Case Number: EWC/15/2017
24 October 2017

CENTRAL ARBITRATION COMMITTEE
TRANSNATIONAL INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 1999 AS AMENDED BY THE 2010 REGULATIONS
DECISION ON COMPLAINT UNDER REGULATION 20

The Parties:

Mr Gordon Lean

and

ManpowerGroup

Introduction

1. On 30 January 2017 Mr. Jonathan Hayward, Unite International Officer, on behalf of Mr Gordon Lean (the Complainant) submitted a complaint to the Central Arbitration Committee (CAC) pursuant to the Transnational Information and Consultation of Employees Regulations 1999, as amended by the 2010 Regulations (the Regulations or TICE).

2. In accordance with section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), the CAC Chairman established a Panel to consider the case. The Panel consisted of Her Honour Judge Stacey as Chairman and Mr Simon Faiers and Ms Judy McKnight CBE as Members. The Case Manager appointed to support the Panel was Nigel Cookson.

The complaint

3. The Complainant submitted that ManpowerGroup (the Employer) had failed to comply with Regulation 18 of TICE in that, because of a failure of the central management, the European works Council ("EWC") had not been established at all in accordance with the

provisions of the Schedule to the Regulations (the "Subsidiary Requirements"). The Complainant submitted that pursuant to Regulation 18(c), the Subsidiary Requirements applied 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, if the parties had failed to conclude an agreement under Regulation 17 and the Special Negotiating Body ("SNB") had not taken the decision under Regulation 16(3)[1]. In this case, a request that met the criteria laid down in Regulation 9 was sent to the Employer's management in France on 3 June 2013 and no agreement was concluded within the three years following the date of the valid request. The Employer had not applied the provisions of the Schedule.

Summary of the Employer's response to the complaint

4. In its response dated 13 February 2017 the Employer argued firstly, that the Complainant had no locus in bringing the Complaint to the CAC, as Regulation 20 reserved to the SNB the right to bring such a complaint, should an SNB be in existence. Here, the SNB was still in place and was in the final stages of concluding an EWC agreement under Regulation 17: the SNB and the Employer having agreed to extend the three years' negotiation period in order to reach a mutually beneficial agreement. An EWC agreement (the EWC Agreement) was concluded shortly thereafter in March 2017.

5. The Employer stated that, the Complainant had first complained to the CAC on 19 May 2014 alleging a failure to consult about the balloting arrangements for the UK SNB elections (the First Complaint). This complaint was withdrawn on 17 June 2014. After both Unite candidates failed to secure election to the SNB, the Complainant had brought a new claim to the CAC alleging that the Subsidiary Requirements applied (the Second Complaint). The Second Complaint was stayed throughout the SNB process and was eventually withdrawn on 30 January 2017. This new complaint (the Complaint) therefore raised the question of issue estoppel.

[1] Regulation 16(3) provides that the SNB may decide not to open negotiations with central management or to terminate negotiations. Any such decision must be taken by at least two thirds of the votes cast by its members. It was not relevant in this case, and neither party suggested that such a decision had been made.

6. Thirdly, the Employer submitted that it was consistent with the purpose of EU Directive 2009/38/EC ("The Directive") and the principle of autonomy of the parties set out in Preamble 19 for the SNB to extend the time in which to conclude an agreement. The purpose of TICE and the Directive was to encourage EWC agreements wherever possible and to impose the Subsidiary Requirements only where the parties were unable to conclude an agreement. Where the parties decided that they were able to conclude an agreement but, as in this case, needed more time in which to do so, the principle of autonomy must take precedence. Where an SNB continued in good faith in an effort to conclude a consensual EWC agreement, it was the SNB, and only the SNB, that could decide to call an end to the process by bringing a Regulation 20 complaint.

7. In the alternative, if the Complainant had standing to bring a Regulation 20 claim, then the claim must be dismissed on the ground that the only reason that the EWC had not yet been established was because the parties needed a little extra time to conclude an agreement which suited their circumstances and that was the sole cause of the delay rather than any failure on the part of central management.

Complainant's comments on the Employer's response

8. In his comments on the Employer's Response dated 23 February 2017 the Complainant reiterated once more that the provisions of the Subsidiary Requirements applied after the expiry of three years following the valid request, i.e. 3 June 2016, as no agreement had been concluded under Regulation 17 before this date.

9. An SNB existed for the purpose defined in TICE, which was to negotiate with central management an agreement for an EWC. The very purpose, and therefore the existence, of an SNB came to an end either once an EWC agreement was concluded, or there was a failure to conclude an agreement. Regulation 18(c) determined the period in which an EWC agreement should be concluded. Here, the SNB ceased to exist from 3 June 2016 as it had failed to conclude an agreement within that period. In the absence of an SNB, an employee or employees' representative became the 'relevant applicant'.

10. The Employer was mistaken in claiming that the parties could, by consent, extend the period of negotiations beyond the expiry date in Regulation 18(c). Regulation 18 was abundantly clear as to when the provisions of the Schedule applied in circumstances where the SNB had not taken a decision provided for in Regulation 16(3)[2].

11. While both Article 6 of the Directive and Regulation 17 allowed the parties to negotiate the terms of the agreement, neither provision allowed for the negotiation period to be extended. If this were to be the case then reference to such an ability would have been stated.

