



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 includes two decisions of the Court of Appeal: (i) on whether the Central Arbitration Committee (CAC) has jurisdiction to hear complaints post Brexit where the European Works Council's (EWC) central management is situated in the UK, and (ii) on whether collective redundancies need a common rationale to constitute a transnational matter requiring consultation with the EWC. This bulletin also covers the successful judicial review challenge against regulations introduced in July 2022 to allow employment businesses to supply workers to cover the duties of those taking part in industrial action, and the Strikes (Minimum Service Levels) Act, which has recently received Royal Assent following much discussion and commentary. We hope you find the bulletin useful.

In the courts...

easyJet Plc v easyJet EWC and others, Court of Appeal

Legal Context

Under Regulations 21 and 21A of the amended Transnational Information and Consultation of Employees Regulations 1999 (TICER), the EWC can bring disputes about the operation of the EWC or information and consultation procedure to the CAC.

Background

In our previous [updates](#), we reported on easyJet EWC's successful application to the CAC that it had jurisdiction to hear the EWC's complaint against easyJet. The case concerns the proper interpretation of Regulations 4 and 5 of TICER as amended following Brexit. easyJet was unsuccessful in its appeal to the Employment Appeal Tribunal (EAT) and appealed to the Court of Appeal.

Court of Appeal Decision

The Court accepted that the relevant provisions were unclear in themselves but agreed with the EAT that the EWC's interpretation was correct considering the Regulations as a whole. easyJet also raised the burden of having to operate two EWCs – the existing UK one and a German EWC which it had established to take effect following the end of the Brexit transition period. While the court accepted that operating two EWCs could result in practical difficulties, it considered that these were "far from insuperable" and "must be set against the protection of employees in the UK via the existing EWC".

Commentary

It remains to be seen whether easyJet will appeal to the Supreme Court. However, the current position is that an EWC that operated before the end of the Brexit transition period and established under the subsidiary requirements will continue to be able to bring claims under TICER in the CAC.

Olsten (UK) Holdings Limited v Adecco Group European Works Council, Court of Appeal

Legal Context

This decision considers the scope of the duty to inform and consult the EWC where collective redundancies are proposed in more than one EEA state.

Background

In our previous [update](#), we reported on the EAT's decision fining Adecco GBP 20,000 for failing to consult its EWC over redundancies in multiple jurisdictions in 2020. Adecco's case was that the redundancy exercises had different rationales and so they were not required to call an extraordinary general meeting under their EWC agreement. For example, an exercise in Sweden was triggered by recession, loss of sales and poor financial results, and an exercise in Germany related to ongoing workforce changes due to changes in legislation discouraging the hiring of temporary workers. The EAT did not accept this argument and said that redundancies proposed separately in more than one EEA state at the same or about the same time constitutes a transnational matter, even if they did not share a common rationale. Adecco appealed to the Court of Appeal.

Court of Appeal Decision

The court overturned the EAT's decision. The court said that a "transnational matter" under the Adecco EWC Agreement had the same meaning as under the EWC Directive and TICER, and applies where the matter "concerns or has potential effects" on at least two undertakings in each of two different countries. The Court noted that "concerns" is a broad linking verb meaning relates to or affects, meaning there must be some kind of nexus, relationship or link between two matters, or in the way that a single matter affects undertakings in each of two states.

The court went on to say that in light of this, "independent, unrelated employment events in two or more countries, such as those hypothesised by the EAT (redundancies in response to a fire in Bulgaria and an earthquake in Portugal that struck at around the same time but have no "real nexus" as the EAT put it), will not constitute a transnational matter requiring an Extraordinary Meeting to be convened". And "it follows that a mere coincidence of timing of proposals for collective redundancies or business restructuring happening in undertakings in two countries is not enough to trigger an Extraordinary Meeting and it is not irrelevant that such "exceptional circumstances" are unrelated or have no common rationale or nexus at all."

Commentary

This is a welcome decision for employers. The EAT's decision had led to concerns that EWCs could argue that small, unrelated and single country divestitures, redundancies and outsourcings etc. might trigger the requirement for consultation. The Court of Appeal's decision appears to restore the orthodox view and reduce that risk.

