

CENTRAL ARBITRATION COMMITTEE
TRANSNATIONAL INFORMATION AND CONSULTATION OF EMPLOYEES
REGULATIONS 1999 AS AMENDED BY THE 2010 REGULATIONS
DECISION ON COMPLAINT UNDER REGULATION 8

The Parties:

Mr Kwasi Agyemang-Prempeh

and

Facilicom Services Group

Introduction

1. On 30 August 2016 Mr. Jonathon Heywood, Unite International Officer, on behalf of Mr Kwasi Agyemang-Prempeh (the Complainant) submitted a complaint to the Central Arbitration Committee (CAC) under the Transnational Information and Consultation of Employees Regulations 1999, as amended by the 2010 Regulations (the Regulations or TICE).
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 consider the case. The Panel consisted of Her Honour Judge Stacey as Chairman and Mrs. Maureen Chambers and Mr. Michael Leahy OBE as Members. Mrs. Chambers was unable to attend the hearing on 9 December 2016 and Mr. Mike Cann was therefore appointed to replace her. The Case Manager appointed to support the Panel was Nigel Cookson.

The complaint

3. The Complainant submitted that the Employer had failed to comply with its statutory duties under Regulation 8 of TICE to provide information that had been requested by him as

an employee of the Employer to which he was entitled pursuant to Regulation 7 of the Regulations, in three respects as follows:

- “a) Failing to obtain and provide the employee and employee's representatives, with the average number of employees employed by the undertaking, or as the case may be the group of undertakings, in the United Kingdom and in each of the other Member States in the last two years; and
- b) Relating to the structure of (i) the undertaking, or as the case may be the group of undertakings, and (ii) its workforce, in the United Kingdom and in each of the other Members States in the last two years; and
- c) Failing to obtain and provide information requested above, which includes information as to the employment situation in the undertaking, or as the case maybe, group of undertakings. This shall include suitable information relating to the use of agency workers (if any).”

Summary of the Employer's response to the complaint

4. In its response to the Complaint dated 12 October 2016 the Employer explained that it was a leading facilities provider, active in the fields of cleaning, security, airport services, catering, education, employment agencies, facilities management, construction & contracting, and hotel & catering services throughout Western Europe and currently employed approximately 28,000 people across numerous undertakings in the Netherlands, Belgium, France and the United Kingdom. Given the nature of the work, the majority of its employees were based at the offices of its clients, the details of which were confidential.

5. The Employer accepted that the Complainant, who is one of its employees and is a representative of Unite the Union, had sent a letter to its UK HR Director on 18 February 2016 requesting various information including: “a breakdown of the structure of the Facilicom group of undertakings and its workforce including employee numbers by member state, division, function and site/location within the United Kingdom and in each of the other Member States in the last two years.”

6. On 24 March 2016 the UK HR Director received a further letter requesting information of the structure of the undertaking for the purpose of establishing whether it fell within the scope of the Directive 2009/38/EC. This letter specifically cited that the information that was to be provided under Regulation 7(3) of TICE.

7. The UK HR Director responded to the request by way of letter dated 30 March 2016 with as much information as was available to the Employer at that time. This included details of the average number of employees in the UK, Netherlands, France and Belgium in 2013, 2104 and, with respect to the UK, for 2015. Also attached was a link to the Company Annual Reports for information as to the structure of the business and its workforce (copies of which were attached to the response).

8. On 15 April 2016 the UK HR Director received a further letter which stated: "...unless we are provided with information on where Facilicom's employees are employed (by site) and the number of employees employed (by site) in both the UK and the other Member States, it is impossible to seek the employees support in order to meet the criteria as outlined above and as required under the TICE Regulations."

9. In a letter dated 25 May 2016 the Employer confirmed that it met the criteria to fall within the scope of the Regulations and also confirmed that, due to "privacy regulations", it could not provide the information requested.

10. The Employer stated that it was keen to comply with its obligations under Regulation 7(3) and that it had already provided details of the average number of employees employed by each of its undertakings in the Member States for 2014. The Employer was now able to provide such information for 2015: United Kingdom: 2,081, France: 2,666, Belgium: 4,387 and Netherlands: 19,516.

11. In accordance with Regulation 7(3)(b)(i) the Employer could now provide further information in relation to the structure of the undertakings in the UK and the other Member States in the last two years, details of which were attached to its Response. The Employer stated that it had also attached to its Response all the information that it had relating to the structure of its workforce, including relevant extracts from its 2014 and 2015 Annual Reports.

12. The Employer considered that the information requested by the Complainant by letters dated 18 February 2016 and 15 April 2016 went beyond the scope of the information that was required to be provided under Regulation 7(3)(b)(ii). In any event, due to confidentiality reasons and the nature of the commercial agreements it had in place with its clients, the Employer was not able to disclose specific information regarding its employees' places of work where this would identify the names of its clients.

Complainant's comments on the Employer's response

13. In his comments on the Employer's Response dated 19 October 2016 the Complainant stated that under Regulation 9 of TICE and Article 5 of Directives 94/45/EC and 2009/38/EC a 'valid request' was required in order to initiate negotiations for the establishment of a European Works Council ("EWC"). As laid down in TICE a valid request must meet the criteria in Regulation 9. Regulation 7 required central management to obtain and provide the employee or employee's representatives with information which would assist and enable them to seek a valid request as outlined in Regulation 9.

14. The Complainant was satisfied that the undertaking fell within the scope of the Regulations and wished to seek the support of colleagues in other Member States in order to submit a valid request. However, the information provided by central management did not allow him to seek such support as it had not provided any details as to where its employees were employed within each member state. The further information referred to by central management in its response dated 12 October 2016 did not provide any new or relevant information that would assist the Complainant in seeking the necessary support from his colleagues in other Member States.

