

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

**DECISION ON WHETHER PARAGRAPH 35 OF THE SCHEDULE APPLIES
TO THE APPLICATION**

The Parties:

BECTU

And

Picturehouse Cinemas Limited

Introduction

1. BECTU (the Union), submitted an application under Schedule A1 (the Schedule) dated 27 November 2014 to the CAC that it should be recognised for collective bargaining purposes by Picturehouse Cinemas Limited (the Employer) for a bargaining unit comprising “All staff, with the exception of senior management, including those employed on a casual basis at the Clapham Picturehouse, London”. The CAC gave both Parties receipt of the application on 1 December 2014. The Employer submitted a response to the CAC on 3 December 2014.

2. In accordance with section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), the CAC Chairman established a Panel to deal with the case. The Panel consisted of Professor John Purcell, Panel Chairman, and, as Members, Ms Lesley Mercer and Mr Bryan Taker. Mr Taker was replaced by Mr Peter Martin for the purposes of this decision. The Case Manager appointed to support the Panel was Adam Goldstein.

Correspondence following receipt of the Union's application

3. In its response to the application the Employer contended that there was an existing agreement for recognition in force with City Screen Staff Forum (the Forum) covering workers in the proposed bargaining unit and attached a copy of a document dated 9 January 2004 entitled "THE CITY SCREEN STAFF FORUM: Recognition Agreement with City Screen Limited." By a letter from the case manager dated 5 December 2014 the Panel invited the Union's comment on this issue. In a letter dated 12 December 2014 the Union made, amongst others, the following points. It was noted that the Forum was still returning the Annual Return for a Trade Union to the Certification Officer (form AR21) showing no income and no expenditure. This indicated that it had not developed the financial footprint that would be expected of a trade union. Further, the Union questioned how "members" paying no subscriptions could be seen as genuine members. One of two named officers for the Forum was Marc Allenby who appeared to be Director of Distribution for Picturehouse Entertainment. Further, following the European Court of Human Rights judgment in *Demir and Baykara v Turkey [2008] ECHR 1345 (Demir)* sham agreements with sham unions set up by the employer should be disregarded in the statutory process.

4. The Union's letter was copied to the Employer for comment. These were received in a letter dated 17 December 2014 which made, in summary, the following points. The Forum did not charge subscriptions because it incurred no costs. The Employer questioned the Union's contention that members not paying subscriptions was indicative of a union not being effective and contended that it could in fact show it was an efficient organisation that represented its members. On the Union's point about sham agreements with sham unions, the Employer countered that the Forum had, on a number of occasions, successfully negotiated improvements in pay and conditions for staff. These improvements included a pay increase of 10% in 2014 and a further 2% increase three months later.

The hearing and relevant issue

5. By a letter dated 22 December 2014 the Parties were informed that the Panel had decided to hold a hearing to assist its consideration of whether the Union's application was rendered inadmissible by the existence of a collective agreement between the Employer and the Forum under which the Forum was recognised as entitled to conduct collective bargaining for any workers falling within the Union's proposed bargaining unit. The letter stated that Paragraph 35 of Schedule A1 required that the Panel decide whether the existence of an agreement between the Employer and any other union acted as a bar to BECTU'S application and that the Panel would address this as a preliminary issue. The parties were therefore advised that the Panel would not be seeking to address the other validity and admissibility provisions at the hearing. The Parties' written submissions were invited in advance and the hearing was held on 26 January 2015 in London. The names of those who attended are appended to this decision.

Background

6. Both parties referred to *TUR1309/2003 BECTU & City Screen Limited* in which City Screen Limited (now Picturehouse Cinemas Limited) had contended that, in accordance with paragraph 35 of the Schedule, BECTU's application was inadmissible as there was already in force an existing agreement with Forum. For that case, the Employer submitted a copy of an agreement between it and the Forum dated 10 October 2014. In its decision of 10 December 2003, the Panel on this previous case concluded that, for the purposes of paragraph 35 of the Schedule, there was no collective agreement in force under which a union was recognised as entitled to conduct collective bargaining for the relevant workers.

