EMPLOYMENT TRIBUNALS

Claimant: Unite the Union

Respondents: 1) Interserve (Facilities – Slough) Ltd
2) Osborne Property Services Ltd

Heard at: London South (Croydon) by CVP

On: 10-12 February 2021 and in Chambers on 15 March 2021

Before:

Employment Judge Tsamados
With members:
Mr J Hutchings
Ms C Oldfield

Representation
Claimant: Mr P Powlesland, Counsel
Respondents: 1) Mr R Kohanzad, Counsel
2) Mr D Soanes, Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

1) The First Respondent was in breach of regulation 13(2)(d) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE);

2) We make a declaration under regulation 15(8)(a) TUPE that the First and Second Respondent are jointly and severally liable under regulation 15(9) TUPE;

3) We order the First and the Second Respondent to pay appropriate compensation to those affected employees as identified in the list provided by the Claimant at B262 who were members of the Claimant Trade Union

immediately prior to the transfer and of a description in respect of which the Claimant was recognised by the First Respondent;

4) We assess the appropriate amount of compensation in respect of each affected employee to be one week's pay;

5) There will be a remedy hearing to determine the amounts of a week's pay in respect of each affected employee if required.

REASONS

Claims and issues

1. By a Claim Form that was presented to the Employment Tribunal on 13 April 2018, following a period of early conciliation between 27 February and 16 March 2018, Unite the Union (the Claimant) brought a complaint against Interserve (Facilities Services – Slough) Ltd (the First Respondent) that it had failed to inform and consult with the Claimant Trade Union prior to a transfer of undertaking between the First Respondent and Osborne Property Services Ltd.

2. The First Respondent presented a Response to the Claim on 28 June 2018 in which it denied the complaint.

3. At a Preliminary Hearing on Case Management held on 10 June 2019, Employment Judge (EJ) Hyde joined Osborne Property Services Ltd as the Second Respondent to the proceedings. EJ Hyde made a series of case management directions in order to prepare the matter for the full hearing which was originally scheduled for three days in September 2020.

4. The Second Respondent presented a Response to the Claim on 20 December 2019 in which it also denied the complaint.

5. The issues to be determined by the Employment Tribunal have been agreed between the parties and are contained within the bundle of documents at pages 61 to 63. The complaint is essentially one of failure to inform and consult contrary to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) regulation 13 and is brought against the First and Second Respondents. The Claimant brings the Claim in the capacity of a Recognised Trade Union on behalf of affected employees who are members of Unite the Union. Their names are listed at page 262 of the bundle.

6. It is agreed between the parties that the Social Housing and Office Management Contract with Slough Borough Council (SBC) transferred from the First to the Second Respondent on 1 December 2017. It is also agreed that the transfer of affected employees amounted to a service provision change under TUPE regulation 3(1)(b). I do not propose to set out the issues here, but a copy is attached to this Judgment.

Evidence

7. We were provided with an agreed bundle of documents consisting of 265 pages and a separate index. In addition, we were provided with a counter schedule of loss by the First Respondent.

8. We were also provided with a witness statement bundle containing statements for each of the witnesses we heard evidence from. We heard evidence on behalf of the Claimant from Mr Bob Middleton, the Regional Co-Ordinator of Unite the Union. We heard evidence on behalf of the First Respondent from Mr Paul Kenton, HR Business Partner. We heard evidence on behalf of the Second Respondent from Ms Carol Brown, Contract Administrator and Ms Sarah Taylor, Group People Director.

The hearing

9. The hearing was conducted remotely on 10, 11 and 12 February 2021 using the HMCTS Cloud Video Platform (CVP) and the documents were provided in electronic format. Whilst at times there were connectivity issues, we were able to overcome them and to conduct a fair hearing. The morning of the first day was set aside for reading the documents and witness statements. The Tribunal then heard the evidence and submissions on days two and three. There was insufficient time to reach a decision and the Tribunal reserved Judgment. The Tribunal then met in Chambers on 15 March 2021 in order to reach a decision.

10. During the course of the hearing, I determined that it was appropriate for each of the Respondents' Counsel to be given the opportunity to cross examine each other's witnesses. Whilst the Respondents might be on the same side, they may have conflicting interests and even be pointing the finger at each other. So, the First Respondent must be able to cross examine the Second Respondent's witnesses and vice versa, in the same way that they would cross examine the Claimant.

Findings

11. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we were required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal has, however, considered all the evidence provided and has borne it all in mind.

12. I would state at the outset that the Tribunal's task was not assisted by the absence of witnesses directly involved in the matters that we needed to determine. We did not hear evidence from Mr Andy Morris, an employee of the First Respondent and the local Unite the Union representative, who had been employed from the days when SBC was the employer and had attended the transfer of undertaking consultation meetings with the Respondents. We understood from Mr Middleton that Mr Morris has since retired, and he has been unable to contact him. We did not hear evidence from Ms Mo Hackett, who was employed by the Second Respondent and was directly involved in discussions with the First Respondent and Mr Middleton with regard to the transfer of undertaking. Also, Andy Clements, Operations Manager. Whilst this is not meant as a criticism of the parties, it did mean that first-hand evidence as to the events in issue was limited.

