



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 October 2022 to March 2023 and includes a decision of the Central Arbitration Committee (CAC) on the limitation period for bringing a Regulation 20 claim under the Transnational Information and Consultation of Employees Regulations 1999 (TICER) and two interesting Employment Appeal Tribunal (EAT) decisions considering: (i) whether the CAC has jurisdiction to hear complaints post Brexit where central management is situated in the UK, and (ii) whether the duty to inform and consult arises where collective redundancies are happening in multiple European Economic Area (EEA) states but there is no common rationale for the redundancies. We hope you find the bulletin useful.

In the courts...

Olsten (UK) Holdings Ltd -v- Adecco Group European Works Council Appeal and Cross Appeal, EAT

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 2020, Adecco was challenged by its EWC over a number of separate redundancy exercises that were implemented in different jurisdictions. Adecco's case was that the redundancy exercises were unconnected, and all had different rationales. For example, an exercise in Netherlands was triggered by a change in Dutch law that encouraged direct hiring over agency work, and an exercise in Hungary related to loss of a major client.

The CAC held that Adecco should have convened an extraordinary meeting of the EWC. Adecco appealed and the EAT has now decided against Adecco on this point.

EAT Decision

The EAT held 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 and were not part of an overarching programme.

The EAT gave a number of reasons for its conclusion including the following points:

- Countries may be closely integrated, and redundancies decided upon in one EEA state are inherently likely to have indirect or knock-on effects on employees elsewhere "*without the need to search on each occasion for a direct link, common cause or decision; particularly because there is generally free movement of workers between those states.*"
- Under the Adecco agreement, collective redundancies were included within the definition of a transnational issue if they significantly affect Adecco employees in "*each of at least two EEA countries*". The EAT said that indicates that the effect in each of the two countries "*need not be the same effect and that there could be differing effects in one country and another, such as indirect or knock-on effects destabilising the workforce across countries, even though decisions may be made in two or more countries without any common cause or any common intended effect*".
- It would be difficult to secure EWC rights if they could be defeated by requiring local management to take sole responsibility for redundancies. The EAT said that it is inherent in a group structure that the central management has at least oversight of individual countries and the ability to impose its will and that local management can be influenced by the policies of central management without the need for a direct diktat from the centre.
- The EAT gave the example of a factory fire in Bulgaria leading to redundancies in Bulgaria occurring in the same week as an earthquake in Portugal leading to redundancies in Portugal. Adecco argued that it would be very burdensome to have to call an EWC meeting in this situation, but the EAT disagreed and said that in such a case the employer could call a short virtual meeting, optimistically noting that "*everyone would recognise that the two separate events were not linked, that knock-on effects in other countries were unlikely and that they could be followed up at national level.*"

Adecco was fined GBP 20,000 for this failure which the EAT considered to be a medium gravity breach - "*far from trivial but not of the utmost seriousness*". The maximum UK penalty is GBP 100,000. In calculating this amount, it considered that this was a first time breach for Adecco and that it was genuinely mistaken about the meaning of "transnational".

Commentary

Although interpretation will depend on the precise terms of the specific EWC agreement, multi-national employers considering collective redundancies in EEA states should take note

of this decision and review their internal processes to ensure that there is oversight of activity in individual jurisdictions to avoid inadvertently failing to consult the EWC.

The penalty decision is also interesting as this is the second time that the EAT has imposed penalties for such breach.

However, we understand that the case is due to be heard by the Court of Appeal on 13 June 2023 therefore this may not be the last word on the matter.

Mr I Firea and 2 Sisters Food Group, CAC

Legal context

TICER was amended by the Employment Rights (Amended) (EU Exit) Regulations 2019 in preparation for the UK leaving the EU. Regulation 20 of amended TICER broadly provides that a complaint can be made to the CAC by a relevant applicant who considers that there has been a failure to establish a European Works Council (EWC) or information and consultation procedure.

Background

In July 2015, a trade union representative submitted a request to establish a special negotiating body (SNB) to 2 Sisters Food's management. In March 2017, a Regulation 20 TICER complaint was made to the CAC that regulation 18 of TICER applied because central management had refused to commence negotiations within the six month time limit and no EWC had been set up because of the failure of central management. Following 2 Sisters Food's commitment to set up an EWC, the complaint was withdrawn. For various reasons, nothing was set up, and in 2022, Unite wrote to 2 Sisters Food requesting that the EWC be set up. 2 Sisters Food responded that as the UK had left the EU, it was not legally possible to set up an EWC although it was open to alternative discussions. In October 2022, a Regulation 20 complaint under amended TICER was made to the CAC.

