# Case Ref No: IC-84/2021

**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**

**[DRAFT] DECISION ON WHETHER TO ACCEPT THE APPLICATION**

**The Parties:**

Unite the Union

And

Actavo (NI) Ltd

**Background**

1. The Industrial Court (the Court) received an application on 31st March 2021, for recognition at Actavo (NI) Ltd, 14-15 Harbour Court, Heron Road, Sydenham Business Park, Belfast. The bargaining unit was described as ‘All Actavo Engineers and Store Workers in Northern Ireland’.

2. The application was copied to the Employer on 1st April 2021. The Employer Response Form was issued to the Employer on 1st April 2021 with a deadline of 12th April 2021.

**Application Form**

3. In its application, the Union stated that the total number of workers employed by the employer was 50, the number of workers in the bargaining unit was 41 and the number of Union Members in the bargaining unit was 21.

4. The Union also produced a letter to the Court which was from the Union to the Employer, of which the Employer acknowledged receipt on 15th March 2021, which made a formal request for recognition.

This letter describes the bargaining unit as:

‘All Actavo Engineers and Store Workers in Northern Ireland’.

**Employer Response to Union Application**

5. The Employer Response was received on 12th April 2021.

In its response, the Employer stated that the Union’s written request for recognition under Schedule 1A was first received on 15th March 2021.

On the answer to the question about receipt of application, the Employer stated that it had received the Application Form on 31st March 2021 and that the bargaining unit had not been agreed prior to receiving the application.

6. The Employer stated that it employs a total of 110 workers. The Employer did not agree with the number of workers in the bargaining unit as defined in the Union’s application and stated:

‘The union’s proposed bargaining unit (as described on their application) is “all Actavo Engineers and Store Workers in Northern Ireland”. The union claims that there are 41 employees in that proposed bargaining unit, that the employer has approximately 50 employees in total, and that the union has membership of 21 out of 41 in the proposed bargaining unit. Whilst the employer cannot verify (or not) the size of the union’s membership, all of the other numbers provided by the union are incorrect. In total within Northern Ireland, the employer currently employs 110 employees, of which 89 are engineers (including team leaders) and 5 employees work in the employer’s stores. In addition, the employer engages a number of sub-contractors. The employer divides that workforce between two of its major clients. The employer believes (but does not know for certain) that the union’s application relates to only part, not all, of its NI workforce. Even then, the union’s numbers are still incorrect, with 52 employees being engineers and/or stores workers, not 41 as the Union believes’.

7. On 14th April, the Employer was advised to produce an Organisational Chart to the Court in order to understand the corporate structures in relation to the two sub-contractors. The Union was also asked to provide any comments in relation to the Employer Response Form and stated, on 15th April:

‘In relation to the numbers, we were basing our figures on the detail provided to us by members of the union. If it is the case that there are other employees who carry out the same function i.e. engineers and stores persons, then we would be including them in any recognition request irrespective of what external contract they were working on. We do not consider that they would fall into a different bargaining group due to the contract they were working on’.

**Panel Meeting on Friday 16 April 2021**

8. The Court Panel met on Friday 16th April to review the papers in this application. The Panel concluded that the range of matters in relation to admissibility and validity tests appeared to be satisfied but that further clarification would be required as to the location of the workers in the proposed bargaining unit and how the job titles in the provided Organisational Charts related to the categories of Engineers and Store Workers.

**Membership Check Requested**

9. In order to assist in the completion of the determination of the tests in the Schedule, the Chairman, with approval from the Panel, instructed the Case Manager to conduct a membership and ‘majority likely to’ check. The following information was requested from the Parties:

From the Union:

* **the names and addresses of all Union members currently within the proposed Bargaining Unit on Friday 16th April 2021;**
* **your understanding of the job titles of each of these Union members;**
* **details of how Union subscriptions are paid by members, amount paid, and date of last payment.**

The Employer was asked to provide:

* **a list of the names and addresses of the workers in the proposed bargaining unit on Wednesday Friday 16th April 2021; and**
* **job titles for each of these workers.**

10. Both Parties were asked to provide the Panel with a cross-referencing chart setting out which job titles, as set out in the Employer’s organisational chart, corresponded with the categories of workers described in the proposed bargaining unit as ‘Engineers and Store Workers’.

