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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JAMES E McCABE LIMITED FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application for judicial review of a decision of the Industrial Court dated 14 August 2003 to accept the application of the Amalgamated Transport and General Workers Union under Schedule 1A of the Trade Union and Labour Relations (Northern Ireland) Order 1995 (as inserted by Article 3 of the Employment Relations (Northern Ireland) Order 1999). The application to the Industrial Court was made by the union in relation to James E McCabe Limited as employer, seeking recognition to be entitled to conduct collective bargaining on behalf of a group of workers. This application for Judicial Review by the employer concerns the extent of the documents and information to be furnished to the employer and the procedures adopted by the Industrial Court further to the union's application for recognition. In particular the names of workers in the union and of those supporting recognition of the union were not disclosed to the employer.

The legislation

[2] Schedule 1A provides a statutory scheme for the recognition of trade union entitlement to conduct collective bargaining on behalf of a group or groups of workers, which statutory scheme operates as follows:

1. The union makes a written request to the employer for recognition (paragraph 4). The request must satisfy five validity requirements (paragraphs 5 to 9). The employer may reject the request or the employer and the union may reach agreement on a bargaining unit and that the union be recognised as entitled to conduct collective bargaining on behalf of the unit (paragraph 10).

2. If the employer rejects the request or if negotiations fail the union may apply to the Industrial Court to decide-

(a) whether the proposed bargaining unit is appropriate or some other bargaining unit is appropriate and

(b) whether the union has the support of a majority of the workers constituting the appropriate bargaining unit (paragraphs 11 and 12).

3. The Industrial Court has an acceptance period of 10 days from the date of receipt of the application (or such extended period as the Industrial Court may specify) to decide first, whether the request for recognition was valid under paragraphs 5 to 9 and second, that the application was made in accordance with paragraph 11 or 12 and third, (and of particular importance in the present case) that the application is admissible under paragraphs 33 to 42. If satisfied on these matters the Industrial Court will accept the application (paragraph 15). It was the decision of the Industrial Court in the present case that the union application was admissible under paragraphs 33 to 42 and that the union application be accepted that is the subject of the employer's application for Judicial Review.

4. If the application is accepted the appropriate bargaining unit must be determined (paragraphs 18 and 19). If the bargaining unit differs from the proposed bargaining unit the Industrial Court must decide whether the application is invalid under paragraphs 43 to 50 (paragraph 20). This includes the provision at paragraph 45 that the application is invalid unless the Industrial Court decides that-

(a) members of the union constitute at least 10 per cent of the workers constituting the relevant bargaining unit and

(b) a majority of the workers constituting the relevant bargaining unit would be likely to favour recognition of the union as entitled to conduct collective bargaining.

If the Industrial Court is so satisfied that the application is valid, or if it has been determined that

the bargaining unit is the same as the proposed bargaining unit, then the union application proceeds.

5. If the application proceeds there are provisions for the holding of a secret ballot in which the workers constituting the bargaining unit are asked whether they want the union to conduct collective bargaining on their behalf (paragraphs 22 and 23). If the union are supported by a majority of the workers voting and at least 40 per cent of the workers constituting the bargaining unit the Industrial Court will issue a declaration that the union is recognised as entitled to conduct collective bargaining and if the result is otherwise the Industrial Court will issue a declaration that the union is not so recognised (paragraph 29).

[3] This application for Judicial Review concerns the general provisions about admissibility of union applications and in particular paragraph 34(b). The relevant paragraphs of Schedule 1A are –

"33.An application under paragraph 11 or 12 is not admissible unless –

(a) it is made in such form as the Court specifies, and

(b) it is supported by such documents as the Court specifies.

34.An application under paragraph 11 or 12 is not admissible unless the union gives (or unions give) to the employer –

(a)notice of the application, and

(b)a copy of the application and any documents supporting it.

36 (1)An application under paragraph 11 or 12 is not admissible unless the Court decides that –

(a) members of the union (or unions) constitute at least 10 per cent of the workers constituting the relevant bargaining unit, and

(b) the majority of the workers constituting the relevant bargaining unit would be likely to favour

recognition of the union (or unions) as entitled to conduct collective bargaining on behalf of the bargaining unit."

