Neutral Citation Number: [2022] EAT 183 EA-2021-000017-AT
EA-2021-000045-AT

IN THE EMPLOYMENT APPEAL TRIBUNAL
ON APPEAL FROM THE CENTRAL ARBITRATION COMMITTEE

AND IN THE MATTER OF AN APPLICATION UNDER REGULATION 21(6) OF THE TRANSNATIONAL INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 1999

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 13th December 2022

Before :

THE HONOURABLE MR JUSTICE KERR

- -

Between :

OLSTEN (UK) HOLDINGS LIMITED **Appellant (Respondent to Cross-Appeal)**

- and –

ADECCO GROUP EUROPEAN WORKS COUNCIL (BY ITS EMPLOYEE REPRESENTATIVES) **Respondent (Cross-Appellant)**

And Between :

ADECCO GROUP EUROPEAN WORKS COUNCIL (BY ITS EMPLOYEE REPRESENTATIVES) **Applicant**

- and –

OLSTEN (UK) HOLDINGS LIMITED **Respondent to the Application**

- -
- -

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

Hearing date: 24 November 2022

- -

JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is Tuesday 13 December 2022 at 10am. The version released for publication may be treated as authentic.

SUMMARY

Topic no 27 (Central Arbitration Committee)

The Central Arbitration Committee (**CAC**) had correctly concluded that proposed redundancies in more than one EEA state proposed by undertakings in a group operating across numerous EEA states, gave rise to a "transnational" matter, creating an obligation on the employer group under a European Works Council (**EWC**) agreement to call an extraordinary meeting to provide information and engage in dialogue with employee representatives.

The CAC had correctly upheld the complaint of the respondent EWC, acting through its employee representatives. The CAC had correctly decided that it was not necessary for decisions on redundancies in more than one EEA state to share a common rationale. Redundancies proposed by group undertakings in more than one EEA state at the same or about the same time constituted a transnational matter, even if they did not share a common rationale. The appeal would be dismissed.

The CAC had correctly held that the complaint by the EWC was out of time in respect of certain redundancies in the Netherlands and Hungary, announced by the relevant group companies more than six months plus five working days before the complaint was brought. To that extent, the complaint was brought after expiry of the limitation period which expired six months and five working days after those redundancies were announced. The cross-appeal would be dismissed.

On the EWC's application to the Appeal Tribunal (exercising original not appellate jurisdiction) to impose a penalty on the appellant (as appointed representative of the Group with its headquarters in Switzerland) in respect of the two well-founded complaints, there would be a penalty of:

(1) £20,000 for breaching the EWC agreement by failing to convene an extraordinary meeting with the steering group of employee representatives, established under the EWC agreement, to provide

information and engage in dialogue about collective redundancies in Sweden and Germany (**the redundancies complaint**); and

(2) £5,000 for breaching the EWC agreement and regulation 18A of the Transnational Information and Consultation of Employees Regulations 1999, as amended (**the 1999 Regulations**) by refusing to supply business sales performance data broken down by country in connection with the November 2020 Annual Plenary Meeting (**the sales data complaint**).

The Honourable Mr Justice Kerr:

Introduction

1. This case is about the obligations of a multinational group of companies to inform and consult a European Works Council established by an agreement (**the EWC agreement**) underpinned by an EU directive. That directive bears the lengthy title: *Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)*. I shall refer to it more briefly as **the directive**. It replaced Directive 94/45/EC of 22 September 1994 and is transposed in this country by the Transnational Information and Consultation of Employees Regulations 1999, as amended (**the 1999 Regulations** or **the Regulations**).

2. The appellant (**Olsten**) represents the interests of the employer, which is part of the Adecco Group, based in Zürich, Switzerland (**the Adecco Group** or **Adecco**). Olsten contends that the Central Arbitration Committee (**the CAC**) in its decision now appealed against, misinterpreted the scope of a "transnational" matter triggering the obligation to convene a meeting to discuss proposed collective redundancies.

3. The respondent to the appeal (**the EWC**) defends the CAC's interpretation of what is a "transnational" matter, under the directive, the 1999 Regulations and the EWC agreement. The EWC also cross-appeals against the CAC's decision that part of the EWC's complaint to the CAC was out of time.

4. Finally, the EWC applies to this Appeal Tribunal under regulation 21(6) of the 1999 Regulations for a penalty notice to be issued against Olsten in respect of the failure of the Adecco Group to comply with its obligations under the EWC agreement in two respects:

(1) first, by failing to convene an "Extraordinary Meeting" to provide information and engage in dialogue about collective redundancies with the Steering Group established under the EWC agreement (**the redundancies complaint**); and

(2) second, in breach of the EWC agreement and of regulation 18A of the 1999 Regulations, refusing to supply business sales performance data broken down by country in connection with the November 2020 Annual Plenary Meeting (**the sales data complaint**).

5. Olsten denies that the redundancies complaint is well founded, for the reasons advanced in its appeal. It is agreed that if, contrary to the CAC's decision, no transnational matter arose, both the cross-appeal and the application in respect of the redundancies complaint fall away. Olsten admits that the sales data complaint is well founded, but offers a plea in mitigation in respect of it. Olsten asks for the amount of the penalty in respect of the sales data complaint – and, should its appeal fail, the redundancies complaint - to be set at the bottom end of the scale.

