Neutral Citation Number: [2023] EWCA Civ 756

Case No: CA-2022-002486

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
His Honour Judge Tayler
EA-2021-000760-LA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2023

Before :

LORD JUSTICE BEAN
LORD JUSTICE COULSON
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

EASYJET PLC	**Appellant**
- and -	
EASYJET EUROPEAN WORKS COUNCIL	**Respondent**
- and -	
SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY	**Intervenor**

- -
- -

Mr Daniel Stilitz KC and Ms Sophie Belgrove (instructed by **Lewis Silkin LLP**) for the **Appellant**
Mr Fergus McCombie (instructed by **EWC Legal Advisers**) for the **Respondent**

Hearing date: 23 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 30 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice William Davis:

1. The issue in this appeal is whether the easyJet European Works Council ("the EWC") remained in existence after the UK's departure from the European Union. The EWC was established pursuant to the Transnational Information and Consultation of Employees Regulations ("TICER") 1999. Those Regulations were amended by the Employment Rights (Amendment) (EU Exit) Regulations 2019 (the 2019 Regulations. easyJet ("the company"), the appellant in these proceedings, argues that the amended regulations meant that the EWC ceased to exist as from 31 December 2020 i.e. the completion day of the UK's withdrawal from the EU.

2. TICER implemented EU Directives 94/45/EC and 97/74/EC. These Directives were subsequently replaced by EU Directive 2009/38/EC (the Directive). European Works Councils (EWC's) were to be established by any substantial undertaking operating within the EU. They were to provide information to and to engage in consultation with employees' representatives on transnational issues. The company established the EWC at some point following TICER. It is a well-known airline which operates across Europe. It employs some thousands of people both in the UK and elsewhere in Europe.

3. In May 2020 the company announced plans to reduce staff numbers by up to 30%. It stated that an employee consultation process would begin "in the coming days". Staff reductions were planned in at least two countries within the European Economic Area. On 30 June 2020 the company began consulting with trade unions in relation to the proposed redundancies in the UK. Between June and August 2020 the company and the EWC communicated about the process of and the timescale for consultation with the EWC. Between September and December 2020 the communication was largely one-way, namely the EWC seeking further information needed to enable a proper consultation to occur. On 30 November 2020 the company e-mailed the EWC saying that further information was "about to be provided".

4. In the event of a dispute about the operation of the information and consultation process of a European Works Council, a complaint can be made to the Central Arbitration Committee ("the CAC"). In this case the EWC submitted a complaint on 15 March 2021. The company's response was to challenge the jurisdiction of the CAC. They said that the provisions of TICER on which the EWC relied no longer had any application due to the amendment of TICER consequent upon the UK's withdrawal from the EU. The CAC considered this as a preliminary issue. It determined that it did have jurisdiction. It concluded that the EWC continued to exist and was able to make the complaint pursuant to TICER.

5. The company appealed to the Employment Appeal Tribunal. The appeal was heard by HHJ James Tayler. In a judgment handed down on 4 November 2022 Judge Tayler dismissed the company's appeal. He concluded that a proper construction of TICER as amended did not mean that the amendments made by reference to the UK's withdrawal from the EU had led to the EWC ceasing to exist. He reached that conclusion by reference to the natural and ordinary meaning of the words of the relevant part of TICER as amended, by reference to other provisions within the amended regulations (in particular transitional provisions) and by reference to the Explanatory Memorandum to the 2019 Regulations. The company now appeals against the decision of Judge Tayler.

6. In strict terms all that fell to be decided by the CAC was whether the EWC retained the power to make an application pursuant to TICER in relation to matters which occurred prior to exit day. The CAC implicitly concluded that the EWC continued to exist after exit day. Judge Tayler was explicit in his conclusion that TICER as amended would continue to apply to existing EWCs. I shall approach the issue on the same broad basis.

7. The critical provisions of TICER as amended are regulations 4 and 5. The parties to the appeal helpfully provided a version of these provisions showing the amendments made by the 2019 Regulations. They are as follows:

