



Welcome to this edition of the "Working with Unions" bulletin designed to keep you updated with key cases and legal developments affecting trade unions and employee representative bodies. This bulletin covers the period of April to June 2021 and includes an interesting Central Arbitration Committee (CAC) decision considering the effect of Brexit on UK European Works Councils (EWC) and a decision of the Employment Appeal Tribunal (EAT) reading down section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) to give workers protection from detriment for taking industrial action. We hope you find the bulletin useful.

## **In the courts...**

### **Adecco Group EWC & Adecco Group, Central Arbitration Committee**

#### **Legal Context**

This decision considers the scope of the CAC's ability to make orders where the breach - here failure to inform and consult on redundancies - have already taken place.

#### **Background**

In March 2021, the CAC upheld two complaints made by Adecco's EWC that Adecco had (i) failed to inform and consult the EWC about collective redundancies concerning Adecco Group undertakings in at least two countries within the scope of the EWC agreement ("collective redundancies complaint"), and (ii) failed to provide country specific business sales performance data as required under the terms of the EWC agreement ("Business sales performance data complaint"). The EWC had not however asked the CAC to make any orders in those proceedings. The CAC gave the EWC 21 days in which to consider whether it wished to apply for any orders to be made. The EWC asked the CAC to make the following orders:

#### *Collective redundancies complaint*

The EWC acknowledged that the redundancies had already been implemented so it was too late for consultation, however, it asked the CAC to make an order requiring central management to:

- Hold an extraordinary meeting to discuss the collective redundancies made during 2020 in all of the countries covered by the EWC Agreement, and
- Provide to the EWC a list of individual contract terminations as a result of redundancy in all the countries covered by the EWC Agreement during 2020, detailing the age, number of years' service with Adecco group, gender,

place of work and job titles of the individuals affected. The EWC said that this information was needed to understand the number of redundancies actually made during this period, the establishments in which the redundancies were made, and the positions that were declared redundant in order to assess the possible impact of the redundancies on retained employees at those establishments. The information about the age and gender of the redundant employees was requested to help the EWC assess whether certain categories of employee (e.g. men or women, older or younger employees, employees with shorter or longer service) were disproportionately made redundant, and what impact that might have on gender balance within workplaces and on the loss of employees' experience.

#### *Business sales performance data complaint*

The EWC requested an order requiring central management to provide the EWC financial data broken down by each country within the scope of the EWC Agreement detailing 13 separate metrics for the most recent company financial year ending before 1 April 2020, and those from the previous financial year and forecasts for the following year for comparative purposes.

Adecco argued that neither order should be made because of the time that had passed meaning that the past failures could not be remedied by the orders, and also that the orders, as requested, would go far beyond the failings that the CAC had identified in the substantive complaints and what was required under the EWC agreement – for example, the CAC had only found breaches in relation to Sweden and Germany in respect of the collective redundancies complaint and there was no requirement to provide any of the granular information in relation to individual redundancies under the EWC agreement, which the EWC was now seeking. Adecco also confirmed that it would "shortly" provide the EWC with "a country-by-country breakdown of the 2020 full year sales and organic sales growth year-on-year information".

#### **CAC Decision**

The CAC decided that no orders should be made in respect of either of the two complaints.

#### *Collective redundancies complaint*

The CAC accepted that the information requested went beyond the failings identified by the CAC and that it was now too late for consultation on those redundancies to take place. The CAC noted however that its decision did not mean that such an order could never be made where redundancies had already been implemented but it was appropriate in this case not to make such an order given that (a) several months had passed since the redundancies had taken place, (b) the EWC agreement contained an express statement providing that Adecco would not be prevented from taking decisions in a timely manner and that management prerogatives would not be affected, and (c) the fact that detailed information about the in-scope countries had been provided to the EWC in the course of Adecco giving evidence in response to the EWC's complaint.