13. The evidence we did hear was from: Mr Middleton, who did not attend any of the consultation meetings; Mr Kenton, who has worked for the First Respondent since 2010 and had been involved in the events leading to the transfer to the Second Respondent and the consultation meetings; Ms Brown, who worked for the First Respondent as a Contract Administrator since 2007 until the date of transfer to the Second Respondent and had taken notes at the consultation meetings; and Ms Taylor, who is employed by the Second Respondent and had very limited direct involvement in the events in question.

14. One of the issues we were asked to determine was whether at the material time the Claimant Trade Union was recognised by the First Respondent.

15. Mr Middleton, the Claimant's Regional Co-ordinator, whose role involved supervising Unite Regional Officers who represent members in the Manufacturing Sector, gave evidence as to the history of the Claimant's recognition as a Trade Union, as follows. The Claimant was recognised by SBC prior to the transfer of undertaking to the First Respondent. In 2001, SBC outsourced the maintenance of social housing and offices to the First Respondent. The Recognition Agreement with the Claimant passed from SBC to the First Respondent. He points to a number of documents as evidence of this.

16. The first is an email from SBC's Service Lead People dated 4 July 2020 in which Ms Surjit Nagra states that whilst she was not involved in the original transfer to the First Respondent, she can confirm that the Claimant was definitely part of the Recognised Trade Unions and attaches a copy of the Facilities Agreement (at B205 & 207-211). This is an agreement in essence allowing those employees conducting Trade Union duties to take time away from work to do so. It is dated 5 August 2015 between SBC and a number of Trade Unions including the Claimant, although it is not signed by the Claimant.

17. The second is a Recognition Agreement between the First Respondent and the Claimant. This is at B65-73. At B64 is a covering letter dated 30 October 2001 from Mr Jim Boyle, then the First Respondent's HR Manager, to Mr Middleton enclosing a copy of "the agreed Trade Union Recognition Agreement for staff who are transferring from Slough Borough Council to Interserve (Facilities Services – Slough) Ltd". The letter asked Mr Middleton to sign the agreement and then contact Mr Boyle so that he could then arrange for all parties to sign. The attached Agreement is between a number of Trade Unions, including the Transport and General Workers (which is now called Unite the Union) and the First Respondent. It has only been signed by Mr Middleton.

18. We note that the extent of the recognition is set out at paragraphs 3.3 and 3.4, which is essentially in respect of bargaining rights, and consultation on behalf of staff who are not managers (at B67). Mr Middleton confirmed that the Claimant did not bargain on behalf of the First Respondent's managers although it did represent them at disciplinary and grievance hearings.

19. We further note that the Agreement could be terminated by either side giving six months' notice of termination in writing. The final clause states that the Agreement is not legally binding and is binding in honour only (at B72).

20. Other documents are in the form of six letters from the First Respondent to Mr Middleton, said to evidence regular consultation meetings, the earliest of which is dated 19 February 2002 and the latest of which is dated 17 September 2009.

21. Mr Middleton said in evidence that these letters provided a snapshot of activities between the Claimant and the First Respondent. His position was that meetings were quite frequent during the early days of the transfer from SBC to the First Respondent, that there had been monthly meetings at one point, and these became quarterly by 2007 once the policies and procedures were in place. He accepted Ms Brown's evidence that regular meetings had not taken place between the two parties since 2014, given that he was not in a position to contradict her first-hand knowledge of this. He would not accept the Second Respondent's contention that the Recognition Agreement was no longer a live agreement. His further evidence was that the contract that SBC had with the First Respondent "ticked along" and there were very few situations that arose where the Claimant needed to become involved, apart from disciplinary and grievances. Mr Kenton's evidence was that he was unaware of any meetings between the First Respondent and the Claimant during

the time of his tenure.

22. During the afternoon of the first day of the hearing, the First Respondent conceded that there was a Trade Union Recognition Agreement in place with the Claimant at the material time of the transfer.

23. In 2016, SBC put the contract out to tender, splitting it into two contracts, social housing and office maintenance. The Second Respondent won the tender for the office maintenance contract. The Second Respondent took over the maintenance of SBC's offices on 1 December 2017. It is accepted by the parties that this amounted to a service provision change for the purposes of TUPE regulation 3(1)(b).

24. On 22 August 2017 Mr Andy Clements, the First Respondent's Operations Manager, wrote to all employees (including Mr Morris) notifying them of the transfer and seeking their nominations for four staff representatives (two white collar workers and two blue collar workers) for the purposes of information and consultation under TUPE. We were provided with one such letter which was sent to Mr Ashley Gerrish, the First Respondent's Assistant Commercial Manager, at B80.