> *4 Circumstances in which provisions of these Regulations apply*
>
> *(1) Subject to paragraph (2) the provisions of regulations ~~7~~ 17 to 41 and of regulation 46 shall apply in relation to a Community-scale undertaking or Community-scale group of undertakings only where, in accordance with regulation 5, the central management is situated in the United Kingdom.*
>
> *(2) The following regulations shall apply in relation to a Community-scale undertaking or Community-scale group of undertakings whether or not the central management is situated in the United Kingdom—*
>
> *~~(a) regulations 7 and 8(1), (2) and (4) (provision of information on employee numbers); …~~*
>
> *~~(b) regulations 13 to 15 (UK members of the special negotiating body); …~~*
>
> *(c) regulation 18 to the extent it applies paragraphs 3 to 5 of the Schedule (UK members of the European Works Council);*
>
> *(d) regulations 23(1) to (5) (breach of statutory duty);*
>
> *(e) regulations 25 to 33 (protections for members of a European Works Council, etc);*
>
> *(f) regulations 34 to 39 (enforcement bodies) to the extent they relate to applications made or complaints presented under any of the other regulations referred to in this paragraph;*
>
> *(g) regulations 40 and 41 (restrictions on contracting out).*
>
> *5 The central management*
>
> *(1) ~~The central management shall be responsible for creating the conditions and means necessary for the setting up of a European Works Council or an information and consultation procedure in a Community-scale undertaking or Community-scale group of undertakings.~~ This regulation applies where--*
>
> *~~(a) the central management is situated in the United Kingdom; …~~*

(b) the central management is not situated in a ~~Member State~~ 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 ~~Member State~~ 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 ~~Member State~~ Relevant State or

(ii) in the case of a Community-scale group of undertakings, there are employed in a group under-taking, which is situated in the United Kingdom, more employees than are employed in any other group undertaking which is situated in a ~~Member State~~ Relevant State, ~~and the central management initiates, or by virtue of regulation 9(1) is required to initiate, negotiations for a European Works Council or information and consultation procedure.~~

(2) Where ~~the circumstances described in paragraph (1)(b) or (1)(c) apply~~ this regulation applies, the central management shall be treated, for the purposes of these Regulations, as being situated in the United Kingdom and--
(a) the representative agent referred to in paragraph (1)(b); or

(b) the management of the establishment referred to in paragraph (1)(c)(i) or of the group undertaking, referred to in paragraph (1)(c)(ii),
shall be treated, respectively, as being the central management

8. In its unamended form regulation 4 dealt with the procedure for setting up an EWC and the way in which an EWC was to be conducted once established. Regulations 6 to 16 were concerned with the establishment of an EWC via requests made by employees. Regulations 17 to 41 dealt with the operation of an EWC. Complaints to the CAC were provided for in Regulations 21 and 21A. Those various provisions were only to apply where the central management was situated in the UK.

9. Regulation 5 in its unamended form established the duty on an undertaking to establish an EWC. The central management of the undertaking was to be responsible for creating the conditions necessary for the setting up of an EWC where one of three criteria applied: the central management was located in the UK; the central management was not situated in an EU member state and the representative agent of the central management was situated in the UK; neither the central management nor the representative agent were situated in an EU member state and, in respect of a Community-scale undertaking or group of undertakings, there were more employees of the undertaking in the UK than in any other EU member state.

10. The amendments to regulation 4 repealed the provisions concerned with the establishment of an EWC. Both parties to this appeal agree that the effect of these amendments is that, subject to any transitional provisions, no new EWC can be

established after 31 December 2020. Regulation 4 otherwise was unamended. The critical words of the regulation for the purposes of this appeal are "…only where, in accordance with regulation 5, the central management is situated in the United Kingdom". In its unamended form, regulation 5 created the duty on an undertaking to establish an EWC. This duty was repealed by the amendments to TICER. Regulation 5 is now a deeming provision in relation to undertakings where central management is not situated in a "Relevant State" i.e. a country within the EEA or the UK.

11. The company argues that the meaning of the critical words in regulation 4 are clear and unequivocal. The circumstances in which TICER will apply are only where central management is situated in the UK as defined by regulation 5. Because regulation 5 was amended to exclude central management situated in fact in the UK, TICER no longer applies to that situation. The deletion of what was regulation 5(1)(a) was deliberate. TICER is now restricted to cases where central management is deemed to be in the UK.

12. Judge Tayler decided that the interpretation of regulation 4 contended for by the company did not accord with common sense. In his view, the words "in accordance with regulation 5" could not serve to exclude undertakings where the central management in fact was situated in the UK. The regulation applied to undertakings where the central management was situated in the UK. The words "in accordance with regulation 5" simply meant "in agreement or harmony with" the terms of regulation 5. Thus, TICER applied to cases where central management is deemed to be in the UK as well as where central management in fact is so situated.

