Case Number: IC/47(2014)
31 July 2014

CENTRAL ARBITRATION COMMITTEE

THE INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 2004

DECISION ON A COMPLAINT UNDER REGULATION 13

PARTIES:

Cofely Workplace Limited

and

1) Dr Jason Moyer-Lee in his capacity as an Employees' Representative
2) Mr Henry Chango Lopez & others

INTRODUCTION

1. Cofely Workplace Ltd (the Employer), submitted an application to the CAC dated 25 April 2014 under Regulation 13 of The Information and Consultation of Employees Regulations 2004 (the Regulations) for a declaration as to whether there was a valid employee request. The CAC gave the Employer and Dr Moyer-Lee notice of receipt of the application on 28 April 2014. Dr Moyer-Lee submitted a response to the CAC on 6 May 2014 which was copied to the Employer.

2. In accordance with section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), the CAC Chairman established a Panel to deal with the case. The Panel consisted of Mr Chris Chapman, Chairman of the Panel, and, as Members, Mr Arthur Lodge and Ms Judy McKnight CBE. The Case Manager appointed to support the Panel was Nigel Cookson.

THE APPLICATION

3. In its application dated 25 April 2014, the Employer explained that on 28 March 2014 the Independent Workers' Union of Great Britain ("IWGB") submitted a request to the CAC to negotiate an agreement with the Company in respect of information and consultation of its

employees based at the University of London (the Request). The Request, which stated that it was made pursuant to Regulation 7 of the Regulations, related only to University of London ("UOL") based employees of the Company. This site was only one of approximately 600 sites operated by the Employer. Approximately 9200 people were employed across these sites in the UK.

4. In order for a request to be valid under Regulation 7(2), it must be made by at least 10% of the employees in the undertaking. In this case the Request covered approximately 13% (29 employees out of a total of 210 employees) of the employees at the UOL site and not 10% of the employees in the undertaking. The Company was the undertaking and it employed such numbers that in order for the request to be valid it would need to be submitted by 920 employees whereas in fact it had only been made by 29 employees. On this basis the Employer submitted that the Request was invalid and the CAC should declare it to be so.

THE EMPLOYEES' RESPONSE

5. Dr Jason Moyer-Lee, as an employees' representative, submitted a response to the application dated 6 May 2014. He argued that in this instance the relevant "undertaking" was the UOL contract and that the "economic activity" was providing facilities management to the University of London.

6. Dr Moyer-Lee set out the industrial relations background that had prevailed on the site since the spring of 2011 and which cumulated in an employee request to negotiate an agreement in respect of the Regulations being submitted to the Employer by Mr. Henry Chango Lopez, employee and Branch Chair of the UOL Branch of the IWGB, on 28 March 2014.

7. It was the Employees' view that the Employer had demonstrated that it unconditionally accepted that the UOL contract was the appropriate bargaining unit for the purposes of information, consultation and negotiations and so the Employer's submission that "undertaking" referred to the entirety of the company was contradictory.

8. Arguing that information and consultation of employees of a company of 9200 employees spread over 600 sites throughout the UK should be conducted through one

negotiated agreement clearly flew in the face of current industrial relations practices.

9. Additionally, the Employer's implication that an employee request would need to be made by 920 employees in order to represent 10% of the 9200 employees which were spread throughout the UK would mean that employees from a number of different contracts, who had absolutely no contact with one another and no means of contacting one another, would have to coordinate the collection of 920 valid signatures from throughout the UK. This interpretation would not ensure the "effectiveness" of the Regulations and would virtually prohibit the implementation of the Regulations in large companies employing thousands of people throughout the country on a variety of sites and contracts.

10. Accordingly, it was submitted that the Employee Request was valid and the CAC should declare it to be so.

EMPLOYER'S COMMENTS ON THE EMPLOYEES' RESPONSE

11. On 13 May 2014 the Employer commented on the employees' response. It submitted that the argument put forward by Dr Moyer-Lee that a valid employee request was made on 28 March 2014, notwithstanding that such request was made by just 28 employees out of a workforce of some 9,200 individuals on the basis that 'the undertaking' in question was not the Company (the employer of the workers in question), but the UOL contract was misconceived. The Employer detailed its reasons as to why it had arrived at this conclusion and, as these reasons are set out in its submissions to the Panel below, they are not repeated here.

THE HEARING

12. On 14 May 2014 the parties were informed that the CAC would be holding a hearing on 15 July 2015 to assist the Panel to determine the application. Both parties lodged statements of case prior to the hearing which included supporting documents. All submissions received were duly cross copied between the parties and to the Panel. The names of those who attended the hearing on 15 July 2014 are appended to this decision.

THE EMPLOYER'S SUBMISSIONS

13. The Employer explained that it specialised in the provision of facilities services and associated building maintenance and operated at 600 sites across the UK employing approximately 9,200 people.

14. In accordance with the terms of a contract with the University of London ("UOL") it provided various maintenance services across four of the University's academic buildings, five halls of residence and 17 academic flats. A total of 210 employees were employed to provide services associated with this contract.

