Case Ref No: IC87/23

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 APPROPRIATE BARGAINING UNIT

The Parties:

Financial Services Union

And

Allied Irish Bank (AIB Group) plc

Background

1. The Industrial Court (the Court) received an application from The Financial Services Union (FSU) on 22nd May 2023, for recognition at Allied Irish Bank (AIB). The Employer is a commercial bank operating in Northern Ireland as part of the UK subsidiary of Allied Irish Banks plc. The proposed bargaining unit was described as '*Employees working at Level 4 and above in Northern Ireland'*

Acceptance Stage

2. The Panel appointed in this case consists of Mrs. Sarah Havlin, Chairman of the Industrial Court of Northern Ireland, Ms. Barbara Martin, Member of the Industrial Court of Northern Ireland with experience of acting on behalf of Employees, and Mr. Patrick Masterson, Member of the Industrial Court of Northern Ireland with experience of acting on behalf of Employers. By way of a Decision on 6th July 2023, the Panel decided that the Application met the requirements for acceptance

Negotiation Period

3. Pursuant to Schedule, the parties were referred by the Chairman of the Industrial Court to the Labour Relations Agency (LRA) on 6th July 2023 to explore the possible agreement of the bargaining unit.

4. The Parties attended with LRA for facilitated negotiation meetings but the bargaining unit could not be agreed. In absence of any agreement, the matter was referred back to the Industrial Court on 9th August 2023.

5. The Chairman directed by way of correspondence that the parties must lodge submissions in respect of the appropriate bargaining unit and the matter would be considered by the Industrial Court at a hearing on 04 September 2023.

Description of proposed bargaining unit:

6. The proposed bargaining unit, upon which the Acceptance Decision was based, is expressed as '**All Level 4 and Above Staff in Northern Ireland**'.

7. The description of the bargaining unit was the subject of some dispute in terms of the wider operations of the Employer, being an employer which operates across both jurisdictions on the island of Ireland; the Republic of Ireland and Northern Ireland.

8. The Panel noted from the initial Employer response form, that it was unclear to the Employer as to which workers should fall into the Union's description of its proposed bargaining unit. It is noted that the Union's number of total workers in the proposed bargaining unit was stated in its original application as being 89, and the Employer's total number as stated in its response was 219 This was due to the Union including only those workers who are based in Northern Ireland and who can claim the legislative rights of workers in the jurisdiction of Northern Ireland. The Employer included all of its workers who are Level 4 and above without making the distinction of which workers would fall within the jurisdiction of Northern Ireland, and therefore included workers outside Northern Ireland.

9. Further, it was stated by the Employer that 9 workers were of a somewhat 'hybrid' status in that they had a Northern Ireland base address (and so were included by the Union as 'Northern Ireland workers') but they worked outside Northern Ireland, for example in Great Britain and in roles with functions stretching across the entire operations of the Employer, such as leadership roles.

10. For the purpose of the Acceptance test, namely that 10% of the proposed bargaining unit are Union members and that a majority of workers in the proposed bargaining unit are likely to support recognition, it was the view of the Industrial Court that the Union is correct to frame the bargaining unit to contain the applicable number of workers who fall within the jurisdiction of Northern Ireland. If a worker lives or is based in Northern Ireland and/or that worker can claim the legislative rights which apply in that jurisdiction, then only those workers will fall within the Union's proposed bargaining unit. The matter of jurisdiction is therefore clear. The issue of whether the proposed bargaining unit is 'appropriate' is an entirely separate point which is the consideration presently before the Panel for determination.

11. The Panel noted that, in commercial terms, the Employer regards all of its workers as being a cohesive group regardless of whether they are based in Northern Ireland or the Republic of Ireland. The legal reality is that the Employer is operating and employing workers in different jurisdictions, and for the purpose of an application to the Industrial Court for statutory recognition, the Union is entitled and correct to frame the proposed bargaining unit to only include those workers employed by AIB who are Northern Ireland workers. The Panel's present task of assessing whether the proposed bargaining unit is appropriate is therefore limited to considering the

proposed unit of designated Northern Ireland workers under Paragraph 19B of the Schedule, as set out at paragraphs 12-16 below.

Legal issues

12. Paragraph 19 of the Schedule provides:-

"(1) This paragraph applies if-

(a) the Court accepts an application under paragraph 11(2) or 12(2),

(b) the parties have not agreed an appropriate bargaining unit at the end of the appropriate period (defined by paragraph 18), and

(c) at the end of that period either no request under paragraph 19A(1)(b) has been made or such a request has been made but the condition in paragraph 19A(1)(c) has not been met.

(2) Within the decision period, the Court must decide whether the proposed bargaining unit is appropriate.

(3) If the Court decides that the proposed bargaining unit is not appropriate, it must also decide within the decision period a bargaining unit which is appropriate."

13. Paragraph 19B provides:-

"(1) This paragraph applies if the Court has to decide whether a bargaining unit is appropriate for the purposes of paragraph 19(2) or (3) or 19A(2) or (3).

(2) The Court 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 Court 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 Court must take into account any view the employer has about any other bargaining unit that he considers would be appropriate.

14. Relevant legal principles, in terms of statutory recognition applications, were established by the Court of Appeal in the case of *Kwik Fit Ltd v Central Arbitration Committee [2002] EWC Civ 512.* The first is that the test for the Industrial Court to apply is whether the proposed bargaining unit is an appropriate bargaining unit, not whether it is the 'most effective' or 'most desirable' bargaining unit. Therefore, the Industrial Court is not required to assess the quality of multiple possible bargaining units and decide which is better or best. The straightforward task for the Court is to decide if the bargaining unit proposed by the Union is an appropriate vehicle for the conduct of collective bargaining concerning that group of workers in the context of its compatibility with effective management.

15. The second is that the 'compatibility with effective management' test was further clarified by the *Kwik Fit* case to mean "consistent" or "able to co-exist with".