25. Voting then took place and individuals were appointed as staff representatives. We were not given clear evidence as to who the four staff representatives were and at one point there was some confusion as to whether Mr Morris was one of the elected staff representatives. However, on balance of probability this did appear to be a mistaken belief and that Mr Morris was not one of the elected staff representatives.

26. On 11 September 2017, prior to a meeting with nominated staff representatives, Mr Morris approached Mr Kenton, the First Respondent's HR Business Partner, who was to conduct the meeting. Mr Morris told Mr Kenton that the Claimant had a Recognised Trade Union Agreement for SBC for collective bargaining purposes and because of this, consultation should take place through him. Mr Kenton was unaware of the Agreement and asked Mr Morris to provide him with evidence of it. Mr Kenton invited Mr Morris to attend the meeting in any event, but he declined. During the course of the meeting, Ms Mo Hackett attended and introduced herself as an HR Business Partner for the Second Respondent.

27. Later that day, Mr Kenton attended a meeting with Ms Hackett and Mr Clements to discuss how the Second Respondent was going to formally engage with staff during the consultation process.

28. On 18 September 2017 Mr Kenton received an email from Mr Middleton forwarding on an email which he had sent to Ms Debbie Murray (an ex- employee of the First Respondent) on 15 September 2017 (at B181-182). In his email to Ms Murray, Mr Middleton stated that the First Respondent's management at SBC had said that there was no Recognition Agreement with Unite and as a result the Second Respondent had refused to meet with him or his local representative. The email also stated that he had raised the matter with SBC and informed them that he may have to pursue a claim at a Tribunal for failure to consult, although that was not obviously a course of action he wanted to take. He requested Ms Murray's assistance to enable the TUPE discussions to get "back on track".

29. On 19 September 2017, Mr Kenton responded to Mr Middleton (at B181). In his email he explained that Ms Murray had left the First Respondent's employment two years ago and acknowledged that in the past the First Respondent and the Claimant had worked closely in some issues concerning labour relations on the contract and that they had been very grateful for the approach that he had taken to help them achieve their aims. He further explained that Mr Morris, who he believed to be the staff representative for the Claimant, was invited to attend the meeting on 11

September 2017. The email further explained that Mr Morris advised him that he had been told by someone from Unite that he should not attend. The email continued that Mr Kenton believed that the First Respondent had complied with the law in asking for work representatives for consultation. The email concluded by explaining that the Second Respondent would be the appointed contractors from 1 December 2017 and that there was a further meeting pencilled in for 25 September 2017 to which both Mr Middleton and Mr Morris were most welcome to attend.

30. By email sent later that day on 19 September 2017, Mr Middleton responded to Mr Kenton thanking him for his response, stating that, as he was aware, the Trade Union Recognition formed part of the TUPE transfer from SBC to the First Respondent, that he hoped the positive relationship between the parties would continue and that he was unable to attend the forthcoming meeting due to a prior commitment, but Mr Morris would be attending the meeting as the Unite Workplace Representative (at B180).

31. On 19 September 2017, the Second Respondent provided a list of the measures that it intended to take for "economical (sic), technical or organisational reasons" post-transfer in accordance with its obligations under TUPE regulation 13(4). This is at B88-92.

32. It would appear that the second consultation meeting scheduled for 25 September actually took place on 3 October 2017. This meeting was between the First Respondent, the Second Respondent, the elected staff representatives, and Mr Morris who is described in the notes of the meeting as "Driver/Union Representative". The notes of the meeting are at B93-97 and were taken by Ms Brown (who at that time was employed by the First Respondent).

33. At the start of the meeting, Mr Alan Perrett, of the Second Respondent, asked if there were any more concerns about the transfer and Mr Morris is recorded as stating "no not really". The notes indicate that it was an extensive meeting and discussed a number of issues including those matters raised in the Second Respondent's list of measures letter.

34. Following the meeting, the First Respondent issued letters to all those employees who were transferring to the Second Respondent detailing the measures that the Second Respondent intended to take post transfer. Neither the Claimant nor the First Respondent have been able to provide a copy of this letter although it is referred to as being issued within an email from Mr Middleton to Ms Hackett dated 10 October 2017 (at B130).

35. On 6 October 2017, Mr Middleton wrote to Ms Hackett by email introducing himself and requesting a meeting with her on 10 October (at B98).

36. On 10 October 2017, Mr Middleton and Mr Morris met with Ms Hackett to discuss the issue of the Trade Union Recognition. Mr Middleton gave evidence that this was a very brief meeting, lasting a few minutes, in which Ms Hackett made it clear that the Second Respondent was not prepared to recognise Unite the Union. After the meeting, that same day, Mr Middleton wrote to Ms Hackett setting out his concerns and raising a number of questions as to the Second Respondent's proposed operation of the contract (at B130-131). Mr Middleton forwarded this email to Mr Morris that same day, asking him to make the members aware of its contents and to inform them that he will be sending them all a letter on Friday (at B106).

