EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mr A Reeves**

First Respondent: **OCS Group (UK) Limited**

Second Respondent: **Rentokil Initial UK Limited**

Heard at London South Employment Tribunal on 29 & 30 January 2018

REASONS

Introduction

1 At the conclusion of the hearing the judgment and reasons for it were given by the Tribunal orally. These written reasons have been prepared because the claim by Mr Reeves was the lead claim within rule 36 of the Employment Tribunals Rules of Procedure 2013. The other claimants in the related cases are entitled to know the reasons for the judgment.

2 For the sake of simplicity the First Respondent is referred to as 'OCS' and the Second Respondent as 'Rentokil'.

Background facts

3 The parties had helpfully agreed facts which I reproduce subject to minor changes. These agreed facts apply to this claim and also to the related claims. Hence there is reference to 'Claimants' in the plural.

> The Claimants were employed in various roles within the pest control business of OCS which traded as "Cannon Pest Control".
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> OCS sold its pest control customer portfolio to Rentokil effective 18 January 2017.
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> As a result of the transaction, approximately 90 employees transferred to Rentokil on 18 January 2017 pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 including all of the Claimants ('the Transferring Employees') except Mr A, who did not transfer to Rentokil.
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> Mr A, and some of his colleagues, was subsequently made redundant by OCS following a consultation exercise.
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> On 18 January 2017, all of the employees affected by the transfer were invited to simultaneous meetings across the country attended by representatives of both OCS and Rentokil.
>
> In the meetings, the employees were informed of the sale of the business, that the Transferring Employees' employment had transferred to Rentokil, and that

they were no longer employees of OCS. The Transferring Employees were informed by the Respondents that Rentokil had confirmed that it did not intend to take any measures in respect of the Transferring Employees.

On or around the 18 January 2017, letters were posted to the Transferring Employees from OCS at their home addresses. The letters confirmed the sale of Cannon Pest Control and that the Transferring Employees' terms and conditions would remain the same. The letters also contained information packs regarding the transfer.

The Transfer of Undertakings (Protection of Employment) Regulations 2006

4 The claims being made are that there was a breach of the obligations to inform and consult affected employees contained in regulation 13 of the 2006 Regulations. That regulation is as follows:

13 Duty to inform and consult representatives

(1) In this regulation and regulations 13A 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of--

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

(2A) Where information is to be supplied under paragraph (2) by an employer--

(a) this must include suitable information relating to the use of agency workers (if any) by that employer; and

(b) "suitable information relating to the use of agency workers" means--

(i) the number of agency workers working temporarily for and under the supervision and direction of the employer;

(ii) the parts of the employer's undertaking in which those agency workers are working; and

(iii) the type of work those agency workers are carrying out.

(3) For the purposes of this regulation the appropriate representatives of any affected employees are--

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b) in any other case, whichever of the following employee representatives the employer chooses--

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall--

(a) consider any representations made by the appropriate representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

(10) Where--

(a) the employer has invited any of the affected employee to elect employee representatives; and

(b) the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer.

5 There are supplementary provisions in regulation 14 as to the election of employee representatives. Regulation 15 provides the Tribunal with the jurisdiction to decide a complaint that there has been a breach of the provisions of regulation 13. It is not in dispute that the Claimant has the standing in the circumstances to bring this complaint to the Tribunal.

The facts

6 The Tribunal finds the further facts based upon the relatively limited evidence provided to the Tribunal.

7 In the autumn of 2016 OCS was considering the sale of its pest control businesses in the UK and also in Eire. This claim relates only to the UK business although the Asset Purchase Agreement covers both businesses. The UK business operated from various offices / depots across the country and there was an administrative office in Morecambe. OCS invited expressions of interest from prospective buyers and Rentokil expressed such an interest. By a letter of 12 October 2016 OCS invited Rentokil to submit an offer in accordance with the terms of that letter. The sale was to be by way of a sale of the business rather than a sale of shares

in a company which ran the business. Hence the relevance of the 2006 Regulations. The only provision in the letter that is material for this case was the proposed timetable. That provided for an exchange of contracts, followed by '[c]ompletion following the appropriate period required to complete employee consultation under the relevant TUPE legislation.' It is thus apparent that at that time OCS intended that there should be appropriate consultation.

8 An offer was made by Rentokil on 21 November 2016.[1] The offer letter recorded that it was expected that the employment of relevant staff would be transferred to Rentokil, but no mention was made of any consultation. However the issue clearly did arise shortly thereafter and there was an exchange of emails on 23 November 2016 between the parties arranging for a conversation with Rentokil's in-house legal counsel 'to discuss the TUPE issue'. Reference was made to an experience OCS had had with a previous transaction. That was followed up by an email from OCS to which was attached an 'Advice note on the risk into facilitating a TUPE transfer within 24 hours.'