The Guidance issued by the Industrial Court

[4] In November 2002 the Industrial Court issued a document described as "Guidance for the Parties". The Guidance deals with the completion of an application form and indicates that applicants should complete the form in as much detail as possible "but in the knowledge that it and any supporting documentation must be copied to the employer. It would therefore not normally contain names or addresses of individuals." The Guidance discusses the issue of confidential information and states that names and addresses of individuals provided by other parties will not be disclosed without the agreement of the parties, but if supplied as part of the application documentation will be supplied to the other party. In the consideration of whether there is 10 per cent union membership in the bargaining unit the Guidance states that unions need not supply membership lists with the application since they will know that if the membership list is supplied with the application form the union is obliged to copy it to the employer, although it is stated that this obligation does not apply if the list is supplied separately. This approach is emphasised in the notes that accompany the union's application form, which invite the union to provide supporting evidence, but make an exception for the names of individuals, and points out that any information provided will have to be copied to the employer.

[5] As a matter of policy the Industrial Court will not inform employers of the names of union members unless the union agrees or has supplied the names with the application form. There will be cases where the employer disputes 10 per cent union membership in the bargaining unit or disputes that the majority of workers in the bargaining unit are likely to favour recognition. The Guidance provides for a verification scheme involving the case manager who, with the cooperation of the parties, might carry out a membership check. The employer would supply the names of workers in the bargaining unit along with a unique identifier specified by the case manager and the union would provide names of union members in the bargaining unit along with a unique identifier and the two lists could be cross checked. In relation to the likely views of the majority of workers in the bargaining unit the Guidance states that in theory the Industrial Court could carry out an attitude survey but points out the practical problems in doing this as it would require cooperation by the employer and more significantly could pre-empt an eventual ballot. In either case it is anticipated that the Industrial Court, through its case manager or a third party, would facilitate evaluation of union membership and of the likelihood that the workers favour recognition by the cooperation of the employer in an evaluation exercise that did not involve disclosure to the employer of the names of workers who were union members or were likely to favour recognition.

[6] The Deputy Chairman of the Industrial Court stated on affidavit that the Industrial Court was acutely conscious of the generally recognised need to preserve the identity of individual union members and the identity of persons within any proposed bargaining unit who are likely to support union recognition from disclosure, as such persons, if identified, may run the risk of being made subject to intimidation or victimisation. It was further stated on affidavit that when the Industrial Court was reconstituted in Northern Ireland in 2001 its members, including its

panel members from both sides of industry, agreed unanimously on the Court's policy on disclosure of workers names and the rationale for the policy was the concern that where workers are identified by name there may be a risk of future intimidation or victimisation from one side or another in the context of the recognition dispute.

The union application

[7] On 14 May 2003 the union made a written application to the employer for recognition and the employer replied by letter dated 13 June 2003 refusing recognition. On 1 August 2003 the union made its application to the Industrial Court under paragraph 11. For the purposes of paragraph 33(a) the Industrial Court has specified a standard form of application but for the purposes of paragraph 33(b) the Industrial Court has not specified any documents that must support the application. The union application comprised three documents, first, a standard form application, second, a schedule with the title "J E McCabe Ltd – Members at 28.7.03" listing 14 union members by reference number only and third, a blank petition with the introductory words –

"We the undersigned would wish to join the Amalgamated Transport and General Workers Union if a voluntary agreement has been reached between J E McCabe Ltd and the AT&GWU to negotiate on matters of pay, hours and holidays on our behalf or the Industrial Court awards recognition to the Amalgamated Transport and General Workers Union for same."

The application form, the schedule and the blank petition were copied to the employer.

[8] The application form defined the proposed bargaining unit and specified the number of workers in the bargaining unit as 38. The number of union members in the proposed bargaining unit was stated to be 14 as evidenced by the schedule. In response to the request made on the form for evidence that the majority of workers in the bargaining unit were likely to support recognition for collective bargaining the union stated –

"We have presently 14 members paying direct debit and have surveyed the rest of the bargaining unit, which employees have signed the petition, stating they are willing to join the ATGWU if recognition is granted."

