Judgments

R (on the application of Independent Workers' Union of Great Britain) v Central Arbitration Committee

[2019] EWHC 728 (Admin)

Queen's Bench Division, Administrative Court (London)

Supperstone J

25 March 2019

Judgment

John Hendy QC and Sarah Fraser Butlin

(instructed by **Harrison Grant Solicitors**) for the **Claimant**

Joseph Barrett (instructed by **Government Legal Dept.**) for the **Defendant**

The First Interested Party was not represented

Christopher Jeans QC and Ronnie Dennis

(instructed by **Mills & Reeve LLP**) for the **2nd Interested Party**

Daniel Stilitz QC (instructed by **Government Legal Dept.**) for the **3rd Interested Party**

Hearing date: 26 February 2019

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Approved Judgment

Mr Justice Supperstone :

Introduction

1. The Independent Workers' Union of Great Britain ("the Union") challenges two related decisions of the **Central Arbitration Committee** ("the CAC"), both dated 10 January 2018.

2. The Union is an independent trade union that represents security guards, post room workers, audio-visual staff, porters and receptionists working for Cordant Security Ltd ("Cordant") and/at the University of London ("the University").

3. The CAC is the statutory body charged with resolving union recognition disputes. Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") sets out the detailed scheme under which it operates.

4. The Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State") has ministerial responsibility for the CAC. The Secretary of State is entitled to be notified of, and to be joined as a party to, these proceedings pursuant to s.5 of the Human Rights Act 1998 ("the HRA"), in particular because the Union seeks a declaration of incompatibility under s.4 of the HRA.

5. **On** 20 November 2017 the Union made two **applications** to the CAC to be recognised by Cordant and to be recognised by the University for collective bargaining purposes under Schedule A1 to the 1992 Act.

6. The Union challenges, first, the decision of the CAC rejecting the Union's **application** to be recognised for collective bargaining purposes by Cordant for a proposed bargaining unit comprising "Security Guards, Postroom workers, AV Staff, Porters and Receptionists" working for Cordant and/at the University ("the proposed Cordant bargaining unit") ("the **First Decision**").

7. Second, the Union challenges the decision of the CAC rejecting its **application** to be recognised for collective bargaining purposes by the University in respect of the proposed Cordant bargaining unit ("the **Second Decision**").

8. The basis of the First Decision was that the CAC was satisfied that, for the purposes of paragraph 35 of Schedule A1 to the 1992 Act there is in force a collective agreement under which an independent trade union, namely Unison, is recognised by Cordant, the employer, as entitled to conduct collective bargaining **on** behalf of workers falling within the Union's proposed bargaining unit. Accordingly, the Union's **application** to the CAC is not admissible.

9. The basis of the Second Decision is that the CAC was satisfied that the University is not the employer of the workers in the Union's proposed bargaining unit and therefore the Union's **application** to the CAC is not admissible.

10. **On** 20 July 2018 Lambert J granted the Union permission to challenge the two decisions and directed that the hearings in the two cases be listed together.

The Relevant Factual Background

11. Cordant employs approximately 4,000 workers to work at sites owned or controlled by their clients under outsourcing agreements in "support" roles, such as security. The University has an outsourcing contract with Cordant for the provision of its "front of house" services.

12. There is an existing collective agreement in place between Unison and Cordant which covers all staff employed by Cordant to work at the University's sites. A voluntary collective agreement was made between Balfour Beatty and Unison with effect from 23 September 2011. This collective agreement transferred through various transfers under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") such that it now applies as between Cordant and Unison.

13. The University also recognises Unison (and the University and College Union) for collective bargaining purposes for all except its most senior staff.

14. Approximately 70 of the workers employed by Cordant to work at the University's sites would fall within the Union's proposed bargaining unit.

The Legal Framework

The Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act")

15. The legal framework governing **applications** for recognition by trade unions is set out in Schedule A1 to the Act.

16. Paragraph 1 of Schedule A1 provides:

"A trade union (or trade unions) seeking recognition to be entitled to conduct collective bargaining **on** behalf of a group or groups of workers may make a request in accordance with this Part of this Schedule."

17. "Worker" is defined by s.296 of the 1992 Act, in so far as relevant, as follows:

"(1) In this Act 'worker' means an individual who works, or normally works or seeks to work—

(a) under a contract of employment, or

(b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or

(c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.

(2) In this Act 'employer', in relation to a worker, means a person for whom one or more workers work, or have worked or normally work or seek to work."

18. Paragraph 2(4) of Schedule A1 provides:

"References to the employer are to the employer of the workers constituting the bargaining unit concerned".

