

CENTRAL ARBITRATION COMMITTEE
TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992
SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION
DETERMINATION OF THE BARGAINING UNIT

The Parties:

BECTU

and

The Rio Centre (Dalston) Limited

Introduction

1. BECTU (the Union) submitted an application to the CAC dated 2 December 2014 that it should be recognised for collective bargaining by The Rio Centre (Dalston) Limited (the Employer) for a bargaining unit comprising “All grades and categories of staff employed by Rio Cinema (Dalston) Limited except for the General Manager”. The stated location of the bargaining unit was 107 Kingsland High Street, London E8 2PB. The application was received by the CAC on 3 December 2014 and the CAC gave both parties notice of receipt of the application on 4 December 2014. The Employer submitted a response to the CAC dated 18 December 2014 which was copied to the Union.

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 Gillian Morris, Chairman of the Panel, and, as Members, Mr Arthur Lodge and Ms. Judy McKnight CBE. The Case Manager appointed to support the Panel was Nigel Cookson and, for the purposes of this decision, Miss Sharmin Khan.

3. By a decision dated 12 January 2015 the Panel accepted the Union's application. The parties then had a period of 20 working days starting with the day after that on which the CAC gave notice of acceptance of the application to reach an agreement on the appropriate bargaining unit. As no agreement was reached, the parties were invited to supply the Panel with, and to exchange, written submissions relating to the question of the determination of the appropriate bargaining unit. A hearing was held in London on 16 February 2015 and the names of those who attended the hearing are appended to this decision.

4. The Panel is required, by paragraph 19(2) of the Schedule to the Act (the Schedule) to decide whether the Union's proposed bargaining unit is appropriate and, if found not to be appropriate, to decide in accordance with paragraph 19(3), a bargaining unit which is appropriate.

Preliminary issue

5. At the commencement of the hearing the Employer submitted that the Union had improperly submitted two confidential documents as part of its written evidence for the hearing. These documents were recognition agreements or parts thereof between the Union and two other employers, one of which was expressly stated to be confidential. In an email to the CAC Case Manager dated February 9 2015 the Chairman of the Employer's Board of Directors, Mr Lyons, expressed his discomfort at the inclusion of these documents in the Union's evidence forwarded to him by the CAC and asked the Case Manager to confirm that the Union was authorised to distribute these documents to the CAC and to the Employer itself. In a letter to the Employer dated 10 February 2015 the Case Manager informed the Employer that it was the Panel's view that it was a matter for the Union what documents it chose to submit. Mr Lyons then contacted the employers which were party to these agreements to ascertain whether they considered these documents to be confidential. In emails to Mr Lyons dated 10 February 2015 and 11 February 2015 respectively each employer stated that these documents were confidential and that they should not have been distributed by the Union. In an email to the CAC dated 11 February 2015 Mr Lyons attached the correspondence between him and the two employers and stated that this presented a significant issue as the Union had improperly submitted documents that it had no right to submit and had created a problem for those in receipt of those documents. Mr Lyons requested that the hearing should be postponed until the matter had been resolved. In a letter

dated 11 February 2015 the Case Manager informed Mr Lyons that the Panel had declined this request but had invited the Employer to raise this matter as a preliminary issue at the hearing should it wish to do so.

6. At the hearing, the Union submitted that collective agreements were not confidential and were often used in evidence in employment tribunals. The Union submitted that one of the two agreements did not state that it was confidential; in the case of the second, the drafts leading up to the agreement had been confidential but the final agreement was not. However the Union acknowledged that it should have had the courtesy to inform the two employers in question that it was intending to submit the recognition agreements at issue in evidence.

7. The Panel Chair informed the parties that the Panel was not in a position to determine the status of the two recognition agreements in question. She also informed the parties that the Panel would be making its decision on the appropriate bargaining unit in the light of the individual circumstances of the Employer and that the Panel did not consider either of these recognition agreements to be material to this case. It was agreed by the parties that no further reference would be made to these agreements; that the copies in the possession of Panel members would be destroyed; and that they would play no part in the decision of the Panel. Mr Lyons asked that it should be recorded in the Panel's written decision that he had undertaken in writing not to review these documents or to transmit them further.