16. The task before the Panel is therefore to determine if the proposed bargaining unit is one which could reasonably be said to be an appropriate grouping of workers for the purpose of collective bargaining on pay hours and holidays, on behalf of that group of workers, in the context of whether such a unit of workers, as a vehicle for such collective bargaining, is able to co-exist with effective management of the Employer's undertaking. The issue of what is 'appropriate' must be considered by the Panel with the primary consideration being compatibility with effective management, but it can also be considered by reference to any of the relevant factors stated at Paragraph 19B(3)(a)-(e) and 19B(4), provided that such considerations do not conflict with the primary consideration of compatibility with effective management.

Summary of Written Submissions by the Parties:

The Union submitted:

17. "The Financial Services Union is the majority Union within AIB Group. We are recognised for collective bargaining purposes for employees across the Group at Levels 1 to 3. The Financial Services Union is fully certified and registered as a Union within Northern Ireland. We are recognised for collective bargaining purposes in a variety of Financial Institutions in the Jurisdiction.

18. The Union did hold collective bargaining rights for AIB employees at Level 4 and Above. However, those members chose to walk away from collective bargaining a number of years ago. The Employer states that these members were expelled from the Union. This is an untruth, the situation in respect to collective bargaining for members at Level 4 and above was not as a result of any expulsion of members by the Union. Level 4 and above members (Managers at the time), despite the advice of the Union, walked away from collective bargaining for pay purposes. They had done so on the promise that the introduction of Individual performance related pay, for managers, would deliver a better outcome for them than any collectively agreed pay

outcomes. While managers may have benefited from this performance related pay for a small number of years, performance related pay was later agreed for the collectively bargained group of workers, and the collective outcome was in effect applied to the non-collectively bargained group.

19. The banking crash brought about an end to all these practices where pay freezes were introduced for all employees, irrespective of their level, within the organisation or where they worked in the group. There were, however, cases taken in the North of Ireland by the Union which were won in the Courts in the jurisdiction around contractual pay rights. These outcomes were applied to workers in Northern Ireland and not across AIB Group. This is a point of note, the employer must accept that we are representing workers in Northern Ireland and are governed by the legislation of the jurisdiction.

20. When the main period of the Banking crisis ended, the Union and employer entered normal annual pay discussions for our collectively bargained group of workers. These annual pay discussions agreed either locally or with the assistance of a Third Party were applied across AIB Group for all the collectively bargained group of workers irrespective of the jurisdiction that they operated in. The only caveat being that there are differing minimum and maximum pay levels, these are based on the jurisdiction of operation and reflect the market trends in terms of pay levels and possible local arrangements such as “London Weighting Allowance”.

21. Level 4 and above members were not represented at these discussions. However, at the end of each round of discussions, the FSU would seek from the employer clarity as to whether the collective outcome would be applied to members at Level 4 and above. The employer for their part confirmed each year that they would be applying the same outcome to their Level 4 and above employees.

22. The Union held a ballot of members each year on these pay proposals. We set out to our members, irrespective of their Level, the agreed pay offer and every member was afforded the opportunity to accept or reject these pay proposals. The employer was and still is aware that the Union does not discriminate our members when it comes to such ballots. Every member is afforded the opportunity to vote whether they are collectively bargained or not. We argued that it was in the employer’s best interest to provide clarity on what the employer was applying to our members at Level 4 and above. Up to a few years ago this was accepted by the employer, and they provided such clarity in advance of any ballot.

23. What has changed? The employer in their wisdom has decided that they do not agree with the tried and tested strategy for dealing with pay for all members across the Group. A decision has been made at the higher levels within the Group to change the strategy, and those representatives of the employer here today must implement this change in strategy. As a result of this change in strategy by the employer, our members at Level 4 and above working in Northern Ireland, have been treated less favourably than their counterparts in respect of pay for 2020, 2021, 2022, and 2023 and also by extension will be treated less favourably in 2024.

24. As a result, of this less favourable treatment, this group of workers has approached the Union seeking inclusion in the collective bargaining group

discussions for pay purposes. The Union has made attempts through local discussions with the employer to seek that they review their strategy; revert to our previously agreed way of working; ensure industrial peace; and return to the status quo. At every point the employer has refused our reasonable requests and insists in their belief that Level 4 and above employees do not belong in a collective bargaining agreement. They are managers and should be separate to the collective agreement for members at Levels 1 to 3.

25. We reconstituted our Level 4 and above working group for discussions and as set out in the employer's submission to the Court, there has been two meetings with this group. However, the employer has insisted that pay will not be negotiated at this forum and has worked around the matter with no real discussion taking place other than the employer setting out their view of the world. There has been and continues to be no real input into the discussion from the employee perspective.

26. Given the employer's continued frustration of the process, our members asked the Union to pursue collective bargaining for them. We are here today representing our members of that group, working in Northern Ireland. The Court can make a decision on collective bargaining for workers in Northern Ireland only and that is what we are asking you to do.
We have provided the Court with evidence of our levels of membership within the bargaining unit.

27. In terms of the compatibility of the Bargaining Unit, the legislation sets out that where a certified Union can show that it represents the majority of workers within the specified bargaining unit and can show that the majority of those members would support collective bargaining, then the Court can make such an order. The employer has supplied the Union with "Specified Information Required" setting out the number of employees it has employed in AIB NI at Level 4 and above. In this information we note that there are a total of 80 employees in AIB NI that are at Level 4 and Above. The employer, in their original response to the Court, did not set out how many employees work in the bargaining unit.
The Union's position at the time of lodging the claim set out that we had, at that time, 45 members in the bargaining unit. It was our understanding, at the time, that there were a total of 89 employees in the bargaining unit. Therefore the Union held 50.5% of the total workforce in the bargaining unit.

28. We have subsequently increased our membership within the bargaining unit as a consequence of two issues:

1) We have cleaned up our membership records to include employees working only in AIB NI but that may be also reporting to UK, ROI or indeed AIB Group. They are, nonetheless, working and paid in Northern Ireland.