2 Sisters Food claimed, among other things, that a limitation of claims period should be read into Regulation 20, which is silent on the point.

CAC Decision

The CAC noted that 2 Sisters Food did not provide any case law in support of its argument that a time limit should be implied into Regulation 20. It also did not consider that it was necessary or appropriate that it should do so.

Commentary

Employers, particularly those that have received a request to set up an EWC pre-Brexit should therefore take note that a Regulation 20 complaint can still be made against them regardless of the time that has passed since the original request was made.

easyJet Plc v easyJet EWC and others, EAT

Legal context

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

In our previous [update](#), 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 appealed to the EAT, which has now upheld the CAC's decision.

EAT Decision

The EAT agreed that the EWC's interpretation was correct considering the natural and ordinary meaning of the relevant provisions, as well as Parliament's intent.

Commentary

Permission to appeal the EAT's decision was granted on 6 March 2023 so it will be interesting to see how this case develops.

USDAW and Others v Tesco Stores Ltd, Supreme Court

This is a long running case relating to a dismissal and re-engagement exercise undertaken by Tesco as part of an exercise of changing terms and conditions which included removing an element of contractual pay. As reported in our previous [updates](#), this was challenged by USDAW, and initially the High Court granted an injunction to prevent Tesco from carrying out the dismissals.

The injunction was overturned by the Court of Appeal. The Supreme Court has now granted permission to appeal the Court of Appeal's decision.

Mercer v Alternative Future Group, Court of Appeal

In our previous [update](#), we reported on the Court of Appeal's decision that the protections in the Trade Unions and Labour Relations (Consolidation) Act (TULRCA), as currently drafted, do not extend to preventing employers from taking action short of dismissal in response to striking employees.

The Supreme Court has now granted permission to appeal the Court of Appeal's decision and the case is due to be heard in December 2023.

Trending Topics

BEIS introduces Strikes (Minimum Service Levels) Bill

The Department for Business, Energy & Industrial Strategy (BEIS) introduced the Strikes (Minimum Service Levels) Bill in January 2023. If passed, the Bill will allow the government to set minimum levels of service in certain relevant sectors including blue light services, transport, education and border security, which must be met during industrial action. The minimum service levels will be implemented through a process of the employer giving the union a work notice identifying the people who are required to work during the industrial action. Failure to comply with the work notice requirements could result in the union losing protection from a damages claim and employees losing automatic unfair dismissal protection.

While the principle of minimum service levels for periods of strike action is not a new one - it is something that currently exists in some form in other jurisdictions in Europe and is recognised by the ILO as a potentially legitimate restriction on the right to strike in certain circumstances - its potential introduction in the UK represents a significant shift in industrial relations law in the UK.

Unlike the earlier Transport Strikes Bill, the current Bill does not provide for any negotiation and agreement with unions on what minimum levels may look like. This therefore gives rise to the key question as to what the minimum service levels look like and to which specific organisations and services they will actually apply.

It is clear that the unions will continue to challenge the Bill. However, if implemented, the new rules are likely to have significant practical implications for both unions and employers caught by the legislation and impact on their approach to industrial action. In particular, it is likely that unions will look at other forms of industrial action, such as work to rule and overtime bans, as an alternative means of progressing their IR strategy, and impacted employers will therefore have to turn their minds to how they deal with different IR strategies. It is also possible that the introduction of minimum service levels could in fact serve to prolong periods of strike action as the strikes themselves have less of an operational impact on employers.

Significant strengthening of the rights of European Works Councils on the horizon?

Under the EWC EU Directive, certain multi-national organizations are required to establish a EWC or a procedure for informing and consulting employees about transnational workforce related issues where this is requested by a qualifying group of employees. The obligation applies to undertakings (or a group of undertakings) with at least 1000 employees within the EU and the other countries of the European Economic Area (Norway, Iceland and Liechtenstein) and at least 150 employees in each of at least two member states.