37. On 10 October 2017, Ms Hackett wrote by email to Mr Middleton stating that she was reviewing his email and would respond accordingly to the points that he had queried around the operational elements of the transfer. She also asked him to

provide any documentation evidencing any Trade Union recognition agreement which transferred from SBC to the First Respondent. This email is at B117.

38. Mr Middleton subsequently wrote to his members by letter dated 18 October 2017 at B109-110. The letter explained that the Second Respondent was not prepared to recognise Unite the Union for any collective bargaining or to consult as to any measures it intended to implement after 1 December 2017. The letter went on to invite the members to return a ballot paper indicating whether they were willing to take part in an industrial action ballot. Mr Middleton's evidence was that the Claimant did not get the necessary percentage required to hold a further ballot.

39. On 20 October 2017, Mr Middleton responded to Ms Hackett's email by providing a copy of the Trade Union Recognition Agreement and a selection of documents in support of the Claimant's involvement with the First Respondent. The email ended by stating that Mr Middleton believed that he did not need to provide any further information regarding recognition that existed for his members employed on the building maintenance contract. This email is at B120, the recognition agreement and the supporting documents are at B64-79.

40. On 22 October 2017, Ms Hackett forwarded Mr Middleton's email and the attachments to Mr Kenton and asked him to give her a call the following day (at B129). In evidence, Mr Kenton stated on reading the email chain which was included with Ms Hackett's email that it was only then that he became aware of the meeting that Mr Middleton and Mr Morris attended on 10 October and that the Second Respondent had decided not to recognise Unite the Union.

41. On 23 October 2017, Mr Kenton spoke to Ms Hackett by telephone. She asked him if the First Respondent was able to substantiate the claims of the Claimant that a recognition agreement was indeed in place at SBC. Mr Kenton said that he would investigate and get back to her.

42. Mr Kenton's position was that, even though the Agreement was not fully executed, as it was only signed by one out of the five signatories, his view was that there may well have been a Recognition Agreement for Unite in place at SBC, which therefore transferred under TUPE. Mr Kenton made Ms Hackett aware that it was the First Respondent's belief that an Agreement could be in place for Unite at SBC in the light of this evidence.

43. On 27 October 2017, the Second Respondent wrote to the First Respondent requesting TUPE Employee Liability Information (ELI) for the employees who were wholly or mainly assigned to the contract at SBC (at B145-148).

44. Shortly after receiving this request, the First Respondent provided the Second Respondent with the ELI (at B235-240). Within this information, it was confirmed in answer to the question "is the employee covered by a Trade Union Recognition Agreement - as per payroll information" (at B238-240), that yes, there were a number of employees (from payroll information) working at SBC who were covered by a Recognition Agreement.

45. On 3 November 2017 Ms Hackett wrote to Mr Kenton asking him to investigate to establish if the First Respondent had copies of any agreements, arrangements and codes of practice between the First Respondent and any Trade Union or other representative body of employees, including collective and recognition agreements. She stated that the Second Respondent required details of any current application for recognition by a Trade Union pursuant to Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 (at B156). The letter also asked if Mr Kenton could provide any evidence that the First Respondent had served notice to

de-recognise the Trade Union and if any Recognition Agreement was in place. Finally, the letter asked if as part of the TUPE consultation the First Respondent had been negotiating with the Trade Union to date.

46. On 6 November 2017, Mr Kenton responded to Ms Hackett telling her that as the First Respondent had been unaware of the existence of the Recognition Agreement with Unite, it would not have gone through a de-recognition process (at B163).

47. By a letter dated 7 November 2017, Ms Hackett wrote to Mr Kenton at B164. This letter advised him that it remained unclear from their correspondence and discussions as to whether or not a valid Trade Union Recognition Agreement existed between the First Respondent and the Claimant. The letter went on to say that, for the avoidance of doubt, on 1 December 2017, the Second Respondent would be serving a notice of de-recognition on the Claimant, without prejudice to its argument that no Union Recognition Agreement was in existence. The letter also stated that the Second Respondent believed that this "de-recognition event is a measure" and so is advising the First Respondent accordingly. The letter ended by stating that no doubt the First Respondent would factor this into the collective TUPE consultation which it was conducting.

48. On 8 November 2017, Mr Kenton wrote to Ms Hackett explaining that so as to enable the First Respondent to have meaningful consultation with the staff representatives, he needed to know why the Second Respondent was going to de-recognise the Claimant (at B168). The Second Respondent did not respond to his request.

49. On 10 November 2017 Ms Hackett wrote to Mr Kenton asking him to confirm if the First Respondent had been negotiating and consulting with the Claimant to date (at B170). Mr Kenton telephoned Ms Hackett and told her that by consulting with Mr Morris and including him in the consultation meetings so that he could update his Unite members, he had been consulting with the Claimant's nominated Trade Union representative throughout.