2) We have had several individuals join the Union in the intervening period since commencement of the claim.

This is normal practice. We have people that have left membership also for a variety of reasons, natural attrition being the main one. Our current membership figure is a total of 57. So, if we take the Bank's specified information, we hold 71.25%

membership density; and if we consider our original submission, we have 64% membership density within the bargaining unit. No matter which figures used, the Union can show that we have the membership density that fulfils the requirement as set out in the legislation.

29. The tests, as set out pursuant to the Act, have been met by the Union. The Union has had a long-standing good working relationship with AIB Group and AIB NI. The parties have worked together to bring about and agree massive change programmes within AIB Group and AIB NI, as an example of this good working relationship, the Union and the employer agreed on the closure of the majority of the Bank's branches in Northern Ireland along with the associated redundancies. All employees impacted by these changes were represented by the Union in our discussions. The subsequent agreement applied to all our members irrespective of their Level within the organisation.

30. The discussions outlined above were specific to AIB NI and did not impede on the general collective agreements nor did the discussions impede the normal management of the Group business. There has been a change of strategy by the employer in terms of their approach to the Union; how we agree change programmes; and especially so in terms of annual pay negotiations. This change of strategy by the employer, has negatively impacted our members at Level 4 and above working in Northern Ireland. This has had the effect of members now seeking the protection of collective bargaining.

31. The fault, in terms of the listing of this claim, lays directly at the actions of senior management in AIB that have, by their actions, changed the strategy of dealing with the Union. Our membership numbers, before listing the claim, were always such as would have met the requirements set out in the legislation. We did not pursue such a claim, as the working relationship we had with the employer gave members the protections that collective bargaining would give. The actions of the current management have forced our hand and that of our membership, leaving us with no option but to protect our members through this claim.
We are asking the Court to reinforce the protections set out in legislation in Northern Ireland and to ensure that our members at Level 4 and above are afforded these protections.
The Union has fulfilled all requirements as set out in the legislation, we have shown evidence of our membership numbers, which satisfies the requirements and there are no impediments to granting recognition."

The Employer submitted:

32. "Allied Irish Bank PLC ("the Bank") welcomes the opportunity to provide these submissions to the Court. In the first instance it would like to make it clear that the Bank has other Union recognition agreements in place with the FSU ("the Union") that work well. In this instance however the Bank does not accept that recognition is appropriate for the reasons set out in this submission.

33. The Bank has also reviewed the submission of the Union to this Court. Whilst there are a number of points that the Bank does not agree with, it feels it is important to particularly highlight that the Bank's objection to collective bargaining for L4 and

above employees in Northern Ireland is not limited to whether the Union can show sufficient membership support.

In summary, the Bank's position is that:

• There are concerns that there is not majority support for recognition.
• Recognition would be incompatible with effective management.
• Recognition would lead to a small, fragmented bargaining unit.
• There are concerns regarding the characteristics of the workers, particularly those at L6 and in relation to the views of the other L4-L6 managers across the group.
• The location of the managers is variable and the nature of their work may be entirely non-NI focussed.

Further, the Bank takes exception to the Union's assertions that the Bank has sought to somehow frustrate matters and/ or to refuse to engage properly in discussion. This is firmly not the case. At all material times the Bank has co-operated with and acted fairly in complying with the required procedures.

34. Indeed, it was the Union that refused to engage in the discussions proposed by the Bank prior to the matter having to be referred to the LRA. In response to the Unions submission, the Bank would like to take this opportunity to reply to some of the detail provided by the Union to the Court, in particular to provide a reply to assertions made in section 2 of their submission;

35. The Union have noted their view of the approach for pay awards for levels 4 and above in previous years. They have also referenced the fact that they ballot all Union members working in AIB on pay, whether covered by the collective agreement or not. While it's not for the Bank to agree who the Union choose to ballot, the Court should note that the Bank has questioned the Union's approach in this regard particularly on the appropriateness of same. The Bank would argue that it's this approach that has caused an unnecessary frustration amongst a small cohort of our managers who are in effect balloting to accept or reject a pay award that did not apply to them. The union has therefore orchestrated this issue by their actions. In an effort to suppress this issue, the Bank worked to expedite communications surrounding pay for levels 4 and above, to ensure that they were fully informed on the approach to Pay for their grades. Out of courtesy, we also confirmed the Pay award applying to managers to the Union, in the interests of good employee relations. Given our Pay agreement with the Union specifically applies to levels 1-3 in all jurisdictions, it is incorrect, as referenced in the Unions submission, to assume that the same outcome would automatically apply to levels 4 and above.

36. Managers' pay is reviewed separately with considerations to a range of factors including the Bank's financial performance, market movements, cost of living and other relevant considerations and an appropriate Pay award is determined by the Bank's Executive Committee taking into account these elements. The Bank's position is set out as follows:

37. Background and Recent events: The Bank has a particular key and genuine concern that the bargaining unit, as proposed, is incompatible with effective management. The Bank is very concerned that any agreement on a bargaining unit

for this cohort will cause significant difficulties in relation to effective management across the L4 and above group across the Bank, fragmentation and divisiveness as a consequence.

38. There is also a significant lack of appropriateness in the bargaining unit as proposed, particularly with regard to the characteristics of the L6 workers. Again, this is discussed further below.

39. As we have outlined to the Union in our initial response to the claim in April 2023 and also in our response form to the Industrial Court – we have a long-established managers forum, which the Union and their nominated representatives already attend, that has, and continues to, serve both sides well. This forum has an agreed agenda with the Union submitting topics for discussion to the Bank in advance. Managers' Pay and approach is an example of the topics covered.

40. Given that the managers chose to exit the Union back in the 1990's – and in order to promote positive employee relations in the Bank – AIB established this forum to give the manager population a voice. This forum discusses Pay and conditions for managers in AIB Group, as well as providing an opportunity for this managers forum to hear from senior management in the Bank in relation to some strategic initiatives of note.