The Issues

6. There are therefore four issues which the Appeal Tribunal has to or may have to decide. They are:

(1) whether the CAC misdirected itself on the meaning of a "transnational" matter;

(2) if the CAC did not so misdirect itself, whether the CAC wrongly found that the EWC's application was out of time in respect of redundancies in the Netherlands and Hungary;

(3) what penalties should be imposed: in respect of the redundancies complaint, if the CAC did not

so misdirect itself; and, in any case, in respect of the sales data complaint;

(4) if the CAC did misdirect itself on the meaning of a transnational matter, whether I should remit the redundancies complaint back to the CAC or substitute a decision in favour of Olsten.

The Legal Framework: Overview

7. The directive made a number of changes to the regime established by its predecessor, Directive 94/45/EC, while preserving its rationale: to ensure that where an undertaking or group of undertakings operates in multiple states of the European Union (**EU**) or European Economic Area (**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.

8. The directive's 49 recitals show that its aim is to "modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees' transnational information and consultation rights…" (recital (7)); to promote "dialogue between management and labour", the objective set in article 136 of the Treaty Establishing the European Community (recital (8)); and keep to a minimum "the burden on undertakings or establishments while ensuring the effective exercise of the rights granted" (recital (9)).

9. 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", which may lead to "unequal treatment of employees affected by decisions" within one undertaking or group. Appropriate measures were therefore needed to ensure the affected employees are properly informed and consulted when decisions are taken in an EU or EEA state other than that in which they are employed (recital (12)).

10. To that end, European Works Councils (or 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. Recital (16) explains:

> **"The transactional 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."**

11. In accordance with the principle of the autonomy of the parties, the relevant information and consultation rights may be created by agreement. It is for the parties "to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources" of EWCs (recital (19)). However, if agreement is not reached, certain default "subsidiary requirements" set out in Annex 1 to the directive apply.

12. Article 1 states the objective of the directive and the consequent requirement to establish an EWC in every Community-scale undertaking or group of undertakings (article 1(2)). The competence of the EWC is "limited to transnational issues" (article 1(3)). By article 1(4):

> **"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."**

13. The machinery for establishing an EWC or relevant agreement is found in articles 5, 6 and 7 and Annex 1. A "special negotiating body" of employees' representatives is established under article 5. Its task is to negotiate an agreement with management. It may decide not to open negotiations, but only by a two thirds majority (article 5(5)). In that event, the subsidiary requirements do not apply, the negotiation stops and a new request to convene the special negotiating body may be made at the earliest two years after the decision not to open negotiations (article 5(5)).

14. If (as in this case) the negotiations lead to agreement, the content of the agreement is regulated by article 6. As per 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)).

15. 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". Those subsidiary requirements apply (by article 7(1)) where the parties so decide or, where management refuses to commence negotiations within six months of a request (made under article 5(1)) from the special negotiating body to do so.

16. The subsidiary requirements found in Annex 1 to the directive comprise rules governing the operation of an EWC where the parties so decide or where management refuses to start negotiating within six months of being asked to do so. I need not set out the detail because in the present case agreement was reached and consequently the rights and obligations of the parties are governed by the EWC agreement.

17. 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, the date on which the transition period ended under the agreement for withdrawal of the United Kingdom from the EU. After that there were changes to the Regulations, but I am not concerned with them.

18. The Regulations largely replicate the provisions of the directive. 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 at least two different Member States."**

19. 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.

20. By regulation 18A, where there is an EWC agreement or an 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. For present purposes, it is not necessary to set out in detail the content of the information that must be provided. Broadly, it must be sufficient, and given in sufficient time, to enable an informed consultation (regulation 18A(3)-(6)). But the information that must be provided "shall be limited to transnational matters" (regulation 18A(7)).

21. A complaint may be presented to the CAC where the EWC (or information and consultation representatives) consider that an agreement made under regulation 17 has not been complied with or regulation 18A has not been complied with or the information provided is materially false or incomplete (regulation 21(1) and (1A)). Such a complaint must (regulation 21(1B)) be brought within "six months beginning with the date of the alleged failure or non-compliance". 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 …." (regulation 21(4)).

22. If the defaulter is the central management of the employing group, the other party may apply under regulation 21(6) to the Employment Appeal Tribunal for a penalty notice to be issued. The Appeal Tribunal must issue a penalty notice (regulation 21(7)) unless 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(8)). The maximum penalty is £100,000 (regulation 22(2)).

23. When deciding on the amount of the penalty, this Appeal Tribunal must take into account the gravity of the failure, the period over which it occurred, the reason, the number of employees affected and the number of employees of the Community-scale undertaking or group of undertakings in the EEA member states. The penalty is recoverable by the Secretary of State as a civil debt (regulation 22(5)).

24. An appeal to this Appeal Tribunal lies on any question of law arising from any declaration or order of the CAC or in proceedings before the CAC (regulation 38(8) of the 1999 Regulations). In disposing of such an appeal, the Appeal Tribunal may, in the usual way, exercise any of the powers of the body appealed against or remit the case to that body: Employment Rights Act 1996, section 35(1).

Outline of the Facts

25. Adecco is a worldwide provider of permanent and temporary workers to its client businesses. Its ultimate parent company is based in Switzerland. Olsten, based in London, was at the material times Adecco's UK representative agent appointed to represent Adecco for the purposes of its functions under the directive. In 2020, Adecco employed more than 18,000 people in 20 or 21 EEA member states (Switzerland is not in the EU or EEA).

26. The EWC is the joint body established under the EWC agreement, which was amended and restated in 2018. The EWC appears in these proceedings by its employee representatives. The EWC agreement is dated 24 May 2018. The preamble refers to the directive and provides for employee representatives and management representatives to cooperate in a spirit of good faith. The objective (clause I) is to establish the EWC. The scope of the agreement is in clause II: it extends to group companies in EEA states, the UK and Switzerland in which Adecco or its subsidiaries operate.

