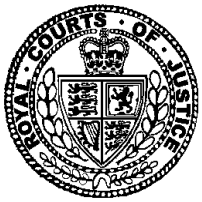

Neutral Citation Number: [2023] EWCA Civ 883

Case No: CA 2023 000015

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HONOURABLE MR JUSTICE KERR
EAT [2022] 183

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2023

Before:

LADY JUSTICE SIMLER
LORD JUSTICE DINGEMANS
and
LADY JUSTICE WHIPPLE

- -

Between:

OLSTEN (UK) HOLDINGS LIMITED	**Appellant**
- and -	
ADECCO GROUP EUROPEAN WORKS COUNCIL	**Respondent**

- -
- -

Andrew Burns KC and Sam Way (instructed by **Lewis Silkin LLP**) for the **Appellant**
Richard O'Dair (instructed by **EWC Legal Advisers**) for the **Respondent**

Hearing dates: 13 June 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Simler:

Introduction

1. This appeal concerns the meaning and scope of an agreement setting up a European Works Council, and in particular, the scope of the obligation to convene an extraordinary meeting to inform and consult employee representatives.

2. The principal question to be determined is the meaning and extent of the following obligation set out at clause V.1.4 of the agreement between the parties to this appeal:

> "Extraordinary Meetings will be convened to provide Information and engage in Dialogue with the Steering Group on the following transnational Issues where exceptional circumstances or decisions arise:
>
> a) …
>
> b) in the event of collective redundancies which significantly affect existing Adecco Employees in each of at least two EEA countries in which Adecco has employees."

3. The question arises against a background of legislation, both domestic and European Union ("EU"), that provides for a structured mechanism for large and medium sized employers to inform and consult employees on matters of exclusively local or national concern if their employees require it: see the Information and Consultation of Employees Regulations 2004 which implemented the EU Information and Consultation Directive 2002/14/EC. Until 31 December 2020, by virtue of EU Directive 2009/38/EC (implemented by the Transnational Information and Consultation of Employees Regulations 1999 (as amended) (the "1999 Regulations")), a UK based multinational enterprise of "Community-scale" (employing 1,000 or more employees with at least 150 employees in each of at least two EU or European Economic Area ("EEA") countries) was required upon request to (or could at its own volition) establish a European Works Council (an "EWC" or committee of the representatives of the employees) or some other suitable procedure for consulting its employees at a transnational level about matters of transnational concern significantly affecting the interests of the workers. For all material purposes, the 1999 Regulations continue to apply because they continue to apply to complaints made before 31 December 2020 (see paragraph 41 of schedule 2 of the Employment Rights (Amendment) (EU Exit) Regulations 2019).

4. The Adecco Group AG, based in Zürich, Switzerland, is a global provider of HR solutions and the placement of temporary workers, through subsidiary companies owned by it. It is the ultimate parent company of the appellant, Olsten (UK) Holdings Ltd (who I shall refer to as "Adecco"). At all material times, Adecco was the Adecco Group AG's representative agent appointed to represent it for the purposes of its functions under Directive 2009/38/EC ("the Directive").

5. On 24 May 2018, Adecco and the respondent agreed an amended and restated Adecco Group European Works Council agreement ("the Agreement") which replaced an earlier agreement dated 11 December 2013. Between 2019 and June 2020, collective

redundancy consultation processes in Adecco Group subsidiaries were commenced in four European states: Hungary, the Netherlands, Sweden and Germany. Following correspondence to which I shall return below, the respondent made a complaint dated 24 November 2020, to the Central Arbitration Committee ("the CAC") under regulation 21 of the 1999 Regulations, alleging (among other things) that Adecco had failed to inform and consult the respondent about collective redundancies in at least two countries within the scope of the Agreement, including by failing to convene an "Extraordinary Meeting" to provide such information in breach of clause V.1.4 of the Agreement.

6. The CAC Panel appointed to hear the complaint ("the CAC Panel") upheld it in part (relating to Sweden and Germany only). Adecco appealed to the Employment Appeal Tribunal ("EAT"), contending so far as material to the present appeal, that the CAC Panel had misinterpreted the scope of a "transnational matter" triggering the obligation to convene an Extraordinary Meeting to discuss proposed collective redundancies. As well as resisting the appeal, the respondent applied to the EAT under regulation 21(6) of the 1999 Regulations for a penalty notice to be issued against Adecco in respect of the failure of the Adecco Group AG to comply with its obligations under the Agreement (among other things) by failing to convene an Extraordinary Meeting to provide information and engage in dialogue about collective redundancies.

7. The appeal was heard by Kerr J in the EAT, whose judgment dated 13 December 2022 is reported as [2022] EAT 183. The EAT dismissed Adecco's appeal. The judge issued a penalty notice assessed at £20,000 for the failure from 27 May 2020, when the respondent's steering group requested an Extraordinary Meeting to the last of the relevant notices of dismissal (given in Germany) on 24 September 2020, at which point the failure ceased to have any operational impact because it was by then too late to engage in a dialogue to avert redundancies.

8. The single ground of appeal pursued by Adecco in this court is that the CAC Panel misdirected itself or misinterpreted the meaning of a "transnational matter" when construing clause V.1.4 of the Agreement, and was wrong to hold that it was irrelevant whether the Swedish and German redundancy proposals had been "separately formulated in different countries in light of unrelated national circumstances" and sufficient that there were two such proposals in two countries at about the same time. Mr Burns KC contends on behalf of Adecco that to be transnational for these purposes, a matter must concern or have potential effects in at least two different countries. Where, as he submitted here, the relevant decisions were taken locally, one in Sweden and one in Germany for reasons particular to each of those countries, unconnected with each other and not dictated by the central management of Adecco Group AG in Switzerland, the redundancy proposals were not transnational and did not trigger the requirement to convene an Extraordinary Meeting.