R (on the application of ASLEF and Ors) v the Secretary of State for Business and Trade, High Court

Legal Context

Until July 2022, employment businesses committed a criminal offence under the Employment Agencies Act 1973 and secondary legislation if they supplied agency workers to replace workers taking part in an official strike (or to cover the duties of a worker who had themselves been reassigned to perform the duties of an officially striking worker). In 2015, the then government consulted on trade union reforms, which included a proposal to revoke this law. A majority of the responses to the consultation were against the proposal. However, the consultation was declared unfit for purpose, no formal response was published, and the revocation was dropped. In June 2022, with a backdrop of widespread strikes in rail and other sectors, the government announced that it would be relying on the 2015 consultation to change the law.

On 21 July 2022, the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 came into force. The Regulations allowed employment agencies to supply staff to cover striking workers provided the temporary workers had the required skills to carry out the necessary duties.

Judicial review challenge

13 trade unions brought claims for judicial review of the Regulations. They claimed that the government had failed to comply with the requirements for consultation under the Employment Agencies Act, and that the removal of the ban on using agency workers was unlawful interference with the rights of trade unions and their members under Article 11 of the European Convention on Human Rights (ECHR). The Secretary of State for Business and Trade argued that the 2015 consultation had met his duty to consult, and in the alternative that relief should be refused since it was highly likely the outcome would not have been substantially different if he had consulted further; he also denied that there was any interference with ECHR rights and any such interference would be proportionate.

The High Court found that the Regulations were unfair, unlawful and irrational and should therefore be quashed. The purpose of the consultation duty required the Secretary of State to take into account the views and evidence of those who are likely to be well informed, and reassuring Parliament that the measure has been tested with interested parties. The Secretary of State had not consulted before the Regulations were introduced, nor even tested the decision against the views of unions and others expressed in 2015. The judge noted that the decision to revoke the then law proceeded "at exceptional speed, despite [concerns] about Parliamentary scrutiny, and without any further consultation at all". There was no evidence that a shortened consultation or one with a more limited group of consultees was considered. There was also no impact assessment at the time of the decision. It was not likely that a rational and open-minded Secretary of State, conscientiously considering the responses to a consultation held in 2022, would have come to the same decision.

Having found for the claimants on the above, the High Court did not express a view on the argument that the Regulations were a breach of Article 11 ECHR.

Since the Regulations have been quashed, previous law will apply once more. This means that until any further legislation is passed, from 10 August 2023, it will once again be a criminal offence to supply agency workers to cover the duties of workers on strike. If the government wishes to pursue the proposal again, it will need to hold a public consultation and consider the responses when deciding whether to implement it.

Commentary

Employers who sought to make use of the ability to engage agency workers to cover industrial action under the Regulations will need to ensure that this practice ceases before 10 August 2023. However, the practical impact is likely to be fairly limited as our experience showed that many employers (and employment businesses) had not been in favour of taking this approach.

New Legislation

Strikes (Minimum Service Levels) Act receives Royal Assent

As previously reported, the Strikes (Minimum Service Levels) Bill was introduced in January 2023, which would allow the government to set minimum levels of service in certain relevant sectors. After much to-ing and fro-ing between the Houses in Parliament, the Bill received Royal Assent on 20 July 2023. The government will implement the minimum service levels for passenger rail services, ambulance services and fire and rescue services, following public consultation. One of the main criticisms of the Bill was the potential for a trade union to lose its protection from a damages claim if the employer's work notice requirement is not complied with and the uncertainty around the trade union's obligations in this regard. The government has announced that it will launch a consultation this summer on the reasonable steps that unions must take to comply with a work notice. Both unions and employers will welcome clarification on both the minimum service levels and the steps for compliance that unions must take. In the meantime however, employers in the impacted sectors should revisit their industrial relations strategy and consider the practical implications that the Act may have for them.

Trending Topics

Growth in non-traditional trade union membership

In recent months, we have seen increasing interest in union membership amongst workforces that have traditionally had lower trade union uptake, for example, in the tech industry. We have also seen newer, less traditional trade unions use restructuring exercises in the current economic climate to generate membership and support for a recognition campaign.

Difficult pay negotiations

It will not come as a surprise that some of our clients are experiencing more protracted pay negotiations in light of current cost pressures. In organisations that have a recognised trade union, some are considering taking the option of implementing a pay award without union agreement as a way of resolving the impasse, with the risk of being subject to a costly section 145B TULCRA unlawful inducement claim. We are also seeing unions encourage employees to bring internal grievances and complaints, and using any fall out as a potential lever to garner support for a statutory recognition request.

In other news...