27. The information and consultation within the EWC is "limited to transnational matters". Transnational matters are defined (in a manner similar to that in article 1(4) of the directive) thus:

> **"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. I have added it because I think it must have been intended; without it the concluding words make little sense; with it, the definition closely matches the definition in article 1(4) of the directive.

28. At clause II.1 there is 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."**

29. Clause II.2 then deals with changes to Adecco's organisation, for example where it divests itself of a company in an EEA state, or acquires one. The scope of the EWC agreement is extended or restricted accordingly.

30. Clause III deals at length with the composition of the EWC. I need not set out all of it. Clause III.4.1 provides for the appointment of an AEWC Co-ordinator by Adecco "responsible for ensuring

smooth and effective AEWC information and consultation process and all administrative matters concerning the operation of the AEWC." Clause III.4.2 provides for a "Steering Group" comprising five employee representatives, to "serve as the channel to communicate with the Adecco Management between the Annual Plenary Meetings and to attend Extraordinary Meetings as defined in Clause V.1.4".

31. Clause IV deals with "functions and procedure for information and consultation". The extent and quality of information and consultation are linked to the provisions of the directive. Again, I need not set out all the detail. The information must include "all elements required for the employee representatives to understand the data in order to develop a reasoned opinion." The concluding words of clause IV.1 are:

> **"The content of the information, the time when, and the manner in which it is given, must be such as to reasonably enable the Employee Representatives within the AEWC to:**
> **a) acquaint themselves with and examine its subject matter;**
> **b) undertake a detailed assessment of its possible impact; and**
> **c) where appropriate, prepare for consultation."**

32. Clause V then deals with the venue, frequency and duration of meetings. Clause V.1 provides for an "Annual Plenary Meeting" over four days each year, preceded by consultation between the Co-ordinator and a spokesperson appointed by the Steering Group. Under clause V.1:

> **"The Agenda will include information and dialogue on transnational matters, relating to the Adecco Group within the geographical scope of this Agreement, in particular concerning the structure, economic and financial situation, the probable development of the business and of service provision, sales, the situation of employment including substantial changes concerning organization, outsourcing, major collective redundancies and layoffs of the workforce, transnational health and safety issues, introduction of new working methods and technology, training, corporate social responsibility, as well as an update on on-going integration of newly acquired companies."**

33. And the concluding words of clause V.1 are:

> **"The Agenda and any supporting documentation that is not subject to the Confidentiality provisions as set out in this AEWC Agreement shall be distributed by the AEWC Co-ordinator by electronic means or placed on a secure internet website to all AEWC Employee Representatives 2 weeks prior to the Annual Plenary Meeting."**

34. Clause V.1.4 deals with "Extraordinary Meetings". An extraordinary meeting must be

convened to engage in dialogue with the Steering Group on "the following transnational matters" where "exceptional circumstances or decisions arise". These are then set out:

> **"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."**

35. 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."**

36. As the EWC eventually accepted during the oral argument, that provision must mean that an extraordinary meeting is convened *with* the Steering Group, rather than *of* the Steering Group. A little later reference is made to "the Steering Group and Management Representatives" agreeing on extending an invitation to the AEWC members in the countries most affected.

37. Finally, I should mention that 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."**

38. 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.

39. Also in early 2020, in the Netherlands a change in the law effective from 1 January 2020 was encouraging direct hiring rather than using temporary agency workers. This caused a drop in the business of Adecco's Dutch subsidiary and other suppliers of agency labour. The Dutch subsidiary (**Adecco Netherlands**) began a collective redundancy consultation process in February 2020. On 24

February, Adecco Netherlands reached agreement with the national works council for the dismissal of 75 employees for redundancy, or about nine per cent of the workforce.

40. However, only three employees were actually dismissed, early in March 2020. The rest were not; instead, they benefitted from a government scheme that paid 90 per cent of wages for workers affected by the coronavirus epidemic which was then developing. In April 2020, the Netherlands government granted the application for subsidy for the other Adecco Netherlands employees who otherwise faced redundancy.

41. In Hungary, Adecco's subsidiary (**Adecco Hungary**) had lost a major client in 2019, representing about 40 per cent of Adecco Hungary's business and was considering redundancies in the spring of 2020. On 5 May, management decided that redundancies were necessary. A union official was informed the next day but Hungarian law did not require a consultation process. In all, nine employees were made redundant, or 10.2 per cent of the workforce in Hungary. The last redundancy was made on 11 May 2020.

42. Adecco Sweden started consultation with the relevant unions on a further 16 redundancies on 25 May 2020 and on 11 more redundancies the next day, 26 May. On 26 and 27 May, the Steering Group (comprising five employee representatives) telephoned, emailed and wrote to the Adecco Group 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".

43. The Steering Group's letter complained that opportunities to take advantage of Covid-related subsidy schemes (as 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 EWC 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".

44. On 28 May, Adecco Sweden began consultation with the relevant unions about a further five redundancies there. On 29 May, the Adecco Group emailed to 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 the Adecco group central management and the Steering Group. The agenda topics included, firstly, "Situation of Workforce in Adecco Group Europe: current and outlook"; and "COVID-19 Update". Further agenda details and presentations were to follow.

45. The first batch of presentations comprised some 65 pages of worldwide workforce and financial data, broken down by regions rather than countries; a paper called "Covid 19 Update"; a paper on the Q1 2020 financial results; another one on the outlook for Q2; and "Concluding Messages" followed by "Key Financial Indicators" and a paper on the Annual Report for 2019.