15. On 28 March 2014, an employee request was sent to the CAC. This request was made by 28 employees on the UOL contract. It was the Employer's case that the Request was invalid and it therefore sought a declaration, pursuant to regulation 13(1) of the Regulations, that the employee request did not satisfy any requirement of Regulation 7(2) to (4) as it was made by just 28 out of its 9,200 employees which represented just 0.3% of the workforce.

16. Contrary to the express words of the Regulations, the underlying European Directive, the guidance published by the Department of Trade and Industry ("DTI") and a body of case law determined by the CAC, the employees claimed that the "undertaking" in question was not the Company (the employer of the workers in question), but rather the UOL contract. The sole issue before the CAC therefore was the correct interpretation of the word "undertaking" within the Regulations.

17. Pursuant to Article 11 of the Information and Consultation Directive (2002/14/EC) ("the Directive"), Member States had until 23 March 2005 to adopt the provisions of the Directive. The UK implemented the Directive by enacting the Regulations. It was trite law that the Regulations were to be interpreted in conformity with the underlying Directive and so the dictionary definition of "undertaking" provided by Dr Moyer-Lee was of no assistance.

18. The Directive made a clear distinction between establishments on the one hand, and undertakings on the other. Whereas an establishment related to a particular site, or unit of business, an undertaking related to the wider business (or company) carrying out the economic activity in question.

19. Importantly, the Directive provided a choice to the UK Government. It could apply in one of two situations and the UK Government was entitled to choose whether it applied to a company/undertaking that employed at least 50 employees; or where an individual site, establishment or unit of business within a company employed at least 20 employees. Article 4 left it to the individual Member States to determine the practical arrangements for a workforce to exercise the rights contained within the Directive.

20. It was obvious from both the express provisions of the Regulations and the 'Explanatory Memorandum' provided by the DTI, that the UK elected to apply the Directive only to 'undertakings' (or companies) employing at least 50 employees. As set out in its Guidance to the Regulations, the DTI expressly stated that in terms of companies, it believed this meant a separately incorporated legal entity as distinct from an organisational entity such as an establishment, division or business unit of a company. The employees said that too much notice should not be taken of the DTI Guidance but the Regulations support the position taken by the DTI.

21. That the Regulations were drafted so as to apply only to the legal entity employing the workers in question, rather than mere establishments or business units, was reflected in Regulation 3(3) which stated that:

"In these Regulations, an undertaking to which these Regulations apply is referred to, in relation to its employees, as "the employer".

22. Indeed, the Employer argued, in **Coombs & Holder v GE Aviation Systems Ltd (IC/43/(2012)**, the CAC was required to decide whether the word "undertaking" was capable of applying not to an employer, but to a wider group of companies which included the employer and it decided that it was not capable of such a meaning.

23. Pursuant to the express words of the Regulations, as construed in **Coombs**, the word "undertaking" referred to the legal entity employing the workers that made the request. Just as the phrase was incapable of referring to a wider entity which did not have its own legal identity, it equally cannot refer to a lesser entity which had no legal identity such as an establishment, a particular contract, or a unit of business. This reflected the basic distinction contained within the Directive between an establishment and an undertaking.

24. On the facts of the present matter, the only legal entity capable of being the employer of the workers making the Request was the Company itself. The inevitable result of such a conclusion was that 10% of the employees employed by the Company must make the Request in order for it to constitute a valid employee request.

25. Impermissibly, the employees sought to elide the definitions of "undertaking" and "establishment" which was contrary to the express terms of the Regulations and the aim of the Directive. This argument had been rejected by the CAC both in **Coombs** and in **Pye v Partnerships in Care Limited IC/11/2007.**

26. It was to be noted that nowhere in the employees' letters to the CAC, or their Response Form was it even argued that the Company ran the University of London site as an 'autonomous unit' or stand alone business. In truth, there was nothing to distinguish the present case from the facts as found by the CAC in **Pye** and the same reasoning would apply to the UOL site on the facts of the present matter. The site/contract in question was merely one of 600 operated by the Company and each site/contract was operated by a centralised management and HR structure. None of the sites were operated with any degree of autonomy and the statutory accounts of the Company made no suggestion of any independence of the UOL contract. The inevitable conclusion was that the Company employed thousands of employees across hundreds of locations and the UOL contract was nothing more than one of the Company's "establishments". It was not an undertaking pursuant to the Regulations.

27. It was the Employer's belief that defining the word "undertaking" as referring to mere sites/establishments within an employer would cause significant confusion. If "undertakings" included subdivisions of a business, it would be unclear as to the correct definition/application of the term "establishment" and if the definition of "undertaking" was capable of applying to multiple (non-legal) entities within an employer, an employer would not know whether a valid employee request had been made or which particular undertaking it applied to. This would mean that it was the employees that were responsible for defining the undertaking in question and this could not be right. On this basis there could be multiple undertakings within one employer each with over-lapping boundaries. The possible confusion caused by this was of real impact in circumstances where a significant fine could be levied upon employers who did not properly respond to a valid request.

