Neutral Citation Number: [2024] EAT 104

Case No: EA-2021-000901-AS
EA-2021-001229-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 July 2024

Before :

THE HONOURABLE MR JUSTICE CHOUDHURY

- -

Between :

HSBC EUROPEAN WORKS COUNCIL **Appellant**

- and -

HSBC CONTINENTAL EUROPE **Respondent**

- -
- -

Fergus McCombie (instructed by **EWC Legal Advisers**) for the **Appellant**
Andrew Burns KC (instructed by **A&O Shearman**) for the **Respondent**

Hearing date: 22 May 2024

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JUDGMENT

SUMMARY

CENTRAL ARBITRATION COMMITTEE (CAC)

The Appellant and the Respondent Employer were party to a European Works Council Agreement under which the central management was located in the United Kingdom. The UK was, at the time of the Agreement – October 2015 - a member state within the EEA. The Employer took the view that, post-Brexit, for the purposes of the *EU Council Directive 2009/38 EC* ("the Directive"), the UK could no longer be the location of the central management under the Agreement and gave notice that as from 1 January 2021, it would (amongst other matters) designate a representative agent in Ireland to assume the role of central management, exclude HSBC's UK business from the scope of the Agreement and exclude UK Representatives as members of the EWC. The EWC objected and brought two complaints before the CAC contending that the Employer had failed to comply with the Agreement and ought to have treated existing arrangements as continuing after exit-day. The CAC concluded that the complaints were not well-founded. The Appellant appeals against both decisions of the CAC by way of two separate appeals.

Held, dismissing the appeals, that the CAC had not erred in its interpretation of the Agreement. The parties had expressly contemplated that there could be changes to the scope of the Agreement dependent on whether the Employer's operations expanded or contracted so as to include or exclude a Member State, and it could not be said to be outside the contemplation of the parties that the scope could also be affected by changes in EU membership status. In other words, the Agreement was intended to include operations in Member States as they are from time to time. After exit-day, the UK could no longer be where central management was located for the purposes of the Directive. This had the effect of changing the scope of the Agreement by operation of law. The other changes as to the applicable regulations and choice of law followed from that change and were consistent with the terms of the Agreement.

THE HONOURABLE MR JUSTICE CHOUDHURY:

Introduction

1. The Appellant, the HSBC European Works Council ("the EWC"), and the Respondent Employer ("HSBC") were party to a European Works Council Agreement ("the Agreement") under which the central management was located in the United Kingdom. The UK was, at the time of the Agreement – October 2015 - a member state within the European Economic Area ("EEA"). This appeal concerns the effect of Brexit on the Agreement after the UK ceased to be a member state of the EEA. HSBC took the view that for the purposes of the *EU Council Directive 2009/38 EC* ("the Directive") the UK could no longer be the location of the central management under the Agreement and, on 4 December 2020, gave notice that as from 1 January 2021, it would (amongst other matters) designate a representative agent in Ireland to assume the role of central management, exclude HSBC's UK business from the scope of the Agreement and exclude UK Representatives as members of the EWC. The EWC objected and brought a complaint before the Central Arbitration Committee ("CAC"). By a decision dated 22 June 2021 ("the First Decision") the CAC concluded that the complaint was not well-founded. By a further decision dated 11 August 2021 ("the Second Decision"), the CAC concluded that further complaints as to HSBC's failure to comply with certain terms of the Agreement were also not well-founded. The Appellant appeals against both decisions of the CAC by way of two separate appeals.

Background

2. HSBC is a well-known Bank employing staff in several European countries, both within and outside the EEA. On 9 October 2015, HSBC's central management and members of the Special Negotiating Body representing HSBC's employees in the EEA Member States entered into the Agreement. Clause 2.3 of the Agreement provided:

> "2.3 For the purposes of the EWC Directive, HSBC Central Management is situated in the United Kingdom which means that this agreement is subject to the United Kingdom's *Transnational Information and Consultation of Employees Regulations 1999* and 2010 ("TICER")…"

3. Article 5 of the Agreement, under the heading, "Operations Covered" provided:

> "5.1 This Agreement covers all wholly-owned or majority controlled operations of HSBC in the EEA Member States. A list of operations covered in this agreement is listed in Appendix 1. The list will be amended in the event of merger or acquisition or disposal." (Emphasis added)

4. The list at Appendix 1 sets out those countries "as at End August 2015" comprising the EWC and the number of employees in each such country. The list included the UK with 48,307 employees and Ireland with 382 employees.

5. Article 7 of the Agreement dealt with the appointment of EWC members. So far as relevant, it provided:

> "7.1 For the purposes of this Agreement, the EWC members are those HSBC employees who, from time to time, have been elected or appointed to the EWC under the terms of this Agreement. The EWC members will be selected in accordance with the procedure providing for the election/appointment of EWC members under the requirements of that country's national law implementing Council Directive 2009/38/EC. Further information in relation to the selection is set out in Appendix 1 to this Agreement. The Select Committee shall, if an election is called, be informed, in advance, of the method of election and provided with full details of any election result.
>
> 7.2 EWC members will be elected / appointed on a country basis.
>
> 7.3 HSBC employees of all functions / business lines working within the EEA Member States will be included in the calculation of staff numbers of each EEA Member State. Each EEA Member State in which HSBC has operations is entitled to one member plus one additional member for every 10% tranche (or part thereof – rounded up to the closest whole 10%) of the entire European workforce located in that country/function/business line. Where HSBC has 20 employees or fewer in an EEA Member State, any such EEA Member State will not be entitled to their own member and the employees in that EEA Member State will be represented by such other EEA Member State's member(s) as determined by HSBC Central Management and the Select Committee.
>
> 7.4 The number of members on the EWC will be amended in the event of the expansion of HSBC into new geographical areas or in the growth of employee numbers within the EEA Member States.

> 7.5 On the basis of the current scope of HSBC's operations in the EEA, employee representation by country will be as per Appendix 1. These figures will be updated annually, based on headcount as of December 31st. The Select Committee will receive in advance a full list of updated employee representatives and substitutes.
>
> …
>
> 7.9 EWC members and substitutes who cease to be employees of HSBC or work within the Business area or Country they represent for whatever reason shall cease to be members of the EWC. They shall immediately forego any rights as employee representatives on the EWC but shall continue to be bound by a duty of confidentiality. In the event that no substitute is available this shall be discussed between HSBC Central Management and the Select Committee." (Emphasis added)

6. Article 18 provided that the Agreement shall renew automatically after an initial period of four years and that it was terminable thereafter by either party upon the giving of six months' written notice. Article 18.5 dealt with amendment:

> "18.5 If HSBC Central Management and the members of the EWC deem it necessary, this Agreement may be amended by mutual consent. Either HSBC Central Management or the EWC, following a two-thirds majority vote of EWC members, can request the revision of all or part of this Agreement. A revision request must be sent in writing to all signatories, setting out the purpose of the revision request. If the revision is not agreed within six months from the opening of negotiations, the revision request is considered to be ineffective." (Emphasis added)

7. Article 19 of the EWC Agreement provided that the Agreement was negotiated under Article 6 of the Directive and that it is to be governed and construed according to TICER and English Law.