The employer's questionnaire

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[9] The staff of the Industrial Court forwarded to the employer a questionnaire and a copy of the Guidance. In the completed questionnaire the employer did not agree the proposed bargaining unit nor the union's estimate of union membership in the proposed bargaining unit nor that a majority of workers in the bargaining unit were likely to support recognition. The employer objected to the use of the schedule of members on the basis that it did not identify the members and it was therefore not possible for the employer to verify that those identified by reference number were employees of the employer or were employed in the proposed bargaining unit. The employer also objected to the use of the blank petition on the grounds that the details of the methodology used were not provided and that in the absence of names the employer was not able to verify that the signatories were employed by the employer or were employed in the proposed bargaining unit.

[10] The Industrial Court assigned a case manager, who spoke to a union representative on 4 August 2003 and was told that the petition had been signed by 11 persons within the proposed bargaining unit. On 13 August the case manager was told by a union representative that 36 persons in the proposed bargaining unit had signed the petition. A copy of the completed petition was received at the offices of the Industrial Court on 14 August 2003. The case manager spoke to a representative of the employer on 12 August 2003 concerning the return of the employer's questionnaire and again on 13 August 2003 and the completed questionnaire arrived at the offices of the Industrial Court on 14 August 2003. The completed petition received at the Industrial Court on 14 August 2003 was not copied to the employer.

The decision

[11] The members of the Industrial Court met on 14 August 2003 and considered the union application and documents namely the application form, the schedule and the blank petition, and also considered the employer's questionnaire and a report from the case manager which recorded the fact that the petition received at the Industrial Court on 14 August 2003 was signed by 36 persons from the proposed bargaining unit. The members of the Industrial Court did not receive a copy of the completed petition.

[12] The Industrial Court decided that –

"(a)Members of the union constitute at least 10% of the workers constituting the proposed bargaining unit.

(b)A majority of 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.

(c)Having considered the submissions made by the parties the application meets the remaining

statutory admissibility and validity criteria.

The Industrial Court's decision is therefore that the application is accepted."

The grounds for Judicial Review.

[13] The employer, as the applicant in this application for Judicial Review, challenges the decision of the Industrial Court on various grounds that can be considered under three broad headings, namely, illegality, procedural unfairness and irrationality. The detailed grounds were as follows –

"(a)The amalgamated Transport and General Workers Union when making the application to the Industrial Court did not give to the employer the documents supporting the application as required by paragraph 34(b) of Schedule 1A of the Trade Union and Labour Relations (NI) Order 1995 (as inserted by Article 3 of the Employment Relations (NI) Order 1999) and accordingly the Industrial Court is required under paragraph 15(2)(b) and 15(4) of Schedule 1 A of the Trade Union and Labour Relations (NI) Order 1995 not to accept the application and to take no further steps under part 1 of Schedule 1A of the 1995 Order.

(b)The Industrial Court has failed and neglected to carry out its statutory duty under paragraph 15(4) of Schedule 1A of the Trade Union and Labour Relations (NI) Order 1995 to refuse to accept the application by virtue of the fact that the amalgamated Transport and General Workers Union when making the application to the Industrial Court did not give to the employer the documents supporting the application as required by paragraph 34(b) of Schedule 1A.

(c)The Industrial Court's decision made on 14th August 2003 to accept the application of the amalgamated Transport and General Workers Union was irrational, unlawful, ultra vires and `Wednesbury' unreasonable.

(d)The declaration sought at paragraph 2 accords with a correct and proper interpretation of the relevant statutory provisions and, insofar as the Industrial Court is acting or proposing to act otherwise than in accordance with those provisions, the Court is acting or proposing to act in a manner which is irrational, unlawful, ultra vires and `Wednesbury' unreasonable.

(e)The decision of the Industrial Court was reached in breach of the rules of natural justice in that:

(i)The employer did not have a copy of one of the documents supporting the application, namely a copy of the completed petition and was accordingly thereby deprived of any opportunity to know the case that was being made and being able to comment on it.