9 We were shown an internal Rentokil email of 24 November 2016 in which the Commercial Director of Rentokil set out the pros and cons of (a) a simultaneous exchange of contracts and completion of the sale and purchase, and (b) an exchange of contracts followed by completion between '10 - 30 days later to facilitate TUPE information.' We also saw an email of 28 November 2016 from OCS to Rentokil from which it is apparent that OCS remained concerned about its obligations under the 2006 Regulations.

10 In an email of 28 November 2016 to OCS Rentokil referred to specific roles of employees in the business. The email includes the following:

> Re TUPE / consultation etc – Our position is pretty straightforward. We will abide by how ever many days you guys deem appropriate in light of the advice you receive to do the process properly. We are hopeful that's 10 days as OCS covering the Morecambe place reduces the complexity and we intend to offer roles for all Field based and BDMs / Account Managers . . . .'

11 A further revised offer was made by Rentokil on 30 November 2016. The only provision which is material for these proceedings is a statement that Rentokil would 'agree to a shared liability (50%) for TUPE related liabilities.' That proposal was accepted by OCS and enshrined in clause 11 of the Asset Purchase Agreement.

12 The transaction was completed during the evening of 17 January 2017. None of the employees working in the pest control business had previously been made aware of the proposed transaction, other than the Technical & Safety Manager. An email was sent to the Claimant (and other affected employees) early on the morning of 18 January 2017 requiring all members of staff to be at their respective branches at 2 pm that day for an important announcement to be made. There was a short conference call involving each of the regions, followed up by individual meetings in each of the branches. On 18 January 2017 also a letter was sent to the Claimant (and

[1] This was actually a revised offer, but that is not material.

other affected employees) confirming the sale of the business and stating that the Claimant was now employed by Rentokil.

13 There is one other potentially material document not so far mentioned. There was an internal OCS email of 27 January 2017 from the Interim MD, the relevant parts of which are as follows:

> Whilst we are providing Transitional Support we have an obligation to capture and pass on enquiries amongst many other things.
>
> . . . .
>
> Given that [Rentokil Ireland] don't have our ex-customers set up on their systems yet they have no means of dealing directly with these clients and they have to adhere to their promise of 'no measures' within the first 30 days. Transferred Sales personnel therefore are still attached and supported by OCS systems and personnel.

14 The evidence of Mr Greany, the Area Commercial director for Rentokil for the UK, Ireland and other countries was that following the completion of the acquisition Rentokil undertook a review of the business and there was a decision made to make changes to the organisational structure. Consultation with individuals then commenced on 17 February 2017. Seven employees were subsequently made redundant. We comment on that evidence below.

15 The Claimant said the following in paragraphs 3 and 4 of his witness statement, and he was not cross-examined on what he said.

> I have never had any intention of working for Rentokil as I understood them to have a very bad reputation within the industry. Many of my former colleagues at OCS will tell you the same, which is why such huge numbers of us left after the transfer. I think only a handful of the 50 or so technicians chose to stay with Rentokil after the transfer. It is no exaggeration to say that I would consider having Rentokil next to my name would be a blot on my CV.

Submissions

16 Mr Kemp made submissions on behalf of Rentokil first. He submitted that there was no obligation on Rentokil to consult the Claimant under regulation 13(6) of the 2006 Regulations for two reasons. The first was that there was no definite plan such as to constitute a 'measure'. The second was that any obligation lay on OCS as the employer.

17 Mr Kemp submitted that there was at the most a technical breach of the duty to inform employees in regulation 13(2) in that the employees had been provided with the relevant information on the day after the transfer had been effected. That delay, he said, did not on fact have any impact on the Claimant because the Claimant had said that he would have declined to be transferred to Rentokil in any event.

18 Further, said Mr Kemp, if the Claimant (and other employees) had been advised of the transfer at the stage when it was being proposed, as opposed to after it had been concluded, then there was a risk to the business in that the Claimant and others may have resigned.

19 Mr Kemp submitted that although any award was intended to be punitive rather than compensatory, that only applied to a failure to consult employees, as opposed to a failure to inform them of the proposed transfer.

20 Mr Johnston made submissions on behalf of OCS. He said that OCS had been informed that Rentokil did not intend to take any measures, and therefore the obligation to consult the Claimant had not arisen. He accepted that OCS had made a conscious decision not to comply with the obligation to inform the Claimant in accordance with the Regulations. A mitigating factor was that there was a genuine concern not to cause any instability or uncertainty for the Claimant and his colleagues. He also submitted that the Claimant had not been prejudiced by the delay in his being informed of the transfer.

21 Mr Gray replied on behalf of the Claimant. He submitted that the Respondents had simply ignored the obligations in the Regulations for their own commercial pursuit of profit. He (correctly) pointed out that under regulation 4(8) an employee who is notified in advance of the proposed transfer and objects to his employment being transferred may effectively resign. That, he said, was an important right.