12. As for the Employer's argument that the Claimant was to be estopped on the basis that he had previously submitted a complaint under Regulation 20, the First and Second Complaints had been on different grounds to the current complaint and had been subsequently withdrawn.

Employer's further comments

13. In a letter dated 1 March 2017 the Employer, by way of comment on the Complainant's letter, observed that Mr Hayward had worked with the SNB in July and December 2016 when, according to his letter of 23 February 2017, it did not exist. It submitted that TICE contained no express provisions as to when an SNB came into existence or stopped existing and therefore it was not a question of law, but simply a matter of fact.

14. Contrary to the Complainant's submissions, under the Regulations an SNB continued to exist after the three year period had expired for other purposes, including for the bringing of a claim under Regulation 20 to compel an employer to set up an EWC if the SNB process had concluded or failed. If the Complainant's argument was correct, the SNB would no longer exist once an agreement had been reached or when Regulation 18 applied and so an SNB could never bring a complaint under Regulation 20(1). It would therefore have the effect of rendering Regulation 20(3)(a) meaningless.

15. Similarly, an SNB may well wish to complain about a failure by management to permit meetings or provide training at or towards the end of the three year period. A complaint under

[2] See fn 1.

Regulation 21A(1)(a) or (c) must be brought by an SNB member. If the Complainant was correct, once three years had expired and the SNB no longer existed, no-one would be a 'relevant applicant' under the Regulations at that point and it would remove the right to bring Regulation 21A complaints in relation to failures towards the end of the three-year period.

16. It was accepted that TICE did not expressly provide for the SNB and management to agree to extend negotiations for a period to reach a consensual agreement. However a consensual approach was consistent with the whole approach of the Directive which focused on autonomy. While Regulation 18 strictly applied after three years from the request, flexibility was achieved by making the SNB the appropriate body to be able to bring a complaint under Regulation 20 and the structure of Regulation 20 was not inconsistent with the Directive.

17. If, notwithstanding the above, the CAC did not agree that under TICE the SNB continued to exist beyond the three year negotiation window, so that the Complainant did have standing, the Employer argued that the CAC could implement the purpose of the Directive by exercising its discretion under Regulation 20(4). The appropriate order to be made under Regulation 20(4) would be to implement the parties' EWC Agreement, rather than impose the Subsidiary Requirements.

18. Furthermore, there were no grounds within the complaint to suggest that there had been any 'failure of central management' that was responsible for the failure for the SNB to conclude an agreement within three years, so the complaint must fail on this point in any event.

The hearing

19. In order to clarify with the parties the areas in dispute, to give any appropriate guidance on the legislation and to establish whether there was any way of assisting the parties to resolve the issues set out in the Complaint the matter was set down for an informal meeting. This meeting took place in Birmingham on 5 May 2017 with the Panel Chair and case manager in attendance on behalf of the CAC.

20. The informal meeting was useful. Although it did not result in the resolution of the issues between the parties it allowed the Panel Chair the opportunity of establishing with the parties those matters that would need to be addressed for the determination of the Complaint. The issues were agreed and after the parties' further attempts at resolution were unsuccessful, a date was then set and the parties duly served notice of the hearing. The parties were invited to supply the Panel with, and to exchange, written submissions ahead of the hearing, which was held in London on 25 September 2017. The names of those who attended the hearing are appended to this decision.

The issues

21. The issues identified as relevant to the disposal of the complaint during the course of the informal meeting on 5 May 2017 are:

- **Did the Manpower SNB exist at the time of the 2017 complaint?**
- **Did TICE cause the SNB to cease to exist at the moment when a Regulation 17 agreement was reached or when Regulation 18 applied?**
- **Or did the SNB continue to exist until it was terminated or disbanded in fact, until which time it could bring a claim under Regulation 20 or Regulation 21A(1)(a) or (c)?**
- **If Mr Lean was a relevant applicant, was he barred from contending that Regulation 18 applied when his same or similar complaint was withdrawn on 30 January 2017?**
- **Has there been any failure of central management in establishing an EWC in accordance with TICE and/or the Directive?**

Agreed facts

22. The Employer is a Community-scale undertaking with its central management based in the US, which provides recruitment and assessment, training and development, career-management, outsourcing, and workforce consulting. For TICE purposes its authorised representative is in the UK. On the 3 June 2013 a request to establish an SNB was sent to Manpower management in France. As a result, ballots or appointment processes took place throughout the Employer's European workplaces with the Employer publishing the balloting

arrangements for the UK SNB elections on 1 May 2014. The Complainant stood as a candidate in the UK SNB ballot but was not elected.

23. The first meeting of the SNB took place on 4 September 2014 in London. Jonathan Hayward (UNITE International Officer), who represented the Complainant today, was appointed as the paid expert to advise the SNB and there were SNB negotiations with management in February 2015. Four more negotiation meetings took place over a fifteen month period. The SNB continued to work on the negotiations and took advice from Mr Hayward in July and December 2016. There was a meeting between management and the SNB on 1 and 2 December 2016. The SNB representatives considered final amendments to a draft agreement in early 2017 and a majority of the SNB approved the final draft of the EWC Agreement in March 2017. By 13 March 2017 the required majority of the SNB representatives had signed the EWC Agreement and it came into effect. Clause 5.1 (b) of the EWC Agreement provided for the SNB representatives to become EWC representatives without further elections or appointment save where national legislation dictated otherwise. The EWC Agreement also provided that employee representatives served for a four year term unless otherwise provided for by national law. It was a matter of considerable disappointment to the Complainant, and no doubt other potential candidates, that there would be no opportunity to stand for election to the EWC for a further period of four years from the commencement of the EWC Agreement, over seven years from the previous election.