19. Paragraph 4 provides that a request for compulsory recognition must be made in accordance with paragraphs 5-9. Paragraph 4(1) states that the trade union seeking recognition "must make a request for recognition to the employer". Paragraph 5 states that "The request is not valid unless it is received by the employer".

20. Paragraph 6 provides that a request will not be valid unless the union making it has a certificate of independence.

21. Under s.5 of the 1992 Act, an independent trade union is defined as a union which is not under the domination or control of an employer and is not liable to interference by the employer tending towards such control. A list of trade unions is maintained by the certification officer, who determines **on application** by a union whether it should be given a certificate of independence (s.6 of the 1992 Act). Where the certification officer considers that a trade union no longer satisfies the definition of independence, he may withdraw its certificate of independence under s.7(1) of the 1992 Act.

22. Paragraph 10 provides that the compulsory recognition machinery under Schedule A1 does not come into play if the union is voluntarily recognised by the employer as entitled to conduct collective bargaining. It also provides for negotiation between the union and the employer with a view to reaching agreement **on** the bargaining unit and recognition.

23. Paragraph 11 provides that the union may apply to the CAC to decide **on** the proposed bargaining unit and whether the union has sufficient support to be recognised where either the employer has failed to respond to a request for recognition, or has declined such a request and been unwilling to negotiate.

24. Paragraphs 33-42 contain provisions about the "permissibility" of **applications** to the CAC under paragraph 11. Paragraph 35 provides, so far as relevant:

"(1) An **application** under paragraph 11… is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is (or unions are) recognised as entitled to conduct collective bargaining **on** behalf of any workers falling within the relevant bargaining unit.

(2) But sub-paragraph (1) does not apply to an **application** under paragraph 11… if…

(a) the union (or unions) recognised under the collective agreement and the union (or unions) making the **application** under paragraph 11 or 12 are the same, and

(b) the matters in respect of which the union is (or unions are) entitled to conduct collective bargaining do not include all of the following: pay, hours and holidays ('the core topics').

(3) …

(4) In applying sub-paragraph (1) an agreement for recognition (the agreement in question) must be ignored if—

(a) the union does not have (or none of the unions has) a certificate of independence,

(b) at some time there was an agreement (the old agreement) between the employer and the union under which the union (whether alone or with other unions) was recognised as entitled to conduct collective bargaining **on** behalf of a group of workers which was the same or substantially the same as the group covered by the agreement in question, and

(c) the old agreement ceased to have effect in the period of three years ending with the date of the agreement in question. …"

25. Paragraph 37 of Schedule A1 is concerned with an **application** made by more than one union under paragraph 11 or 12. Paragraph 37(2) states:

"The **application** is not admissible unless—

(a) the unions show that they would cooperate with each other in a manner likely to secure and maintain stable and effective collective bargaining arrangements, and

(b) the unions show that, if the employer wishes, they will enter into arrangements under which collective bargaining is conducted by the unions acting together **on** behalf of the workers constituting the relevant bargaining unit."

26. Part II of Schedule A1 is concerned with voluntary recognition. This is concerned with a case where following a request under Part I the employer agrees to recognise a trade union without the need for an **application** to the CAC.

27. Paragraph 56 provides for termination of an agreement for recognition. It reads, so far as relevant:

"(1) The employer may not terminate an agreement for recognition before the relevant period ends.

(2) After that period ends the employer may terminate the agreement, with or without the consent of the union (or unions).

…

(5) The relevant period is the period of three years starting with the day after the date of the agreement."

28. Parts IV to VII of Schedule A1 are concerned with the derecognition of trade unions previously recognised to conduct collective bargaining. They provide for a number of different procedures. Most are concerned with the derecognition of trade unions which have gained recognition under Part I or Part II and which will be independent. Part VI is concerned with the derecognition of non-independent trade unions and provides the mechanism by which a worker or workers may apply to the CAC for the derecognition of a non-independent trade union.

Article 11 of the European Convention on Human Rights ("ECHR")

29. Article 11 of the ECHR provides:

"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 interests.

2. No restrictions 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…"

Grounds of Challenge

30. The Union initially contended that the First Decision was unlawful because:

i) The CAC's decision was taken without an oral hearing, allegedly in breach of the Union's rights under Article 6 ECHR ("the Article 6 challenge"); and/or

ii) By precluding the Union's **application** for recognition, paragraph 35 of Schedule A1 to the 1992 Act breached the Union's rights under Article 11 ECHR. In the circumstances, paragraph 35 should either be (a) "read down" pursuant to s.3 of the HRA, so as not to preclude such an **application** for recognition, or (b) be subject to a declaration of incompatibility pursuant to s.4 of the HRA ("the Article 11 challenge").

