Case Number: DI/4/2016

20 December 2016

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SECTION 183 – DISCLOSURE OF INFORMATION

Unite the Union

and

John N Dunn Group Ltd

Introduction

1. Unite the Union (the Union) submitted a complaint to the CAC dated 10 October 2016, received by the CAC on 14 October 2016, under section 183 of the Trade Union and Labour Relations (Consolidation) Act 2014 (the Act). The complaint related to an alleged failure by John N Dunn Group 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 Kenneth Miller, Deputy Chairman, and, as Members, Mr Bill Lockie and Mr Gerry Veart. The Case Manager appointed to support the Panel was Linda Lehan.

3. The Employer submitted, on 21 October 2016, 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 asked if the parties felt that it would be advantageous to hold an informal meeting. The Union declined this offer stating that they had already had meetings whereby the information was requested and refused by the Employer and did not feel there was any point in having meetings for meeting's sake when the company position had not changed. The Panel decided to hold a formal hearing which took place in Newcastle on 7 December 2016. 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.

Summary of the submission made by the Union

4. The Union submitted that it was recognised by the Employer for the purposes of collective bargaining on behalf of workers covered by the JIB PMES & SNJIB Plumbing Agreement & JIB Electrical Agreement. The Agreement was signed by both parties on 20 February 2014 with an effective date of 18 February 2014 and a copy of the agreement was produced by the Employer.

5. The Union referred to Paragraph 2.1 of the Agreement which provided for a series of pay increases beginning with a 4% increase in April 2014, a 2.5% increase in June 2014 and a further 3.5% increase in April 2015. This would be followed by a further 3% increase every six months from October 2015 until pay reaches the promulgated rate.

6. The Union also referred to Clause 3 of the Agreement which stated:

> *"The Company is committed to achieving a return to the relevant promulgated terms and conditions and intends to continue to review the position against the market on an ongoing basis. Pay increases are subject to the market improving in the way the Company hopes, in order that the market is able to support the proposed increases."*

7. The Union stated that in October 2015 and March 2016 the Employer refused to pay the 3% increase due under the Agreement on the grounds of affordability. Upon reviewing the Employer's Annual Report and Financial Statements for the relevant period, it appeared to the Union that the Employer had made a profit and should have been able to afford to honour the pay increases in the Agreement. However, the Employer did not agree.

8. The Union stated that it considered that the company accounts were not detailed enough to be able to properly develop their pay claim and needed access to the working accounts. The Union stated that it made a verbal request for sight of the working accounts on 15 September 2016 and was refused. A further request was made in writing on 28 September 2016, which was also refused.

9. The Union stated that they appreciated the Employer's assertion that disclosure of the working accounts could cause substantial injury or damage to their business and were willing to provide assurances to the Employer that it would treat the information confidentially, limiting access only to the 4 full time officers with responsibility for collective bargaining on behalf of the Employer's employees.

10. The Union argued that without access to the working accounts they were materially impeded from bargaining and were negotiating blind, on out of date information which was prepared with an entirely different purpose in mind. The Union believed that the information would assist in being able to formulate an argument that the ongoing 3% pay increases provided in the Agreement were in fact affordable. The Union claimed that it they had access to the working accounts and had the full picture of the facts then they could, if required, tailor their requests for a wage increase to the information provided and that would benefit industrial relations moving forward as their members would be confident that the company had been transparent in its attitude to providing such information. The Union also stated that if the figures reflected that the builders did not pay enough to make a profit they would be able to speak to them, on a confidential basis, informing them that they needed to pay more to be able to fulfil their contract.

11. The Union stated that they needed to understand the working accounts and confirmed to the Panel that they required to see amongst other figures the Contractor's prices, Director's pay and benefits and contractual pricing arrangements.

12. Finally, the Union emphasised that good industrial relations and effective collective bargaining should be based on an equality of bargaining positions. The Employer makes its decisions based on its working accounts; it would seem fair that the Union makes its decisions in the collective bargaining arena based on the same set of facts. The Union stated that it was prepared to address the Employer's key concern about confidentiality and there was little other substantive objection. With that addressed it considered that it was in accordance with good industrial relations practice to disclose the material.

Summary of the submission made by the Employer

13. By way of background information the Employer explained that John N Dunn was a family business which had been running for 31 years. The recession had hit the company hard and they

had gone through difficult and painful times having to close offices and release staff including Directors which included two brothers.

14. The Employer stated that the reasons for their refusal to allow the Union access to their working accounts fell within the statutory restrictions in paragraph 182(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 and quoted paragraph 182(1)(e) which states:

> (1) An employer is not required by section 182 to disclose information…….
>
> (e) the disclosure of which would cause substantial injury to his undertaking for reasons other than its effect on collective bargaining or

15. The Employer explained that the substantial injury or damage would arise from the fact that their working accounts contained commercially sensitive information. The Employer stated that dissemination of their working accounts would lead to their competitors becoming aware of commercially sensitive information in the working accounts which could substantially injure their business.

16. The Employer referred to the ACAS Code of Practice which provides that "substantial injury may occur if, for example, certain customers would be lost to competitors,.…" The Employer considered that the very request made by the Union had been anticipated by the ACAS Code of Practice at Paragraph 14 which makes clear that disclosure of such information might cause "substantial injury".