41. Given this forum is in place, and operational, the Bank does not accept that formal recognition is required for the Northern Ireland element of this group of employees. This forum is an effective vehicle for addressing manager concerns and we continue to meet on a regular basis. The Union's Industrial Relations Officer and their nominated manager members are attendees at this forum and they ensure that member concerns are raised and discussed as part of the agenda.

42. Following the decision made by some managers to depart from the union in the 1990's, and the majority's decision to walk away from collective bargaining as they no longer felt it was of benefit to them, some manager members remained in the union but for representation on an individual basis only in the event of a personal issue.

43. Following acceptance by the Court of the Union's claim, the Bank wrote to the Union on the 12th July 2023 inviting them to discussions concerning their application for recognition. The Union replied to the Bank on the 14th July 2023 to advise that they were not willing to meet with the Bank to resolve the matter locally and wished for it to be referred to the LRA. Both sides attended the LRA on 9th August 2023. The Bank attended these discussions, in good faith, with a view to trying to reach agreement on an appropriate bargaining unit. The Union, however, remained entrenched in terms of their position. The Bank is concerned that the Union did not attend the LRA with any intention of trying to reach an agreement.

44. The Union's claim has described the proposed bargaining unit as "employees at level 4 and above working in Northern Ireland". The Bank disputes the appropriateness of this bargaining unit on a range of grounds. We would repeat, for the sake of clarity for the Court, that the Union's statement (contained in its initial

application to the Court) that a bargaining unit had been agreed with the Bank is incorrect.

45. The grounds upon which the Bank objects to recognition are as follows:

Majority Support: Whilst the Bank acknowledges that the Union may be able to demonstrate the requisite level of union membership at the L4-L6 level combined, it does not accept that (a) it has the requisite membership at L6 (senior managers) itself and
(b) there is majority support for recognition in the proposed bargaining unit at those levels.

The Bank is of the view that it may be the case that some of those with Union membership had signed up to the Union many years ago and have simply allowed their membership to continue rather than actively intending to continue with it. We note from the Union's submission that whilst there have been "several" (unspecified) additions to the membership, a number of people have left their membership with the Union since the commencement of this claim for recognition.

46. The Bank is genuinely concerned that there is not majority support amongst the membership. Other than the Union saying that there is, there is no evidence to support this. The potentially significant divisive ramifications of carving out this small group of managers in our respective submission warrant more evidence than simply the Union saying that majority support exists. The Bank reiterates that it already has an effective employee forum in place that works effectively between the Bank and its managers.

47. Compatibility to effective management: The proposed bargaining unit is described as "Level 4 and above managers working in Northern Ireland". For absolute clarity for the Court, this means Level 4 managers, Level 5 managers and Level 6 managers. Level 6 managers are senior management and are part of the senior management team in the UK.

48. The Bank does not differentiate between managers working in Northern Ireland, Great Britain or Republic of Ireland in terms of approach. These managers have the same, equitable terms and conditions across the 3 jurisdictions that the Bank operate in, commensurate to their level. The Union is seeking collective bargaining for a very small group of managers.

49. As there are only 80 possible members in this proposed bargaining unit (as outlined the long decision of the Industrial Court to accept the application), the size of the bargaining unit would only represent 3% of the overall employee number at Level 4, 5 & 6 in AIB Group.
Naturally, the Bank is extremely concerned by this given such a low percentage of staff at that level would have Union representation to consult and negotiate on their behalf, in comparison to the balance of 97% across the network

50. One of the Bank's key concerns regarding the proposal to separate out this small group of managers is that it will damage the Bank's ability to effectively manage L4 and above managers. It would be incompatible with effective management for this

relatively small number of managers to be collectively bargained for when their other colleagues doing exactly the same job in other jurisdictions are not. The Bank is strongly of the view that this will create division and discord.

51. For example – we have L4 HR Business Partners operating across the jurisdictions. In the event that the L4s in Northern Ireland are included for collective bargaining going forward, it could potentially mean that a business partner working in Northern Ireland could have different hours of work and different rates of Pay to their peers, despite the fact that they've the exact same job description and accountabilities. This would most definitely cause discord among this group of employees.

52. Preference to avoid small, fragmented bargaining units: From the numbers referenced above it is clear that recognition for this group would create a small, fragmented business unit. One of the Bank's core values is to 'Be one team'. If the Bank is required to agree a small, fragmented bargaining unit for such a small groups of managers who ultimately could therefore have different terms in relation to pay as their 2,521 peers, this stands very much against the Bank's core values.

53. We strive for inclusivity and diversity in the Bank. Having a fragmented bargaining unit, as proposed, is counter to our core values. To separate this small group of managers as part of this claim would be fractious for this group and would be isolating them from their peers in terms of pay and conditions. The Bank promotes equity, fairness and inclusion. It goes against its core values as an organisation to have managers on the same grade receiving different pay based solely upon their geographic location and therefore potentially based on their nationality. This in turn could lead to claims of discrimination (leaving aside how unmeritorious) against the Bank and cause significant issues with good industrial relations.

54. As previously stated, we have an effective Managers' Forum which is long established and promotes positive employee relations for our manager population across the group. It is notable that some of the Union's members have rescinded their membership since this process for collective recognition commenced.

55. The characteristics of workers: The Court should be aware that Level 6 managers have different performance metrics and a different remuneration approach than Level 4 and Level 5 managers in AIB group. It should also be noted that there are only five Level 6 managers in Northern Ireland. This is five out of 116 Level 6 managers in the AIB group. We do not differentiate between managers working in Northern Ireland, Great Britain or Republic of Ireland in terms of approach and to include them in a bargaining unit as part of this claim would be a disadvantage for this group and would be isolating them from their peers in terms of pay and conditions.

