Appeal No. UKEAT/0096/18/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 & 15 October 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR GORDON LEAN — APPELLANT

MANPOWER GROUP — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Michael Potter (of Counsel) Instructed by: Unite the Union Unite House 128 Theobalds Road Holborn London WC1X 8TN
For the Respondent	Mr Andrew Burns QC (of Counsel) Instructed by: Baker & McKenzie LLP 100 New Bridge Street London EC4V 6JA

SUMMARY

CENTRAL ARBITRATION COMMITTEE (CAC)

The **Transnational Information and Consultation of Employees Regulations 1999** as amended in 2010 **(TICE)** are the domestic implementation of EU Council **Directive** 2009/38/EC. Pursuant to **TICE** Regulation 9, on 3 June 2013 a request was made by employees' representatives of the Respondent Community-scale undertaking (Manpower) to negotiate an agreement for a European Works Council (EWC). There followed ballots for membership of the necessary Special Negotiating Body (SNB) throughout Manpower's European workplaces. The Claimant Mr Lean, an employee of Manpower, stood as a candidate in the UK SNB ballot but was not elected. Negotiations between the SNB and Manpower's central management took place. This resulted in an EWC agreement signed on 13 March 2017, which was more than 3 years after the date of the request to negotiate. **TICE** Regulation 18(1)(c) states that the provisions contained in its Schedule (the Subsidiary Requirements) for establishing the EWC '*...shall apply if - ...(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).*' No such decision under Regulation 16(3) had been taken.

On 30 January 2017, i.e. before the EWC agreement was entered, the Claimant made complaint to the CAC pursuant to **TICE** Regulation 20 on the basis that (i) *'because of a failure of central management, the* [EWC]*...has not been established'* (20(1)(b)); and that (ii) as an employee and *'in a case where a* [SNB] *does not exist'* (20(3)(b)), he was a *'relevant applicant'* for that purpose. In particular he contended that the effect of Regulation 18(1)(c) was that, in the event that an EWC agreement had not been concluded between the SNB and central management within 3 years of the Regulation 9 request to negotiate, the SNB as a matter of law ceased to exist.

The CAC dismissed the complaint, holding that the existence of the SNB was a question of fact; and that the SNB in fact continued in existence after the third anniversary of the request to negotiate.

The EAT dismissed the Claimant's appeal, in particular holding that on its proper construction Regulation 18(1)(c) is not to be read as if its conditions for application of the Schedule are merely the expiry of 3 years without an EWC; that its words *'failed to conclude an agreement'* mean *'are unable to conclude an agreement*'; that as at the third anniversary of the request to negotiate the parties were not unable to reach agreement, and thereafter proceeded to do so; that the SNB continued to exist after the third anniversary; and that accordingly the Claimant was not a 'relevant applicant' for the purpose of **TICE** Regulation 20.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Claimant Mr Gordon Lean, an employee of the Respondent (Manpower) against the Decision of the Central Arbitration Committee (CAC : Her Honour Judge Stacey, Mr Simon Faiers and Ms Judy McKnight CBE) dated 24 October 2017, whereby it dismissed Mr Lean's complaint dated 30 January 2017 that, because of a failure of Manpower's central management, a European Works Council (EWC) had not been established in accordance with the provisions of the schedule to the **Transnational Information and Consultation of Employees Regulations 1999** as amended in 2010 (TICE).

2. The CAC held in particular that (i) Mr Lean was not a 'relevant applicant' within the meaning of **TICE** Regulation 20; (ii) only the Special Negotiating Body (SNB) could have been a 'relevant applicant'; (iii) in any event there had been no failure of central management; (iv) in any event, if the complaint had been well founded, its order would have been to impose the EWC agreement made between the SNB and Manpower on 17 March 2017.

3. In reaching conclusions (i) and (ii) the CAC rejected Mr Lean's argument that the SNB had ceased to exist from 3 June 2016 and that in consequence he was entitled to make application under Regulation 20 as an employee of Manpower. By his Notice of Appeal, Mr Lean renews this argument but does not challenge conclusions (iii) or (iv). Accordingly the appeal is, on the face of it, moot. However, since it raises an important point as to the operation and correct interpretation of the provisions of **TICE**, Manpower does not oppose the hearing of the appeal on that basis. I agree that it should proceed.

4. The **TICE Regulations 1999** were the domestic implementation of **EU Council Directive** 94/45/EC, *'on the establishment of a EWC or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees'*. The Regulations were amended in 2010 in order to give effect to the successor **Directive** 2009/38/EC. All subsequent references are to the latter **Directive**.