9. For the respondent, Mr O'Dair advanced textual and purposive arguments in support of the approach adopted by the tribunals below. He submitted that on a natural reading of clause V.1.4 (b), the events giving rise to this dispute count as transnational, and he relied in particular on the introductory words "the following transnational Issues", which make it clear that the events or matters that follow are transnational. He submitted that Adecco's approach overlooks the importance of certainty and effectiveness. He accepted that the construction adopted by the EAT means that there will be occasions, as he put it in writing, "when the reach of the Directive would be

over broad given its purposes. But it is not uncommon for legal rules to be broader than strictly necessary for the attainment of their purposes i.e. in order to ensure effectiveness and ease of application". He submitted that the example identified by the EAT of the unrelated factory fire in Bulgaria and the earthquake in Portugal both leading separately to redundancies and nonetheless requiring an Extraordinary Meeting to be called, is an invitation to use a hard case to make bad law.

The legal framework

10. The Directive made changes to the regime established by its predecessor, Directive 94/45/EC, to provide clarity (recital 1) while preserving its rationale: to ensure that where an undertaking or group of undertakings operate in multiple states of the EU or EEA, employees' representatives are informed and consulted upon matters affecting them decided or to be decided in a state other than that in which they are employed.

11. The Directive has 49 recitals which together reflect its purpose. The recitals are not legally binding, but are an aid to interpretation. Thus, recital (7) recognises the need to modernise the legislation on transnational information and consultation with a view to ensuring the effectiveness of these rights while at the same time remedying the lack of legal certainty resulting from some of the predecessor provisions. The burden on undertakings and establishments is also to be kept to a minimum while ensuring the effective exercise of the rights granted (recital (9)).

12. Against that background, recital (10) recognises that the functioning of the internal market involves various processes, including cross-border mergers, take-overs and joint ventures that lead to the "transnationalisation" of businesses, and that in order to develop harmoniously, those businesses operating in two or more member states must inform and consult representatives of those of their employees who are affected by their decisions.

13. Recital (11) explains that procedures for informing and consulting employees "are often not geared to the transnational structure of the entity which takes the decisions affecting those employees", and this may lead to "the unequal treatment of employees affected by decisions within one and the same undertaking or group". Appropriate measures were therefore regarded as necessary to ensure that affected employees are "properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed": recital (12). To that end, EWCs or other suitable procedures "for the transnational information and consultation of employees" must be created: recital (13). The requirement applies whether or not the group concerned has its headquarters inside or outside the EU or EEA.

14. Recitals (15) and (16) are important. They explain:

> "(15) Workers and their representatives must be guaranteed information and consultation at the relevant level of management and representation, according to the subject under discussion. To achieve this, the competence and scope of action of a European Works Council must be distinct from that of national representative bodies and must be limited to transnational matters.

> (16) The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States."

15. In accordance with the principle of the autonomy of the parties, the parties are encouraged to devise arrangements for transnational information and consultation by agreement. Thus, recital (19) states that it is for the parties "to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources" of EWCs to suit their own particular circumstances. The parties may devise their own bespoke EWC provided it meets certain minimum criteria, but if no relevant procedure agreement is reached despite employee demand for one, a statutory form of EWC conforming to the subsidiary requirements set out in Annex 1 to the Directive will apply.

16. Recital (21) emphasises the distinction between information and consultation of employees at transnational and at national level to ensure the effectiveness of dialogue at transnational level, permitting suitable linkage between national and transnational levels of dialogue, and ensuring the legal certainty required for the application of the Directive. Likewise, recital (29) stated that there must be written "arrangements for linking the national and transnational levels of information and consultation of employees appropriate for the particular … undertaking … defined in such a way that they respect the competences and areas of action" of the different levels of employee representation bodies.

17. Turning to the Directive's operative provisions, article 1 (headed "Objective") states the purpose of the Directive and consequent requirement to establish an EWC in every Community-scale undertaking or group of undertakings (article 1(2)).

18. Article 1(3) and (4) are important:

> "3. Information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve that, the competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues.
>
> 4. Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States."

19. Articles 4 to 7 deal with the machinery for establishing an EWC or relevant agreement. A "special negotiating body" of employees' representatives is established under article 5 to negotiate an agreement with management. Where negotiations lead to an agreement, article 6 governs the content of such an agreement. In accordance with recital (19) and by article 6(2), the agreement determines (among other things) the undertaking or undertakings covered by it; the composition, number of representatives and balance of representation on the EWC; their term of office; the functions and procedure for information and consultation; and arrangements for "linking information and consultation of the [EWC] and national employee representation bodies …" (article 6(2)(c)).

20. The parties may agree to establish information and consultation procedures instead of an EWC (article 6(3)). By article 6(4), the relevant agreement under article 6 "shall not, unless provision is made otherwise therein, be subject to the subsidiary requirements of Annex 1". Since in the present case agreement was reached and the rights and obligations of the parties are governed by the Agreement, it is unnecessary to set out all the subsidiary requirements found in Annex 1. However, paragraph 1 of Annex 1 makes clear that the establishment, composition and competence of a EWC shall be governed by the rules set out at (a) to (f). The first rule at paragraph 1(a) is that "the competence of the European Works Council shall be determined in accordance with Article 1(3)." Paragraph 1(a) goes on to provide that

> "the information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies."

Paragraph 3 provides:

> "Where there are exceptional circumstances or decisions affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, … the European Works Council shall have the right to be informed. It shall have the right to meet, at its request, the central management."

21. The 1999 Regulations implement the Directive in this country. As the relevant events occurred in 2020, the parties are agreed that the applicable version of the 1999 Regulations is the one then in force. That version remained in force up to 31 December 2020 and this court is not concerned with changes made thereafter in consequence of the UK's withdrawal from the EU.