56. Lack of appropriateness: The Bank does not differentiate its managers by jurisdiction. A manager working in Northern Ireland is on the same terms and conditions as their peer in Great Britain or indeed in Republic of Ireland. It would not be appropriate to isolate the manager cohort in Northern Ireland to have a different approach to some of their fundamental terms of Pay and Conditions. This approach

would potentially cause frustration and litigation given the likely claim for lack of equity to peers. Although some of the managers at levels 4 and above have a work location in Northern Ireland, their role is in another jurisdiction (Great Britain or Republic of Ireland). To have different terms & conditions, including pay, to their immediate peers and possibly their superiors would be unfair and constitute unequal treatment. For example – there are a number of people in the role of Level 4 Senior Customer Relationship Manager across all jurisdictions we operate in. There are employees in this role on our GB Payroll, with a home address in GB but in their role, and their work address and team is based in Belfast. If the Level 4's in Northern Ireland are included for collective bargaining going forward, it could potentially mean that this employee's peers could have different terms & conditions and rates of pay to them, despite the fact that they have the same role, reporting lines and accountabilities.

57. At present, the Bank's employees can and frequently do transfer (both on request of the Bank or through promotional opportunities) between jurisdictions. By having 7 AIB Submission to the Industrial Court fragmented approach whereby we have collective bargaining recognition for one jurisdiction and therefore potentially different terms and conditions applying would preclude the transferability which all employees have in their contract of employment. This would also limit promotional opportunities for the wider staff base.

58. The Bank accepts that the Union may have the requisite membership numbers required at junior management level to pursue this claim for collective bargaining. It does not accept that it has the requisite membership at senior management level (Level 6). Furthermore, the Bank does not accept that a majority of the members at L4-L6 would support the claim for collective bargaining, particularly if they knew that this would lead to fragmentation from their peers.

59. Given the long-standing manager forum which has given, and continues to give, managers a voice and positively addressed their concerns (of which the Union and their nominated manager members are attendees), the Bank would question how many of the long-term manager members would actually support this claim for collective bargaining at a ballot.

60. The Union has claimed that 'it's clear the employer is trying its utmost to frustrate the process'. This could not be further from the truth. The Bank has cooperated with all requests from the case manager and has provided all information requested in a timely manner. It is simply the case that from the Bank's perspective, recognition may not be supported and/or does not make sense for the reasons identified above."

Considerations

Stages of Process in an Application for Statutory Recognition and Role of the Industrial Court

61. Employers may need to work with Trade Unions which represent groups of their employees, known as bargaining units. However, not all workers who are members of a trade union will be employed in a workplace where their Union enjoys

recognition rights. Recognition of a Union entitles the Union to collective bargaining rights, which is the right to directly negotiate with the Employer in respect of pay hours and holidays on behalf of a group of workers.

62. Many Trade Unions enjoy recognition rights through voluntary recognition agreements with Employers. If a Union believes that it has a sufficiently significant level of support for recognition within a group of workers and that group of workers is an appropriate bargaining unit, the Union can approach an Employer to request voluntary recognition. If an Employer refuses to enter into a voluntary agreement, an independent certified Trade Union can utilise the statutory application procedure for legal recognition by applying to the Industrial Court of Northern Ireland 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).

63. The Industrial Court provides a formal platform for the parties to exchange information within the limits of individual worker's privacy and data protection rights, and the individual employment rights of workers. It is the parties, not the Industrial Court, who are best placed to understand the workplace situation in which they are involved and positive workplace relationships are in the interests of both Employer and workers. Agreement is therefore encouraged and facilitated at all stages in partnership with both parties in dispute, and with the Labour Relations Agency In the absence of agreement between a Union and an Employer, the Industrial Court will act in an arbitration role and issue binding decisions to the parties. This can be done at each stage of the process, if required. These decisions are based on the evaluation of the best information available on the balance of probabilities in accordance with the statutory requirements under the Schedule. The Industrial Court has no investigative power and it will not directly inspect or interrogate the records of either party nor will it contact individual workers.

64. The consideration of the appropriate bargaining unit is the second stage of the Industrial Court's procedure of narrowing down the issues in a contested application for statutory recognition by a Trade Union. The first stage is Acceptance and the next stage is consideration of Recognition, either with or without a ballot.

65. The Acceptance test is a consideration of both union membership levels, and whether a majority of workers in the group of workers proposed as a bargaining unit are likely to favour the recognition of the Union. In this case, the acceptance of the application was based on the stated membership density within the proposed bargaining unit, which was assessed as being over 50% at that point in time. In the absence of evidence to the contrary, Union membership is taken as a strong indicator of likely support for recognition. In other cases, a Union may not have a majority membership and can seek to rely on other evidence of significant support for recognition, for example declarations from workers in the bargaining unit who are not members of the Union, but who may be contemplating membership. Each case will turn on its own individual circumstances.

66. After Acceptance, the relevant unit for the Court's further consideration, shifts from the Union's 'proposed' bargaining unit to what is deemed to be the 'appropriate' bargaining unit. In many cases, both the proposed and the appropriate units end up

being the same. However, this is not always the case and the Industrial Court must declare an appropriate bargaining unit which has been either reached by negotiation of the parties, or determined by way of a formal decision by the Industrial Court. The appropriate bargaining unit is then used as the unit upon which the next stages of the process are based.

67. The immediate next stage of the process will involve careful consideration of the numbers in the appropriate bargaining unit (which may have changed since Acceptance stage), the Union's membership levels within it and any other available evidence which relates to the support or non-support of Union recognition. There will be an exchange of information on these matters and, if the parties remain in disagreement, the Industrial Court will take a decision on the available evidence at to whether recognition of the Union should be declared automatically or if a ballot is required. If a ballot is ordered by the Industrial Court, it will appoint a qualified independent person to contact the workers within the appropriate bargaining unit and conduct the ballot in a fully independent and confidential manner.

68. It should be noted, that if the appropriate bargaining unit is agreed or determined as being different from the Union's proposed bargaining unit, the Industrial Court must run a validity process of the appropriate bargaining unit. This process involves a reconsideration of the admissibility and acceptance tests to determine if those conditions continue to be satisfied, and, if that is the case, for a Validity decision on any different bargaining unit to be issued, before proceeding further.