The European Parliament considers that EWCs still face significant challenges in enforcing their rights on timely and effective consultation which means that they often have little practical influence over an employer's decision making process, particularly in cases of restructuring. The Parliament is now calling on the European Commission to propose

legislation that will implement an 'ambitious revision' of the EWC Directive "*that reinforces worker's rights to information, consultation and participation*".

Broadly, proposed measures include:

- broadening the scope of matters that fall to be considered by the EWC;
- requiring that employee representatives are given 'prior' opportunity to express a view on a proposed measure that must (rather than 'may') be taken into account in related decision making;
- revising confidentiality provisions with a greater focus on justifying the reason for confidentiality; and
- increasing financial penalties to GDPR-level fines for non-compliance and a risk of injunctions for failure to inform and consult.

As the effective 'gatekeeper' of most EU legislation, the European Commission must agree to the European Parliament's request to initiate legislation effecting the proposed changes to the EWC Directive. The usual legislative process would then start, involving the participation of and negotiation between the European Parliament and the Council of the EU.

Although the implementation of a new EWC Directive is still some way off, if the recommendations of the European Parliament are adopted, it will lead to a significant strengthening of the influence and enforcement rights of EWCs. Given the potential effect of these proposals, it is worth paying close attention to their progress through the legislative process.

In other news...

TUC analysis finds women seven times more likely than men to be out of work because of caring responsibilities

Analysis from the Trades Union Congress (TUC) has found that women are seven times more likely than men to be kept out of the labour market due to caring responsibilities. Women in their 30s are most affected, with one in 10 women in this age group leaving the jobs market because of the pressures of looking after their family. As well as children, the analysis found that women shoulder most of the care for elderly and disabled relatives. The TUC has called on the government to take action to keep women in work, make sure they are paid fairly and address the gender pay gap.

Women 7 times more likely than men to be out of work due to caring commitments - TUC

TUC vows to fight government over workers' rights

Frances O'Grady, the head of the Trades Union Congress (TUC) has stated the unions are ready to fight the government on attempts to strip workers' rights. Following government plans to change the rules on strike action, speaking at a TUC conference, O'Grady confirmed that TUC has taken legal counsel over whether such plans breached the law, warning ministers "*Read my lips: We will see you in court*". Ms. O'Grady also warned that Business Secretary Jacob Rees-Mogg wants workers' rights derived from EU laws, such as "*holiday pay, time off for mums and dads and limits on safe working hours*" to be "*stripped from the statute book*".

Unions will fight government over workers' rights, vows TUC - BBC News

TUC publishes press release on mass exodus of key workers

According to a TUC poll conducted by YouGov, around one third of key workers in the public sector have taken steps to leave their current profession to get a job in a different field, or are actively considering doing so. This statistic followed a warning to ministers that public services are facing a “*mass exodus*” of key workers unless they deliver “*decent pay rises*”. The TUC has added that ministers need to prioritise pay rises in line with the cost of living for key workers in the public sector, and invest in public services by reversing the impact of rising inflations.

Other key statistics from the TUC’s press release include: 47% of key workers have highlighted feeling undervalued as a major factor behind the “*mass exodus*”, while 33% highlighted the poor work life balance and 31% highlighted the excessive workloads. Latest NHS data also shows that the NHS is operating short of almost 130,000 staff due to unfilled vacancies (a vacancy rate of 9.7%.)

Around 1 in 3 key workers in the public sector have taken steps to leave their profession or are actively considering it - TUC

Calls for mandatory disability pay gap reporting

The TUC has written to the government calling for urgent action to introduce legislation for mandatory disability pay gaps and place an associated duty on employers to produce action plans identifying steps they will take to address such gaps. France O’Grady, TUC’s General Secretary added that “*Ministers must change the law so that all jobs are advertised with flexible options clearly stated, and all workers have the legal right to work flexibly from their first day in a job.*” The letter also calls for increased funding to be given to the Equality and Human Rights Commission (EHRC) to enforce disabled workers’ rights to reasonable adjustments, and for changes to be made to the EHRC’s statutory code of practice so that it includes more examples of adjustments. This comes after TUC analysis found that the disability pay gap has increased to 17.2% (from 16.5% in 2021).

Non-disabled workers paid 17% more than disabled peers – TUC (7 November 2022).

Calls for clarity on the future of EU-derived employment rights

Christina McAnea, the General Secretary of Unison, has written to the Prime Minister to voice concerns about the Retained EU Law (Revocation and Reform) Bill, which contains default “*sunset*” provisions that will repeal all EU-derived secondary legislation at the end of 2023 unless the government specifically legislates to preserve them.