(ii)The Industrial Court acted on an alleged schedule of members made available by the Union which schedule was not capable of any analysis by the employer as it contained no means for the employer to determine whether it was accurate and accordingly the employer was deprived of any opportunity of knowing the case made against it and of being able to comment on it.

(iii)The Court did not properly and adequately take account of the written submissions of the

applicant.

(iv)The Court relied on evidence from the Union that was not in the possession of the applicant.

(v)The Court did not adequately and properly investigate and verify the evidence presented by the Union.

(vi)The Court did not afford the applicant the opportunity to comment on all the evidence that was before the Court.

(vii)The decision was reached in undue haste and without proper consideration of all the papers.

(viii)The Industrial Court devised and implemented a procedure which permitted the Union to decide

1.whether to reveal the names of union members ("the union members") who were employees in the proposed bargaining unit and

2.whether to reveal the names of persons ("the persons") who were employees in the proposed bargaining unit who would be likely to favour recognition of the union as entitled to conduct collective bargaining on behalf of the bargaining unit thereby preventing the employer from checking that the union members and the persons were in fact employees of the employer and also members of the proposed bargaining unit.

(ix)The Industrial Courts procedure of not revealing the names of the union members and the persons demonstrated antipathy to employees.

(x)The report of the case manager, who had a proactive role in obtaining evidence from the union, was made available to the Industrial Court but was not made available to the employer.

(xi)The Industrial Court did not itself consider the completed petition.

(xii)The Industrial Court failed to make a distinction between help to the parties to reach agreement and help to a party in the adjudicating process.

(f)The decision was reached in breach of the provisions of the Trade Union and Labour Relations (NI) Order 1995 as inserted by Article 3 of The Employment Relations (NI) Order 1999 in that –

(i)The Court went on to consider the application despite the fact that the employer had not been supplied with the supporting documentation contrary to paragraph 34 of Schedule 1A of the said Order.

(ii)The Court did not consider the fact that the employee had not been given the supporting documentation.

(g)The Court made an error in law.

(h)In light of the above and the statutory provision aforementioned the decision of the Court is unreasonable and irrational.

(i)The decision of the Court was ultra vires.

(j)The Court reached a decision for which there was no or insufficient evidence.

(k)The Industrial Court failed to apply the correct onus of proof but rather proceeded on the basis that the unions case was correct unless there was reason to suppose it to be incorrect, being

prepared to accept assertion from the union on that basis but rejecting assertion from the employer."

[14] The courts in England and Wales have expressed their reluctance to become involved in the decisions of the Central Arbitration Committee in its operation of the equivalent legislation. I agree with and adopt the approach of Moses J in R (On the application of British Broadcasting Corporation v Central Arbitration Committee [2003] EWHC 1375 (Admin) at para 13 where he stated -

"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 delay it. The intervals between each of the successive stages are specified and they are short. 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."

Moses J also endorsed Elias J and the Court of Appeal in R (On the application of Quik Fit Limited) v Central Arbitration Committee [2002] EWCA Civ 512 –

"The CAC was intended by Parliament to be a decision making body in a special area that is not suitable for the intervention of the court. 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."

Illegality

[15] The employer contends that the approach of the Industrial Court was not in accordance with the requirement in paragraph 34(b) that the union should give to the employer a copy of the application "and any documents supporting it". The Industrial Court decision that the application was admissible amounted to a finding that the union had complied with paragraph 34(b). Accordingly that amounted to a finding that paragraph 34(b) did not require the union to give to the employer the completed petition forwarded on 14 August 2003. The Industrial Court contends for a narrow interpretation of paragraph 34(b) by which only copies of those documents furnished to the Industrial Court with the application form would be given to the employer. The employer contends for a wider interpretation of paragraph 34(b) by including all documents relied on by the union whether furnished with the application form or at any later time. On the employer's approach the Industrial Court ought to have declared the application inadmissible when the union failed to copy to the employer the completed petition.