15. The Complainant did not believe that 'confidentiality' was a valid reason for withholding the information requested. Rather, the Complainant believed that central management was purposely withholding information in order to avoid having to establish a EWC as was clearly demonstrated in the Employer's letter dated 25 May 2016 in which it stated "...the board believes that there is no added value in establishing a European Works Council now because there are no cross border issue to discuss...".

16. The Complainant alleged that central management was clearly and purposely obstructing the Complainant's legal right to seek the support of his colleagues to establish a EWC and called upon the CAC to issue an order instructing the Employer to provide the information.

The hearing

17. Having considered the parties' submissions the Panel called for a hearing to take place in order to determine the Complaint: the parties clearly did not agree on the interpretation and scope of the Regulations. The parties were invited to supply the Panel with, and to exchange, written submissions and a hearing was held in London on 9 December 2016. The names of those who attended the hearing are appended to this decision. Both sides had produced bundles of relevant documents and submissions which had been exchanged in advance of the hearing. The Complainant had included case law from CJEU in its submissions, but no authorities were relied on by the Employer. Mr Gilroy had not brought a copy of the Complainant's submissions and authorities with him to the hearing but was content to proceed without them.

The issues

18. At the outset of the hearing the issues were clarified. The Employer accepted that it falls within the scope of the Directive. It therefore considered that it was not required to provide answers or information to any of the requests made by the Complainant, since the purpose of the information was to establish whether the Regulations and Directive apply to the Employer and it had already made that concession. In the alternative, the Employer argued that it had provided all the information to which the Complainant was entitled under the Regulations in any event. The Employer conceded that it was no longer relying on confidentiality as a defence to the claim.

19. The Complainant however was not satisfied and considered that under the Regulations he is entitled to know the details of all collective structures – Works Councils and the parties to any collective bargaining arrangements and details of where the Employer's employees and agency staff are based by site establishment.

20. The issue for determination by the Panel is whether the Complainant can establish that on a proper interpretation of the Regulations as construed in accordance with the Directive and the CJEU case law, that it is entitled to that information from the Employer. It is the task of the Complainant to prove its case and in relation to findings of fact the standard of proof is the balance of probabilities.

Findings of fact

21. The evidence was largely not in dispute and was set out clearly in the papers. The Employer is a facilities provider based in the Netherlands, active in the fields of cleaning, security, airport services, catering, education, employment agencies, facilities management, construction & contracting, and hotel & catering services throughout Western Europe and currently employed approximately 28,000 people across numerous undertakings in the Netherlands, Belgium, France and the United Kingdom. The majority of its employees are based at the offices of its clients.

22. During the course of the hearing both parties provided additional information which was not in dispute and the Panel therefore records the following further findings of fact.

23. The Complainant has worked for 11 years at the central London premises of Goldman Sachs as a site based cleaning manager. Following a series of TUPE¹ transfers over the last decade or so he is now employed by a wholly owned UK subsidiary of the Employer, Facilicom Cleaning Services Limited. At the Goldman Sachs' site, there are two other managers, two supervisors, nine team leaders and approximately 32 operatives employed by the Employer all working for the cleaning contract between Goldman Sachs and the Employer, Goldman Sachs thus being the client of the Employer. The Complainant has minimal contact with the head office or registered office of the Employer, or the UK subsidiary which employs him and no or minimal contact with other employees of the Employer employed and based in other locations on other contracts with clients of the Employer. He has only ever worked at the Goldman Sachs' office.

¹ Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended)

24. Consistent with its response to the claim, the cleaning and other service contracts the staff based at the sites of the various clients of the Employer would appear to have little or no contact with other employees at any other site or on other contracts.

25. In a series of letters between 30 March 2016 and 6 December 2016 the Employer provided to the Complainant the number of both the average number of employees and agency workers employed by the undertaking and the group of undertakings, in the United Kingdom and in each of the three other Member States in which it operates, namely Netherlands, Belgium and France for the last two years.

26. The Employer has also disclosed the name and email address of the Chair of the Works Councils in the Netherlands. In the Netherlands there are a number of Works Councils covering each group of services such as cleaning and security. There are also national Works Councils in France and Belgium.

27. The Employer has also supplied the Complainant with extracts from its annual reports which is publicly available information containing general information. It is not possible to discern the workplaces of the Employer's employees from the information supplied.

28. The Employer's board of directors is opposed to the establishment of a EWC and that it would not add value as there are no cross-border issues to discuss and establishing a EWC would only be a formality. They assert that the different Works Councils support their view.

Summary of the Complainants' submissions

29. The Complainant stated that in order to trigger the statutory process he needed to be able to contact representatives or employees direct so as to ascertain whether they would support his attempt to establish a EWC. The Complainant believed case law had established his entitlement to this information under Regulation 7(3)(b).

30. The Objective of Directive 2009/38/EC was outlined in Article 1:

“1. The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.”

“2. To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Article 5(1), with the purpose of informing and consulting employees.” (Emphasis added)

31. Article 5(1) of the Directive set the criteria to satisfy a request:

“Article 5(1): In order to achieve the objective set out in Article 1(1), the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.”

32. Article 4(4) of the Directive specified that the management must provide the relevant information in relation to Article 5:

“4. The management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management within the meaning of the second subparagraph of paragraph 2 of the Community-scale undertaking or group of undertakings shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required for commencing the negotiations referred to in Article 5, and in particular the information concerning the structure of the undertaking or the group and its workforce. This obligation shall relate in particular to the information on the number of employees referred to in Article 2(1)(a) and (c).”

