Case Number: DI/04/2017

12 December 2017

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 dated 28 April 2017 to the CAC under section 183 of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992. The complaint was received by the CAC on 2 May 2017. 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 CAC Chairman established a Panel to consider the complaint. The Panel consisted of Professor Gillian Morris, Panel Chair, and, as Members, Mr Rod Hastie and Mr Keith Sonnet. The Case Manager appointed to support the Panel was Linda Lehan.

3. The Employer submitted a response to the Union's complaint which was received by the CAC on 23 May 2017. On 25 May 2017 the CAC received an e-mail from the Union requesting a stay of the application until July 2017. The Union said that the stay had been agreed during national negotiations with the Employer. The Panel granted this stay, followed by a further stay at the request of the Union until 31 August 2017. Following the expiry of the second stay the Union informed the Case Manager that it wished to pursue the complaint and in an e-mail to the Case Manager dated 5 September 2017 the Union requested sight of the bundle referred to by the Employer in its response to the application but not provided with it. In an e-mail to the Case

Manager dated 7 September 2017 the Employer stated that the bulk of the information referred to was in the bundle provided by the Union with its application and that given that the matter had been stayed the Employer had not incurred further cost and time in sending it. At the request of the Employer the Panel agreed that the Employer should send this material to the CAC by 20 September 2017. In an e-mail to the Case Manager dated 4 October 2017 the Union again confirmed that it wished to proceed with the complaint and requested that the matter should proceed to a full hearing. Having considered the documentation submitted by both parties, the Panel concluded that there was no reasonable likelihood of the Union's complaint being resolved by conciliation and that a hearing should be held. The parties were invited to supply the Panel with, and to exchange, written submissions prior to the hearing. In a letter to the parties dated 9 October 2017 the Case Manager made clear to the parties that these should be full submissions which should include any information and evidence that the parties required the Panel to consider at the hearing, including any information which may previously have been supplied to the CAC. A hearing to determine the Union's complaint took place on 4 December 2017 and names of those who attended the hearing are listed in Appendix 2 to this decision.

Background

4. The Employer is an information technology services company. It designs, builds, operates, supports and maintains IT systems and services, mainly for government departments and large businesses. As at 17 November 2017 it had approximately 8,103 permanent employees in the UK&I together with around 878 "contingent workers". The Employer recognises the Union in respect of a group of employees in Manchester ("the Manchester bargaining unit"). This bargaining unit covers all the Employer's employees contractually based at MAN23 or Central Park in Manchester (the Employer's Manchester offices); employees contractually based at home and living within 30 miles of Central Park; and an agreed small group of employees contractually based at home further away. A small group of employees are excluded from the bargaining unit either because they transferred in under TUPE and were covered by other bargaining arrangements or because they had asked to be excluded. There are approximately 595 employees in the bargaining unit.[1]

[1] The figures in this paragraph are taken from the Witness Statement of Stephen Hammond, the Employer's Head of Employee Relations, provided for the purposes of the hearing.

5. The Union submitted to the Employer, on 7 March 2017, a request for information for collective bargaining. The letter in which the request was made was headed "Re: Pay Review 2017". The information which is the subject of this complaint (the "contested information") fell under the heading of Equality Information. This section of the request reads as follows:

> Unite analysed the 2016 pay data and identified significant concerns in relation to pay inequality, including a 16% overall gender pay gap and even pay gaps within the same Professional Community role.
>
> Further analysis is required to understand the causes of these inequalities, whether any aspects of the agreement are perpetuating them, and how we can address them.
>
> Since the populations within particular role codes inside the bargaining unit are often too small to allow statistically robust analysis, it is necessary to provide information relating to the whole UK workforce to enable this to be done properly. This is valid because many of the processes (e.g. recruitment, objective setting, appraisal, promotion, management discretion) which apply to those in the bargaining unit are the same or very similar to those applied elsewhere.
>
> Unite agrees that the company need not provide the same level of information for the whole UK workforce as it provides for the bargaining unit, and would accept the following statistical summary:
>
> 1. Evidence of training on how to prevent bias and what proportion of appraising managers and pay planning managers have completed it.
> 2. Total number of employees by role code, then by gender, ethnicity, disability, age, sexual orientation, religion & belief and whether full-time or part-time.
> 3. PAC by level of assessment, then by role code and then by gender, ethnicity, disability, age, sexual orientation, religion & belief and whether full-time or part-time.
> 4. The following figures for all UK employees, then broken down for each role code and then by gender, ethnicity, disability, age, sexual orientation, religion & belief and whether full-time or part-time:
>
>   a. Number of employees