13. Whilst this approach has the benefit of simplicity, I am unpersuaded that it is possible to interpret regulation 4 in that way simply by reference to the words of the regulation. In its decision the CAC expressed the view that regulation 4(1) as amended was poorly drafted and was capable of being read in the way contended for by the company. In his submissions on this appeal Mr Stilitz KC on behalf of the company more than once described the amended regulations as "possibly not the best thought through piece of legislation". I agree with those observations. The opacity of regulation 4 means that a wider view has to be taken of the regulation in the context of the regulations as a whole in order to reach a proper view as to its meaning. I should note that Judge Tayler conducted the same exercise in case he was wrong in his initial conclusion.

14. Regulation 18 of TICER deals with the subsidiary requirements of an EWC as set out in the schedule to TICER. In its amended form it is as follows:

> *(1) The provisions of the Schedule ~~shall~~ continue to apply ~~if~~ on and after exit day in any case where they applied before exit day.—*
>
> ~~*(a) the parties so agree;*~~
>
> ~~*(b) within the period of six months beginning on the date on which a valid request referred to in regulation 9 was made, the central management refuses to commence negotiations; or*~~
>
> ~~*(c) after the expiry of a period of three years beginning on the date on which a valid request referred to in regulation 9 was made, the parties have failed to*~~

~~*conclude an agreement under regulation 17 and the special negotiating body has not taken the decision under regulation 16(3).*~~

The schedule sets out the composition of an EWC, how its members are to be appointed by ballot, the competence of an EWC and the procedures applicable to an EWC. The matters contained in the schedule as a whole are of relevance to an EWC based in the UK where the central management is situated in the UK. As regulation 4(2)(c) makes clear, the schedule is of limited application where central management is not situated in the UK. Regulation 18 as amended assumes that an existing EWC will continue to operate. Were it otherwise, there would be no purpose in providing that the schedule will continue to operate in any case where it applied before 31 December 2020. This is inconsistent with the proposition that the effect of the amendments to regulations 4 and 5 was that existing EWCs ceased to exist.

15. Further inconsistency with the company's submission is to be found in regulation 23(6) under the heading breach of statutory duty. This reads as follows:

> *A recipient whom the central management (which is situated in the United Kingdom) has entrusted with any information or document on terms requiring it to be held in confidence may apply to the CAC for a declaration as to whether it was reasonable for the central management to impose such a requirement.*

Regulation 4(2)(d) provides for the application of regulations 23(1) to (5) to undertakings wherever central management is situated. Regulation 23(6) is not included in regulation 4(2)(d) because it is explicitly restricted to the situation where central management is situated in the UK. There was no amendment of regulation 4(2) to remove such a situation from the ambit of regulation 4 as was done in relation to the regulations concerning the establishment of a new EWC. Regulation 23(6) appears in the amended TICER as it did in the original version. If existing EWCs were to cease to exist, regulation 23(6) would be entirely redundant. Given the detailed amendment of other parts of TICER, it is reasonable to assume that its retention was deliberate.

16. The 2019 Regulations include transitional provisions. These include provisions in relation to information requests and ongoing negotiations i.e. the steps prior to the establishment of an EWC. They are as follows:

> *Information requests*
>
> *34. Despite the amendments and revocations made by Part 1 of this Schedule, the 1999 Regulations continue, on and after exit day, to have effect in relation to a request for information made under regulation 7(1) before exit day as they had effect immediately before that day, but subject to the modifications.*
>
> *Ongoing negotiations*
>
> *35. Despite the amendments and revocations made by Part 1 of this Schedule, the 1999 Regulations continue, on and after exit day, to have effect in relation to ongoing negotiations as they had effect immediately before that day, but subject to the modifications.*

> *36. The reference in paragraph 35 to ongoing negotiations is a reference to any case in which the negotiation process for the establishment of a European Works Council or an information and consultation procedure was commenced, but not concluded, before exit day.*

The reference to "modifications" does not have any impact on the facts of this case. Therefore, although regulations 7 to 12 of TICER in its original form have been repealed by the deletions in regulation 4 as set out above, the transitional provisions keep those provisions alive where the process had commenced prior to 31 December 2020. On their face they provide a very limited exception to the bar on the establishment of a new EWC. It would be inconsistent with the proposition that any current EWC will cease to exist for it to be possible for a new EWC to be established where the process already was in train at exit day. Mr Stilitz argued that the transitional provisions were anomalous and futile. I understand that they run counter to the case he has put forward. To that extent they are anomalous. However, they are clear and explicit. They cannot be described as some kind of obvious error. Rather, they are deliberately drafted transitional provisions which are consistent only with the continued existence of current EWCs.

