EMPLOYMENT TRIBUNALS

Claimant: **ABM Facility Services UK Limited**

Respondent: **Proway Window Cleaning Company Limited**

Heard at: **East London Hearing Centre (Cloud Video Platform)**

On: **20 August 2020 and, in chambers, 7 September 2020**

Before: **Employment Judge Moor**
Members: **Mr T Burrows**
Mr S Woodhouse

Representation

Claimant: Mr A O'Neill, solicitor
Respondent: Mr T Sheppard, counsel

RESERVED JUDGMENT

1. **The complaint under Regulation 12 of the Transfer of Undertaking (Protection of Employment) Regulations 2006 is well-founded. The Respondent failed to provide the Claimant with adequate pay information in relation to four employees.**

2. **The Respondent is ordered to pay to the Claimant £1,080 in compensation.**

REASONS

1. The Claimant ('ABM') is a facilities management company. Its business includes servicing large shopping centres. The Respondent ('Proway') had a contract with ABM to clean windows at shopping centres.

2. On 30 June 2019, ABM gave 3 months' notice to Proway to terminate the contract. ABM had decided that, from1 October 2019, it would provide window-cleaning services directly. The parties agree that this was a relevant transfer under the Transfer of Undertaking (Protection of Employment) Regulations 2006 ('TUPE'). They also agree that four employees of Proway were assigned to the 'organised grouping of resources' that was the subject of the transfer. Proway was therefore

obliged, under Reg 11 of TUPE, to provide Employee Liability Information ('ELI') to ABM. ABM claims that Proway did not provide complete/accurate ELI and brings this complaint under Reg 12 TUPE.

Issues

3. The issues are whether or not, in relation to Mr N Turnham, Mr A Perrin, Mr B Cass, and Mr A Bates, Proway provided to ABM ELI in accordance with the TUPE Regs 2006 Reg 11(2)(b). In particular whether Proway gave to ABM in writing (or otherwise available in readily accessible form):

    3.1 particulars that an employer is obliged to give under section 1(4)(a) of the Employment Rights Act 1996 namely: '*the scale or rate of remuneration or the method of calculating remuneratio*n';

    3.2 28 days before the transfer i.e. by 3 September 2019.

4. If not, then the Tribunal must make a declaration and decide whether to award compensation. If it becomes necessary, we must consider whether it is just and equitable to award compensation and for how much having regard to the following:

    4.1 Whether is it just and equitable to award the statutory minimum amount of £500 per employee to whom the failure relates;

    4.2 whether ABM has mitigated its loss;

    4.3 whether the loss claimed by ABM is attributable to the failure to provide ELI.

Remote Hearing

5. The parties agreed to a remote hearing by video. We ensured that all participants could be seen and heard by all others. On occasion an individual would drop-out of the hearing, and we paused in order for them to return. These pauses and longer breaks meant that the hearing lasted longer than if it had been in person. We reserved our decision and deliberated in chambers on 7 September 2020. We thank the representatives for making efficient use of the time available and Mr O'Neill for providing a chronology.

Findings of Fact

6. Having heard the evidence of Mr M Bacon, window cleaning director of ABM, Mr D Bedford, sole director of Proway and Mr N Turnham, former window cleaning supervisor at Proway; and having read the signed witness statements of Ms S Thakar, HR Manager at ABM, and Mr A Bates, window cleaner now of ABM; and having read the documents referred to us, we make the following findings of fact.

7. Proway had a cleaning contract with ABM and its predecessor for about 33 years. On 30 June 2019 ABM gave 3 months' written notice to Proway terminating the contract.

8. Assigned to that contract were: Mr A Perrin and Mr N Turnham, who were supervisors, and Mr A Bates and Mr B Cass, who were window cleaners.