31. The Union initially contended that the Second Decision was unlawful **on** analogous grounds to those raised in the Article 6 challenge and the Article 11 challenge to the First Decision. In addition, the Union contended that the CAC erred in interpreting s.296(2) and paragraph 2 of Schedule A1 of the 1992 Act as requiring a written contract between an individual worker and the University alone ("the employer challenge").

32. Subsequently the Union withdrew the Article 6 challenge in relation to both decisions; and Mr John Hendy QC, **on** behalf of the Union, confirmed, as appeared from the Union's skeleton argument, that it no longer pursued the employer challenge under domestic law. The Union now accepts that the CAC correctly interpreted and applied the relevant domestic legislation.

33. Accordingly, the sole remaining challenge to both decisions is the Article 11 challenge.

The CAC Decisions on Article 11 ECHR

The First Decision

34. The material part of the decision is at paragraphs 20-23. So far as is relevant they state:

"20. The Panel recognises that paragraph 35 must be read and given effect in a way which is compatible with Article 11. We also recognise that Article 11 includes the right to engage in collective bargaining (*Demir v Turkey* [2009] IRLR 766). However the wording of paragraph 35 is clear and, in the Panel's view, it is not possible to read and give effect to it in a manner which would enable the

Union to seek recognition in the face of the existing recognition agreement with Unison. Furthermore, such an approach would run counter to the CAC's general duty under paragraph 171 to have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, since it would upset existing collective bargaining arrangements.

21. The Panel recognises that the Union may wish to contend that paragraph 35 is incompatible with Article 11. However, the CAC has no power to make any such declaration. That is a matter for the High Court…

…

Decision

23. The Panel is satisfied that, for the purposes of paragraph 35 of the Schedule, there is in force a collective agreement under which an independent trade union is recognised by the Employer as entitled to conduct collective bargaining **on** behalf of workers falling within the Union's proposed bargaining unit. Accordingly, by virtue of paragraph 35, the Panel finds the Union's **application** to the CAC is not admissible."

The Second Decision

35. The material part of the Second Decision is at paragraphs 27-32, which state (so far as is relevant):

"27. … In its submissions, the Union readily accepted that there were contracts of employment between the workers in the proposed bargaining unit and Cordant – which might be called the *de jure* employer. However, the Union argued that the existence of these contracts should not preclude the University, for the purposes of an **application** for statutory recognition, being a *de facto* employer of the workers **on** the grounds that the University substantially determines their terms and conditions with Cordant, specifically pay, hours and holidays.

28. Purely for the purposes of determining the admissibility of this **application**, let us suppose that the Union is correct in its factual assertion that the University has, in practice, substantially determined the terms of the workers' contracts of employment with Cordant in so far as pay, hours and holidays are concerned. We proceed **on** that basis without implying that the Union's assertion is correct and without further analysis of the meaning of 'substantially determined'…

29. The schedule itself does not provide a more precise definition of 'employer' other than that found in paragraph 2… However, 'employer' is defined, in relation to a worker, in section 296(2) of the Act. It is coupled with the definition of 'worker' in section 296(1). The two definitions must be read together. … It follows that, for the Union's case to succeed, there must still be a contract between each individual worker in the bargaining unit **on** the one hand and the University **on** the other hand. That is an absolute requirement. However, there is no such contract in this case. **On** the face of it, that is fatal to the Union's **application**.

30. The Union has not proposed any wording that might be 'read into' section 296 to enable it to give effect to the Union's Article 11 rights…

31. Section 43K(1)(a)(ii) ERA [Employment Rights Act 1996] provides an extended definition of 'worker' and 'employer' for the purpose of Part IVA ERA only. As the EAT noted in *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] IRLR 752, it was specifically designed to secure whistleblowing protection for workers and health services in England, Scotland and Wales. … In a collective bargaining context, such an approach would not just be novel, as the Union accepts; it would transform the statutory machinery for collective bargaining and run counter to the CAC's general duty under paragraph 171 of the Schedule. An acceptance that this **application** is admissible would go entirely against 'fair and efficient practices and arrangements' because it could lead to a situation where the same workers in the same bargaining unit had one trade union in respect of their *de facto* employer (which, in this sort of case, would be the end user in an outsourcing arrangement) and another trade union in respect of what we might call the *de jure* employer (the actual employer to whom the service provision has been outsourced). Far from creating fair and efficient practices, this would be a recipe for chaotic workplace relationships.

32. The CAC is a creature of statute and it must apply the statute. In the Panel's view, such an expansion of the definition of 'worker' and 'employer' is a matter for Parliament. In respect of the Union's contention that section 296 of the Act is incompatible with the Union's Article 11 rights, it is a matter for the High Court."