#### *Business sales performance data complaint*

The CAC accepted Adecco's submission that it has no jurisdiction to make an order in respect of its future conduct. It also accepted that its substantive decision did not specify the thirteen metrics now requested by the EWC. Therefore it was not empowered to order that those metrics be provided. However, in relation to Adecco's comment that it would shortly provide the EWC with individual country business sales data, the CAC reserved its right to reconsider its decision if that information was not provided to the EWC within 21 days.

#### **Commentary**

The decision is a helpful reminder that the CAC will only make orders where such orders are still capable of remedying the breach although the CAC did caution that this does not mean that orders would never be made after redundancies had been implemented. The EWC's request for diversity related data in respect of collective redundancies is interesting and continues the trend we identified in our previous bulletin on the growing focus from trade unions on the impact of business restructurings on workforce diversity.

## easyJet EWC and easyJet plc, Central Arbitration Committee

### Legal Context

TICER was amended by the Employment Rights (Amended) (EU Exit) Regulations 2019 in preparation for the UK leaving the EU. Under Regulations 21 and 21A of amended TICER, the EWC can bring disputes about the operation of the EWC or information and consultation procedure to the CAC.

### Background

easyJet's EWC is established under the TICER subsidiary requirements. The EWC submitted a complaint against easyJet for breaching its duties under amended TICER namely, to inform and consult the EWC in light of its proposals to reduce staff numbers by up to 30% during 2020. In anticipation of Brexit, easyJet had appointed its German branch as the representative agent of the central management of the company. This appointment was to take effect immediately when the UK ceased to be subject to the Brexit transition period, which took effect at 11pm on 31 December 2020. easyJet argued that from that time, amended TICER came into force and easyJet ceased to be obliged to operate an EWC as a matter of UK law and the management of the German branch was obliged to comply with German legislation transposing the EWC Directive. If easyJet's interpretation of amended TICER was correct, the CAC would not have jurisdiction to hear the complaint. This was a preliminary hearing to decide that issue.

The parties' submissions hinged upon the relationship between Regulations 4 and 5 of amended TICER:

- Regulation 4(1) provides that Regulations 21 and 21A (amongst others) apply "only where, in accordance with regulation 5, the central management is situated in the UK".
- Regulation 5(1) applies where (b) the central management is not situated in a Relevant State and the representative agent of the central management (to be designated if necessary) is situated in the United Kingdom; or (c) neither the central management nor the representative agent (whether or not as a result of being designated) is situated in a Relevant State and (i) in the case of a Community-scale undertaking, there are employed in an establishment, which is situated in the United Kingdom, more employees than are employed in any other establishment which is situated in a Relevant State, or (ii) in the case of a Community-scale group of undertakings, there are employed in a group undertaking, which is situated in the United Kingdom, more employees than are employed in any other group undertaking which is situated in a Relevant State.

easyJet argued that regulation 5(1) did not apply to it as it had a representative agent situated in Germany and Germany was a "Relevant State" as defined in Regulation 2(1) of amended TICER. Therefore Regulations 21 and 21A were not engaged.

The EWC argued that that the amendments to TICER did not have the effect that easyJet was contending. It pointed to various comments that had been made by BEIS, Parliament and the House of Lords Secondary Legislation Scrutiny Committee that show that the intention was that rights of existing EWCs (as opposed to the establishment of new EWCs) would continue post exit day. It also pointed to Regulation 18 (Subsidiary requirements) of amended TICER which stated that the provisions of the Schedule continue to apply on and after exit day in any case where they applied before exit day, as being the strongest and clearest statement of Parliament's intention that the subsidiary requirements continued to apply after exit day as it did before.

### CAC Decision

The CAC held that it does have jurisdiction to hear the complaint because the amended TICER provisions relied on by the EWC still apply to easyJet (and other like entities). The CAC accepted that Regulation 4(1) was poorly drafted and is capable of having the interpretation that easyJet contends. However, that matter was not "free from doubt" and the CAC noted that reading it that way would conflict with other provisions of amended TICER such as Regulation 18 (subsidiary requirements) which expressly state that the subsidiary requirements would continue to apply post exit day. The CAC agreed that Regulation 18 constitutes the strongest statement of Parliament's intentions with regard to the continued applicability of the subsidiary requirements. Having considered amended TICER as a whole, the CAC decided that regulation 4(1) does not apply to exclude situations where central management is situated in the UK without recourse to the provisions of Regulation 5. An opposing decision would also potentially result in there being no forum for EWCs to challenge employers' alleged breaches of TICER prior to exit day.