Preliminary matters

7. Before the hearing commenced, the Panel Chairman requested that the Employer provide copies of minutes of the three most recent of the Forum's AGMs held in 2011, 2012 and 2013. These minutes were referenced within a document already included in the Employer's bundle of documents, being responses by the

Forum's President Ben McSeoin to questions in a letter from the Certification Office of 18 August 2014, but were not included in that bundle. Copies of the minutes were received after the hearing on Monday 2 February 2015 and were forwarded to the Union for comment and the Union's comment is summarised at paragraph 23 below. The minutes recorded 11 attendees for 2011, eight attendees for 2012 and seven for 2013. These included Forum employee representatives from various cinemas including at Oxford, Bath, Cambridge, Liverpool, Clapham, Hackney and Brixton. Subjects under discussion included:

- Pay matters, for example recommending voting against an initial pay offer in order to drive the final offer higher (2011 AGM)
- Queries about a slush fund
- Provision of staff areas and facilities
- Handling of redundancies by the company
- Concerns about communication between managers and staff
- Staff training
- Provision of breaks

In the minutes of 2011 AGM the Forum's Administrator, Marc Allenby was recorded as taking a list of action points to present to the company which the Forum would seek to resolve within a specified period with discussion to take place with directors at a meeting in the summer. The other minutes did not conclude in this way although the 2012 minutes did have a list of "Points to follow up". In the e-mail accompanying the documents the Employer's representative stated that, as the last of these was held in October 2013 she understood that Ben McSeoin (the Forum's current President) was planning to hold the next AGM in March 2015. This was in order to keep the meetings a good distance apart from one another.

8 The Employer also provided, during the hearing, examples of initial pay offers and final pay offers for three years of 2008/09, 2009/10 and 2010/11. These had headings including Front of House, Phone Room, Projectionists and Late Night Allowance. An example of a change between the initial and final offer was in 2010/11 for Front of House where the initial offer of a 2.2% increase from £6.06 to £6.19 (£6.52 in London cinemas) was revised to a 2.75% increase from £6.06 to £6.23 (£6.56 in London cinemas).

Summary of the Union's submissions

9. The Union submitted that the Forum was not an “organisation of workers” as set out at section 1 of the Act. The Forum was an organisation set up by the company with the principal purpose of frustrating the recognition legislation and preventing the Union from gaining recognition. The Forum's Annual Return for Trade Union for the year ended 2012 sent to the Certification Officer showed that the Forum's head office was in the premises of the company; that the Forum had no income or expenditure and that the Forum's members did not pay subscriptions.

10. The Employer had stated that there had been a history of collective bargaining between it and the Forum. However the Union had not seen convincing evidence of genuine collective bargaining. This contrasted with the Union's dealings with the Employer. Mr Donaghy, a Supervisory Official for the Union had first become involved with a campaign at another of the Employer's cinemas, the Ritzy in Brixton, in 2006-2007. There had been two separate strike days. Following this, negotiations had been started with the company and a voluntary recognition agreement was accepted by BECTU members. The agreement included phased increases in pay. As a result of gaining recognition, terms and conditions were far superior at the Ritzy compared to Clapham. In order to demonstrate that Forum members had voted over a pay offer, the Employer had supplied an e-mail dated 2 December 2014 from the Forum's President Ben McSeoin to Alistair Oatey. The e-mail stated the Forum accepted the pay offer in question and detailed that of the 65 Forum members who had voted, 21 had voted “No” and 44 people had voted “Yes”. Apart from this e-mail, the Union submitted, there was no evidence that Forum members voted on pay offers.

11. At least one of the Forum's officers was a Senior Manager employed by the Employer. This called into question whether collective bargaining could be effectively conducted when both sides appeared to be from management.

12. The Union did not accept that the Forum had members in the sense commonly understood for trade unions. Individuals did not pay subscriptions. The Union referred the CAC to standards it applies when scrutinizing union membership for purposes of

the statutory tests where free membership is offered. The Union submitted that an organisation cannot be a union without genuine members. In the Union's view a union member was someone who applied to join and paid subscriptions in order to receive the individual and collective benefits that came from being a union member. It would be impossible for BECTU to provide its various services, such as legal services, if they did receive subscriptions from members.

13. The Forum's communications with its members were not what would be expected of a trade union. BECTU, for example, kept in touch with members on a frequent basis and via a number of means: online, e-mail and letters, through its journal and in face to face meetings. The Employer had not provided evidence of comparable activity by the Forum. From the application form for the Forum, it did not appear that its members agreed to be bound by the Forum's rules.

14. The Forum was in breach of its own rules. For example, rule 12.1.1 of "The City Screen Staff Forum: Rules of the Staff Forum (revised 23rd January 2004)" ("the Rules") supplied by the Employer stipulated there would be two trustees. However, the Employer was unable to confirm if the Forum currently had any trustees. Further, the Rules also stipulated that the Forum's Administrator should be employed by the Forum but Marc Allenby, the present Administrator, was employed by the Employer.