33. Recital 25 of the Directive further reiterated this legal obligation:

“(25) The responsibility of undertakings or groups of undertakings in the transmission of the information required to commence negotiations must be specified in a way that enables employees to determine whether the undertaking or group of undertakings where they work is a Community-scale undertaking or group of undertakings and to make the necessary contacts to draw up a request to commence negotiations.”

34. In order for an employee to initiate the commencing of negotiations they must be able to meet the criteria laid down in Article 5(1) i.e. a written request of at least 100

employees or their representatives. The employee can choose how he wishes to submit the request and therefore needed to be provided with the necessary information which would enable them to accomplish this task. This therefore required them to know where employees were employed by place of work and address within each Member State and the names and addresses of any representatives. Unless they had this information it was impossible for the employee to obtain a written request from at least 100 employees or their representatives in at least two undertakings or establishments in at least two different member states.

35. This access to information was foreseen in Article 4(4) and recital 25. Article 4(4) states:

“[central management] shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required for commencing the negotiations”.

36. In turn, Recital 25 states:

“information required to commence negotiations must be specified in a way that enables employees...to make the necessary contacts to draw up a request to commence negotiations.”

37. In the 2004 decision C-440100 *Gesamtbetriebsrat der Kuhne & Nagel AG & Co KG v Kühne & Nagel AG & CO. KG* (“the Kuhne & Nagel judgment) the CJEU held:

“70. It follows that the provision of information on the average total number of employees and their distribution across the Member States, the establishments of the undertaking and the undertakings in the group, as well as the names and addresses of the employee representation which might participate in the setting up of a special negotiating body in accordance with Article 5 of the Directive or in the establishment of a European Works Council, may be demanded to the extent to which that provision is essential to the opening of negotiations for the establishment of such a council.

“71. It is for the national courts to determine, on the basis of all the material available to them, whether the information requested is essential to the opening of the negotiations referred to in Article 5(1) of the Directive.”

38. The Complainant stated that the information of the sites where the employees are based was ‘essential’ to the opening of negotiations since the Employer had made plain that it did not want a EWC established and, in the Complainant’s view, the information was necessary to allow him to approach the employees direct. It was not sufficient to have only the names and addresses of the employees’ representatives across the Member States. If he knew the identity of the sites where employees were based he would be able to check with unions across the Member States as to whether they had representatives at the relevant sites. As it stood, the Complainant was unable to do this as he did not know where the employees worked. The Complainant would need to know where employees were based by site, including the address of the workplace, so that he could contact or attend the site in furtherance of its objective to assess support for a EWC. The Complainant’s representative had already attempted to liaise with trade union colleagues in the relevant Member States but without knowledge of the sites it was a fruitless task.

39. The Complainant submitted that the subsequent further case of C-349/01 *Betriebsrat der Firma ADS Anker GMBbH v ADS Anker GMBbH* (“the Anker judgment”), reiterated the Employer’s obligations. In its judgment the CJEU held:

“56. It is clear from both the purpose and general scheme of the Directive that the obligations by which the central management or the deemed central management is bound under Article 4(1) of the Directive must be interpreted as encompassing both the obligation to supply directly to the employees' representatives information which is essential for the opening of negotiations to set up a European Works Council and the obligation to supply that information to employees' representatives through their undertaking in the group to which those representatives submitted a request for information in the first place.”

40. As a result of these two CJEU rulings the European Commission had amended and strengthened the requirements to provide detailed information in this area in the recast Directive of 2009/38/EC, and the UK had in turn amended the TICE Regulations in the Transnational Information and Consultation of Employees (Amendment) Regulations 2010 (SI 2010/1088). The two rulings set out what can be demanded from an employer and Mr Hayward submitted that he was seeking no more than that to which the Complainant was entitled under the current regulations.

41. TICE further provided a very detailed definition of 'suitable information relating to the use of agency workers', namely:

- i. **The number of agency workers working temporarily for and under supervision and direction of the undertaking;**
- ii. **The parts of the undertaking in which those agency workers are working; and,**
- iii. **The type of work those agency workers are carrying out.**

42. The Employer had disclosed only one name and email address of the existing Works Councils within the undertaking, which was wholly insufficient. During the course of the hearing the Employer offered to provide contact details for each Works Council in the Member States. However the Complainant considered this too was insufficient since the Employer had already made clear its views on the establishment of a EWC and had also said that the Work Councils supported its view that a EWC was not necessary. The Complainant believed that both sets of information should be available – contact directly by having knowledge of site location of the employees and contact details through employee representatives – and the information he required the Employer to provide was essential in order to achieve the purpose of the Directive and Regulations.

43. Asked to address the Employer's point that the Complainant was not entitled to know the actual site at which employees were based the Complainant queried how any request under the Regulations could ever clear the first hurdle. It argued that the structure of the workforce was where the employees worked rather than the address of the head office.

44. Although the terms "undertaking" and "establishment" are not defined in the TICE Regulations, Mr Hayward submitted that the definitions of these terms in other EU derived employment rights would be applicable.

45. In closing the Complainant submitted that the Employer had failed to provide the required and requested information necessary for him to commence the negotiations referred to in Article 5 and it was a misreading of the Directive and Regulations to assert that the scope of Regulation 7 was limited to the issue of whether the Employer had sufficient number of employees and EU member-state penetration (as a Community-scale undertaking or group of undertakings) for the Directive and Regulations to be applicable.