## Commentary

This is the first substantive decision of the effect of Brexit on UK EWCs. There have been a couple of cases before this decision (Verizon and Adecco) however those EWC agreements contained express provisions to deal with Brexit and the CAC decisions turned on interpreting that drafting. easyJet has appealed the CAC's decision so it will be interesting to see what the Employment Appeal Tribunal (EAT) decides.

## Mercer v Alternative Future Group, Employment Appeal Tribunal

### Legal Context

TULRCA provides protections for employees who are participating in industrial action or other trade union activities.

Section 238A provides that an employee will be automatically unfairly dismissed if the reason for dismissal is that they took part in protected industrial action.

Section 146 provides that an employer must not subject workers to a detriment where the sole or main purpose is to deter them from taking part in the activities of an independent trade union at an appropriate time. Section 152 provides that an employee will be automatically unfairly dismissed if they are dismissed for taking or proposing to take part in the activities of an independent trade union at an appropriate time.

The legislation therefore makes a distinction between 'industrial action' and 'activities of a trade union' where protection from detriment is only provided for the latter. Previous case law has held that participating in industrial action is not protected under sections 146 and 152.

Article 11 of the European Convention of Human Rights (ECHR) provides a qualified right to freedom of association and assembly that includes the right to participate in trade union activity. Restrictions on the exercise of Article 11 rights are permitted only where they are "prescribed by law" and "are necessary in a democratic society...for the protection of the rights and freedoms of others".

### Background

Mrs. Mercer was a workplace representative for Unison. In early 2019, Unison arranged a series of strikes to take place at her employer's. She was involved in planning and organising the strikes, took part in some media interviews covering the strikes, and indicated an intention to participate in the strikes. She was suspended and ultimately given a written warning for abandoning her shift to take part in the strikes. She brought a claim in the employment tribunal under section 146 arguing that participating in industrial action amounted to 'activities of a trade union'.

The tribunal held that, as a matter of ordinary language, participation in industrial action would constitute activities of a trade union. However, this is not how it had been interpreted by previous case law. The tribunal considered that Article 11 ECHR was infringed by the lack of protection for detriment from participating in industrial action. However, it considered that interpreting section 146 more broadly to encompass industrial action so as to make it compatible with Article 11 would "go against the grain" of the legislation and so it could not read section 146 down.

### EAT Decision

The EAT agreed with the tribunal that the lack of protection from detriment for participating in industrial action was a breach of Article 11 ECHR. The EAT considered however that it was possible to read down section 146 so as to make it compatible with Article 11 ECHR without going against the grain of TULRCA. It noted that "the very fact that dismissal for participation in industrial action is protected (albeit in limited circumstances) militates against any argument that it is a cardinal feature of TULRCA that protection against detriment for such participation should not be protected". It also noted that Parliament's express aim was that trade union law should comply with Article 11 ECHR.

The EAT decided to read down section 146 by adding a new definition of 'an appropriate time' in section 146(2) to include "(c) a time within working hours when he is taking part in industrial action".

## Commentary

The EAT's decision gives employees a right to be protected from detriment for participating in industrial action, which goes against previous decisions considering the same issue. Employers should think carefully and seek legal advice before taking action in response to industrial action that may amount to a detriment for an employee. The EAT did, however, helpfully confirm that withholding pay from employees taking industrial action is lawful and does not amount to a detriment.

## IWGB v CAC and Rooffoods Ltd t/a Deliveroo, Court of Appeal

### Legal Context

Schedule 1 to TULRCA provides a mechanism by which an independent trade union can apply to be compulsorily recognised by an employer under the statutory recognition procedure. An independent trade union can only make such an application in respect of a group or groups of "workers". A worker is defined as "an individual who works, or normally works or seeks to work: (a) under a contract of employment, or (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his".