22. The 1999 Regulations largely replicate the provisions of the Directive. Significantly, by regulation 2(4A), matters are defined as "transnational":

> "… where they concern –

> (a) the Community-scale undertaking or Community-scale group of undertakings as a whole, or
>
> (b) at least two undertakings or establishments of the Community-scale undertaking or Community-scale group of undertakings situated in two different Relevant States."

23. Under regulation 2(1), a Community-scale undertaking is one with at least 1,000 employees within the EEA member states and at least 150 employees in each of at least two EEA member states; while a Community-scale group of undertakings is a group with at least 1,000 employees within the EEA member states; at least two group undertakings in different member states; and at least one group undertaking with at least 150 employees in at least one member state and at least one other group undertaking with at least 150 employees in another member state.

24. Regulation 18 of the 1999 Regulations and the Schedule made under it, mirrored the subsidiary requirements provided for in Annex 1 of the Directive, as described above (in particular, paragraph 6 of the Schedule). By regulation 18A, where there is an EWC agreement (or other agreed information and consultation procedure) (established under regulation 17), the central management of the employer group must provide the relevant information to the EWC (or information and consultation representatives). The regulation says little about the content of the information that must be provided, beyond stating that it must be such as to enable examination of its subject matter and a detailed assessment of its possible impact to enable consultation. Regulation 18A(7) makes clear that the information and consultation so provided to members of an EWC "shall be limited to transnational matters".

25. Part V of the 1999 Regulations deals with compliance and enforcement. A complaint may be presented to the CAC where the EWC consider that an agreement made under regulation 17 has not been complied with, regulation 18A has not been complied with or the information provided is materially false or incomplete: see regulation 21(1) and (1A). If the CAC upholds the complaint it must make a decision to that effect and may order the defaulter to take "such steps as are necessary to comply with the terms of the agreement ….": see regulation 21(4). Where the entity in default is the central management of the employer group, the other party may apply under regulation 21(6) to the EAT for a penalty notice to be issued, and a penalty notice must be issued unless the EAT is satisfied that "the failure resulted from a reason beyond the central management's control or that it has some other reasonable excuse for its failure": regulation 21(7) and (8). The maximum penalty is £100,000: see regulation 22(2).

26. An appeal to this court, as to the EAT, lies on any question of law arising from any declaration or order of the CAC or arising in any proceedings before the CAC under the 1999 Regulations: see regulation 38(8). Appeals from the EAT to this court are also limited to appeals on a question of law.

The Agreement

27. The Agreement is dated 24 May 2018. Its preamble states that Adecco Group AG has engaged in European wide exchange of transnational information since 2011; that an EWC was established on 11 December 2013; and that the parties had decided to amend and restate the earlier agreement, all in accordance with (among other things) the

Directive and the 1999 Regulations. It continues that the "purpose is to promote the social dialogue at European level within the Company, without encroaching upon the purview of national representative bodies …"

28. The scope of the Agreement is in clause II which states:

> "The Agreement extends to companies … of the Adecco Group in the countries part of the EEA, the United Kingdom and Switzerland in which Adecco or its subsidiaries operate. The information and consultation within the [Adecco EWC] shall be limited to transnational matters. Matters are considered as transnational where they concerned or have potential effects at least on two undertakings of the Group situated in two different EEA countries [or] on the Community-scale group of undertakings as a whole."

The word "or" in square brackets does not appear. The EAT added it because it must have been intended; without it the concluding words make little sense and with it, the definition closely matches the definition in article 1(4) of the Directive. I agree with and have adopted that approach.

29. Clause II.1 contains an exclusion of "Local Matters and Issues" in the following terms:

> "Issues which relate to one or more undertakings in one or more participating countries and which relate inter alia to day-to-day management, remuneration, compensation, benefits, rights, terms and conditions of employment, staffing levels of the single country and other issues of similar kind will be excluded from discussion under these procedures as they are to be dealt with specifically through local or national information and consultation arrangements."

30. Clause III deals at length with the composition of the EWC, but it is unnecessary to set it out. Clause IV deals with "functions and procedure for information and consultation". The extent and content of information and consultation mirror the provisions of the Directive and the 1999 Regulations, and need not be set out.

31. Clause V deals with the nature, venue, frequency and duration of certain meetings. The meetings covered are annual plenary meetings, steering group annual meetings and Extraordinary Meetings. For example, clause V.1 says that the agenda for the annual plenary meeting will include information and dialogue on transnational matters, relating to the Adecco Group, and in particular, on substantial changes concerning organisation, outsourcing, major collective redundancies and layoffs of the workforce.

32. Clause V.1.4 deals with Extraordinary Meetings as follows:

> "Extraordinary Meetings will be convened to provide Information and engage in Dialogue with the Steering Group on the following transnational Issues where exceptional circumstances or decisions arise:

> a) in the event of substantial relocations, and
>
> b) in the event of collective redundancies which significantly affect existing Adecco Employees in each of at least two EEA countries in which Adecco has employees.
>
> c) in the event of an acquisition of a substantial business having transnational effect."

In such a case, clause V.1.4 continues:

> "An Extraordinary Meeting of the Steering Group will be convened at the same time or as soon as reasonably practicable after (and in any event within five working days after) the relevant circumstances or decision are announced in the affected Countries to local works councils, trade unions, or other Employee Representatives as required by local laws."

33. Finally, clause IX.1 (applicable law) provides:

> "This Agreement shall be legally binding and shall have the standing of an Agreement under Directive 97/74/EC and Directive 2009/38/EC, as implemented in UK Statutory Instrument 1999 No. 3323 (The Transnational Information and Consultation of Employees Regulations 1999), as amended by Statutory Instrument 2010 No. 1088, (The Transnational Information and Consultation of Employees (Amendment) Regulations 2010). This Agreement shall be governed by and interpreted in accordance with the laws of the United Kingdom."