8. Brexit meant that, as of 11pm on 31 December 2020 ("exit day"), the UK would cease to be a member state. In November 2020, HSBC decided to designate Ireland as its representative agent with effect from 1 January 2021. Pursuant to the Directive, Ireland, as representative agent, would be deemed to be central management. By a letter dated 4 December 2020, HSBC wrote to the EWC to give notice of its intention to designate HSBC Ireland as its central management representative agent with effect from 1 January 2021. The notice was accompanied by an updated version of the Agreement ("the Amended Agreement") confirming the appointment of HSBC Ireland. The Amended Agreement contained amended and additional provisions under Arts 2 and 19. Articles

2.3 to 2.5 of the Amended Agreement provided:

> "2.3 HSBC Central Management is situated in the United Kingdom, which meant that this agreement was subject to the United Kingdom's Transnational Information and Consultation of Employees Regulations, 1999 and 2010 (TICER) until 31 December 2020 when the transition period following the United Kingdom's withdrawal from the EEA ended. As HSBC Central Management is no longer situated in an EEA Member State, it has designated HSBC Securities Services (Ireland) DAC in the Republic of Ireland to act as its representative agent from 1 January 2021 (the "Representative Agent").
> 2.4 Any references to HSBC Central Management in this agreement shall include reference to the Representative Agent with effect from 1 January 2021
> 2.5 With effect from the date of appointment of the Representative Agent, this agreement is governed by Irish law and subject to Ireland's Transnational Information and Consultation of Employees Act 1996 (as amended) ("TICEA")." (Emphasis added)

9. Article 19 of the Amended Agreement provides:

> "19.1 This Agreement is negotiated under Article 6 of [the Directive] and is to be governed and construed according to TICEA and Irish Law
> 19.2 Any disputes between the parties as regards the meaning and/or operation of this Agreement shall be resolved in accordance with the procedures set out in the Transnational Information and Consultation of Employees Act 1996 (as amended).
> 19.3 The English text of this Agreement is the binding text.
> 19.4 The parties agree that the courts of Ireland shall have non-exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).
> 1 9.5 The signatories of this Agreement hereby confirm that they are fully authorised to agree the terms of this Agreement."

10. The letter also stated that as the Agreement covered only EEA operations, HSBC had concluded that it was no longer appropriate for the UK Business to remain involved in its EWC, or for UK employees to be represented by it, from 1 January 2021.

11. By an email dated 2 June 2021, Mr Philip Sack, Director of EWC Legal Advisers, lodged a complaint with the CAC pursuant to Regulation 21 of TICER, that HSBC Central management had not complied with the terms of the Agreement by:

    a. Excluding its UK business from the scope of the Agreement in breach of Article 5 (Operations Covered) of the Agreement (as interpreted by the amended TICER);

    b. Excluding UK representatives from the EWC in breach of Article 7 (Appointment of EWC Members of the Agreement (as interpreted by the amended TICER)); and

c. Amending the Agreement without the consent of the members of the EWC in breach of Article 18.5 of the Agreement.

12. The email went on to state that

> "The EWC considers that references in the EWC Agreement to "the EEA Member States" should now be read as references to "the Relevant States" in accordance with the amended TICE Regulations".

13. HSBC lodged a detailed response to the Complaint on 16 June 2021, rejecting any suggestion that it was in breach and contending that the changes were necessitated by the fact that the UK was no longer an EEA Member State.

14. The CAC considered the matter on the papers. By the First Decision, the CAC concluded as follows:

> "25) In relation to the first complaint, Article 5 of the Agreement reads as follows:
> OPERATIONS COVERED
> 5.1 This Agreement covers all wholly-owned or majority controlled operations of HSBC in the EEA Member States. A list of operations covered in this agreement is listed in Appendix 1. The list will be amended in the event of merger or acquisition or disposal.
> The Panel is satisfied that Article 5 is clear and unambiguous in stating that the Agreement is confined to the Employer's operations in the EEA Member States. It is not disputed that the UK ceased to be a party to the EEA Agreement after its withdrawal from the EU. The Complainant contended that references in the Agreement to "the EEA Member States" should, following withdrawal, be read as references to "the Relevant States" in accordance with amended TICER and should thus include the UK within its scope. The Panel does not accept that the Agreement can be read as covering a "Relevant State" as defined in amended TICER in the absence of any express amendment to the Agreement to this effect; the Panel does not accept that the reference to the concept of a "Relevant State" in amended TICER means that the express terms of the Agreement are thereby overridden. Having examined both the original and the amended Agreement the Panel is satisfied that no amendment was made to the Agreement changing its scope from EEA Member States to Relevant States as defined in amended TICER. The Panel has concluded therefore that the UK business ceased to be covered by the Agreement once the UK ceased to be an EEA Member State and on this basis the Panel rejects the first complaint.
> 26) In relation to the second complaint. Article 7 of the Agreement, so far as material reads as follows:
> …
> The Employer submitted that the exclusion from the EWC of UK representatives was wholly in accordance with the express wording of Articles 7.2 and 7.3, under which the defining criterion was that the operation in question must be located within an EEA Member State in order to be entitled to a representative. The Employer also said that Article 7.5 provided for annual updating of Appendix 1 (the

> list of how many representatives each country is entitled to based on employee headcount) with no provision for discretion regarding that updating: it flowed directly, objectively and automatically from the numbers of employees in the EEA countries at the time. The Panel is satisfied that Articles 7.3 and 7.5 are clear in relating the number of employee representatives to which a country is entitled to the scope of the Employer's operations in the EEA and that on that basis a country which is outside the EEA is not entitled to a representative. The Panel has therefore concluded that the exclusion of UK representatives from the EWC does not constitute a breach of the Agreement.
> 27) In relation to the third complaint, Article 18.5 reads as follows:
> ....
>
> The Panel accepts the Employer's submission that the exclusion of the UK business from the scope of the Agreement and exclusion of UK representatives from the EWC did not require any amendments to Articles 5 or 7 respectively and that these exclusions followed automatically from the UK ceasing to be a EEA Member State. The Panel observes that good industrial relations practice would have favoured some form of prior consultation with the EWC on these measures but is satisfied that this was not required under the Agreement.
>
> 28) As stated in paragraph 22 above, the Panel has not considered the amendments to Articles 2 and 19 for the purposes of this decision. The procedure which should be followed by the Complainant if it wishes the Panel to consider those amendments under the heading of the third complaint is set out in that paragraph." (Emphasis added)

15. Accordingly, the complaints were held to be not well-founded. The CAC gave the Appellant the opportunity to challenge further matters not included within the scope of the first complaint and stated that if it wished to do so, it should inform the CAC in writing within 21 days of the first decision.