### Background

The Independent Workers of Great Britain trade union (IWGB) applied to the Central Arbitration Committee (CAC) to be recognised by Deliveroo for collective bargaining in respect of riders in its Camden and Kentish Town food delivery zone, under the statutory procedure.

The CAC rejected the application on the basis that the riders did not satisfy the definition of workers in TULRCA noting that there was no mutuality of obligation between the parties and that the riders had an unfettered and genuine right to provide a substitute to make a delivery on their behalf.

IWGB unsuccessfully appealed to the High Court, which found that Article 11 was not engaged on the facts of the case. IWGB appealed to the Court of Appeal. The questions on appeal were: (1) Do the riders fall within the scope of protection afforded by Article 11 as it relates to the right to form and join trade unions? and (2) If so, does Article 11 give IWGB the right to seek compulsory recognition in respect of them?

### Court of Appeal Decision

The Court of Appeal dismissed IWGB's appeal. The court rejected IWGB's argument that Article 11 applies to "everyone" and not only those in an employment relationship. Existing case law requires there to be the existence of an employment relationship for Article 11 to be engaged. The question of whether an employment relationship exists should be considered by reference to the criteria identified in ILO R198. Paragraph 13 of ILO R198 refers to the fact that work "must be carried out personally by the worker" as an indicator of an employment relationship. The CAC was entitled to find on the facts that the riders were not in an employment relationship given the genuine right of the riders to provide a substitute rider and therefore Article 11 was not engaged.

## Commentary

This decision concerned a very narrow point of law - who has the right to form and join trade unions under Article 11 ECHR - rather than the employment status of the riders for employment law rights or taxation purposes. However, the decision is consistent with the Court of Appeal's decision in *Pimlico Plumbers* reiterating that an entirely unfettered right of substitution will point away from personal service and towards self-employment.

## Trending Topics

Recent months have seen the practice of dismissal and re-engagement, also known as "fire-and-rehire", in the spotlight. A number of trade unions have joined calls to end the practice and there are currently a number of private members bills seeking to make dismissal automatically unfair if the purpose of the dismissal is to re-employ on less favourable terms. Acas was commissioned by BEIS to gather evidence of how the practice has been used in the UK. This was a



purely fact find investigation and no recommendations for reform were put forward by Acas although their report summarises the various responses it received from the participating organisations. BEIS indicated in June that it was not proposing to devise "heavy-handed litigation" to ban its use although it emphasised that it shouldn't be used as a negotiation tactic and that "nothing was off the table" in terms of future developments. Acas has now been tasked with preparing clearer guidance on when it should be used and good practices for employers. Many employers have had to consider restructuring plans as a result of the pandemic. Given the increased scrutiny of using dismissal and re-engagement, employers should carefully consider the public relations and employee relations risks before adopting this practice.

## In other news...

### Prospect calls for legal "right to disconnect"

Following a poll earlier in the year regarding the mental health of those working from home during the pandemic, Prospect wants the government to give employees a legal "right to disconnect" in the upcoming Employment Bill. This would prohibit bosses from routinely contacting employees outside of set hours. However many have raised doubts over how Prospect's proposals would work practically. France has had a right to disconnect law for four years, where companies are asked to set agreed hours for "teleworkers". Since 1 April 2021, employees in Ireland have had the right not to respond to messages or phone calls during non-work hours. The Employment Bill is expected to be published later this year.

<https://www.reuters.com/article/global-tech-workers-idUSL8N2ML638>

<https://www.bbc.co.uk/news/uk-politics-57314814>

### Calls for mandatory ethnic pay gap reporting

The Confederation of British Industry, Trades Union Congress (TUC) and the Equality and Human Rights Commission have written to Michael Gove calling for mandatory ethnicity pay gap reporting. The joint letter calls on ministers to set a clear timetable for bringing the reporting into law, a move the signatories say would help draw attention to pay disparities and a lack of minority representation in senior positions, potentially leading to action from employers. The reporting would build on the existing gender pay gap reporting requirements.