Mr N Turnham

9. In relation to Mr N Turnham, who was a supervisor, Proway provided the following written information to ABM:

   9.1 On 7 August 2019, on ABM's pro-forma, Proway described Mr Turnham's pay as '*price work*' and his basic hourly rate £14.00 (92);

   9.2 On 13 August 2019, in answer to Ms Thakar's question about what price work meant, Proway gave a description of price work as: '*Every single job has a wage value and the team leaders/Supervisors pay the staff members that work on that job their usual hourly rate. If the job is completed and signed off properly the team leader/Supervisor is paid the balance of the price on that job.'* (94)

   9.3 On about 22 August 2019, in response to Ms Thakar's request of 16 August, 3 months' worth of payslips (97);

   9.4 On 23 August 2019 a set of terms and conditions of employment dated 10 January 2014 which stated, under the subheading 'pay', that he was paid '£14ph & price work';

   9.5 Overnight on 10/11 September 2019 (in answer to ABM's query of 5 September 2019 in which it asked for a breakdown on '*how you cost price work*' on ABM sites (114) and, on 10 September, for a '*full explanation of the price work rates*' so that they had accurate ELI on pay (115)), Mr Bedford sent handwritten and printed notes of ABM jobs completed in June, July and August (54-62). He explained in his email: '*please find attached the last 3 months' wage totals for the two supervisors A Perrin and N Turnham. Work is distributed to both of them with wage values that I try and ensure will cover all the staff's wages for the month. The two of them use the labour available and pay the staff their respective hourly rates and the balance makes up their wages. Although they have an hourly rate by name it is just for the purposes of calculating holiday pay and also just in case a job does not have enough money on it to cover their pay so they can always be assured they will not fall short on a job that may have been underquoted'.* It was clear from this that Mr Bedford set the wage values not the supervisors.

   9.6 Overnight on 10/11 September 2019 the handwritten documents attached related to 'Nick' (who could reasonably be assumed to be Mr Turnham given the description of the notes), and the printed

documents related to Aaron, Mr Perrin. Mr Bedford accepted in his evidence that these documents did not show all the 'wage values' for the window cleaning jobs done by Proway that were to transfer, because some of those jobs were done on 4-monthly and 6-monthly and annual rotations. On being asked why he had not provided all of the wage values, Mr Bedford's responses varied:

9.6.1 One position was that he did not think they would be useful because ABM would have to decide on their own wage values.

9.6.2 Another was that ABM had said on 28 August 2019 (113) that they were not going to pay price work and that, therefore, '*what they was after was inside information*.'

9.6.3 Mr Bedford agreed that to calculate how much an employee would get, then the wage value for each site would be needed.

9.7 On 11 September 2019 (in response to a request on that day) Proway provided 12 months' payslips and P60s showing Mr Turnham's year's earnings to 5 April 2019 were £44,510.

9.8 On about 13 September 2019 Ms Thakar asserted in an email to Proway that they had received no specific details relating to a specific calculation on pay. She went on, unless they received further information, they would treat price work as subjective and ad hoc and non-contractual (123). If it was asserted it was contractual, she warned there would have to be redundancies. Proway suggested ABM speak to the staff who had all the required information (128).

9.9 Mr Turnham called Ms Thakar in mid-September to ask if there was any further information she required. And she said she was happy with what Mr Perrin had sent.

9.10 Mr Bacon, for ABM, agreed that price work was well understood in the industry. His description of it accorded with that given in the information provided to ABM. He showed he understood that wage values for each job depended on commercial factors.

10. It was Mr Bedford's clear evidence, and Proway's position in its Response (para 10.2, p26, for which he gave instructions) that the supervisors had a salary target of £40,000 per year, to reach via price work. In his oral evidence he explained that '*I just make sure [their] annual salary is made up.'* By which he meant to £40,000.

11. When asked in re-examination whether this achieving the certain salary was a formal part of the agreement with them, his answer was clear that '*absolutely*' it was. His evidence was that he would make the supervisor's salaries up to this amount if they had not reached it by way of price work during the year. He was

also clear that Proway did not inform ABM of this target salary in writing. ABM was not aware of it.

12. On 19 September ABM informed Mr Turnham of their position that price work was non-contractual and that on transfer he would be paid his hourly rate. ABM's view, set out in that letter, was that a redundancy would have to follow because the level of pay was economically unsustainable. This was also Mr Bacon's evidence.