Summary of the Complainants' submissions

24. In opening, Mr Hayward for the Complainant, commenting on the issues set out in paragraph 21 above, agreed that they represented the matters to be determined but adding that some issues were of greater importance than others.

25. The request made to the Employer on 3 June 2013 met the criteria laid down in Article 5 of the Directive and Regulation 9 of TICE. The Employer did not dispute that this request was a 'valid request' as outlined in the Directive and TICE.

26. The criteria determined by TICE as to when the Schedule should apply in relation to Regulation 18(1)(c) were a matter of fact. The valid request referred to in Regulation 9 was

made on 3 June 2013 and this was not disputed by the Employer. The SNB did not take a decision under Regulation 16(3) and the Employer did not seek to claim otherwise. Neither did the Employer dispute the fact that the period of three years beginning on the date on which a valid request was made expired on 3 June 2016. Finally, the Employer did not dispute the fact that the parties did not conclude an agreement under Regulation 17 before the end of the expiry date.

27. The application of the Schedule after the expiry of three years was clearly outlined and detailed within the Directive and TICE and were universally accepted as a maximum period by key stakeholders operating in the area of European Works Councils[3].

28. The terms of the application of the Schedule outlined in both the Directive and the subsequent TICE regulations provided for a maximum, non-flexible and non-negotiable timeframe of a three-year period. The Complainant believed that this timeframe was introduced to ensure that negotiations could not be perpetual. Not to do so could lead to potential abuse and exploitation of the process. TICE did not allow for this period to be extended nor did it allow the CAC discretion in this matter.

29. The recognition, importance and strict application of timeframes by the CAC in the area of the Information and Consultation of Employees Regulations 2004 ("ICE"), the sister regulations to TICE, could be found in the CAC decision in the case *IC/44/2012 Sita UK*. Here, 10% of the employees had submitted a request that the employer negotiate an information and consultation agreement. The employer claimed that a pre-existing agreement was already in place and therefore, as the number of employees supporting the request was above 10% but less than 40%, it intended to hold a ballot of the employees to seek their endorsement of the valid request.

30. In accordance with the regulations, where an employer seeks endorsement of a valid request through a ballot of the whole workforce on the basis that it believed there was a pre-existing agreement, it must inform the employees of its intention to hold the ballot within one month of receiving the valid request. The valid request in this case was received by the

[3] Examples given were publications by BIS (now BEIS), Eversheds LLP, Lewis Silkin LLP and BEERG: the Brussels European Employee Relations Group.

employer on 29 August and it informed its employees on 3 October of its intention to hold the ballot. The employer had issued its notification four days outside the one month deadline. In its considerations at paragraph 22 the CAC Panel stated:

> **"22. The Panel has examined in detail the submissions received from both parties. We believe that a genuine effort has been made on the part of the employer to operate in good faith within what are quite complex regulations. However, having said that, it is our view that the reasons given by the employer in mitigation of the failure to comply do not alter the simple facts of this case, facts which are not in dispute."**

31. It also stated in paragraph 26:

> **"26. Having looked at the whole of Regulation 8 and on the facts we find that Regulation 8(3)(a) has not been complied with. The language of Regulation 8(3) is clear. It states that the employer must comply with the terms of Regulation 8(3)(a) by informing the employees in writing within one month of the date of the employee request that he intends to hold a ballot. The Regulations do not allow for this period to be extended. Nor do the Regulations allow the CAC discretion in this matter. We accept that the employer has been acting in good faith in attempting to comply with the Regulations. The mitigating circumstances, including genuine misunderstanding of the Regulations in this respect; and being away from the office on holiday during some of the relevant time period, are noted by the Panel but do not alter the fact that the requirements relating to an endorsement ballot in Regulation 8 have not been compiled with."**

32. The CAC panel concluded:

> **"28. The Panel's decision is that the employer has failed to comply with its duty under Regulation 8 in that it did not inform its employees within the period specified in paragraph 8(3)(a) that it intended to hold a ballot. We find the complaint in this respect well-founded. Accordingly, we declare that the employer is under the duty in regulation 7(1) to initiate negotiations. For the reasons given above the Panel makes no finding in relation to the PEA complaint under regulation 10(1)."**

33. The Complainant submitted that the similarities with this current case were clear. As identified in paragraph 22 of its considerations, the CAC panel in *Sita* concluded "…mitigation of the failure to comply do not alter the simple facts of this case, facts which are not in dispute". As outlined above in this present case, the simple facts of this case are not in dispute.