Matters clarified at the commencement of the hearing

8. *The proposed bargaining unit.* The Union applied to the CAC for recognition in respect of a bargaining unit comprising "All grades and categories of staff employed by Rio Cinema (Dalston) Limited except for the General Manager". Since the Union had made its application the Employer had appointed an Executive Director and the Union had headed its written submissions "The BECTU case for a bargaining unit that covers all staff including all senior staff with the exception of the Chief Executive" (sic). The Employer confirmed that the Executive Director had come into post on 16 February 2015, the day of the hearing, and that the General Manager was now on the same level as the four other senior managers who were below the Executive Director. The Panel Chair said that the Panel would welcome the views of the parties as to whether this was, in essence, the same bargaining unit for which the Union had originally requested recognition or whether it constituted a substantive amendment

to the Union's proposed bargaining unit as originally described. She explained why this was a relevant distinction in relation to the Panel's decision-making process as summarised in paragraph 4 above. The Union stated that it had been its intention to exclude from its proposed bargaining unit the single individual at the top of the organisation who was appointed directly by the Employer's Board. At the time of the Union's request to the Employer and application to the CAC this had been the General Manager; it was now the Executive Director. The Employer stated that the role and responsibilities of the Executive Director had changed considerably from those of the previous General Manager but that he had no objection to the term "Executive Director" being substituted for that of "General Manager" and for the description of the bargaining unit as amended to be treated as the Union's proposed bargaining unit for the purposes of the Schedule. For the purposes of this decision the Panel has, therefore, treated the Union's proposed bargaining unit as "All grades and categories of staff employed by Rio Cinema (Dalston) Limited except for the Executive Director".

9. *The staff at issue.* At the request of the Panel Chair the parties clarified the posts, and the nomenclature used to describe those posts, which the Union wished to include within the bargaining unit and which the Employer did not. The Employer stated that, since the appointment of the Executive Director, there were five senior managers below the Executive Director, all of whom the Employer wished to exclude from the bargaining unit. It was agreed that for the purposes of this decision they should be referred to as the General Manager; the Finance Officer; the Chief Projectionist; the Chief Programmer; and the Audience Development Officer. They are collectively referred to in this decision as the 'senior managers'. It was common ground between the parties that the senior managers are paid a salary and are not eligible for overtime payments and that all other staff are hourly paid.

Summary of the submissions made by the Union

10. The Union submitted that its proposed bargaining unit was appropriate. The Union stated that this was a community cinema with a collaborative structure where individuals covered for each other when and if necessary. The Union stated that as far as it could establish the total number of staff employed at the cinema was no more than 30 and just over 81% of these had expressed a wish (since the request for recognition began in July 2014) that

collective bargaining be established on behalf of cinema workers and management grades in one bargaining unit.¹ The Union stated that its members wished to use their own discretion in calling meetings and consulting members as and when on issues that may affect all staff equally or may affect front-of-house staff more than managers or vice versa. The Union stated that its members wished to be in charge of their own internal democracy.

11. The Union submitted that its proposed bargaining unit would be compatible with effective management as none of the senior managers had ultimate responsibility for budgets or policies and therefore would not have a conflict of interest in negotiations over pay, hours and holidays. The Union submitted written descriptions of the roles and responsibilities in practice of each senior manager which, in the Union's view, demonstrated each individual's lack of authority over budgets and policies and limited capacity to hire and fire staff; how all five covered each other's roles and filled in for front- of- house staff when required; and how appropriate it was for them to be part of a single bargaining unit. The Union said that it wished to exclude the Executive Director from its proposed bargaining unit as it believed that this individual would have the authority to make decisions on pay, hours and holidays.

12. The Union accepted that senior managers were invited to attend Board meetings for particular items but said that this was not a matter of entitlement and that, when present, they were junior partners. The Union stated that it was the perception of senior managers that they had not been making policy and that this position would not change under the Executive Director. In answer to the Employer's statement that the feedback of senior managers on short-listed candidates had had a decisive influence on the Board's selection of the Executive Director the Union submitted that the invitation to provide feedback had been expressed as a courtesy invitation.

13. In answers to questions from the Panel the Union clarified the arrangements for pay, hours and holidays currently in operation at the Employer. Senior managers were informed of the salary they would receive on appointment; since that time they had received the same percentage increase (or decrease) as the hourly paid staff. Senior staff received no additional payments for additional hours worked. Hourly paid staff were paid for hours worked; around

¹ Note: The report of the membership and support check dated 24 December 2014 conducted by the CAC Case Manager to assist in the acceptance decision in this case showed that there were 27 workers in the Union's proposed bargaining unit, of whom 81.48% had signed a petition supporting recognition.