b. Median, Mean and Standard Deviation months in current Professional Community role code

c. Minimum, Median, Mean, Standard Deviation and Maximum individual reference salaries (basic pay)

d. Minimum, Median, Mean, Standard Deviation and Maximum full time equivalent minimum (FTE) individual reference salaries (basic pay)

e. Minimum, Median, Mean, Standard Deviation and Maximum total earnings. An explanation of what has been included in total earnings and how it has been given a monetary value.

f. Minimum, Median, Mean, Standard Deviation and Maximum FTE £s bonus/incentive payments

g. Minimum, Median, Mean, Standard Deviation and Maximum % bonus/incentive potential/on-target-earnings

h. Minimum, Median, Mean, Standard Deviation and Maximum £ out of hours payments over the previous 12 months (i.e. overtime, shift, standby, callout)

i. Minimum, Median, Mean, Standard Deviation and Maximum hours (all worked hours, not just normal hours or paid hours)

j. Minimum, Median, Mean, Standard Deviation and Maximum £ value of company benefit car / cash in lieu

k. Minimum, Median, Mean, Standard Deviation and Maximum % pay increase over previous 12 months

6. In an e-mail to the Union dated 12 April 2017 the Employer stated that its position

> on the sharing of national-level equality data is clear. The suggestion that national level data in this depth and of this magnitude is required for us to conduct collective bargaining in Manchester is simply not correct. It has never been needed before and its absence will not impede the negotiations…. Fujitsu will not be changing its position on this topic.

The e-mail concluded by stating that should the Union "choose to inappropriately pursue Fujitsu for national-level data at the CAC, pay negotiations for this year will be cancelled and rescheduled following the panel hearing".

7. On 26 April 2017 the Union submitted the Pay and Benefits Claim agreed by its members to the Employer together with a covering letter. Paragraph 2 of that covering letter read as follows:

> In terms of the timetable, you were asking us to drop our request for equality information or the company would delay pay talks until after the CAC hearing. Members decided that this was unacceptable, they could not be complicit in covering up serious equality issues. Members instructed us to lodge a CAC claim. We hope the company will reconsider its position – it would not look good to punish employees for wanting to tackle inequality.

On 10 May 2017 the Employer wrote to the Union noting "with regret" that the CAC claim had been filed against it. In that e-mail the Employer reiterated that it did not intend to put any pay offers to the Union while legal action was being taken against it, "regardless of reason".

8. In a document headed "National Dispute Resolution proposed by Fujitsu 19.5.2017" the Employer offered to implement a series of actions if industrial action by the Union was immediately suspended. Under the heading "While the action is suspended" the Employer's proposals included the following:

> c) Fujitsu and Unite will jointly ask the CAC to defer dealing with Unite's claim for information for Manchester collective bargaining until July 2017.
>
> d) Manchester pay talks will resume as soon as possible, with an agreement that any aspects of the claim that cannot be negotiated without the resolution of the CAC claim will be dealt with separately and later.

9. The Union and Employer signed the "Manchester Pay and Benefits Agreement" ("the 2017 Agreement") on 13 July 2017. Appendix 1 to that Agreement, headed "Points for August 2017 Pay Review", began with the sentence "This year's agreement was reached in the context of the company's offer to resolve the national dispute, in particular point d)".

10. It was common ground between the parties that two items of the Union's Pay and Benefits Claim for 2017 ("the 2017 Claim") had been placed on hold pending resolution of the CAC complaint. These were as follows:

> 11. Work with UNITE to investigate and close the 17% **gender pay gap.** Work with UNITE to publish information about the pay gap rather than waiting until the legislated deadline for publication.