34. Furthermore, in paragraph 26, the CAC panel in *Sita* had concluded: "The Regulations do not allow for this period to be extended. Nor do the Regulations allow the CAC discretion in this matter." This interpretation and the clarification on this matter was fundamentally important. Mr Hayward likened it to a football match where both teams agreed to extend playing time beyond the 90th minute without the consent of the referee simply because they were enjoying the game. On the Complainant's reading of both the Directive and TICE there were no references or clauses that allowed the period of three years to be extended. Nor could there be found any reference or clause in TICE that gave the CAC discretion in this matter. He also noted that the lack of express provision for the SNB to extend time to reach an agreement was in stark contrast to the ICE Regs: there was nothing that mirrored Regulation 14(5) of ICE, which permits an extension of the six month negotiation period by the consent of the parties[4].

35. In the alternative, Mr Hayward submitted that if it was accepted that the March 2017 EWC Agreement was an appropriate agreement then if Mr Lean was not a 'relevant applicant' before the EWC Agreement was signed, he must be one now as the SNB had ceased to exist as soon as the agreement became effective.

36. Conversely, if the EWC Agreement was not an agreement under the Regulations then the SNB could not have been properly constituted and so the Complainant became a 'relevant applicant' and the Subsidiary Requirements applied. Either way, at some point in the process the Complainant became a 'relevant applicant' and so was entitled to bring the complaint he submitted.

37. The Panel, observing that the Complaint appeared to be entirely procedural, asked whether there were any aspects of the EWC Agreement itself that raised concern. Mr Hayward explained that he had two areas of concern. First, that the EWC Agreement allowed for the SNB to become the current EWC which would be in place for four years. It did not allow for the election of EWC members when it came into force and Unite wished to be able to contest a seat on the EWC. The Regulations were silent on such a state of affairs although Mr Hayward believed it would be challengeable. Second, the EWC Agreement did not cover 90% of the employees as it did not extend to those employees contracted to a third party. The application

[4] Regulation 14(5) of ICE permits a majority of the negotiating representatives and the Employer to extend this period indefinitely, should they so agree.

of the Subsidiary Requirements would allow Unite to contest positions on the EWC and would extend to all employees and it was for these reasons that Mr Hayward believed the provisions of the Schedule were preferable to those of the Agreement.

38. The Panel asked what would happen in circumstances whereby an SNB brought a complaint to the CAC under Regulation 20 at the end of the three year period but the CAC Panel found that there was no failure on the part of central management and so could make no order under Regulation 20(4). Mr Hayward submitted that in practice, once the three years had expired, the SNB no longer had standing and there was an obligation on the part of the Employer to put in place the provisions of the Schedule – the Subsidiary Requirements in other words.

39. Mr Hayward reiterated his view that the SNB could not continue after the three year period had expired, therefore the so-called EWC Agreement reached between the SNB and Employer did not have the status of an agreement reached in accordance with the Regulations.

40. Mr Hayward submitted that the Employer's suggestion that the wording in Regulation 20 was ambiguous and that "unable" to reach an agreement in the three-year period was not the same as having "failed" to reach agreement, was disingenuous semantics. The meaning of Regulation 20 was clear: where the parties had failed to reach an agreement in the time allotted, the Schedule applied. If the Panel found in favour of the Complainant it should make a decision to that effect and the Subsidiary Requirements must be applied. The option of applying the EWC Agreement as argued by the Employer did not exist.

41. Finally, the Complainant agreed that the CAC played an important role in supporting good industrial relations although this did not extend to changing the law in order to do so. The general power given to the CAC in paragraph 171 of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 to have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, was understood to apply to the CAC's approach in all its jurisdictions. The Complainant urged the Panel to make an order requiring the Employer to take such steps as were necessary to establish the EWC in accordance with the provisions of the Schedule.

Summary of the Employer's submissions

42. In opening the Employer referred the Panel to a set of photographs in its bundle which were taken at the inaugural meeting of the EWC in June 2017 and which clearly demonstrated that the EWC had been established. The Complainant, Mr Lean, having failed to get elected as a member of the SNB, was not a member of the EWC, whose membership had been drawn *en total* from the SNB save where prohibited by national law. This complaint was an attempt to try to disband the EWC established by the democratically elected representatives of Manpower employees across Europe. Instead, the CAC was called upon to make an order to impose an inferior EWC under the Subsidiary Requirements, apparently in an effort to seek fresh elections in the UK in which the Complainant could stand.

43. Under Regulation 20(1) a complaint may be presented to the CAC by a "relevant applicant" where Regulation 18 applied and because of a failure of the central management, the European Works Council or information and consultation procedure had not been established. A "relevant applicant" was defined in Regulation 20(3) as:

> **in a case where a special negotiating body exists, the special negotiating body; or**
> **in a case where a special negotiating body does not exist, an employee, employees' representative, or person who was a member of the special negotiating body (if that body existed previously).**

44. Only if there was no SNB in existence at the time of this complaint could the Complainant in this case be a relevant applicant. However, that the SNB existed was a matter of fact. The SNB Chair had confirmed to the CAC that the SNB unanimously decided to continue to negotiate the EWC Agreement rather than enforce the Subsidiary Requirements. Therefore it was clear that the SNB representatives were operating as an SNB in March 2017. Both parties involved had no doubt that it was still in existence and was in existence at the time of the complaint. Therefore, unless TICE invalidated that existence, the Complainant was not a relevant applicant and his claim must be dismissed.

