Neutral Citation Number: [2022] EAT 162

Case No: EA-2021-000760-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 November 2022

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

easyJet PLC	**Appellant**
- and -	
easyJet European Works Council	**Respondent**
-and-	
Secretary of State for Business Energy and Industrial Strategy	**Intervenor**

- -
- -

Andrew Burns KC and **Jesse Crozier** (instructed by Lewis Silkin LLP) for the **Appellant**
Fergus McCombie (instructed by EWC Legal Advisers) for the **Respondent**
Written submissions for the Intervenor

Hearing date: 13 October 2022

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JUDGMENT

SUMMARY

CENTRAL ARBITRATION COMMITTEE (CAC)

The CAC did not err in law in concluding that it had jurisdiction to hear the complaint of the easyJet European Works Council made against easyJet PLC under Regulations 21 and 21A of **amended TICER**.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the decision of the Central Arbitration Committee ("CAC") dated 1 June 2021, Professor Gillian Morris, Panel Chair, Mrs Anna Berry and Mrs Maureen Chambers. The CAC decided, as a preliminary issue, that it had jurisdiction to hear the complaint of the easyJet European Works Council ("the EWC") made against easyJet PLC ("the employer") under Regulations 21 and 21A of the **Transnational Information and Consultation of Employees Regulations 1999**, as amended by the **Employment Rights (Amendment) (EU Exit) Regulations 2019**, ("**amended TICER**").

2. The employer controls an airline group with operations across the EU and the EEA. Given its size, the group must operate a European Works Council ("EWC") for the provision of information and consultation about transnational matters affecting its employees across the EU and the EEA. Central management of the group is situated in the United Kingdom.

3. The employer contended that the amendments made to Regulations 4 and 5 of **amended TICER**, with effect from the end of the Brexit transition period, have the consequence that the regulations no longer apply where central management is situated in the United Kingdom. The CAC rejected this construction for the reason set out concisely at paragraphs 38 to 41 of its decision. Although asserted as 3 grounds of appeal, the employer essentially asserts that the CAC erred in its construction of **amended TICER**. In this judgment I will concentrate on what I consider to be the correct approach to the construction of the relevant provisions.

Amended TICER

4. The key provisions for the purpose of this appeal are Regulations 4 and 5 of **amended TICER**. Regulation 4 provides:

> 4 Circumstances in which provisions of these Regulations apply
>
> (1) Subject to paragraph (2) the provisions of regulations 17 to 41 and of regulation 46 shall apply in relation to a Community-scale undertaking or Community-scale group of undertakings only where, in accordance with regulation 5, the central management is situated in the

United Kingdom.

5. Regulation 4(1) applies relevant provisions of **amended TICER** "only where, in accordance with regulation 5, the central management is situated in the United Kingdom." Core to the appeal is what is meant by central management being situated in the United Kingdom "in accordance with regulation 5".

6. Regulation 5 provides:

> 5 The central management
>
> (1) This regulation applies where—
>
> > (b) the central management is not situated in a Relevant State and the representative agent of the central management (to be designated if necessary) is situated in the United Kingdom; or
> >
> > (c) neither the central management nor the representative agent (whether or not as a result of being designated) is situated in a Relevant State and—
> >
> > > (i) in the case of a Community-scale undertaking, there are employed in an establishment, which is situated in the United Kingdom, more employees than are employed in any other establishment which is situated in a Relevant State, or
> > >
> > > (ii) in the case of a Community-scale group of undertakings, there are employed in a group undertaking, which is situated in the United Kingdom, more employees than are employed in any other group undertaking which is situated in a Relevant State.
>
> (2) Where the circumstances described in paragraph (1)(b) or (1)(c) apply, the central management shall be treated, for the purposes of these Regulations, as being situated in the United Kingdom and--
>
> > (a) the representative agent referred to in paragraph (1)(b); or
> >
> > (b) the management of the establishment referred to in paragraph (1)(c)(i) or of the group undertaking, referred to in paragraph (1)(c)(ii),
>
> shall be treated, respectively, as being the central management.

7. The oddity is that Regulation 5 of **amended TICER** refers only to certain situations in which central management **is not** situated in the United Kingdom. In the circumstances set out in Regulation

5 central management is **deemed** to be situated in the United Kingdom. Regulation 5 does not apply to a situation in which central management **is** situated in the United Kingdom

8. The employer contends that "in accordance with" in Regulation 4 of **amended TICER** naturally means "as defined by" and that the term "situated in the United Kingdom" is defined to include only circumstances that fall within Regulation 5. On the employer's construction the term "situated in the United Kingdom" does not include any circumstances in which central management is, in fact, situated in the United Kingdom.