[16] The narrow interpretation has been accepted by the Central Arbitration Committee in

England and Wales in addressing the problem of disclosure of the names of employees under their equivalent legislation. In Amalgamated Engineering and Electrical Union v Control Techniques Drives Limited (TUR1/109/2001 (22 October 2001)) the union's application form referred to a petition signed by workers in support of union recognition and offered to disclose a copy of the petition to the CAC on a confidential basis. The parties agreed to supply lists of names of workers to the case manager to enable comparisons to be undertaken with copies of the signed petition and the case manager's report was furnished to the parties and the CAC. A list of the names of union members was not disclosed but there was no issue about the list as the company accepted that 10% of the workers were in the union. However the company submitted that the application was inadmissible as it failed to comply with the legislation that required the union to give to the employer a copy of the application and any documents supporting it (being the same wording as paragraph 36(b)). The CAC found that the supporting documents to be given to the employer were any documents a union chooses to attach to its application form and that the petition was not a document that the union was required to copy to the company. The same approach was taken in Amicus v British Gypsom-Isover Limited (TUR1/173/2002 (29 May 2002)). The union offered to supply on a confidential basis a copy of its membership list and a petition signed by workers favouring union recognition. The company submitted that as the union had not supplied the membership list nor the petition with its application the evidence should not be taken into account or alternatively that if the union wished to rely on those documents they should have been copied to the employer as documents supporting the application. These documents were furnished to the case manager on a confidential basis for verification and the results were furnished to the parties and the CAC. The CAC agreed with the interpretation in Amalgamated Engineering and Electrical Union v Control Techniques Drives Limited.

[17] The statutory requirement under paragraph 34 (b) is that the union must copy to the employer the documents supporting the application. The purpose of requiring copies of supporting documents to be given to the employer must be to allow the employer to have notice of the case being made by the union and so to enable the employer to make representations in response to that case. I do not accept the union's contention that the purpose is simply to provide the employer with copies of the documents furnished to the Industrial Court with the application form. Paragraph 34(b) refers to documents "supporting" the application form rather than documents "accompanying" the application form. There seems no reason arising from the wording of paragraph 34(b) why the supporting documents should be limited to those submitted at the same time as the application form is submitted, rather than supporting documents submitted some days later. I would consider that paragraph 34(b) could not be interpreted in a manner that would permit a document in support of the application submitted to the Industrial Court in the days after the submission of the application form not to be copied to the employer. Accordingly I do not accept the approach of the union and the Industrial Court and the Central Arbitration Committee on this issue.

[18] The documents "supporting" the application are those provided by the union to be presented to the Industrial Court to be taken into account in the adjudication. There are two aspects to the process by which the Industrial Court considers whether to accept the union application. One aspect concerns the adjudication by the members of the Industrial Court. The other aspect concerns the investigation by a case manager or third party, who seeks to verify the information relied on by the union to advance its application, with the results of that verification process being forwarded to the Industrial Court for the purposes of its adjudication.

[19] The employer's response to the application was to complete a non statutory questionnaire furnished by the Industrial Court, by which questionnaire issue was joined by the employer as to the extent of membership of the union and the likelihood of majority support for union recognition. A verification stage may involve the case manager or other independent party seeking to establish whether the requisite number of union members and the likelihood of the requisite majority support for union recognition can be established. This involves investigation of the identities of workers leading to verification of the numbers of workers involved as members or likely supporters and a report to the Industrial Court. The names of the employees are not in themselves important but are the means by which the requisite numbers might or might not be confirmed. This verification of identities is not undertaken by the employer or by the union but by the third party. Nor is the verification of identities undertaken by members of the Industrial Court. The report on the methodology and the numerical outcome is disclosed to the union and the employer and the Industrial Court. I would consider that documents furnished to a case manager or third party for the purpose of verification of the information relied on by the union would not be documents "supporting" the application, provided that the documents were not before the members of the Industrial Court in their deliberations and any third party report was copied to the parties.

[20] The employer objects to this interpretation of paragraph 34(b) on the basis that there is no provision for the confidentiality of names in the legislation and there are other provisions in Schedule 1A that deal with detriment to workers who may be subject to victimisation or harassment as a result of their association with an application for union recognition. I consider that the absence of any provision for confidentiality in the legislation does not preclude the adoption of confidential measures provided that the measures are not contrary to the legislative provisions and there is compliance with the requirements of procedural fairness. A petition without names was copied to the employer and a petition with names was sent to the third party and not copied to the employer. As in the present case, the third party who reports to the Industrial Court the results of the investigation will provide a numerical outcome, and need not include the names on the petition, as they would be of no value to the Industrial Court.