69. It is therefore essential for the matter of the bargaining unit to be assessed before the application can proceed as it will enable the Industrial Court to consider the support level for Union recognition within the appropriate bargaining unit and progress the application to the next stages up to and including a ballot, if required.

70. The task for the Panel at this stage is to test whether the unit proposed is appropriate for its purpose, and that purpose is to enable collective bargaining which is able to coexist with effective management. It is not for the Industrial Court to find that collective bargaining itself cannot coexist with the effective management of an Employer's undertaking. An Employer may have strong views about the existence of a unionised unit or units within its workforce, but that does not negate the role and function of the Industrial Court which is one of gaining best understanding of the level of support on the part of workers, within an appropriate unit, for recognition of that trade union to collectively bargain with the Employer on behalf of the workers in that unit.

Statutory Test - Appropriate Bargaining Unit

71. The central question for the Panel is whether the proposed bargaining unit can be reasonably said to be 'appropriate'. As previously stated, the legislation requires the panel to test appropriateness by reference to what is 'compatible with effective management'.

In terms of assessing compatibility with effective management, insofar as they do not conflict with the primary need for the bargaining unit to be compatible with effective management, under section 19B(1)(3), the Panel can take the following matters into consideration:

a) the views of the employer and the union
b) existing national and local bargaining arrangements
c) the desirability of avoiding small and fragmented bargaining units within an undertaking
d) the characteristics of workers falling within the bargaining unit under consideration
e) the location of workers

Further, under section 19B(1)(4) it is stated that when taking the Employer's views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the Court must take into account any view the employer has about any other bargaining unit that it considers would be appropriate.

72. In terms of *'the views of the Employer and the Union'* in this case, these have been set out above and our conclusions on the arguments submitted is set out in this decision.

73. In terms of '*existing national and local bargaining arrangements'* in this application it is noted that no other Union is recognized by the Employer and the Union has an existing recognition agreement in place with the Employer for the purpose of bargaining for workers below Level 4. The Union is therefore an existing collective bargaining partner of the Employer. This is therefore a material consideration for the Panel.

74. In terms of '*the desirability of avoiding small and fragmented bargaining units'* it must be noted that 'fragmentation' has been further defined in the case of *Lidl Ltd v Central Arbitration Committee [2017] EWCA Civ 328.* The Court of Appeal held that 'units' and 'fragmented' naturally connoted a whole that had been broken into parts. The context was to ensure that employers should not have to negotiate in more than one forum with more than one trade union in respect of workers that were much the same. The policy expressed by para.19B(3)(c) was that, other things being equal, where a group of employees could appropriately be bargained for by a single trade union in a single bargaining unit, it was desirable that they should be. Thus the consideration of 'fragmentation' is in the context of avoiding proliferation and a complex situation, where an Employer would have to negotiate with multiple Unions. It does not prevent a scenario where a Union can be recognized for a small section of an employer's workforce. Therefore the Panel's view is that the Employer's arguments about the claimed 'fragmentation' of its overall workforce by the designation of workers in the proposed bargaining unit, are in fact arguments relating to the issue of compatibility with effective management, and not specific arguments which are relevant to the issue of avoiding small and fragmented bargaining units. The desirability of avoiding small and fragmented bargaining units is therefore not deemed to be a relevant consideration in this case.

75. In terms of '*the characteristics of workers'*, this is a central focus of the arguments made by the parties and is deemed to be a material consideration for the Panel in this case. Our conclusions on this consideration are contained in this decision.

76. In terms of '*the location of workers'*, as stated at paragraphs 7-11 above, the location of workers has been a contested issue between the parties. This was argued by the Employer in the context of the total size of the proposed bargaining unit, when the total workforce of the Employer is multi-jurisdictional. The Industrial Court has no authority to consider arguments which relate to the inclusion of any workers into the bargaining unit who fall outside the jurisdiction of Northern Ireland or to exclude from it those Northern Ireland workers who can claim entitlement to the benefits of Northern Ireland legislation. The reasoning and the decision of the Panel that only Northern Ireland workers can fall within the proposed bargaining unit has been made clear at paras 7-11 above. It is not the Union's designation of the bargaining unit as a separate unit for Northern Ireland workers which is the cause of any division, but the consequence of an Employer operating in different jurisdictions, in which different laws apply.
The only material consideration at this stage for the Panel, in terms of the location of workers, is the location of Northern Ireland workers in the context of whether the working location of those Northern Ireland workers may raise concerns about compatibility with effective management and the appropriateness of their inclusion in the bargaining unit. This was therefore deemed to be a material consideration for the Panel in terms of those workers who fall within the bargaining unit because they are based in Northern Ireland, but who may work in other locations or across the operations of the Employer. This was noted by the Panel as being particularly the case for Level 6 workers.

77. In terms of any proposed alternative bargaining unit put forward by the Employer, this can be considered by the Panel, insofar as it may be helpful in two possible ways:

- In the event that the Union's bargaining unit is not deemed to be appropriate and the Panel must consider what other bargaining unit would be appropriate
- In illustrating to the Panel why the Union's proposed bargaining unit may not be appropriate. It is important to state that the Panel, as per the principle in the *Kwik Fit* case, is **not** required to compare the two units and make a judgment as to which is 'better' or 'best'. The Panel must only look at the issue of determining whether the Union's proposed bargaining is or is not appropriate. However, information provided by the Employer by way of an alternative bargaining unit may also have the potential to persuade the Panel that the Union's proposed bargaining unit is not appropriate.