9. The EWC contends that "in accordance with" means in agreement or conformity with. The EWC contends that there can be agreement or conformity between concepts without them being co-extensive or identical. Put another way, Regulation 4 can be in accordance with Regulation 5 because it is in harmony with it. The EWC contends that Regulation 5 applies to certain situations in which central management is not located in the United Kingdom but is deemed to be so. The relevant regulations apply in circumstances in which central management is, or is treated as being, located in the United Kingdom. Regulation 5 does not exclude cases in which central management **is** situated in the United Kingdom from falling within Regulation 4.

Natural and ordinary meaning of words

10. The starting point, and generally the end point, is the natural and ordinary meaning of the words used. In **Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government and others** [2019] UKSC 33, [2019] 1 W.L.R. 4317 Lord Carnwath said:

> In summary, whatever the legal character of the document in question, the starting point—and usually the end point—is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.

11. This approach is also generally appropriate where the provision has been amended. In **Inco Europe Ltd. and Others v First Choice Distribution** [1999] 1 W.L.R. 270 CA, Hobhouse LJ set stated at 273:

> In general terms, it is undoubtedly correct that the effect of an amendment to a statute should be ascertained by construing the amended statute. Thus, what is to be looked at is the amended statute itself as if it were a free-standing piece of legislation and its meaning and effect ascertained by an examination of the language of that statute.

12. Courts and tribunals often refer to "ordinary English words" that bear their "natural and ordinary meaning". But many ordinary English words have more than one natural and ordinary meaning. Often the meaning depends on the context in which they are used. As Lord Carnwath put it in **Lambeth London Borough Council** to determine the natural and ordinary meaning of words they must be "viewed in their particular context" and the process of construction should be "guided by common sense". Context and application of common sense can, where words have more than one potential meaning, lead to the conclusion that the words bear one of their ordinary meanings that is not the one most regularly used. Ascertaining the natural and ordinary meaning of words in context, and by the application of common sense, is not necessarily a matter of first impressions, but may require a little thought, before deciding what the words must mean.

13. I consider that this appeal can be determined by construing the natural and ordinary meaning of the words viewed in context, to reach a sensible result. Regulation 4(1) of **amended TICER** states in terms that the relevant regulations apply to central management that is "situated in the United Kingdom". I consider it means what it says - and that the words "in accordance with regulation 5" cannot sensibly bear an interpretation that converts the words "situated in the United Kingdom" to **exclude** central management that **is** situated in the United Kingdom". That construction would not accord with common sense. I do not consider that the words used, or the grammatical construction, requires that interpretation.

14. The Oxford English Dictionary gives as a definition of "accordance" as "in agreement or harmony with". I consider that the natural meaning of "in accordance with regulation 5" is that the words "situated in the United Kingdom" includes situations where central management is deemed by Regulation 5 be situated in the United Kingdom **in addition** to where it is, in fact, situated in the United Kingdom. The term "situated in the United Kingdom" is thus in harmony with Regulation 5

because it extends to the situations in which central management is deemed to be situated in the United Kingdom.

15. That is sufficient to determine the appeal. However, if I am wrong in my conclusion at the first stage of construction, I consider that the secondary tenets of construction support the same conclusion.

Construction of words in accordance with the Parliamentary intent

16. Sometimes it may be necessary to apply a construction that is other than the natural and ordinary meaning of words. The Court of Appeal stated: **In re British Concrete Pipe Association's Agreement** [1983] I.C.R. 215, Sir John Donaldson M.R at 217 E-F:

> Our task, as I see it, is to construe the Act of 1969, and in so doing the prima facie rule is that words have their ordinary meaning. But that is subject to the qualification that if, giving words their ordinary meaning, we are faced with extraordinary results which cannot have been intended by Parliament, we then have to move on to a second stage in which we re-examine the words and see whether they must in all the circumstances have been intended by Parliament to have a different meaning or a more restricted meaning.

17. Lord Nicholls of Birkenhead said at 396F to 397G:

> Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 , 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used."

18. The EWC contends that it would be a nonsense for the regulations to apply to deemed UK central management, but not to actual UK central management. The EWC contends that after the Brexit transition period no new EWC are to be established, but existing EWC are to remain operational. The EWC relies on provisions of **amended TICER** to support this contention.

19. Regulation 18 provides:

> 18 Subsidiary requirements
>
> (1) The provisions of the Schedule continue to apply on and after exit day in any case where they applied before exit day.—

20. Regulation 18A provides:

> 18A Information and consultation
>
> (1) This regulation applies where--
>
> (a) a European Works Council or information and consultation procedure has been established before exit day under regulation 17; or
>
> (b) a European Works Council has been established before exit day by virtue of regulation 18.

21. The EWC relies on similar provisions in Regulations 21 and 21A of **amended TICER** that allow procedures established before exit day to continue to apply to EWCs after the Brexit transition period.