45. In response to Mr Hayward's submission that the SNB's sole purpose was to set up the EWC and once that purpose had been taken away it must, by law, cease to exist, Mr Burns QC submitted that there was nothing in Regulations 17 or 18 which addressed the termination of an SNB. Therefore the termination of the SNB was a matter of fact and a matter of choice for

the SNB. Whilst it was common ground that the principle purpose of the SNB was to negotiate an agreement with central management, it also had secondary functions. The Employer submitted that the Complainant's contention that it could be inferred or implied from TICE that the purpose and therefore the existence of an SNB ended either once an EWC agreement was concluded or if there was a failure to conclude an EWC agreement, was not correct. Once the EWC came into existence the SNB was likely to be disbanded as it had served its purpose but it did not terminate by operation of law, just as a matter of fact. Similarly, if the SNB did not reach agreement it could either be disbanded if it had given up hope of securing agreement or it could continue to seek agreement. Once again, it was a question of fact whether it existed, not a matter of law.

46. At the end of the usual three year negotiating period it was open to the SNB to agree with the Employer that it should continue to negotiate. That was consistent with the purpose of EWC Directive 2009/38 and the principle of autonomy of the parties. Indeed, the purpose of TICE and the Directive was to encourage EWC agreements wherever possible and to impose the Subsidiary Requirements only where the parties were "unable to conclude an agreement" (Article 7). Where the parties decide that they are able to conclude an agreement but need more time in which to do so, the principle of autonomy must take precedence. Subsidiary Requirements were not needed to achieve the objective set out in Article 1(1) – any EWC Agreement concluded outside the three year period would meet that objective. In such circumstances, there was no failure on either part: "have not" was not the same as "were unable".

47. As long as the SNB continued, it made sense that it could choose to continue the negotiation process or end it and bring a Regulation 20 claim to the CAC. If the three year deadline was approaching and no agreement had been concluded, it would be open to the SNB to apply pressure on central management to reach an agreement otherwise the Subsidiary Requirements would apply. This did not allow the employer to prevaricate and worked for the employer as well. In effect, it empowered both sides. The Employer did not accept the scenario of an SNB in cahoots with an employer delaying and frustrating the setting up of an EWC arguing that in reality unions would make a stand and the SNB would fall apart as members left and it would cease to exist.

48. If the SNB decided to disband itself rather than bring a claim under Regulation 20, then (and only then) an ex-member or any employee became a 'relevant applicant'. It was plainly a fall-back position. However, where the SNB was in existence, as here, and continued to negotiate a consensual EWC Agreement, it was the SNB, and only the SNB, that could decide to call an end to the process by bringing a complaint. If, however, the SNB were content to continue negotiations it should be allowed to do so. It would be contrary to the principle of autonomy to read Regulation 20(1) in any other way.

49. Confirmation that the SNB was not terminated as suggested came from Regulation 20 itself. The SNB continued to exist for other purposes under TICE, including bringing a claim under Regulation 20 to compel an employer to set up an EWC if the SNB process had concluded or failed. Under Regulation 20(3)(a) the SNB was the primary complainant under Regulation 20(1) for compliance and enforcement purposes. If the Complainant's construction was correct, the SNB could never complain under Regulation 20(1) as it would never exist as a matter of law at the time such a complaint could arise. That would render Regulation 20(3)(a) meaningless.

50. An SNB may also complain about a failure by management to permit meetings or provide training at, or towards, the end of the three year period. A complaint under Regulation 21A(1)(a) or (c) must be brought by an SNB member. If the Complainant was correct, once three years had expired the SNB no longer existed, there would be no 'relevant applicant' at that point and it would remove the right to bring complaints under Regulation 21A at or towards the end of the three year period. The end of the three year period is often a critical phase of the SNB negotiation process. That could not be the intention of TICE, particularly as it expressly provided for a six month time limit which could well span the ending of the three year negotiation period. Therefore on a true construction of Regulations 18, 20 and 21 the SNB could and, as a matter of fact did, continue in existence when the three year period expired.

51. Asked by the Panel why TICE contained no comparable provision to extend time as found in ICE, the Employer submitted that it may have been for simplicity. A period had to be set which would allow the SNB to trigger the Subsidiary Requirements. However, if it was the case that an SNB was frustrating the process then it would be open to the CAC to say that

it was not fulfilling its duties. Here there was no failure on either part and the EWC Agreement reached was consensual.

52. The employer in *Sita* had failed to inform its employees of its decision to hold a ballot within the time period specified in the ICE Regulations and so the panel had no alternative but to make an order. Regulation 15(2) of ICE stated that where a panel found the complaint well-founded, as in *Sita*, then the panel "shall make an order". It had no discretion to do otherwise but under TICE a CAC panel had discretion. If there was a failure on the part of an employer, then it was open to the CAC to uphold the complaint but to then use its discretion, which could mean the terms of the EWC Agreement being applied. In ICE there was no such discretion as the regulations set out what the CAC must do.

53. The Complainant first complained in 2014 that the Employer had failed to consult him about the UK arrangements for the ballot and the First Complaint was then withdrawn. The Complainant stood for election on the SNB, but was not elected. He then brought the Second Claim to set aside the result of the SNB elections and impose an EWC under the Subsidiary Requirements. The Second Complaint was adjourned by agreement and on 30 January 2017 it was withdrawn. The following day he brought this Complaint on the same or similar basis of the claim he had just withdrawn.