[https://www.theguardian.com/business/2021/jun/25/cbi-tuc-and-ehrc-press-government-on-mandatory-ethnic-pay-gap-reporting?CMP=Share\\_AndroidApp\\_Other](https://www.theguardian.com/business/2021/jun/25/cbi-tuc-and-ehrc-press-government-on-mandatory-ethnic-pay-gap-reporting?CMP=Share_AndroidApp_Other)

<https://www.ft.com/content/ffd69da3-849e-445e-a76f-b8cb4212043a>

### Trade Unions sign open letter to Prime Minister following Commission for Racial Disparities

Prospect and TUC unions have signed an open letter to the Prime Minister following the report of the Commission for Racial Disparities (the "Report"). The unions felt that the Report understated the scale and the challenge of change required, and called on the government to reflect on the inadequacies of the Report.

<https://prospect.org.uk/news/trade-unions-write-to-prime-minister-following-commission-for-racial-disparities/>

### Trade unions call on investors to address executive pay

Trade unions and campaigners urged 60 of the biggest investors in UK companies to vote against those with particularly wide pay gaps between management and workers and emphasised the pay gap disclosures that became mandatory in annual reports in 2020. Support at AGMs for pay policies has also fallen this year, down to 91.4% on average across UK public companies, down from 94.8% last year.

<https://www.ft.com/content/ffd3bb5-12fd-4f1c-a9a4-8c5c9dee4de9>

### Trade union membership rose by 118,000 in 2020, but falls in private sector

Trade union membership rose by 118,000 to 6.6 million in 2020, according to new estimates from the Department for Business, Energy & Industrial Strategy (BEIS), making the rise in union membership since 2015 the largest sustained increase since the 1970s. The rise was the result of increasing unionisation of public sector workers, up by 228,000 to 4 million compared to a fall of 110,000 to 2.5 million among private sector workers. GMB has said that the rise in union membership during the pandemic shows that modern, campaigning unions are more relevant than ever, however trade

union coverage of the private sector stands at its lowest level since the aftermath of the financial crisis at the end of the 2000s. However just 13% of private sectors are unionised.

<https://www.gmb.org.uk/news/union-membership-rockets-120k-pandemic-worker-organisation-more-relevant-ever>

<https://www.theguardian.com/politics/2021/may/27/membership-of-uk-trade-unions-rises-for-fourth-year-in-a-row>

## **UTAW union campaigns to protect worker privacy**

The United Tech and Allied Workers (UTAW) union is campaigning to protect workers' privacy and raise awareness about workplace monitoring practices. The campaign is not against workplace monitoring, acknowledging that there are positive instances of surveillance, however UTAW raises concerns about technology "being deployed or used in a way that takes away from the worker in some way." The union's desired outcomes focus on raising awareness and improving enforcement of the UK's data protection laws.

<https://www.computerweekly.com/news/252502551/Tech-sector-trade-union-campaigns-to-protect-workers-privacy>

# CAC cases at a glance

## Trade Union Recognition Decisions

### GMB

| Parties                              | Application             | Date          | Status                               |
|--------------------------------------|-------------------------|---------------|--------------------------------------|
| GMB & The Devonshire Group           | Trade Union Recognition | 20 April 2021 | Application accepted                 |
| GMB & Grissan Carrick Limited (2)    | Trade Union Recognition | 10 May 2021   | Application accepted                 |
| GMB, Unite the Union & Mears Limited | Trade Union Recognition | 15 June 2021  | Application in progress              |
| GMB & Eddie Stobart                  | Trade Union Recognition | 18 June 2021  | Application in progress              |
| GMB & Springvale EPS Ltd             | Trade Union Recognition | 23 June 2021  | Application in progress              |
| GMB & Fablink Tank Systems Limited   | Trade Union Recognition | 25 June 2021  | Validity decision in favour of union |
| GMB & Response Engineering Solutions | Trade Union Recognition | 29 June 2021  | Application accepted                 |
| GMB & Response Engineering Solutions | Trade Union Recognition | 29 June 2021  | Application in progress              |