17. All of those factors point to an interpretation of regulation 4(1) which provides for the continued existence of EWCs which were established prior to exit day. Such an interpretation is not inconsistent with the words of the regulation. I do not agree with the argument that the words unequivocally remove existing EWCs from TICER. The regulation applies TICER where "the central management is situated in the UK". On its face that suggests that it includes instances of central management in fact so situated. The amendment to regulation 5(1) involved changing its purpose from setting out the duty of undertakings to a pure deeming provision. Given the nature of the amendment, the reference to central management situated in the UK inevitably was deleted. I am wholly unpersuaded by the company's argument that this deletion served to remove existing EWCs from the ambit of TICER. The reference in regulation 5(1) of the original TICER to undertakings where "the central management is situated in the UK" was in the context of the duty laid on those undertakings to establish EWCs. Such central management did not fall within TICER because of regulation 5(1). Rather, it did so because it was referred to in regulation 4(1) – as it still is. I reject the proposition that the amendment of regulation 5(1) for one purpose in fact had a more profound effect.

18. Mr Stilitz argued that the court must give effect to the intention of Parliament. That proposition is uncontroversial. He submitted that the context of the amendments to TICER is significant, namely the withdrawal of the UK from the EU. The aims of Brexit were and are to remove the UK's obligations to conform with processes applicable to member states of the EU. Thus, it was congruent that extensive changes were made to TICER so as to limit the application of consultation requirements. I accept that this was the context of the amendments to TICER. However, whether the supposed aims of Brexit were met in this particular case must depend on an analysis of the legislation. The context of the amendments is of limited assistance in that exercise.

19. The 2019 Regulations which amended TICER were made on 4 March 2019. They were considered in draft by the Delegated Legislation Committee on 13 February 2019. The responsible Minister, Kelly Tolhurst, answered questions from the

committee members in relation to the draft regulations. Mr Stilitz submitted that what the Minister had to say assists in a proper interpretation of regulation 4(1). *Pepper v Hart* [1993] AC 593 requires that any such statement must clearly disclose the legislative intention lying behind what are said to be ambiguous or obscure words. In this case the Minister said this:

> *I will explain one set of provisions about which hon. Members may have concerns. The Employment Rights (Amendment) (EU Exit) Regulations 2019 make changes to the rules on European works councils. Businesses and trade unions in the UK value the opportunity for employee engagement and consultation that the councils provide, and the Government recognise and encourage those benefits. However, withdrawing from the EU without a deal will mean that the UK is no longer covered by EU rules on European works councils.*
>
> *In that scenario, it would be for the EU to give UK workers the right to be represented on the councils. It is an unavoidable and unfortunate truth that there is no way for the UK unilaterally to ensure that workers in this country retain that right without a deal. There is also no way to replicate the European works council system only in the UK, as their purpose is to enable cross-border engagement. That requires the same rules in all countries, which requires a withdrawal agreement.*

What the Minister said was not in response to a specific question on the issue of EWCs. I do not consider that the Minister's statement clearly discloses the legislative intention of the amendments to regulations 4 and 5. It is as consistent with the position as agreed by the parties to this appeal, namely that no new EWCs can be established after exit day.

20. What she said in committee on 13 February 2019 was not the Minister's final word on the issue. When the 2019 Regulations were made, they were accompanied by an Explanatory Memorandum. It was laid before Parliament and contained information for the Joint Committee on Statutory Instruments. It was confirmed by the Minister as meeting "the required standard". Section 7 of the Memorandum dealt with "what is being done and why". The paragraphs relevant to the issue in the appeal are as follows:

> *7.4……In a 'no deal' scenario, the government will ensure the enforcement framework, rights and protections for employee representatives in the UK European Works Councils continue to be available, as far as possible.*
>
> *7.5 Provisions relevant to existing European Works Councils, which can continue to operate, are maintained. These include:*
>
> *• the enforcement framework, for example where there is a dispute about the operation of an existing European Works Council….*
>
> *• the protection for confidential information shared with the European Works Council or through the information and consultation procedure.*

> *7.6 However, the SI amends the TICE Regulations 1999 so that no new requests to set up a European Works Council or information and consultation procedure can be made…..*
>
> *7.7 Where a request for information, a negotiation to establish a European Works Council or information and consultation procedure or enforcement proceedings are in progress on exit day, the existing provisions are saved so that the process can reach completion.*

I consider that what is said in the Explanatory Memorandum is entirely consistent with the proposition that existing EWCs continue to be within the ambit of TICER. There is no other sensible conclusion.