54. The *res judicata* principle was based on the principle that there should be "finality in litigation and… a party should not be twice vexed in the same matter". Mr Burns submitted that where a CAC complaint was dismissed, the principle of issue estoppel prevented it being re-litigated. It was an abuse to re-litigate something that had been settled or decided. The Complainant's Second Complaint and this Complaint were both that central management had failed to establish an EWC. This Complaint was on broadly the same grounds as the Second Complaint that he had withdrawn. He again sought an order establishing a Regulation 18 EWC – the Subsidiary Requirements. It was an abuse of the CAC procedure to withdraw a complaint and then bring the same complaint again. The Second Claim was adjourned so that Mr Hayward could assist the SNB in reaching an EWC Agreement. The Employer and the SNB went to significant time, cost and effort to agree an EWC Agreement. The Complainant was estopped from reviving it in a third complaint, particularly as this sought to undermine the principle of autonomy referred to in the Preamble to the Directive.

55. The reason that the EWC had not been established by the time of the Complaint was not because of a 'failure of central management' but because the parties decided, in accordance with the principle of autonomy of the parties, to conclude an EWC Agreement which suited their circumstances in preference to applying the Subsidiary Requirements. That was the sole cause of the delay.

56. The EWC Agreement was in the process of being agreed at the time of the Complaint at the end of January 2017 and was concluded in March 2017. The EWC was now in place and in operation. This was not a case of a failure by central management and so the claim must be dismissed. The agreed extension served the purpose of the Directive and TICE to establish a consensual EWC where possible. The evidence shows that the extension agreed between the parties was successful.

57. Even if the chronology of events amounted to a technical breach on the Employer's part, it had a discretion under Regulation 20(4). It would be industrial madness, Mr Burns submitted, to force a strict application of Regulation 18 on the parties just because the EWC Agreement was reached outside the period of three years from the request. This would cause confusion and disarray among EWC representatives from across Europe and would likely result in less effective information and consultation processes.

58. The CAC could implement the purpose of the Directive by exercising its discretion under Regulation 20(4) not to make an order requiring an inapt, inferior and unwanted EWC (a reference to the Subsidiary Requirements) to be established inappropriately under Regulation 18. Instead, it could make orders which best assist effective information and consultation within the undertaking by implementing the parties' EWC Agreement.

59. The Directive states that the Subsidiary Requirements must apply in three situations. First, where everybody agreed they applied; second, where management refused to start negotiations; or third, where management did not refuse to negotiate but negotiations fail. Here, negotiations did not fail, nor was there an absence of agreement after the negotiations. It was correct that a three year limit applied however the Directive provided:

Subsidiary requirements

In order to achieve the objective set out in Article 1(1), the subsidiary requirements laid down by the legislation of the Member State in which the central management is situated shall apply:

…

Or

b. where, after three years from the date of this request, they are unable to conclude an agreement as laid down in Article 6 and the special negotiating body has not taken the decision provided for in Article 5(5).

60. The crucial wording was where "they are unable to conclude an agreement". Here the parties were not unable after three years, they were able to do it at that point, given a little more time. The wording of Regulation 18 and in particular the discretion of the CAC to support good industrial relations, information and consultation should be viewed in that light. Like the Complainant, the Employer considered it to be an important and widely recognised implicit duty of the CAC in the conduct of its proceedings[5]. Both parties agreed – at least on this point – that the CAC's stature and expertise in promoting and assisting parties to achieve good industrial relations across all its jurisdictions was a given, and we were invited to take a broad, activist and purposive approach to our statutory responsibilities by both sides.

61. The fact that the Complainant had already brought, and withdrawn, a Regulation 20 claim, even if not amounting to an abuse of process, was another factor weighing against exercising discretion to overturn all the SNB's work in establishing the EWC and the EWC Agreement.

62. In summary, the Complainant was not a relevant applicant and so was not entitled to bring a complaint nor had there been a failure on the part of the Employer and so the claim should be dismissed. However, if the Employer was wrong about both points and if the Panel found the complaint well-founded then the Employer would ask that the Panel use its discretion and order that the EWC Agreement continue.

[5] Paragraph 171 of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 states that in exercising functions under the Schedule the CAC must have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace but there is no similar provision to be found in TICE.

THE LAW

63. In order to consider the complaint it is necessary to consider in detail the material parts of the Regulations covering the content and scope of an EWC agreement, the provisions relating to the application of the Subsidiary Requirements, the provisions relating to a failure to establish an EWC and the provisions relating to disputes about the operation of an EWC.

64. Regulation 17 sets out the content and scope of an EWC agreement which, insofar as is material, provides as follows:

> **17.—(1) The central management and the special negotiating body are under a duty to negotiate in a spirit of cooperation with a view to reaching a written agreement on the detailed arrangements for the information and consultation of employees in a Community-scale undertaking or Community-scale group of undertakings.**
>
> **(2) In this regulation and regulations 18 and 20, the central management and the special negotiating body are referred to as "the parties".**
>
> **(3) The parties may decide in writing to establish an information and consultation procedure instead of a European Works Council.**
>
> **(4) Without prejudice to the autonomy of the parties, where the parties decide to proceed with the establishment of a European Works Council, the agreement establishing it shall determine—**
>
> **(a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;**
>
> **(b) the composition of the European Works Council, the number of members, the allocation of seats and the term of office of the members;**
>
> **(c) the functions and the procedure for information and consultation of the European Works Council and arrangements to link information and consultation of the European Works Council with information and consultation of national employee representation bodies;**
>
> **(d) the venue, frequency and duration of meetings of the European Works Council;**
>
> **(dd) where the parties decide that it is necessary to establish a select committee, the composition of the select committee, the procedure for appointing its members, the functions and the procedural rules;**
>
> **(e) the financial and material resources to be allocated to the European Works Council; and**

(f)the date of entry into force of the agreement and its duration, the arrangements for amending or terminating the agreement, the circumstances in which the agreement is to be renegotiated including where the structure of the Community-scale undertaking or Community-scale group of undertakings changes and the procedure for renegotiation of the agreement.