22 Mr Gray submitted that the arguments of Mr Kemp and Mr Johnston concerning mitigating factors were wrong, and that the deliberate failure to inform the Claimant until after the transfer was an aggravating factor. He also made submissions about the obligation to consult, and we mention that below. Mr Gray made reference to past procedural matters concerning disclosure and the case for OCS as originally pleaded, to which we also refer briefly below.

Discussion and conclusions

23 We deal first with the obligation to consult under regulation 13(2). It is entirely clear, and not disputed by the Respondents, that there was a breach of that obligation. One point not so far mentioned is that when the response was originally presented to the Tribunal OCS pleaded that there were special circumstances within regulation 13(9) rendering it not reasonably practicable for it to have complied with its obligations. No details were provided. Wisely that element of the defence to the claim was withdrawn before this hearing commenced. The material issue before us is what award ought to be made to the Claimants.

24 The 2006 Regulations were introduced in accordance with Council Directive 2001/23/EC. Recital (3) to the Directive provides as follows:

> It is necessary to provide for the protection of employees in the event of a change of employer, in particular to ensure that their rights are safeguarded.

25 It has to be a fundamental right of any individual to decide whether to be employed by a particular company, or not. What occurred here was that the Claimant was deprived of his right to object to his employment being transferred. We do not accept the submission that there was no adverse impact on the Claimant as he would have resigned anyway. The Claimant was entitled to be informed in advance of the transfer. We do not accept the submission that there was any concern about causing uncertainty or instability to the Claimant and his colleagues by informing them in advance of the proposed transfer. None of the documents before us show any hint of any concern to protect or advance the interests of the employees. Such

correspondence as has been disclosed revealed only concern for the commercial interests of the Respondents.

26 The leading authorities are *Susie Radin Ltd v. GMB* [2004] IRLR 400 CA and *Todd v. Strain* [2011] IRLR 11 EAT. They are cases under the 1992 Act but apply also the cases under the TUPE Regulations. We do not accept the submission by Mr Johnston that there is a distinction to be drawn where there is solely a failure to inform, and no obligation to consult arises. That is quite clear from paragraph 41 of the judgment of HHJ Peter Clark in *Cable Realisations Ltd v. GMB Northern* [2010] IRLR 42.

27 As stated, the Regulations were introduced for the protection of employees. Regulation 13(2) placed a specific obligation on a putative transferor to provide certain information before the transfer was effected. The putative transferor in these proceedings, OCS, in conjunction with Rentokil, made a commercial decision to ignore that obligation. There was no excuse and the penalty for such breach must be paid. We have no hesitation in awarding the Claimant 13 weeks' pay. The amount is to be calculated in accordance with sections 220-228 of the Employment Rights Act 1996, with the date of the transfer being the 'calculation date' for those purposes.

28 There is a separate obligation in regulation 13(6) to consult employees. The obligation only arises when the transferee is proposing to take 'measures', as to which see *Institution of Professional Civil Servants v. Secretary of State for Defence* [1987] IRLR 373. We have been told during this hearing that Rentokil did not intend to take any measures. Rentokil was obliged under regulation 13(4) to provide information to OCS about any such proposed measures. We have not seen any document from Rentokil to OCS stating that no measures were to be taken. What we do have is the OCS email of 27 January 2017 from its Interim MD referring to Rentokil having to adhere to the promise of 'no measures' within the first 30 days. We note that that period is the one originally proposed by OCS as the length of consultation with the transferring employees.

29 It is common ground that neither of the Respondents complied with the original disclosure order dated 20 October 2017 made in these proceedings. There then was a further preliminary hearing on 9 January 2018. At that latter hearing neither of the Respondents opposed the application by Mr Gray that there should be a formal disclosure statement in accordance with the CPR. Disclosure must of course be kept in proportion, but we are not satisfied that there has been full disclosure. We are somewhat sceptical as to whether the evidence of Mr Greany is sufficiently complete, but are making any specific finding. Each of us has considerable experience of similar business transactions, although not necessarily of the same scale. We consider it highly unlikely that no internal documents were produced by Rentokil between the date when heads of terms were agreed and subsequent completion containing some proposals as how best to merge the business being acquired from OCS with the existing Rentokil business. We consider it likely that what occurred was that there was some accommodation reached between the Respondents to minimise the risk of a successful claim to the Tribunal that no proposals

would be put forward but that there would be a 'review' period of 30 days, following which specific measures could be proposed. It is unlikely to be coincidence that redundancy consultation with the employees started immediately after the 30 days had expired.

30 There is one small point concerning the email of 27 January 2017. In the first line there is reference to 'Transitional Support' using upper case initial letters. That appears to us to be an indication that it is a term defined in another document which has not been provided, and which may also contain relevant information.

31 Our conclusion concerning the consultation point is this. We make no finding on it at present, and adjourn it generally. If higher authority should decide that our conclusion about the award to be made in respect of the failure to inform Mr Reeves is incorrect, then we will resume these proceedings, and consider the making of further case management orders, including orders relating to disclosure in respect of the issue relating to consultation.

Employment Judge Baron

20 February 2018