OF BALLOT

The Parties:

Unite the Union

And

Dunbia (Northern Ireland)

Introduction

1. Unite the Union (the Union) submitted an application to the Industrial Court (the Court) dated 3rd November 2008 for recognition at Dunbia (Northern Ireland) (the Employer), Granville Industrial Estate, Dungannon, County Tyrone, BT70 1NJ, for a bargaining unit consisting of "Hourly paid employees at Dunbia sites in Dungannon". The Court gave both parties notice of the receipt of the application on 6th November 2008 and the Employer submitted a response to the Court on 14th November 2008, which was copied to the Union.

2. In accordance with Article 92(A) of the Industrial Relations (Northern Ireland) Order 1992, the Industrial Court Chairman established a Panel of the Court to deal with the case. The Court consisted of Mr Eugene O'Loan, Chairman, and, as Members, Mr Irvine McKay and Mr Bob Gourley. The Case Manager appointed to support the Court was Mr Paul Lyons.

3. By a decision dated 11th December 2008 the Court accepted the Union's application.

4. Having accepted the Union's application, the panel is required by Part 1 of Schedule 1A to the Trade Union and Labour Relations (Northern Ireland) Order 1995 to consider whether a majority of the workers constituting the bargaining unit (BU) are members of the Union. If so, the Court must issue a declaration that the Union is recognised as entitled to conduct collective bargaining on behalf of the workers constituting the BU, unless certain conditions are met in which case it will order a ballot to be held. If not, it will order a ballot to be held.

5. A hearing was held on 20th March 2008 to determine how this case should proceed. Dunbia (the Employer) was represented at the hearing by Mr P Coll of counsel instructed by Elliott Duffy Garrett Solicitors. Unite (the Union) was represented by Mr J Quinn.

The Union's case

6. Mr Quinn explained that the application for recognition was made in respect of all hourly paid operatives excluding clerical, administrative and management grades and supervisors. It did include weekend workers but not agency workers or casuals who are not employees. There were, he said, 419 people in this BU of whom 199 were members of the Union. In addition 31 workers in the BU supported the application by way of signing a petition to that effect. The documents upon which this was based had been supplied to the case manager. In relation to the Union's outline case Mr Quinn advised that this provided in table form a breakdown of employees/Union members by department at 12 March 2009 and said that these numbers had not been refuted by the Employer. The information had been gathered by leaders and shop stewards and forwarded to the Union. The weekend workers were casual staff who had no mutuality of obligation – they were part of a pool who attended on an irregular basis and did not have to attend if they did not want to. They were not employees.

7. The Union requested a workplace ballot. In any ballot there can be pressure but in a workplace ballot everything is done openly and can be seen. There are standard breaks when voting can take place. A fully postal ballot might not be reliable as there were inconsistencies over the number of employees. The Union requested that

postal voting arrangements be made for staff who are absent on holiday, maternity leave etc.

The Employer's case

8. Mr Coll argued that the Union had made assertions without evidence. He noted that the figures in the Union's outline case did not relate to 9 January 2009 (the relevant date for the purpose of establishing membership and support). He submitted that even if the Court accepted the Union's figure of 199 members out of 419 employees, that would put the Union in some difficulty.

9. Union figures did not include casuals, referred to as "zero hours employees" by the Employer, i.e. they had no entitlement to any minimum number of hours of work but would work when work was available. They had been included in the case manager's report. The Union was, he said, wrong to believe that they were not employees. The basis for that argument was an old contract, which had been replaced. Mr Coll said that the parties reached agreement on 3 June 2008 that the staff to be covered would be all hourly paid employees at Dunbia's Dungannon site. The Union then applied for recognition for all hourly paid operatives in Dunbia plants in Dungannon excluding clerical, administrative and management grades and supervisors. The Union's letter of 14 October 2008 (applying to the Employer for recognition) and the application to the Court did not refer to exclusion of zero hours employees. At a meeting in the Seagoe Hotel, at which the Employer was present, the Union had referred to a figure of 460 including weekend employees. Now the Union wished to exclude zero hours employees. Since they had not previously asked to exclude zero hours employees this was a strong indication that the Union recognised and accepted the agreement of June 2008 to include them.

10. The case manager had been provided with a list of zero hours workers and their current contract. The Union should not seek to exclude these staff as this amounted to less favourable treatment. Mr Coll submitted that the attempt to exclude these staff was an attempt to skew the figures in the Union's favour. If, in future, collective bargaining rights applied, these employees would be welcomed into the protection of the Union. In the list given to the case manager there were 70 zero hours workers

(highlighted) of whom there were 13 Union members to the Employer's knowledge (underlined).