46. The first 16 redundancies in Sweden were made on 1 June 2020. Two days later, the possibility of redundancies at German Adecco subsidiaries (together, **Adecco Germany**) emerged. Workforce changes there had been ongoing for several years due to legal changes discouraging the hiring of temporary workers; 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".

47. 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, the Adecco group 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.

48. On 24 June 2020, the Adecco Group 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".

49. 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 … ."**

50. The letter then stated in detail why management saw no common cause to the redundancies in each individual country and no centrally taken decision. Consequently, clause V.1.4 of the EWC agreement did not apply and no extraordinary meeting would be called. However, the Adecco Group 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 management prepared some presentation notes to address to 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.

51. The employee representatives on the EWC decided to open a formal dispute on the refusal of the Adecco Group to recognise the issue of collective redundancies across four countries (Sweden, Netherlands, Hungary and Germany) as transnational. The formal dispute document sent to the Adecco Group 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.

52. 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 EWC agreement. A dialogue took place. The employee representatives and management explained their opposed points of view. The same day, the last five redundancies were implemented in Sweden. The debate continued between the employee representatives' spokesman and the Adecco Group's HR communications and project lead, in subsequent correspondence and by telephone.

53. On 30 June 2020, the five EWC representatives on the Steering Group opened a further formal dispute complaining that information about the Group's financial results was being given by "aggregates of countries" instead of "country by country". This, the complaint stated, had been refused because the Adecco Group preferred to provide information that was already publicly available.

54. The complaint document then referred to an agreed rule of procedure (supplementing the EWC agreement) stating that the AEWC Co-ordinator:

> **"shall inform the steering group each year by the 1st of April of the most recent business sales performance and workforce data per country covered by the geographical scope of the AEWC agreement."**

That complaint was occasioned by the Steering Group not being informed in advance (as they explained in a document dated 11 June 2020, following the call the previous day) of redundancies in three particular countries (Netherlands, Sweden and Hungary).

55. In an attempt to resolve matters, management agreed over the summer of 2020 (as recorded in an email of 18 September 2020) that two experts would discuss and attempt to agree on the scope of a "transnational" matter. In relation to the request for provision of sales performance and workforce data on a country by country basis, in the same email, management provided a single page breakdown of sales in each of the 25 European states (in millions of euros) for the full year 2019, followed by a "year on year" percentage increase or decrease over the previous year, 2018.

56. 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.

57. The Annual Plenary Meeting was due to take place on 5, 6, 19 and 20 November 2020. In advance of it, on 22 October, the Adecco Group provided the EWC with information, on a confidential basis. This consisted of about 22 pages or slides showing group-wide high level performance and strategy information. It did not include details of financial performance broken down by region or by country.

58. On 4 November, further information was provided the day before the Annual Plenary Meeting was due to start. This consisted of a 12 page slide presentation from the Group's Chief HR Officer,

called "Brand-driven organisational structure update". It included charts showing personnel in charge of regions and countries, reporting procedures and strategies for business development. It did not include any financial information. That was to follow at the meeting and to be discussed during the second phase of the meeting, on 19 and 20 November 2020.

59. The first part of the meeting took place on 5 November 2020. Over the following days, the Adecco Group provided the EWC with further information arising from the session on 5 November and written information for discussion when the plenary meeting resumed on 19 November. That information mainly comprised some 70 pages of slides showing global financial information (though not actual sales figures) and workforce data as at November 2020, mainly broken down by region rather than country.

60. These documents were not marked confidential and I understand they or many of them were publicly available. There were two pages of workforce data broken down by European countries, showing "Q3 2020 highlights" and percentage figures relating to retention, volume turnover and vacancies and actual figures for "headcount". Much of the global trend data on the workforce was linked to Covid-19, not surprisingly as this was November 2020.

61. On 10 November, the Hungarian representative on the Steering Group emailed the Adecco Group management reiterating the request for financial information broken down by country:

> **"… we wish to repeat our request from previous years to receive the most recent business sales performance data country by country covered by the geographical scope of the AEWC Agreement, in accordance with the AEWC Rules of Procedure (page 5). This information is needed so that the EWC can undertake a detailed assessment of company plans relevant to employees within scope of the EWC, in accordance with article IV.1 of the AEWC Agreement and regulation 18A of the Transnational Information and Consultation of Employees Regulations 1999."**

62. That information was not provided. The second part of the Annual Plenary Meeting then took place on 19 and 20 November 2020. The EWC's English adviser then complained in writing to the

CAC on 24 November that the Adecco Group (whose appointed representative is Olsten) had, firstly, failed to inform and consult the EWC about collective redundancies concerning Adecco group undertakings in at least two countries within scope of the EWC Agreement; and, secondly, refused to inform the EWC Steering Group of the most recent business sales performance data "per country" within the scope of the EWC agreement.

63. Several rounds of written evidence and submissions were then 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. 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.

64. It is unnecessary to repeat the detailed contentions and evidence of the parties, which occupied the first 40 pages of the CAC's decision. They are similar to the submissions made to me, which I will consider a little later in this judgment. Having set them out, the CAC, in its initial decision of 5 March 2021, examined first the time point which is now the subject of the EWC's cross-appeal. The panel accepted the submission of the Adecco Group that the complaint was out of time in so far as it concerned the redundancies in the Netherlands and Hungary.