12. Remove the **mobility clause** from standard contracts. It discriminates against carers (disproportionally women) and disabled employees. It should only be used where justified ie. travel is actually required for the job.

The parties had differing views on whether the 2017 Agreement as a whole had been concluded. These views are reflected in the summary of the parties' submissions later in this decision.

Matters clarified at the start of the hearing

11. The Panel Chair sought the confirmation of the parties that the contested information had been requested in the Union's letter to the Employer dated 7 March 2017 headed "Re: Pay Review 2017". Both parties confirmed that this was the case. The parties also confirmed that they had agreed that items 11 and 12 of the 2017 Claim remained on hold pending resolution of the Union's complaint to the CAC. The parties confirmed that they held differing views on whether the remainder of the 2017 Claim had been settled.

12. The Union confirmed that the Employer had provided the information requested in item 1 of the contested information (evidence of training on how to prevent bias and what proportion of appraising managers and pay planning managers have completed it) and that this was no longer at issue.

Preliminary Issue

13. The Panel Chair said that the Panel had noted that in the Union's written submissions it had stated that the non-disclosure of the information requested had prevented the Union from carrying out any meaningful analysis of pay inequality in time for the submission of its 2017 pay claim. The Union had also stated that the ongoing non-disclosure of the information requested was preventing the Union from:

i Concluding the 2017 Pay and Benefits Agreement;

ii Monitoring pay inequalities arising from that Agreement;

iii Formulating future pay claims; and

iv Contributing meaningfully to the Employer's equal pay review to alleviate these disadvantages.

The Panel Chair said that the Panel wished to consider, as a preliminary issue, whether the Panel was entitled to deal with the complaint and asked the parties to make submissions relating specifically to this matter. She asked the parties to read the judgment of Forbes J in *R* v *Central Arbitration Committee ex parte BTP Tioxide Ltd* [1982] IRLR 60, with particular reference to paragraphs 31-34 and 40-42 as printed in the Industrial Relations Law Reports, and to incorporate what was said in this judgment into their submissions. Paragraphs 31-34 read as follows:

> 31. Thus not all matters about which negotiations may take place between unions and employers are properly called 'collective bargaining' but only those matters which fall within s 29 of the Act of 1974.[2] Further, in relation to giving information, such matters must be those in respect of which the union is recognised (s.17). But 'recognised' means (s.11) recognised for the purposes of collective bargaining, and the synonym of collective bargaining is 'negotiations relating to s 29 matters'.
>
> 32. From these provisions I think one can deduce that the Act contemplates that there may be, in addition to collective bargaining which entitles a union to information, (1) bargaining between employers and unions which does not amount to collective bargaining because it does not relate to matters referred to in s 29 of the Act of 1974; (2) dealings, to use a neutral term, between employers and unions which do not amount to collective bargaining because they cannot properly be called negotiations; and (3) collective bargaining which does not attract the right to information because it is not about matters in respect of which the union is recognised for collective bargaining.
>
> 33. I can see no obstacle under the Act to an agreement which recognises the union's right to collective bargaining, ie negotiation, about one aspect of employees' terms and conditions of employment and also recognises a right to some form of dealings with the employers (sic), which does not answer to the description of collective bargaining, perhaps because it cannot be called negotiation, about another aspect. Indeed, it seems to me that the definition of 'recognition' inevitably accepts this possibility as I have already indicated.

[2] References are to the precursor legislation of TULRCA 1992.

> The result of such an agreement would, of course, be that the union was entitled to information in respect of its collective bargaining role but not in respect of its other role under the recognition agreement. This seems to me to be a matter which the language of the Act plainly contemplates. But the committee has directed itself that this result is contrary to the intention of the Act. It seems clear to me, therefore, that it misdirected itself in law, or on the intention and construction of the legislation.
>
> 34. For these reasons I think that the committee was wholly wrong in its approach to the intention of the Act….

