Case Ref No: IC-73/2018

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 WORKERS CONSTITUTING THE BARGAINING UNIT

The Parties:

Unite the Union

And

Kestrel Foods Ltd.

DECISION

Background

1. The Industrial Court (the Court) received an application, on 13th March 2018, from Unite the Union for recognition at Kestrel Foods Ltd, Unit 8, Carn Drive, Carn Industrial Estate, Portadown BT63 5WJ. This address is the location of the proposed bargaining unit. The bargaining unit was described as "production operatives." The Court accepted the application by way of a short Decision dated 16th April 2018 and a Long Decision, issued on 2nd May 2018.

2. The Court decided that the proposed bargaining unit was the agreed bargaining unit, described as "production operatives", by way of a Short Decision of 22nd May 2018 and issued on 2nd July 2018.

3. The Court further decided that it intended to hold a ballot and notice of this was communicated to the Parties on 6th June 2018 and a Long Decision was issued on 6th July 2018.

4. The Court further decided, by way of a Long Decision dated 5th July 2018, and issued on 3rd August 2018, that a workplace ballot should be held on Friday 24th August 2018 with appropriate exceptions for postal ballots for those on anticipated absence on that date. Those entitled to participate in the ballot were only those workers set out in the Court's Decision of 22nd May 2018.

Workers constituting the bargaining unit

5. In response to its 'third duty' under paragraph 26(4)(a) of the Schedule, the Employer provided, on 10th July 2018, the names and addresses of workers constituting the bargaining unit and has been fulfilling its duties under paragraphs 26(4)(b) and (c) to provide to the

Court the names and addresses of workers joining and ceasing to be members of the bargaining unit.

6. The Chairman of the Panel issued a Note to the Parties on 15th August 2018 in order to clarify the outstanding issues on workers constituting the bargaining unit. The Panel met on 17th August 2018 to seek to resolve this outstanding matter. One Panel Member was on leave and unavailable to participate in the Panel's deliberations. However, he has approved the Chairman's Note, agreed that the Panel should seek to resolve this matter and has since approved this Decision.

7. The Decision of the Court on the bargaining unit, dated 22nd May 2018, and issued on 2nd July 2018, set out the agreed bargaining unit as being 'Production Operatives'. In the 'Conclusions' to that Decision, at paragraph 29, the Court stated, "in light of the remarks made by both Parties at the Hearing, that the 49 workers constituting the agreed bargaining unit were made up of the category of workers with contractual job titles of 'Production Operatives' and that the agreed bargaining unit did not differ from the proposed bargaining unit."

8. In the Court's Decision on Ballot, dated 5th July 2018 and issued on 3rd August 2018, the Court stated that "Those entitled to participate in the ballot were only those workers set out in the Court's Decision of 22nd May 2018." At paragraph 17 of the Decision, the Court stated, "The figure of 49 workers had been insisted upon by the Employer during the appropriate period leading up to the Court's determination. The Court therefore expected the Employer to provide only the names and addresses of workers who are 'four square' equivalent to those 49 workers."

9. At paragraph18 of the Decision, it is stated, "The Chairman stated that the Court would scrutinise closely the names and addresses provided under paragraph 26(4) before forwarding them to the QIP to ensure that only workers in the agreed bargaining unit, as determined by the Court in its Decision of 22nd May 2018, were included in the ballot."

10. In response to the Case Manager's letter of 20th July 2018, the Employer provided a list of names, addresses and job titles of those workers constituting the bargaining unit. Following a Panel meeting on 3rd August, the Case Manager wrote again to the Employer, copied to the Union, on 6th August, requesting further information in relation to a range of workers.

11. The Employer replied promptly on 8th August. This response was not copied to the Union, as explained in the Case Manager's letter to the Union of 10th August. At a Panel meeting on 9th August, the Panel decided to seek further information from the Employer, and the Union, in relation to the employment, if any, of three categories of atypical workers on a range of dates and between dates. Responses on the part of the Employer and the Union were requested by close of play on Wednesday 15th August.

12. As stated above, the Court had already set out its intention to scrutinise the names and addresses to be forwarded to the qualified independent person (QIP) in light of the previous discrepancies in the information provided by the Employer.