15. There was no evidence that there had been any elections for Executive Committee members of the Forum whilst Rule 10.1.1 stipulated that the "Five ordinary members of the Executive Committee shall be elected each year to serve for a term of two years commencing on 1 April following election."

16. The Forum was not a trade union. The Union accepted that the Forum was on the Certification Officer's list but stated that the listing was currently under review. The Union pointed out that Rule 1.1 of the Rules opened by stating that "The name of the Forum is THE CITY SCREEN STAFF FORUM ("The Forum") and questioned why this did not state that "The name of the union is THE SCREEN STAFF FORUM..." In *TUR1309/2003 BECTU & City Screen Limited* the Panel had noted that being listed by the Certification Officer was evidence but not conclusive evidence that an organisation was a trade union. The Union pointed out that the Forum did not

have a Certificate of Independence although it accepted that it did not need one in order to be “union” in terms of the Act. The Union, however, asked the Panel to have regard to Article 11 of the European Convention on Human Rights and submitted that domestic legislation must be construed in a manner consistent with Article 11. Article 11 provided that:

11.1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interest.

11.2 No restriction shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the state.

The European Court of Human Rights judgment in *Demir* provided that “The right to bargain collectively with the employer has, in principle, become one of the essential elements of the ‘right to form and join trade unions for the protection of one’s interest’ set forth in Article 11 of the Convention, it being understood that states remain free to organise their systems so as, if appropriate, to grant special status to representative trade unions.” It was accepted by Supperstone J in *Netjets Management Ltd v Central Arbitration Committee* [2012] IRLR 986 (*Netjets*) at paragraph 42 that “the Schedule must be construed so as to give proper effect to the “essential” Article 11 “right to bargain collectively with the employer”” and the principle was accepted in *R (on application of Boots Management Services Ltd) v Central Arbitration Committee and ors* [2014] EWHC 2930 (*Boots*). Following *Demir* it was clear that statutory provisions and decisions must give proper effect to the “essential” Article 11 “right to bargain collectively with the employer.” The Union did not submit that the relevant legislation on trade union recognition was incompatible with Article 11. However, the relevant legislation should be interpreted in the light of *Demir* and

companies should not be allowed to set up organisations to prevent legitimate trade unions from bargaining on behalf of their members.

17. The Union submitted that if a trade union on the Certification Officer's list was not independent, it was likely to be subject to the influence or control of the employer and, in consequence, could not collectively bargain within the meaning of Article 11. The Forum had been set up with the purpose of frustrating a statutory recognition application. It had been set up by the company's management without consultation with the workforce. All Forum's officers initially were members of management and at least one officer was still a member of the company's management. The first version of the agreement dated 10 October 2003 was signed on behalf of the Forum by Lyn Goleby, Managing Director of City Screen and the version dated 9 January 2004 still showed that Ms Goleby had signed on behalf of the Forum. Initially, the Forum had no members but it now had 176 individuals described as members who did not pay subscriptions and were not bound by the Forum's rules. The Forum had no assets or income and was wholly dependent upon the company for finances and resources. The Union acknowledged that there was a potential route for derecognition of a non-independent union through part VI of the Schedule. However, this was difficult to use, as illustrated by the fact that no applications received by the CAC had resulted in a decision. Having regard to these points and applying *Demir* (as accepted by the High Court in *Netjets* and *Boots*) the Union asked the Panel to interpret the reference in paragraph 35 of the Schedule to "a Union" as being to "an independent union" in order to give effect to Article 11.

18. The Union submitted that there was no evidence of collective bargaining of the type that would be expected between two sides of industry. It would not be expected, as was the case in the Forum, to have senior manager on one side on behalf of the Forum and management on the other side. The Employer had stated that the Forum Pay Offer Meeting of 3 November 2014 was "tense" and that the "discussion was heated" but, the Union submitted, this was not reflected in the minutes of the meeting that the Employer had supplied (see paragraph 35 below). The Pay offer information covering three years that was submitted by the Employer during the hearing only showed that initial offers had been revised; it did not demonstrate any process of negotiation of the initial offers.