The material parts of paragraphs 40-42 read as follows:

> 40. …. [I]t seems plain to me that all the committee was, and could be, adjudicating upon was a complaint that an employer *has failed* (the emphasis is mine) to supply information (s.19(2)). This declaration must specify, if they find the complaint well founded, the information in respect of which they so find. I feel confident that these provisions only entitle the committee to deal with a complaint relating to a past failure and information already refused and do not permit a declaration of what the committee prospectively considers the employer in future cases should disclose. I feel some sympathy with the committee on this point as a declaration made in the circumstances of this case, where the argument was a general one, might well be expected to govern all future cases of the same description, and the declaration was no doubt framed in this way to assist in avoiding future disputes about the same subject matter. Nevertheless, I consider that in this form the declaration was outside the committee's statutory powers.
>
> 41. Nothing I have said about this should be taken as an indication that a union cannot ask for information for future use. Indeed, the scheme of the Act seems to me clearly to envisage that before, say, presenting a wages claim the union may require information to enable that claim to be properly based, so long as the request for information is covered by s 17 ….
>
> 42 For the reasons I have given this application must be granted and the decision and declaration quashed.

As neither party had referred to *BTP Tioxide* in its original submissions the Panel granted an adjournment for this case to be read and considered by the parties before hearing their oral submissions on the preliminary issue.

Summary of the submissions made by the Union on the preliminary issue

14. The Union said that its primary position was that it needed the information for the purposes of the 2017 Claim and that the 2017 Agreement had not been concluded. The Union said that it had been written into that Agreement that the matter remained live. The Union referred to Appendix 1 of the Agreement, which states that "This year's agreement was reached in the context of the company's offer to resolve the national dispute, in particular point d)". As stated in paragraph 8 above, point d) reads "Manchester pay talks will resume as soon as possible, with an agreement that any aspects of the claim that cannot be negotiated without the resolution of the CAC claim will be dealt with separately and later". The Union said that although specific reference had been made to leaving open items 11 and 12 of its 2017 Claim, the contested information was relevant to the 2017 Claim as a whole.

15. The Union said that in putting together its 2017 claim it had specifically identified that it had different priorities to previous years. One of the specific matters it had identified was its serious concern about the lack of fairness and transparency in the Employer's pay and benefits system and the gender pay gap in pay and benefits. The Union said that it had made a difficult decision to proceed with the 2017 pay settlement despite the Employer's refusal to disclose the equalities information the Union needed to formulate a meaningful pay claim to meet its concerns about pay outcomes by reference to protected characteristics. In 2017 there had been an ongoing large-scale redundancy exercise and a significant number of Union members in the Manchester bargaining unit faced losing their jobs. Had the Union delayed negotiating a pay increase these members would have received lower redundancy payments based on their existing salaries, and the Employer's practice of dismissing redundant employees with pay in lieu of notice had put the Union under increased pressure to reach a settlement. The Union said that it had been unable to put forward the reasoned claim it wanted to make in the absence of the contested information and that it was entitled to revisit the 2017 Agreement. The Union acknowledged that it was unlikely that it would wish to re-open the entire agreement but submitted that the likelihood of this

happening was not a matter for the Panel; the important point was that it was open to it to do so having read and analysed the contested information.

16. The Panel asked the Union about what it understood by Section 16 of the 2017 Agreement headed Review and Termination. Section 16 reads as follows:

> The agreement is intended to be reviewed and updated on at least an annual basis, partly to allow for the annual pay review effective from 1st August 2017, moving to 1st October each year from 2018 onwards. This will be undertaken using the agreed procedure for dealing with collective issues.
>
> Either party may give six months' notice to terminate this agreement. Such notice to be given in writing and delivered to the other party's registered office. In the event that this agreement or the Recognition Agreement is terminated, individual terms and conditions remain unchanged unless subject to appropriate consultation with relevant parties.

The Union stated that the provision for review referred to the entire collective agreement not merely the annual pay review. In answer to a further question from the Panel about the implications of reopening the 2017 Agreement for those who had already received redundancy payments on the basis of that agreement, the Union reiterated that it would not lightly reopen the Agreement but that Appendix 1 entitled it to do so.