The Parties were asked to supply the information to the Case Manager no later than 5pm on Thursday 22nd April 2021.

**Information provided by the Parties**

11. On Monday 19th April 2021 the Union provided:

* A membership list containing 21 names, with membership numbers, method of payment, date of last payment, addresses and understood job titles for those within the proposed bargaining unit.

On 22nd April, the Union, rather than produce a cross-referencing chart, further stated, ‘With respect to the Actavo Northern Ireland Organisation Chart, the bargaining group that we are referring to are the Client A staff titled:-

Installation Engineer X 44

Store Assistant X 3’

12. On Thursday 22nd April 2021 the Employer provided a response to the Court with the following:

* A list of 57 workers including names, addresses and job titles relating to Client A
* A list of 53 workers including names, addresses and job titles relating to Client B

Rather than produce a cross-referencing chart, the Employer gave a further explanation of its stance towards workers in the proposed bargaining unit as follows:

‘The Industrial Court also asked for an explanation of job titles of “engineers” and “stores”.

First and foremost, very few (if any) of the “engineers” are engineers in the lay or

professional sense. These are job roles/ titles that are used by/ chosen by Client A and

Client B respectively, and Actavo simply replicates those as a matter of convenience and

to comply with the clients’ wishes. Client A refers to “installation engineers”, whereas

Client B refers to “enablers”, or “installation technicians”. No engineering qualifications

or experience is required of any of those job holders.

If the Industrial Court is minded to consider all of Actavo’s Northern Irish operations as a

single unit, then the more reliable way to compare (or distinguish, as the case may be)

is by reference to the job descriptions which we can send to the Industrial Court if it

wishes. In terms of commonality, other than the warehouse/ stores-based employees,

all the remainder are field-based employees undertaking technical duties, but Actavo

reiterates (as it did in the Employer Response Form) that these employees work in two

entirely separate teams.’

**Membership and ‘Majority Likely to’ Checks**

13. A comparison of the names and addresses on the Union Membership list, with the list of workers in the proposed bargaining unit supplied by the Employer showed the following:

**Result of the checks of the level of Union Membership and ‘majority likely to’**

|  |  |  |
| --- | --- | --- |
|  | Client A | Client B |
| Number of workers on list supplied by the Employer | 57 | 53 |
| Number of Union Members relevant to this application on list supplied by the Union | 21 | 0 |
| Number of Union Members with dues paid | 20 | 0 |
| Number of Union Members whose names and addresses match with those provided by the Employer | 14 | 0 |
| Number of workers who would be likely to favour recognition of the Union | **14(24.6%)** | **0 (0%)** |

The following points should be noted:

1. On the Union’s list, four members had different addresses but the names matched, this would bring the percentage likely to favour recognition to **18** (**31.6%)**.
2. Two names on the Union list were not included on the Employer list but in a letter accompanying the membership check the Employer has stated that two workers have left the company. One of these two names has also not paid Union contributions since December 2020.
3. The Employer also excluded a worker who resides in the Republic of Ireland that did appear on the Union list. If this worker was included the percentage likely to favour would be **19 (33%)**.
4. The Union stated in an accompanying note with the member list that they have two further members listed against a workplace of Actavo, with an address of Channel Commercial Park, Belfast but have not included them on the membership listing provided to the Court in case they are not directly employed by Actavo Communications. The Union also stated that their membership list related to Client A.
5. The Employer’s list for Client A included the following job titles:

Regional Manager, Resource Manager, Planning and Optimization Manager, Field Efficiency & Crewing Manager, Team Manager, Warehouse Supervisor, Scheduler, Installation Engineer and Stores Assistant.

1. The Employers list for Client B included the following job titles:

Head of Commercial Networks, Operations Manager, Senior Contracts Manager, Cabling Operations Manager, Commercial Manager, Civils Manager, Stores Manager, Enabling Team Manager, Cable Technician, Residential Technician, Installation Technician, Office Administrator, Administrator, Noticing Administrator, Civils Work Team Member and Enabler.