> 14. Some examples of information which if disclosed in particular circumstances might clause substantial injury are: cost information on individual products, detailed analysis of propose investment, marketing or pricing policies, and price quotas or the make-up of tender prices. Information which has to be made available publicly, for example under the Companies Acts, would not fall into this category".

The Employer stated that they referred in particular to the fact that it was anticipated that substantial injury might be caused by "cost information on individual products", "pricing policies" (some of their pricing policy could be derived from their working accounts) and the make-up of tender prices".

17. The Employer reaffirmed that the information made available on Companies House pursuant to the Companies Act, a copy of which had been sent to the Union, provided them with the information required.

18. The Employer stated that the level of detail in the working accounts included a detailed analysis of profitability by contract and by region which was not something that was shown in the accounts lodged with Companies House pursuant to the Companies Act. The Employer explained that the analysis of each contract within the working accounts was without doubt commercially sensitive information and if competitors, or even current employees who were members of the Union, were privy to that information it could foreseeably cause substantial injury to their business undertaking. The Employer stated that their existing operatives were not subject to restrictive covenants and could readily leave their employ to start up in competition with them using the information.

19. The Employer explained that their working accounts only took account of the first 7 months of the financial year and did not give a full 12 month reconciliation of their financial position and things could change during the year which would have a detrimental impact on the 12 month results.

20. The Employer said that information had previously been sent out against their wishes by the Union to all its members who were employed by them and they could not reasonably rely on the Union to respect the highly confidential nature of their working accounts.

21. The Employer stated that it was with respect that Unite was not materially impeded in collective bargaining by not receiving a copy of their working accounts. The working accounts were not significant in themselves or relevant to the Union's bargaining role and there was no need, let alone necessity, for them to have a copy of the working accounts. The Employer stated that Parliament had legislated to provide that limited Companies must publish annual accounts and did not require limited Companies to publish their working accounts.

22. The Employer stated that the accounts as at 31 March 2016 had been sent to the Union and as would been seen from them the Company made a profit before tax of £81,858. The Employer stated that it was made clear at their regular 6 month review with the Union that a 3% increase to the workforce would cost the organisation a total of £266,000 and they had explained that bearing

such increased wage costs would have meant potential redundancies in the workforce. It was also explained at their pay review in October 2016 that whilst still winning contracts, they were still working to extremely tight margins to win work and at that time were also looking at potential mandatory increases to the Plumbers' Pension Scheme contributions and also a £18,500 mandatory cost from the Apprenticeship Levy due in April 2017.

23. The Employer stated that they had honoured their Local Collective Agreement and met with Unite regularly, on a 6 monthly basis, kept Unite updated on the market conditions and given their reasons for not being able to increase operatives' pay.

24. The Employer stated that the Union had indicated that it would be in accordance with good industrial relations for their working accounts to be disclosed, however, had not detailed any facts which supported that contention. The Employer referred again to the Acas Code of Practice which it explained highlights that working accounts or the information contained therein is not the type of information which is relevant:

> "… Some examples of information relating to the undertaking which could be relevant in certain collective bargaining situations are given overleaf:
> ……
> (v) Financial: cost structures; gross and net profits; sources of earnings; assets; liabilities; allocation of profits; details of government financial assistance; transfer prices; loans to parent or subsidiary companies and interest charged".

25. Finally the Employer stated that it would be disingenuous for the Union to suggest that disclosure of employers' workings account would be in accordance with good industrial relations.

Considerations

26. In reaching its decision on this complaint the Panel has carefully considered the oral and written submissions of both parties.

27. The Union's position was that it considered the company accounts were not detailed enough for them to be able to properly develop their pay claim and needed access to the working accounts. The Employer was not prepared to hand over their working accounts due to the commercially sensitive information contained therein.

28. The Panel accepts that the information contained in the working accounts is of a very sensitive nature and if it was to be disclosed could cause substantial injury and damage to the company. The Panel accepts that the Union regards the working accounts as important for collective bargaining but as stated by the Employer the working accounts only take account of the first 7 months of the financial year and therefore do not give a full 12 month reconciliation of their financial position.

29. The Panel would reiterate the Employer's comments in that the ACAS Code of Practice provides that "substantial injury may occur if, for example, certain customers would be lost to competitors,..… and would refer the parties to the ACAS Code of Practice at Paragraph 14 which makes clear that disclosure of such information might cause "substantial injury".

> 14. Some examples of information which if disclosed in particular circumstances might clause substantial injury are: cost information on individual products, detailed analysis of propose investment, marketing or pricing policies, and price quotas or the make-up of tender prices.

30. The Panel's view is that the Union has not been materially impeded by not having access to the working accounts and that they are able to conduct collective bargaining with the information provided to them in the Annual accounts.

Declaration

31. The Panel finds and declares that the complaint is not well founded.

Professor Kenny Miller
Mr Bill Lockie
Mr Gerry Veart
20 December 2016

Appendix

Names of those who attended the hearing:

On behalf of the Trade Union:

Mr Steve Cason	Unite Regional Officer

On behalf of the Employer:

Mr Stephen Bilclough	Chairman
Ms Clare May	HR Adviser