The Parties' Submissions and Discussion

The First Decision

36. The Union contends that the CAC fell into error in failing to read paragraph 35 of Schedule A1 to the 1992 Act down to ensure compliance with Article 11 ECHR; in the alternative, a declaration of incompatibility is sought.

37. Mr Hendy submits that the Union's Article 11 rights are breached because in this case the "inhibition which paragraph 35 imposes **on** what would otherwise be the Union's right to seek compulsory collective bargaining under Schedule A1" is unjustifiable (*Pharmacists' Defence Association Union v Boots Management Services Ltd and another* [2017] EWCA Civ 66 ("*Boots*") at para 55, per Underhill LJ).

38. In *Boots* an independent union sought recognition but the CAC rejected its **application** under Schedule A1 by reason of paragraph 35 because another union was already voluntarily recognised by the employer. However, the incumbent union in that case was not independent and Schedule A1 provided a procedure by which a non-independent incumbent union could be derecognised. If that procedure were utilised and resulted in the derecognition of the incumbent union (which I understand has now happened) then there would cease to be an impediment to the admission of the applicant union's claim for recognition.

39. In the present case there is no mechanism within Schedule A1 for the workers in the bargaining unit or their union to obtain the derecognition of the incumbent union since it is independent. Schedule A1 provides for the derecognition of (1) independent trade unions who have been involuntarily recognised, that is, by virtue of a declaration of recognition by the CAC (see Parts IV and V of Schedule A1); and (2) non-independent trade unions who have been voluntarily recognised (see Part VI of Schedule A1). Accordingly, there is a mechanism to derecognise voluntarily recognised non-independent unions and involuntarily recognised independent trade unions. Mr Hendy describes the lack of any mechanism for the derecognition of a voluntary agreement with an independent trade union as being a *lacuna* in the legislation in respect of which there is no clear legislative rationale. This, he suggests, is particularly striking in circumstances where, as in the present case, the incumbent union has ceased to represent the majority of workers in the bargaining unit but the applicant union does. Mr Hendy submits that in those circumstances, paragraph 35 of Schedule A1 must be read down to ensure that there is no breach of Article 11, or a declaration of incompatibility must be made.

40. Mr Hendy relies **on** Underhill LJ's *obiter* statement in *Boots* at para 62 that: "… if derecognition under Part VI were not available there would in my view be a breach of Article 11". However, the court there was looking at a different scenario from the present case. Underhill LJ's *obiter* statement is of no relevance to the instant case where the existing collective bargaining arrangement is with an independent trade union. It was looking at a "sweetheart agreement" with a non-independent union, whereas in our case we have an incumbent independent union perfectly capable of protecting the rights of workers in the bargaining unit. The legislation draws a sharp distinction between existing bargaining units with an independent trade union and a non-independent trade union. I agree with Mr Stilitz that what the Union is seeking to do in the present case is what the Court of Appeal in *Boots* deprecated, namely using Article 11 to challenge what the Union suggests is some "sub-optimal element" in the scheme.

41. Mr Stilitz submits, and I agree, that the Article 11 challenge to paragraph 35 needs to be viewed against the background of the scheme of the recognition provisions as a whole, and the policy objectives underlying that scheme. The Strasbourg court has never held Article 11 to encompass a right to compulsory recognition of trade unions. In *Demir* the relevant breach of Article 11 occurred because the court struck down a collective agreement entered into voluntarily between the union and the employer. Similarly, in *Unite The Union v United Kingdom* [2017] IRLR 438, where the applicant's

complaint was about the abolition of a compulsory form for collective bargaining in the agricultural sector, the court said (at para 65):

"The European and international instruments… do not support [the] view that a State's positive obligations under Article 11 extend to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector."

42. Ms Emma Waite, Deputy Director of Employment Rights and Enforcement at the Department for Business, Energy and Industrial Strategy, explains in her witness statement the proposals for the new machinery for recognition of trade unions which were first set out in the White Paper, *Fairness at Work*, published **on** 21 May 1998. At paragraph 9 she summarises the policy objectives underlying Schedule A1:

"9. The changes implemented by way of Schedule A1 to the 1992 Act were envisaged to achieve the following policy objectives, among others:

(a) the encouragement of voluntary arrangements for collective bargaining, which were to be given primacy;

(b) the avoidance of competing and overlapping collective bargaining arrangements, and 'turf wars' between rival unions;

(c) the encouragement of stability and continuity in collective bargaining arrangements;

(d) the avoidance of small, fragmented bargaining units; and

(e) the grant of greater rights to independent trade unions, as opposed to non-independent trade unions."

These aims were reflected in the scheme of Schedule A1 to the 1992 Act (see, for example, para 25 above).