1. For Client A, if those workers with the job titles of managers and supervisors were discounted and only those job titles specified in the Union’s proposed Bargaining Unit were included, the count would stand at 47. Taking account of points 1 and 3 above the percentage likely to favour recognition at Client A would be **19 (40%)**.

14. On 27th April in a letter to the Court, the Employer advised that the list provided was not for the date specified in the membership check letter of 16th April. The letter stated:

‘As I explained yesterday, in the course of discussing your report with Actavo NI, it transpired that unfortunately there had been an administrative error when compiling the list of names and addresses for the purposes of the membership check. In short, Actavo NI had

produced the list of names and addresses as at 15 March 2021 (the date of the union’s

application for recognition) and not as of 16 April 2021 (the date of the court’s request

for a membership check).

In that intervening month there had been a number of changes to the numbers of

employees (some internal transfers, some new joiners etc). I can confirm that the list

now attached (called version 2) is the correct list, and is accurate as at 16 April 2021. I

have tracked the changes to the list and added some additional comments by way of

context/ explanation.

With regards to your letter of Friday 23 April 2021, clearly this new list may change your

membership check. By Actavo NI’s reckoning the number of employees in the proposed

bargaining unit may have increased. That may or may not have a knock on effect on the

numbers/ proportion of union membership.’

15. A new list of workers only for Client A was provided.

**Result of the checks of the level of Union Membership and ‘majority likely to’ taking into account only those job titles specified in the proposed bargaining unit**

|  |  |
| --- | --- |
|  | Client A |
| Number of workers on list supplied by the Employer | 51 |
| Number of Union Members relevant to this application on list supplied by the Union | 21 |
| Number of Union Members with dues paid | 20 |
| Number of Union Members whose names and addresses match with those provided by the Employer | 14 |
| Number of workers who would be likely to favour recognition of the Union | **14(27.4%)** |

If the 4 workers noted above at Point 1 were included the final count would stand at **18 (35.2%).**

The worker at point 3 can now be excluded as they no longer work in Northern Ireland.

16. At a Panel meeting held on 28th April 2021, the Panel determined that the Parties needed more time to make submissions on the revised membership check figures provided by the Employer. Accordingly, the Case Manager wrote to the Parties on 29th April giving them until noon on Thursday 6th May 2021 to make further submissions on the revised Case Manager’s Report.

17. It came to light after the Panel meeting of 28th April that the Parties had made further submissions, as set out above, on the issue of which categories of workers should be included in the categories of ‘Engineer’ and ‘Store Worker’ in the proposed bargaining unit. However, these submissions had not been made available to the Panel, or indeed to the respective Parties, when it provisionally considered this matter at its 28th April meeting.

18. The Case Manager therefore wrote to the Parties on 4th May 2021 enclosing further relevant submissions.

19. As a result of further correspondence with the Parties, the Case Manager wrote again to them extending the deadline for further submissions until noon on Wednesday 12th May 2021.

20. In a letter dated 12th May, the Union made the following statement:

‘We, Unite the Union have been working with our members since March of last year recruiting employees who wanted to join the Union and were keen to have a recognised Union in Actavo in order to address workplace issues. The covid 19 pandemic together with the mobile nature of the workforce in question seriously impacted on our ability to communicate with employees. We had recruited more than 50% of the workforce at one time over this period however members were dissatisfied at the speed of addressing the issue. It was our understanding that the Court was not accepting applications for some period during this time.

We had written several times seeking to engage with the company without reply. At the time of initial application to the courts we had what we believed to be, more than 50% of the bargaining group as we saw it at that time. To date the figures as of today’s date 12 May 2021 have increased by 1 with that persons details attached separately.

We believe that any poll of the workforce will demonstrate a clear majority of staff within the previously described ‘bargaining group’ in favour of having a recognised trade union within the employer.’

21. The Panel met again on Friday 14th May to consider the application. It should be noted that the Panel was operating under a significant disadvantage of not having paper files at its disposal.