16. On 12 July 2021, the Appellant gave notice that it wished to pursue a complaint regarding the changes to the Agreement, in particular to Articles 2.3, 2.4, 19.1, 19.2 and 19.4 and the inclusion of a new Article 2.5.

17. Once again, HSBC lodged a detailed response, on which the Appellant was given an opportunity to comment. That response and those comments are summarised extensively at [11] to [34] of the Second Decision, which was issued on 11 August 2021. The CAC's conclusions were as follows:

> "36) The Panel has considered the submissions and the accompanying documentation provided by the parties carefully. Having reviewed the documentation the Panel is satisfied that, for the reasons set out below, the complaint regarding these amendments is not well-founded. The Panel is satisfied

that it was able to reach a decision on the complaint fairly without a hearing and on the basis of the documentation before it without further submissions from either party. The Panel noted the parties' submissions on the issue of the CAC's jurisdiction under amended TICER. In the light of its conclusions on the substance of the complaint referred to, the Panel decided that it would be appropriate to dispose of that complaint on the assumption that the CAC had jurisdiction to consider it under amended TICER without determining the question of jurisdiction under amended TICER either way. For the avoidance of doubt, the Panel has not given any consideration to the question of jurisdiction under amended TICER for the purpose of this decision and nothing in this decision should be taken as expressing the Panel's view on any of the submissions relating to that question. The Panel's decision is based entirely on its interpretation of the Agreement and whether the amendments made by the Employer to the Agreement were made in breach of Article 18(5) of the Agreement.

37) The amendments to the Agreement which are the subject of the complaint cover two substantive areas: the designation of HSBC Ireland as the Employer's representative agent with effect from 1 January 2021 and the change in the law governing the Agreement from English to Irish law and, in particular, the exclusion of English law. This decision addresses each of these areas in turn.

38) It is common ground between the parties that the Employer was required by EU law to designate a representative agent within an EU Member State for the purposes of the Directive once the transition period following the UK's withdrawal from the EU ended. The Complainant did not appear to dispute the choice of HSBC Ireland as the representative agent for the purposes of the Directive but nevertheless sought to argue that the amendments to Articles 2.3 and 2.4 which reflect this change constituted a breach of the Agreement as the procedure in Article 18.5 of the Agreement had not been followed prior to the amendments being made. The Panel does not uphold this contention. The Panel is satisfied that once HSBC Ireland had been designated as the representative agent for the purposes of the Directive (such designation not having been disputed by the Complainant) it would have been anomalous for the Agreement to continue to state, as it did in Article 2.3 in its unamended form, that for the purposes of the Directive the central management was situated in the United Kingdom.

The Panel has therefore concluded that it was a necessary consequence of the change of representative agent to HSBC Ireland that the Agreement should be amended to reflect that change and rejects the submission that the amendments to Articles 2.3 and 2.4 were made in breach of the Agreement because the amendments were not agreed by the EWC. The Panel also observes that the procedure in Article 18.5 does not appear to have been designed to cover amendments which are required by law rather than being proposed at the will of the parties. Article 18.5 lays down a procedure for amending the Agreement by mutual consent in which failure to agree to a revision of the Agreement within six months of the opening of negotiations means that the revision request is "considered to be ineffective" and the status quo prevails. It is clear that the Agreement would no longer have been compliant with the Directive if the substantive position as represented in unamended Article 2(3) had remained unchanged; indeed, under the Directive the role of representative agent would have been automatically transferred to the establishment or group undertaking employing the greatest number of employees in a Member State had the Employer itself failed to designate a new representative agent in a Member State. In such circumstances it would be anomalous for the text of the Agreement not to reflect the new reality regardless of whether the EWC had explicitly consented to that

amendment.

39) The remaining amendments to Article 2.3, the amendments to Articles 19.1, 19.2 and 19.4, and the inclusion of Article 2.5, refer to the change in the law governing the Agreement from English to Irish law. The Complainant acknowledged that an EWC governed by TICER would not comply with the Directive and that it followed from the designation of HSBC Ireland as the representative agent for the purposes of the Directive that Irish law would apply to the Agreement (see paragraphs 27 and 29 above). However the Complainant submitted that the application of Irish law did not preclude the continued application of English law; rather, both systems would apply unless and until the EWC had consented to the removal of English law in accordance with the procedure in Article 18.5. The Employer submitted that the change to Irish from English law occurred as a matter of law rather than as a matter of the choice of the parties to the Agreement and that the amendments to Articles 2 and 19 merely informed readers of the accurate situation, removing any room for confusion between the text of the Agreement and the current legal position.

40) It was common ground between the parties that it followed from the designation of HSBC Ireland as the representative agent for the purposes of the Directive that Irish law would apply to the EWC (although they differed on whether English law would also continue to apply, the Complainant saying that Article 19.4 of the Agreement envisaged that the Agreement may be subject to more than one jurisdiction). On that basis it was clear that some amendments to Articles 2 and 1 9 of the Agreement, which in their unamended form referred only to English law and TICER, were required to reflect the application of Irish law, even if English law were to continue to apply. The Panel does not consider that the introduction of references to Irish law in these articles without the procedure in Article 18.5 being followed would, in itself, constitute a breach of the Agreement as it would merely reflect the legal position as understood by both parties. The Panel also reiterates its observation set out in paragraph 38 above that Article 18.5 does not appear to be designed to cover situations in which, should the parties fail to reach agreement on a proposed amendment, retention of the status quo is not an option.

41) The Complainant submitted that the Employer had breached the Agreement by seeking to remove the application of English law to the Agreement without the Complainant's consent. The Complainant submitted that the choice of law governing a European Works Council Agreement was a matter for negotiation between the parties and the designation of HSBC Ireland did not automatically mean that English law ceased to apply. The Panel is content to assume for the purposes of this decision (without deciding the matter) that the choice of law governing a European Works Council agreement is potentially a matter for negotiation. However the Panel is satisfied that under the Agreement the parties saw the designation of the central management for the purposes of the Directive governing the Agreement as inextricably linked. Article 2.3 in its unamended form reads as follows:

For the purposes of the EWC Directive HSBC Central Management is situated in the United Kingdom which means that this agreement is subject to the United Kingdom's Transnational Information and Consultation of Employees Regulations, 1999 and 2010 (TICER).