78. Therefore, in this case, the Panel has formed the view that the relevant and permissible considerations for the Panel when determining the appropriateness of the bargaining unit based on its compatibility with effective management (provided they do not conflict with the primary need to consider compatibility with effective management) are:

* the characteristics of the workers

* existing national and local bargaining arrangements

* the views expressed by the Union and Employer (and, in the case of the Employer's views
  any alternative bargaining unit proposed by the Employer)

* the location of the workers

Reasons

79. Before turning to our conclusions on the primary issue of whether the proposed bargaining unit is deemed to be appropriate, as considered under the overriding test of what is compatible with effective management, we will deal with the Panel's conclusions on the other relevant and permissible considerations, insofar as they do not conflict with the issue of compatibility with effective management:

Characteristics of workers

80. The Panel is of the view that the Union's proposed bargaining unit contains job roles with shared features, which would tend to support the positon that it is appropriate for the purpose of collective bargaining for a distinct group; namely that all the workers within it are easily identifiable by job title, job role and job function. Further, all job roles in the Union's proposed bargaining unit share many common and unifying characteristics, including similar skills sets, similar pay and conditions and they are all classed as 'management' roles. Indeed, workers at Level 4 and above participate in the current Manager's Forum

81. The Panel's conclusion therefore is that the shared characteristics of the workers within the proposed bargaining unit is a strong starting point for designating an appropriate unit for the purpose of collective bargaining for a distinct and cohesive group of workers at management level. However, it was noted by the Panel that the evidence in this case confirms that Level 4 and Level 5 workers would be junior and middle management levels respectively, which share strong similar characteristics, for example levels of authority and line management reporting structure. Whereas, Level 6 is the highest level of executive staff in the entire organization. These workers report directly to Board level and have significant leadership responsibility, considerable influence on organizational strategy and the top level decision making of the organization. In Northern Ireland terms, there are only 5 Level 6 workers

82. In terms of any collective bargaining process, the Panel is of the view that it is questionable how any Level 6 leader in Northern Ireland could conduct collective bargaining for such a unit on behalf of the Employer, without creating a conflict of interest which may be unmanageable. A Level 6 leader has no direct line manager as per Level 4 and Level 5 staff, and they report to Board level. A Level 6 leader also has significant influence and control over organisation strategy and decision making. In the context of governance and checks/balances, the Panel is of the view that the inclusion of Level 6 staff in a combined bargaining unit that includes Level 6 workers, could produce a bargaining process which is difficult to co-exist with effective governance and management.

Existing National and Local Bargaining Arrangements

83. The Union argued that it is well placed as a collective bargaining partner of the Employer because it is currently the sole Union which is recognised by the Employer, albeit for staff below Level 4. The Union further argued that it historically enjoyed recognition rights for Level 4 staff and above. The Union also argued that management level workers are now actively seeking the recognition of their Union for pay bargaining to be reignited. The Union argued that it is therefore clear that the Employer should recognize the Union once again as a bargaining partner for workers at this level.

84. The Union further stated that refusal of voluntary recognition by the Employer has led it to take advantage of the option of applying for statutory recognition under the Northern Ireland legislation for its members at Level 4 and above in Northern Ireland who want Union recognition. This statutory route is not currently open to the Union in the Republic of Ireland. However, the Union argued that it is entitled to invoke the statutory rights afforded to those Northern Ireland workers at Level 4 and above who want their Union to collectively bargain on pay, on their behalf.

85. The Employer accepted at the hearing that this strategy on the Union's part may be lawfully accessible in this jurisdiction and that the Union may have a significant level of membership in the unit proposed. However, the bargaining unit proposed is commercially problematic because the existing negotiation arrangements for Level 4 staff in the entire Group is done through its Managers' Forum and the existence of any separate bargaining unit for Northern Ireland workers would cut across this pay negotiation arrangement and would therefore be unworkable. Further, the Employer is not convinced that Union membership equates to support for recognition and argued that many members may have retained their membership just because they did not cancel it after de-recognition of the Union for management level staff, for example they may have retained membership for personal reasons and reasons other than supporting Union recognition for managers. (Note - The Chairman advised the parties at the hearing that the issue of membership density/support for recognition will be further considered at the next stage of the process and recognition may need to be tested by ballot if the qualifying conditions are met, but this is not a matter for consideration at this stage of the process).

86. The Panel is of the view that the existing bargaining arrangements are not an impediment to the designation of the proposed bargaining unit as being appropriate. The Panel notes the concerns of the Employer about cutting across the negotiations with the Manager's Forum, and that this forum represents the majority of its management staff across the Group. However, this argument only relates to the challenge for the Employer in fairly balancing any differences of *outcomes* which may flow from collective bargaining. It is not a credible impediment to the Employer managing the process of collectively bargaining with the Union for this group of workers. The task of the Panel is to decide what is workable as a process, any potential future outcomes of any bargaining process, should the Union achieve statutory recognition, is not a matter for the Panel to consider.

Location of the Workers

87. The application is limited to a bargaining unit of Northern Ireland workers at Level 4 and above. However, within those workers, some at Level 4 and above are based in Northern Ireland but work across the operations of the organization outside Northern Ireland. For example, a Level 6 worker can be a 'Group' leader and may be the overall Director of certain functions across all jurisdictions of the Employer's operations.

88. It is the view of the panel that the stated location of a worker in Northern Ireland and/or a worker's address in Northern Ireland gives the entitlement of that worker to fall within a bargaining unit of Northern Ireland workers. However, the Panel accepts the point made by the Employer that a very senior leader at Level 6 who is a cross jurisdictional leader, who operates in multiple locations and who has significant influence and leadership may not be an appropriate worker to include in the bargaining unit. This consideration is not wholly related to the working or residential location of certain workers within the bargaining unit, but is more of an extension to the consideration of the characteristics of workers at Level 6, in terms of their significant seniority and overall leadership responsibility for the Employer's undertaking. These considerations have led the Panel to question whether the inclusion of Level 6 workers in the bargaining unit is appropriate. Our conclusions on the matter of Level 6 workers is set out below at paragraphs 95 and 96.