13. Ultimately, terms could not be agreed with Mr Turnham, who reached a settlement with ABM for £10,941 comprising notice of £3,360 and redundancy £6,825. These were not enhanced payments (as Mr Bedford suggested in his statement). The legal costs in reaching a settlement included £240 for the provision of advice from an independent solicitor to Mr Turnham that the law requires.

Mr Perrin

14. In relation to Mr Perrin, Proway provided the same information at the same time as Mr Turnham except that:

    14.1 On 10/11 September Proway provided the typed information (provided by Mr Perrin) as to the wage value of his jobs in the last 3 months [60-62]. It is clear that these were wage values. Each sheet identified which window cleaner was paid and the balance that was due to Mr Perrin.

    14.2 His P60 showed annual pay to 5 April 2019 as £39,967.

    14.3 On 20 September 2019 Mr Perrin sent ABM and example of price work. This showed that Mr Bedford set the wage values for the job. Mr Perrin informed the Respondent he had copies of everything on his laptop and was happy to share them (135).

15. Our findings of fact about the salary target of £40,000, above, apply to Mr Perrin. Proway would make his wages up to £40,000 if the payment she achieved by price work did not amount to that much.

16. Mr Perrin decided to accept ABM's offer of continued employment. He signed a new contract of employment with them whereby he was to be paid £33,000 per annum for 40 hours per week plus overtime paid at £15.86. He was paid £2,000 ex gratia in order to reach this agreement. Mr Bedford observed in his evidence that this was a big cut in wages. The legal costs of it were, as above, £240.00.

Mr Cass and Mr Bates

17. In relation to these two employees, Proway filled in the ABM ELI pro forma by stating that they were full time and hourly paid. Their rate was: Mr Cass £12.00 per hour and Mr Bates, £11.00 per hour. The information in relation to them was provided at the same time as for Mr Turnham. Their written statements of terms and conditions, signed in 2017, showed these rates.

18. The first three months' worth of payslips provided on 22 August 2019 did not show any price work for Mr Cass. They must have shown the price work Mr Bates was paid in June 2019, but this was not picked up by the Claimant.

19. Upon receiving the full payslips on 11 September, Ms Thakar noticed 5 references to price work on Mr Bates' payslips, including the first from June 2019. She noticed one reference for Mr Cass, in December 2018. The method of price work to hourly paid staff could not be identified from the explanation given on 94 about the method of calculating price work for supervisors.

20. In his statement (paragraph 22) Mr Bedford refers to the items identified as 'price work' on Mr Bates' payslips as '*bonuses from Mr Perrin to Mr Bates when he worked hard to get everything completed in the month*'. And that the December 'price work' for both Mr Bates and Mr Cass related to the fact that he would pay everyone a Christmas bonus. Proway did not provide this information in writing to ABM. Mr Bedford said that he did not provide written information on bonuses because '*I didn't have to because ABM did not have to pay them'*. In re-examination he said that bonuses were discretionary but that he always paid them.

21. The only reference to bonuses in the information provided to Proway appears in the empty column for 'bonus' at the bottom of Mr Perrin's sheets at p60.

22. In order to 'regularise' the position, (Ms Thakar paragraph 27), new terms and conditions were entered into with Mr Bates and Mr Cass as part of a settlement agreement whereby they settled any claims arising including for wages or bonuses. Their hourly rate was increased to £13.00 per hour. Fixed legal costs of £240 each were expended on these agreements in order to satisfy the legal requirement that employees were given independent legal advice.

Other Evidence

23. In 2017/2018 there had been negotiations between Proway (effectively owned by Mr Bedford) for a sale of the business to ABM. These fell through. During these negotiations employee pay information was provided: namely hourly rates and the phrase 'price work' for supervisors. At that time, ABM did not question what 'price work' meant. The proposed contract required Mr Bedford to provide all company documents to ABM and he had to give a personal guarantee under that contract.

24. On 29 August 2019 ABM wrote to Proway with the measures it envisaged taking in relation to employees. It stated that it did not wish to change terms and conditions but, in relation to pay, that it did not pay price work (113).