Summary of the Employer's submissions

46. The Employer submitted that its primary case was that the complaint was misconceived and/or wholly unnecessary. It explained that Article 11 was merely the provision that imposed the Directive on the Member States and Article 4 was transposed into UK law by Regulation 5. The purpose of Regulation 7 combined with Regulation 8 was to enable an employee or an employees' representative to request information for the purpose of determining whether an employer was part of a Community-scale undertaking or Community-scale group of undertakings in order to establish whether it fell within the scope of Directive 2009/38/EC.

47. Since the Employer had already conceded to the Complainant that it fell within the scope of the Directive the purpose of the requests for information had therefore been satisfied: nothing more was required of it.

48. A complaint under Regulation 8 was the means by which an employee or an employees' representative may enforce the entitlement to the provision of information in accordance with Regulation 7. There was no need for any complaint to be determined under Regulation 8 because of the Employer's concession.

49. But in the alternative and as a subsidiary argument, the Employer had provided the Complainant with the requisite information.

50. The case law relied upon by the Complainant referred to Regulation 9 but the Employer was not defending a complaint under Regulation 9. The Complaint brought here was under Regulation 8 which was parasitical to Regulation 7. The Complainant had erroneously conflated Regulation 7 with Regulation 9. The Employer therefore had no case to answer and there was no need for Mr Gilroy to engage with the detail of the rulings as the point was fundamentally misconceived.

51. Mr Gilroy repeated that as a result of the correspondence that had passed between the parties starting on 18 February 2016 and cumulating with the Employer's letter to the Complainant dated 25 May 2016 the Employer had acknowledged that it met the criteria to fall within the scope of the Directive and the Employee's Representative had confirmed that it was

satisfied that the information it had been provided with confirmed that this was the case². Despite having made the above concession, the Employer continued to provide information to the Complainant as requested.

52. As previously stated, the complaints before the Panel were, therefore, misconceived, and/or there was simply no purpose in the Panel making any order as sought by the Complainant. In the alternative, if, contrary to the above submissions, the Panel concluded that the Complainant's complaints were not misconceived, the Employer submitted that it had provided the Complainant with details of the average number of employees employed by each of its undertakings in the Netherlands, Belgium, France and the United Kingdom for 2014 by means of the UK HR Director's letter of 30 March 2016³. In addition, the relevant information for 2015 was set out in the Employer's Response to the complaint with comprehensive information relating to the structure of the undertakings and their workforces in the United Kingdom and each of the other Members States for 2014 and 2015 being set out by way of appendices to the Employer's Response.

53. The Employer had provided certain information which detailed the structure of the undertaking across the Member States which included details on location (pp19-50 Complainant's bundle). It consisted mainly of extracts from the publicly available annual report of the Employer including lists of its limited companies across member states with names of location of the registered office of the corporate entity by city name. For example, Facicom UK Ltd, Facicom Cleaning Services Ltd and Trigion Security Services Ltd have their registered offices in London (p.23 Complainant's bundle).

54. Mr Gilroy submitted that the Complainant could easily ascertain the location of the sites in the Netherlands using the information already provided by the Employer and a copy of, for example, the Dutch equivalent of the 'Yellow Pages'. However, when asked to explain how it would be possible to determine from the registered office of the corporate entity where its employees worked given its structure of basing its employees with its various clients, Mr Gilroy conceded that his client had only supplied a list of names of various limited companies providing little clue to their whereabouts or activities or where their employees might be based

² See the chronology set out in the Employer's Response in paragraphs 5-9 above.

³ See paragraph 7 above.

or work. But he asserted that the Employer had done all that it was obliged to do and that all requisite information had now been provided. It had provided information on the Dutch holding company, the Dutch subsidiaries as well as the subsidiaries in Belgium, France and the UK. The Employer had also provided information on the percentage of the workforce made up of agency workers in each of its undertakings.

55. In the preamble to the case law relied upon by the Complainant it was clear that the cases concerned the construction of Article 4 and Article 11 of the Directive. Article 4 related to the responsibilities of establishing a EWC whereas Article 11 was headed “Compliance with this Directive” and this provision called on Member States to bring into effect the Directive. The cases were therefore not on point.

56. Mr Gilroy repeated that the Complaint was brought under Regulation 8 with the provisions of Regulation 7 setting the bar for compliance as to whether the information had been provided. The case law referred to was not authority for the proposition suggested by the Complainant. If it was it would have been articulated. The Complainant seemed to be moving the debate into Regulation 9 territory. The proceedings brought against the Employer were adversarial proceedings and therefore the Employer was entitled to look at the wording of the Regulations and question the specifics of the complaint.

57. The Employer stated that it had initially made an oversight regarding agency workers which it had now corrected and it had provided information under these figures as to what the workers did.

58. The Employer was asked which Member States had Works Councils already established. The Employer stated that it would be possible to provide the Complainant with names and contact details for each of its Works Councils. It had already provided the details of the Chair in the Netherlands and it could confirm that it also had Works Councils in Belgium and France. Mr Gilroy did not know whether or not the establishments in the Member States were unionised.

59. Mr Gilroy conceded that given the nature of the structure of the Employer and its business, its employees were in the main not based on its own premises, but would be based at

and work from the premises of the Employer's clients. The Chair of the Panel sought clarity from the Employer as to what it believed constituted an establishment, undertaking and structure. In response, Mr Gilroy explained, using the UK as an example, that the establishment of the undertaking would be the UK subsidiary's head or registered office in Regent Street, London. The structure was that as shown in the organogram in the bundle of exhibits showing the links between the various components of the Group at p.19 of the Complainant's bundle. He conceded that, for example, the Complainant may work at Goldman Sachs but that would not be apparent anywhere on the organograms since Goldman Sachs was the client of the company and there would be many such clients at various different locations within London or the UK. He did not have the details and was unsure of the scope of the Employer's undertaking.