The factual background

34. The EAT set out an outline of the facts at paragraphs 25 to 72. I gratefully adopt that summary so far as it relates to collective redundancies in Sweden and Germany, but note that the CAC Panel dealt with the point raised by this appeal as a question of law without making any clear findings of fact on disputed matters concerning the collective redundancies relevant to this appeal. The following summary should be read on that basis.

35. In 2019 there was a recession in Sweden. Adecco's Swedish subsidiary ("Adecco Sweden") announced redundancies in late 2019 and early 2020. Relevant unions were consulted under Swedish law. The dismissal of 33 employees occurred in or about early January 2020. These were linked to the recession, loss of sales and poor financial results.

36. Adecco Sweden started consultation with the relevant unions on a further 16 redundancies on 25 May 2020 and 11 further redundancies on 26 May. On 26 and 27 May, the Steering Group (comprising five employee representatives) telephoned, emailed and wrote to Adecco Group AG central management in Zürich, expressing surprise that "we have recently been informed about collective redundancies in at least

3 different European countries of the Adecco Group as a consequence of the Covid 19 crisis".

37. The steering group's letter complained that opportunities to take advantage of COVID-related subsidy schemes (as had happened in the Netherlands) may have been missed elsewhere. The letter referred to the situation in Sweden, the Netherlands and Hungary, and requested an Extraordinary Meeting under clause V.1.4 of the Agreement on the ground that there were "collective redundancies which significantly affect existing Adecco Employees in each of at least two EEA countries in which Adecco has employees".

38. On 28 May, Adecco Sweden began consultation with the relevant unions about a further five redundancies there. On 29 May, Adecco Group AG emailed the EWC members the "first batch of presentations" ahead of a meeting due to take place on 10 June 2020, to discuss the impact of the COVID-19 crisis as previously agreed between central management and the Steering Group. The agenda items for discussion included, "Situation of Workforce in Adecco Group Europe: current and outlook"; and "COVID-19 Update". Further agenda details and presentations were to follow.

39. The first 16 redundancies in Sweden were made on 1 June 2020. Two days later, the possibility of redundancies at Adecco subsidiaries in Germany ("Adecco Germany") emerged. Workforce changes had been ongoing for several years due to legal changes discouraging the hiring of temporary workers. There were sectoral pressures in certain industries and what was later described by Ms Danica Ravaioli of Adecco Germany as an "inefficient and cost-intensive supply structure".

40. On 3 June 2020, Adecco Germany announced a collective redundancy consultation process, which eventually affected a total of 260 employees, of which about half were represented by a national works council. Against that background, on 5 and 9 June, Adecco Group AG sent an agenda and further documents to the Steering Group. The meeting fixed for 10 June took place on that date. The next round of 11 redundancies in Sweden was implemented on 12 June.

41. On 24 June 2020, Adecco Group AG refused the Steering Group's request for an Extraordinary Meeting. The covering email explained that the situation in Germany was not covered by the response however, management was "also investigating Germany". The formal letter referred to the meeting of 10 June and the challenges posed by the pandemic and its effect on the economy. The Group was doing all it could "to mitigate the negative effects of this world-wide crisis".

42. Having acknowledged that in a general way, the COVID-19 pandemic was having a negative effect on the economy and therefore potentially on jobs, the letter went on to explain that as for "the decision to let colleagues go":

> "… the Group operates as follows: the Adecco Group Headquarters is responsible for developing the Group strategy and for translating, in consultation with the countries, the strategic objective into local operational targets and country budgets for its businesses across the globe. While the overall strategy and objectives are set at the centre, local management teams must decide how to put the strategy to work and how to

> best achieve the objectives that have been set. So, within the agreed budget, local management is fully empowered to make decisions on commercial strategy, pricing, client segmentation, business line development, people investment, as well as on managing operating costs. It is clear that in such situations, where operating costs are not or no longer proportionate to sales development, local management is also empowered to make decisions in order to re-balance costs levels. Unfortunately, in some cases, local management may need to consider and implement redundancies. To state it clearly: the Adecco Group Headquarters does not ask countries to cut jobs and it is up to each country to make decisions relating to the composition and volume of its workforce based on a series of parameters.
>
> In this context, no decision on individual or collective job losses within the countries covered by the AEWC Agreement is ever taken by European or global management. In addition, beside the fact that a consultation for local matters between Management and Employee Representatives in the AEWC is not in scope of the AEWC Agreement … ."

43. The letter then explained in detail why management saw no common cause or rationale for redundancies in each individual country and that there was no centrally taken decision. Consequently, clause V.1.4 of the Agreement did not apply and no Extraordinary Meeting would be called. However, Adecco Group AG invited the steering group to take part in a call at the end of June 2020 to discuss any further points arising from the letter. The call was fixed for 29 June. Adecco Group AG management prepared presentation notes to address the steering group, including on the issue of redundancies in each of various countries and why they were considered not to raise a transnational issue.

44. The employee representatives on the EWC disagreed with that conclusion, and decided to open a formal dispute on the refusal of Adecco Group AG to recognise the issue of collective redundancies across four countries (Sweden, the Netherlands, Hungary and Germany) as transnational. The formal dispute document sent to Adecco Group AG in late June 2020 recorded that this was the third occasion on which management had sought to argue that redundancies taking place across several EEA countries at the same time did not raise a transnational issue.

45. The scheduled call took place on 29 June, attended by the steering group, but not as an Extraordinary Meeting under clause V.1.4 of the Agreement. A dialogue took place. The employee representatives and management explained their opposing points of view. The last five redundancies were implemented in Sweden on the same day. The debate continued between the parties.

46. On 30 June 2020, the five EWC representatives on the steering group opened a further formal dispute complaining about the provision of business sales data, but since this appeal does not concern that aspect of the complaint, it is unnecessary to describe it or the Group management's response, including at or before the Annual Plenary meetings.