Unison is calling for the government to remove all employment legislation from the Bill and extend the “*sunset*” date to the end of 2033 to facilitate time for the government to carry out a proper review. The letter from the General Secretary of Unison follows oral evidence given by Unison’s Head of Legal Services, Shantha David, to the Bill’s Parliamentary Committee, which called for a comprehensive list of the legislation affected by the Bill to be produced and greater clarity on the status of the EU-derived legislation which has been amended to include domestic law provisions.

Letter-to-Prime-Minister-REUL2.pdf (unison.org.uk)

Retained EU Law (Revocation and Reform) Bill (Second s - Hansard - UK Parliament)

Union tells ministers to stop ‘hiding behind’ pay review bodies in strike talks

Frances O’Grady, general secretary of the TUC, and Christina McAnea, general secretary of Unison, accused the government of refusing to negotiate in good faith stating “*now is not the time for smoke and mirrors. Now is the time for genuine negotiations*”. This comes following their letter to Jeremy Hunt, the Chancellor of the Exchequer, which demanded “*genuine negotiations*” and accused the government of “*repeatedly refusing to talk about public sector pay*” adding “*ignoring the main issue on the table isn’t a negotiation*”. The Prime Minister has said he would “*do whatever I need to do*” to protect people’s safety and minimise disruption. He insisted the government was showing “*reasonableness*” with its pay offers.

Unions tell ministers to stop ‘hiding behind’ pay review bodies in strike talks | Industrial action | The Guardian

Two thirds of long Covid sufferers report unfair treatment at work

A survey from the TUC and Long Covid Support Employment Group found that 2 in 3 people with long Covid reported unfair treatment at work, up from 52% in 2021. The survey of 3000 people, published around the third anniversary of lockdown, found that 1 in 7 people lost their jobs because of the condition and half say they were not given any or all of the reasonable adjustments required to manage their job. The TUC and Long Covid Support Employment Group have called on ministers to take action and ensure that those with long Covid are protected by law.

New report: 2 in 3 people with Long Covid say they are treated unfairly at work - TUC

TUC criticises government over Migration Bill

The TUC has criticised the government's Illegal Migration Bill, claiming that it is “*a gift to dodgy employers*” looking to exploit migrant workers in the underground economy. The Bill, introduced in the House of Commons on 7 March 2023, will mean that those who arrive in the UK illegally will not be able to stay and will instead be detained and then promptly removed, either to their home country or a safe third country. But the TUC claims the Bill will leave nearly 200,000 asylum seekers in limbo indefinitely by trapping them in temporary accommodation, while they are not allowed to have their asylum claims heard and the vast majority are unable to officially work. This will leave them open to exploitation from unscrupulous employers, the TUC argued.

Migration Bill is “a gift” to dodgy employers looking to exploit migrant workers in underground economy - TUC

CAC cases at a glance

Trade Union Recognition Decisions

BFAWU

Parties	Application	Date	Status
BFAWU & YES. Rose Group	Trade Union Recognition	31 March 2023	Application in progress

CWU

Parties	Application	Date	Status
CWU & Wincanton for Screwfix	Trade Union Recognition	16 March 2023	Application in progress

GMB

Parties	Application	Date	Status
GMB & The Noble Collection UK Limited	Bargaining Unit Decision	15 March 2023	No recognition following ballot
GMB & Klockner Pentaplast	Trade Union Recognition	01 November 2022	Application in progress
GMB & Homefair Blinds UK Limited	Trade Union Recognition	04 January 2023	Application withdrawn
GMB & Movianto UK Limited (2)	Trade Union Recognition	23 February 2023	Recognition granted following ballot
GMB & The Glenmorangie Company Ltd	Trade Union Recognition	09 March 2023	Application withdrawn
GMB & Ventcroft Ltd	Trade Union Recognition	21 March 2023	Application in progress
GMB & Macdonald and Muir Limited (1)	Trade Union Recognition	28 March 2023	Application in progress
GMB & Macdonald and Muir Limited (2)	Trade Union Recognition	28 March 2023	Application in progress
GMB & Don-Bur (Bodies & Trailers)	Trade Union Recognition	30 March 2023	Application in progress