The Directive

5. The purpose of the **Directive** is identified in its Article 1.1 and 1.2. These read:

> **'(1.1). The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.**
>
> **(1.2). To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Article 5(1), with the purpose of informing and consulting employees. The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively'.**

6. This reflects the recitals to the **Directive** : see in particular recitals 9, 12 and 13.

7. The principle of autonomy of the parties is identified in recital 19:

> **'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.'**

8. The requirement of provision for the imposition of 'Subsidiary Requirements' is identified in recital 32:

> **'32. Provision should be made for certain subsidiary requirements to apply should the parties so decide or in the event of the central management refusing to initiate negotiations or in the absence of agreement subsequent to such negotiations.'**

9. The fundamental rights protected by the **Directive** are noted in recital 46:

'This Directive respects fundamental rights and observes in particular the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right of workers or their representatives to be guaranteed information and consultation in good time at the appropriate levels in the cases and under the conditions provided for by Community law and national laws and practices (Article 27 of the Charter of Fundamental Rights of the European Union).'

10. Article 4 is headed 'Responsibility for the establishment of a European Works Council or and employee information and consultation procedure'. It includes:

'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, as provided for in Article 1(2), in a Community-scale undertaking and a Community-scale group of undertakings.'

11. Article 5 concerns the SNB and includes:

'1. In order to achieve the objective set out in Article 1(1), the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments is in at least two different Member States.

2. For this purpose, a special negotiating body shall be established in accordance with the following guidelines:

(a) The Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories.

….

3. 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 the European Works Council(s), or the arrangements for implementing a procedure for the information and consultation of employees.

….

5. The special negotiating body may decide, by at least two-thirds of the votes, not to open negotiations in accordance with paragraph 4, or to terminate the negotiations already opened.

….

A new request to convene the special negotiating body may be made at the earliest two years after the above mentioned decision unless the parties concerned lay down a shorter period.'

12. Article 7 is headed 'Subsidiary Requirements' and includes:

'1. In order to achieve the objectives 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:

–where the central management and the special negotiating body so decide,

–where the central management refuses to commence negotiations within six months of the request referred to in Article 5(1), or

–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).'

….

TICE

13. The commencement of the process of negotiation is governed by Regulation 9. This provides as material:

'(1) The central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure where – (a) a valid request has been made by employees or employees' representatives…

(2) A valid request may consist of – (a) a single request made by at least 100 employees, or employees' representatives who represent at least that number, in at least two undertakings or establishments in at least two different Member States;

…..

(5) The central management may initiate the negotiations referred to in paragraph (1) on its own initiative.'

14. As to the SNB, Regulation 11 provides for its functions as follows:

'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.'

15. As to its composition, Regulation 12 includes:

'(1) Subject to paragraph (3), the special negotiating body shall be constituted in accordance with paragraph (2).

(2) In each Member State in which employees of a Community-scale undertaking or Community-scale group of undertakings are employed to work, those employees shall elect or appoint one member of the special negotiating body for each 10% (or fraction of 10%) which those employees represent of the total number of employees of the Community-scale undertaking or Community-scale undertakings employed in those Member States… its controlling undertaking or one or more controlled undertakings.

…

(4) The special negotiating body shall inform the central management, local managements and the European social partner organisations of the composition of the special negotiating body and of the date they propose to start negotiations.'

16. Procedures for the elections for UK members of the SNB are then set out in Regulations 13 and 14.

17. Regulation 16 governs the negotiation procedure. As material it provides:

> **'(1) With a view to concluding an agreement referred to in regulation 17 the central management must convene a meeting with the special negotiating body and must inform local managements accordingly.**
>
> **(1A) Within a reasonable time both before and after any meeting with the central management, the members of the special negotiating body are entitled to meet without the central management or its representatives being present, using any means necessary for communication at those meetings.**
>
> **(2) Subject to paragraph (3), the special negotiating body shall take decisions by a majority of the votes cast by its members and each member of the special negotiating body is to have one vote.**
>
> **(3) The special negotiating body 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.**
>
> **(4) Any decision made under paragraph (3) shall have the following effects—**
>
> > **(a) the procedure to negotiate and conclude the agreement referred to in regulation 17 shall cease from the date of the decision; and**
> >
> > **(b) a purported request made under regulation 9 less than two years after the date of the decision shall not be treated as such a request, unless the special negotiating body and the central management otherwise agree.**
>
> **(5) For the purpose of the negotiations, the special negotiating body may be assisted by experts of its choice…who may, at the request of the special negotiating body, attend in an advisory capacity any meeting convened in accordance with paragraph (1).'**

18. As to the content and scope of an EWC agreement, Regulation 17 includes:

> **'(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.'**
>
> **….**

19. As to Subsidiary Requirements, Regulation 18 provides:

> **'(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).'