50. On 16 November 2017, Mr Kenton emailed Ms Hackett expressing his disappointment that she had failed to provide him with any reasons as to why the Second Respondent wanted to serve de-recognition on the Claimant prior to the scheduled consultation meeting taking place later that day (at B174).

51. On 16 November 2017, the First Respondent held a further consultation meeting with the staff representatives and Mr Morris. The transcribed notes of this meeting taken by Ms Brown are at B175-176 and Mr Kenton's note of the meeting is at B179. Mr Kenton's note describes Mr Morris as the "Unite Local rep". At the meeting Mr Kenton explained that the Second Respondent had declined to attend the meeting and would hold their own meeting, that the Second Respondent had expressed their intention not to deal with the Claimant after the transfer date, that it was his view that this was not the right way forward and that he would continue to communicate with Unite and the SBC representatives during the consultation process. At the meeting Mr Morris confirmed that a meeting was scheduled to take place with the SBC Union members imminently.

52. In cross-examination, Mr Middleton was asked if by this time it was obvious that the "writing was on the wall". He replied yes and added that Ms Hackett had made it clear that the Second Respondent was not going to recognise the Claimant Trade Union.

53. The transfer from the First to the Second Respondent took place on 1 December 2017.

54. On 6 December 2017, the First Respondent received an email from Mr Middleton, attaching a letter he had received from Ms Taylor, the Second Respondent's Group People Director, on 1 December 2017 (B197-198 and B193). The letter from Ms Taylor stated, for the avoidance of doubt, in the event of a Recognition Agreement existing and transferring to the Second Respondent, neither of which were admitted, the letter should be accepted as notice of immediate de-recognition of Unite the Union in relation to the employees referred to in the letter. The letter referred to 103 employees who had transferred to the Second Respondent from the First Respondent by way of a TUPE transfer that day. The names of the employees are listed within a schedule attached to the letter which is at B194-196.

55. On 11 December 2017, Mr Kenton confirmed to Mr Middleton that the First Respondent had accepted that there may well have been a Recognition Agreement in place for the Claimant in respect of staff employed at SBC but reiterated that it had been unaware of the existence of the Agreement until a copy of it had been provided by Mr Middleton in October 2017.

56. Mr Middleton said in evidence that he had spoken to Mr Morris and that the reason why Mr Morris declined to attend the September 2017 meeting was because he would not be there as a Trade Union representative, but as a staff representative. In cross examination, Mr Middleton refused to accept that Mr Morris could and later did attend the meeting in the official capacity of a Trade Union representative. He gave two reasons for this. Firstly, for the Claimant to attend in an official capacity, he as the Unite Regional Organiser would have had to have been formally invited as the officer with responsibility for the Claimant's members. Secondly, the First Respondent had already elected staff representatives instead of dealing with representatives of the Recognised Trade Union and so attendance could never be in an official capacity. His overall position was that any involvement by Mr Morris and himself was not by way of consultation under TUPE, albeit it amounted to consultation in the ordinary sense of the word. In evidence it did become apparent that the Claimant's essential complaint was not that the First Respondent had failed to consult but that the Second Respondent had failed to consult as to its proposal to not deal with the Union.

57. Mr Kenton's evidence was that for all intents and purposes Mr Morris had been invited to and had attended meetings in his capacity as a Trade Union representative of Unite the Union. He pointed to the email correspondence in which he invited Mr Middleton to attend the meeting originally scheduled for 25 September 2017 and Mr Middleton replied saying that he was unable to attend but would send Mr Morris on his behalf.

58. In evidence, both written and in cross examination, Ms Taylor stated that it was the Second Respondent's strongly held position that they did not recognise Trade Unions. In her witness statement, she stated that as a business, the Second respondent had never had any involvement with Trade Unions or Trade Union recognition and that it was something that did not fit well with their business model. In cross examination she said that the Second Respondent was a medium-sized family business of just over 1000 employees and that the company philosophy was not to have recognised Trade Unions although it was happy to allow employees to be accompanied by their Trade Union representatives at disciplinary and grievance hearings.

59. This claim has been brought by the Claimant on behalf of the former employees of the First Respondent who are members of the Union. The list of names of such persons is at B262. The list does not contain the job titles of each person and no evidence was provided of this. It was therefore impossible to ascertain whether any of the persons named were managers or non-managers beyond being told in

evidence that Mr Morris was a Driver and Mr Gerrish a Commercial Assistant. In evidence Mr Middleton advised that one of the named members, Mr Fenn, had unfortunately died and that this had only come to his attention the week before our hearing. The information provided at B212-240 does not contain the names of the members of staff for us to cross reference to.

60. At the end of the evidence, we heard submissions from all of the parties. Mr Kohanzad and Mr Soanes provided written submissions which they spoke to. Mr Powlesland provided oral submissions. We were very grateful to Counsel and have taken their submissions into account in reaching our conclusions.