60. Mr Gilroy considered that to interpret the establishment as the place where the employee physically worked would be an impermissible extension of the Regulations. He did not know if the Employer's employees contained mobility clauses but suggested that perhaps an employee could be working at one site one week servicing a contract and at another site the following week.

61. Regulation 2 did not contain the definitions of 'establishment' and 'undertaking' as put forward by the Complainant. Asked where one would go for the definition of 'establishment' the Employer submitted that as far as the Complainant was concerned the establishment under the Regulations would be the head office in Regent Street, London. He rejected the Complainant's assertion that help with the meaning of "undertaking" an "establishment" could be found from other employment law provisions, but did not refer to any particular statutory provisions or case law in support of his argument.

62. The Employer explained that there were national Works Councils in France and Belgium. In the Netherlands there were Works Councils covering each group of services such as cleaning and security. In addition, it had collective bargaining agreements in place across the Member States. It offered to provide the Complainant with the contact details of the chairs of the various Works Councils and the details of any collective bargaining, where it existed, within 28 days. Asked about the point previously raised as to confidentiality the Employer confirmed that it no longer asserted confidentiality and withdrew its contentions previously raised as referred to in paragraphs 4, 9 and 12 above.

The Law

63. The TICE Regulations provide a process and a framework for an employee to obtain information to establish if his or her employer is an undertaking to which the regulations apply in implementation of the EWC Directive whose purpose is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings. If the employer is an organisation to which the Regulations apply, a valid request (as defined) demonstrating sufficient interest from amongst the workforce in establishing a EWC or information and consultation procedure can be made, which triggers the initiation of negotiations to set up such a Works Council or information and consultative body.

64. The purpose of the Regulations therefore is to establish channels for employees to receive information and be consulted at an EU wide level, in addition to any national works councils or collective bargaining arrangements that may exist, where sufficient numbers are interested in receiving such information and their employer is a sufficiently large organisation with a reach across the EU (a ‘Community-scale undertaking’ or ‘Community-scale groups of undertakings’).

65. The Regulations are divided into parts and the part at issue in this case is Part II pithily entitled “Employee Numbers and Request to Negotiate Establishment of a European Works Council or Information and Consultation Procedure” containing Regulations 6-10. Regulation 6 concerns the calculation of employee numbers which is not in dispute here. Regulation 7 provides as follows:

Entitlement to information

7.—(1) An employee or an employees' representative may request information from the management of an establishment, or of an undertaking in the United Kingdom for the purpose of determining whether, in the case of an establishment, it is part of a Community-scale undertaking or Community-scale group of undertakings or, in the case of an undertaking, it is a Community-scale undertaking or is part of a Community-scale group of undertakings.

(2) In this regulation and regulation 8, the management of an establishment or undertaking to which a request under paragraph (1) is made is referred to as the “recipient”.

(3) The recipient must obtain and provide the employee or employees' representative who has made the request with information—

(a) on the average number of employees employed by the undertaking, or as the case may be the group of undertakings, in the United Kingdom and in each of the other Member States in the last two years; and

(b) relating to the structure of—

(i) the undertaking, or as the case may be the group of undertakings, and

(ii) its workforce,

in the United Kingdom and in each of the other Member States in the last two years.

(4) Where information disclosed under paragraph (3) includes information as to the employment situation in the undertaking, or as the case may be the group of undertakings, this shall include suitable information relating to the use of agency workers (if any).

66. Regulation 8 provides as follows:

Complaint of failure to provide information

8.—(1) An employee or employees' representative who has requested information under regulation 7 may present a complaint to the CAC that—

(a) the recipient has failed to provide, or as the case may be obtain and provide, the information referred to in regulation 7(3); or

(b) the information which has been provided by the recipient is false or incomplete in a material particular.

(2) Where the CAC finds the complaint well-founded it shall make an order requiring the recipient to disclose information to the complainant which order shall specify—

(a) the information in respect of which the CAC finds that the complaint is well-founded and which is to be disclosed, or as the case may be obtained and disclosed, to the complainant;

(b) the date (or if more than one, the earliest date) on which the recipient refused or failed to disclose, or as the case may be obtain and disclose, information, or disclosed false or incomplete information; and

(c) a date (not less than one week from the date of the order) by which the recipient must disclose, or as the case may be obtain and disclose, the information specified in the order.

(3) If the CAC considers that, from the information it has obtained in considering the complaint, it is beyond doubt that the undertaking is, or that the establishment is part of, a Community-scale undertaking or that the establishment or undertaking is part of a Community-scale group of undertakings, it may make a declaration to that effect.

(4) The CAC shall not consider a complaint presented under this regulation unless it is made after the expiry of a period of one month beginning on the date on which the complainant made his request for information under regulation 7.

67. Regulation 9 & 10 states that:

Request to negotiate an agreement for a European Works Council or information and consultation procedure

9.—(1) The central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure where—

**(a) a valid request has been made by employees or employees' representatives; and
(b) on the relevant date the undertaking is a Community-scale undertaking or the group of undertakings is a Community-scale group of undertakings.**

(2) A valid request may consist of—

(a) a single request made by at least 100 employees, or employees' representatives who represent at least that number, in at least two undertakings or establishments in at least two different Member States; or

(b) a number of separate requests made on the same or different days by employees, or by employees' representatives, which when taken together mean that at least 100 employees, or employees' representatives who represent at least that number, in at least two undertakings or establishments in at least two different Member States have made requests.

(3) To amount to a valid request the single request referred to in paragraph (2)(a) or each separate request referred to in paragraph (2)(b) must—

(a) be in writing;

(b) be sent to—

(i) the central management, or

(ii) the local management;

(c) specify the date on which it was sent; and

(d) where appropriate, be made after the expiry of a period of two years, commencing on the date of a decision under regulation 16(3) (unless the special negotiating body and central management have otherwise agreed).