25. During Proway's contract, Mr Bedford set the wage values and his evidence was that these would vary according to what the client (shop) was prepared to pay: the client's requirements; and the experience of what the job demanded.

Submissions

26. We thank the representatives for their helpful submissions.

27. We refer to Mr O'Neill's written submissions which include out a useful section on the law**.** His points in essence were that:

    27.1 Section 1 pay information should include contractual and non-contractual amounts. Thus the lack of information about bonuses for Mr Cass and Mr Bates, however discretionary, was in breach of the Regulations. The payslips that were provided did not help because they described the bonuses as 'price work'.

    27.2 The information on price work was insufficient for an employee or the Claimant to be able to calculate what he was paid. To meet the legal requirement, the Respondent needed to have given the Claimant the 'wage values' for each site.

    27.3 The Respondent had not informed the Claimant about the £40,000 salary target for the supervisors and this was also a breach of the Regulations.

    27.4 The obligation to provide information is on the Respondent and the Claimant did not have to be proactive in seeking it out.

    27.5 The lack of information meant the situation was uncertain and therefore settlement agreements were reached. Compensation should cover not only the costs of reaching settlements but the amounts paid.

    27.6 Even if we did not accept that the losses were not attributable to the failure, the law set a default position of £500 and there was a view that this incorporated an element of 'penalty' because the underlying purpose of the Regulations was to protect employees.

28. This summary, does not do justice to Mr Sheppard oral submissions, but in brief he contended:

    28.1 For the supervisors the method of calculation had been given. Section 1 particulars on pay do not require employees to be given absolute figures in every case. Here price work was a well-understood concept, as Mr Bacon had agreed. The history showed that it had not been questioned in the past and that was because it was understood.

    28.2 Plenty of information had been provided in the form of contracts and payslips. Mr Perrin material referred to bonuses.

    28.3 He did not agree that Regulation 12 incorporated a 'penalty'. They were simply drafted: £500 was a starting point no more no less. Here the

losses were not attributable to any failure to provide information but were about economic decisions that would have been made in any event.

Law

29. Under Regulation 11(1) of TUPE the transferor must provide ELI to the transferee in writing or another readily accessible form.

30. Regulation 11(2)(b) of TUPE defines ELI as including: *'those particulars of employment that an employer is obliged to give to an employee pursuant to section 1 of the [ERA]'.*

31. So far as pay is concerned, section 1 of the ERA requires the employer to provide to the employee particulars of '*the scale or rate of remuneration or the method of calculating remuneration'.*

32. Section 1 probably ought to be read, consistently with the 1991 EU Directive on the information to be provided to an employee '*applicable to the contract or employment relationship'*. Article 2(2)(h) provides that it must be '*at least … the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled*.'

33. On the only appellate case on the matter, it was held in Born London Ltd v Spire Production Services Ltd UKEAT/0225/16/LA by the EAT that the section 1 ERA particulars in relation to pay need not specify whether they were contractual or not. In that case Spire had informed Born that non-contractual bonuses were paid. It gave specific information as to how to calculate the bonus (one week's pay plus £7.50 per year of service). Born contended they were contractual and claimed that Spire had given incorrect ELI. The EAT held that the ET had correctly struck out the complaint as having no reasonable prospect of success because the pay information required under section 1 ERA did not distinguish between contractual and non-contractual pay. Nor did the relevant EU Directive assist. The ET had relied, for interpretive assistance, on the definition of wages in section 27 ERA where it was allowed that there might be non-contractual elements.

34. It is well-established that the section 1 statement is not a statement of contractual terms. In Born, therefore, HHJ Eady QC was not persuaded that section 1 had to leave out those elements of pay that were non-contractual. She agreed that the 1991 Directive covered aspects beyond the contract by referring to the employment relationship. She also held that the requirement to give particulars of the 'method of calculation' was not confined to contractual entitlements by observing: '*moreover, requiring an employer to give particulars of the method of calculation, rather than specifying whether the payment is contractual in nature, enables an employee to understand how their pay is determined while avoiding the problems of legal definition that can arise when dealing with certain forms of remuneration.*'

35. She acknowledged that her conclusion meant that: '*whilst this would not provide a putative transferee with a clear contractual categorisation of the employment*

particulars, it will provide a comprehensive list of the rights and obligations listed under section 1 and thus enable a commercial assessment to be made as to the potential liabilities arising from a relevant transfer.'