13. In relation to various forms of atypical employment, the bargaining unit, as originally proposed by the Union and agreed between the Parties, does not exclude workers in such employment relationships. Indeed, it was the Union, in a communication of 19th June 2018 which first mentioned atypical workers. Nonetheless, since the Employer has included workers in atypical employment in its list of names and addresses to be passed on to the QIP,

the Court is seeking to clarify whether these workers come within the agreed definition of the workers constituting the bargaining unit. As stated above, these are "who are 'four square' equivalent to those 49 workers."

14. The purpose of the Court's letters of 9th August to the Employer, and 10th August to the Union, was to seek to establish whether workers in any of these atypical employment relationships were employed on any of the dates outlined or between the dates outlined.

15. The Panel had not, at that stage, reached any conclusions on these matters. Depending on the information received, the Court could conclude that atypical workers were employed on certain dates, namely on 24th April or 22nd May or between those dates (but were not included in the 49 employees identified as within the bargaining unit).

16. Those dates and periods of employment are 'Employed on 12 March 2018', being the date upon which the application was received, 'Employed between 12 March and 24 April 2018', the latter being the date upon which the Employer fulfilled its duty under paragraph 18A of the Schedule, 'Employed on 24 April 2018', 'Employed between 24 April and 22 May 2018', the latter being the date upon which the Court determined that the Parties had agreed the bargaining unit, and 'Employed on 22 May 2018'. If so, it is at least arguable that these workers were therefore not in the contemplation of the Parties when the bargaining unit, being these 49 identified workers, was agreed and determined.

17. On the other hand, if no such workers were employed on or between these dates (and were included in the 49 employees identified as within the bargaining unit), it is at least arguable that, so long as these workers are 'Production Operatives', they are 'four square' equivalent to those 49 workers whom are agreed to constitute the bargaining unit.

18. It is the normal practice for the Court to pass to the QIP those names and addresses given to the Court by the Employer unless there are concerns over the issue at hand, namely which workers constitute the bargaining unit. The Court could therefore only exclude the names and addresses of workers so provided by the Employer if it was fully satisfied that such workers are not within the workers constituting the bargaining unit.

19. Both Parties were invited to respond to the matrix provided by close of play on Wednesday 15th August. The Union was given sight of the provided matrix, but not any names or addresses, so that it had an opportunity to respond to it by 10am on Friday 17th August. In order to expedite the resolution of this outstanding matter, both Parties were invited to make submissions to the Court on the position of any additional atypical workers by 10am on Friday 17th August.

Submissions of the Parties

20. On 15th August 2018, the Employer made its response, setting out the figures requested in the provided matrix of dates and periods of employment, as follows:-

	Fixed Term Contract Worker	**Casual Worker**	**Agency Worker**
Employed on 12 March 2018	1	0	0
Employed between 12 March and 24 April 2018	3	0	0
Employed on 24 April 2018	0	0	0
Employed between 24 April and 22 May 2018	2	0	4
Employed on 22 May 2018	2	0	0

It provided the names and employment status of the workers identified in the matrix and also, as requested, a template agency worker contract.

21. The Union, in submissions dated 16th August, made the following points. It submitted that casual/temporary workers had been brought in but there was no 'large contract', as claimed by the Employer, to justify this increase. It claimed that this increase had resulted in a reduction in overtime and additional hours for the workers in the bargaining unit. The Union also submitted that these workers also included 'students who had no intention of staying' and included some family members. The Union claimed that these workers had been 'brought in to load up the bargaining unit with workers who would vote against' recognition.

22. The Employer did not make any further submissions beyond its response of 15th August.

Deliberations

23. The Panel reminded itself that it had determined that it would only exclude the names and addresses of workers so provided by the Employer if it was fully satisfied that such workers are not within the workers constituting the bargaining unit.

24. The Panel considered the evidence submitted by the Employer on 15th August 2018 and various correspondence from the Union. It took into account that the evidence from the Employer indicated that no atypical workers were employed on 24th April 2018, the date upon which the Employer responded to its paragraph 18A duty. Although atypical workers

were employed on other dates and during other periods, the Panel concluded that it was not 'fully satisfied' that the Parties contemplated that two categories of workers in these atypical employment relationships, namely those on fixed-term contracts and those on 'casual' contracts, were excluded from the bargaining unit agreed by the Parties on 22nd May 2018.