11. The zero hours workers should be included as originally agreed. They were treated as employees, and were afforded holiday pay, sick pay and disciplinary procedures and do not work on an irregular or ad hoc basis. They are expected to turn up at weekends and are subject to discipline if they do not. Only rarely is there no work at the weekend. When there is work, the zero hours employees must be present, on holiday or sick. They are not casual employees. Occasionally contract workers are used in addition at weekends.

12. Mr Coll referred to clauses of the new contract, a copy of which was exhibited. It contained clauses on holiday, SSP, notice and disciplinary rules, which were matters that would not apply to casuals. It had been introduced in August 2008. Zero hours employees had the same rate of pay as those who worked during the week and had the same type of work. If they were to be excluded then changes to contract terms would still impact on them. The contract permitted the Union access to them. There was a mutuality of obligation when work was available at the weekend and in any event there was an overarching contract of employment.

13. In regard to the case manager's report, the Employer has no basis to disagree and reserves its position. But if the Employer cannot disagree the same must apply to the Union, unless they have evidence to refute it. The figures provided by the Union are an assertion and that is not enough especially as they do not relate to the relevant date of the case manager's report.

14. The Employer accepted that agency workers should not be included.

15. Mr Stewart, HR manager, gave evidence. He said that 3 types of staff worked at weekends – contractors, zero hours employees and a small number of Monday to Friday employees. First call for work is given to zero hours employees, then to contractors, then to Monday to Friday employees. This made up the 170 or so workers needed. Some zero hours employees have long service. They are treated the same as other employees and typically there are high attendance rates. A

number of zero hours employees have been disciplined, commonly for time keeping and attendance. The Employer issued a new handbook in August 2008 and at the same time issued the new contract for zero hours employees.

16. In relation to the ballot, the Employer requested a postal ballot for convenience, good business practice and to secure fairness. This was an intensive business and there would be some inconvenience to leave a place of work to vote. The nature of the work requires thorough hygiene and staff would have to change out of protective clothing to vote and then prepare again for work. As staff do not work 9 to 5 there cannot be a vote at the end of the day. Staff may have to work later and be in a rush to go home. A postal vote would minimise opportunities for peer pressure and undue influence. There was not a uniformity of opinion among staff regarding Union recognition and this heightened the need for probity. As there was a large proportion of foreign nationals, a postal ballot would best resolve communications issues with all information in writing. The Court would ensure that the right persons obtained ballot papers. The Employer denied interference and Mr Stewart said that the Employer recognised unions elsewhere.

Conclusions

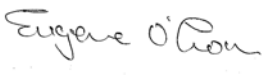
17. The Court accepts that the “zero hours workers” are employees. The evidence of Mr Stewart was not challenged and the Court accepts that these workers have an obligation to work when required and the Employer has an obligation to offer work to them and that an employment relationship exists. In any event, the requirement is to assess Union membership among “workers” in the BU. The contract for zero hours workers requires them to do work personally for the Employer and therefore, even if they are not employees they are workers as defined and should be included in the BU. The Court also accepts that it would be incongruous to exclude this group from the protection of Union recognition. The Court therefore finds that they are part of the BU (all hourly paid operatives excluding clerical, administrative and management grades and supervisors at the Employer’s plants at Dungannon).

18. The Court does not accept the figures proposed by the Union, as they relate to a date much later than the date of the case manager’s report. In any event at this

stage the Court must examine only the number of Union members, not those who have signed a petition, and the Union's figures would not demonstrate that Union members are a majority. The Union had supplied a membership list to the case manager. Figures on the number of employees were supplied at the same time by the Employer. The case manager's findings based on this were not disputed and the Court accepts that these figures should apply. They demonstrate that there are 439 employees on the Employer's list of employees in the BU of whom 203 are named as Union members. That is about 46%. There are another 30 named by the Union as members but who do not appear on the Employer's list of employees in the BU. Without evidence that these members are in fact in the BU, which has not been provided, the Court cannot conclude that they should be counted. The Court's conclusion is that there is not a majority of Union members in the BU and that a ballot should be held.

19. Therefore the Court gives notice to the parties that it intends to arrange for the holding of a secret ballot in which the workers constituting the BU are asked whether they want the Union to conduct collective bargaining on their behalf.

20. The ballot will be conducted at the workplace and there will in addition be a postal ballot to accommodate any worker in the BU who is for any reason absent from the workplace during the time of the ballot. In making this decision the Court believes that the ballot, properly supervised as it will be, will not be affected by unfairness or malpractice. The Court has considered the costs and considers them reasonable and believes that a workplace ballot is practical.



Mr Eugene O'Loan
Mr Irvine McKay
Mr Bob Gourley

Decision Date: 2nd June 2009
Date Issued to Parties: 3rd June 2009