17. The Union identified two additional collective bargaining matters for which the information was sought, derived from sections 13 and 14 (fourth paragraph) of the 2016 Manchester Pay and Benefits Agreement. These read as follows:

> 13. <u>Equal Pay Review</u>
>
> The Company is committed to doing an Equal Pay Review and will work jointly with UNITE in Manchester to agree a timescale.
>
> The Company will continue to work on a more open and transparent pay system, working with Unite to achieve this. In addition, the Company will work with Unite and other employee bodies in developing its approach to pay and benefits.

> The Company and Unite will continue to work together to contribute to the "Think, Act and Report" initiative and feedback to the Joint Working Group. The initiative supports the Company's business aims and, in particular, its Responsible Business strategy by valuing and promoting a diverse workforce and identifying to managers and employees the benefits of inclusivity.
>
> 14. Implementation and Monitoring
>
> The Company will provide UNITE with appropriate information for joint monitoring of pay and benefit outcomes, particularly where these relate to agreements reached.

The Union said that the Equal Pay Review was not an answer to the gender pay gap

18. The Union referred to a document headed "Pay Inequality in Fujitsu: Unite dossier, 10 November 2017" which it said showed that the Union had carried out further analysis with a mind to that analysis being used to inform a pay claim. The Union emphasised that its work relating to inequality was ongoing and that pay inequalities were part of the collective bargaining process. The Union pointed to the first sentence of paragraph 41 of the judgment in *BTP Tioxide* where Forbes J stated that "[n]othing I have said about this should be taken as an indication that a union cannot ask for information for future use". The Union also referred to the CAC decision in *Pressed Steel Fisher and Transport and General Workers' Union* Award No. 79/571, where the CAC stated at paragraph 19 that

> Where a claim is anticipated by the Union – eg. the annual wage round, then it appears to us right to regard the period during which it is preparing its case as part of the process and so a distinct stage of the collective bargaining. Indeed, viewed practically, it is an odd approach that excludes the formulation of a claim from the stages of collective bargaining and, in the context of disclosure of information, has the added paradoxical result of denying access to information under the provisions of the statute at the precise time when it is most useful. The same reasoning must apply with greater strength where the matter is an established issue occurring from time to time such as manning.

19. The Union submitted that *BTP Tioxide* had been superseded by the Court of Appeal decision in *Vining* v *London Borough of Wandsworth* [2017] EWCA Civ 1092, [2017] IRLR 1140.

In this case the Court of Appeal held that the exclusion of members of a local authority's parks police force and their representatives from the rights to redundancy consultation contained in TULRCA 1992 on the grounds that parks police were in "police service" breached their rights under Article 11 of the European Convention on Human Rights ("ECHR"). The Union drew particular attention to paragraph 63 of the judgment of the court, the material parts of which read as follows:

> In our view a right of the kind conferred by ss.188-192 of the 1992 Act – that is (in the case of the union) to be consulted, and (in the case of employees) to be consulted for – falls squarely within the 'essential elements' protected by Article 11. There may be room for argument about whether they fall within the definition of 'collective bargaining' in the narrow sense of that term. In traditional industrial relations terminology, at least in the UK, a distinction tends to be drawn between negotiating rights and consultative rights, and the term 'collective bargaining' tends to be reserved for the former; likewise the core content of collective bargaining tends to be thought of as matters like pay, hours and holiday. But the question is one of substance rather than terminology. The rights conferred by ss188-192 of the 1992 Act are collective in character, since they involve the consultation of a trade union about the prospective dismissal of at least twenty employees. The 'consultation' required has to be undertaken 'with a view to reaching agreement' (see s 188(2))…. Thus, whether or not the consultation rights afforded to a recognised trade union by sections 188-192 constitute 'collective bargaining' in the sense that the Grand Chamber used that term in *Demir*, they are so closely analogous to the rights there recognised that they are plainly to be treated as 'essential elements' of the rights protected by article 11.

The Union submitted that on the basis of this case the right to be consulted was within the definition of collective bargaining for the purposes of the disclosure of information provisions.