21. Mr Stilitz did not argue that no weight could or should be given to the Explanatory Memorandum. However, he submitted that any reliance on it should be very limited in comparison with what was said by the Minister in Parliament. He relied on what was said in *R v M Najib and Sons Ltd* [2018] 1 WLR 5041 at [30] in relation to the explanatory note to the TSE (England) Regulations 2010. I find that reference of little assistance. An explanatory note is not the same as an Explanatory Memorandum. There was an explanatory note in relation to the 2019 Regulations. It is of no assistance on the issue in the appeal. As was pointed out in *Najib* an explanatory note states expressly that it is not part of the regulations. The Explanatory Memorandum in this case was expressly confirmed by the Minister. In my view significant weight can be given to its content.

22. The factual position now is that the company as an EU wide undertaking with a substantial workforce in the EU has had to comply with the Directive. It has done so by appointing its German branch as its representative agent with effect from 31 December 2020. The company has an operational EWC in Germany. Mr Stilitz argues that, on the interpretation of regulation 4 adopted by Judge Tayler, there will be the wholly anomalous position whereby the company is obliged to operate two EWCs – one in the UK and one in Germany. This will be burdensome on the company and its employees. It will be contrary to the purposes of the Directive which speaks of a single EWC for any undertaking. This anomaly is said to far outweigh any anomalies arising from the deeming provision in regulation 5. Having two EWCs within the same undertaking could lead to practical difficulties. Were an employee to sit on both EWCs, they potentially would find themselves subject to conflicting obligations by reference to the differing national laws.

23. I accept that practical difficulties may arise from the existence of two EWCs operated by the same undertaking. I do not accept that, as put by Mr Stilitz, the position would be wholly unworkable. For the problems created by the existence of two EWCs to be determinative of the issue in the appeal, that would have to be the position. In fact, whilst there are obvious problems, they are far from insuperable. In any event, whilst the EWC now operating in Germany allows participation by UK employees, it is only on a permissive basis. The practical difficulties created by the existence of two EWCs must be set against the protection of employees in the UK via the existing EWC.

24. The Directive no longer governs the operation of the existing EWC in the UK. The purposes of the Directive are of little relevance to the EWC which is governed by the

provisions of TICER i.e. English law. If, as I consider to be the case, those provisions require the existing EWC to continue in existence, the significance of the Directive falls away.

25. For all these reasons I consider that Judge Tayler was correct in his conclusion that the company's appeal from the decision of the CAC should be dismissed. It follows that I would dismiss the appeal from the decision of Judge Tayler. I conclude that, by reference to TICER as amended, the EWC in relation to the company which existed prior to exit day continues to exist for all purposes set out in TICER as amended. The CAC has jurisdiction to hear the complaint made to it in March 2021. It will have jurisdiction in relation to any future complaint by the EWC in the absence of any legislative change.

LORD JUSTICE COULSON

26. I agree with both judgments.

LORD JUSTICE BEAN

27. William Davis LJ has given clear and compelling reasons, with which I entirely agree, for his conclusion that the Respondent's interpretation of TICER should be accepted. I add some observations only on one point raised by the Appellant.

28. Mr Stilitz KC submitted that we should give far less weight to the Explanatory Memorandum to the 2019 Regulations than to what the Parliamentary Under-Secretary had said when draft regulations had been discussed in the Delegated Legislation Committee several months earlier. I would unhesitatingly reject this submission. Even if the Minister's remarks had been the last word on the subject I do not consider that they were anywhere near sufficiently clear to satisfy the test in *Pepper v Hart*. But they were not the last word. Later in 2019 the Department for Business, Energy and Industrial Strategy laid the Regulations before Parliament. The Explanatory Memorandum stated, in the passages cited by William Davis LJ, that, while no new EWCs could be set up, existing EWCs could continue to operate.

29. I also note that paragraph 1 of Part 2 of the Annex to the Explanatory Memorandum stated as follows:

> "1.1 The Minister for Small Businesses, Consumers and Corporate Responsibility, Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
>
> > "In my view The Employment Rights (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate".
>
> 1.2 This is the case because amendments are only made to current legislation relating to EU derived employment law, to *ensure continuity and legal certainty* in the case of no deal being agreed between the UK and the EU at the time UK leave the EU." [emphasis added]

30. In those circumstances easyJet's submission that the Explanatory Memorandum should be given little weight amounts to saying that the Minister and the Department must have misunderstood their own secondary legislation and misled Parliament

accordingly. It was no doubt for these reasons that when the case was before the EAT, the Secretary of State applied for permission to intervene in support of the decision of the CAC that it had jurisdiction to hear the complaint in this case, making specific reference to paragraphs 7.4-7.7 of the Explanatory Memorandum.

31. I too would dismiss the appeal.