Regulation 18(1)(c) is at the heart of this case.

20. The Schedule to the Regulations then sets out a backstop of detailed provisions for establishing the EWC in the Community-scale undertaking or group of undertakings.

21. Part V of the Regulations concern compliance and enforcement. Under the heading 'Failure to establish European Works Council or information and consultation procedure', Regulation 20 provides as material:

'(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 agreement under regulation 17 or, as the case may be, to establish a European Works Council in accordance with the provisions of the Schedule.'

22. Under the heading 'Disputes about failures of management', Regulation 21A provides as material:

'(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 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 16(1A)…

(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 –

(a) 'defaulter' means, as the case may be – (i) the management of any undertaking belonging to the Community-scale group of undertakings; (ii) the central management…

…

(c) 'relevant applicant' means – (i) for a complaint in relation to regulation 16(1A), a member of the special negotiating body…'

23. As to interpretation of the Regulations in the light of the Directive, it is uncontroversial that when a national court interprets a provision of national law, it is required to do so as far as possible in the light of the wording and purpose of community law in order to achieve the result sought by Community law: **Marleasing SA v La Comercial Internacional de Alimentacion SA C-106/89** [1990] ECR I-4135. The only constraints on the broad and far-reaching nature of that interpretative obligation are that (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed, and (b) that the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate : see **Vodafone 2 v Revenue and Customs Commissioners** [2010] Ch 77 at [38] and cases cited therein.

The agreed facts

24. These are set out in paragraphs 22 and 23 of the CAC Decision. Sufficient to record that Manpower is a Community-scale undertaking with its central management based in the USA. On 3 June 2013 a valid request was made pursuant to Regulation 9. There followed ballots for membership of the necessary SNB throughout Manpower's European workplaces. Mr Lean stood as a candidate in the UK SNB ballot but was not elected.

25. The first meeting of the SNB took place on 4 September 2014. Pursuant to the powers under Regulation 16(5), Mr Jonathan Hayward (International Officer of UNITE) was appointed as the paid expert to advise the SNB. Negotiations with management took place in February 2015 and continued throughout that year and in 2016. The SNB's work included taking expert advice from Mr Hayward in July and December 2016.

26. In early 2017 the SNB representatives considered the final amendments to a draft agreement. An EWC agreement approved by the requisite majority of SNB representatives had been signed by 13 March 2017. The agreement provided for SNB representatives to become EWC representatives without further elections or appointment and for employee representatives to serve a four-year term, in each case save where national legislation dictated otherwise. The consequence was that there would be no further opportunity to stand for election to the EWC until a date 7 years after the previous ballot. This was a considerable disappointment to Mr Lean and other potential candidates.

The CAC hearing

27. Mr Lean made his application to the CAC on 30 January 2017, i.e. before the EWC agreement had been concluded. He applied under Regulation 20, contending that he was a 'relevant applicant' within the meaning of Regulation 20(3)(b) because the SNB had ceased to exist on or immediately after the 3 June 2016 and he was an employee of Manpower. Manpower disputed that SNB had ceased to exist or therefore that Mr Lean was a 'relevant applicant.'

28. At the hearing Mr Lean was represented by Mr Jonathan Hayward. His contentions were based on the provisions of Regulation 18(1)(c). He submitted that, if upon the expiry of 3 years from the date of the Regulation 9 request, the SNB and central management had not concluded

an EWC agreement within the meaning of Regulation 17, three consequences flowed. First, the provisions of the Schedule as to 'Subsidiary Requirements' automatically took effect. Secondly, the SNB's statutory purpose of negotiating an EWC agreement came to an end. Thirdly, that as a matter of law the SNB thereupon ceased to exist. As at 3 June 2016 there was no concluded EWC agreement. Accordingly, Mr Lean was entitled to apply to the CAC under Regulation 20 for an Order that an EWC be established in accordance with the Subsidiary Requirements.