19. In summary, the Union stated that the Forum was not organisation of workers but a puppet created by the Employer in the response to the application by BECTU in October 2003 for *TUR1309/2003 BECTU & City Screen Limited*. That application was lodged on 6 October 2003 and the Forum was established following decisions taken at board meeting of 10 October 2003. The Union therefore doubted the Employer's claim that the Forum was simply set up to help staff (see paragraph 28 below). The Union disagreed with the Employer's view that members could enter a contractual agreement upon joining even if they did not know the rules. Further the Union had seen no authority for the Employer's view that collective agreements did not have to be reached as result of negotiation. The Forum offered no legal services, received no subscriptions and did not have the financial footprint that would be expected of a trade union. There had been a number of breaches of the Forum's rules and it did not have an Executive Committee. There was no formal procedure by which Forum representatives provided their credentials to the company and communication between the Forum and its members would be insufficient in a trade union like BECTU. The Forum was not independent. The Employer had stated that the Forum Administrator Mr Allenby's role in the Forum was completely independent from his role in the company. However he was a manager of the Employer. The Employer had admitted that the Forum had not threatened industrial action or requested that a dispute be taken to Acas. There could not be genuine collective bargaining when three out of four people round the table were on one side. The Employer had cited *R(NUJ) v CAC [2005]* but this was a judgment handed down before *Demir*. Post-*Demir* it was not possible for sham agreements to block a genuine trade union.

20. Further, there was no collective agreement in force which qualified under paragraph 35 of the Schedule and the Forum was not an organisation of workers as defined at section 1 of the Act.

Summary of the Union's comment on the AGM minutes

21. The Union commented on the minutes of the AGMs provided by the Employer on 2 February 2015 (see paragraph 7 above) in a letter from Mr Donaghy dated 3 February 2015. In this letter the Union noted that the Forum did not propose

to hold another AGM until 2015. This was in breach of the Forum's rule 7.1.1 requiring a meeting by the end of January. This was another example of the "wholesale disregard or ignorance of their rules". The Union conceded that genuine unions occasionally breached their own rules but the fact that the Forum seemed unaware of their rules was not surprising as those rules had been drafted by management and had never been amended. The Union continued that the minutes did not resemble the record of any union conference that Mr Donaghy had ever attended. There were no motions, no debate, no voting and no discussion of policy. Most of the business conducted appeared to be members raising gripes and the Forum agreeing to ask the company for clarity. There was no evidence that the points raised had actually been discussed with management. However, as Marc Allenby (who stated that he would discuss some issues with management) was a senior manager himself, the minutes were not evidence of collective bargaining between two sides.

Summary of the Employer's submissions

22. The Employer submitted that the Union's application was inadmissible by reason of paragraph 35 of the Schedule as the CAC ought to be satisfied that there is already in force a collective agreement under which a union is recognised as entitled to conduct collective bargaining on behalf of the workers in the relevant bargaining unit. The union recognised was the Forum which was recognised for the purposes of collective bargaining in matters including pay, hours and holidays at Clapham Picturehouse pursuant to a recognition agreement dated 9 January 2004 with Picturehouse (under its former name of City Screen Limited) ("the Recognition Agreement").

23. The Forum rules, on their face, constituted a body capable of falling within the definition of a trade union in Section 1 of the Act ie being an organisation which consisted wholly or mainly workers of one or more description; and had as one of its principal purposes the regulation of relations between workers of that description and their employer. The Employer supplied a document entitled "CITY SCREEN STAFF FORUM: Rules of Staff Forum" which was shown as being revised on the 23 January 2004. The Employer drew attention to Rule 2.1 within this document which stated that the Forum had the object of advancing and regulating relations between (i) all

employees of City Screen Limited (now Picturehouse), and (ii) safeguarding the interests of the members of the Forum. Rule 3 stated that membership was open to all but was a matter of choice for each employee. Membership conferred the right to stand for election to positions of authority within the Forum and to vote in those elections (Rules 5.1.1(b) and (c)). Members were entitled to attend and vote at General Meetings and on any ballot (Rules 7 and 20). The Forum was entitled to charge subscriptions but did not currently levy subscriptions because Picturehouse provided paid time off for Forum representatives and provided facilities free of charge for the conduct of the Forum's business. The Forum bore no costs so there was no need to defray those costs through subscriptions.

24. The Employer submitted that the Recognition Agreement was an agreement by Picturehouse to conduct collective bargaining with the Forum in relation to all front of house assistants and all projectionist staff employed at all cinema sites and so included all employees below managerial level. It was a recognition agreement within paragraph 35 of the Schedule unless the Union could show that (i) the Forum was not a trade union or; (ii) that the Forum was not recognised under a collective agreement as entitled to conduct collective bargaining on behalf of the workers within the relevant bargaining unit. The Union had not provided convincing evidence under either of these headings.

25. The Employer submitted that the Forum fell within the definition of a trade union in section 1 of the Act. The circumstances that caused the CAC to doubt the Forum was a trade union in 2003 no longer applied in that the Forum had a substantial number of members and had undertaken the functions of the trade union including collective bargaining for many years. The Employer provided the following illustrations in support of this submission.