It follows from this provision that once the Employer's central management ceased to be situated in the UK for the purposes of the Directive, HSBC Ireland being the

'deemed central management' for those purposes, the Agreement ceased, under the terms of that Agreement, to be subject to TICER. The Panel does not consider

> that the Employer was unilaterally and illegitimately removing itself from TICER's scope as the Complainant contended; rather it was a consequence of the link (and severance of the link) between the situation of central management for the purposes of the Directive and the governing law laid down in unamended Article 2.3, itself a product of agreement between the parties.
> 42) As stated in paragraph 40 above the Panel regards the inclusion of Article 2.5 and the amendments to Articles 19.1, 19.2 and 19.4 as a necessary consequence of the application of Irish law to the Agreement following the designation of HSBC Ireland as the representative agent. The removal of any reference to English law in those articles follows from the Panel's interpretation of Article 2.3 set out in paragraph 41 above and does not, in the Panel's view, constitute a breach of the Agreement.
> 43) The Complainant drew attention to the wording of Article 19.4 which states that the Agreement is subject to the non-exclusive jurisdiction of the courts of England and Wales, in its unamended form and, as amended, to the non-exclusive jurisdiction of the courts of Ireland. The Complainant said that this meant that the Agreement itself envisaged that it may be subject to more than one jurisdiction to settle any dispute or claim arising. The Panel does not consider that, in either its unamended or amended form, Article 19.4 changes the identity of the governing law specified in Articles 2.5, 19.1 and 19.2; rather it deals with the fora in which disputes or claims under that governing law may be settled. The CAC is a creature of statute whose jurisdiction does not extend to TICEA or other provisions of Irish law. The Panel does not consider, therefore, that Article 19.4 can be relied upon to retain the CAC's jurisdiction under the Agreement over disputes or claims arising out of the Agreement.
> 17. Decision
> 44) For the reasons given in paragraphs 38-43 above the Panel's decision is that the complaint that the Employer has not complied with the terms of the Agreement by amending Articles 2.3, 2.4, 19.1, 19.2, 19.4 and including Article 2.5 without the consent of members of the EWC in breach of Article 18.5 of the Agreement is not well-founded.
> 18. Concluding observation
> 45) The Panel has held that the Employer did not breach the Agreement by making the amendments to the Agreement which are the subject of this complaint without the consent of members of the EWC. However, the Panel observes that good industrial relations practice would have favoured some form of prior consultation with the EWC on these measures prior to their introduction regardless of whether this was required under the Agreement itself." (Emphasis added)

Grounds of Appeal.

18. The Appellant's First Appeal lies against the First Decision. The two grounds relied upon therein are as follows:

    a. Ground 1 – The CAC erred in law by failing to take account of the prohibition under Regulation 40 of TICER which renders void "any provision in any agreement…in so far as it purports – (a) to exclude or limit the operation of any provision of these Regulations other than a provision of Part VII".

b. Ground 2 – The CAC erred in law in that it failed to give the Appellant the opportunity to present its case on Regulation 40, notwithstanding the absence of any reference to that provision in its complaint.

19. The Appellant's Second Appeal lies against the Second Decision. The seven grounds relied upon in that appeal are as follows:

a. Grounds 1 and 2 - The CAC erred in law in finding that it could decide the issues between the parties without considering (over the objections of HSBC and as requested by the Complainant) whether it had jurisdiction, and had it considered the matter, it would have been bound to conclude that it had jurisdiction.

b. Grounds 3, 4 and 5 – The CAC erred in law in interpreting Article 2.3 of the EWC Agreement as transferring the central management to Ireland upon the occurrence of Brexit, such interpretation:

   i. failing to have regard to the fact that Brexit would not have been in contemplation of the parties at the time the Agreement was entered into (Ground 3);

   ii. failing to give Article 2.3 its natural construction (Ground 4); and

   iii. not reflecting the intentions of the parties and nor being justified by the need to prevent anomalies (Ground 5).

c. Ground 6 – The CAC erred in concluding that any pre-Brexit agreement which was otherwise effective under UK law would cease to have effect following Brexit.

d. Ground 7 – The CAC erred in law in finding that the parties' choice of law in Article 19 had been overridden in the absence of a specific legislative provision to that effect.

20. The Respondent resists both appeals.

Legal Framework

The Directive.

21. Article 1 of the Directive provides that its purpose is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings, and that to that end, EWCs shall be established in every such undertaking. By Article 1.6, the powers and competence of EWCs and their scope shall cover all the establishments or group undertakings "located within the Member States", "[u]nless a wider scope is provided for in the agreements…". This proviso does suggest that a relevant agreement could cover entities located outside Member States. Whether or not that is in fact the case will depend on the terms of the particular agreement in question.

22. Article 4 of the Directive confers the responsibility for the establishment of a EWC on the "central management". Article 4.2 of the Directive deals with the situation where the central management is not located in a Member State:

> "2. Where the central management is not situated in a Member State, the central management's representative agent in a Member State, to be designated if necessary, shall take on the responsibility referred to in paragraph 1.
> In the absence of such a representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State shall take on the responsibility referred to in paragraph 1.
>
> 3. For the purposes of this Directive, the representative or representatives or, in the absence of any such representatives, the management referred to in the second subparagraph of paragraph 2, shall be regarded as the central management.
> …"

23. Article 6 of the Directive provides that the agreement between central management and the special negotiating body must be negotiated "in a spirit of cooperation" and sets out "without prejudice to the autonomy of the parties" what any such agreement is to determine. Where such agreement is not reached, "subsidiary requirements", as set out in Annex 1 to the Directive, are to apply.

24. As stated above, the Directive was implemented in the UK by TICER. Regulation 4 of TICER sets out the circumstances in which TICER was to apply:

> **"4.— Circumstances in which provisions of these Regulations apply**
> (1) Subject to paragraph (2) the provisions of regulations 7 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.
> …" (Emphasis added)

25. Regulation 5(1) mirrored the terms of Article 4 of the Directive by conferring the responsibility for the establishment of the EWC on central management, where:

> "…(a) the central management is situated in the United Kingdom;
> (b) the central management is not situated in a Member 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 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, or
> (ii) in the case of a Community-scale group of undertakings, there are employed in a group undertaking, which is situated in the United Kingdom, more employees than are employed in any other group undertaking which is situated in a Member 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.
> …" (Emphasis added)

26. Regulation 17 includes the duty to negotiate in a spirit of cooperation. Regulation 17(4) provided that:

> "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;
> …"

27. Regulation 17(8) mirrored Article 1(6) of the Directive as to the scope of the powers and competence of a EWC and Regulation 17(9) dealt with the information to be disclosed:

> "17
> …
> (8) Unless a wider scope is provided for in an agreement referred to in paragraph (1),

> the powers and competence of a European Works Council and the scope of an information and consultation procedure shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States.
>
> (9) Where information disclosed under a European Works Council agreement or an information and consultation procedure includes information as to the employment situation in the Community-scale undertaking or, as the case may be, the Community-scale group of undertakings, this shall include suitable information relating to the use of agency workers (if any)."