Summary of the submissions made by the Employer on the Preliminary Issue

20. The Employer submitted that the pay and benefits element of the 2017 Pay Review had been concluded by the 2017 Agreement without the contested information and unencumbered by the absence of the contested information. The Employer said that the Union had wanted to continue collective bargaining and had done so. The Employer stated that it would not have finalised the agreement on pay had it thought that this aspect of the 2017 Agreement could be

reopened; rather, it would have delayed an agreement and backdated any increase. The Employer confirmed that it had backdated increases on occasion in the past. The Employer submitted that had the parties intended that the agreement as a whole could be reopened this would need to have been made explicit.

21. The Employer agreed that items 11 and 12 of the Union's 2017 Claim had been put on hold pending resolution of the CAC claim but submitted that the contested information was not required for collective bargaining purposes. The Employer pointed to its commitment in section 13 of the 2017 Agreement to undertaking an Equal Pay Review and to working jointly with the Union to agree a timescale. The Employer also stated that it had taken the positive steps of publishing early its Gender Pay Gap Report which also detailed the next steps it was proposing to take to close the gender pay gap. The Employer stated that the Union had already been provided with extensive equalities data pursuant to the Manchester Recognition Agreement together with the unconscious bias training information. The Employer said that the equalities data already provided had not been used by the Union in practice; rather the equalities agenda had been furthered by the Employer outside the collective bargaining process with the Union participating in that process appropriately. The Employer also stated that the Union had not tabled issues as to pay by reference to sexual orientation or religion which were the two protected characteristics in respect of which the Employer had not shared detailed data. The Employer acknowledged that the Equal Pay Review may, depending on the outcome, produce information which may be relevant to collective bargaining in the future but submitted that it was not relevant at present. In relation to item 12 of the Pay Claim, relating to mobility clauses, the Employer stated that these clauses were dealt with on an individual basis and were not a matter for collective bargaining. The Employer said that it recognised that a mobility clause may present difficulties for some people and that if it did the need for such a clause should be examined in the light of the individual's specific role.

22. The Employer submitted that, on the basis of *BTP Tioxide*, there was no entitlement to information for future collective bargaining. The Employer stated that *BTP Tioxide* was later than the CAC decision in *Pressed Steel Fisher* and was a decision of a higher court.

23. The Employer submitted that *Vining* was not relevant to the present case. The Employer said that *Vining* was dealing with a matter in relation to which there was specific statutory provision and did not mean that there was a right to collective bargaining on every matter.

Decision of the Panel on the Preliminary Issue

24. Having considered carefully the submissions of the parties and the evidence before it the Panel decided that it was not entitled to deal with the Union's complaint. The Panel informed the parties of this decision at the hearing and did not, therefore, hear any further oral evidence from either party. The considerations which led the Panel to reach this decision are set out below.

Considerations relating to the Preliminary Issue

25. The provisions relating to disclosure of information for collective bargaining purposes are contained in TULRCA 1992, s 181- 185. The relevant provisions, so far as material to this decision, are contained in Appendix 1 to the decision.

26. The Panel noted that, on the basis of paragraph 40 of *BTP Tioxide*, it was entitled only to deal with "a complaint relating to a past failure and information already refused" and that the disclosure of information provisions do not permit a declaration of what the Panel prospectively considers the Employer in future cases should disclose. It was common ground between the parties in this case that the contested information was requested by the Union, in its letter to the Employer of 7 March 2017, for the purposes of the 2017 Pay Review.

27. It was agreed between the parties that items 11 and 12 of the Union's 2017 Claim, set out in paragraph 10 above, remained on hold pending resolution of the Union's complaint to the CAC. However the parties differed as to whether other elements of the 2017 Claim had been concluded. The Union submitted that they had not been concluded and that it was entitled to revisit the entire 2017 Agreement if, having read and analysed the contested information, it wished to formulate revised proposals. The Union relied on the first sentence of Appendix 1 to the 2017 Agreement which reads as follows:

> This year's agreement was reached in the context of the company's offer to resolve the national dispute, in particular point d).

This sentence refers to a document headed 'National Dispute Resolution proposed by Fujitsu 19.5.2017" which, *inter alia*, states that while industrial action is suspended:

> d) Manchester pay talks will resume as soon as possible, with an agreement that any aspects of the claim that cannot be negotiated without the resolution of the CAC claim will be dealt with separately and later".