26. The Forum, as shown in its Annual Return for a Trade Union for the year ended 2012, sent to the Certification Officer, had 176 members although the Employer now understood that there were 174 members. Therefore the Forum was an organisation that consisted wholly or mainly of workers of descriptions covered by the Recognition Agreement. The Forum had 10 members at the site subject to the Union's current application. The Forum could not be sensibly said to have any other

purpose than the regulation of relations between its members and Picturehouse. The Forum had not brought any cases to the Employment Tribunal on behalf of Forum members. There had been no strike action, or threat of strike action, by the Forum against the Employer and the Forum had not asked that any dispute be taken to Acas or another external arbitrator. However, the Employer submitted that the absence of serious conflict between the Forum and the employer indicated the success of the collective bargaining process. Each member had chosen to become and to remain a member and thereby had become bound by the Forum's rules even if a given member was unaware of the precise rules, a principle the Employer submitted had been established in *John v Rees [1970] Ch 345*. The Employer stated, further, that once a union had rules it had to abide by those rules in so much as it could be forced to abide them under of the powers of the Certification Officer.

27. As detailed in responses by the Forum to a letter from the Certification Officer dated 18 August 2014, the Employer set out the Forum's functions and the means by which in conducted those functions, noting that the Forum:

- i. held an election for its President as recently 22 January 2014
- ii. had 174 members in 19 different cinemas, each cinema having a Forum Site Representative
- iii. Represented members at grievance and disciplinary hearing
- iv. Participated in Communications Meetings and Pay Negotiation Meetings with management
- v. Held meetings in relation to pay negotiation where necessary as well as AGMs

The Employer made further reference to the responses to emphasise that members engaged in Forum business were paid for that time, had their expenses reimbursed by the Employer and that the Forum President demonstrated commitment and passion to his role and believed that the Forum undertook genuine collective bargaining.

28. As detailed by Mr Alistair Oatey, the Employer's Director of Operations, the Forum was created by the management team of Picturehouse in October 2003. The Forum was handed over to the Forum's members shortly after its formation when elections for the Forum's officials took place in March 2004. One person elected at that time was Marc Allenby, then a Marketing Assistant. Mr Allenby had remained in place while there been a number of Presidents of the Forum, each being either in a

Front of House or Projectionist role. The Forum was set up to be beneficial to staff. Questioned by the Union, Mr Oatey stated that the Forum's establishment had nothing to do with the activities of BECTU. Mr Oatey conceded that staff had not requested a consultative body and that no members of staff were invited to a board meeting on 10 October 2003 which led to the Forum's establishment. An annual pay offer had been submitted by the Employer to the Forum since then. The Employer paid more than its competitors and had increased pay each year despite sometimes difficult market conditions. Comparing terms and conditions between the Ritzy (where BECTU was recognised) and the Clapham Picturehouse, the Employer stated that these were different rather than better at the Ritzy as the Union had argued. There was the potential to earn more at Clapham.

29. The Forum was free to negotiate each pay offer and had in fact done so at a meeting each year save for when the initial offer seemed to have been uncontentious. The 2014 negotiations became tense and resulted in very significant changes to the initial offer at the instigation of the Forum. There were three attempts to reach agreement for that year. The Forum had always consulted its members prior communicating acceptance of the final offer to the Employer and the Employer had always treated the Forum as having the right to negotiate on behalf of the its members and had not put pay offers to staff prior to reaching agreement with the Forum. Although Mr Oatey was unaware of the exact manner by which the Forum consulted its members, he believed that members voted on pay offers. An example of ballot results was contained in the e-mail from Ben McSeoin (see paragraph 10 above). Each year, collective bargaining had resulted in agreement between the Employer and the Forum; the Employer had not imposed a pay deal or other change in terms and conditions. Representation by the Forum of members at grievance and disciplinary proceedings had resulted in the positive outcomes. These included, in September 2013, a dismissed employee being later reinstated and a worker subject to a disciplinary meeting being given only a verbal warning. The Forum's Administrator, Marc Allenby, was now a senior employee of Picturehouse but was an elected official of the Forum on the Forum's behalf rather than on behalf of management.

30. The Employer stated that the company's management had no influence over the Forum's activities. The Employer had some interaction with the Forum on

administrative activities. An example was that the Employer sent staff the invitation to join the Forum (as well as to join BECTU where it was recognised at the Ritzy Brixton) through its pay roll team. The Employer did not provide the Forum's rules to staff. The Employer had no role in the Forum's elections or the Forum's communications with its members. The Employer did not know in advance what the result of an election was.