28. Where agreement is not reached pursuant to Regulation 17, Regulation 18 provided that the subsidiary requirements set out in the Schedule to TICER were to apply. Regulation 18A, TICER, which applied whether a EWC was established under Regulation 17 or Regulation 18, imposes the duty to provide information and to consult.

29. Regulation 40 of TICER, so far as is relevant, provided:

> "40.— Restrictions on contracting out: general
> (1) Any provision in any agreement (whether an employee's contract or not) is void in so far as it purports–
> (a) to exclude or limit the operation of any provision of these Regulations other than a provision of Part VII; …"

30. TICER was amended with effect from 30 December 2020 ("Amended TICER") to take account of the UK's withdrawal from the EU. Regulation 4 was amended so as to narrow the range of provisions that are to apply (down from Regulations 7 to 41 to Regulations 17 to 41), and Regulation 5 was amended by, amongst other matters, deleting the words of Regulation 5(1)(a) referring to central management being located in the UK.

31. Regulation 17 was amended such that only the obligation under sub-paragraph (9) to include information as to the use of agency workers remained. Regulation 18 was amended to provide for the continuation of subsidiary requirements "in any case where they applied before exit day". Regulation 18A was similarly amended such that it applied to those EWCs established "before exit day" under Regulation 17 or 18. Regulation 40 was unamended.

32. Several of these provisions of TICER and Amended TICER were considered recently by the Court of Appeal in *EasyJet plc v EasyJet European Works Council* [2023] EWCA Civ 756 ("*EasyJet*"). The employer in *EasyJet* contended that the *EasyJet* EWC ceased to exist as from 31 December 2020, i.e. upon the UK's withdrawal from the EU, thereby removing *EasyJet* EWC's entitlement to bring a complaint to the CAC about a failure to inform and consult about proposed collective redundancies. In upholding the CAC's conclusion that the *EasyJet* EWC and therefore the entitlement to complain to the CAC, continued to exist after 31 December 2020, the Court of Appeal (William Davis LJ) stated as follows:

> "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 21and 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.
> …
> 13 … 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. …"

33. The Court of Appeal went on to consider Regulations 18 (subsidiary requirements), 23(6) and the transitional provisions and considered that these were inconsistent with the employer's proposition that any current EWC would cease to exist. The Court of Appeal concluded:

> "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."

34. The Court of Appeal noted that the company, which was still required to comply with the Directive, had complied by appointing its German branch as its representative agent. It was argued by the company that the continued existence of *EasyJet* EWC in the UK would lead to the wholly anomalous situation whereby the company is obliged to operate two EWCs – one in the UK and one in Germany. As to that, the Court of Appeal said as

follows:

> "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."

First Appeal

Ground 1 – Error in failing to consider the application of Regulation 40 (restriction on contracting out)

35. In able and concise submissions on behalf of the EWC, Mr McCombie contended that the effect of the Court of Appeal's decision in *EasyJet* was that Amended TICER continues to apply to all EWCs established before exit day. The fact that the *EasyJet* EWC was established under Regulation 18 (subsidiary requirements) rather than by voluntary agreement under Regulation 17, does not provide a basis for distinguishing *EasyJet* given that the Court of Appeal relied on a number of provisions, including those (such as Regulation 23(6)), that were common to agreements made under both Regulation 17 and Regulation 18 in support of its conclusion as to the effect of Regulations 4 and 5. Furthermore, he submits that the fact that the continuation of the EWC in this case with central management in the UK might mean the existence of two EWCs – one here and one in Ireland – does not preclude such continuation for the reasons considered by the Court of Appeal in *EasyJet* at [24] and [25]. Mr McCombie submits that in these circumstances, it was incumbent upon the CAC to engage with the fact that the Agreement continued in force after exit day, and that that the amendments purportedly made by HSBC were made

in breach of the requirements under Article 18.5 of the Agreement for amendment by mutual consent. HSBC's purported amendments to exclude the UK and the employee representatives there from the EWC are contrary to the restriction on contracting out under Regulation 40.

36. As for the terms of the Agreement, Mr McCombie submits that there is a clear lacuna in the Agreement in that it does not refer to what should happen when a Member State ceases to be a Member State. Whilst certain provisions, such as those under article 7.4 of the Agreement, refer to expansion into new geographical areas, no provision is made for the reverse. Although Article 5 of the Agreement covers operations "in the EEA Member States", this ought to be interpreted as being a reference to all of those states identified in the Appendix (i.e. those who were Member States as at August 2015) and not, as HSBC contends, those that that are Member States from time to time. Alternatively, the term "in the EEA Member States" could be interpreted, post-Brexit and in accordance with Amended TICER as meaning "Relevant States". It is only the EWC's interpretation of the Agreement that leads to continued compliance with Amended TICER as required and it is that interpretation that ought to be given effect.

37. Mr Burns KC for HSBC submits that Mr McCombie's reliance on *EasyJet* is misplaced for the simple reason that this is not a case where, as in *EasyJet*, it is being contended that the EWC in question ceased to exist after exit day. The Agreement did not at any time cease to exist. It was a voluntary agreement which expressly limited its application to operations "in the EEA Member States". As the UK was, post-exit day, no longer a Member State, the Agreement did not apply to those operations in the UK. Mr Burns KC submits that there is no warrant at all for interpreting the express words, "in the EEA Member States" as meaning "Relevant State", which was a concept only introduced by Amended TICER and could not have been in the parties' contemplation at the time of entering the Agreement. The purpose of the Agreement, expressly stated as being to

comply with the Directive, means that it must cover operations that are situated within an EEA Member State, that is to say those that are such Members from time to time. The UK's change in status necessitated, under the Directive, the appointment of a representative agent, which was Ireland. Once that occurred (without objection or challenge from the EWC) the terms of Article 4 of the Agreement, and in particular the words, "which means that", resulted in the relevant implementing legislation becoming TICEA. In these circumstances, the CAC's interpretation gave effect to the autonomy of the parties to decide on the scope of the Agreement and did not give rise to any error of law.

38. As to Ground 1 specifically, Mr Burns KC submitted that this was not a ground of complaint before the CAC, and that the EWC has failed, in any event to identify any specific provision of TICER that has been excluded or limited by any provision in the Agreement.