50% of these staff had no guaranteed hours, the remainder had a guaranteed minimum although in practice the hours worked in a particular week may be above or below that minimum and some staff with no guaranteed hours had *de facto* regular hours. There were four rates of hourly payments, categorised as follows: (a) cleaners and front-of-house staff; (b) projectionists; (c) senior projectionist; (d) relief managers. On occasion front-of-house staff who had been appropriately trained may act as relief managers; their rate of pay would depend on the role they were fulfilling during the hours worked. Pay increases were not the subject of negotiation and were awarded on an irregular basis; two years ago staff had been asked to forego 10% of their pay as a result of the Employer's financial difficulties. The Union stated that all staff received the same holiday entitlement, calculated on a *pro rata* basis for those who were not full-time. The Employer did not dispute the Union's account and added that in the event of the cinema having a specified level of surplus all staff had received a bonus based on a percentage of their salary (a basis of distribution which the Board wished to review).

14. The Union explained that two of the five senior managers had written contracts; the remainder had verbal contracts. Neither party was able to state how many of the remaining staff had written contracts. The Union accepted that the Chief Projectionist and General Manager hired and managed staff but submitted that this should not prevent them being part of the bargaining unit. In answer to questions from the Panel the parties were unable to give an agreed account of the disciplinary procedure in operation at the Employer. The Employer said that the template for the written contract required the Chair of the Board of Management to form a disciplinary panel but acknowledged that it was not known which staff worked under that contract. The Finance Officer said that there had been very few disciplinary incidents in the last few years.

15. The Union acknowledged that the Employer had been sympathetic to recognition for staff other than the senior managers but emphasised the strength of feeling among all staff that senior managers should be part of the bargaining unit. The Union stated that the staff saw themselves as working for a distinct 'family-type' organisation rather than an organisation based on 'us and them'. The Union did not accept the Employer's contention that the senior managers belonged on the management 'side'. The Union stated that hundreds of collective agreements covered both salaried and hourly-paid staff and that the inevitable differences in roles and responsibilities between senior managers and others did not prevent them being part

of a single bargaining unit. In answer to the Employer's submissions that their roles and responsibilities were about to change, the Union said that this was a matter of speculation. The Union submitted that there was a contradiction in the Employer's attitude to the senior managers: if their views were valued, as the Employer claimed, why did the Employer not respect their wish to be in the bargaining unit?

Summary of the submissions made by the Employer

16. The Employer stated that its Board believed that the senior managers as well as the Executive Director should be outside the bargaining unit. The Employer stated that its Board considered that it was in the best interests of the organization if some members of staff were recognizably 'management' and some were not. The Employer stated that the Board did not believe that the inclusion of senior managers was compatible with effective management as it would create a conflict of interest for the Union, the senior managers, and possibly the Board itself if senior managers who had scheduling and other responsibilities of a supervisory and/or management nature were included in a bargaining unit with more junior staff. The Employer submitted that the scheduling power of the General Manager meant that the General Manager could effectively fire front-of-house staff who were on zero-hours contracts by not allocating them any work.

17. The Employer stated that under its previous regime the General Manager had micro-managed the organization and had resisted change. The new structure was designed to change this 'top-down' approach. The Executive Director, who had replaced the General Manager at the top of the organization, had a more strategic role and the intention was to give all five senior managers greater responsibility in their respective areas with the expectation that they would take control of those areas. The Board intended that the General Manager should deal with staff, for example, and the Finance Officer should take responsibility for finance. The Employer stated that the exact titles and job descriptions of the senior managers (other than those of the Executive Director and General Manager) were currently under discussion with those individuals, as was the Staff Handbook. The senior managers had provided initial comments on the form of their employment contracts, many of which would be incorporated in the final version.