28. That it recognised UNISON for the UOL site was immaterial to the correct construction of the word "undertaking" within the Regulations. Further, the phrase "bargaining unit" within the Trade Union & Labour Relations Consolidation Act 1992 referred to a group (or groups) of workers covered by a recognition agreement. All this meant was that for the purposes of collective bargaining, the Employer recognised the UOL site as a 'unit' of employees and it had nothing to do with whether that unit constituted an "undertaking" within the meaning of the Regulations. There was no conflict whatsoever between a company agreeing to recognise a trade union for a specific 'unit' of employees, but also denying that such a unit constituted "an undertaking" pursuant to an entirely unrelated Directive. The Employees' argument on this ground was misconceived.

29. The Employees also argued that defining the word "undertaking" as applying to a company as a whole (rather than sub-divisions within that company) was contradictory to the intent of the Regulations and Directive. They argued that this would effectively prevent workers from enjoying their rights to information and consultation within large diffuse companies but the simple answer to this argument was that the drafters recognised that the 'coverage' of the Directive would be affected by the choice of the individual Member State as to whether the Directive was applied to "undertakings" or "establishments".

30. Applying the Directive to "undertakings"/companies with at least 50 employees (regardless of where such employees are located) resulted in a wide coverage as against 'larger' companies whilst applying the Directive to "establishments"/business units with at least 20 employees (regardless of the size of the company) would result in more sites being covered within the Member State, but potentially at the expense of covering large diffuse companies that had many hundreds of employees who were based at small sites with fewer than 20 employees. The fact that this choice was provided to the individual Member States was fatal to the employees' argument on this point.

31. As for the employees' point regarding the various contracts with no common characteristics the Employer would say that the Regulations allowed for an employer to make separate agreements with its employees. The employees also said it was not appropriate to have one representative representing 368 employees but the Employer would say that the Regulations allowed for one representative to cover more than 1000 employees in an undertaking that employed 25,000 or more employees given that the number of

representatives could not exceed 25.

32. Regulation 16 stated that a negotiated agreement could be a single agreement or it could comprise different parts. This clearly recognised that a negotiated agreement could cover separate establishments within an undertaking but it did not mean that the establishments were undertakings in their own right. This provision that allowed for separate agreements would be superfluous if the employees were right in their assertions. Regulation 8 again supported the Employer's interpretation as it referred to one or more pre-existing agreements.

33. The UK's enactment of the Regulations ensured that the Directive applied to the Company in circumstances where a "valid employee request' was made. In conformity with the choice set out in the Directive, the UK Government was entitled to draft regulations which required 10% of the workforce of the Company to make such a request. Accordingly, the interpretation advanced by the employees was plainly inconsistent with the express terms of the Regulations and the purpose of the Directive and was simply an attempt to realign the definition of "undertaking" with the definition of "establishment". The UK Government had made its choice and had chosen "undertaking" and it was not open to Dr Moyer-Lee to unpick that decision.

34. Finally, reliance was placed upon **Brown v G4 Security (Cheltenham)** (UKEAT/0526/09/RN**)** as authority for the proposition that the word "undertaking" was to be defined as including sub-divisions/sites within an employer but no such proposition could be derived from this case. The EAT was not required (and did not) adjudicate upon such an issue. The matter came before the EAT pursuant to an application made by Mr Brown for a Penalty Notice to be issued under Regulation 22(6). The application was made in circumstances where the Respondent had conceded that the Regulations applied and the CAC had found the Respondent to be in breach of the Regulations at a previous hearing where the Respondent had not raised any argument as to the correct interpretation of "undertaking" within the Regulations. Accordingly, neither the CAC, nor the EAT decided the issue presently before this Panel. **Brown** offered no guidance whatsoever as to the correct interpretation of the Regulations.

35. Conversely, the CAC has been troubled twice before with the specific arguments

raised in the Response (**Pye** and **Coombs**). On both occasions, the arguments now advanced by Dr Moyer-Lee were rejected.

36. In closing the Employer submitted that it must be right that "establishment" and "undertaking" had different definitions otherwise the UK Government would not have faced a choice when it came to implementing the Directive. The government had made its choice and it could not be unpicked simply because of the difficulties posed by a scattered and diverse workforce. The employees had tried to show that the UOL contract was managed as a separate entity but the agreement to recognise UNISON told the CAC nothing as to how the entity itself was managed. In any event, the Employer's primary position was that the "undertaking" must be the company; it must be a legal entity. For the reasons set out above, the CAC was invited to hold that the request made by 28 employees on 28 March 2014 did not constitute a 'valid employee request' within the meaning of Regulation 7(1).

THE EMPLOYEES' SUBMISSIONS

37. It was the Employees' case that the relevant "undertaking" in this matter was the UOL facilities management contract of Cofely Workplace Limited and so the request made by 28 employees employed under the contract for the Employer to negotiate an agreement in respect of information and consultation was a valid request.

38. Dr Moyer-Lee, for the employees, set out the recent industrial relations history between the employees on the UOL contract and the Employer and how, in October 2011, Balfour Beatty Workplace ("BBW"), the employer at the time, voluntarily recognised UNISON in respect of the employees on the UOL contract to, amongst other things, "establish a framework for consultation and collective bargaining" and "enhance effective communication with all Staff throughout the Company". The Recognition Agreement was submitted into evidence by Dr Moyer-Lee.