65. Under regulation 21(1B) of the 1999 Regulations the complaint had to be made "within a period of six months beginning with the date of the alleged failure or non-compliance." The last of the events concerning the redundancies in the Netherlands and Hungary occurred on 6 May 2020, the panel found. The obligation (if there was one) was then to convene an Extraordinary Meeting not more than five working days later, i.e. on or before 13 May 2020. The complaint was brought on 24

November 2020, more than six months later. The part of it relating to events in the Netherlands and Hungary was therefore out of time, the panel agreed.

66. The panel then went on to consider the redundancies in Sweden and Germany. The complaint about them was not said to be out of time. The panel did not accept the submission of the Adecco Group that "Clause V.1.4 is confined to situations where collective redundancies in two EEA countries share a common rationale". An extraordinary meeting had to be convened under clause V.1.4 if at least one of the three kinds of transnational issues identified in (a), (b) or (c) of clause V.1.4 arose. The second of these, in (b), was "in the event of collective redundancies which significantly affect existing Adecco Employees in each of at least two EEA countries … ."

67. Where that is so, it is (in the panel's words echoing the Adecco Group's submission) "irrelevant whether … they are 'separately formulated in different countries in the light of unrelated national circumstances' or otherwise for country-specific reasons". There is, the panel held, "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". The panel therefore upheld the redundancies complaint and turned to consider the sales data complaint.

68. Rejecting most of the Adecco Group's submissions but confining its consideration to the information required to be provided for the Annual Plenary Meeting in November 2020, the panel held that in the present case, business sales performance data broken down by country was required in order for the EWC to fulfil its role under clause IV.1 of the EWC agreement and that the Adecco Group had breached the agreement by failing to provide such data for the November 2020 Annual Plenary Meeting. It based its decision on the requirement for sufficiency of information in the EWC agreement itself and regulation 18A of the 1999 Regulations, not on the non-binding rules of procedure for operating the EWC agreement.

69. The CAC noted that it had not been asked to make any specific orders and therefore stated that it would consider any request for a particular order subsequently, if any were sought by the EWC, after giving the Adecco Group an opportunity to comment. This process led to the CAC's second written decision, dated 12 April 2021. Again, the panel set out the parties' detailed submissions very fully. I need not do so here. The panel also noted its powers to make orders, or refrain from doing so, under the 1999 Regulations.

70. The panel made no order following the success of the redundancies complaint. The success was confined to the redundancies in Sweden and Germany. It was too late for consultation on those redundancies. Detailed information about them had been provided in response to the complaint. The panel had not determined any issue of sufficiency of information in relation to the redundancies complaint. The Group's shortcoming was the failure to convene an Extraordinary Meeting.

71. As for the sales data complaint, also successful, the panel accepted that it could not order an employer to provide particular information in relation to a future plenary meeting; it could only order provision of information in respect of the November 2020 meeting. The panel went on to note that the Adecco Group had stated that "the AEWC will shortly be provided with a country-by-country breakdown of the 2020 full year sales and organic sales growth year-on-year information." If that were done, there would be no need for an order. The CAC decided to make no order but to give the Adecco Group 21 days to make good that assurance and it would then reconvene if necessary.

72. I have not seen the resulting disclosure but am told the Group was as good as its word and supplied the information broken down by country within the 21 day period. The CAC then closed the case and made no further order. Olsten (on behalf of the Adecco Group) appealed to this Appeal Tribunal on 15 April 2021. The EWC applied on 20 May 2021 for a penalty notice to be issued under

the 1999 Regulations in respect of the two breaches found by the CAC. On 31 May 2021 the EWC cross-appealed against the finding that part of the redundancies complaint was out of time.

First Issue: Misdirection as to Transnational Matter

73. Mr Andrew Burns KC, for Olsten, advances as the single ground of appeal that the CAC misdirected itself or misinterpreted the meaning of "transnational" matters. He submits that there was no overall collective redundancy process with a common rationale, as is required. To be "genuinely transnational", matters must involve (in Mr Burns' words) "a decision … about employees which is taken in another Member State; and … affecting employees in more than one Member State".

74. Here, he submitted, the relevant decisions were taken locally, i.e. in Sweden and Germany (and Netherlands and Hungary where the claim was out of time) for reasons particular to those countries, unconnected with each other and not dictated by the central management of the Adecco Group in Switzerland. He submitted that this interpretation reflected the definition of transnational matters in article 1(4) of the directive and regulation 2(4A) of the 1999 Regulations.

75. He also relied on the reference in recital (11) to information and consultation procedures often not being "geared to the transnational structure of the entity which takes the decisions affecting those employees"; and the reference in recital (12) to decisions affecting employees in Community-scale undertakings being "taken in a Member State other than that in which they are employed".

76. Here, Mr Burns submitted, each of the collective redundancy processes in the respective countries was a purely national affair, governed by the appropriate national legislation in that country. The evidence showed that the Adecco Group management in Switzerland played no part in the process, other than setting budgets and parameters. It was left to local management to decide whether job cuts should be made. This function fell within the exclusion in clause II.1 of the EWC agreement

of "staffing levels" from the scope of a transnational matter.

77. A transnational matter, according to Mr Burns, would typically involve a decision made in one EEA state which has consequences in at least one other EEA state. The redundancies in Sweden and Germany would have to "have formed part of or been a consequence of a single management project, proposal or response …. proposed, approved or co-ordinated at some sort of central or transnational level …". Entirely unrelated employment events in two or more EEA states do not make a matter transnational merely because they happen at about the same time.

78. That would be unduly burdensome on management, contrary to the objective in recital (9) of keeping "to a minimum the burden on undertakings and establishments while ensuring the effective exercise of the rights granted". The CAC accepted on the Adecco Group's unchallenged evidence that the collective redundancies in Sweden and Germany were two independent matters; it was a coincidence that they occurred at about the same time. But, Mr Burns submitted, the CAC drew the incorrect conclusion from that evidence that the matter was nonetheless transnational.