Discussion

39. The autonomy of the parties to agree the terms of any EWC agreement is expressly acknowledged in the Directive: see Article 6 of the Directive. Although provision is made for subsidiary arrangements where an agreement is not reached, the existence of a voluntary agreement between the parties is to be given considerable deference. As is also made clear in the Directive, the parties can agree that any EWC agreement covers operations that go beyond those situated in Member States. However, whether that is the case in a particular agreement will depend on its terms. The Agreement in the present case is a voluntary one, reached under Regulation 17 of TICER. Article 5 of the Agreement states unequivocally that it covers operations located "in the EEA Member States". There is a question as to whether those operations are fixed as being those identified at the time of the Agreement (i.e those set out in the Appendix to the Agreement)

or whether it was intended by the parties to include operations in EEA Member States as they are from time to time. In my judgment, there are several reasons to prefer the latter approach.

40. First, the terms of the Directive are clear that the powers and competence of a EWC shall "cover all the establishments … located within the Member States": Article 1(6) of the Directive. If a state were to become a Member State within the lifetime of the Agreement, it would necessarily, in order to comply with the Directive, include any operations that may exist in that state. Failure to include such a state would be in breach of the Directive. Conversely, where a state ceases to be a Member State, the obligations under the Directive would not extend to operations in that state unless the parties expressly so agreed.

41. Second, the terms of the Agreement suggest that it was intended to apply to those operations in EEA Member States from time to time. Article 5 of the Agreement provides that "The list will be amended in the event of merger or acquisition or disposal". This expressly envisages that the list of operations can expand or contract (and that it would in fact do so automatically- "will be amended" - without the need to amend following the procedure envisaged under Article 18.5). The fact that such expansion or contraction is by reason of merger, acquisition or disposal, (i.e. by reason of a commercial decision on the part of HSBC) does not in my view preclude an amendment to the list necessitated by other factors, such as the admission into the EU of another country. Article 7.4 of the Agreement provides that the "number of members on the EWC will be amended in the event of the expansion of HSBC into new geographical areas or in the growth of employee numbers within the EEA Member States." This expressly envisages amendment of the list of operations (once again automatically) where operations expand into another EEA Member State. In my view, the same would apply if such expansion were to occur, not by reason of the opening of a new facility in another country, but because an existing facility is located in a country that becomes, post-Agreement, a Member State. Such an

interpretation would be consistent with the purpose of the Directive, which is to ensure that information and consultation obligations are complied with in respect of all workers located within Member States. Article 8.1 of the Agreement, which stipulates the principles that are to guide discussions where HSBC makes changes to its EEA operation structure "Through organic growth, acquisitions, restructuring, closing of operations or facilities [or disposals], which result in a change to employment numbers within HSBC." One of those principles, set out at article 8.1(c) is that "[w]here an acquisition introduces an EEA Member State, then that country will be entitled to representation in accordance with Article 7…"

42. The upshot of these provisions is that the list of operations will be amended whenever operations are expanded so as to involve another EEA Member State or reduced by result of a closure or disposal of operations in a particular EEA Member State. Where the parties have expressly agreed that the Agreement is only to cover operations located in the EEA Member States, there is no reason why the same should not apply where the expansion or contraction results from a change in membership of the EEA rather than a commercial decision on the part of HSBC. Mr McCombie submits that there is a lacuna in the Agreement that cannot be filled by taking the same approach as that taken for commercial expansion or contraction. However, it appears to me that where the parties had expressly agreed what operations are covered (i.e. those in EEA Member States) and had provided for automatic changes to take effect when operational changes brought in or removed a particular Member State, they can be taken to have agreed that the same would occur where the change is the result of a change in a State's membership status.

43. I was referred to *Arnold v Britton* in which the Supreme Court reiterated the well-known principle that:

> "15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord

> Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, …, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn [1971] 1 WLR 1381, 1384—1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995—997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] 1 WLR 2900, paras 21—30, per Lord Clarke of Stone-cum-Ebony JSC."

44. The Supreme Court went on to emphasise seven factors important in the interpretative exercise. The sixth such factor was as follows:

> "22 Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SC (UKSC) 240, where the court concluded that "any…approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract: see paras 21 and 22."

45. It is apparent from its terms that although Brexit was a possibility at the time of entering into the Agreement, the parties had not expressly contemplated a change in the operations to which the Agreement applied resulting from the departure from the EU of a Member State. However, this is not a case where the parties had not contemplated changes to the list of operations at all. Clearly, they had, and in so doing they had made express provision for changes to the list to take effect automatically as a result of commercial decisions that brought into play or excluded a particular Member State. In such circumstances, it is reasonably clear, in my judgment, that the parties would have intended that changes resulting from a change in Membership status would equally result in changes to the list of operations. The Agreement makes no provision for operations outside EEA Member States so as to give rise to any argument that the parties might have intended to retain within scope those operations that were no longer located within an EEA Member State.

Of course, it might be said, on the basis of the nature of the appeal now being brought, that the EWC would not have intended that at all. However, to take account of that would be to have regard to subjective intentions, which are not relevant. In my judgment:

a. The natural and ordinary meaning of Article 5 of the Agreement, namely that the Agreement only applies to operations in the EEA Member States, is (as the CAC found) clear and unequivocal;

b. Other provisions in the Agreement are consistent with that interpretation;

c. The parties clearly envisaged that commercial changes affecting the location of operations would automatically amend the list and it may reasonably be inferred that they would have intended that a change in membership status of the EU would have the same effect; and

d. Accordingly, the Court should give effect to that intention.

46. The decision in *EasyJet* does not undermine that analysis. In my judgment, contrary to Mr McCombie's submissions, it is significant that the dispute in that case was whether or not the *EasyJet* EWC continued to exist after exit day. HSBC has not argued at any stage that the Agreement in the present case ceased to have effect, and neither was the EWC's complaint to that effect. Instead, the contention throughout has been that the Agreement has continued to operate but that it has been unlawfully amended so as to exclude the UK operations.

47. I do not accept Mr Burns KC's contention that *EasyJet* is irrelevant because it was concerned with a Regulation 18 agreement rather than a voluntary agreement reached by the parties under Regulation 17. I accept Mr McCombie's submission that the principle established in *EasyJet*, namely that a pre-existing EWC agreement continues to exist after exit day, applies as much to Regulation 17 agreements as it does to those made under Regulation 18. That is clear from the Court of Appeal's unqualified statements about the continued existence of EWC agreements and because, as Mr McCombie highlighted,

some key planks of the Court of Appeal's reasoning applied to both types of agreement. However, the potential applicability of *EasyJet* is not determinative of the essential question in this case, which is whether the CAC erred in law in interpreting the Agreement as it did. In this regard, it is significant, in my view, that the Agreement was one reached between the parties, in circumstances where the autonomy of the parties to so agree is to be respected, and where express provision has been made as to the scope of the Agreement. The fact that the Agreement continues post-exit day (as per the decision in *EasyJet*) does not mean that amendments are impermissible or that an interpretation that removes UK Operations from being within scope is precluded. Whether or not such amendments and/or such interpretation is permissible and/or correct in law depend very much on the terms of the Agreement. As such, the significance of *EasyJet* is somewhat limited. That view gains support from what the Court of Appeal in *EasyJet* said about the continuing EWC agreement in that case:

> "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."