### PCS

| Parties                          | Application             | Date          | Status                  |
|----------------------------------|-------------------------|---------------|-------------------------|
| PCS & Axis Security Services Ltd | Trade Union Recognition | 16 April 2021 | Application in progress |

### RMT

| Parties                             | Application             | Date          | Status              |
|-------------------------------------|-------------------------|---------------|---------------------|
| RMT & Briggs Marine Contractors Ltd | Trade Union Recognition | 22 March 2021 | Recognition granted |

### TSSA

| Parties  | Application             | Date        | Status                  |
|--|-------------------------|-------------|-------------------------|
| TSSA & First Greater Western Limited (operating as Great Western Railways) | Trade Union Recognition | 14 May 2021 | Application in progress |

### UCU

| Parties                 | Application             | Date         | Status               |
|-------------------------|-------------------------|--------------|----------------------|
| UCU and Study Group Ltd | Trade Union Recognition | 11 June 2021 | Application accepted |

### Unite the Union

| Parties                                 | Application             | Date        | Status                  |
|---|-------------------------|-------------|-------------------------|
| Unite the Union & 2 Agriculture Limited | Trade Union Recognition | 10 May 2021 | Application in progress |
| Unite the Union & East End Foods PLC    | Trade Union Recognition | 19 May 2021 | Application accepted    |



| Parties  | Application             | Date         | Status  |
|--|-------------------------|--------------|---|
| Unite the Union & Pioneer Foods (UK) Limited   | Trade Union Recognition | 25 May 2021  | Recognition granted                                   |
| Unite the Union & DHL Parcel UK Limited        | Trade Union Recognition | 26 May 2021  | Application accepted                                  |
| Unite the Union & Splunk Services (UK) Limited | Trade Union Recognition | 3 June 2021  | Following ballot, union not entitled to be recognised |
| Unite the Union & DHL Services Limited         | Trade Union Recognition | 18 June 2021 | Application in progress                               |

#### United Voices of the World

| Parties   | Application             | Date        | Status  |
|---|-------------------------|-------------|---|
| United Voices of the World & Service to the Aged (Sage) | Trade Union Recognition | 18 May 2021 | Following ballot, union not entitled to be recognised |

### Disclosure of Information Decisions

#### PDAU

| Parties                              | Application               | Date        | Status                  |
|--------------------------------------|---------------------------|-------------|-------------------------|
| PDAU & Boots Management Services Ltd | Disclosure of Information | 7 June 2021 | Application in progress |

#### UCU

| Parties  | Application               | Date          | Status                  |
|--|---------------------------|---------------|-------------------------|
| UCU (King's College London Branch) & King's College London | Disclosure of Information | 23 April 2021 | Application in progress |

#### Unite the Union

| Parties                         | Application               | Date          | Status                  |
|---------------------------------|---------------------------|---------------|-------------------------|
| Unite the Union & Serco Limited | Disclosure of Information | 30 April 2021 | Application in progress |

### European Works Council Decision

#### Adecco

| Parties                             | Application        | Date       | Status               |
|-------------------------------------|--------------------|------------|----------------------|
| Adecco Group EWC & Adecco Group (3) | Complaint from EWC | 5 May 2021 | Complaint not upheld |

#### easyJet

| Parties                   | Application                         | Date        | Status               |
|---------------------------|-------------------------------------|-------------|----------------------|
| easyJet EWC & easyJet PLC | Preliminary hearing on jurisdiction | 1 June 2021 | CAC has jurisdiction |

| Parties                            | Application        | Date         | Status               |
|------------------------------------|--------------------|--------------|----------------------|
| HSBC EWC & HSBC Continental Europe | Complaint from EWC | 23 June 2021 | Complaint not upheld |

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