TUC warns government not to backtrack on promise to strengthen sexual harassment laws

The Trades Union Congress (TUC) has recently told the government it would be 'shameful' if it allowed a bill strengthening sexual harassment laws to fall. The government previously promised to support The Worker Protection Bill, which imposes a new preventative duty to tackle abuse and harassment in the workplace. But reports in the Financial Times suggest ministers will allow the Bill to fall. TUC General Secretary Paul Nowak said: "Rishi Sunak must not abandon vulnerable staff. These protections are essential."

Government must not backtrack on promised new sexual harassment laws, warns TUC – TUC

Trade union membership reaches record lows, says DBT

The Department for Business and Trade has reported that trade union membership is at its lowest level since 2017. Membership declined to 22.3% in 2022, this being the second year in a row where there has been a decline in membership rates. The decrease was driven primarily by a decline in female union members in the private sector. Union membership rates are also at historic lows for young people, with only 4% of employees aged 16 to 24 in a union last year.

Trade union membership at its lowest level since 2017 – Practical Law

Young people shun trade unions as the gig economy takes hold – The Times

TUC survey finds more than half of families struggle financially when fathers take paternity leave

A poll from TUC has found that more than half (53%) of families struggle financially when fathers and partners take paternity leave. The poll also found that low-income households and self-employed workers were the most likely to miss out on paternity leave, while 1 in 5 fathers or partners who do take time off end up working during leave. TUC has called on ministers to increase statutory paternity pay and overhaul the parental leave system, saying: "Ministers should give all dads better-paid paternity leave – and create a new right to well-paid parental leave just for dads, that doesn't rely on mums giving up some of their maternity leave."

1 in 2 families struggle financially when dads take paternity leave – TUC poll

Union delegates pass motion for miscarriage to be covered by statutory parental bereavement leave

On 5 June 2023, the GMB congress passed a motion calling for the law to be changed so that miscarriage and termination for medical reasons before the 24th week of pregnancy are covered by statutory parental bereavement leave. The motion also recommended that workplaces adopt a pregnancy loss policy and make workplace adjustments where necessary. Currently, eligible employees have a right to two weeks' paid parental bereavement leave if they lose a child under 18 years old or have a stillbirth from the 24th week of pregnancy.

GMB congress passes motion for miscarriage to be included in parental bereavement leave – Practical Law

More than half of people support AI regulation to protect jobs, survey finds

A survey from tech trade union Prospect has shown that 58% of workers think the government should regulate the use of generative AI in the workplace to safeguard jobs. The survey also found a high level of discomfort with workplace monitoring: 71% of respondents felt uncomfortable with the use of wearable tracking devices to monitor their location while 69% felt uncomfortable with the use of cameras to monitor hybrid and remote workers in their homes.

Survey reveals support for AI regulation to safeguard jobs – Practical Law

Union leaders warn government over suppressing wages

Unions have issued a warning to the government following concern that they will use high inflation figures to justify lower pay offers. The government is expected to publish wage increases for teachers and nurses, but ministers have insisted offering higher salaries to the public sector will fuel inflation. Mary Bousted, general secretary of the National Education Union, said: "The government does want to think carefully about this, if they want to avoid enraging an already incredibly disaffected profession further." Pat Cullen, Royal College of Nurses General Secretary and Chief Executive, said: "Unions

will not stand for the Chancellor's attempts to suppress wages because the government is failing to get a grip on inflation."

Nurses and teachers fearing new pay squeeze due to high UK inflation rate – The i

TUC call on government to go further on flexible working rights

The TUC and other campaigners have called on the government to deliver its manifesto commitments to "unlock" flexible working. The statement follows the Employment Relations (Flexible Working) Bill, which received Royal Assent on 20 July 2023 and which strengthens employee rights to request flexible working. But unions, rights groups and women's organisations have argued that a right to request is not a legal right to flexible working from day one in the job and many flexible working requests will be rejected by employers.

Unions and campaigners say government "must go further" on flexible working rights - TUC

UNISON renews commitment to campaign for fully-funded childcare following report

UNISON has renewed its commitment to campaign for fully-funded childcare following the publication of the 2023 Working Families Index, which found that 60% parents reported it is "financially harder to raise a family". Josie Irwin, UNISON national officer, said: "Childcare costs on top of rising household bills are putting working parents, but particularly women, in a very difficult position."