39. In September 2012, UNISON initiated a high profile public campaign for improved terms and conditions on par with public sector employees of the University. As BBW was in charge of security for the UOL, senior management of the company were present at nearly all of the protests that took place during the campaign.

40. However, in April 2013, dissatisfied with how UNISON had invalidated the local branch elections after voting had taken place, employees at the UOL contract left UNISON en masse and formed an autonomous "UOL" branch of the Independent Workers' Union of Great Britain (IWGB).

41. Shortly after forming the new union branch, officials from the IWGB met with senior management at BBW and requested that the company voluntarily recognise the IWGB. The request was denied on the basis that the company preferred to continue recognising UNISON.

42. The IWGB continued to campaign on behalf of the employees. It held protests, filed a number of formal grievances, and conducted ten days of industrial action. On the second day of industrial action, BBW announced improved sick pay, holidays, and pensions for employees at the contract. The industrial dispute which formed the basis for the first five days of industrial action was also over union recognition for the IWGB.

43. By January 2014, over 50% of the employees at the UOL contract were members of the IWGB and as of 10 July 2014, the IWGB represented 67% of the employees. On 28 March 2014, an employee request to negotiate an agreement in respect of information and consultation was submitted by Mr. Henry Chango Lopez, an employee and also the Chair of the UOL Branch of the IWGB.

44. The background set out above provided the context in which the employee request was made and the employer response submitted. The context was one of high industrial tensions as well as mutual distrust and confrontation. The history also demonstrated the Employer's clear policy of refusing to engage with the union that represented the majority of employees.

45. It also demonstrated that the Employer had repeatedly and unconditionally accepted that the UOL contract was the appropriate bargaining unit for the purposes of information, consultation, and negotiations. There had never been a dispute about the territory that should be covered by union negotiations. The only dispute had been about with *which* union the negotiations should be conducted. Therefore, the Employer's submission that "undertaking" referred to the entirety of the Company appeared contradictory to its current and past policies with regard to information, consultation, collective bargaining, and industrial relations more

broadly.

46. Additionally, the Employer's submitted interpretation of "undertaking" appeared contradictory to the intent of the Regulations, which were the domestic implementation of European Parliament and Council Directive 2002/14/EC.

47. Article 1(2) of the Directive stated: "The practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness." Arguing that information and consultation of employees of a facilities management company of 9,200 employees spread over 600 sites throughout the UK should be conducted through one negotiated agreement clearly flew in the face of current industrial relations practices in the UK. Facilities management companies which recognised unions for the purposes of informing, consulting, and collective bargaining routinely did so on a client contract basis.

48. Additionally, the implication of the Employer's submission was that an employee request would need to be made by 920 employees in order to represent 10% of the 9,200 employees which were spread throughout the UK. This would mean that employees from a number of different contracts, who had absolutely no contact with one another and no means of contacting one another, would have to coordinate the collection of 920 valid signatures from throughout the UK. Only someone with the vaguest familiarity with UK industrial relations practices would believe such task was possible. Not only would this interpretation of the law not ensure the "effectiveness" of the Regulations, it would virtually prohibit the implementation of the Regulations in large companies employing thousands of people throughout the country on a variety of sites and contracts.

49. Furthermore, if the Regulations were to be implemented on the basis of the interpretation of "undertaking" as submitted by the Employer, the ratio of representatives to employees would be drastically different to the proportions envisaged by the drafters of the legislation. Regulation 19(3) stated that the appropriate number of representatives should be one representative for roughly every 50 employees, subject to a minimum of 2 and maximum of 25 representatives. Were the Regulations to be implemented in line with the Employer's interpretation, there would be one representative for every 368 employees. This was over

seven times as many people per representative as envisaged by Parliament. If this interpretation was to stand, not even the entire UOL contract (210 employees) would be entitled to one representative.

50. Article 1(3) of the Directive stated: "When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees".

51. Given the Employer's track record outlined earlier, it was submitted, that its application to the CAC was not done with regard to Article 1(3) but rather as a deliberate attempt to avoid informing and consulting its employees at the UOL at all costs.

52. The definition of the word "undertaking" was sufficiently broad to envisage the interpretation of the word submitted by the employees and Dr Moyer-Lee put into evidence a number of dictionary definitions which supported this statement.

53. The Employer submitted that its interpretation of the word "undertaking" as referring to the entire company was consistent with the Regulations. However, the Regulations did not define "undertaking" beyond it being: "a public or private undertaking carrying out an economic activity, whether or not operating for gain". Therefore, whilst its submitted interpretation was not necessarily inconsistent with the letter of the law, neither was that put forward by the employees and, contrary to the Employer's submission, the employees' definition of "undertaking" would not be impracticable. The UOL covered separate buildings and halls of residence and taken together, could be considered parts of the "undertaking." If however, the "undertaking" was the company as a whole, as claimed by the Employer, then it could never be smaller than a legal entity.

54. The Employer referred to the CAC decisions in **Pye** and **Coombs** and suggested that in both cases the CAC had rejected the employees' approach to the word "undertaking" and it also submitted the DTI's guidance on the interpretation of the word as evidence.