(4) The date on which a valid request is made is—

(a) where it consists of a single request satisfying paragraph 2(a) or of separate requests made on the same day satisfying paragraph 2(b), the date on which the request is or requests are sent; and

(b) where it consists of separate requests made on different days satisfying paragraph 2(b), the date of the sending of the request which resulted in that paragraph being satisfied.

(5) The central management may initiate the negotiations referred to in paragraph (1) on its own initiative.

Dispute as to whether valid request made or whether obligation in regulation 9(1) applies

10.—(1) If the central management considers that a request (or separate request) did not satisfy any requirement of regulation 9(2) or (3) it may apply to the CAC for a declaration as to whether the request satisfied the requirement.

- (2) The CAC shall only consider an application for a declaration made under paragraph (1) if—**
- (a) the application is made within a three month period beginning on the date when a request, or if more than one the first request, was made for the purposes of regulation 9, whether or not that request satisfied the requirements of regulations 9(2) and (3);**
 - (b) the application is made before the central management takes any step to initiate negotiations for the establishment of a European Works Council or an information and consultation procedure; and**
 - (c) at the time when the application is made there has been no application by the central management for a declaration under paragraph (3).**
- (3) If the central management considers for any reason that the obligation in regulation 9(1) did not apply to it on the relevant date, it may, within a period of three months commencing on the date on which the valid request was made, apply to the CAC for a declaration as to whether that obligation applied to it on the relevant date.**
- (4) Where the date on which the valid request was made is a date falling before the date of any declaration made pursuant to an application made under this regulation the operation of the periods of time specified in paragraphs (1)(b) and (1)(c) of regulation 18 shall be suspended for a period of time—**
- (a) commencing on the date of the application; and**
 - (b) ending on the date of the declaration.**
- (5) If on an application for a declaration under this regulation the CAC does not make any declaration in favour of the central management and considers that the central management has, in making the application or conducting the proceedings, acted frivolously, vexatiously, or otherwise unreasonably, the CAC shall make a declaration to the effect that paragraph (4) does not apply.**

68. The TICE Regulations implement and give effect to the EWC Directive, the material parts of which are set out above in the summary of the Complainant's submissions (see paragraphs 29- 45) and we do not propose to repeat them here.

69. There has been no directly relevant case law in the UK that either party or the Panel could identify. The salient paragraphs of the *Kuhne & Nagel* and *Anker* judgments is as set out above, see paragraphs 37 and 39.

70. For the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as amended, "an undertaking, business or part of an undertaking" (Regulation 3(1)(a)) has been broadly defined in the considerable body of authority and is not co-terminous with the corporate structure of a group of companies. There is also extensive

authority on the definition of “establishment” for the purposes of collective consultation with employees, in for example collective redundancy situations, where the right to collective consultation is affected by the number of proposed redundancies at a particular establishment (s.188 of the Act). At the risk of over-simplification in general terms it means the unit or entity to which the workers are assigned to carry out their duties, not the whole of the employer’s organisation (*USDAW v WW Realisation 1 Ltd, Ethel Austin & S of S for BIS* (CJEU C-80/14 30/4/2015) (the Woolworths’ case).

71. It is trite law that CJEU has repeatedly reiterated that an employment relationship is essentially characterised by the link between the worker and the part of the undertaking or business to which he is assigned to carry out his duties. In *Athinaiki Chartopoiia* (C-270/05) the CJEU clarified that the terms ‘undertaking’ and ‘establishment’ are different and that an establishment normally constitutes part of an undertaking, but may be the same where the undertaking does not have several distinct units.

Discussion

72. The first issue is whether the Complainant’s application is wholly misconceived in light of the Employer’s acceptance that the Regulations apply and the Complainant’s acceptance that, at least by the time of the hearing, it had received the information requested in paragraph (a) of its application (see paragraph 3 above).

73. The drafting of Regulation 7 is interesting in that by paragraph 7(1) it describes the purpose of the entitlement to information as being to determine whether the recipient of a request for information (an employer) is a Community-scale undertaking to which the Regulations apply. However, the information required to be provided by paragraph 7(3)(a) will conclusively answer that question. Yet by paragraph 7(3)(b) the Regulations require the recipient to provide further information which has no bearing on that question: “The recipient must obtain and provide the employee...who has made the request with information...relating to the structure of the undertaking, or as the case may be the group of undertakings, and its workforce, in the UK and in each of the other Member States in the last two years.” The information required by 7(3)(a) mirrors the definition of a Community-scale undertaking and Community-scale group of undertakings. Information about the structure and workforce is not

relevant for the numbers game that determines whether an employer is covered by the regulations. Something more must have been intended by Regulation 7(3)(b). If Mr Gilroy's analysis was correct, why would there be a need for Regulation 7(3)(b)? It is clear that something more is required by paragraph 7(3)(b) to that set out in the preceding paragraph 7(3)(a) – otherwise the paragraph would be otiose.

74. Accordingly, on a plain reading of the Regulations the Panel concludes that it is not enough for the Employer simply to make the concession that the Regulations apply in order to avoid providing the information required by Regulation 7(3)(b).

75. If, however, we are wrong about that, a consideration of the CJEU case law cited by the Complainant lends weight to the Complainant's argument.