The Union submitted that the likelihood in practice of it formulating revised proposals on pay and benefits was irrelevant and was not a matter for the Panel to decide. The Employer submitted that the pay and benefits elements of the Union's 2017 Claim had been agreed without the contested information and that it would not have reached agreement with the Union had it considered that these elements of the claim could be reopened. The Employer submitted that, had the parties intended that the 2017 Agreement as a whole could be reopened, this would have been made explicit in that agreement.

28. The Panel examined carefully the terms of the 2017 Agreement and concluded that its provisions are not consistent with the Union's submission that the parties intended the pay and benefits clauses to be capable of being reopened. First, the Panel noted the statement in Section 14, sub-paragraph 5 of the Agreement that "the Company is committed to spending the entire budget on pay rises effective from 1st August 2017". This is not consistent with the possibility of further increases. Secondly, the Panel noted the terms of Section 15 relating to the Agreement's legal status. Section 15 begins as follows: "In accordance with the Trade Union and Labour Relations (Consolidation) Act 1992, part IV, Chapter 1, paragraph 179, the parties agree that the following aspects of this agreement are intended to be legally enforceable parts of the contract between the Company and its Employees". It is followed by a list of matters, including pay and benefits. There is no indication that any of these matters are open to further modification by the parties in the event that the provisions of the 2017 Pay Review were to be revisited prior to the next annual pay review. Third, there is specific provision in the final sentence of Section 14 that "any backdated modifications to salaries as a result of the 2016 pay review will be taken into account in implementing the 2017 agreement". Had the parties anticipated the possibility of backdated modifications to salaries following reopening of the terms of the 2017 Agreement the Panel would have expected similar provision to be made. Fourth, the Panel would have expected the 2017 Agreement to contain an explicit reopener clause in the section on implementation and monitoring had this been the intention of the parties. On the basis of the evidence before it the Panel was therefore satisfied that, on the balance of probabilities, the parties did not intend that the Union could seek to reopen the entire 2017 Agreement if the CAC were to order disclosure of the contested information and the Union's analysis of that information suggested that revised pay and benefits proposals should be formulated.

29. Having reached the conclusion set out in paragraph 28 above, the Panel was then required to consider whether items 11 and 12 of the Union's 2017 Claim, which the parties agreed to place on hold pending resolution of the CAC complaint, fell within the definition of "collective

bargaining". Item 11 is a request for the Employer to work with the Union to investigate and close the gender pay gap and to work with the Union to publish information about the pay gap prior to the statutory deadline. The Panel did not consider that a request to engage in such activities of itself constitutes "collective bargaining". The Panel noted the Union's submission that, following *Vining*, the right to be consulted should be seen as within the definition of collective bargaining. The Panel noted that in this decision the Court of Appeal held that the statutory redundancy consultation provisions were so closely analogous to the rights recognised by the Grand Chamber in *Demir* that they were to be treated as 'essential elements' of the rights protected by article 11 of the ECHR (see paragraph 19 above). The Panel noted that there are separate statutory schemes relating to collective bargaining and consultation rights and was not persuaded that *Vining* requires the statutory schemes governing collective bargaining to be extended to cover consultation. In relation to item 12, the Employer gave evidence that the application of mobility clauses were dealt with on an individual basis within the organisation and was not currently subject to collective bargaining. This evidence was not challenged by the Union. The Panel therefore concluded that neither item 11 nor item 12 of the 2017 Claim fell within the scope of "collective bargaining" on the facts of this case.

30. The Union stated that the primary purpose of requesting the contested information was the 2017 Pay Review but said that the information was also required in order to formulate future pay claims. The Union submitted that the Panel should have regard to paragraph 41 of *BTP Tioxide*, which refers to a union asking for information for future use, and the CAC decision in *Pressed Steel Fisher* (see paragraph 18 above). The Panel fully appreciates that a union may wish to obtain information from an employer to prepare a future pay claim. However section 181(1) of TULRCA 1992 requires an employer to disclose information only *on request*. No evidence was put before the Panel that the Union had requested the contested information from the Employer for use in formulating a future pay claim nor, indeed, for the purposes of Sections 13 and 14 paragraph 4 of the 2016 Pay and Benefits Agreement (see paragraph 17 above). The sole evidence before the Panel that a request had been made for collective bargaining purposes was the Union's letter of 7 March 2017 which was headed "Re: Pay Review 2017". As stated in paragraphs 28 and 29 above, the Panel considered that the 2017 Pay Review had been concluded other than in relation to items 11 and 12 which it did not consider, on the facts of this case, fell within the definition of "collective bargaining". In the light of these findings the Panel concluded that it would have been unable to grant a remedy to the Union, had it proceeded to consider the substance of the complaint and found in the Union's favour, without exceeding its statutory powers as set out in *BTP Tioxide*.