55. In **Coombs**, the CAC panel noted that the regulations did not define the word

"undertaking" and found that whilst the DTI's view as expressed in its Guidance must carry some weight, it was not to be regarded as determinative or even highly persuasive. The decision provided a useful precedent of a CAC panel stating the limited usefulness of DTI guidance. It also provided clarification that **Pye** did not definitively equate "undertaking" with "company" and clearly distinguished between what was adjudicated on in **Coombs** and what was to be adjudicated on in this current case.

56. In the case of **Brown and G4 Security (Cheltenham) IC/27(2009)**, an employee request was submitted by 85 signatories of the undertaking G4 Security (Cheltenham), which employed 350 people. This was despite the fact that G4 Security UK employed 45,000 people nationwide. Although the complaint in **Brown** was made in line with Regulation 19, the Panel specifically set itself the task of determining whether a valid employee request had been submitted and it found that there had been a valid request by employees under Regulation 7 for the Employer to initiate negotiations to reach an agreement.

57. In 2010 the EAT heard the case of **Brown**. The judgment of the EAT used the words "undertaking" and "establishment" interchangeably. Both the EAT, and the CAC panel which heard the case before it, implicitly agreed that the undertaking consisted of 350 employees of G4S (Cheltenham). The wording of the judgment, although not explicit, appeared to indicate that the 350 people were employees of a single G4S contract. Additionally, both the EAT and the CAC panel before it, held that the employee request of 85 signatories constituted over 10% of the undertaking.

58. It was submitted that the facts in **Brown,** in so far as they were material to the issue of what constituted the undertaking in respect of which 10% of employees must make the request for it to be valid, were analogous to the facts of this case.

59. In support of his argument that the UOL contract was of a similar situation as found in **Brown**, Dr Moyer-Lee explained that every major issue that affected employees on the UOL contract was addressed by the Employer on a contract basis and that the Employer used the term "company" when referring to smaller units at a local level. For example, the Employer's agreement with UNISON referred to "company" but the agreement was limited to the UOL contract. Paragraph 2(4) of Schedule A1 supported this argument. Dealing with statutory trade union recognition it stated that reference to the employer was to the employer

of the workers.

60. As regards the point made by the Employer that it was possible to have more than one pre-existing agreement in an undertaking the employees would say that it was common practice in universities to have a number of different unions representing different groups of employees on the same campus.

61. Whilst the application of the Directive gave a choice to the UK government, it was the employees' case that there was some flexibility in the definition of "undertaking". To apply the Regulations to a giant management company with employees scattered across hundreds of sites throughout the UK would preclude the implementation of the Regulations in many instances. There was no binding decision on this issue. **Pye** only decided that the care home was not an undertaking but importantly, it did not preclude a smaller entity than a company being an "undertaking". The appropriate level in this case was the UOL contract. Accordingly, the employees submitted that the Employee Request was valid and requested that the CAC declared it to be so.

THE PANEL'S CONCLUSIONS

62. The facts in this case are not in dispute. The relevant employer for the purpose of the Regulations is Cofely Workplace Limited. Balfour Beatty Workplace Limited had been the employer of the employees at the UOL contract up to 16 December 2013 when it was acquired by Cofely Limited. Following its acquisition its name was changed to Cofely Workplace Limited. Neither is it disputed that the Employer currently employs in the region of 9,200 employees spread over some 600 sites across the UK. However, what is in dispute is the interpretation of the term "undertaking" as found in Regulation 7 and its correct application to the facts of this case .

63. This is an application brought by the Employer, Cofely Workplace Limited, under regulation 13 of the Information and Consultation Regulations 2004. The Employer is seeking a declaration that the employee request dated 28 March 2014 signed by 28 employees working at its University of London contract was not a valid request as it had not been made by 10% of the employees employed in the undertaking.

64. Regulation 13 enables an employer to dispute an employee request or dispute whether the obligation in regulation 7(1) applies. As far as is material, it provides:

"Dispute about employee request, employer notification or whether obligation in regulation 7(1) applies

13. (1) If the employer considers that there was no valid employee request—
(a)because the employee request did not satisfy any requirement of regulation 7(2) to (4) or was prevented from being valid by regulation 12, or
(b)because the undertaking was not one to which these Regulations applied (under Regulation 3) on the date on which the employee request was made,
the employer may apply to the CAC for a declaration as to whether there was a valid employee request.
(2) …
(3) The CAC shall only consider an application for a declaration made under paragraph (1) or (2) if the application is made within a one month period beginning on the date of the employee request or the date on which the employer notification is made."

65. The employee request that is in dispute was made on 28 March 2014 and the Employer's application was received by the CAC on 25 April 2014 and so was within the time limit stipulated in regulation 13(3) above.