31. The Employer submitted that although Marc Allenby was a senior manager for Picturehouse Cinemas Limited there was no conflict with this and his role in the Forum. Mr Allenby was not a board member. He did not have any decision making role in the HR side company or concerning finance. Answering a question from the Union the Employer stated that if Mr Allenby were to lead the Forum on strike this would not be a problem for him in his management role. The Employer was not able to state how much time exactly Mr Allenby spent in his Forum role but the Employer allowed him paid time off to perform his Forum duties.

32. The Employer's own interface with the Forum included pay negotiations and meetings on other matters such as biannual meetings with senior managers. It was the Forum's President that raised matters other than pay. There had been a number of Presidents since the Forum was established but Mr Allenby had remained in place as Administrator. Answering a Panel question the Employer stated that neither Marc Allenby nor Ben McSeoin the current Forum President were available to attend the hearing.

33. Answering questions from the Union the Employer answered as follows. The Employer did not know if the Forum currently had any trustees. The Employer could not confirm whether or not the Forum's rules were ever amended but stated that the difference between the first version and the second was confined to tidying the wording in a number of clauses. The Employer stated that Forum rule 3.2.1 stipulating that membership terminated with the termination of the member's employment was because the Forum's purpose was confined to negotiating terms and conditions of employment for workers within the company.

34. The Employer stated the Forum's AGMs were held at one of the company's cinemas with the attendance of the Forum Representatives from each of the cinemas. As many members could attend as wished to do so. The Employer allowed time off for those attending. Answering question from the Panel, the Employer submitted that although there was potential to close down a cinema if a mass meeting occurred the Employer would have been aware if there were staffing implications involved. The Employer was regularly approached by staff for paid time off to attend pay meetings and consultative meetings of the Forum.

35. The Employer stated that the 2014 pay meeting was attended by Mr Oatey, the managing director and the finance director representing management. Pay meetings were usually 60-90 minutes but the 2014 meeting would have been about 90 minutes long. The Employer submitted minutes of the Forum Pay Offer Meeting dated 3 November 2014. The minutes showed 16 attendees including 3 from management and 13 including local Forum reps and the Forum's Administrator and President.

36. The Employer responded to the Union's contention that the fact that the Forum did not have its own premises, or even its own offices, underlined that the Forum was not trade union. The Employer stated that Mr Oatey also did not have his own office.

37. The Employer stated that it did not believe an election for Forum EC members had taken place recently save the election for President on 22 January 2014.

38. The Employer stated that the fact that the Union had been campaigning at Clapham Picturehouse in the summer of 2014 had had no influence on how in the Employer had conducted the pay round for 2015.

39. Forum reps were self selected but there was not a formal process by which they provided their credentials to the Employer.

40. The Employer submitted that the Recognition Agreement should be treated as an agreement that was now in force under which the Forum was entitled to conduct collective bargaining. Alternatively, the arrangements between the Forum and the

Employer should be seen as such as to amount to a collective agreement. The Recognition Agreement had been regarded by both the Employer and the Forum as entitling the Forum to conduct collective bargaining on behalf of workers. In the decision of 10 December 2003 the CAC doubted that the initial recognition agreement was within the ambit of paragraph 35 of the Schedule. The CAC held that the collective agreement was one which was intended to apply but was not, in fact, in force as an agreement between the workers and the Employer. This had now changed. The Forum now consisted wholly or mainly of workers within the scope of the Recognition Agreement and acted in accordance with the Recognition Agreement and had done so since it became a valid trade union, ie when the Forum became an organisation with worker members and elected officials in March 2004. So now the CAC had to ask whether a collective agreement was in force under which the Forum was recognised as entitled to conduct collective bargaining on behalf of the workers. Paragraph 35 required there to be (i) a collective agreement that; (ii) is in force and; (iii) which provides an entitlement to one or more unions to conduct collective bargaining. That agreement, however:

- need not be in writing;
- may be an arrangement evidenced by conduct rather than a formal written or oral agreement;
- need not have been reached after a process of negotiations between the trade union and the employer; can be made on behalf of trade union rather than by it;
- and need not extend to all matters that be included within the definition of section 178 of the Act.

Contrary to paragraph 34 of the CAC's 2003 decision stating that paragraph 35 of the Schedule required a collective agreement to be reached with the agreement or consent of workers the Employer contended that the wording of paragraph 35 of the Schedule only required the collective agreement itself to be made on behalf of the workers. Once the Forum acquired members, it became a trade union. At that point the existing collective agreement became a collective agreement entitling the Forum to conduct collective bargaining on behalf of the workers as a trade union and this was further confirmed by the conduct of the parties.