Parties	Application	Date	Status
GMB & Apcoa Parking (UK) Ltd	Trade Union Recognition	3 April 2023	Application accepted

IWGB

Parties	Application	Date	Status
IWGB & RSA (The Royal Society for the Encouragement of the Arts, Manufactures and Commerce)	Trade Union Recognition	07 December 2022	Method of collective bargaining agreed

NEU & NASUWT

Parties	Application	Date	Status
NEU & NASUWT & Frensham Heights Educational Trust Limited	Trade Union Recognition	25 November 2022	Method of collective bargaining agreed
NASUWT, NEU & Radley College (1)	Trade Union Recognition	25 January 2023	Application withdrawn
NASUWT, NEU & Radley College (2)	Trade Union Recognition	15 March 2023	Application accepted

PCS

Parties	Application	Date	Status
PCS & Old Royal Naval College	Trade Union Recognition	19 January 2023	Method of collective bargaining agreed
PCS Union & Mitie Limited	Trade Union Recognition	16 March 2023	Recognition granted without ballot

UCU

Parties	Application	Date	Status
UCU & University of Brighton	Trade Union Recognition	30 January 2023	Method of collective bargaining agreed

RMT

Parties	Application	Date	Status
RMT & Carlisle Support Services	Trade Union Recognition	21 October 2022	No recognition on grounds of inadmissibility
RMT & Isles of Scilly Shipping (Guemsey) Ltd	Trade Union Recognition	21 November 2022	Method of collective bargaining agreed
RMT & Bespoke Facilities Management	Trade Union Recognition	13 March 2023	Application accepted
RMT & First Transpennine Express (Transpennine Express) (2)	Trade Union Recognition	04 April 2023	No recognition following ballot

UNISON

Parties	Application	Date	Status
UNISON & Orchard Day Nursery (Liverpool) Limited	Trade Union Recognition	04 January 2023	Application withdrawn

Unite the Union

Parties	Application	Date	Status
Unite the Union & Inflite Engineering Services Limited (1)	Trade Union Recognition	03 October 2022	Application withdrawn
Unite the Union & Valley Vets Ltd	Trade Union Recognition	25 January 2023	Application in progress
Unite the Union & Moog Controls Limited	Trade Union Recognition	23 February 2023	Application accepted
Unite the Union & Visibility Scotland	Trade Union Recognition	07 March 2023	Application in progress
Unite the Union & WFL (UK) LIMITED	Trade Union Recognition	20 March 2023	Application withdrawn
Unite the Union & Comic Enterprises Limited	Trade Union Recognition	22 March 2023	Application accepted
Unite the Union & Inflite Engineering Services Limited (2)	Trade Union Recognition	23 March 2023	Recognition granted

Parties	Application	Date	Status
Unite the Union & Mitie Technical Facilities Management Limited	Trade Union Recognition	28 March 2023	Recognition granted without a ballot

United Road Transport Union (URTU)

Parties	Application	Date	Status
URTU & Brenntag UK Limited	Trade Union Recognition and Method of Collective Bargaining Decision	24 October 2022	Method of collective bargaining agreed
URTU & Pullman Fleet Solutions Limited	Trade Union Recognition	1 March 2023	Recognition granted without a ballot
URTU & Advanced Supply Chain Group	Trade Union Recognition	20 March 2023	Application in progress

United Voices of the World

Parties	Application	Date	Status
United Voices of the World & Places for People Leisure Management	Trade Union Recognition	21 February 2023	Method of collective bargaining agreed

Disclosure of Information

BMA

Parties	Application	Date	Status
BMA & Sandwell & West Birmingham Hospitals NHS Trust	Complaint	14 November 2022	Application in progress

GMB

Parties	Application	Date	Status
GMB & Wiltshire Council	Trade Union Recognition	01 February 2023	Application in process

Unite the Union

Parties	Application	Date	Status
Unite the Union & Fujitsu Services Limited (5)	Complaint	26 January 2023	Complaint was not well-founded
Unite the Union & Arrow XL Ltd	Complaint	15 December 2022	Application in progress
Unite the Union & Edinburgh Airport Limited	Complaint	27 February 2023	Application in progress

European Works Council

Parties	Application	Date	Status
2 Sisters Food Group	Complaint	26 January 2023	Complaint is well-founded
Menzies Aviation	Complaint	12 October 2022	Application in progress

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