Case Number: DI/7/(2014)

17 October 2014

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SECTION 183 – DISCLOSURE OF INFORMATION

Unite the Union

and

Fujitsu Services Ltd

Introduction

1. Unite the Union (the Union) submitted a complaint to the CAC dated 29 May 2014, received by the CAC on 30 May 2014, under section 183 of the Trade Union and Labour Relations (Consolidation) Act 2014 (the Act). The complaint related to an alleged failure by Fujitsu Services Ltd (the Employer) to disclose information for the purposes of collective bargaining.

2. In accordance with section 263 of the Act, the Chairman established a Panel to consider the complaint. The Panel consisted of Professor Lynette Harris, Deputy Chairman, and, as Members, Mr Peter Martin and Mr Paul Gates. The Case Manager appointed to support the Panel was Linda Lehan and, for the purposes of this decision, Simon Gouldstone.

3. The Employer submitted, on 6 June 2014, a response to the Union's complaint. To establish whether there were any ways in which the parties could be assisted in resolving the issues in dispute, the Panel Chair held an informal meeting with the parties on 21 July 2014. As it did not prove possible to reach agreement on all the issues, the Panel decided to hold a formal hearing which took place in Manchester on 26 September 2014. The names of those who attended the hearing are appended to this decision. Both parties provided written statements of case which were exchanged, and submitted to the Panel, in advance of the hearing.

Background

4. The following background information was provided by the parties and, except where otherwise stated, was agreed by them.

5. The Employer, Fujitsu Services Ltd (FSL), is an information technology services company which designs, builds, operates, supports and maintains IT systems primarily for government departments and large businesses. Nationally it employs about 10,000 staff of whom 1,000 are engineers. In April 2012 FSL set up Fujitsu Services (Engineering Services) Ltd (FSESL) to provide technical resources to FSL. FSESL is a wholly owned subsidiary of FSL and the Directors of FSESL are senior managers of FSL. FSESL employs about 350 staff and is a fully integrated part of FSL's business.

6. The Union is recognised for collective bargaining by FSL within its operation in Manchester. The bargaining unit consists of employees contractually based at Central Park Manchester, employees based at home and living within 30 miles of Central Park and a small group of home-based employees living further away. There are about 800 employees in the

bargaining unit. The parties' relationship is governed by the 'Union Recognition Agreement for Fujitsu Services Manchester' (the Recognition Agreement). The Agreement includes, at paragraph 2.7, a provision that "This agreement establishes mechanisms for negotiating changes to terms and conditions of employment and for an annual pay review for Employees within the Bargaining Unit". The Recognition Agreement is supplemented by the 'Manchester Pay and Benefits Agreement' (the Pay and Benefits Agreement) which consolidates the agreed elements of the terms and conditions arrangements for employees within the bargaining unit.

7. The Union submitted to the Employer, on 26 March 2014, a request for information in line with the timetable, and disclosure provisions, of the Pay and Benefits Agreement. The Union subsequently submitted its CAC complaint as the Employer had not provided all the information requested. However, by the date of the hearing, the only outstanding issue was the Employer's alleged refusal to supply information relating to the terms and conditions of staff employed by FSESL.

8. In its written submission, the Employer contended that the Union had not stated clearly the information it sought about FSESL employees. The Union responded through its solicitors, by way of a letter dated 24 September 2014, with a detailed list of items. The Employer protested that it had not had an opportunity to consider, and respond to, this list but, at the beginning of the hearing, the Panel Chair stated that the Employer could address the issue in its oral presentation. The Union confirmed at the hearing that it was only seeking the items set out in item 1 of its letter and, for the purposes of this claim, was not seeking the information set out in item 2 of the letter.

Summary of the submission made by the Union

9. The Union accepted that its complaint was in respect of FSL as the employer but that it was fully entitled to request information about the terms and conditions of FSESL staff as FSESL was a subsidiary of FSL and there was an undeniably close relationship between the two companies. The Union drew the Panel's attention to the FSESL *Report and financial statements 2013* which stated, "The Company's principal activity is the provision of technical resources to the Engineering Services division of Fujitsu Services primarily mobile project deployment and hardware maintenance technicians Deskside Support and Service Desk Resources". FSESL therefore provided an exclusive service to one customer, FSL. In addition, the Directors were senior managers of, and accordingly paid by, FSL and there was one call centre which received calls for, and allocated work to, both companies.