47. On 22 and 24 September 2020, the 260 employees selected for redundancy by Adecco Germany were given notice of dismissal. However, their actual departure dates varied; some continued to work up to the end or near the end of 2020, while others left the business earlier. The last of the actual departures was therefore some time at the end of 2020; while the last notices of dismissal were given earlier, on 24 September 2020.

48. The EWC made its written complaint to the CAC on 24 November 2020, that Adecco Group AG had failed to inform and consult the EWC about collective redundancies concerning Adecco Group AG undertakings in at least two countries within scope of the Agreement (and refused to inform the EWC steering group of the most recent business sales performance data "per country" within the scope of the Agreement).

49. Several rounds of written evidence and submissions were submitted to the CAC by the parties. The Panel appointed by the chair of the CAC (under section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992) comprised Professor Gillian Morris, sitting with Mr Robert Lummis and Mr Gerry Veart. The CAC procedure does not automatically include an oral hearing with cross-examination of witnesses. No oral hearing was sought or held in this case. The CAC decided the matter on the basis of the documents, which were voluminous. Its eventual written decision was delivered in two tranches. The first was dated 5 March 2021; the second, 12 April 2021.

The decisions and reasoning of the tribunals below

(i) The CAC Panel decision

50. Having summarised at length the detailed submissions made by both sides, the CAC Panel held that it had no jurisdiction to determine the complaints concerning the Netherlands and Hungary.

51. In relation to the redundancies in Sweden and Germany, the CAC Panel described what had been said by Adecco about the redundancies in Sweden and Germany as follows:

> "58. … The Employer provided evidence that the Swedish national recession had led the Swedish management to decide that there should be 65 redundancies between 1 January 2020 and 30 June 2020. The Employer emphasised that the largest number of dismissals of more than one employee on which Swedish management consulted its trade unions took place in December 2019 and January 2020 and the final decision for the "overwhelming majority" of employees had taken place by 1 June 2020. The Panel has examined carefully the dates and figures set out in the witness statement of the Chief Executive Officer of Adecco Group Sweden. These show that Swedish management undertook five rounds of collective redundancies consultation in line with local law: two in December 2019, when a total of 33 dismissals were the subject of consultation; the consultation process in respect of the remainder commenced on 25 May 2020 (16 dismissals); 26 May 2020 (11 dismissals); and 28 May 2020 (five dismissals). In Germany on 29 May 2020 national management had decided that it needed to formulate proposals for redundancies and on 3 June 2020 national

> management announced a collective redundancy consultation process in accordance with local law. The Panel is satisfied that it has jurisdiction to consider whether the collective redundancies announced in Sweden and in Germany should have been the subject of an Extraordinary Meeting under Clause V.1.4 of the Agreement."

52. The CAC Panel did not accept the submission of Adecco Group AG that:

> "60. … Clause V.1.4 is confined to situations where collective redundancies in two EEA countries share a common rationale. The opening paragraph of Clause V.1.4 lists three "transnational issues" which trigger the obligation to convene an Extraordinary Meeting. The Panel considers that, insofar as any weight is to be placed on the reference to the singular "transnational issue" in the concluding paragraph of Clause V.1.4, it is more likely to refer to whether the issue under consideration falls within the first, second or third of the transnational issues listed, but this is not a matter on which the Panel is required to give a concluded view."

The paragraph continued with the Panel expressing itself satisfied that:

> "…where there are "collective redundancies which significantly affect Adecco Employees in each of at least two EEA countries in which Adecco has employees" it is irrelevant whether, … they are "separately formulated in different countries in light of unrelated national circumstances" or otherwise for country-specific reasons. The Panel does not consider it a barrier to compliance with Clause V.1.4 that each country may be acting autonomously when proposing collective redundancies; there is no requirement that the collective redundancies referred to in Clause V.1.4 should be proposed, approved or coordinated at central level or at any level beyond that of the individual country. …"

53. The CAC Panel therefore upheld the redundancies complaint and turned to consider the remaining complaint.

(ii) The EAT judgment

54. The EAT substantially agreed with the CAC Panel's reasoning and the respondent's submissions in support of it. The judge declined to add what he described as a gloss sought by Adecco that the relevant decision must be taken in "another" member state, affecting employees in at least two EEA states. He reasoned that there was no such gloss in the Directive, the 1999 Regulations or the Agreement.

55. His further reasoning can be summarised as follows:

    i) Redundancies decided on in one EEA state are inherently likely to have indirect or knock-on effects on employees in the same undertaking or group in another

EEA state without the need to search for a common cause or decision, especially given free movement of workers between those states. He gave the example of a decision to make employees redundant taken in one Benelux country as likely to affect the workforce in a neighbouring Benelux country.

ii) Collective redundancies are expressly included within the definition of a transnational issue by clause V.1.4 (b). They cannot be part of the exclusion for "staffing levels" in the exclusion for "local matters" in clause II.1. If "staffing levels" include the making of collective redundancies, the provisions would make little sense; collective redundancies would be excluded from being transnational in clause II.1, yet included at clause V.1.4 (b), making the Agreement internally inconsistent.

iii) The inclusion of collective redundancies within the definition of a transnational issue adds the requirement that the redundancies must significantly affect Adecco employees in "each of at least two EEA countries", indicating that the effect in each of the two countries need not be the same and there could be differing effects in one country and another, including indirect or knock-on effects destabilising the workforce across countries, even though decisions may be made in two or more countries without any common cause or any common intended effect.

iv) It would be difficult to secure enjoyment of the information and consultation rights conferred if the undertaking or group could defeat them by requiring local management to take sole responsibility for redundancies. It is inherent in a group structure or centralised undertaking that the central management has at least oversight of country based units of management and the ability to impose its will on decentralised undertakings in individual countries.