79. For the EWC, Mr O'Dair relied on the reasoning of the CAC panel. As the panel noted, the Adecco Group had "acknowledged that the Agreement did not prescribe that collective redundancies in two or more countries must be the result of a request by Adecco Group Headquarters … ." The Group had relied on the use of the singular, not the plural, in the concluding words of clause V.1.4, on the subject of how Extraordinary Meetings should be conducted: "by telephone or videoconference depending on the transnational issue under consideration… ." The panel had rejected that reasoning (which Mr Burns did not press in argument before me).

80. The panel had correctly reasoned, Mr O'Dair submitted, that "transnational issues" in the opening words of the same clause V.1.4 must necessarily include the three kinds of situations stated

in (a), (b) and (c) at the end of the opening paragraph. The second of those, at (b), was "collective redundancies" significantly affecting Adecco employees "in each of at least two EEA countries …". The exclusion in clause II.1 for "staffing levels of the single country" could not be equated with collective redundancies because the latter are expressly included in the three kinds of transnational issue described at (a) to (c) at the start of clause V.1.4.

81. Mr O'Dair submitted that Olsten was trying to rewrite the definition of a transnational issue by adding to it an element conspicuously absent from the language used, namely a decision taken in another EEA state affecting employees in more than one EEA state. He commended and defended the panel's reasoning:

> **"… 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. It is the responsibility of the Employer to establish any necessary reporting mechanisms to ensure that its obligation to convene an Extraordinary Meeting to provide information and engage in Dialogue with the Steering Group can be met."**

82. The panel's interpretation, Mr O'Dair submitted, was a fair and just one because it promoted "the legal certainty required for the application of this Directive" (recital (21)); while Olsten's interpretation meant that the EWC would have the near impossible task of proving whether or to what extent a decision was taken in one country or another, or by one or another level of management within the relevant undertaking or group.

83. I have carefully considered these rival contentions. After reflection, I am satisfied that the EWC has much the better of the argument and that the CAC's interpretation of the provisions in the EWC agreement, read in the light of the directive and the 1999 Regulations, was correct. I substantially accept the panel's reasoning and Mr O'Dair's submissions in support of it.

84. I decline to add the gloss sought by Mr Burns, requiring that the relevant decision must be taken in "another" Member State, as he put it, affecting employees in at least two EEA states.

(Switzerland is not in fact an EEA state but that does not matter; in a global group, the relevant decision could be taken, for example, in the USA.) My reasons are as follows.

85. First, the language of the provisions in the directive, the Regulations and the EWC agreement does not include any such gloss. It is striking that the framers of the directive and Regulations did not include such language, if Olsten's construction was intended. Mr Burns was driven to invite inferences from recitals in the directive because the express words he needed to solidify his argument were absent from the normative provisions that followed on from the recitals.

86. Second, redundancies decided upon in one EEA state are inherently likely to have have indirect or knock-on effects on employees in the same undertaking or group in another EEA state without the need to search on each occasion for a direct link, common cause or decision; particularly because there is generally free movement of workers between those states. A decision to make employees redundant taken in one Benelux country is likely to affect the workforce in a neighbouring Benelux country. (Adecco itself groups these countries together for public reporting purposes.) Workforces in neighbouring countries may be closely integrated and the provisions were drafted against that background.

87. Third, collective redundancies are expressly included within the definition of a transnational issue, by clause V.1.4, at (b). Mr O'Dair is therefore right to say they cannot be part of the exclusion for "staffing levels". The latter phrase, in my judgment, connotes how many workers to hire in the first place, not whether to dispense with some, and if so how many and which ones, having first decided to hire them. If "staffing levels" included 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 EWC agreement internally inconsistent.

88. Fourth, 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" (my emphasis). That indicates 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.

89. Fifth and importantly, as Olsten's arguments in this very case show, 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 – whether or not it chooses to do so - on decentralised undertakings in individual countries.

90. Local management can be influenced by the policies of central management without the need for a direct diktat from the centre. Decisions may be taken by local country based managers in consultation with central management at the group headquarters in another country. Thus, the Adecco Group in this case does not dispute its supervisory oversight role; it sets budgets and parameters to be applied by local management, in the usual way.

91. Enjoyment of the relevant rights should not turn on nuances in the relations between local and central management. A local manager may be *instructed* by central management to effect redundancies; or *advised* to do so; or *authorised* to do so, but on the understanding that the decision is that of the local manager; or central management may set the budgetary and financial conditions for redundancies in a particular country; and applying those conditions may lead to redundancies in

more than one country; or it may merely keep an eye on local managers and the decisions they make; or decide for strategic, political or tactical reasons to know as little about them as possible.

92. On Mr Burns' approach, 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. I think the panel was right to decide against that approach. The EWC's and the CAC's interpretation has the virtue of transparency and legal certainty, as Mr O'Dair pointed out.

93. It is true that on that interpretation, a transnational issue can arise without the need for any real nexus between two sets of redundancies. In oral argument, I mentioned 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.

94. I accept, as Mr O'Dair did, that an extraordinary meeting would have to be convened because the matter is transnational. Mr Burns said that would be inconvenient and burdensome. But I think the point is overstated; in such a case, 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.

95. For those reasons, I agree with the CAC's conclusion and the appeal must fail. I turn next to consider the cross-appeal.

Second Issue: Cross Appeal on the Time Point

96. I can deal with this issue briefly. Mr O'Dair attempted to submit that the CAC had misread the agreement and that the obligation was to convene an extraordinary meeting within a reasonable time, not within five working days of the relevant redundancies being made. He also submitted that

the panel should have upheld the timeliness of the complaint relating to the Netherlands redundancies, since these should be combined with the Sweden redundancies, occurring after 24 May 2020, to form a two-state transnational issue triggering the obligation to convene an extraordinary meeting.

97. In my judgment, neither of these submissions has any merit. The obligation is clearly to convene an extraordinary meeting of the EWC, but it has to be done within five working days of the last relevant redundancies being made. The five day time limit is workable if the meeting is convened quickly, using modern electronic communication techniques. The meeting need not take place within the five working day period; it must be convened within that period.

98. Here, the Netherlands and Hungary redundancies combined, and the ensuing lapse of five working days, all occurred before 24 May 2020, the date falling six months before the making of the complaint to the CAC. The Netherlands and Hungary redundancies, combined, formed a transnational issue; there were redundancies in two EEA states at that stage, not just one. Time therefore started to run from 13 May 2020 towards the expiry of the six month limitation period. For those brief reasons, the CAC decision on timing was correct and the cross-appeal must fail.

Third Issue: Penalties

99. Mr Burns clarified in oral argument that (unlike in Olsten's written skeleton argument) he did not suggest he could resist the imposition of a penalty on the basis of a "reasonable excuse", in the case of either the redundancies complaint or the sales data complaint. In written argument he had accepted that a penalty must be imposed in respect of the sales data complaint but advanced a "reasonable excuse" defence in respect of the redundancies complaint.

100. The reasonable excuse relied on in written argument was the Adecco Group's belief in the correctness of its interpretation of "transnational"; "the Grounds of Appeal constitute a reasonable

excuse for Adecco's failure to convene an Extraordinary Meeting (or alternatively strong mitigation)." In oral argument, the "reasonable excuse" defence was abandoned but the mistake remained strong mitigation, Mr Burns submitted.

101. He submitted that the penalties for each element should be at the bottom end of the scale from £0.01 to £100,000. Individual cases, Mr Burns reminded me, turn on their facts and little assistance is likely to come from other decided cases, as pointed out by Underhill J, as he then was, in *Darnton v. Bournemouth University*, UKEAT/0391/09/RN, 4 March 2010, at [12] (a case arising under the Information and Consultation of Employees Regulations 2004).

102. However, Mr Burns compared the facts here to those in (among other cases) *Verizon EWC v. Central Management of the Verizon Group* [2021] IRLR 22, saying the wrongdoing was more venial in the present case. The grounds of appeal, even if the appeal failed, were genuinely advanced and provided strong mitigation; a reasonable mistake was made about the correct reading of "transnational"; and about the obligation to provide sales data broken down by country.

103. The failure to convene an extraordinary meeting, Mr Burns submitted, occurred over a short time; it affected a small number of employees, namely 32 in Sweden and 260 in Germany, out of a workforce in EEA member states of 18,626 in EEA states in May 2020 (though I believe this figure includes Switzerland, not an EU or EEA state). The failure resulted from a genuine but mistaken belief in the perceived correctness of the Adecco Group's interpretation of "transnational".

104. As for the sales data complaint, Olsten accepted that the Appeal Tribunal must impose a penalty, but advanced the following points in mitigation. The EWC had been provided with detailed financial and economic information broken down by region. The Group had also voluntarily provided the breakdown by country for 2019 with a year on year comparison with the year 2018.

105. The failing was very limited and short-lived, Mr Burns submitted. The CAC's decision was confined to the single failure at the November 2020 Annual Plenary Meeting. The breakdown by country was provided after the CAC's initial decision, with the consequence that it did not have to make any order requiring that information to be provided.

106. The reason for the failing, Mr Burns submitted, was a "misunderstanding" in that Adecco believed the only requirement for information broken down by country was contained in a non-binding rule of procedure. The Group had reason to suppose that data broken down by individual countries was not "transnational". The failing was that the information provided was not sufficiently "granular" (as Mr Burns put it); it was not that no information was provided at all.

107. The number of employees affected was low; it affected the EWC employee representatives only, out of 18,095 employees in EEA states in November 2020 (which again I think includes Switzerland, not an EEA state). There was no specific proposal at the November 2020 Annual Plenary Meeting, such as envisaged redundancies, in relation to which the EWC was prejudiced by the failure.

108. Mr O'Dair submitted that the dispute went back to 2018 and that the Adecco Group's insistence on its wrong interpretation of "transnational" was longstanding. Management's arguments, as he put it, "flew against the plain meaning of the text" and "owed … very little to legal merit". The Adecco Group accepted that central management had the role of budget setting and it could not be denied that this hugely influenced the level of redundancies in individual countries.

109. As for the sales data complaint, Mr O'Dair submitted that the Steering Group had been seeking the country based sales data for some time and it had been denied on several occasions. The

rules of procedure did not justify withholding the information; on the contrary, they confirmed that sales data broken down by country was necessary properly to inform the Steering Group and enable it to take part in an intelligent dialogue. The need for country-specific data flowed from management's own argument that local autonomy was paramount with regard to redundancies.

110. In my judgment, the failings of the Adecco Group in the two respects identified is far from trivial but not of the utmost seriousness. The failings lie somewhere between the two extremes, the first default being more serious than the second. In relation to both cases, I am required by regulation 21(6A) to "issue a written penalty notice to the central management requiring it to pay a penalty …". I shall consider the two limbs of the complaint in turn, starting with the redundancies complaint.

111. The failure to which the penalty relates is the failure to convene an "Extraordinary Meeting" of the EWC. The period of the failure is from 27 May 2020, when the Steering Group requested an extraordinary meeting, down to the first decision of the CAC on 5 March 2021. However, when the last of the relevant notices of dismissal were given (in Germany) on 24 September 2020, the Group's failure ceased to have operational impact because after 24 September 2020 it was too late to engage in a dialogue in an attempt to avert the redundancies.

112. How grave was the failure? As I have indicated, I think it was of medium gravity. I bear in mind that the Adecco Group does not have a record of any previous CAC finding against it of such a failure. It has no "form". Further, the Group did permit a call to take place on 29 June, albeit not in the form of an extraordinary meeting. There was some relevant discussion during that call, which I take into account.

113. The decision to adopt a self-serving and expedient interpretation of "transnational" was a risk I regard as deliberately taken, knowing it was challenged and supported by quite weak arguments.

The penalty should not include any element of punishment for exercising the right of appeal or arguing its case on appeal about the meaning of "transnational". But the Group's primary case up to the oral hearing was that the mistake constituted a reasonable excuse and thus a complete defence. That left no room for calling evidence of contrition, an apology or assurances about future practice.

114. These considerations are relevant to the gravity of the failing. I have already addressed the period of time over which it occurred. The operative period was from 27 May to 24 September 2020, a period of nearly four months. I have already addressed the reason for the failure. It was the Group's mistaken belief in its interpretation of "transnational". Although I have not seen any legal advice and privilege was not waived, I am prepared to accept that the belief was genuine, albeit the risk of espousing the belief must have been appreciated.

115. The number of employees affected was 32 in Sweden and 260 in Germany, out of a Europe-wide workforce (in May 2020) of 18,626. An aggravating feature is that redundancies in the Netherlands were averted due to Covid-related concessions from government and the Steering Group were arguing that similar concessions might avert redundancies in other states; an issue that could and should have been discussed at the extraordinary meeting that was not called.

116. Balancing the aggravating and mitigating features and considering the range which is from £0.01 to £100,000, I have concluded that the amount of the penalty in respect of the redundancies complaint should be £20,000.

117. I turn next to the penalty in respect of the sales data complaint. The failure was to provide information about the Group's financial results given by "aggregates of countries" instead of "country by country". The period of the failure was from 30 June 2020 until the date in or about late April 2021 when the Group delivered on its promise to provide the requested data, following the first CAC

decision in March 2021, adverse to the Group on the point, and the second decision of 12 April 2021 giving the Group 21 days to provide the information.

118. How grave was this failure on a scale from £0.01 to £100,000? It was less serious than the first one. Again, I bear in mind that the Group has no previous record against it of a finding that it had offended in this way before. On this aspect, Olsten did accept in written argument before the Appeal Tribunal that a penalty must be imposed. No defence of reasonable excuse was run. Still, Olsten did not call any evidence to support its plea in mitigation, though the Appeal Tribunal, exercising an original jurisdiction, can hear oral evidence. There was no evidence of contrition, no apology and no assurances about future conduct.

119. On the other hand, this was not a case where no information was provided at all. Regionally based information was given, among much high level financial and other information on strategy, particularly strategies for dealing with the Covid pandemic. I was not able to explore fully how much of the information that was given was already publicly available. It is tolerably clear that at least some of it was, but I did not have full evidence about which of the financial and workforce documents provided were or were not in the public domain.

120. I have already addressed the period of time over which the failure occurred. What was the reason for it? It was, as Mr Burns submitted, that there was a mistaken belief that no obligation to provide country-based data existed. This, however, was based on the supposition that there could be no obligation to provide country-based information because the "requirement" to do so was found in non-binding rules of procedure. The CAC exposed this as the palpable non-sequitur it was and is.

121. Again, I accept that the mistake was genuinely made, but it was also a risk deliberately taken, with knowledge that it could be a mistake because the Group knew the Steering Group was arguing

for a different and in my judgment clearly stronger interpretation. The Group understandably believed what it wanted to believe but must, in the real world, sensibly have known that its belief was not infallible; and now faces the consequence of the belief having turned out to be wrong.

122. I accept Mr Burns' point that there was no specific adverse impact on employees other than the Steering Group members because there was no particular redundancy proposal on the table at the November 2020 meeting. The number of employees affected is therefore very low, out of the Europe-wide workforce of 18,095 as at November 2020.

123. Balancing the aggravating and mitigating features, I accept that the default is near the bottom of the scale and I find that the penalty in respect of the sales data complaint should be £5,000.

124. The total amount of the penalty imposed in respect of the two complaints found by the CAC to be well-founded is therefore £25,000. That amount must be paid by not later than 1 February 2023.

Fourth Issue: Remedy on the Appeal

125. For the reasons given above, the appeal and cross-appeal are both dismissed. The question whether to remit the matter or substitute my decision for that of the CAC panel therefore does not arise. If it had arisen, I would have accepted the submission of Mr O'Dair that the redundancies complaint – raising the question of the scope of a "transnational" matter or issue – should be remitted for further consideration by the CAC panel. I would not have accepted that the question is one that admits of only one possible answer, as Mr Burns suggested.

126. If I had disagreed with the CAC's conclusion that it is irrelevant whether redundancies affecting Adecco companies in two EEA states shared a common rationale, I would still regard the question of transnationality as one of fact and degree for evaluation by the CAC; and I would have

directed the panel to look again at the factual material bearing on whether there was a sufficient link between the redundancies to make them a transnational issue, in particular in the light of the supervisory role of the Adecco Group in Switzerland.