41. The Employer turned to the Union's submissions on the effect of the decision of the European Court of Human Rights in *Demir* which meant, according to the Union, that a sham agreement with a sham union set up by the employer ought to be disregarded in the statutory process. The Employer submitted that the provisions of the Act did not infringe the Article 11 rights of the Union or any of its members who were in the relevant bargaining unit. The Forum was not a "sham union" and the collective agreement was not a "sham agreement". In any event, Part VI of the Schedule provided a remedy by permitting an application to be made for derecognition of non-independent union as a prelude to the applicant union applying for recognition under part 1 of the Schedule.

42. The Employer cited section 5 to section 6 of the Act that provided that a trade union was independent unless it was a trade union which was under the domination or control of an employer or liable to interference by an employer tending towards such control. Therefore, the broad definition of a trade union at section 1 of the Act assumed an organisation was a trade union even it was thus dominated and controlled, although such an organisation would not be able to obtain a certificate of independence. So the CAC could not treat the Forum as something other than trade union simply because it was created by or at the instigation of Picturehouse. Further, the CAC could not treat the Recognition Agreement as something other than a collective agreement simply because the Forum was dominated or controlled by Picturehouse when the recognition agreement was first made. Therefore, the Union's point, that an organisation had to be independent to qualify under paragraph 35 of the Schedule, was redundant.

43. The Employer summed up its submissions by stating that it had shown that there had been improvements for staff as a result of the Forum's intervention. Therefore the Forum acted as an organisation of workers on behalf of workers by conducting collective bargaining. That collective bargaining was the means by which initial pay offers were improved upon. This was sufficient for the legislation. Therefore the Forum met the statutory tests under paragraph 35 of the Schedule and the application by the Union was inadmissible.

Considerations

44. The task before the Panel is to decide whether there is already in force a collective agreement under which a union is recognised as entitled to conduct collective bargaining on behalf of workers in the Union's proposed bargaining unit, in accordance with paragraph 35 of the Schedule. The Panel has carefully considered all the evidence, both written and oral, submitted by both parties on this question as summarised earlier in this decision. The Panel must decide if the Forum is an organisation of workers and, if so, whether a collective agreement is in force with the Employer in which the Forum is recognised to conduct collective bargaining. We will address both of these questions by examining the following areas: 1) what is the effect of any change in circumstances since a previous CAC Panel decided that the BECTU's application for *TUR1309/2003 BECTU & City Screen Limited* was not blocked by virtue of a collective agreement being in force? 2) Is there a collective agreement that is currently in force and, if so, is it between the Employer and a trade union as defined by the Act? 3) Is any of this changed by considering Article 11 of the European Convention on Human Rights as it is now understood following the *Demir* judgment?

The effect of changes since 2003

45. The organisation in question for the decision of 10 December 2003 for *TUR1309/2003 BECTU & City Screen Limited* was, as now, the Forum. In 2003 the Panel in the previous case decided that the Forum was not a trade union in accordance with the Act because it did not have any members amongst the cinema staff it sought to represent and therefore could not be said to be "an organisation which consists wholly or mainly of workers..." as a union is defined in section 1 of the Act. According to the Employer the Forum now has 174 members, including non-managerial staff. The Union submitted that these members could not be viewed as true members. Clearly they are very different to members of many independent trade unions. Notably they do not pay fees. Further there was no evidence of a contractual obligation upon individuals at the point of joining the Forum as the application form

omitted to state that members would be bound by the Forum's rules. The Union also contended that the Forum was not an organisation of workers by highlighting what the Forum lacked when compared to an a trade union such as BECTU. For example, communication with Forum members was less frequent and thorough than would be expected of a typical trade union; as the Forum had no income it could not offer the services to its members of a typical trade union and there did not appear to be a formal structure for representatives to give credentials to the Employer. The Union argued that the Forum did not have its own premises and had a senior manager as one of its chief officers. Further, the Forum's own rules have been significantly breeched or ignored in that there are no Trustees and an Executive Committee of 5 ordinary members does not exist. It is evident, too, that none of the AGMs of the Forum for which the Panel has the minutes were quorate under rule 7.4. This requires 50% of the membership or 20 members which ever is fewer to attend. While the quorum rule was not drawn to our attention by either party, it is clear from a reading of the Forum Rules.