Views expressed by the Union and Employer (including the view of the Employer on any other bargaining unit that it considers would be appropriate):

89. The Union has argued that the proposed bargaining unit is appropriate in that it designates a category of workers with very clear and obvious links and commonalities and is therefore compatible with effective management, because such a unionized unit can coexist with effective management of the Employer's overall undertaking. The Employer claims that such a unit will be difficult to manage separately, will cause workplace division and unrest and will cut across company practice and approaches to managing pay and reward for other similar staff across the wider organisation at same or similar pay grades.

90. In illustrating its argument, the Employer had previously put forward a suggested alternative bargaining unit, which is considerably larger in number, and includes workers across the Group. The Panel's reasoning and decision on the point of jurisdiction is set out at paras 7-11 above.

91. Notwithstanding the fixed issue of jurisdiction, the Employer argued at the hearing that the achievement of recognition limited to such a small group of its workers - those which fall into the Northern Ireland side of its operations - is largely pointless. The Employer argued that the Northern Ireland Union members at Level 4 and above represents only 3% of its total workers at Level 4 and above in the Group. It would not be feasible to bargain on pay with such a small fraction of what the Employer regards as the total group, and further, the support for Union recognition across the Group at Level 4 and above is unknown. Some thirty years ago these management level workers ceased to be a part of Union pay bargaining and set up separate arrangements on pay negotiations through the Managers' Forum. This arrangement works well in the view of the Employer and, reverting to Union

recognition for such a small part of the management staff would cut across the current arrangements which applies to all management staff at present. There would also be a limit to any meaningful outcomes from collective bargaining when the Union has support of only a very small part of an overall cohesively structured group of the Employer's management staff.

92. By way of comparison, the Employer argued that a cohesive collective bargaining approach applies to non-management staff (those below Level 4) across both Northern Ireland and the Republic of Ireland. This is because the Union enjoys recognition rights under a voluntary agreement for all staff below Level 4, regardless of the two different legal jurisdictions. The Employer stated that the Union cannot replicate its Group-wide standing for staff below Level 4, for those staff above Level 4, given its limited support across the whole Group amongst the totality of staff above Level 4. Thus, seeking statutory recognition for such a small fraction of the overall management staff (Northern Ireland only) will be disruptive and any desired outcomes will be constrained by the Employer's need to balance the pay awards for its full workforce at Level 4 and above, equality considerations and the Employer's duty to negotiate with the Managers' Forum.

93. The Union rejected this argument and stated that any employer working across jurisdictions must consider and manage the application of different laws and of different pay allowances which apply in certain places and not in others, a well-known example being the London Weighting Allowance. The Union acknowledged that any negotiations for a Northern Ireland unit would not apply to workers beyond Northern Ireland, but it is compatible with effective management if Northern Ireland workers are represented by a recognised Union for pay bargaining, when the majority of those workers have demonstrated a desire for recognition of their Union by their Employer. The Union stated that it cannot, at present, pursue a statutory process for recognition in the Republic of Ireland under the present Labour Laws in that jurisdiction, but this disparity should not disadvantage Northern Ireland workers and their Union in seeking to apply their statutory rights under the Schedule.

94. The Panel has carefully considered the opposing views of the Union and Employer. The Panel particularly noted the information provided by the Employer about the nature of the Level 6 role.

95. Having carefully considered the comprehensive submissions of both parties, the Panel has reached the view that the Union's proposed bargaining unit is not appropriate and it is not compatible with effective management for the following reason:

- The inclusion of Level 6 workers within the proposed bargaining unit is not compatible with effective management

96. The Panel has reached this conclusion based on the evidence of the considerable level of influence and decision making of Level 6 workers. These are characteristics which sets these workers apart from Level 4 and Level 5 workers. Further, there is a potential for a significant conflict of interest for Level 6 workers acting as negotiators on behalf of the Employer in a collective bargaining process for

a combined bargaining unit of Levels 4, 5 and 6 staff, given the level of influence and seniority held by Level 6 workers. The Panel is therefore of the view that Level 6 workers are a distinct and separate Group whose terms and conditions are more appropriately managed and negotiated separately. The Panel is of the view that Level 5 workers are not likely to be conflicted to the same degree and that a unit comprising of Level 4 and Level 5 workers would be appropriate for a process of collective bargaining which would be compatible with effective management of the Employer's undertaking.

97. The Industrial Court is therefore required to determine the appropriate bargaining unit. The Panel is of the view that the appropriate bargaining unit is:

'***Allstaff at Level 4 and Level 5 in Northern Ireland'***

This bargaining unit is considered by the Panel to be appropriate and compatible with effective management for the following reasons:

- This bargaining unit can be clearly understood by both parties as to which workers fall within it and which do not
- Level 4 and Level 5 are workers at junior and middle leadership level respectively
- The job roles are similar job roles with a strong commonality of features including similar pay rates and employment conditions and also share similar line management and reporting arrangements
- The budget responsibility for Level 4 and Level 5 workers is under the same management
- Whilst the Employer is concerned that separate arrangements on pay for Northern Ireland management staff will be divisive, cut across existing pay negotiation structures and conflict with arrangements for the rest of the Employer's Level 4 and Level 5 workforce outside Northern Ireland, such a submission is an argument against the principle of statutory recognition for collective bargaining. This relates to the Employer's dissatisfaction with the Union utilising the applicable law in Northern Ireland for Northern Ireland workers and it is not a sufficient reason for the Panel to determine that a bargaining unit of Northern Ireland workers is not appropriate. This submission is also an argument about the potential for *outcomes* which may or may not flow from collective bargaining and which could be problematic. Such an argument does not demonstrate that a process of collective bargaining for this particular group of workers cannot coexist with effective management. If the Union were to achieve recognition, this will merely enable the Union to negotiate on behalf of this particular unit of workers, it does not require the Employer to accede to Union demands.

- DECISION

The Decision of the Industrial Court is that the appropriate Bargaining Unit is

'All management staff at Level 4 and Level 5 in Northern Ireland'

Mr. Sarah Havlin
Ms Barbara Martin
Mr Patrick Masterson

DATE: 27th September 2023