76. The facts in *Kuhne & Nagel* were similar in many respects as the facts in this case. In order to prepare for the establishment of a EWC the national Works Council had requested information about the average number of employees and their distribution across the Member States, the undertakings and establishments and about the structure of the company and group of companies, as well as the names and addresses of the Kuhne & Nagel group employee representatives in the Member States (para 25 of the judgment, p83 Complainant's bundle). As with the Employer before us, Kuhne & Nagel did not dispute that it was under an obligation to provide the information because it was part of a Community-scale undertaking or Community-scale group of undertakings. However it refused to supply the information on grounds that its central management was located in Switzerland. (The territorial jurisdiction point is not relevant to the facts before us, where the Employer's central management is in the EU state of the Netherlands, but we note in passing that the CJEU found against Kuhne & Nagel and held that the location of its central management being outside the EU was no defence to the claim.) The first point to note therefore is that it was not considered that Kuhne & Nagel's concession that it was a Community-scale undertaking relieved it of the obligation to provide information.

77. Mr Gilroy's second point, advanced in oral argument but not in his written submissions, was that the Complainant had conflated Regulation 7 with Regulation 9. This too is addressed in the CJEU authorities. The first CJEU case on the EWC Directive, *Bofrost* (C-62/99 [2001])

ECR 1-2579), which was extensively referenced in both *Kuhne & Nagle* and *Anker*, reiterates (see paragraphs 32 and 38 of the judgment for example) that “it is implicit in the Directive’s purpose that the obligations which it lays down are to be fulfilled in such a way as to enable the workers concerned, or their representatives, to have access to the information which is necessary if they are to be able to determine whether or not they are entitled to request the opening of negotiations and, where, relevant, to make that request in due form.” The cases do not distinguish between the two elements necessary to the entitlement to make the request – namely, (1) whether the employer is a Community-scale undertaking (Regulation 7 of the domestic TICE Regulations and (2) if there is sufficient interest in an EWC from the workforces in at least two member states, in order to make a valid request (Regulation 9 TICE). It is no doubt for that reason that Regulations 7 and 9 are both contained within Part II of the Regulations. An analysis of the facts in all three cases: *Bofrost*, *Kuhne & Nagel* and *Anker* support this interpretation.

78. The Panel therefore does not accept the Employer’s principal submission that by its concession that it is a Community-scale undertaking or part of a Community-scale group of undertakings the complaint is misconceived.

79. The next issue is whether the information that has been supplied is compliant with paragraph 7(3)(b) of the Regulations, it being accepted that the information provided complies with 7(3)(a). What is meant by “information relating to the structure of the undertaking or group of undertakings and its workforce”?

80. Mr Hayward relied on the dicta in *Kuhne & Nagel* and *Anker* set out above which reflects the full extent of both the EU case law on the point (see paragraphs 37 and 39 above.) there is no domestic case law on point.

81. It is implicit that the information to be provided may go beyond that which is in the public domain and that, for example, providing extracts from annual reports publicly available on an Employer’s website or from Companies House⁴ (as occurred here) will not necessarily be sufficient. It is almost so obvious it hardly needs stating but there would be no need for the

⁴ Huis, Maison, or whatever the name of the appropriate body in each relevant member state.

regulation if it was co-extensive with corporate reporting requirements and publicly available documentation.

82. There is no doubt that it entitles the Complainant to the name and contact details (email, telephone and postal address) for each Works Council in the Netherlands, Belgium and France (there being no Works Council in the UK) and details of all collective bargaining arrangements and details of the unions and the name and contact detail of the relevant union officials. Mr Gilroy effectively conceded the point during the course of the hearing when he sensibly agreed, on behalf of the Employer, to provide this information to the Complainant within 14 days and agreed to the making of an order in these terms. Accordingly, as set out below we make that order as it is information to which the Complainant is clearly entitled as it is material which is essential as a pre-requisite to the triggering of a request for the establishment of a EWC.

83. Mr Hayward's submission is that he is also entitled to know the details of all the locations where the Employer's employees and agency staff work, or as he put it the details of where the Employer's employees and agency staff are based by site establishment, e.g. the address of the Goldman Sachs' office where the Complainant is based since the business model of the Employer is to base its employees and agency staff at the premises of its client. The information provided so far by the Employer is opaque in that it does not enable the Complainant to find out where the Employer's employees work or any means of getting in touch with them or their representatives.

84. The test is whether the information is essential to the opening of negotiations for the establishment of a EWC. In order to open negotiations the Complainant must find out if others would like to join in his request to negotiate an agreement for a EWC. Where representative structures already exist through collective bargaining or Works Councils the details of the site establishments is not essential as he can find out through the representative structures. For the CAC to find otherwise would undermine and cut across existing information and consultative and collective bargaining structures and be contrary to the purpose and intention of the Directive and Regulations.

85. However, where there are no such structures, such as in the UK, the position requires closer analysis. The ratio of *Kuhne & Nagel* paragraphs 70 and 71 make clear that there are

two aspects to the question – firstly the type of information that may be required to be provided, and secondly, whether it is essential to the opening of the negotiations. The domestic TICE Regulations leave the matter widely and openly defined in paragraph 7(3)(b) by the use of the phrase “relating to” to enable the CAC to consider the material available in any particular case, given our industrial relations expertise for which were appointed (s.260(3) of the Act).

86. On the first question the definition of establishment and undertaking become relevant in order to understand what is meant by “the provision of information on...the establishments of the undertaking and the group undertakings, and on the structure of the undertaking and of the undertakings in the group...may be demanded to the extent to which the provision is essential to the opening of negotiations for the establishment of such a council.” (*Kuhne & Nagel* para 70).