25. No worker in these two categories was employed on 24th April 2018, the date upon which the Employer responded to its paragraph 18A duty. Two fixed-term contract workers were employed between 24th April and 22nd May and on 22nd May, when the bargaining unit was agreed. However, the primary controversy at that stage was the distinction between those workers who were 'contractual Production Operatives' and those who were not. The Union's submissions, in raising an issue of alleged 'loading up' of atypical workers into the bargaining unit, appeared to the Panel to raise a separate issue to that of whether workers in these employment relationships were 'workers constituting the bargaining unit'.

26. The Panel was aware that these categories of atypical workers had not been excluded from the proposed and then agreed bargaining unit. The Employer had provided a template fixed-term contract and stated that a casual worker contract was identical except for the term of employment. In these circumstances, the Panel could not distinguish between these atypical employment relationships and that those workers in these relationships could not be excluded from the workers constituting the bargaining unit on the basis of their employment relationship.

27. The Panel also considered the position of agency workers in the bargaining unit. The Panel noted that no agency workers were employed on 24th April or 22nd May 2018. There were four agency workers employed between those dates but these workers did not appear on the lists provided by the Employer. The names of two further agency workers were included on the list of workers in the bargaining unit provided by the Employer on 10th July, under its duty in paragraph 26(4)(a) of the Schedule, but these workers had not appeared on later lists provided.

28. There also remains an unresolved issue of whether agency workers are 'workers' for the purposes of the Schedule. The Court has not heard submissions on this matter. However, if the Court had concluded that agency workers could be workers constituting the bargaining unit, it would have had to consider this issue.

29. This issue would have to be considered in light of The Agency Workers Regulations (Northern Ireland) 2011. It can also be noted that the Agency Worker contract provided by the Employer is, as would be expected, based on the Regulations.

30. On the one hand, regulation 6 of the Regulations ('Relevant terms and conditions') provides:-

> *"(1) In regulation 5(2) and (3) "relevant terms and conditions" means terms and conditions relating to—*
>
> *(a) pay;*
>
> *(b) the duration of working time;*
>
> *(c) night work;*
>
> *(d) rest periods;*

(e) rest breaks; and

(f) annual leave."

Paragraph 3(2) of the Schedule provides:-

> *"(2) References to collective bargaining are to negotiations relating to pay, hours and holidays;"*

Hence, two of the three 'core issues' upon which collective bargaining may take place under the Schedule are included in the 'relevant terms and conditions' governed by the Regulations.

31. On the other hand, 'worker' is defined, in regulation 2(2) of the Regulations, as:-

"an individual who is not an agency worker but who has entered into or works under (or where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual,

and any reference to a worker's contract shall be construed accordingly."

This definition of 'worker' coincides with the definition of 'worker' set out in in Article 2(2) of the 1995 Order which provides the definition of 'worker' for the purposes of the Schedule.

32. Hence, without the deciding the issue, it would appear that the definition of 'worker' in the Regulations excludes agency workers from being within the scope of the definition of 'worker' for the purposes of the Schedule.

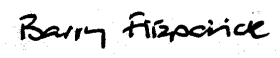
33. In the circumstances, and on the balance of probabilities, the Panel concluded that agency workers were not in the contemplation of the Parties when the bargaining unit, of the 49 workers who were 'Production Operatives', and those 'four-square equivalent' to those workers, was agreed.

Conclusion

34. The Panel was concluded that there was insufficient evidence that it was in the contemplation of the Parties that fixed-term contract workers and casual workers should not be included amongst those constituting the agreed bargaining unit. On the balance of probabilities, the Panel concluded that agency workers were not intended to be included in the agreed bargaining unit.

DECISION

35. The Decision of the Industrial Court is that those workers set out in the Court's Decision of 22nd May 2018 as constituting the bargaining unit include fixed-term contract workers and casual workers but not agency workers.



Mr Barry Fitzpatrick
Mr Patrick Masterson
Mr Robin Bell

Date of decision – 17th August 2018
Date decision issued to Parties – 5th September 2018