31. For the reasons set out in paragraphs 25-30 above the Panel concluded that it was not entitled to deal with the Union's complaint.

Concluding observation

32. The Panel received detailed written submissions from the parties on a number of other issues relevant to this complaint. In the light of its conclusions on the preliminary issue, the Panel did not consider any aspect of the parties' submissions beyond those required to deal with the preliminary issue. Nothing in this decision should be seen as giving a view on the merits of any of the submissions other than those relating specifically to the preliminary issue.

Declaration

33. For the reasons given in paragraphs 24-30 above the Panel finds that the Union's complaint is not well founded.

Professor Gillian Morris – Panel Chair

Mr Keith Sonnet

Mr Rod Hastie

12 December 2017

APPENDIX 1

Extracts from the Trade Union and Labour Relations (Consolidation) Act 1992 relevant to the preliminary issue

181 General duty of employers to disclose information

(1) An employer who recognises an independent trade union shall, for the purposes of all stages of collective bargaining about matters, and in relation to descriptions of workers, in respect of which the union is recognised by him, disclose to representatives of the union, on request, the information required by this section.

In this section and sections 182 to 185 "representative", in relation to a trade union, means an official or other person authorised by the union to carry on such collective bargaining.

(2) The information to be disclosed is all information relating to the employer's undertaking (including information relating to use of agency workers in that undertaking) which is in his possession, or that of an associated employer, and is information -

(a) without which the trade union representatives would be to a material extent impeded in carrying on collective bargaining with him, and

(b) which it would be in accordance with good industrial relations practice that he should disclose to them for the purposes of collective bargaining.

(3) A request by trade union representatives for information under this section shall, if the employer so requests, be in writing or be confirmed in writing.

(4) In determining what would be in accordance with good industrial relations practice, regard shall be had to the relevant provisions of any Code of Practice issued by Acas, but not so as to exclude any other evidence of what that practice is.

(5) Information which an employer is required by virtue of this section to disclose to trade union representatives shall, if they so request, be disclosed or confirmed in writing.

183 Complaint of failure to disclose information

(1) A trade union may present a complaint to the Central Arbitration Committee that an employer has failed –

(a) to disclose to representatives of the union information which he was required to disclose to them by section 181, or

(b) to confirm such information in writing in accordance with that section.

The complaint must be in writing and in such form as the Committee may require.

(5) If the Committee finds the complaint wholly or partly well founded, the declaration shall specify –

(a) the information in respect of which the Committee finds the complaint is well founded,

(b) the date (or, if more than one, the earliest date) on which the employer refused or failed to disclose or, as the case may be, to confirm in writing, any of the information in question, and

(c) a period (not being less than one week from the date of the declaration) within which the employer ought to disclose that information, or, as the case may be, to confirm it in writing.

APPENDIX 2

Names of those who attended the hearing

On behalf of the Trade Union:

Ms B Criddle	Counsel
Ms R Halliday	Solicitor
Ms S Hutchinson	Regional Officer
Mr K Davies	Senior Representative
Mr I Allinson	Duty Senior Representative
Mr M Norman	Workplace Representative

On behalf of the Employer

Ms Georgina Hirsch	Counsel – Devereux Chambers
Mr Jonathan Coley	Solicitor – Pinsent Masons
Mr Stephen Hammond	Head of Employee Relations – Fujitsu
Ms Sarah Kaiser	Diversity and Inclusion Lead EMEIA - Fujitsu
Mr Sandy Dhindsa	Observer Fujitsu