48. That is to be contrasted with the terms of the Agreement which provide very clearly that it fulfils HSBC's obligations under the Directive: Article 2.2 of the Agreement. Moreover, it has not been and cannot be contended that the Directive no longer governs the operation of the Agreement in the present case; indeed, the opposite is the case.

Regulation 40

49. The difficulty with this ground, as Mr Burns KC highlights, is that the EWC has not identified any specific provision in the Agreement that purportedly excludes or limits the operation of any provision of TICER or Amended TICER. The EWC's argument appears to be that HSBC has interpreted certain provisions of the Agreement so as to exclude UK

Operations from its scope and that by doing so, has rendered void the obligation under Regulation 18A, TICER, as to the provision of information and consultation. However, Regulation 18A imposes obligations on central management to give information and consult with members of the EWC. There is nothing on the face of Regulation 18A that requires such members to include those that were previously representative of UK employees. Whether or not a person is a member of the EWC at the time Regulation 18A is invoked will depend on an application of other provisions in the Agreement. For reasons already stated, such members will only derive from operations "in the EEA Member States": see article 5 of the Agreement. There is nothing in Regulation 18A that requires that such members will include those from operations in a "Relevant State" (i.e. Member States and the UK).

50. Even if it were the case that Article 5 of the Agreement breached Regulation 40, the effect would be to render that provision void. Regulation 40 does not operate by leaving the impugned provision intact and subject only to an acceptable interpretation. If, on a correct interpretation, it gives rise to a breach it must be voided. However, that would render the Agreement unworkable as there would be no definition as to the scope of the Agreement. The EWC's argument is that Article 5 should be amended to read "in the Relevant States". However, a breach of Regulation 40, TICER would confer no power to amend, and even if it could, such power would not extend to an amendment to incorporate a term – i.e. "Relevant States" - that was not in existence at the time of the agreement and could not have been in the parties' contemplation.

51. For these reasons, Ground 1 of the First Appeal fails and is dismissed.

Ground 2

52. This ground raises a procedural issue. It is said that the EWC was denied the opportunity to make representations on the grounds of complaint, which did not refer, expressly or

otherwise to Regulation 40, TICER. By contrast, HSBC was permitted to lodge a detailed response to the EWC's brief statement of complaint. The CAC then moved straight to a decision on the papers without receiving any further representations from the EWC.

53. I consider this ground to be unfounded. The statement of complaint was brief, but it is not contended that the CAC failed to understand the complaint being made or that it failed to take any aspect of the complaint into account. Indeed, the entirety of the complaint was replicated at [5] of the First Decision. The complaint did not indicate that any further representations were to be made. Crucially, there was no reference at all to Regulation 40, or any argument based thereon. Furthermore, there is no correspondence before me to suggest that having received HSBC's response, the EWC sought and was denied an opportunity to make further representations, whether based on Regulation 40 or the matters in the Complaint. Nor is there any complaint that the matter was determined by the CAC on the papers. In these circumstances, I can discern no unfairness in the procedure adopted by the CAC. The CAC has the discretion to determine its own procedure: s.263(5) *Trade Union and Labour Relations (Consolidation) Act 1992*. By Regulation 38(2), TICER, the CAC shall "give any person whom it considers has a proper interest in the application or complaint an opportunity to be heard". The complaint here was "heard" in that it was comprehensively addressed by the CAC in a detailed written decision. The fact that the EWC's argument on Regulation 40 went "unheard" was due to the fact that it had not been raised at the time of the complaint or at any stage prior to the decision. There was nothing to prevent the EWC from raising the point had it so wished. The CAC was fully entitled to proceed as it did and cannot be criticised for not inviting submissions on an issue that had not been raised.

54. In any event, given that the Regulation 40 issue has been dismissed under Ground 1 of the First Appeal, Ground 2 is rendered redundant. Even if the CAC had considered the Regulation 40 point it would have been bound to conclude that it was not well-founded

for the reasons already set out.

Second Appeal

Grounds 1 and 2 – Failure to consider whether the CAC had jurisdiction

55. Under these grounds (which were drafted by other Counsel and before the decision in *EasyJet*), the EWC contends that by failing to grapple with the issue of jurisdiction, and by taking the shortcut of assuming jurisdiction in the EWC's favour, the CAC failed to come to the correct conclusion on the interpretation of Articles 4 and 5 of the Agreement. Had it properly considered the jurisdiction point, it would have been bound to conclude that it did have jurisdiction by reason of the continued effect of TICER. In such circumstances, the CAC would not have found that the amendments to the Agreement were permissible.

56. Mr Burns KC submits that these grounds are academic in view of the fact that the CAC proceeded on the assumption, in the EWC's favour, that it had jurisdiction.

57. I agree with Mr Burns KC that the approach taken by the CAC to jurisdiction renders these grounds academic. Jurisdiction was assumed in the EWC's favour. It is not contended by the EWC that the CAC ought to have found that it lacked jurisdiction or that its operative assumption was incorrect. The real dispute here is that the CAC failed to treat Amended TICER as continuing to apply to the Agreement and the EWC, and that had it done so, it would not have taken the approach that it did to the purported amendments to the Agreement. However, those are arguments that could be (and have been) raised elsewhere in the appeal. It is not necessary or appropriate to challenge a decision by way of appeal where there is no disagreement with the substance of the decision.

Grounds 3 to 5 – Error in interpretation of Article 2.3 of the Agreement.

58. The submission here is that the CAC erred in failing to acknowledge that the Agreement

continued to operate after exit-day with the provisions relating to the UK operations intact and that the CAC's acceptance of the amendment to Article 2.3 to refer to Ireland as the central management was wrong in law. The CAC's approach, it is said, leads to an unnatural interpretation of Article 2.3 that was not justified by the need to prevent anomalies, given that it would be neither anomalous nor unworkable to find that two EWCs continued after exit day – one in the UK and one in Ireland.

59. Mr Burns KC submits that the change to Article 2.3 of the Agreement was one that was required by operation of law under the Directive as the UK could no longer after exit day be the central management. The intention of the parties as to the continued applicability of TICER can be discerned from their use, in Article 2.3 of the phrase "which means". That phrase indicates that the parties' intention at the time of the Agreement was to apply the implementing law of the country in which central management was located.