43. Mr Stilitz submits that Schedule A1 to the 1992 Act contains a detailed and comprehensive scheme which provides, in defined circumstances, for a trade union to apply for compulsory recognition from an employer for collective bargaining purposes. Where matters cannot be determined by agreement, **applications** for recognition are determined by the CAC, provided various complex pre-conditions are satisfied.

44. The state's obligations under Article 11 are limited, and do not extend to a positive obligation to require compulsory collective bargaining in all circumstances (see *Unite The Union v United Kingdom* at paras 59-60 and 65-66). Whilst the right to collective bargaining falls within the ambit of Article 11, there is no universal or unqualified right to compulsory recognition.

45. In *Boots*, in rejecting the challenge, Underhill LJ (with whom the rest of the Court of Appeal agreed) said at para 54:

"It follows from the recognition by the court in *Demir* that 'the right to bargain collectively with the employer' is an 'essential element' of the rights protected by Article 11 that a complaint that domestic law does not accord such a right in a particular case will fall within the scope of Article 11. But, at the risk of spelling out the obvious, it does not follow from that that Article 11 confers a universal right **on** any trade union to be recognised in all circumstances. It is self-evident that any right to be recognised conferred by domestic law will have to be defined by **rules** which identify which unions should be recognised by which employers in respect of which workers and for what purposes. To the extent that the **rules** of any such scheme constrain access to collective bargaining for a particular union (or its members) the constraints will have to be justified by—to use the language of the *Unite* decision (see para 66, quoted at para 44 above)—'relevant and sufficient reasons' and should strike a fair balance between the competing interests at stake. But the decision also makes clear that in assessing any such justification the state should be accorded a wide margin of appreciation."

46. Underhill LJ continued (at para 68):

"The devising of a statutory scheme of recognition inevitably requires a large number of detailed choices about both substantive and procedural matters, seeking, as Mr Stilitz put it, to 'balance and calibrate the interests of multiple stake-holders' (e.g. workers, employer and competing trade unions). There will inevitably be some choices which not only could have been made differently but could have been made better. But I think it is clear from the case law of the ECtHR referred to above that Article 11 cannot be used as a tool to challenge this or that arguably sub-optimal element in a scheme provided that a fair balance has been struck. Both before and after *Demir* the court has emphasised the wide margin of appreciation which must be accorded to member states in this area."

(See also *Vining and others v London Borough of Wandsworth and another* [2017] EWCA Civ 1092, Sir Terence Etherton MR, giving the judgment of the court, at para 64).

47. The effect of paragraph 35 is that the CAC will not entertain an **application** for recognition if there is already in force a voluntary agreement for collective bargaining with an independent trade union in respect of the relevant bargaining unit, as is the case here.

48. In *Sindicatul "Pastorul Cel Bun" v Romania* [2014] IRLR 49 (at para 133) the Grand Chamber emphasised the width of the margin of appreciation as to how trade union freedom and protection of the occupational interests of union members may be secured (see also *Boots* at paras 46 and 46 above, and *Manole and Romanian Farmers Direct v Romania* (**Application** 46551/06) at para 60). Mr Stilitz makes the point in relation to the sensitive character of the social and political issues involved that in the UK different governments have taken different approaches to this thorny question of collective bargaining arrangements.

49. *Vining* also does not assist the Union. The Article 11 challenge was upheld in circumstances where the only argument advanced by the Secretary of State was whether the rights to consultation in the event of collective redundancies fell within the essential elements protected by Article 11. The Secretary of State did not seek to justify the exclusion of parks police officers, or trade unions representing them, from rights accorded by ss.188-192 of the 1992 Act. By contrast in the present case the Secretary of State staunchly defends the scheme as falling comfortably within the state's margin of appreciation.

50. Mr Hendy, relying **on** the Supreme Court's decision in ***R*** *(Steinfeld) v Secretary of State for International Development* [2018] 3 WLR 415, contends that the doctrine of margin of appreciation is not a relevant consideration in the present context. He contends **on** a proper analysis the court is concerned here with a negative obligation. The Union is asking not to be excluded from machinery put in place by Parliament. He submits that it is the exclusion from existing legislative machinery which is an interference that must be justified (see *Vining* at para 64).

51. I do not accept this submission. The margin was narrow in the *Steinfeld* case principally because it was a case concerned with direct discrimination **on** grounds of sexual orientation. By contrast, as the ECtHR and the domestic courts have stressed, the margin of appreciation is wide in cases concerned with rights under Article 11.

52. In my judgment there has been no interference with Article 11 in the present case. The Union is free to seek voluntary collective bargaining arrangements with both Cordant and the University. I agree with Mr Stilitz that is sufficient to ensure compliance with the right to bargain collectively under Article 11.