10. When FSESL was established, the Union had been told that it would be undertaking work of a lower skill level than that of FSL engineers. The Union believed that as FSESL engineers enjoyed inferior terms and conditions of employment this impacted on the position of FSL engineers who, the Union contended, were suffering fewer opportunities for overtime as work was being deliberately allocated to FSESL engineers. That was one area of concern the Union wanted to be in a position to address.

11. The Union explained that Appendix 4 to the Pay and Benefits Agreement specified a timetable for annual pay negotiations and a comprehensive schedule of information with which the Union would be provided. The Union's request for information, in its letter of 16 March 2014, sought the same information for FSESL as it would expect for FSL. The Employer's response was that it did not consider it was appropriate to disclose information about FSESL as it was a separate company. The Union repeated its concerns that FSESL was apparently undercutting FSL, and the potential impact of that on the terms and conditions of FSL engineers, but it had met with a blanket refusal by the Employer to provide the requested information. The Union was disappointed that the Employer declined to even engage with the Union on that issue or make any attempt to reassure FSL engineers.

12. The Union submitted its *Pay and Benefits Claim* on 29 April 2014. It included, at Point 10, a request that any improvements in terms and conditions should also be applied to FSESL

engineers. In response, the Employer asked the Union to quantify the cost of Point 10, a question, in view of the lack of information, the Union found impossible to answer.

13. The Union later provided the Employer with evidence from FSL engineers about the way they considered FSESL operations were affecting their terms and conditions. The Union provided a list of quoted experiences in its written submission and it included assertions that FSL engineers were having to train FSESL engineers, call centre workers were being instructed to refer assignments to FSL engineers only if it was an emergency and FSESL engineers were being trained to undertake work that would normally be carried out by FSL engineers. The Union stated that those concerns could be summarised as follows:

- the impact on income
- the implications for job security
- the implications for career prospects

The Union reiterated that the Employer had made no effort to reassure FSL engineers and there had been no mention, in its response to the pay claim, of a willingness to address the issues of job security or career prospects. The Employer maintained throughout that information about FSESL was not relevant to the pay negotiations.

14. The Union explained that, as a result of the CAC informal meeting, the parties had scheduled a meeting to discuss the question of providing information about FSESL engineers. That meeting, which had been due to take place shortly before the CAC hearing, had been postponed by the Employer.

15. The Union moved on to explain its position in relation to the relevant statutory provisions.

16. The Union reminded the Panel that section 181(2) of the Act stated that the information to be disclosed was "…all information relating to the employer's undertaking…which is in his possession, or that of an associated employer…" It found the Employer's interpretation of that provision to be unduly pedantic. The Employer had attempted to argue that, as FSESL was a different undertaking, FSL could not be compelled to disclose information about it. The Union had already explained the very close relationship between FSL and FSESL and maintained that there could be no doubt that FSESL was part of FSL's operation. Factors such as the allocation of work, the relative costs of work being undertaken by FSL and FSESL engineers and what income and expenditure transferred between the two companies were all issues relevant to FSL's 'undertaking'.

17. It was pointed out by the Union that there was no question that the information was in FSL's possession. That the information was required for collective bargaining was reinforced by section 178 of the Act which included in the definition of collective bargaining matters connected with duties and the allocation of work. The Union considered that its request fell unarguably within the ambit of collective bargaining.

18. The Union submitted that, in accordance with section 181(2)(a), it had been materially impeded in undertaking collective bargaining. It considered that it had not been able to properly develop its pay claim while being unaware of the terms on which FSESL engineers were employed. For example, were it to pitch its claim too high, that could have increased the differential between FSL and FSESL engineers and adversely affected that job security of FSL engineers. The Employer used market information to determine its position in negotiations and the Union argued that FSESL engineers were in effect another comparator in the market. The position could have obviously been addressed by the Employer agreeing to provide FSESL engineers with the same terms and conditions package as FSL engineers but the Employer had made it clear that they had no intention of doing that.