66. When asked on its application form to indicate why it considered the request to be invalid the Employer stated that the request had not been made by 10% of the employees. Regulation 7 sets out the requirements of a request for it to be considered a valid employee request to negotiate an agreement in respect of information and consultation. As far as is material, it provides:

"7. (1) On receipt of a valid employee request, the employer shall, subject to paragraphs (8) and (9), initiate negotiations by taking the steps set out in regulation 14(1).
(2) Subject to paragraph (3), an employee request is not a valid employee request unless it consists of—
(a) a single request made by at least 10% of the employees in the undertaking; or
(b) a number of separate requests made on the same or different days by employees which when taken together mean that at least 10% of the employees in that undertaking have made requests, provided that the requests are made within a period of six months.
(3) … "

67. The Employer submitted that as it employed a total currently numbering 9,200 employees across 600 sites in the UK, a valid employee request would have to be signed by 920 employees. As the request was only signed by 28 workers on the UOL contract it was

significantly short of the threshold required for it to be considered valid. Conversely, Dr Moyer-Lee argued that the relevant undertaking in this matter was not the company as a whole but the UOL contract and we are told by the Employer that a total of 210 employees were employed to provide services associated with this contract. If Dr Moyer-Lee is right and the relevant undertaking is the UOL contract, then the request would be a valid request in that it was a single request signed by 13.3% of the employees on the contract and the Employer would therefore be obliged to initiate negotiations to reach an agreement under the Regulations. The question we must address therefore is whether or not the UOL contract is an "undertaking" pursuant to the Information and Consultation Regulations 2004.

68. Although Dr Moyer-Lee put forward various dictionary definitions of the term "undertaking" we must look elsewhere to establish what those that drafted the legislation had in mind when they decided upon this term. First, we must look at the Regulations themselves. In Regulation 2 the term is defined thus:

""undertaking" means a public or private undertaking carrying out an economic activity, whether or not operating for gain; …"

69. That it defines an "undertaking" as being an "undertaking" is not helpful.

70. As the Regulations implemented into UK law provisions of the EU Directive, and as stated by the Employer, it is trite law that the Regulations are to be interpreted in conformity with the underlying Directive we turn next to the Directive itself for assistance.

71. During the course of the hearing we were referred to a number of provisions. We start with Article 1 which sets out the object and principles behind the Directive

"1. The purpose of this Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community.

2. The practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness.

3. When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or

establishment and of the employees."

72. Here we are presented with two types of entities to which the Directive applies – "undertakings" and "establishments". They are defined in Article 2 as follows:

"For the purposes of this Directive:
(a) "undertaking" means a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States;
(b) "establishment" means a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources;
(c) "employer" means the natural or legal person party to employment contracts or employment relationships with employees, in accordance with national law and practice;

73. Article 3 sets out the choice faced by Member States in applying the terms of the Directive.

1. This Directive shall apply, according to the choice made by Member States, to:
(a) undertakings employing at least 50 employees in any one Member State, or
(b) establishments employing at least 20 employees in any one Member State.
Member States shall determine the method for calculating the thresholds of employees employed.
2. …"

This Article made clear that the Member States therefore had a choice as to whether they applied the Directive to "undertakings" or "establishments". The inference from this provision is that the terms are mutually exclusive. A choice had to be made between "undertakings" and "establishments" and the UK Government chose the former over the latter. Indeed, it is to be noted that the word "establishment" appears only once in the Regulations and in a different context to that discussed here.

74. That the UK Government made a conscious choice is set out in paragraph 4 of the Explanatory Memorandum to the Regulations prepared by the Department of Trade and Industry.

"4. Legislative Background
4.1 The Regulations are made under powers contained in section 42 of the Employment Relations Act 2004. They give effect to the EC Directive on Informing and Consulting Employees (Directive

2002/14/EC). Article 1 of the Directive states that its purpose is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in the European Community. The Directive applies – at the choice of Member States - to Community undertakings with 50 or more employees in a Member State, or establishments with 20 or more employees in a Member State. The UK has chosen to apply the Directive to undertakings with 50 or more employees. "

75. The UK Government chose not to apply the Directive to "establishments", which are defined in Article 2 as meaning a "unit of business". The UK Government defined "undertaking" in the Regulations by adopting the definition set out in Article 2 of the Directive.

76. Based on the Panel's finding that one definition must exclude the other then we can safely say that an undertaking is not a unit of business and, as far as the Regulations are concerned, a public or private undertaking is not an "establishment".

77. Regulation 3 clearly states that the Regulations apply only to "undertakings". This regulation makes no mention of "establishments". It provides:

"3. (1) These Regulations apply to undertakings—
(a) employing in the United Kingdom, in accordance with the calculation in regulation 4, at least the number of employees in column 1 of the table in Schedule 1 to these Regulations on or after the corresponding date in column 2 of that table; and .
(b) subject to paragraph (2), whose registered office, head office or principal place of business is situated in Great Britain. .
(2) Where the registered office is situated in Great Britain and the head office or principal place of business is situated in Northern Ireland or vice versa, these Regulations shall only apply where the majority of employees are employed to work in Great Britain.
(3) In these Regulations, an undertaking to which these Regulations apply is referred to, in relation to its employees, as "the employer"."

78. This regulation sets out the numerical figure to be satisfied and regulation 3(1)(b) is a domicile issue. In this case before us the relevant "undertaking" is in the UK and it employs the number of employees in column 1 of the table set out in Schedule 1 to the Regulations. Regulation 3 is also clear in that the "undertaking" is "the employer" and it is the employer upon which the obligation falls should the request be a valid request.