[21] The procedures adopted by the Industrial Court included two measures designed to preserve the confidentiality of the names of workers. First, treating the application as limited to the application form so that only those documents presented with the form were treated as supporting documents. The validity of this measure depends on the interpretation of paragraph 34(b) and as set out above I am unable to accept this narrow interpretation of paragraph 34(b). The second measure was to treat the adjudication by the members of the Industrial Court as separate from the investigation by the case manager or other third party. The validity of this measure depends on the interpretation of paragraph 34(b) and as set out above I accept this distinction between the investigation and the adjudication and that paragraph 34(b) does not apply to the former in the circumstances where the documents are not before the members of the Industrial Court in their deliberations and any third party report was copied to the parties. However the validity of this second measure also requires consideration of the requirements of procedural fairness and that issue is discussed below. Whether the documents furnished to the members of the Industrial Court for the purposes of their deliberations ought to have been accepted by the Industrial Court as sufficient to satisfy the necessary aspects of the union's case for recognition is a different question that is also considered below.

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Procedural Unfairness

[22] The applicant contends that the procedures adopted by the Industrial Court on the non disclosure of the workers' names are unfair. In addition the applicant complained of undue haste on the part of the Industrial Court and that the procedures indicated antipathy to the employer, and that the case manager and the Industrial Court took steps to assist the union.

[23] Fairness is a flexible principle depending upon "the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates". In any scheme of statutory decision making the courts will imply "so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness." Lord Bridge in Lloyd v McMahon [1987] AC 625.702.

[24] It is a particular requirement of procedural fairness that a party has the right to know the case against him and the right to respond to that case. The right to know and to respond requires the disclosure of material facts to the party affected, such disclosure being within a reasonable time to allow the opportunity to respond. The operation of the right to know and respond may vary with the statutory context which may allow disclosure of the substance of material facts and may not require disclosure of the details of the sources of those facts. The right to respond need not include the right of a party to cross-examine witnesses. Behind these general procedural matters is the requirement that a party to an adjudication should be aware of the material upon which the decision maker will make the decision and that the party has the opportunity to respond to the material that may be adverse to his or her position in the adjudication.

[25] The Industrial Court Guidance indicates that the general procedural approach is that information furnished to the case manager is reported to the Industrial Court and that report is made available to the employer. If the case manager received a completed petition, as in the present case, the names would not be furnished to the Industrial Court, nor would they be required by the Industrial Court for the purposes of its decision. The case manager reported that the petition had 36 signatories. As a general procedural approach is it fair that the case manager should receive documents and report on their contents to the Industrial Court? The procedure to be adopted, in so far as it is not prescribed by the legislation, is a matter for the Industrial Court and not this court, subject to the requirements of fairness. It is not for this court to devise fair procedures but to determine if the procedures adopted by the Industrial Court are fair. I do not consider that there was any unfairness arising from the absence of procedures for the verification of the identities of workers being undertaken by the employer. Nor do I consider that any unfairness arises from the general procedural approach that involves the case manager receiving information and reporting to the Industrial Court provided the report is made available to both parties.

[26] In this particular case the employer did not receive notice of the receipt of the completed petition or the content of the case managers report. It appears from the respondent's affidavit that the report stated that the union petition received on 14 August 2003 contained 36 signatories. It was confirmed by Counsel for the respondent that the report contained no other undisclosed information. The right to know and to respond would have required that the employer be informed of this information and have a reasonable opportunity to furnish a reply to the Industrial Court. However at that stage the employer would have been proceeding on the basis of the information set out in the union application that all 38 workers supported the application and was challenging the accuracy of that information. The Industrial Court's decision was concerned with whether to undertake a verification process or accept the report on the union petition. The employer's response to the information in the union application had been to issue a blanket challenge to the whole procedure as well as to the union numbers. The employer claimed the right to complete the verification of the identities of the workers, rather than adopt the Industrial Court's process as set out in the Guidance. Had the employer received notice of the completed petition, and the case managers report on its effect, I consider that the employer's response would have been the same and that response would not have informed the Industrial Court's decision on verification. The decision of the Industrial Court to accept the information about the petition in the circumstances is a different question.