29. The CAC rejected this analysis. Preferring the submissions on behalf of Manpower, it held that the question of whether the SNB was in existence was a question of fact. It found as a fact that the SNB had continued in existence beyond 3 June 2016. Thus:

> **'71. .... There was no dispute that they continued to meet and continued to be advised by Mr Hayward as an expert adviser 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.**
>
> **72. …. On the evidence in this case it** *[i.e. the SNB]* **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.'**

30. Accordingly, the CAC concluded that only the SNB could be a 'relevant applicant'. It held that the purpose of Regulation 20 was clear. Thus:

> **'72. … 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.'**

31. As to the relationship between Regulation 18(1)(c) and 20 it held that this:

> **'73. … enables and empowers an impatient SNB to threaten the cliff edge…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.'**

32. In case it was wrong on these matters, the CAC went on to consider the substance of the complaint under Regulation 20. It held that the non-establishment of a CEO of the EWC was not because of any 'failure of the central management'. Thus:

> **'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 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.'**

33. Furthermore, if it had found the complaint to be well-founded, its order pursuant to Regulation 20(4) would have been to impose the EWC Agreement which had in fact been reached by the SNB and central management on 17 March 2017.

The appeal

34. On behalf of Mr Lean, his Counsel Mr Michael Potter submitted that the CAC failed properly to construe the statutory role of the SNB and the parameters of its existence as a legal entity. He identified the case as dependent on a short point of statutory construction and focused his submissions on Regulations 9, 11, 16, 18 and 20. The SNB was a creature of statute created for the purpose of negotiation within the procedures of the Regulations. He accepted that if negotiations ended in an agreement under Regulation 17, then the SNB as a party to that agreement had standing to make an application to the CAC for its enforcement : Regulation 20(1)(a).

35. However, it was otherwise in two particular circumstances where agreement had not been reached between the SNB and central management. The first was where the SNB made a decision to terminate negotiations pursuant to Regulation 16(3). Upon that decision being made, the procedure to negotiate and conclude the agreement ceased : Regulation 16(4)(a). In consequence the SNB's statutory function and purpose (Regulation 12) came to an end. Without such purpose

it must cease to exist. Thus once the SNB had terminated negotiations under Regulation 16(3) it could not reopen them.

36. Pressed on the reference to the SNB in the immediately following sub-Regulation 16(4)(b), Mr Potter submitted that this was no obstacle to the argument. It allowed for a fresh request to be made under Regulation 9 within 2 years of the SNB's decision to terminate negotiations, if the SNB and central management so agreed. However that must be construed as a reference to an agreement made between the parties before the date of the SNB decision to terminate negotiations. The Regulation must be construed against the industrial reality that the time for entering such an agreement with central management was when the parties were on the verge of breaking off negotiations.

37. The second circumstance was provided by Regulation 18(1)(c). If upon the expiry of the 3-year period from the date of the request the SNB and central management had not reached agreement (and the SNB had not taken the decision to terminate negotiations under Regulation 16(3)), then the Subsidiary Requirements automatically applied. The functions and purpose of the SNB were thereupon exhausted and it ceased to exist. If so, it would be irrelevant that a body calling itself the SNB continued to meet and discuss terms with central management. As a matter of law the SNB had ceased to exist and such continuing activity was of no legal effect.

38. As to the language of Regulation 18(1)(c), Mr Potter submitted that the words 'failed to conclude' in the Regulation mean 'not concluded'. This meaning was plain and properly reflected the words 'are unable to conclude an agreement' in the third category identified in Article 7.1 of the **Directive**. The effect of Article 7 and Regulation 18(1)(c) was to impose a

guillotine on negotiations with immediate and automatic effect. This was further emphasised by the mandatory terms of the words 'shall apply' in the Article and the Regulation.

39. He then contrasted the provisions of the **Information and Consultation of Employees Regulations 2004** (ICE). Regulation 14(5) provided for an extension of the statutory 6-month period of negotiation if, before the end of that period, *'the employer and the majority of the negotiating representatives agree that that period should be extended'* and for further subsequent extensions by agreement. There being no comparable provision in the **TICE**, the implication was that the parties were not entitled to extend the time for negotiations.

40. He submitted that the effect of the interpretation reached by the CAC was that SNB and central management could allow negotiations to go on and on without limit of time. In circumstances where the SNB were the elected representatives of the employees, that was a profoundly undemocratic consequence which cut across the fundamental rights which were involved : see recital 46 of the **Directive**. The principle of autonomy of the parties could not be allowed to have that malign effect.

41. As to Regulation 20, his construction of Regulation 18 did not leave the SNB powerless. In circumstances where agreement had been reached within the 3-year period, it could apply for an enforcement order under the first part of Regulation 20(1)(a). As to Regulation 21A(1)(a) and (10)(c)(i), he accepted that the consequence would be that a complaint by 'a member of the special negotiating body' could not be made after the lapse of the 3-year period under Regulation 18(1)(c); but that provided no basis to doubt the correct construction of the latter.