…

65. The application of the Subsidiary Requirements is set out in Regulation 18, which provides as follows:

18.—(1) The provisions of the Schedule shall apply if—

(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).

66. Regulation 20 provides for a complaint to be lodged with the CAC should an EWC not be established, either fully or in part, because of a failure on the part of central management. It provides, insofar as is material, as follows:

20.—(1) A complaint may be presented to the CAC by a relevant applicant who considers—

(a) that the parties have reached agreement on the establishment of a European Works Council or an information and consultation procedure, or that regulation 18 applies; and

(b) that, because of a failure of the central management, the European Works Council or information and consultation procedure has not been established at all, or has not been established fully in accordance with the terms of the agreement under regulation 17 or, as the case may be, in accordance with the provisions of the Schedule.

(2) In this regulation "failure" means an act or omission and a failure by the local management shall be treated as a failure by the central management.

(3) In this regulation "relevant applicant" means—

(a) in a case where a special negotiating body exists, the special negotiating body; or

(b) in a case where a special negotiating body does not exist, an employee, employees' representative, or person who was a member of the special negotiating body (if that body existed previously).

(4) Where the CAC finds the complaint well-founded it shall make a decision to that effect and may make an order requiring the central management to take such steps as are necessary to establish the European Works Council or information and consultation procedure in accordance with the terms of the agreement under regulation 17 or, as the case may be, to establish a European Works Council in accordance with the provisions of the Schedule.

…

67. Regulation 21A, insofar as is material, provides:

21A.—(1) A complaint may be presented to the CAC by a relevant applicant who considers that—

(a) because of the failure of a defaulter, the members of the special negotiating body have been unable to meet in accordance with regulation 16(1A);

(b) because of the failure of a defaulter, the members of the European Works Council have not been provided with the means required to fulfil their duty to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings in accordance with regulation 19A;

(c) because of the failure of a defaulter, a member of a special negotiating body or a member of the European Works Council has not been provided with the means required to undertake the training referred to in regulation 19B; or

(d) regulation 19E(2) applies and that, because of the failure of a defaulter, the European Works Council and the national employee representation bodies have not been informed and consulted in accordance with that regulation.

(2) A complaint brought under paragraph (1) must be brought within a period of six months beginning with the date of the alleged failure.

…

(10) In this regulation—

…

(c)"relevant applicant" means—

(i) for a complaint in relation to regulation 16(1A), a member of the special negotiating body;

(ii) for a complaint in relation to regulation 19A, a member of the European Works Council;

(iii) for a complaint in relation to regulation 19B, a member of the special negotiating body or a member of the European Works Council;

…

Discussion and conclusions

68. The purpose of the Directive and the Regulations is to provide employees in large community-wide multinational companies with the right to be informed and consulted about transnational issues that affect them through an EWC or some tailor-made form of transnational information and consultation procedure[6]. Included in the Regulations is a process to impose a mechanism should an employer fail to initiate negotiations or is reluctant to reach an agreement with the SNB. As the CAC was recognised as the authority on hearing complaints under similar legislation, such as ICE, it was deemed the most appropriate body to hear complaints when the recast EWC Directive was transposed into UK law in 2010[7].

69. The widely accepted role of the CAC is to encourage fair and efficient arrangements in the workplace by resolving collective disputes, either by voluntary agreement or, if necessary, through a legal decision. In the pursuit of this objective the CAC takes the view that, where statute permits, encouraging voluntary arrangements is preferable to the alternative which would be to impose on parties an outcome that perhaps neither would want.

70. Having carefully reflected on the submissions both orally and in writing as set out above, we do not find support for the Complainant's construction of Regulation 20. The Complainant is not a relevant applicant since the SNB remained in existence beyond the third anniversary of the request for the establishment of an SNB. Unlike Cinderella's carriage, the SNB retained its shape as a suitable vehicle for delivering an agreed EWC Agreement, and did not become a useless pumpkin on 3 June 2016.

[6] The tailor (or the tailor's customer) being the SNB
[7] Although the majority of the Regulations in The Transnational Information and Consultation of Employees (Amendment) Regulations 2010 did not commence until 5 June 2011.