18. The Employer acknowledged that at present the organization was a ‘mess’ and that although there was a template contract for front-of-house staff it was unclear who had signed it. He explained that the Employer was conducting a ‘house-cleaning exercise’ with respect to its employment contracts and other matters. For the future the Employer intended to institute three standard forms of contract: one for the Executive Director; one for senior managers; and one for front-of-house staff. In the case of hourly paid staff, unlike the senior staff, standard form contracts would be presented to them without request for comment. There would also be a staff handbook which would formalize matters such as discipline and grievance procedures. The Employer submitted that no distinction should be made between senior managers who directly managed staff (the General Manager and the Chief Projectionist) and those who did not as the intention was that individuals who had a grievance should be able to raise the issue with another senior manager if they chose.

19. The Employer stated that senior managers, unlike other staff, were regularly invited to attend meetings of the Board and did so in practice. The Employer said that meetings were divided into two sessions, A and B, and that senior managers were invited to attend session A. The Employer stated that senior managers were unable to vote because they were not members of the Board but that they were involved in policy discussions and their advice was taken into account and debated. There would continue to be times when the Board would need to meet privately to discuss certain matters but this was normal for any business. The Employer said that in future it wanted the senior managers to drive forward policy in their respective areas. The Employer said that the senior managers had been involved in the two most recent decisions taken by the Board. First, senior managers had been given the opportunity to interview short-listed candidates for the new post of Executive Director and their views had played a decisive role in the choice of candidate. The Employer stated that it had been advised to tell the senior managers that this opportunity was a courtesy from an employment law perspective but that in practice the senior managers had been as actively involved in the final stage of the selection process as Board members. Second, the Finance Officer had advised the Board on the affordability of any pay restoration following the 10% decrease in pay which had been imposed on staff during the time of the previous General Manager in 2013.

20. The Employer stated that its Board considered that it was appropriate for the senior managers to be on the ‘management side’ in the Employer’s dealings with the Union. The

Employer emphasized that senior managers, unlike the other staff, were salaried professionals. The Employer said that the Board wanted all its staff to be paid no less than the London living wage and that it wished over time to raise the salaries of its senior managers, whom it valued greatly and wanted to retain. The Employer said that it also wanted to institute flat-rate, rather than percentage, pay increases as these were fairer to lower-paid staff.

21. In its written submissions the Employer referred to a summary of “certain published precedents” of the CAC which had been received by its Board. The Employer attached the summary of those decisions to its submissions. The Panel Chair informed the parties that she had looked at the complete transcripts of the decisions summarised and that, in her view, some of the summaries did not appear to her to be wholly accurate and seemed, on occasion, to have confused the submissions of a party to the application with the views of the Panel. She informed the parties that previous decisions of CAC Panels did not constitute “precedents” and that each Panel made its decision on the basis of the facts before it but that if the Employer wished the cases summarised to be considered as evidence each party, and the Panel itself, would need to be afforded the opportunity to read and consider the complete transcript of each decision and the parties would need to be able to comment upon them in oral evidence. The Panel Chair said that the CAC could make these transcripts available to the parties and they could be considered during the lunch-time adjournment. The Employer decided that it did not wish these cases to be considered as evidence and they played no part in the Panel’s decision.

22. The Employer concluded by stating that the timing of the hearing was unfortunate because expectations were changing within the organisation and the Employer was making progress in clarifying the roles and increasing the responsibilities of senior managers. The Employer had asked the Union to delay its application to the CAC until matters were more settled but the Union had not wished to do this. For the future, the Board of Directors would have general oversight; the senior managers who constituted the Management Team would have day-to-day responsibility; and the staff would report to the Management Team. The Employer said that the Executive Director would not expect to supervise the senior managers. The Employer accepted that the track-record of the senior managers’ involvement in policy was short because of the approach of the previous General Manager but emphasised their role in the selection of the Executive Director and on pay summarised in paragraph 19 above and

the expectations that they would play a greater role in policy formulation in the future. The Employer reiterated the Board's view that there was a need to demarcate management from staff and that their presence in a single bargaining unit would create a conflict of interest.