Conclusion

42. For the reasons essentially advanced by Mr Andrew Burns QC on behalf of Manpower, I do not accept these submissions. First, I consider that Regulation 16(4) is directly at odds with the proposition that the SNB ceases to exist upon its termination of negotiations with central management, pursuant to the preceding sub-Regulation (3). The necessary implication of the saving provision in Regulation 16(4), i.e. 'unless the special negotiating body and the central management otherwise agree' is that the SNB does continue to exist after it has made and communicated a decision to terminate negotiations. Its role is not thereby exhausted and includes the power to agree with central management to override the statutory 2-year minimum period before a new request can be made under Regulation 9. The contrary construction conflicts with the natural reading of Regulation 16(3) and (4) and the underlying principle of the autonomy of the parties. Nor do I see any basis for the suggestion that it accords with industrial reality to confine the Regulation 16(4) saving provision to agreements entered before the SNB has terminated negotiations.

43. Secondly, on its proper construction Regulation 18(1)(c) is not to be read as if its conditions for application of the Schedule are merely the expiry of 3 years without agreement being reached. In my judgment the natural meaning of the words *'the parties have failed to conclude'* is something more than 'the parties have not concluded'. That something more is made clear by the language of Article 7, which identifies the circumstance that the parties *'are unable to conclude an agreement'*. I recognise that recital 32 of the Directive requires further provision to be made *'in the absence of agreement'*, but the relevant provision in Article 7 adopts the distinct language of inability to conclude an agreement. In my judgment this interpretation of *'failed to conclude'* as meaning 'are unable to conclude' is a permissible interpretation of Regulation 18(1)(c) which does not go against the grain of the Regulations. On the contrary it

accords with the principle of the autonomy of the parties and the aim of consensus. 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. In this respect it is relevant, as Mr Burns noted, that Article 13 of the first (1994) **Directive** contained express provision that it did not apply where there was already an agreement covering the entire workforce which provided for the transnational information and consultation of employees.

44. In the present case, it is clear from the unchallenged findings of fact that the parties were continuing to negotiate after the third anniversary of the request, i.e. after 3 June 2016. There is nothing to suggest that they had reached a stage where they were unable to reach agreement. They proceeded to reach agreement in March 2017.

45. Thirdly, and whatever the correct interpretation of Regulation 18(1)(c), it does not follow that upon the occurrence of the relevant event the SNB thereby ceases to exist. The Regulations do not contain any express or implied provision to that effect. As I have held, it does not cease to exist upon its decision under Regulation 16(3) to terminate negotiations. As Mr Potter has rightly accepted, it does not cease to exist upon entering an EWC agreement with central management. There is no reason why it should be treated as ceasing to exist once Regulation 18 applies. On the contrary, Regulation 20(1)(a) identifies the first condition for the presentation of a complaint by a 'relevant applicant' as that the parties have reached agreement *'or that Regulation 18 applies.'* The ability of the SNB to lay a complaint for the purpose of enforcing the establishment of an EWC may be necessary in either circumstance.

46. I see no good reason to distinguish those circumstances, nor does Regulation 20 do so. Regulation 20(3)(b) merely provides a backstop ability for others to apply in circumstances where

the SNB has for some reason ceased to exist. One obvious example would be where the SNB in question has decided to wind up its activities.

47. Fourthly, Regulation 14(5) of the **ICE** does not provide a useful comparison. The context of that express provision for the parties to extend the time to negotiate is the provision in Regulation 14(3) which limits negotiations to a period not exceeding 6 months. **TICE** Regulation 18(1)(c) is not such a provision. In any event, the autonomy of the parties entitles them to continue to negotiate towards an agreement.

48. Fifthly, I do not accept that the consequence is that negotiations may be continued interminably and against the interests of employees such as Mr Lean. The construction of these statutory provisions must be on the basis that each party is negotiating in good faith and in accordance with its duty under Regulation 17(1). There is nothing to suggest that either party failed to do so.

49. Sixthly, the further effect of Mr Lean's argument would be to deprive or limit the ability of a former member of the SNB to make a complaint under Regulation 21A(1)(a) in circumstances where the relevant breach occurred towards the end of the 3-year period. That makes no sense and cannot be the statutory intention.

50. For all these reasons, I conclude 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. Accordingly this appeal must be dismissed.