Relevant Law

61. Transfer of Undertakings (Protection of Employment) Regulations 2006:

Regulation 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.

Regulation 15 Failure to inform or consult

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;
(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
(c) in the case of failure relating to representatives of a trade union, by the trade union; and
(d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and
(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

(3) If on a complaint under paragraph (1) a question arises as to whether or not an employee representative was an appropriate representative for the purposes of regulation 13, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employees [except where the question is whether or not regulation 13A applied].

[(3A) If on a complaint under paragraph (1), a question arises as to whether or not regulation 13A applied, it is for the employer to show that the conditions in sub-paragraphs (a) and (b) of regulation 13A(1) applied at the time referred to in regulation 13A(1).]

(4) On a complaint under paragraph (1)(a) it shall be for the employer to show that the requirements in regulation 14 have been satisfied.

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by

virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

(6) In relation to any complaint under paragraph (1), a failure on the part of a person controlling (directly or indirectly) the employer to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or
(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

(10) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which an order under paragraph (7) or (8) relates and that—

(a) in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order;
(b) in respect of an order under paragraph (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.
(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him.

(12) An employment tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—

(a) in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed; or
(b) in respect of a complaint under paragraph (10), the date of the tribunal's order under paragraph (7) or (8),

or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

[(13) Regulation 16A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (12).]

Conclusions

62. We considered our findings of fact as against the joint list of issues which is at B61-64.

63. The complaint was essentially narrowed down to one of failure to consult by the First and Second Respondent in respect of the Second Respondent's intention to de-recognise the Claimant Trade Union.

64. The parties accepted that the Offices Maintenance Contract transferred from the First to the Second Respondent on 1 December 2017. The parties also accepted that the transfer of affected employees amounted to a service provision change under regulation 3(1)(b) of TUPE.

65. At paragraph 1 of the joint list of issues, we are asked to determine whether we had jurisdiction to hear the claim on the basis that the Claimant would only have the power to bring this complaint before the Employment Tribunal if, immediately before the transfer date, it was recognised by the First Respondent (the parties accepted that the agreed list of issues erroneously referred to SBC). We considered paragraph 2 of the joint list of issues at the same time, namely whether the Claimant had a valid and recognised collective trade union agreement with the First Respondent (the parties again accepted that the agreed list of issues erroneously referred to SBC).

66. Under regulation 2 of TUPE, the word "recognised" has the meaning given to it within section 178(3) of the Trade Union and Labour Relations (Consolidation) Act 1992. That is:

"In this Act "recognition", in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and "recognised" and other related expressions shall be construed accordingly."

67. From our findings we were satisfied on balance of probability that a valid and recognised Trade Union Recognition Agreement existed between the Claimant and the First Respondent immediately before the transfer date. The fact that the Agreement had fallen largely into disuse did not mean that it did not still exist, although it does perhaps explain why the First Respondent was not aware of it at the time of the events leading to the transfer.

68. We then turned to paragraph 3 of the joint list of issues, which states that: if so whether the said Agreement related to employees working on the Social Housing and Office Maintenance Contract at Slough. More correctly this should be a reference to the Office Maintenance Contract at SBC. From our findings the answer to this question is yes.

69. Turning then to paragraph 4 of the joint list of issues, which states that: if so, what were the names of those employees forming part of the bargaining unit. The bargaining unit under the Recognition Agreement are non-managerial employee members of the Claimant Trade Union. These are identified at B262.

70. At paragraph 5 of the joint list of issues, we are asked to answer the question whether the Agreement was recognised by the First Respondent immediately before the transfer date. From our findings it is clear that the First respondent did recognise the Agreement immediately before the transfer date.

71. Turning then to paragraph 6 of the joint list of issues, whether the Agreement had been de-recognised, at any point, after its recognition, prior to the transfer date. Again, from our findings the answer to this question is no.

72. Paragraph 7 then asks that to the extent that the agreement was recognised by the First Respondent immediately before the transfer date (and so transferred to the Second Respondent under TUPE) with reference to a number of sub-paragraphs which we will consider below.

73. At sub-paragraph a., was the Second Respondent's decision to de-recognise the Agreement a legal implication of the transfer pursuant to regulation 13(2)(b) TUPE or a measure pursuant to regulation 13(2)(d). We were guided to an extent by Harvey on Industrial Relations & Employment Law at paragraph 194.02, which states that the phrase "legal, economic and social implications" of the transfer within regulation 13(2)(a), is a:

"wonderfully vague piece of Euro jargon… shamelessly lifted straight from the directive. Presumably

'legal' implications allude to the impact of the transfer upon the employees' contractual statutory rights against their employer – terms and conditions of employment, continuity of employment and so forth"

74. Given that the Recognition Agreement was not legally binding and was what is known as a voluntary agreement, we cannot see how it conferred any legal implication under regulation 13 (2)(b). However, the Second Respondent's decision to de-recognise the Trade Union Agreement was clearly a measure it was proposing in relation to any of the transferred employees pursuant to regulation 13(2)(d).