79. To assist the Panel reach its decision we have been referred to the Explanatory Memorandum to the Regulations as well as guidance on the Regulations, both documents prepared by the Department of Trade and Industry. The question that the Panel must address is how much notice does it take of the documents prepared by the DTI?

80. Paragraph 4 of the Guidance sets out the position of the Guidance in relation to the CAC which, as far as is material, reads:

"Ultimately though, it is up to the courts to interpret the legislation - in the first instance, this normally means the Central Arbitration Committee (CAC). In taking decisions, the CAC is not bound to follow this guidance. However, those involved in CAC proceedings, such as employers, employees and their representatives, may bring provisions in the guidance to the attention of the CAC as part of the evidence they submit to support their position. The final say rests with the European Court of Justice."

81. What does the DTI guidance say on the definition of "undertaking"? In paragraph 5 it explains:

"…In terms of companies, DTI believes this means a separately incorporated <u>legal</u> entity (which would have its own shareholders and, in the case of British companies, a unique registration number at Companies House), as distinct from say an organisational entity such as an establishment, division or business unit of a company…"

82. Whilst the DTI makes clear that its definition is based on its belief as to the meaning of undertaking, it sets out a number of key elements as to what form an "undertaking" should take. According to the DTI, an "undertaking" must be a legal entity and, in terms of companies, have a unique registration number at Companies House. Further, in an attempt to put flesh on the bones, the DTI proffers the view that an undertaking must be distinguished from an organisational unit and refers to a "business unit" which links back to the definition of "establishment" in Article 2 although it refers to a "unit of business".

83. In paragraph 10 of the Guidance the DTI sets out its view that an undertaking may comprise several "establishments". It reads:

"10. Where an undertaking is part of a group of companies, an employee request must still be made by 10% of the employees *in the undertaking* (ie one of the companies in the group), not 10% of the employees in the group of companies. Similarly, where an undertaking consists of several separate establishments or business units, the request must still be made by 10% of the employees *in the undertaking*, not 10% of

those in one of the establishments or business units."

84. The Employer, in its submissions, referred to "site" but this is not a term used in the Regulations or Directive. It is however, a term used by the DTI in its Guidance. Indeed, in the glossary of terms at the end of the Guidance, it defines "Undertaking" as:

"In the case of companies, a separately incorporated legal entity as distinct from an organisational entity such as an establishment (site) or business unit."

85. The Panel was also referred to three decisions of the CAC. In **Pye** the issue was of a company that operated a number of care homes and a request came from employees at one of the sites. In paragraph 13 of the decision the Panel sets out the issue before it in that Mrs Pye was arguing that the single care home in question was an autonomous unit within the company whereas the employer was arguing the care home was but one of its establishments. The Employer put forward its most recent published accounts as evidence in support of its position. It is significant that in paragraph 14 of the decision, in concluding that there was no evidence that the single care home was a self-sufficient unit, the Panel said:

"**The Panel found those accounts persuasive. It is clear from the accounts that Partnerships in Care Limited is a company employing some 2700 staff across several locations and there is no evidence that the Company comprises a number of separate undertakings. In particular, there is nothing in the accounts to indicate that Redford Lodge, now known as the North London Clinic, is a separate undertaking and there was nothing in Ms Pye's evidence that contradicted that view."**

86. **Pye** was an early case before the CAC, it being determined in 2007. In the more recent case of **Coombs & Mr Holder and GE Aviation Systems Limited,** a decision promulgated on 4 December 2012, the Panel was faced with the other side of the coin. In paragraph 9 we are told that the GE Aviation division in the UK was split into four different subsidiary companies. If the DTI guidance was correct in its assertions, the "undertaking" would be a legal entity and the question that had to be addressed in **Coombs** was whether an "undertaking" could be a group of undertakings or whether it had to be a single undertaking. In paragraph 11 of the decision the Panel made reference to the DTI guidance and quoted from paragraph 5, which we have already referred to above. In paragraph 53 the Panel succinctly identified what it had to decide in a case in which a business takes the form of a group of companies and whether or not it is appropriate that the four sites be considered the "undertaking". In paragraph 54 the Panel asked whether "undertaking" can apply more

widely than to an individual company in a corporate group and in paragraph 55, commenting on the DTI Guidance, the Panel said:

"…Although the Department's view must carry some weight, we do not regard it as determinative or even highly persuasive."

87. The panel in **Coombs** focussed on the Regulations themselves and asked whether they could be made to work effectively if more than one company was to form an undertaking. Having thoroughly examined the matter and, in a fully reasoned decision, the panel determined that they could not and so it decided that the undertaking was limited to the one company.

88. The final case put before us was that of **Brown and G4 Security (Cheltenham) IC/27(2009)**. In this case the issue as to what constituted an undertaking was not a question to be considered by the panel. The matter went to the Employment Appeal Tribunal for the imposition of a financial penalty and whilst the judge that heard the matter used the terms undertaking" and "establishment" interchangeably in the judgment, it has no bearing on this case. The EAT was not sitting in its appellate capacity but rather deciding whether a penalty notice should be issued pursuant to Regulation 22, on the basis that the employer had failed to comply with an order of the CAC.

89. The Directive defines "undertaking" and "establishment" as do the Regulations and it is clear that the UK Regulations are not applicable to establishments, only to undertakings. It is also clear to the Panel that the terms "undertaking" and "establishment" are mutually exclusive and are not interchangeable. The only other view to assist the Panel on this matter is that given by the DTI in its Guidance and explanatory memorandum and we have set out our views on these documents above. In the circumstances of this case we did find the guidance and the explanatory memorandum of assistance in resolving the issue before us. On the basis that this would lead us to conclude that the Employer's interpretation of the meaning of undertaking is the correct one the final question is whether this leads to an interpretation that is inconsistent with the aims and intention of the Directive as argued by Dr Moyer-Lee

90. What then can we assume to be the purpose of the Directive? Dr Moyer-Lee argued

that Article 1(2) called for the Directive to be implemented with due consideration to the industrial relations practices in the UK and so the Regulations should not be interpreted as meaning that there should be one negotiated agreement covering the 9,200 employees of a facilities management company spread over 600 sites throughout the country. To do so, so Dr Moyer-Lee argued, would fly in the face of current industrial relations practices in the UK. He argued that any union recognition agreements in facilities management companies were on a client contract basis. On the other hand, The Employer argued that the Regulations permitted more than one negotiated agreement and so the agreements could be tailored accordingly. The Employer also made the point that the Regulations called for one representative per 1000 employees in those undertakings with 25,000 or more employees and that this negated the employees' argument as to having one representative per every 368 employees if the undertaking was on a company basis and not by contract.

91. Having considered these points the Panel would agree with Dr Moyer-Lee that collective bargaining, in more cases than not, would be done on a local level but in general this is because of the nature of the workforce. It is not right however, to compare a bargaining unit with an "undertaking" as the Regulations make clear that all workers in an undertaking must be covered by Information and Consultation agreements and not just a bargaining unit comprising workers with similar characteristics. That the Regulations limit the number of representatives in large-scale undertakings is so as to avoid an unwieldy Information and Consultation mechanism. Mind, if Dr Moyer-Lee is correct as to his definition of "undertaking" then it is not likely that there would be any undertakings with 25,000 or more employees in one location. Indeed, the Panel is hard pressed to identify any employer that employs this number on a single location in the UK so it must be right that this threshold does not apply on a contract by contract basis, which would be the extrapolation of Dr Moyer-Lee's argument, but would be the sum of the number employed throughout the country.

92. In the absence of any supporting evidence to the contrary we find that we cannot agree with Dr Moyer-Lee's submissions, no matter how eloquently put, as to the interpretation of "undertaking". We do not believe that it was the intention of the UK Government that "undertaking" be so defined on such a scale. If it had so intended, it would have elected for "establishment" and not "undertaking". There is a difference between these terms and both the Directive and the Regulations make this abundantly clear. Whilst we have

commented on the weight to be placed on the definitions given by the DTI we find that in the absence of any alternative interpretation, it is a framework within which to consider the parties' submissions.

93. Having considered the submissions both in writing and those made orally at the hearing on 15 July 2014 we cannot identify any grounds upon which we can conclude that the UOL contract is an undertaking. It is not a distinct business unit within Cofely Workplace, it is not a legal entity in its own right as demonstrated by the accounts the Employer put into evidence nor are we persuaded by Dr Moyer-Lee's argument that it is a standalone autonomous unit. In our view it is simply a sub-division of Cofely Workplace Ltd and as such the employee request made on 28 March 2014 was not a valid request.

94. Finally, we would add this. In paragraph 63 of **Coombs** the Panel made the following observations:

"63. We do not reach this conclusion with any enthusiasm. In many groups of companies the business organisation of the group does not map very well onto its legal structure. The latter has often grown up haphazardly and is paid little attention when management structures are put in place. Undertakings based on the legal structures might not make much sense in industrial relations terms - though the parties are always free to agree information and consultation structures which better suit their business arrangements. Mr Hayward suggested that our approach would render the information and consultation provisions open to manipulation. He put his case for a broader approach very eloquently. However, we cannot convince ourselves that the Regulations were drafted on a broader basis. Possibly their approach is somewhat crude in order not to make them more complex than they currently are or to encourage voluntary negotiation."

95. These are sentiments that we would echo. We would take this opportunity to remind employers of the provision in regulation 16 which allows for agreements to be made in different parts which could be better tailored to a scattered and diverse workforce rather than taking a "one size fits all" approach.

DECISION

96. The Panel's decision is that the application is well-founded and we hereby declare that for the reasons given above, the employee request is invalid.

Panel

Mr Chris Chapman, Chairman of the Panel

Mr Arthur Lodge

Ms Judy McKnight CBE.

31 July 2014

Appendix

Names of those who attended the hearing on 15 July 2014:

For the applicant Employer

Andrew Edge	-	Counsel for the Respondent
Mark McQuillan	-	Partner at TLT, Solicitors for the Applicant
Siobhan Fitzgerald	-	Associate at TLT, Solicitors for the Applicant
Stephen Baker	-	Head of Employee Engagement, Cofely Workplace Ltd

For the respondent Employees

Dr Jason Moyer-Lee	-	President of IWGB
Mr Henry Chango Lopez	-	Employee