Considerations

23. The Panel is required, by paragraph 19(2) of the Schedule to the Act, to decide whether the proposed bargaining unit is appropriate and, if found not to be appropriate, to decide in accordance with paragraph 19(3) a bargaining unit which is appropriate. Paragraph 19B(1) and (2) state that, in making those decisions, the Panel must take into account the need for the unit to be compatible with effective management and the matters listed in paragraph 19B(3) of the Schedule so far as they do not conflict with that need. The matters listed in paragraph 19B(3) are: the views of the employer and the union; existing national and local bargaining arrangements; the desirability of avoiding small fragmented bargaining units within an undertaking; the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant; and the location of workers. Paragraph 19B(4) states that in taking an employer's views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the CAC must take into account any view the employer has about any other bargaining unit that it considers would be appropriate. The Panel must also have regard to paragraph 171 of the Schedule which provides that "[i]n exercising functions under this Schedule in any particular case the CAC must have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, so far as having regard to that object is consistent with applying other provisions of this Schedule in the case concerned." The Panel's decision has been taken after a full and detailed consideration of the views of both parties as expressed in their written submissions and amplified at the hearing.

24. The Panel's first responsibility is to decide, in accordance with paragraph 19(2) of the Schedule, whether the Union's proposed bargaining unit is appropriate. The Panel considers that the Union's proposed bargaining unit is compatible with effective management based on the roles and responsibilities currently in place. The Panel notes that the senior managers are on salaries whereas other workers within the proposed bargaining unit are hourly paid but in the Panel's experience it is not a barrier to effective management to have workers who have different arrangements of this nature in the same bargaining unit. The Panel also notes that it

is not unusual for differing pay adjustments to be made in respect of different groups of staff within a single bargaining unit. The Panel notes the Employer's submissions that the presence of senior managers would create a conflict of interest owing to their managerial roles and involvement in policy matters within the organization. However the Panel does not consider that a bargaining unit containing managers and those whom they manage is, of itself, incompatible with effective management. The Panel did not find the Employer's two examples of senior managers' involvement in policy matters to date persuasive in the context of a small organization of this nature. In relation to the first example – providing feedback on short-listed candidates for the post of Executive Director – in the Panel's experience it is good practice, often followed by small employers, to consult staff in this context. The Panel did not consider that the second example – the role of the Finance Director in a decision on pay restoration – indicated a degree of involvement in policy formulation of a kind which would create a conflict of interest.

25. The Panel has considered the matters listed in paragraph 19B(3) of the Schedule, so far as they do not conflict with the need for the unit to be compatible with effective management. The views of the Employer and the Union, as described earlier in this decision, have been fully considered. The Panel does not consider that there are any existing national or local bargaining arrangements in this case. The Union's proposed bargaining unit would avoid small fragmented bargaining units within the undertaking. As far as the characteristics of workers are concerned, the Panel notes the differences in roles and responsibilities between senior managers and other staff and that senior managers, unlike other workers, are salaried, but for the reasons given in paragraph 24 above does not consider that these differences are sufficient to prevent their co-existence within a single bargaining unit in this case. All the workers in the proposed bargaining unit are located at a single site. The Panel is satisfied that its decision is consistent with the object set out in paragraph 171 of the Schedule.

26. The Panel appreciates that this is a period of change within the Employer's organization and the Employer explained to us at length the amendments to the roles and responsibilities of senior managers which it wishes to introduce. The Panel is able to make a decision only on the basis of the facts as they stand at the time of its decision. However the Panel reminds the parties that, should the CAC eventually declare recognition in this case, there is provision in Part III of the Schedule for the bargaining unit to be varied subsequently

(provided that a collective bargaining method is in place) in specified circumstances such as a change in the organization or structure of the business.

Decision

27. The Panel's decision is that the appropriate bargaining unit is that proposed by the Union, namely "All grades and categories of staff employed by Rio Cinema (Dalston) Limited except for the Executive Director".²

Panel

Professor Gillian Morris, Chairman of the Panel

Mr Arthur Lodge

Ms Judy McKnight CBE

20 February 2015

² See paragraph 8 above for the substitution of "Executive Director" for "General Manager" in the Union's proposed bargaining unit.

Appendix

Names of those who attended the hearing on 16 February 2015:

For the Union

Sofie Mason	-	National Official, BECTU
Willy Donaghy	-	National Official, BECTU
Peter Howden	-	Chief Projectionist, The Rio Centre (Dalston) Ltd
Camille Brooks	-	Senior Projectionist, The Rio Centre (Dalston) Ltd
John Davies	-	Finance Officer, The Rio Centre (Dalston) Ltd
Sara Lyttle	-	Audience Development Officer, The Rio Centre (Dalston) Ltd

For the Employer

Patrick Lyons	-	Chairman of the Board of the Rio Centre (Dalston) Ltd
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