[27] The Industrial Court has adopted its policy of non disclosure of the names of employees because of concerns for intimidation and victimisation. The employer contends that there is no evidence for allegations of intimidation and victimisation and objects to the policy being applied across the board and particularly in the case of the employer where no allegations of harassment, intimidation or victimisation are being made against the employer. In his affidavit the Deputy Chairman of the Industrial Court states that both sides of industry unanimously agree a policy of non disclosure of worker's names because there may be a risk of future intimidation or victimisation from one side or another in the context of the recognition dispute. In his affidavit the regional industrial organiser for the union states that there is a real danger that if the names of union members became known to employers they could be victimised or subjected to some detriment in the workplace and that the disclosure of names would deter individuals from supporting applications for union recognition and therefore prevent unions from making applications for union recognition. The potential detriment to workers is recognised in paragraphs 156-165 of Schedule 1A of the 1995 Order which seeks to protect workers against detriment arising from disputes about union recognition. I am satisfied that there are real concerns that are sought to be addressed by the policy of the Industrial Court in protecting the names of workers. On the issue of the sweeping and disproportionate nature of that policy I am satisfied that the context of these applications is such that it is not appropriate for the Industrial Court to undertake enquiries on a case by case basis to make a determination as to the degree of potential harassment or intimidation in a particular case. Such an exercise in every case would open up an additional inquiry that would take time and effort that would not be compatible with the timings and character of the statutory scheme. Subject to the requirements of fairness in each case a general procedure is the appropriate response to the perceived mischief.

[28] Further the applicant contends that the procedures adopted by the Industrial Court and the case manager demonstrate an inequality of approach in favour of the union that amounted to antipathy to the employer and the favouring of the union. The case manager fulfils an important role in the process ant I reject the contention that there exists an inequality of approach to the parties. Nor do I find that the Industrial Court acted with undue haste. I do not

consider that the procedures adopted by the Industrial Court were unfair, save that the case manager's report should have been made available to the employer.

Irrationality

[29] The applicant contends that the decision of the Industrial Court to accept the union's application was irrational. Allied to that issue the applicant contends that the Industrial Court did not investigate properly the evidence presented by the union and that there was not evidence on the basis of which the Industrial Court could have reached its decision. The particular findings in question are that there was 10% union membership in the bargaining unit and that there was a likely majority of workers in the bargaining unit in support of union recognition. In relation to the 10% union membership the supporting evidence was the schedule of union registration numbers. That schedule was copied to the employer and therefore paragraph 34(b) was satisfied in relation to that document. The employer objected to the document in that it did not indicate that union membership related to the proposed bargaining unit and that the employer had no means of verifying whether reference numbers related to union members who worked for the employer. The employer would have been aware from the Guidance that the policy of the Industrial Court was to retain the confidentiality of the names of the workers and to make available a process for third party verification in the event that the employer disputed the union's contention. The employer did not submit competing evidence (which in most cases would be a difficult exercise) but, more particularly, did not indicate an intention to avail of the verification process. In addition the employer would have been aware of the short timetable that applied to the acceptance process. The Industrial Court considered whether it was necessary to undertake a membership check and decided that it was not necessary. There was no evidence from the employer, no request for a third party verification and no circumstance relating to the schedule that indicated that it might not establish what it purported to establish so as indicate a need for an inquiry into the evidence of union membership. This was not mere assertion but a schedule of references that could have been investigated by the case manager had the employer engaged in such a process. The Industrial Court did not need to see the names of the workers. In all the circumstances the Industrial Court was entitled to accept the evidence from the union as satisfying the requirement to establish 10% union membership in the bargaining unit.