46. The Panel has carefully considered all these points along with the others within the Union's submissions. It has had to make its decision about the status of the Forum on the basis of evidence provided by BECTU and the Employer. Certainly the Forum is highly atypical as an organisation, let alone an organisation of workers. On balance though, we are satisfied that the Forum now has the minimum sufficient structure and agreed processes to represent, to some extent, the interest of its membership within non-managerial cinema staff and is seeking to do this. The Panel was told that the Forum has 174 members who, it would appear, completed and signed an application form. Members have the right to resign by giving four weeks notice. This makes the Forum different from a consultative body which would typically cover all employees and not require an employee to decide to join. It is not a prerequisite of voluntary organisations, like a trade union, that there has to be a level of financial subscription, and this does not feature in the definition of a trade union. Given the minimal requirements established in section 1 of the Act defining a trade union the Panel concludes that the Forum as currently operating is "an organisation (whether temporary or permanent) (a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes includes the regulation of relations between workers of that description ... and employers".

Is there a collective agreement in force?

47. A further question which emerged from the evidence was whether the recognition agreement signed by two members of the company's management was a collective agreement. The Panel has strong doubts about this and has no evidence to query the earlier decision of the CAC in December 2003. The revised agreement signed in January 2004 made only cosmetic changes to the original agreement in October 2003. However since that time members of the senior management who were simultaneously the first officers of the Forum have stood down (in March 2004) and been replaced by an elected President aided by site Forum representatives. The fact that the Forum's Administrator has now become a senior manager weakens but does not fatally compromise the Forum's ability to engage in collective bargaining and reach a collective agreement with management. He has no managerial responsibilities for finance or human resource management. The Panel has carefully considered the Union's point that the written agreement still said to govern the collective relationship between the Forum and Employer was signed by two senior managers. The Panel is minded, though, that it is the actual practice of collective bargaining as governed by an agreement that is significant, rather than the nature of the written agreement signed 11 years ago. The Employer submits that there does not even need to be a written agreement and the Panel concurs with this in so far as paragraph 35 of the Schedule does not require the agreement to be in writing. There is evidence of a process of collective bargaining over pay and conditions certainly in 2014 and to a degree in earlier years. There were three rounds of negotiation over the 2015 pay settlement with the final offer being approved after a membership ballot. Sixty-five of the 174 members took part which is 37% of the membership. This is a respectable turnout. The Panel is satisfied that the Forum, though it has deficiencies, offers staff a form of collective representation and that its collective bargaining activity falls within the definition of collective bargaining provided by s178 of the Act. At the very least, as shown in the 2014 pay talks, some negotiations have taken place between the Forum and the Employer relating to or connected "the terms and conditions of employment, or the physical conditions in which any workers are required to work" (section 178 (2) (a)). Further, one party to these negotiations, as we have already established, is a trade

union according to the definition provided in the Act.

The effect of Demir

48. The Employer submitted that the Act did not require a union to be an independent union to potentially block an application by an independent Union. The Union conceded that the Act did not expressly require an organisation even to have a Certificate of Independence to be a “union”. The Union, however, pointed to the right to form and join trade unions, which now encompassed the right to bargain collectively following the *Demir* judgment. It submitted that, in order to give effect to Article 11, the Panel should interpret the reference in paragraph 35 of the Schedule to “a union” as being to “an independent union”. The Panel is not persuaded that it needs to take this step to amend the meaning of paragraph 35 of the Schedule. Further, the Panel must comply with the High Court judgment in *Boots*. In that judgment Sir Brian Keith concluded that there was no incompatibility between the relevant provisions of the Act, including the Schedule, and Article 11 as the bargaining arrangements between Boots and the non-independent trade union, the BPA, were “terminable by the process in Part VI”. The Panel is satisfied that, though the route may pose some difficulties as the Union has submitted, an application for derecognition of the Forum is open to a worker in the event of an application under part 1 of the Schedule being rendered inadmissible by paragraph 35 of the Schedule.

Decision

49. In the light of these considerations, the Panel is satisfied that, for the purposes of paragraph 35 of the Schedule, there is in force a collective agreement under which a union – the Forum - is recognised as entitled to conduct collective bargaining on behalf of workers falling within BECTU’s proposed bargaining unit. Accordingly, by virtue of paragraph 35, BECTU’s application to the CAC is not admissible.

Panel

Professor John Purcell

Ms Lesley Mercer

Mr Peter Martin

11 February 2015

APPENDIX

Names of those who attended the hearing:

For the Union

Mr Neil Johnson – Thompsons solicitors

Mr Willy Donaghy – BECTU Officer

For the Employer

Mr Tom Croxford – Counsel, Blackstone Chambers

Mr Alastair Oatey – Director of Operations, Picturehouse Cinemas Limited

Ms Sarah Keeble – Partner, Mishcon de Reya