53. However, if contrary to my view there has been interference with Article 11, such interference must be justified in accordance with the requirements of Article 11(2).

54. Mr Stilitz and Mr Christopher Jeans QC, for the University, submit that Schedule A1 sets out a comprehensive scheme for the recognition of trade unions which seeks to balance the competing rights and interests of employers, trade unions and workers. Mr Stilitz advances three reasons in particular, as to why paragraph 35 is justified. First, in precluding an **application** for compulsory recognition when there is already a voluntary recognition agreement in place, it furthers the important aim of avoiding a multiplicity of competing collective bargaining arrangements with different unions in respect of one bargaining unit. As such, as the CAC observed (see para 34 above) it is conducive to efficient and effective collective bargaining between trade unions, their members and employers. Second, it furthers the aim of encouraging the formation and maintenance of voluntary collective bargaining arrangements wherever possible. Such voluntary arrangements are in general desirable, in giving effect to the rights and freedoms of employers, unions and their members freely to enter into

bargaining arrangements of their choosing, and in avoiding contentious recognition proceedings where consensual arrangements have been agreed. Third, it furthers the aim of giving primacy and additional protection to bargaining arrangements entered into between an employer and an independent trade union, which will be likely to be more robust in serving its members' interests in collective bargaining than a union which lacks independence.

55. Mr Stilitz points out that only approximately 70 of the workers employed by Cordant to work at the University sites would fall within the Union's proposed bargaining unit. It follows that the bargaining unit proposed by the Union would have represented a very small sub-set of workers employed at the University sites and of Cordant's workforce. Moreover, under their contracts with Cordant, the workers currently allocated to the University sites may be assigned to work for any other of Cordant's clients.

56. I agree with Mr Stilitz that the manner in which Schedule A1 has operated in the present case is consistent with the principles underlying Article 11 that the voluntary recognition agreement Cordant has entered into with Unison should be protected by the scheme of Schedule A1. Were the Union able to obtain compulsory recognition for collective bargaining purposes that would potentially adversely affect the rights and freedoms of workers within the proposed bargaining unit who are or wish to become members of Unison and/or who wish to continue to be represented by Unison for collective bargaining purposes; and those of Cordant, the employer, which wishes to conduct collective bargaining with Unison, and Unison, which has in place a collective bargaining agreement with Cordant. The Union remains free to seek to persuade Cordant to enter into a voluntary collective bargaining arrangement with it; and nothing in Schedule A1 prevents Cordant terminating its voluntary arrangement with Unison and entering into a new one with the Union.

57. Mr Jeans points to paragraph 37(2) (see para 25 above) as showing how concerned the legislation is with having orderly, practical and harmonious relations between unions in this difficult area.

58. I accept Mr Stilitz' submission that given the wide margin of appreciation to the State in this context, paragraph 35 of Schedule A1 to the 1992 Act is proportionate and strikes a fair balance between the competing interests at stake.

The Second Decision

59. An “essential element” of the rights protected by Article 11 is the right to bargain collectively with the employer (*Demir v Turkey*). Schedule A1 provides that such collective bargaining must, at least, include pay, hours and holidays. The Union contends that this right must extend to bargaining with the *de facto* employer who is in fact controlling and determining such terms and conditions of those workers. It is the Union's case that although the workers' nominal employer is Cordant, the University is “in reality, also their employer” (skeleton argument, para 1).

60. Article 11 requires, Mr Hendy submits, that the right to collective bargaining must be capable of being exercised with the entity with which the workers have a sufficient employment relationship. To be practical and effective this must include the entity which effectively controls the terms and conditions under which the workers work.

61. In support of this submission Mr Hendy relies in particular **on** the decision of the Grand Chamber in *Sindicatul*, to which the Grand Chamber in *Demir* referred. Mr Hendy emphasises that though the priests were not employees of, and had no contract with, the bishopric, those features did not preclude the priests being “workers” for the purposes of exercising their right to form a trade union pursuant to Article 11. The court held therefore that the state's refusal to register a union of priests contravened Article 11(1).

62. In further support of the lack of the need to identify a direct employer in order to engage the trade union rights of Article 11 Mr Hendy refers to the case of *Manole* where a group of self-employed farmers, who were not in an employment relationship, were barred from forming a trade union. The European Court of Human Rights held that this constituted an interference with Article 11(1) that had to be justified by reference to Article 11(2).

63. The Grand Chamber in *Manole* and in *Demir* took into account other international obligations when interpreting Article 11. In *Demir* the court stated at paragraph 85 that it:

"can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases."

