Employment

EAT decides that transnational employers can make business changes without waiting for an opinion from a European Works Council

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After a drought of nearly twenty years and on the brink of a possible Brexit, the EAT has now heard its first two appeals about the workings of European Works Councils ('EWCs'). *Hinrichs v Oracle Corporation* [2019] UKEAT 0194/18/3107 deals with a more fundamental and common complaint made by EWCs than the largely procedural points about the creation of a EWC in *Lean v Manpower Group* [2019] ICR 832. *Hinrichs* addresses the central question about whether a transnational business can go ahead with an international restructuring or must delay it until it has received and considered the formal opinion of the EWC. It has been known, particularly where EWCs are based in France or other continental European countries, for unions to seek court injunctions to try to prevent a business change until the EWC was ready to provide its opinion to the employer (notably the 1997 *Renault Vilvoorde* cases in Belgium and France and the French *GDF-Suez merger* case).

The Oracle EWC appealed from the decision of the Central Arbitration Committee ('CAC') which held that Oracle had not failed to comply with the Transnational Information and Consultation of Employees Regulations 1999 ('TICER'). TICER implements the EWC Directive 2009/39/EC requiring EEA transnational employers to establish on request and then consult with EWCs. Oracle had a EWC which had been established under the UK Subsidiary Requirements in the Schedule to TICER following a request by trade unions.

The facts in the *Oracle* appeal feature a common complaint made by EWCs. Oracle proposed to centralise some of its European operations and so informed its EWC in March 2017 and arranged a conference call for consultation a few days later. During the call it gave information about the closure of sites in Western and Central Europe with up to 380 potential redundancies across Europe. It then commenced local consultation in Poland over proposed redundancies and the first employees took redundancy in early April 2017.

The EWC did not provide its opinion on the restructuring, saying that it had not been provided with sufficient information and needed more detail. Oracle continued with the redundancies without waiting for the EWC opinion. The EWC argued that Oracle had not engaged in meaningful consultation and said Oracle must delay business changes until first, it had given the EWC what it considered to be sufficient information for it to publish an opinion and secondly, it had then taken into account that EWC opinion.

This complaint echoed the long-standing criticism of the EWC Directive as creating 'toothless tigers'. Claims under the previous EWC Directive had been brought in French courts to try to prevent employers implementing proposals to adapt or change the undertaking while an opinion was awaited (*Gaz de France Cass. soc.,* 16 January 2008, n° 07-10597). The trade unions' aspirations of a prescriptive regime were not met when the Directive was recast in 2009. Indeed the new Directive emphasised that EWC opinions must be provided 'without calling into question the ability of undertakings to adapt'.

Oracle pointed to that to argue that the EWC Directive is not prescriptive. Although it requires EWCs to be informed and consulted, it also emphasises:

- keeping to a minimum the burden on undertakings,

- not calling into question their ability to adapt,
- classifying an opinion being useful in the decision-making process as a “goal” rather than a requirement and
- providing that opinions are without prejudice to the competence of central management to consult locally.

The EWC appealed saying that it was unlawful under regulations 18A and 19E(2) of TICER for Oracle to take irreversible decisions before the EWC had provided its opinion. The EAT (Slade J) pointed out that the objective of the EWC Directive is to improve the right to information and to consultation of employees in Community-scale undertakings by having an effective EWC and which enables the undertakings to take decisions effectively. She noted that TICER regulation 18A imposed an obligation on management to give information to the EWC to enable the EWC to:

- acquaint themselves with and examine its subject matter,
- undertake a detailed assessment of its possible impact; and
- where appropriate, prepare for consultation.

Regulation 18A requires management to consult the EWC in such a way as to enable them to express an opinion on the basis of the information provided to them. Any opinion must be provided ‘within a reasonable time’ and ‘may’ be taken into account by management. Such an opinion may be delivered by a EWC after an exceptional meeting under the TICER Schedule, but the provision makes clear that ‘the exceptional information and consultation meeting shall not affect the prerogatives of central management’.

Regulation 19E(2) provides that management is to ensure that the procedures for informing and consulting the EWC and the national employee representative bodies are linked so as to begin with a reasonable time of each other. However there were no express words requiring the local consultation to await the conclusion of the EWC consultation.

The CAC had held that the telephone conference in March 2017 did not discharge management's legal obligations and did not properly constitute an exceptional information and consultation meeting. There was no appeal from that finding and it was agreed that there had been a breach of the obligation to consult. The issue on appeal was whether TICER prevented Oracle from proceeding with the proposed redundancies.

Slade J held that neither TICER nor the EWC Directive imposed an obligation on employers to await an opinion from the EWC before taking and implementing a decision. She rejected the submission from the Oracle EWC that extra words had to be read into regulation 19E(2) TICER to require employers to wait until an EWC had a reasonable opportunity to provide an opinion to national representative bodies. Slade J said that as there is no prohibition in either TICER or the EWC Directive on the employer taking or implementing its decision affecting the workforce before the EWC has produced an opinion, there was no basis for reading words into TICER or construing it in that way.

Provided that an employer has given a EWC the necessary information on its proposals and engaged in consultation, it is not required to wait for an opinion from the EWC before taking and implementing its decision. Employers are not required to give a EWC a reasonable opportunity to provide an opinion to the national representation bodies on any proposal.

This judgment will be a substantial relief to multinationals who are proposing large time-critical restructuring projects across Europe. While they have an obligation to inform and consult EWCs in good time about such proposals, the EWCs cannot hold the employer to ransom by threatening to hold up the transaction until it is ready to issue its opinion.

Andrew Burns QC appeared for Oracle in *Hinrichs v Oracle Corporation* instructed by Lewis Silkin LLP (and appeared for Manpower Group in *Lean v Manpower Group*).