Discussion

60. Article 2.3 of the Agreement, prior to amendment, provided:

> "2.3 For the purposes of the EWC Directive, HSBC Central Management is situated in the United Kingdom which means that this agreement is subject to the United Kingdom's *Transnational Information and Consultation of Employees Regulations 1999* and 2010 ("TICER")…" (Emphasis added)

61. The highlighted words clearly indicate that the parties' intention was that the location of the central management, for the purposes of the Directive, would determine the applicable implementing law. At the time of the Agreement, that was the UK and TICER respectively.

62. Post-exit day, it was not permissible for the purposes of the Directive, for the UK to be the location of central management. Compliance with the Directive required a representative agent to be designated or, in the absence of designation, to be located in the Member State with the largest number of employees. HSBC, in accordance with the Directive, designated Ireland to be the location of central management. As the CAC found

(which finding is not challenged), the EWC "did not dispute the choice of Ireland as the representative agent for the purposes of the Directive". The CAC was correct, in my judgment, to conclude that it would have been anomalous in those circumstances for Article 2.3 to continue to refer to the UK as the location of central management. Such a stipulation would in fact have resulted in a provision that was contrary to the expressly stated purpose of the Agreement which was to fulfil HSBC's obligations under the Directive. In my judgment, this change can properly be described as one that is imposed by law.

63. Mr McCombie's submission is to the effect that there is a rival legal obligation that ought to govern the interpretation of Article 2.3 and that is the need to comply with Amended TICER, which continues to apply to the Agreement. That submission, which relies on *EasyJet*, fails to recognise that the principle established in that case, namely that a pre-existing EWC agreement would not cease to exist after exit day, does not have the effect of precluding changes that are consistent with the intentions of the parties to this voluntary agreement. Furthermore, the continued application of TICER does not, of itself, mean that the Agreement cannot be amended in accordance with its terms so as to apply a different implementing law consequent upon a necessary change to the location of central management or the appointment of a designated representative agent. Thus, in the present case, and unlike the position that pertained in *EasyJet*, the Agreement expressly provided that it would only cover operations in EEA Member States and that, as at the date of the Agreement, the central management was located in the UK "which meant" that TICER would apply. For reasons already set out, it was necessary, post-exit day, to designate another country as representative agent, namely Ireland (a designation to which no objection was taken), which would be deemed the central management for the purposes of the Directive. As stipulated by the parties, the applicable implementing law was determined by the location of central management, "which meant" that TICEA would

apply.

64. The CAC's construction of Article 2.3 was correct. Grounds 3 to 5 therefore fail and are dismissed.

Ground 6

65. The EWC contends here that the CAC erred in finding that "any pre-existing agreement which otherwise was effective under UK law would cease to have effect". The EWC goes on to suggest that "the EWC agreement before the EWC (sic) could operate in parallel to any EWC effective under Irish Law". I have already addressed the first limb of this ground above: the CAC did not find that the Agreement ceased to have effect; rather it found that it continued, albeit on terms that reflected the legal position as understood by the parties.

66. The basis for the second limb of this ground, namely that there could be two EWCs operating in parallel, is the finding in *EasyJet* that the existence of two EWCs – one in the UK and one in Germany - was not unworkable. However, that finding in *EasyJet* has no relevance to the present case. That is because here there is only one EWC established by the Agreement. The Agreement can only be subject to one law, either English or Irish; it cannot simultaneously be governed by both.

67. Mr McCombie submitted that the CAC's conclusions as to the lawfulness of the changes made to Article 2.3 of the Agreement ignored the express requirement under Article 18.5 that any change of terms must be by consensus. The CAC found that HSBC's revised document was not a breach of Article 18.5 as it "merely reflect[ed] the legal position as understood by both parties". It reflected that the EWC was now based in Ireland (p.137, para 18), and so was subject to Irish law and jurisdiction. The CAC correctly held that on a proper construction of the Agreement there was one EWC, one designated representative agent and one choice of law "inextricably linked" to that designated representative agent.

68. All of that said, the extent of the changes to Articles 2.3 and 2.4 and the inclusion of a new

Article 2.5 could be said to go beyond the sort of changes that even the parties might have contemplated could be made without invoking the procedure under Article 18.5. However, it seems to me that the changes, whilst ostensibly extensive, effectively amount to:

a. the removal of the reference to the UK as Central Management;

b. the introduction of a reference to Ireland as the designated representative agent; and

c. the consequential change of implementing law from TICER to TICEA.

69. The first of these was necessitated by the UK's withdrawal from the EU. The second was not disputed by the EWC. Designation was, under the Directive, a matter for HSBC and did not require the EWC's consent or approval. As for the third, for reasons already discussed, this followed from the designation of Ireland as representative agent. The other changes that we see in Articles 2.3 to 2.5, are by way of explanation of the changes made. Such explanation is not a necessary incident of a contract, but its inclusion does not, in my judgment, render unlawful changes that are otherwise lawful and properly made. The inclusion of an explanation for the changes perhaps underlines the CAC's "Concluding Observation" that whilst HSBC:

> "…did not breach the Agreement by making the amendments to the Agreement which are the subject of this complaint without the consent of members of the EWC…, good industrial relations practice would have favoured some form of prior consultation with the EWC on these measures prior to their introduction regardless of whether that was required under the Agreement itself."

70. I agree with that observation, although that has no effect on the question of law, which I have determined against the EWC.

71. Ground 6 therefore fails and is dismissed.

Ground 7 – Choice of Law

72. The EWC's contention here is that the CAC erred in law in finding that the parties' choice of law in Article 19 had been overridden in the absence of a specific legislative provision

having that effect.

73. This point has largely been addressed by the analysis under Ground 6. The parties' choice of wording for Article 2.3 ("which means that…") inextricably linked the location of the central management with the implementing law to be applied. Once Ireland was designated representative agent, and therefore deemed to be central management for the purposes of the Directive, the choice of implementing law, namely TICEA, followed. Far from overriding it, the parties' choice of law was applied. Mr McCombie submitted that it was not open to the parties (whether by agreement or otherwise) to disapply the UK provisions of TICER in so far as they continued to apply after exit day. However, that submission, which is based on *EasyJet*, ignores the fact that there was a voluntary agreement in this case entered into by the parties. The Agreement contains express terms as to its scope and envisages (as discussed above) automatic changes to that scope consequent upon expansion or contraction of operations. The procedure under Article 18.5 of the Agreement for a requested change of terms does not apply to such changes.

74. Ground 7 also fails and is dismissed.

Conclusion

75. For the reasons set out above, and notwithstanding Mr McCombie's powerful submissions, these appeals are dismissed.