Mr Hendy submits, therefore, Article 11 must be read in accordance with the provisions of ILO Convention 87 **on** freedom of association and protection of the right to organise, ILO Convention 98 **on** the right to organise and collective bargaining and ILO recommendation 198.

64. The phrase "employment relationship" as used by the Court does not import, Mr Hendy contends, the concept of employment but is taken from ILO Convention 198. The Grand Chamber in *Sindicatul* stated at para 142:

"…in Recommendation no.198 concerning the employment relationship… the International Labour Organisation considers that the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."

65. *Sindicatul*, is not, in my view, authority for the proposition advanced by the Union. The question in that case was whether the priests were employed by the church. There was no suggestion that although employed by one body they should be taken also to be employed by another. Another distinguishing feature between that case and the present case is that in *Sindicatul* there were "many of the characteristic features of an employment relationship" (see para 143). There was an "appointment decision" which had replaced earlier written contracts of employment between the priests and the church. The Grand Chamber in *Sindicatul* was not concerned with whether, if an individual was in an employment relationship with A, he or she must be deemed also to be in an employment relationship with B **on** the basis that B exercised some form of indirect control or influence over the terms.

66. By contrast it is not suggested by the Union that the University appointed the workers in the present case. They were appointed by Cordant and discharged their activities **on** the basis of contracts with Cordant, which set out their rights and obligations.

67. The case of *Manole* also does not assist the Union. That case was not concerned with the issue before this court, namely the circumstances in which Article 11(1) confers a right to bargain collectively.

68. Article 11(1) confers the right to bargain collectively with the employer. In Part II of A1 (and throughout A1) the employer is referred to in the singular. The collective bargaining right identified by the Court in *Demir* was a right to bargain with the employer. As Underhill LJ stated in *Boots* (see para 45 above) the "essential element" recognised by *Demir* was the right to bargain collectively with the employer (see also the recent judgment in ***R*** *(****IWGB****) v CAC (Interested Party RooFoods Ltd t/a Deliveroo)* [2018] EWHC 3342 (Admin)).

69. None of the international instruments **on** which Mr Hendy relies create or alter rights under domestic law.

70. Mr Simon Cain, Director of HR at the University, states in his witness statement (at para 18) that the university is not involved in the contractual arrangements between Cordant and its employees who are assigned to work at the University. Cordant's contract of employment provides that employees may be assigned to work for any of its clients. Mr Cain continues:

"29. The university does not have any contract in place with any Cordant employee assigned to work at the University.

30. Equally it does not have any involvement in determining their terms and conditions of employment, whether in relation to pay, hours, holidays or otherwise; except that it requires Cordant to pay at least the London Living Wage… Each of those terms and conditions is determined by the workers' contracts of employment with Cordant or an earlier service provider, and/or any side letter issued by Cordant."

As for the University's contract with Cordant, Mr Cain states (at para 44) that:

"The contract does not give the University any influence or control over Cordant employees' terms and conditions of employment, except where the University has already served notice to terminate the contract. In that case, Cordant may not vary any employees' terms of employment without the University's consent."

Mr Cain adds that this is intended to ensure that any re-tendering of the services, or decision to take them back in-house, is based **on** the costs associated with the contract during its normal operation.

71. The Union have sought to introduce evidence in support of their contention that the University is the *de facto* employer of the workers through a witness statement of Mr Danny Millum, secretary of the Union's University of London branch, dated 15 February 2019. Mr Millum says (at para 17) that Mr Cain's witness statement "creates the impression that [the University] is a detached third party without substantive say over the important terms and conditions of outsourced workers. This is not true."

72. Mr Jeans objects to the introduction of Mr Millum's evidence **on** the basis that it was served very late, without permission, and the University has not had an opportunity to respond to it. However as to its contents, Mr Jeans retorts "So what?". There is nothing in Mr Millum's witness statement to suggest that there is any contractual relationship between the outsourced workers and the University, and Mr Hendy rightly does not suggest that the matters referred to by Mr Cain have the effect of creating any such contractual relationship. Plainly they do not. Mr Jeans observes that the Union has still not explained how as a third party the University has the power to change the workers' terms and conditions.

73. That being so, there is no need to determine whether Mr Millum's witness statement should be admitted. I can proceed **on** the basis of the assumption made by the CAC (it appears incorrectly, in the light of the evidence now before the court) that the University did substantially determine the terms and conditions of the relevant workers. It matters not because it is common ground that there is no contractual relationship between the workers and the University.