[30] The other item of evidence concerned the petition. The application form stated that the union had surveyed the bargaining unit "which employees have signed a petition". The blank petition accompanied the application form and was copied to the employer. The employer's response was to question the methodology used in the compilation of the petition, to complain that in the absence of disclosure of the signatories to the petition it could not verify that they were members of the proposed bargaining unit and generally to dispute the existence of any likely majority favouring union recognition. It is now apparent from the affidavit of the Deputy Chairman of the Industrial Court that the case manager spoke to the union representative on 4 August 2003, and contrary to the wording of the application form it was stated that the petition had been signed by 11 persons within the proposed bargaining unit. Further it is stated in that affidavit that on 13 August 2003 the case manager again spoke to the union representative and was told that 36 persons in the proposed bargaining unit had signed the petition. The case manager received a copy of the completed petition on 14 August 2003. On that day the case manager reported to the Industrial Court that the petition was signed by 36 persons from the proposed bargaining unit.

[31] There are several unsatisfactory aspects that arise in relation to the petition. First, given that the wording of the petition invited signatures from aspiring union members, and given the union case that there were 38 members of the bargaining unit and 14 of that number were union members, it is apparent that there was an irregularity in relation to the presence of 36 signatures on the petition. Second, the application form implied that the non union members of the bargaining unit had signed the petition when the application form was completed on 31 July 2003 but upon receipt of the application form the case manager was told that only 11 persons had signed the petition. Third, it is apparent that the petition was circulating after the application form was submitted and that by 13 August 36 persons had signed the petition. Fourth, the employer would appear to have proceeded on the basis of the information contained in the application form and was not informed that on 4 August 2003 only 11 persons had signed the petition and that by 13 August 2003 36 persons had signed the petition. Fifth, it is not apparent that the employer was aware that the petition containing 36 signatures had been provided to the case manager on 14 August 2003.

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[32] As indicated above I do not consider the failure of the union to give to the employer a copy of the completed petition to be breach of paragraph 34(b) because the completed petition was furnished to the case manager as part of the verification process and was not furnished to members of the Industrial Court. The Industrial Court had to determine whether the circumstances were such that a process of verification ought to be undertaken in relation to the issue of a likely majority in the bargaining unit in favour of union recognition. The unsatisfactory aspects of the completed petition outlined above could have influenced the Industrial Court to initiate a verification procedure. It is not clear that it was brought to the notice of the members of the Industrial Court that, contrary to the words of the application form, all the workers in the bargaining unit had not signed the petition at that date.

[33] The unsatisfactory aspects of the completed petition render it incapable of being accepted as evidence of likely majority support for union recognition. The issue of likely majority support demanded investigation. While I do not accept that the approach of the Industrial Court amounted to a reversal of an onus of proof I do accept that, in the absence of any other evidence of likely majority support than that contained in the completed petition, the Industrial Court did not have evidence on which it could have concluded that there was likely majority support.

[34] The level of support for union recognition may yet be determined in the application before the Industrial Court. At the stage where the Industrial Court is considering whether to accept the union application the Industrial Court has to be satisfied that 10 per cent of the workers in the bargaining unit are members of the union and that the majority of workers in the bargaining unit are likely to support union recognition. When an Industrial Court accepts the application and then determines that the bargaining unit is the same as that proposed by the union the issue of 10 per cent membership is not revisited. When an Industrial Court accepts the application and determines that the bargaining unit is the same as that proposed by the union, any secret ballot requires approval from a majority of voters and 40 per cent of workers in the bargaining unit instead of the "likely majority" test that applied at acceptance stage. Having accepted the union application in the present case the Industrial Court has power to order a secret ballot before the conclusion of the process.

[35] In considering the appropriate relief to be ordered by this court in the circumstances of the present case it is noted that while the measure of support for union recognition on a secret ballot is different to that which applies at acceptance stage, a substantial degree of remedial action can be achieved in the later stages of the statutory process. Further, account is taken of the reluctance that the courts should demonstrate in interfering with the operation of a specialist body such as the Industrial Court that has been designated by Parliament as the decision making authority in the fraught area of union recognition. In addition account is taken of the fact that the application of the requirements of legality, procedural fairness and rationality, in the manner and to the extent that they operate in the present case, have been stated in this judgment so as to declare the respective rights of the parties. In all the circumstances I would exercise my discretion not to interfere with the decision of the Industrial Court.