75. At sub-paragraph b., was Mr Morris an appropriate representative of the Claimant (regulation 13(3) TUPE)? From our findings we conclude that the answer is yes. Further, it is clear from the evidence that the First Respondent was consulting with Mr Morris, as the Claimant's workplace representative in his capacity as that representative and we were not convinced that it was of any consequence that the First Respondent had, albeit mistakenly, elected employee representatives with whom it was consulting with as well. Mr Morris was present at the first consultation meeting and invited to attend, although he declined. He attended both the second and third consultation meetings.

76. At sub-paragraph c., did the First Respondent inform appropriate representatives about the Second Respondent's decision to de-recognise the Agreement long enough prior to the transfer date to enable consultation to take place (regulation 13(2) TUPE)? We considered our findings and concluded the following. The First Respondent could not inform the appropriate representatives about the Second Respondent's decision to de-recognise the Agreement any earlier than it found out about it. Mr Kenton became aware of this decision from the email chain he received on 22 October 2017. He found out more formally on 8 November 2017 and he then wrote on that day and on 16 November 2017 attempting to find out the rationale behind the decision. He got no answer to that question. He held a consultation meeting with the appropriate representatives on 16 November 2017 at which he informed them of the Second Respondent's decision to de-recognise the Claimant Trade Union. By this time there were only two weeks to go before the transfer date. So, the simple answer to this question is no, the First Respondent did not inform the representatives of the decision to de-recognise the Claimant long enough prior to the transfer date to enable consultation to take place. All it had to do was to inform the representatives of the decision and indeed that was all it did at the consultation meeting. But this was something that the First Respondent could have done from the earliest date of 22 October 2017.

77. At sub-paragraph d., did the First Respondent consult with appropriate representatives about the fact that the Second Respondent would be de-recognising the Agreement post transfer? From our findings the answer to this is that there was no consultation; it was simply informing the appropriate representatives at the meeting on 16 November 2017. We took into account that under regulation 13(6) the duty to consult is expressed to be "with a view to seeking the appropriate representatives' agreement to the intended measures". It is hard to see how this could happen at a meeting at which the First Respondent was unable to say anything more than what the Second Respondent's intention was and in the absence of the Second Respondent at that meeting. So, the answer to the question is no.

78. At sub-paragraph e., were there special circumstances which rendered it not reasonably practicable for the Respondents to inform and consult with employee representatives about the Second Respondent's decision to de-recognise the Agreement in accordance with regulation 13? From our findings we noted the following: the Second Respondent notified the Claimant of its intended de-recognition at the meeting between Ms Hackett, Mr Middleton and Mr Morris on 10 October, the First Respondent knew about the intended derecognition from 22 October but did not hold a meeting with the appropriate representatives to inform

them until 16 November 2017.

79. There is no definition of "special circumstances" under TUPE, but the expression is clearly intended to mean the same as it does in relation to collective redundancies under section 188(7) of TULR(C)A 1992. Case law in relation to that section indicates that the employer must be able to show that he was constrained by some event or occurrence beyond, or substantially beyond, his control. The circumstances must be "special" in the sense of being something unforeseen or unexpected: "something out of the ordinary run of… commercial or financial events"; there must be reasons which are special to the facts of the particular case (Bakers' Union v Clarks of Hove Ltd [1978] IRLR 366, CA).

80. Whilst we accept the facts identified within Roman numerals i. to iii., we do not accept that they amount to special circumstances bearing in mind the above definition. The First Respondent knew about the planned de-recognition from 22 October 2017 and should have consulted at that point and there was nothing to stop it from doing so whilst awaiting a rationale for the decision to be provided by the Second Respondent. The Second Respondent declined to provide a rationale but could nevertheless have taken part in the consultation meeting that belatedly took place on 16 November 2017 to at least explain its position to the appropriate representatives. We could not find that there were special circumstances here and, in any event, if there were, they were not of a nature that rendered it not reasonably practicable for the Respondents to inform and consult with the employee representatives at an earlier date in October 2017. As a result of our conclusions, it was unnecessary for us to deal with sub- paragraph f.

81. With regard to paragraph 8, whether the Tribunal will make a finding against the Second Respondent under regulation 15(1) well-founded and if so whether a declaration should be made to that effect (regulation 15(7))? Given the above conclusions, the answer is no.

82. With regard to paragraph 9, whether the Tribunal will make a finding against the First Respondent under regulation 15 (1) TUPE well-founded and if so whether a declaration should be made to that effect (regulation 15(8))? Given the above conclusions, the answer is yes and fails to be presented under regulation 15(1)(c). The declaration is made under regulation 15(8)(a) TUPE. The First Respondent failed to comply with the requirement within regulation 13(2)(d) in respect of the measure to de-recognise the Claimant Trade Union from the date of transfer. The award is made to those affected employees as identified in the list provided by the Claimant at B262 who were members of the Claimant Trade Union immediately prior to the transfer of a description in respect of which the Claimant was recognised by the First Respondent.