19. In relation to section 181(2)(b) of the Act, that it would be in accordance with good industrial relations to disclose the requested information, the Union cited the *Acas Code of*

Practice in support of its complaint. Under paragraph 9 it had clearly been hampered in the "formulation, presentation or pursuance of a claim", under paragraph 10 its request was connect with the "subject-matter of the negotiations", it had conformed to the requirements of a trade union under paragraph 16 and the Employer had patently refused, under paragraph 20, "to be as open and helpful as possible".

20. The Union closed by emphasising that the information it sought did relate to the Employer's undertaking, it had been materially impeded in collective bargaining and that it would be in accordance with good industrial relations for the Employer to disclose the information.

Summary of the submission made by the Employer

21. The Employer raised with the Panel its objections to the Union's letter of 24 September 2014. Section 183(1)(a) of the Act allows a trade union to present a complaint to the CAC if an employer has failed to disclose information; section 181(1) requires the union to have made a request. In its letter of 16 March 2014, the Union set out its request and included the statement "We are also asking for the same information for employees of FSESL". It was only in its letter of 24 September 2014 that it particularised its request in respect of FSESL and, apart from a reference to information about "pay structure" during the negotiations, that was the first occasion on which the Employer had a proper opportunity to consider and respond to the request. The Employer submitted that it had therefore never actually refused to provide the information in question. Notwithstanding that objection, the Employer proceeded with its response to the complaint.

22. Section 181(1) explicitly states that the disclosure of information provisions apply only to unions which are "recognised". The Recognition Agreement defined the bargaining unit, in paragraph 3.1, as "Fujitsu Services Employees" and the Pay and Benefits Agreement further stated that it applied to the bargaining unit defined in the Recognition Agreement. There was therefore no doubt that the Union was not recognised for FSESL employees.

23. The Employer emphasised that FSESL was a separate legal entity. Section 181(2) of the Act stated that the information to be disclosed was "…all information relating to the employer's undertaking…which is in his possession, or that of an associated employer…" and the Employer submitted that the 'undertaking' was FSL and that FSESL was a separate undertaking. The Union's request accordingly fell outside the statutory provisions.

24. The Employer explained that the term 'undertaking' was not defined in the Act and that there was little by way precedent decisions that offered any assistance. It cited a previous CAC decision, *Joint Credit Card Company Limited and the National Union of Bank Employees (CAC 78/212)*, in which the CAC had rejected the complaint on the grounds that an external salary survey was not information about the employer's undertaking and made the further observation that, as the Act referred to "an employer", it could not be interpreted as applying to more than one undertaking. In response to the Union's point that FSESL was an associated employer of FSL, the Employer submitted that section 181(2) of the Act gave no union the right to seek information about an associated employer; the obligation on an employer was to disclose information relating to the undertaking which was in the possession of the employer itself or an associated employer. In summary, the Employer's position was that any requested information should be "about" the employer's undertaking and no wider. The Union had accordingly not met the first test under section 181 of the Act.

25. The Employer further submitted that the Union had not established, in accordance with section 181(2)(a) of the Act, that it had been materially impeded in collective bargaining. Previous CAC decisions had indicated that material impediment was not simply a question of information being relevant to the collective bargaining in question. For example, in *ASTMS and Beecham Group Ltd (CAC 79/337)*, the Committee's criterion was that information should be "relevant and significant" and, in *Unite and Constellation Europe Ltd (CAC DI/3/(2007))*, the decision was not to order disclosure of information about salaried employees as the union

was not impeded in negotiating for industrial grade employees. The bargaining in question between Unite and the Employer was about a pay claim. The Employer's position in negotiations was that there was a fixed pay pot for the employees in the Union's bargaining unit and a different pot for FSESL staff.

26. The FSL pay claims in previous years had been resolved, without any information being provided about FSESL, both before and after the establishment of FSESL. The Panel's attention was drawn to the CAC decision in *ACTSS and Chloride Legg Ltd (CAC 84/15)* in which a major factor in declining to uphold the union's complaint was that five pay settlements had been reached without the information requested. The Union had not been impeded in preparing and negotiating the pay claim and, in response to the issues the Union stated it had wished to raise, there had been no mention in its 2014 pay claim job security or career prospects. The Union had accordingly failed to put forward a coherent argument that it had been materially impeded.

27. The Employer also addressed the question of whether it would be in accordance with good industrial relations practice to disclose the information requested by the Union. Paragraph 22 of the Acas Code of Practice encouraged unions and employers to agree permanent arrangements for disclosing information and the Union and the Employer had done that; there was a comprehensive list appended to the Pay and Benefits Agreement. There was one outstanding issue in 2014, the subject of the CAC complaint before the Panel, and, that point aside, the Employer had honoured its commitment. The Code did not state that employers should disclose information about other employers or legal entities and the FSL agreement should be viewed in the context of pay bargaining for FSL employees. The Employer submitted that there were no grounds for finding that it had not followed good industrial relations practice and, for that reason along with the other arguments it had submitted, the Panel should not find the complaint well founded.

28. At the conclusion of its submission, the Employer offered clarification of two issues.

29. The establishment of FSESL was a response to competitors outsourcing, or using third party SMEs, the undertaking of lower skill installation and repair assignments. The objective had been to provide Fujitsu customers with a comprehensive range of services, a 'one stop shop' rather than outsource installation and repair work. Jobs were allocated on the basis of the skills required and the workers in the call centre made no distinction between FSL and FSESL engineers. Career progression was within Fujitsu as a whole and engineers could start in FSESL and move up. The total overtime bill for the Engineering Division had increased since 2011 although it was not possible to provide comparative for FSL and FSESL engineers. It was the Employer's view that job security had improved since the creation of FSESL.

30. The Employer rejected the suggestion from the Union that it had unilaterally postponed the meeting scheduled to discuss the Union's concerns about FSESL. It regarded that meeting as a stage in the possible informal resolution proposed by the CAC Chair but did not feel it appropriate to proceed as the formal hearing was imminent. The meeting had however been rescheduled.

Considerations

31. In determining this complaint, the Panel has had to consider four issues and these are addressed in the following paragraphs.

32. The first issue is whether, within the terms of the statutory provisions, the Union had made a proper request. Section 181(1) states that an employer is obliged to disclose information "on request" and section 183(1) provides for a union to complain to the CAC if an employer fails to meet that request. The Union's request was by way of its letter to the Employer of 16 March 2014 and the opening paragraph of that letter makes reference to Appendix 4 of the Pay and Benefits Agreement. That Appendix contains a comprehensive

schedule of information the Employer has agreed to disclose and includes, for example, 72 items of anonymous information about individuals in the bargaining unit. Later in the letter, the Union states "We are also asking for the same information for employees of FSESL" and further states that it is seeking the information it would receive if those employees were employees of FSL. It is fair to say, as the Employer indicated, that in correspondence during negotiations the information being sought was referred to as 'pay structure' but the Panel is persuaded that the Union's request for information in respect of FSESL employees was clear, namely it sought the Appendix 4 information for FSESL employees, and sufficiently detailed for the Employer to decide whether or not to satisfy the request. It was unfortunate that the Union chose to particularise its request two days before the CAC hearing but the Panel regards that letter as clarification of the Union's position and it could be seen as a concession in that it comprises 17 items rather than the rather longer list in Appendix 4 to the Agreement.

33. The second issue is whether the request for information relates, as section 181(2) provides, to "the employer's undertaking". We have considered carefully the parties' contrasting views and we appreciate that this is an important point for the Employer. In common with the parties, we are unaware of any case law or precedent which offers an authoritative interpretation of the word 'undertaking' and we do not feel it appropriate to develop our own. The disclosure of information provisions, as stated in s181(1) of the Act, apply to "An employer who recognises an independent trade union…"; it does not state, as in other jurisdictions, that it applies to 'undertakings' rather than 'employers'. It further states that the information an employer has to disclose is all information "relating to the employer's undertaking…" The Panel's view is that these words must be read without embellishment as meaning information about an employer's business. The Employer's argument is that information about FSESL is not about FSL's business because FSESL is a separate undertaking. The Panel is not persuaded by that argument. From the parties' evidence, we are satisfied that there is a very close relationship between FSL and FSESL and the factors we found particularly persuasive were:

- FSESL is a wholly-owned subsidiary of FSL
- the Directors of FSESL are senior managers of FSL
- FSL is FSESL's only customer
- assignments are allocated to both companies' engineers through one call centre

In short, the Panel believes that FSESL was established, and continues to operate, as an extension to the services provided by FSL and, for that reason, is part of FSL's undertaking. For the avoidance of doubt, the Panel has not come to this conclusion on the basis that FSESL is an associated employer; it accepts the Employer's submission that the words "associated employer" in section 183(2) refer to a situation in which information about an employer is held by an associated employer. One final point is that the Panel understands the information sought by the Union about FSESL is in FSL's possession; this did not appear to be disputed by the parties.

34. The third issue is whether the Union has been materially impeded by the Employer's refusal to disclose the information requested. The Employer's position was that the Union had not been impeded in negotiating a pay claim. The Union's position was that it had been unable to fully assess the impact, in its widest sense, of making a pay claim and had had difficulty deciding whether to make proposals, for example, in respect of job security arrangements. The Panel's view is that the Union has been materially impeded. There were real concerns apparent at the hearing that the Union was uncertain about the line it should take in negotiations; those concerns may be without foundation but unless it receives some information about the terms and conditions of FSESL engineers it cannot make a fully informed decision about the level of any pay claim it might formulate or any other claim in respect of terms and conditions of employment.

35. The final issue is whether it would be in accordance with good industrial relations for the Employer to disclose the information requested. The Panel is unequivocal that it would

be. There were concerns raised by the Union, which the Panel considers genuine, and they can only be addressed by disclosing information about the terms and conditions of FSESL employees. The parties gave a commitment at the hearing to continue to maintain good relations and we are pleased to be able to record that in this decision. The Panel was concerned to hear that a meeting on this issue between the parties had been postponed but we were told that it had been rescheduled to take place shortly after the hearing.

36. The Panel accordingly upholds the Union's complaint. There were two items on the list in the Union's letter of 24 September 2014 which, following an indication given by the Union at the hearing, have been excluded.

Declaration

37. The Union's complaint is well founded in part and the Panel makes the following declaration in accordance with Section 183(5) of the Act:

i) The information in respect of which the Panel finds the complaint well founded is items 1(a) to 1(o) inclusive in the Union solicitor's letter of 24 September 2014, namely

Details of the terms and conditions package on which FSESL staff are employed including:

(a) Names of the roles in which staff are employed
(b) Details of the pay band for each role
(c) Details of any grading scheme
(d) Details of any pay progression scheme
(e) Details of working hours
(f) Details of any annualised hours scheme
(g) Details of holiday entitlement
(h) Details of sick pay entitlement
(i) Details of any medical entitlement
(j) Details of any standby allowance rates
(k) Details of any shift allowance rates
(l) Details of overtime rates
(m) Details of any pension scheme
(n) Details of the bonus scheme
(o) Details of the terms on which a company vehicle is provided

ii) The information was first requested on 16 March 2014 and the Employer, since that date, has failed to disclose the information.

iii) The Employer should disclose the information to the Union within four weeks of this declaration.

Lynette Harris

Peter Martin

Paul Gates

17 October 2014

Names of those who attended the hearing

On behalf of the Trade Union:

Mr S Brittenden	Counsel
Ms R Halliday	Solicitor
Mr J Carter	Regional Officer
Mr I Allinson	Senior Representative
Mr M Norman	Workplace Representative
Mr R Anderson	Workplace Representative

On behalf of the Employer

Mr C Mordue	Solicitor
Ms B Macaulay-Hick	Employee Relations Manager
Mr J Croyden	Director, Engineering Services
Mr S Chadwick	Operations Manager
Ms J O'Reilly	HR Consultant
Ms P Smith	HR Business Partner