22. The employer asserts that there would be significant practical difficulties in maintaining an EWC in the United Kingdom at the same time as being required to create a new EWC within the EU. I accept that there are significant practical difficulties. However, the employer concedes that these problems will arise on their construction of **amended TICER** where there is deemed UK central management.

23. The irrationality of an interpretation that retains the relevant provisions of **amended TICER** in force for deemed UK central management, but not for actual UK central management, supports the construction that Regulation 4 has the purpose of applying **amended TICER** to both actual and deemed UK central management.

Considering the nature of the amendment

24. Generally, where a provision is amended, it is not intended to alter the meaning of other unamended provisions in the same instrument. In **Boss Holdings Ltd v Grosvenor West End Properties Ltd** [2008] UKHL 5, [2008] 1 W.L.R. 289, Lord Neuberger of Abbotsbury stated [23]:

> In my opinion, the legislature cannot have intended the meaning of a subsection to change as a result of amendments to other provisions of the same statute, when no amendments were made to that subsection, unless, of course, the effect of one of the amendments was, for instance, to change the definition of an expression used in the subsection.

25. In **Regina (Brown) v Secretary of State for the Home Department** [2015] UKSC 8, [2015] 1 W.L.R. 1060 Lord Toulson noted of an assertion that the approach in **Boss Holdings** should not be followed [24]

> In construing any legislation it is relevant to consider its purpose and that may include considering the purpose of an amendment. Parliament may sometimes amend legislation in order to correct a previous interpretation by the court. That said, and with the qualification that we have not heard full argument, I am content for present purposes to accept that generally speaking an amendment cannot affect the construction of an Act as originally enacted

26. It is helpful to consider the provisions of **amended TICER** with the changes from **TICER** marked up (deletions are struck through and additions underlined).

27. Regulation 4 provides:

> 4 Circumstances in which provisions of these Regulations apply
>
> (1) Subject to paragraph (2) the provisions of regulations ~~7~~ 17 to 41 and of regulation 46 shall apply in relation to a Community-scale undertaking or Community-scale group of undertakings only where, in accordance with regulation 5, the central management is situated in the United Kingdom.

28. In broad terms, the changes to Regulation 5 of **amended TICER** mean that Regulations 7 to 16, that dealt with setting up an EWC, no longer apply, but provisions that deal with the operation of an EWC do, where "in accordance with regulation 5, the central management is situated in the United Kingdom"

29. Regulation 5 provides:

> 5 The central management
>
> (1) ~~The central management shall be responsible for creating the conditions and means necessary for the setting up of a European Works Council or an information and consultation procedure in a Communityscale undertaking or Community-scale group of undertakings~~This regulation applies where—
>
> > ~~(a) the central management is situated in the United Kingdom~~;
> >
> > (b) the central management is not situated in a ~~Member State~~ Relevant State and the representative agent of the central management (to be designated if necessary) is situated in the United Kingdom; or
> >
> > (c) neither the central management nor the representative agent (whether or not as a result of being designated) is situated in a ~~Member State~~Relevant State and—
> >
> > > (i) in the case of a Community-scale undertaking, there are employed in an establishment, which is situated in the United Kingdom, more employees than are employed in any other establishment which is situated in a ~~Member State~~Relevant State, or
> > >
> > > (ii) in the case of a Community-scale group of undertakings, there are employed in a group undertaking, which is situated in the United Kingdom, more employees than are employed in any other group undertaking which is situated in a ~~Member State~~Relevant State, ~~and the central management initiates, or by virtue of regulation 9(1) is required to initiate, negotiations for a European Works Council or information and consultation procedure~~.
>
> (2) Where the circumstances described in paragraph (1)(b) or (1)(c) apply, the central management shall be treated, for the purposes of these Regulations, as being situated in the United Kingdom and--
>
> > (a) the representative agent referred to in paragraph (1)(b); or
> >
> > (b) the management of the establishment referred to in paragraph (1)(c)(i) or of the group undertaking, referred to in paragraph (1)(c)(ii),
>
> shall be treated, respectively, as being the central management.

30. Regulation 5 of **TICER** was a somewhat unusual provision. Regulation 5(1) provided that central management was responsible for creating the conditions and means necessary for setting up an EWC where the central management was situated in the United Kingdom (Regulation 5(1)(a) -

UK central management), and in other circumstances where it was deemed to be situated in the United Kingdom (Regulation 5(1)(b) and (c) - deemed UK central management).

31. Regulation 5(2) **TICER,** and now **amended TICER**, applies to "these Regulations"; i.e, all of the provisions of **TICER** and now **amended TICER**. It has the effect that where central management is outside of the United Kingdom, but Regulation 5(1)(b) or (c) applies, central management is deemed to be in the United Kingdom.