v) Local management can be influenced by the policies of central management without the need for a direct order from the centre; and there was no dispute that Adecco Group AG has a general supervisory oversight role, setting budgets and parameters to be applied by local management.

vi) Enjoyment of the relevant rights should not turn on nuances in the relations between local and central management. There are a myriad of ways in which there may be interplay between local managers and central management to effect redundancies. On Adecco's case such an analysis of the interplay between central and local management decision making roles is necessary to determine whether an issue is transnational or not. Transparency and legal certainty militate against this approach.

vii) The judge recognised that on his interpretation, a transnational issue can arise without the need for any real nexus between two sets of redundancies. He referred to the hypothetical case he had mentioned in oral argument – the example of a factory fire in Bulgaria leading to redundancies in Bulgaria occurring in the same week as an earthquake in Portugal leading to redundancies in Portugal. On his analysis an Extraordinary Meeting would have to be convened in such a case. He regarded the contention that this would be inconvenient and burdensome as having been overstated. He observed that the Extraordinary Meeting (no doubt conducted remotely) would be very short,

everyone would recognise that the two separate events were not linked, that knock-on effects in other countries were unlikely and that they could be followed up at national level.

The Appeal

56. The case advanced by Adecco seems to me to have shifted as this complaint has progressed, and many of the arguments advanced at earlier stages have now rightly been abandoned. Be that as it may, the only question for this court is what is the proper construction of clause V.1.4 (b) of the Agreement construed purposively in the context of the Directive and the 1999 Regulations. Is it, as both the CAC Panel and the EAT essentially held, that the clause provides its own exhaustive definition of a "transnational matter"; or is it a precondition that there is a transnational matter as defined by clause II before any question of triggering an Extraordinary Meeting can arise? For the reasons set out below, and notwithstanding the forceful submissions made by Mr O'Dair, I have concluded that the former interpretation is not correct and that no freestanding or separate definition of "transnational matter" is provided by clause V.1.4 for the purpose of triggering an Extraordinary Meeting.

57. There is no dispute that the Agreement is intended to reflect the terms of the Directive and the 1999 Regulations. The preamble says that the Agreement is in accordance with those provisions, and its contents are, as a matter of language, plainly aligned with them.

58. Significantly, clause II of the Agreement reflects the language of the Directive (and the 1999 Regulations) and expressly confines the scope of the information and consultation obligation owed to the EWC under the Agreement to "transnational matters" defined as where the matter "concerns or has potential effects" on at least two undertakings in each of two different countries. This limitation of the competence of the EWC and the scope of the procedures guaranteeing information and consultation with it, is entirely consistent with article 1.3 and 1.4 and recitals (15) and (16) of the Directive, which together ensure that information and consultation occur at the correct level of management and representation, according to the subject under discussion. To achieve this necessary demarcation, the competence and scope of action of an EWC is different and distinct from that of national representative bodies and is required to be limited to transnational matters.

59. In this context a "matter" must include a decision, proposal or policy at a formative or sufficiently early stage for information and consultation about it to have utility. Although at one point Mr O'Dair sought to argue that it extended also to concluded decisions, he ultimately accepted that could not be so.

60. "Concerns" is a broad linking verb. It means relates to or affects. In other words, there must be some kind of nexus, relationship or link between two matters, or in the way that a single matter affects undertakings in each of two states. Consistently with recital (16), a matter's potential effects are also relevant when considering whether it is transnational. The transnational character of a matter is determined objectively, unaffected by the subjective views of either party. This is a question of substance not form. If in fact, and as a matter of substance, proposals to make redundancies in two countries are linked, no matter how or when they are presented, they should be regarded as a transnational matter triggering the relevant obligations.

61. It is clear therefore that the scope of the Agreement (like the Directive and the 1999 Regulations) is limited and applies only where there is a transnational matter in play, as defined by clause II. To engage the main information and consultation obligations under the Agreement, collective redundancy proposals affecting undertakings in two countries must therefore have a common link or nexus of some kind or there must be some way in which each proposal affects or has potential effects on undertakings in each of two different countries. If that link or nexus is not present, the matter is not transnational for these purposes.

62. The remaining question is whether clause V.1.4 about when an Extraordinary Meeting must be convened has a wider scope and contains its own freestanding definition of what is a transnational matter. I do not think it does.

63. I recognise that read in isolation (and without regard to the Agreement as a whole) there is some ambiguity created by the words "the following transnational Issues" in the predicate part of clause V.1.4. Nonetheless, reading the Agreement as a whole, and understanding clause V.1.4 in its context and against the background of the provisions and recitals in the Directive, I consider that the scope of the Agreement is plainly set by clause II which defines what is transnational for all purposes under the Agreement without any exception. Unless a matter gets through the gateway of clause II, and so is transnational, it cannot fall within clause V.1.4. In my view, clause V.1.4 identifies which particular or exceptional transnational matters require an additional or extraordinary meeting. It would be surprising if what is an additional requirement (to call an Extraordinary Meeting) extended beyond that clear scope without any indication that this is what was intended. The operation of clause II as a gateway is mirrored by paragraph 1(a) of Annex 1 to the Directive.

64. Further, the words "transnational Issues" in the predicate must have been intended to have some meaning, but appear redundant on the respondent's case. On the respondent's case the word "transnational" must be further read into (a) but is unnecessary in (b) which requires no nexus at all; while in (c) the requirement to be transnational is expressly provided for by limb (c) itself. This lends support to my view that clause V.1.4 does not provide a freestanding definition of transnational matters for clause V.1.4 purposes.