74. As Mr Jeans observes, the phrase "*de facto* employer" is not a term used in any of the relevant authorities. A *de facto* employer is not a known or recognised concept. I note that Mr Hendy did not pursue the contention that the University is the workers' *de facto* employer in his oral submissions. In my view Mr Jeans and Mr Stilitz rightly describe the Union's case therefore as being that Article 11(1) confers the right to collective bargaining with a third party, who is not a party to the workers' contract, but who, it is said, controls or determines the terms of that contract.

75. I do not accept that Article 11 requires that the Union should have a right of compulsory collective bargaining with the University, which is not the relevant workers' employer and with whom they have no contractual relationship. Thus Article 11 is not, in my view, engaged in this context.

76. If, contrary to my view, Article 11 is engaged, Mr Jeans submits the Union's claim should be approached in terms of the UK's positive obligations under that Article. He contends that the UK has complied with its positive obligations, and indeed it has gone further than those required by that Article, by enacting legislation that allows workers to seek compulsory collective bargaining with their employer. Alternatively, if the claim falls to be analysed in terms of the UK's negative obligations, Mr Jeans submits that the definition at s.296 of the 1992 Act which confines the scheme of enforced collective bargaining about employment contracts to those who are party to those contracts is plainly justified. Mr Jeans repeats his submission that the margin of appreciation is wide in this socially, economically and politically sensitive area.

77. The Union contends that there is no justification for the interference with its Article 11 rights. Mr Hendy submits that industrial chaos would not ensue if outsourced workers are properly protected in the circumstances that exist in the present case where there is an employment relationship with the University. He accepts there is a potential problem but he submits it can be resolved by the CAC (see para 19B(3) and para 171 of Schedule A1). Mr Hendy refers in his written submissions to other jurisdictions, for example the United States and Canada, where he says the concept of joint employer has been adopted in relation to collective bargaining in similar circumstances. There is nothing, Mr Hendy submits, in domestic law or EU law that prevents the workers in fact being in an employment relationship with Cordant, and in an employment relationship with the University at the same time.

78. Mr Hendy submits that when assessing justification, the steps required to be taken are those set out in *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39 by Lord Sumption (at para 20) and Lord Reed (at paras 70-76).

79. I agree with Mr Jeans that the Union's claim should be analysed in terms of the UK's positive, rather than negative, obligations (see *Unite* at paras 59-60).

80. In *Unite* the ECtHR held that Art.11(1) does not impose any positive obligation to provide for compulsory collective bargaining in the agricultural sector (see paras 65-66). I agree with Mr Jeans that similar considerations apply here. In the present case, not only is the Union "free to take steps to protect the operational interests of its members by collective action" (para 65), including voluntary collective bargaining with the University, but it can seek compulsory collective bargaining with the workers' employer (Cordant) who has the power to change their terms and conditions.

81. There are, in my view, relevant and sufficient reasons for limiting the right to compulsory collective bargaining to workers and their employers. The University has a right to arrange its operations in what it considers to be the most efficient and beneficial manner. Organisations are entitled to adopt outsourcing arrangements, should they wish to do so, as a legitimate means of organising their activities. I agree with Mr Stilitz that to permit the Union to obtain compulsory collective bargaining rights with the University would undermine the manner in which the University has chosen to conduct its operations by outsourcing certain services to a third party employer, and that would impinge **on** its economic rights and freedoms.

82. For essentially the same reasons, even if this claim is to be analysed in terms of the UK's negative obligations, as Mr Hendy suggests, I consider any breach of Art.11(1) is justified under Art.11(2). So even if Art.11(1) is engaged and the definition in s.296 of the 1992 Act is viewed as a "restriction" requiring justification under Art.11(2), I am satisfied that the restriction is intended to protect the rights and freedoms of others, which is one of the legitimate objectives prescribed by Art.11(2). It protects the rights and freedoms of employers, workers and trade unions to enter into orderly collective bargaining arrangements; the economic freedom of organisations to arrange their operations in what they consider to be the most efficient and beneficial manner (see *Deliveroo* at para 55); and the freedom of organisations from the imposition of bargaining arrangements. I agree with Mr Jeans that there is no less intrusive alternative that would not unacceptably compromise the achievement of those objectives (see *Bank Mellat* at paras 74-75).

83. As for the boundaries between the State's positive and negative obligations under Article 11, the Grand Chamber observed in *Sindicatul* (at para 132):

"[They] … do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty **on** the State or in terms of interference by the public authorities which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole."

84. In the absence of any contractual relationship I consider s.296 of and paragraph 2 of Schedule A1 to the 1992 Act to be fully compatible with Article 11. In my judgment the balance struck by Parliament falls within the wide margin of appreciation afforded to national authorities when legislating in this area.

Conclusion

85. In my judgment, for the reasons I have given, the Article 11 challenge is not made out to either of the decisions. Accordingly, the claim is dismissed.