71. We find as a fact (on the balance of probabilities and noting that the burden rests with the Complainant) that the SNB continued in existence beyond 3 June 2016, continuing to function effectively and negotiate the EWC Agreement between the parties. There was no dispute that they continued to meet and continued to be advised by Mr Hayward as an expert advisor and their work eventually bore fruit in March 2017 when the EWC Agreement was concluded. At the time of the complaint the SNB was fully functioning and was able to reach agreement. It chose to extend the time period as is evident from the papers we have seen. Indeed, Mr Hayward, in his capacity of expert adviser to the SNB, when the matter of an extension was raised said that it did not have to be in writing as this may confuse the issue.[8]

72. The Panel agreed with the Employer's submission that whether the SNB was in existence was a question of fact for the Panel to determine. On the evidence in this case it was very much alive, even if a little slow moving. It was fulfilling its purpose of seeking to conclude an agreement. The SNB continued in existence therefore until the EWC Agreement came into force on 13 March 2017. Since the SNB existed in January 2017 when the Complaint was lodged, only the SNB could be a relevant applicant. The purpose of the regulation is clear – it enables the SNB to enforce compliance and keep the employer's toes to the fire, should the need arise. It is only if an SNB does not exist, that an employee, such as the Complainant in this case, has locus standi as a relevant applicant. Up until that date, the SNB was the only potential relevant applicant.

73. The interplay between Regulations 18(c) and 20, enables and empowers an impatient SNB to threaten the cliff-edge, no deal Subsidiary Requirements by presenting a complaint under Regulation 20. It does not mean an automatic imposition of the Subsidiary Requirements on the third anniversary of a qualifying request for the establishment of an SNB.

74. The case of *Sita UK* is not comparable or analogous: the circumstances of that case were materially different to those found here. In *Sita* the employer had failed to comply with Regulation 8(3) of ICE and did not inform the employees of the forthcoming ballot within the time period prescribed. The failure was clearly on the part of the employer in not issuing the

[8] Email dated 31 May 2016 from the chair of the SNB, Eefje van Ingen, to the SNB members.

notice of the ballot within the one month timeframe but, as we will come to below, there is no evidence at all of a failure on the part of the Employer here.

75. Mr Hayward was right to draw the Panel's attention to the extension provisions in paragraph 14(5) of the ICE regulations, which on first reading is a compelling argument. But a close reading of the TICE regulations in toto, through the mechanism of an existing SNB having the power to decide when and whether to present a complaint, provides a de facto or implicit power to extend time, should that be considered desirable or necessary by the SNB.[9]

76. Accordingly, as the Complainant is not a relevant applicant, his Complaint must fail. If we are wrong about that, we turn to the remaining matters on the list of issues as agreed at the informal meeting on 5 May 2017. There are two questions outstanding - first, if the Complainant was a relevant applicant, was he barred from contending that Regulation 18 applied when the Second Complaint was withdrawn on 30 January 2017? Second, had there been any failure of central management in establishing an EWC in accordance with TICE and/or the Directive, as referenced by Regulation 20(1)(b)?

77. We do not accept the Employer's argument on the principle of res judicata or issue estoppel. The First and Second Complaints were in respect of different matters at a different time when circumstances were not the same. We would not have found in favour of the Employer on this point.

78. We now turn to the final matter to be addressed. If we are wrong on the substantive matters above, and the Complainant was a relevant applicant by virtue of the SNB ceasing to exist as the clock struck twelve on the third anniversary of the valid request thus triggering Regulation 18(c), would his complaint under Regulation 20 have succeeded? In order for his complaint to be well-founded we must be persuaded that the failure to establish the EWC was on the part of the Employer, as provided for in Regulation 20(1)(b): "that because of a failure of the central management the EWC or information and consultation procedure has not been established at all, or has not been established fully in accordance with the terms of the

[9] Publications put out by law firms such as Eversheds Llp or Lewis Silkin Llp, or BEERG are not binding on us, and the BIS publication Mr Hayward referred to is not statutory guidance. It is the Regulations that are to be construed, not commentary on the Regulations.

agreement under regulation 17 or, as the case may be, in accordance with the provisions of the Schedule." For completeness, we note that in Regulation 20(2) 'failure' is defined as "an act or omission".

79. We have seen no evidence that the failure to establish the EWC any earlier than March 2017 was as a result of any act or omission on the part of the Employer. Both the SNB and the Employer both appeared to be working to reach an agreement between them. Mr Hayward was unable to identify fault on the part of the Employer for the fact the EWC Agreement was completed outside the three year period. His concern with the terms of the concluded EWC Agreement is beside the point for the purposes of this application. The Complaint would have failed on this ground, if the Complainant had been a relevant applicant.

80. Finally, if we are wrong about all of the above, if we had found the Complaint to be well-founded, the Order that we would have made pursuant to Regulation 20(4) would have been to impose the EWC Agreement made on 17 March 2017 – in other words the terms of the agreement under Regulation 17.

Decision

81. For the reasons we have given, the Panel finds that the Complainant is not a relevant applicant in accordance with Regulation 20(3) and is therefore not entitled to bring the complaint. The Complaint is therefore dismissed.

Panel

Her Honour Judge Stacey, Chair of the Panel
Mr Simon Faiers
Ms Judy McKnight CBE

24 October 2017

Appendix 1

Names of those who attended the hearing on 25 September 2017:

For the Complainant

Mr Jonathon Hayward	Unite International Officer
Mr Gordon Lean	Unite the Union Manpower Representative

For the Employer

Mr Anthony Glassborow	ManpowerGroup
Mr Andrew Burns QC	Deveraux Chambers
Mr John Evason	Baker & McKenzie LLP
Ms Sarah Newton	Baker & McKenzie LLP