36. Born was not a case about how specific the method of calculation information has to be, but it may assist with the one of the purposes of the obligation: to allow a transferee to make a commercial assessment as to potential liabilities arising on transfer.

37. If there is a breach of Regulation 11, then Regulation 12(4) provides that the amount of compensation is subject to:

    37.1 the statutory minimum of £500 in Reg 12(5), which itself is subject to:

    37.2 the duty to mitigate in Reg 12(6); and

    37.3 whether the Tribunal considers it is just and equitable to award a lesser sum; and

    37.4 whether the sum is just and equitable having particular regard to any loss sustained by the transferee which is attributable to the matters complained of, Reg 12(4).

Application of facts and law to issues

Mr Bates and Mr Cass

38. For the hourly paid staff, Mr Bates and Mr Cass, it is our clear conclusion that the Proway failed to provide ABM with information about bonus payments:

    38.1 Born was a bonus case. Bonuses are included in 'wages' definition on s27 ERA, therefore information about non-contractual bonuses should have been included in the information provided by Proway.

    38.2 Both Mr Bates and Mr Cass received a Christmas bonus, given to everyone. Proway did not inform ABM about this. Mr Bedford thought he did not need to do so because they were non-contractual: he is mistaken about this.

    38.3 In the previous year Mr Bates as a matter of fact had received discretionary bonuses. And while the payslips were provided (some late) to ABM showing extra payments, those payslips did not inform ABM that those payments were bonuses: to the contrary, they were described as 'price work' on the payslips. This just served to confuse the position. The empty column on Mr Perrin's spreadsheets marked 'bonus', again provided no clear information about who would be paid one and in what circumstances. We find therefore that Proway did not provide ABM with any or any adequate information on other bonuses.

39. Proway were therefore in breach of their obligation under Regulation 11 to provide ABM with information about bonuses relating to Mr Bates and Mr Cass.

40. We have then considered what compensation, if any, to award for these failures. We take into account the following factors:

    40.1 the uncertainty about the extra payments was a factor in ABM wishing to 'regularise' the position and reach a settlement on new terms that did not include bonuses. There is the possibility that, if bonus information had been given to ABM, they would have wished to reach a settlement in any event, but not necessarily: the information would have helped them assess the litigation risk and the need to do so. The legal costs are therefore attributable in part to the failure;

    40.2 the wording on the payslips, 'price work', meant that there was little point asking the individual employees about the payments, because the information that ABM had showed the hourly-paid employees had nothing to do with how wage values were set or likely knew anything about them. We do not consider, therefore, that ABM failed to mitigate their loss by failing to ask employees about these payments.

41. We consider that it would be 'just and equitable' to award compensation for two reasons: there is loss attributable to the failure but also we take into account the underlying purpose of the Regulation which is to protect employees and enable transferees to make a commercial assessment of their likely liabilities.

42. The starting point for any award of compensation is £500. Here we have decided it is not just and equitable to award so much. The attributable losses are lower than that amount and the Respondent met with its obligations in relation to hourly pay, in good time. This is not therefore a case of a complete failure to provide information. Taking all the factors we have set out into account, we consider it just and equitable to award £240.00 in respect of each employee.

Mr Turnham and Mr Perrin

43. We have reached the conclusion that Proway failed in its obligation to provide pay information in relation to Mr Turnham and Mr Perrin.

44. The information for the supervisors that Proway did not provide was that their pay was always made up to £40,000 a year. According to Mr Bedford's evidence this appears to have been a contractual commitment, but even if there was some doubt about this, it was certainly important to the size of their remuneration. This was very clear from Mr Bedford's evidence and was also the case set out in Proway's response.