The increasing pressures of raising a family - Unison

CAC cases at a glance

Trade Union Recognition Decisions

ASLEF

Parties	Application	Date	Status
ASLEF & East Coast Trains Limited trading as Lumo	Trade Union Recognition	6 July 2023	Application accepted

CWU

Parties	Application	Date	Status
CWU & Cuckoo Internet Ltd (1)	Trade Union Recognition	24 May 2023	Application withdrawn
CWU & Maintel Europe Ltd	Trade Union Recognition	19 June 2023	Application accepted
CWU & Boots Hearing Care	Trade Union Recognition	21 June 2023	Application accepted
CWU & FedEx UK	Trade Union Recognition	23 June 2023	Application in progress
CWU & Saab UK Ltd	Trade Union Recognition	10 July 2023	Application accepted

GMB

Parties	Application	Date	Status
GMB & Macdonald and Muir Limited (1)	Trade Union Recognition	11 May 2023	Application not accepted
GMB & Macdonald and Muir Limited (2)	Trade Union Recognition	11 May 2023	Application not accepted
GMB & Amazon UK Services Ltd (2)	Trade Union Recognition	12 May 2023	Application withdrawn
GMB & City Facilities Management (Distribution) Ltd	Trade Union Recognition	18 May 2023	Application not accepted
GMB & Don-Bur (Bodies & Trailers) Ltd	Trade Union Recognition	23 May 2023	Application accepted
GMB & BOOTS Management Services Limited	Trade Union Recognition	26 May 2023	Application withdrawn
GMB & CVH Spirits Limited	Trade Union Recognition	26 May 2023	Application not accepted
GMB & DHL Services Ltd (DHL ACCORD)-DHL Supply Chain	Trade Union Recognition	1 June 2023	Application in progress
GMB & Apcoa Parking (UK) Ltd	Trade Union Recognition	2 June 2023	Method of collective bargaining agreed
GMB & Matalan	Trade Union Recognition	2 June 2023	Application not accepted
GMB & Spectrum Service Solutions Limited	Trade Union Recognition	29 June 2023	Application not accepted
GMB & Cepac Rotherham, Cepac Limited	Trade Union Recognition	30 June 2023	Application accepted
GMB & CTD Tiles Limited	Trade Union Recognition	13 July 2023	Application not accepted

NEU & NASUWT

Parties	Application	Date	Status
NEU, NASUWT & Roedean School	Trade Union Recognition	29 June 2023	Application accepted

Parties	Application	Date	Status
NASUWT, NEU & Radley College (2)	Trade Union Recognition	6 July 2023	Form of ballot decision issued

NUJ

Parties	Application	Date	Status
NUJ & Business Insider Europe Limited	Trade Union Recognition	6 July 2023	Application accepted

PCS

Parties	Application	Date	Status
PCS & Mitie Limited	Trade Union Recognition	13 July 2023	Application accepted

Prospect

Parties	Application	Date	Status
Prospect & Coventry and Solihull Waste Disposal Company	Trade Union Recognition	28 June 2023	Application in progress

RMT

Parties	Application	Date	Status
RMT & Unipart Rail Limited	Trade Union Recognition	6 July 2023	Application accepted

TSSA

Parties	Application	Date	Status
TSSA & Avanti West Coast	Trade Union Recognition	21 June 2023	Application in progress
TSSA & Southeastern Railway (2)	Trade Union Recognition	20 July 2023	Application accepted

Unite the Union

Parties	Application	Date	Status
Unite the Union & Mitie Limited (2)	Trade Union Recognition	5 April 2023	Application withdrawn
Unite the Union & Moog Controls Limited	Trade Union Recognition	7 June 2023	Form of ballot decision issued
Unite the Union & MM Newport LTD	Trade Union Recognition	7 June 2023	Application accepted
Unite the Union & Inflite Engineering Services Limited (2)	Trade Union Recognition	12 June 2023	Form of ballot decision issued
Unite the Union & Bairds Malt (1)	Trade Union Recognition	19 June 2023	Application not accepted
Unite the Union & Bairds Malt (2)	Trade Union Recognition	30 June 2023	Application in progress
Unite the Union & Spirax Sarco Limited	Trade Union Recognition	20 June 2023	Application in progress
Unite the Union & WFL (UK) LIMITED (2)	Trade Union Recognition	22 June 2023	Application accepted
Unite the Union & Leonardo UK Limited	Trade Union Recognition	29 June 2023	Application accepted

United Road Transport Union (URTU)

Parties	Application	Date	Status
URTU & Advanced Supply Chain Group	Trade Union Recognition	31 May 2023	Method of collective bargaining agreed

United Voice of the World

Parties	Application	Date	Status
UVW & Lee Baron Limited	Trade Union Recognition	12 July 2023	Application accepted

Disclosure of Information

None.

Contacts

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