87. The CJEU therefore distinguishes between the establishment and structure of the undertaking. For the avoidance of doubt the Complainant is not seeking further information as to the structure of the Employer, and for the purposes of this decision it is not necessary to consider what information is required to be provided about the undertaking(s) structure. Mr Gilroy’s argument that “establishments” of the undertaking refers only to the registered office of the corporate entity within the group of companies that make up the Employer was unconvincing for a number of reasons. Firstly because of the use of the plural – if it was intended to be the registered office it would have been expressed in the singular; secondly there would be no need for a disclosure requirement since the registered office details are in the public domain; and thirdly because it would confuse establishment with structure if the term establishment referred only to the registered corporate headquarters.

88. We find that in the absence of a contrary definition within either the Directive or domestic regulations the term “establishments” is intended to bear the same meaning as developed in the case law concerning the Collective Redundancy Consultation Directive (98/59 consolidating the earlier Directive 75/129/EEC) and the domestic legislation in s.188 of the Act namely the unit or entity to which the workers are assigned to carry out their duties. Where, as here, the employees are based at and work from the client’s premises and work in isolation from the workplaces of their fellow employees engaged with different clients. It is important for consistency – as set out in the Woolworths’ case “It should be noted from the outset... that,

in accordance with the case law of the Court the term ‘establishment’, which is not defined in Directive 98/59, is a term of EU law and cannot be defined by reference to the laws of the Member States...It must, on that basis, be interpreted in an autonomous and uniform manner in the EU legal order.” (para 45).

89. We next considered the term “undertaking,” to see if that affects the scope or interpretation of “establishments” since it is information about “the establishments of the undertaking” that may be required to be provided. Although not articulated expressly by Mr Gilroy, to be fair to the Employer we considered whether the use of “undertaking” and “establishment” in the same phrase circumscribed the otherwise expansive scope of the meaning. The difficulty however for Mr Gilroy is that he was unable to point to a plausible definition and his skeleton argument was silent on this point. No doubt it would have addressed the issue had he thought it helpful or desirable. In oral submission he suggested tentatively that undertaking in the context of the Regulations and Directive is to be taken as the registered office of the Employer.

90. A read across analogy from the TUPE jurisprudence is not quite so straightforward. Undertaking is not defined in the current TUPE regulations although was defined in the 1981 regulations as “any trade or business”. Currently, TUPE is drafted by reference to what constitutes a relevant transfer. A relevant transfer encompasses not just the transfer of an undertaking, but also part of an undertaking as well as a service provision change. There are thus three potential categories relevant to a TUPE transfer whereas we are concerned only with the definition of an undertaking. The 1981 TUPE regulations are a helpful guide however and we conclude that the establishment of the trade or business of the Employer on the facts before us are clearly the premises where its staff are based, such as, for example, in the Complainant’s case, the Goldman Sachs’ offices where he works with his 44 other colleagues.

91. Our confidence in our conclusion is strengthened when we consider the common sense in having some degree of consistency with TUPE. It is by operation of TUPE that the Employer comes to be the Complainant’s current employer following a series of relevant transfers over the years, and it is information and consultation rights with his employer through a EWC that the Complainant seeks. The trade or business of the Employer is a facilities provider at

numerous establishments which are often the premises of its client, and it is the essential information relating to that, which must be disclosed.

92. Turning next therefore to the final question – on the basis of all the material that the parties have put before us, is it essential for the Complainant to know the unit or entity where the employees of the Employer in the UK are assigned in order for him to open the negotiations referred to in Regulation 9, by ascertaining whether other employees in sufficient number would support his request to open negotiations for the establishment of a EWC?

93. As already stated, it is not possible to glean the identity of the establishments from the information provided to date, either directly or with the help of Yellow Pages or other publicly available tool. The Employer no longer relies on client confidentiality as a reason to withhold the information. There are no existing representative structures or collective bargaining arrangements in the UK with whom the Complainant can make contact. The nature of the business to embed its employees within the client means that they work separately from their colleagues based at other clients - for example, we have seen how the Complainant has worked at his establishment for 11 years and has no knowledge of his colleagues at other sites or on other contracts. Without the information about the other sites in the UK where employees of the Employer are assigned the Complainant will be unable to ascertain if colleagues support his desire to request to negotiate an agreement for a EWC (beyond those assigned with him at Goldman Sachs). There is no other available source for the information and the Complainant has proved to us that the information is essential.

Decision

91. The Panel finds that the Complaint that the Employer has failed to disclose, or as the case may be obtain and disclose, information in accordance with Regulation 7 is well-founded. The earliest date that the Employer failed to disclose, or as the case may be obtain and disclose, information was 30 March 2016.

92. In accordance with Regulation 8(2) the Panel ORDERS that the Employer must disclose, or as the case may be, obtain and disclose, the following information to the Complainant by no later than 28 days from the date of this decision:

1. The names and contact details (email, telephone and postal addresses) for the Chair of each Works Council in each of the Member States in which the Employer has undertakings;
2. Where there are collective bargaining arrangements in place in respect of any undertakings or establishments in any Member State the name and contact details of (email, telephone and postal addresses) the trade union, the undertaking and the coverage of the agreement;
3. Where there is no collective representation by either collective agreement or Works Council, the name and address of the unit or entity to which the Employer's employees and agency workers are assigned to carry out their duties.

The Panel

Her Honour Judge Stacey, Chair of the Panel

Mr. Mike Cann

Mr. Michael Leahy OBE

10 January 2017

Appendix 1

Names of those who attended the hearing on 9 December 2016:

For the Complainants

Mr Jonathon Hayward	-	International Officer, Unite the Union
Mr Kwasi Agyemang-Prempeh	-	Complainant

For the Employer

Mr Paul Gilroy QC	-	Counsel
Ms Hollie Ryan	-	Solicitor, Messrs Charles Russell Speechlys LLP