45. It is not enough for Proway to say that the P60s eventually provided were consistent with the supervisors being paid £40,000 (or more). P60s are merely a historical record of what was paid: they do not give any indication of what rate was expected or how the pay was calculated.

46. Our decision is that, **if** Proway had described the supervisor's pay as piece work made up to £40,000 per year, it likely would have satisfied Reg 11 (save on the holiday pay point, see below). While it was a more difficult decision, we consider that the description of 'piece work' in the 13 August email probably did meet the requirement of section 1 particulars to provide 'the method of calculation'.

    46.1 The method of calculation was that a supervisor would get paid the difference between the 'wage value' for each site less what the hourly-paid workers received for work at that site. While this would not give the employee an absolute figure, that is not what Section 1 requires.

    46.2 Further it would have enabled ABM to make a commercial assessment: Mr Bacon knew what price work was and how to calculate it. Examples were also provided from the last 3 months.

    46.3 The method of calculating pay meant that it was for the employer to set the wage value: there was evidence that wage prices were not fixed. The risk was that ABM would set a lower wage values, it would have some very unhappy supervisors, but it had historical evidence of their P60s to gauge the levels.

47. Finally, we find that the information that the supervisors were paid holiday pay at the rate of £14 per hour, was provided overnight on 10/11 September: about a week beyond the 28 days required in Regulation 11. This was also a failure to provide complete information about pay: before it was explained as a holiday pay rate, it was difficult to work out to what the £14 per hour related.

    47.1 Made a decision early on not to pay price work.

    47.2 In fact if told about £40K would he have got better redundancy/notice pay? Redundancy was at statutory maximum anyway, therefore not; notice pay might have been more?

48. We go on to consider whether to award compensation and, if so, how much.

49. In this case, we are not persuaded that there was any actual loss attributable to the failure to provide information because:

    49.1 ABM had decided before the deadline of 3 September not to pay price rates in any event. Having so decided, they had to negotiate with both supervisors a change to their conditions on pay. Had they known about the minimum of £40,000 per year, this would not have changed that approach because price work could have taken the two above this minimum, as it did for Mr Turnham in the previous tax year.

    49.2 It was also clear from the evidence of Mr Bacon and the documents, that ABM saw the supervisors' conditions as 'economically unsustainable': it was not that they sought to renegotiate their terms because they were uncertain, it was that ABM considered they were too expensive.

50. We do not consider ABM failed to mitigate any loss: they spoke to both supervisors and obtained information from Mr Perrin. ABM was relatively proactive in seeking information by asking questions of Proway, albeit with a two-week delay between 13 August and 5 September.

51. The holiday pay information failure was relatively minor in character, being only one week late, and after a two-week hiatus in queries coming from the Respondent.

52. Bearing in mind all of those factors, we do not think it just and equitable to award £500 per employee: the losses claimed were not attributable to the failures but to economic decisions made by ABM consequent on the transfer. But we have decided that it is just and equitable to award some compensation because this was a failure to provide a key piece of information about overall pay: effectively that the supervisors would be paid a minimum of £40,000. This would have been very simple to state, as it was in Proway's response to the claim. Proway did not tell ABM at all. That failure should sound in a payment of compensation, to recognise one of the aims of the Regulations: to protect employees. The point is well illustrated by the following observations: as it turned out, if Mr Beford had provided this basic information about the supervisors who had given him several years' service, they might have been able to reach more advantageous settlements with ABM than they did. Mr Perrin settled for a new salary of £33,000 for the payment of £2,000. If Mr Bedford had complied with his obligations and stated his minimum salary of £40,000 in black and white, this might well have strengthened Mr Perrin's hand. Similarly, for Mr Turnham in his negotiation over termination payments with ABM. Both parties in this litigation declared the other was playing a commercial 'game': there may be some truth in that on both sides. But ultimately Proway's failures likely led Mr Turnham and Mr Perrin to lose out most of all.

53. Taking all of those factors into account, we consider that Proway should pay to ABM, £300 per supervisor in compensation.

Employment Judge Moor
Date: 8 September 2020