65. In my view the better interpretation of clause V.1.4 is that the existence of a transnational matter is a precondition to its application. In other words, there must be a transnational matter in accordance with clause II for the EWC to have competence in the first place. If there is a transnational matter at stake, then an Extraordinary Meeting must be convened if, in addition, exceptional circumstances or decisions falling within one of the categories listed in (a), (b) or (c) arise. The categories listed in clause V.1.4 are only relevant if that precondition is met. For example, if a substantial relocation that would fall within the terms of limb (a) of clause V.1.4 read in isolation, is nonetheless purely domestic in nature (for example, an office relocation within Germany from Berlin to Hamburg), then that is plainly not a transnational matter and no transnational information and consultation is required (although domestic information and consultation would be). This means that not all transnational matters will necessarily lead to an Extraordinary Meeting being convened.

66. It follows that a mere coincidence of timing of proposals for collective redundancies or business restructuring happening in undertakings in two countries is not enough to

trigger an Extraordinary Meeting and it is not irrelevant that such "exceptional circumstances" are unrelated or have no common rationale or nexus at all. Collective redundancies of this kind would not be transnational in character. They would lack the necessary link or nexus affecting (or potentially affecting) two undertakings in each of two or more countries. This does not require a central management decision, but to qualify as transnational there must be some objective factual nexus between the proposal or proposals to make collective redundancies in two different countries. Thus if the proposal to make redundancies in Sweden *concerns* the undertaking in Germany (because, for example, it has potential effects on employees in the German undertaking) and/or vice versa, the matter will be transnational and an Extraordinary Meeting must be convened if the redundancies also significantly affect existing employees in those two countries. If on the other hand there are two separate, unrelated proposals, each of which only concerns the undertaking in one country and neither has any potential effects on or relates to the undertaking in the other country, no transnational issue arises. It will be for the national employee representative body to be involved in information and consultation in the latter case.

67. The EAT reasoned that it is "inherently likely" that collective redundancies in one member state will have "indirect or knock-on effects" on employees in another member state. I disagree. If as a matter of substance and fact they do, that would make the proposal a "transnational matter", but if they do not, and only have national effects, they are not a "transnational matter", and the question of inherent likelihood does not arise. Nor is there any difficulty or inconsistency between this interpretation and the definition of local matters in clause II.1. Clause II.1 simply draws the distinction between transnational matters and those which only have effects in a single country, consistently with the limited scope of the obligations under the Agreement. The staffing level of a single country is a national matter while staffing levels across two countries is potentially a transnational matter.

68. The EAT said that the effect in each of the two countries need not be the same effect and that there could be differing effects in one country and another, such as indirect or knock-on effects destabilising the workforce across countries, even though decisions may be made in two or more countries without any common cause or any common intended effect. I agree with that observation. However, it is consistent with and supports the construction I prefer. It certainly does not undermine it. If there was some direct, indirect or knock-on effect of the Swedish redundancies leading to or potentially affecting a different group of workers and their redundancies in Germany then the two sets of redundancies would have been connected by that effect.

69. The concern expressed by the EAT and repeated by Mr O'Dair, that information and consultation rights are defeated if local management has "sole responsibility for redundancies", is misplaced. Information and consultation must still take place locally according to national law. Transnational information and consultation is only required where local consultation alone is inapplicable or ineffective because the proposal is a transnational matter. This approach does not render enjoyment of the rights conferred by the Directive and the 1999 Regulations dependent on "nuances" in the relations between local and central management. It makes the rights dependent on whether they are national matters – only having domestic effects on employees in one member state – or transnational matters – having potential effects on employees in any two or more member states.

70. It means that independent, unrelated employment events in two or more countries, such as those hypothesised by the EAT (redundancies in response to a fire in Bulgaria and an earthquake in Portugal that struck at around the same time but have no "real nexus" as the EAT put it), will not constitute a transnational matter requiring an Extraordinary Meeting to be convened. Even if it is possible to convene a short Extraordinary Meeting (held remotely as the EAT suggested) every time local redundancy proposals (whatever their scale) affecting employees in one country in a Community-scale business coincide with such a proposal in an undertaking in a second country in the same Community-scale business, absent a nexus between the two it is contrary to the clear scope of the Agreement, the Directive and the 1999 Regulations to require an Extraordinary Meeting to be convened in such circumstances. To conclude otherwise renders meaningless the requirement for a matter to be transnational. It means, as the EAT said, that entirely independent, unrelated employment events in two or more member states will constitute a transnational matter merely because of the coincidence of timing. As already stated, where decisions are taken on a national level, the appropriate information and consultation requirements are those that exist under national legislation. It is only where there is a transnational matter as defined that the information and consultation requirements under the Directive and any agreement concluded in accordance with it (and the 1999 Regulations), may be invoked. That is unsurprising given the purpose and objects of the Directive.

Disposal

71. This conclusion means that, in my judgement, both the EAT and the CAC Panel made a material error of law and their decisions on this issue must be set aside. It follows that the £20,000 penalty notice and costs orders must also be set aside.

72. Mr Burns invited the court to hold that on a proper construction of clause V.1.4 and on the findings of fact made by the CAC Panel, there is only one inevitable conclusion that follows: Adecco was not under an obligation to call an Extraordinary Meeting and so was not in breach of the Agreement. On this basis he invited the court to substitute a decision to the effect that the collective redundancies complaint was not well-founded.

73. I do not accept this submission and agree with Mr O'Dair that the CAC Panel decided this complaint on the basis of its legal analysis which led the CAC Panel to say that the facts and any possible common rationale were irrelevant.

74. In any event, it appears that the evidence before the CAC Panel focussed on the organisational structure of the employer (with a framework set in Switzerland, managed in each country) and/or where the particular decisions were made. These aspects are of some relevance but do not provide the whole answer. The critical question is whether the particular decision concerned or had potential effects on at least two undertakings in each of two countries (as set out at clause II of the Agreement).