83. With regard to paragraph 10, if the declaration is made (regulation 15(8) TUPE) against the First Respondent, whether the Second Respondent should be jointly and severally liable with the First Respondent in respect of compensation payable (regulation 15(9))? Regulation 15(9) applies but is qualified by regulation 15(5) and applies to regulation 13(2)(d) or 13(9). So, the answer is yes, the Second Respondent is jointly and severally liable with the First Respondent in respect of compensation payable.

84. With regard to paragraph 11, whether any compensation should be awarded, or alternatively reduced, on the grounds that the Respondents did follow a collective consultation process with employee representatives, to include a workplace representative of Unite, that was full and fair in all other respects?

85. We were unclear of what the reference to "other respects" meant because it seemed

clear to us throughout the case that the issue was about the failure to consult and the extent of the failure to consult with regard to de-recognition.

86. Regulation 16(3) defines "appropriate compensation" in regulation 15 as:

> *"… such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty."*

87. A week's pay is calculated gross following sections 220-228 of the Employment Rights Act 1996 and is not subject to the statutory cap - Zaman and others v Kozee Sleep Products Ltd t/a Dorlux Beds UK [2011] IRLR 196, EAT.

88. The nature of the compensation to be awarded under regulation 15 was considered in Sweetin v Coral Racing [2006] IRLR 252, EAT. There, mirroring the approach taken in the collective redundancy regime (see Susie Radin Ltd v GMB and ors [2004] IRLR 400, CA), the EAT held that the award is intended to be punitive and therefore the amount of the award should reflect the nature and extent of the employer's default. The EAT stated that while the Tribunal is entitled to have regard to any loss sustained by the employees caused by the employer's failure, the focus of the award "requires to be the penal nature which governs it, and proof of loss is neither necessary nor determinative of the level at which to fix the award". In essence, therefore, the Tribunal should consider the seriousness or gravity of the default and any mitigating circumstances. Such circumstances might exist, for example, where the Tribunal rejects the 'special circumstances' defence but acknowledges that there were nonetheless mitigating circumstances.

89. Mr Kohanzad for the First Respondent submitted that any award should be no more than 1 week, given that as soon as it found out about the de-recognition it took action and that the affected employees suffered no disadvantage because any earlier information or consultation would not have changed the outcome. Mr Soanes for the Second Respondent submitted that an award of 13 weeks would be absurd and that any award should be minimal. Mr Powlesland for the Claimant submitted that an award of between 8-10 weeks was appropriate in the circumstances.

90. We considered our findings and we have taken into account the following matters.

91. The First Respondent was unaware of the Recognition Agreement prior to the start of the information and consultation process and so in turn was the Second Respondent.

92. The matter came to light during the process and the Second Respondent decided that whether or not there was a Recognition Agreement it was going to de-recognise the Claimant from the date of the transfer.

93. Once the First Respondent became aware of this it delayed by a matter of weeks in raising the issue of de-recognition with the appropriate representatives, but it was waiting for the Second Respondent to provide more information.

94. The Second Respondent did not provide more information and did not attend the consultation meeting on 16 November 2017, but it was unclear whether they were invited to do so by the First Respondent.

95. The Claimant in any event knew that the "writing was on the wall" as had been made clear by Ms Hackett at the10 October 2017 meeting.

96. The provision of information and consultation if it had happened any earlier would not have influenced the Second Respondent's decision on whether or not to de-recognise the Claimant. This was clear from the evidence of both Ms Taylor and

Mr Middleton.

97. There is nothing to indicate any malice or deliberation on behalf of the Respondents.

98. Information was provided and consultation took place on general issues relating to the transfer and whilst information and consultation on de-recognition did not take place when it should have done, there are extenuating circumstances, and in any event, it would have not affected the outcome.

99. We therefore conclude that the appropriate amount of compensation in the circumstances is one week's pay.

100. The actual amounts of compensation to be made to each affected employee will be determined at a remedy hearing if the parties are unable to agree this between them. The parties should notify the Employment Tribunal if they require a remedy hearing by 16 June 2021. If so, a remedy hearing will be listed for half a day.

101. As a footnote we would add the following. We felt hampered by the narrowness of the issues we were asked to decide. One of our biggest concerns was how it was possible that the First Respondent did not recall that it had a Recognition Agreement with the Claimant Trade Union, so elected employee representatives and did not tell the Second Respondent about the existence of a Recognition Agreement when it became aware until belatedly during the process. However, we were not asked to deal with these matters beyond deciding whether there was a Recognition Agreement in place at the time of the transfer. But we do not believe it would have made any difference to the decision to de-recognise the Claimant in any event.

Employment Judge Tsamados
Date: 14 April 2021

Attached: list of issues

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE