Employment

Employment Appeal Tribunal gives first judgment on European Works Councils

Posted on 26 March, 2019 by | Andrew Burns | Colm Kelly

In what could potentially be the last days of the UK as a member of the EU, the EAT has recently published its first judgment on the workings of European Works Councils (EWCs) – *Lean v ManpowerGroup* UKEAT/0096/18/DA.

EWCs are information and consultation bodies representing employees in European multinational companies required by of the EWC Directive (2009/38/EC). The Directive is implemented in the Transnational Information and Consultation of Employees Regulations 1999 ('TICER') which requires certain employers to establish a special negotiating body (SNB) to create a EWC if a proper request is received from workforce representatives. It remains to be seen whether this first EAT judgment is of continuing relevance to multinationals based in the UK or only of academic assistance.

Mr Lean was a Unite union representative at ManpowerGroup. He brought the ever first appeal against a decision of the Central Arbitration Committee ('CAC') in relation to EWCs. ManpowerGroup is an EU-scale undertaking with its central management based in the US and its authorised representative for EWC purposes in the UK. Following a statutory request in 2013 for an SNB to create an EWC, ManpowerGroup held ballots or appointment processes across European workplaces. The SNB was formed and met in September 2014 and negotiated over 15 months from February 2015. TICER allows 3 years for the negotiations, but the SNB was still negotiating (with the assistance of its expert from Unite the Union) as the deadline passed. A majority of the SNB finally approved the final draft of a EWC Agreement in March 2017 and the EWC was formed and began to consult.

Unite the Union and Mr Lean were not content with the EWC agreement that had been reached and complained to the CAC that TICER overrides the parties' agreement and so the EWC agreement that had been reached was a nullity. Unite argued that a SNB ceases to exist at the moment when the 3 year negotiating period expires. The CAC (chaired by HHJ Stacey) agreed with the employer that a SNB continues to exist until it is terminated or disbanded in fact and so the principle of the autonomy of the parties meant that they could agree to extend the negotiation period to secure a EWC agreement.

Regulation 11 TICER sets out the functions of an SNB:

> The special negotiating body shall have the task of determining, with the central management, by written agreement, the scope, composition, functions, and term of office of a European Works Council or the arrangements for implementing an information and consultation procedure.

The first issue for the CAC was whether Mr Lean has standing to bring his complaint. The complaint was made under regulation 20(1) TICER, that there had been a failure to establish an EWC '*because of a failure to central management.*' Only a '*relevant applicant*' had standing to bring such a complaint. Regulation 20 provided that where the SNB continued to exist, the relevant applicant had to be a member of the SNB. If the SNB did not exist, then an employee had standing to bring a complaint.

Mr Lean contended that because the three year negotiating period had expired, the SNB had ceased to exist and he had standing. His argument was based on the terms of regulation 18(1)(c) TICER, which provided that if, after the three year

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period, "*the parties have failed to conclude an agreement*" then the subsidiary requirements applied. Mr Lean contended that the effect of regulation 18(1)(c) was to bring the SNB to an end if no agreement had been reached at the expiry of the three year negotiating period.

The CAC held that the SNB was still in existence in fact and so Mr Lean could not present a complaint – only the SNB could do that and the SNB did not support his complaint. The SNB supported the new EWC agreement that he was trying to undo. Mr Lean appealed to the EAT.

Soole J dismissed the appeal, holding that regulation 18 was not to be read as if its conditions for application of the Schedule are merely the expiry of 3 years without a EWC. He held that the words 'failed to conclude an agreement' mean 'are unable to conclude an agreement' – which was not the case here. At the third anniversary of the request to negotiate the parties were not 'unable' to reach agreement, and indeed they thereafter proceeded to reach agreement. He therefore held that that the SNB continued to exist after the third anniversary; and that accordingly Mr Lean was not a 'relevant applicant' for the purpose of TICER.

Soole J pointed to the language of Article 7 of the EWC Directive which identifies the circumstance that the parties "are unable to conclude an agreement". Recital 32 of the Directive requires further provision to be made 'in the absence of agreement', but Article 7 adopted "*the distinct language of inability to conclude an agreement*". He held that this approach accorded with the principle of the autonomy of the parties and the aim of consensus saying "*If the parties consider that continued negotiation may result in agreement, there is no reason why the mere passage of time should prevent them continuing on that course*".

The principle of autonomy of the parties is identified in recital 19 of the EWC Directive:

> In accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the undertaking or the group's controlling undertaking, to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures so as to suit their own particular circumstances.

The EAT also held that whatever the correct interpretation of regulation 18, it did not follow that after 3 years the SNB ceased to exist because TICER did not contain any express or implied provision to that effect. The SNB had to continue to exist for the purposes of other provisions of TICER - to bring a complaint under regulation 20 or 21A. For that reason an employee or representative could only bring a complaint as a backstop measure where the SNB had "*for some reason ceased to exist. One obvious example would be where the SNB in question has decided to wind up its activities*".

Soole J concluded that the CAC was right to decide that the SNB had continued to exist and therefore that Mr Lean was not a 'relevant applicant' for the purpose of regulation 20 and accordingly dismissed the appeal.

Andrew Burns QC appeared for ManpowerGroup instructed by Baker McKenzie.

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