75. The respondent maintained its argument that Adecco planned the various redundancies in response to COVID-19. That argument is just about compatible with some of Adecco's evidence (to the effect that an overall group budget was set and that the business did see a downturn in mid-2020). But the factual issue at the heart of this case remains undecided. That issue is whether there was a common link or nexus between the redundancies in Sweden and Germany or their potential effects. That is an

evaluative question wholly dependent on clear findings of fact and does not admit of only one inevitable answer. The case must accordingly be remitted to the CAC.

Lord Justice Dingemans

76. I gratefully adopt the summary of the background and issues set out in the judgment of Lady Justice Simler, which I have had the privilege of reading in draft. I agree with much of Lady Justice Simler's judgment but have found the issue of whether "collective redundancies which significantly affect existing Adecco employees in each of at least two EEA countries in which Adecco has employees" should be deemed to be "transnational matters" more difficult.

77. It was common ground that the Adecco European Works Council agreement ("the agreement") has to be construed purposively in the light of the Directive and the 1999 Regulations. The Directive and 1999 Regulations are helpfully set out in Lady Justice Simler's judgment. Recital 7 of the Directive (paragraph 11 above) provides that it was necessary to modernise the relevant legislation "with a view to ensuring the effectiveness of employees' transnational information and consultation rights".

78. I agree that the scheme of the Directive, the 1999 Regulations and the agreement is that the scope of employees' information and consultation rights are limited to transnational matters. This is made clear by, among other provisions, article 1(3) of the directive, the limitation of subsidiary requirements in the Directive by paragraph 1(a) of Annex 1 which expressly refers to article 1(3), regulation 18A(7) and paragraph 6 of the Schedule to the 1999 Regulations, and clause II of the agreement itself.

79. The Directive provided for a set of default rules (what were called subsidiary requirements) in article 7 and Annex 1 in the event that the parties did not conclude an agreement to establish a European Works Council. As it is apparent that the wording of the agreement itself is part based upon the subsidiary requirements set out in Annex 1 of the Directive (some of which are set out in paragraph 20 above) and given the wording in Annex 1 providing for the right to information and consultation in exceptional circumstances including collective redundancies, I was attracted to the proposition that exceptional circumstances such as collective redundancies should be deemed, without more, to be transnational. That was on the basis that the Directive, 1999 Regulations and agreement might have made the assumption that because collective redundancies could be presumed to "have potential effect at least on two undertakings of the group" because of, for example, cross border travel between EEA countries, or simply because the existence of the possibility of transnational effects would give the right to information and consultation thereby making the employees' rights effective. There was also the curious wording of "the following transnational Issues" in article V.1.4 of the agreement to which Lady Justice Simler has referred.

80. In the final event, in the light of the definition of transnational matter in clause II of the agreement, and the requirement that information and consultation be restricted to transnational matters, it is apparent that the Directive and 1999 Regulations contemplate that some exceptional circumstances, such as collective redundancies, may not be transnational matters. I am therefore persuaded that it is not appropriate to interpret clause V.1.4 as deeming every set of "collective redundancies" to be transnational matters. That will need to be shown in the particular circumstances of any case.

81. As matters stand, there has been no finding that the collective redundancies were transnational matters. I agree with Lady Justice Simler that it is apparent that Adecco's case on what is transnational has developed. This is because Adecco had originally refused to arrange a meeting on the basis that central management were not responsible for the decision to impose collective redundancies. That was too narrow an approach to what is a transnational matter. I therefore agree with the order proposed by Lady Justice Simler.

Lady Justice Whipple

82. I am grateful for advance sight of the judgments of both Lady Justice Simler and Lord Justice Dingemans. I agree that this appeal should be allowed and adopt the reasons given by Lady Justice Simler for reaching that conclusion.

83. At its heart, this appeal raises an issue of construction of the Agreement. Lady Justice Simler provides a compelling analysis of the key provisions of that Agreement at paragraphs 57 to 70 above. Clause II determines the scope of the Agreement and defines transnational matters as those which "concerned or have potential effects on at least two undertakings of the Group situated in two different EEA countries…". That definition echoes article 1(4) of the Directive read with recital 16 in particular. It provides Adecco employees with a significant level of protection, ensuring that the EWC will be consulted in relation to any matter which even potentially has transnational effects. But if the matter does not have transnational effects (actual or potential) it will remain within the competence of the national representative bodies. That division seems to me to reflect the purpose of the Directive precisely (see recital 15 and article 1(3) of the Directive which emphasise the distinct functions of the EWC and the national representative bodies) and to underpin the Agreement (see, further, clause II.1 which provides for local matters, in contrast with transnational matters, to be dealt with at local level).

84. In my judgment, clause V.1.4 takes the clause II definition of transnational matters as its predicate. Clause V.1.4 identifies which transnational matters require an extraordinary general meeting. Not all of them do. Only those exceptional transnational matters which also feature in the list trigger an extraordinary meeting.

85. I would wish to pay tribute to the careful judgment of the EAT. There is much in that judgment with which I agree. I do not agree, however, with the EAT's construction of the Agreement. In my view, clause V.1.4 does not provide a free-standing definition of transnational matter; that is not its purpose or effect, nor is it the natural and ordinary meaning of that clause, which must be read in context and in light of clause II. Further, in my view it is an error to assume as inherently likely that two collective redundancies occurring in two EEA states at roughly the same time are connected; whether the two matters are connected or whether either one has actual or potential effects on the employees of a Group undertaking in another EEA country is a question of fact for determination by the CAC if the parties are unable to agree the position; there is no basis in law or within the Agreement for assuming the likely answer to that question.

86. Because there has not in this case been a determination of whether the collective redundancies in Sweden and Germany were connected or whether either one had actual or potential effects on an Adecco undertaking in another EEA country, the matter must

be remitted to the CAC, which is regrettable given the time that has elapsed since the events in question.