**Considerations**

22. Being satisfied that all the other admissibility and validity criteria were satisfied, the Panel considered the ‘majority likely to’ test in paragraph 36(1)(b) of the Schedule which provides:

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

…

(b) a 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.’

23. The first issue to be determined was which categories of workers should be included in the proposed bargaining unit. The second issue was whether the ‘majority likely to’ test had been satisfied.

**Categories of workers in the proposed bargaining unit**

24. The Union’s description of the proposed bargaining unit indicated that the categories of workers to be included in the proposed bargaining unit were ‘Engineers’ and ‘Store Workers’. Although, in its letter of 22nd April, the Union made reference to a ‘functional’ approach to this issue, the Union had, in its submissions, referred only to categories of workers with the job title ‘Engineer’ and ‘Store Worker’.

25. However, both in its Response Form, and in further submissions, particularly of 22nd April, the Employer put forward the view that there was no meaningful distinction between workers with the job title ‘Engineer’ and other workers who performed identical functions in other parts of its organisation, particularly ‘Client B’, where those whom it considered to be ‘Installation Engineers’ had job titles of ‘Enabler’ and ‘Installation Technician’. Indeed, it offered to provide job descriptions of these respective job titles in furtherance of its submissions. It also indicated that various other categories of workers, primarily in managerial grades, should be treated as ‘Engineers’.

26. The Panel considered these respective submissions. On the one hand, it was the Union, at this acceptance stage, which sets out the terms of the proposed bargaining unit and it appeared that the Union, despite reference at one stage to the ‘functions’ of the jobs, was relying on job titles in its description of the proposed bargaining unit. On the other hand, to the extent that the term ‘Engineer’ could be interpreted as a generic category of worker, the Employer had put forward an arguable case that other workers, with job titles such as ‘Enabler’ and ‘Installation Technician’, performed identical functions to those who had the specific job title ‘Engineer’. It had also submitted that certain managerial grades could be considered as ‘Engineers’.

27. The Panel concluded that it should accept the Union’s interpretation of its own proposed bargaining unit. If the application was accepted, it would be open to the Employer to put forward an alternative bargaining unit, including ‘Enablers’ and ‘Installation Technicians’ and some managerial grades, at the subsequent bargaining unit stage.

**‘Majority likely to’ test**

28. According to the revised Case Manager’s Report, Union membership, at its height, stood at 35.2%, being 18 workers out of the 51 workers identified by the Employer as being in the proposed bargaining unit.

28. It is common practice both within the Court and the CAC to consider a ‘momentum’ approach where Union membership falls short of majority membership, together with any further evidence of a ‘majority likely to’ favour recognition for the purposes of collective bargaining.

29. For example, the Union’s Application Form indicated that there were 41 workers in the proposed bargaining unit. On that basis, the Union would have had 44% membership in the proposed bargaining unit and would have been three workers short of a ‘majority likely to’ threshold.

30. However, at a membership level of 35.2%, and without further evidence of support for recognition within the proposed bargaining unit, such as a petition signed by non-Union workers in the bargaining unit, the Panel did not have the evidence upon which to take such an approach. Both Parties had been given additional time to make further submissions but no further evidence, as opposed to submissions, had been produced upon the basis of which further investigation could be made into the figures in the revised Case Manager’s Report.

31. Accordingly, the Panel decided that the admissibility test in paragraph 36(1)(b) of the Schedule was not satisfied and the application was not accepted.

**DECISION**

For the reasons outlined above, the Industrial Court has decided that:

1. members of the Union constitute at least 10% of the workers constituting the proposed bargaining unit;
2. a majority of workers constituting the proposed bargaining unit would not be likely to favour recognition of the Union as entitled to conduct collective bargaining on behalf of the bargaining unit; and
3. the application meets the remaining admissibility and validity criteria.

The Industrial Court’s decision is therefore that the application is not accepted.



Mr Barry Fitzpatrick

Mr Robin Bell

Mr Patrick Masterson

Decision Date: 14 May 2021

Date Issued to Parties: 20 August 2021