32. The amendment to Regulation 5(1) **amended TICER** entirely removes the requirement that central management be responsible for creating the conditions and means necessary for the setting up an EWC, irrespective of whether there is UK central management or deemed UK central management. I consider that Regulation 5(1)(a) has been removed because it is not necessary. The responsibility for creating the conditions and means necessary for the setting up of an EWC is no longer applicable in the case of UK central management or, indeed, deemed UK central management. Subsection 5(1)(b) and (c) have been retained because they set out the circumstances in which there is deemed UK central management for the purposes of Regulation 5(2), and hence **amended TICER** as a whole. Regulation 5 has been amended so that its primary purpose, requiring that an EWC be established, has been entirely removed, but its secondary purpose, deeming central management to be situated in the United Kingdom, for the purposes of all the regulations has been retained.

33. Prior to the amendment, Regulation 4 clearly applied the relevant provisions of **TICER** to UK central management. UK Central management did not fall within Regulation 4 because it was referred to in Regulation 5(1)(a), but because it came within Regulation 4(1)(a). There was no need for Regulation 5(1)(a) to define the term "situated in the United Kingdom" in Regulation 5(1)(a) to mean "situated in the United Kingdom"; that would be otiose. I do not consider that the amendment of another provision, Regulation 5, was designed to change the meaning of the term "situated in the United Kingdom" in Regulation 4(1)(a). That would be contrary to the normal approach when construing the effect of an amended provision on another unamended provision.

Correcting drafting errors

34. In limited circumstances drafting errors may be corrected; **Inco Europe Ltd. and Others v First Choice Distribution (a firm) and Others**[2000] 1 W.L.R. 586, Lord Nicholls of Birkenhead, 179 C-H:

> In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, Statutory Interpretation, 3rd ed. (1995), pp. 93–105. He comments, at p. 103:
>
> > "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74 , 105–106.

35. The circumstances in which errors can be corrected are limited: Leggat J in **R (on the application of N) v Walsall MBC** [2014] EWHC 1918 at [65]:

> "When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursuing the identifiable purposes of the legislation it enacts in a coherent and principled manner. That assumption shows appropriate respect for Parliament, enables Parliament most effectively to achieve its purposes and promotes the integrity of the law. In essence, the courts interpret the language of a statute or statutory instrument as having the meaning which best explains why a rational and informed legislature would have acted as Parliament has. Attributing to Parliament an error or oversight is therefore an interpretation to be adopted only as a last resort".

36. If I am wrong in my previous analysis, I would conclude that the construction the employer advances results in an outcome that is nonsensical, because it means that the definition of "in the United Kingdom" excludes central management that is "in the United Kingdom". The words "only where, in accordance with regulation 5, the central management is situated in the United Kingdom" should be replaced with words to the effect "only where central management is situated in the United Kingdom or deemed to be situated in the United Kingdom by regulation 5".

Explanatory Statements and other materials

37. The EWC and the Secretary of State for Business Energy and Industrial Strategy, who was granted permission to intervene, but chose not to participate in the hearing, contend that contemporaneous and later political statements support the contention that EWCs established before the end of the Brexit transition period were to continue in operation thereafter pursuant to **amended TICER**.

38. In **Regina (Westminster City Council) v National Asylum Support Service** [2002] UKHL, [2002] 1 W.L.R. 2956, Lord Steyn held that [5]:

> In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see Cross, Statutory Interpretation, 3rd ed (1995), pp 160-161. If used for this purpose the recent reservations in dicta in the House of Lords about the use of Hansard materials in aid of construction are not engaged

39. The Explanatory Memorandum to the **Employment Rights (Amendment) (EU Exit) Regulations 2019** provides:

> 7.5 Provisions relevant to existing European Works Councils, which can continue to operate, are maintained. These include:
>
> • the enforcement framework, for example where there is a dispute about the operation of an existing European Works Council;

> • the employee representative rights and protections, such as the rights to training and time off, and the protections from suffering detriment or unfair dismissal; and
>
> • the protection for confidential information shared with the European Works Council or through the information and consultation procedure.
>
> 7.6 However, the SI amends the TICE Regulations 1999 so that no new requests to set up a European Works Council or information and consultation procedure can be made.

40. Accordingly, if contrary to my above determinations, there is real ambiguity, I consider it is clear that the parliamentary intent was that **amended TICER** would continue to apply to EWCs that had been established before the end of the Brexit transition period.

Matters that occurred prior to the end of the Brexit transition period

41. I also accept the argument of the EWC that it cannot have been the intention of Parliament to remove the right to complain to the CAC in respect of matters that had occurred before the end of the Brexit transition period. That would be the effect of the construction advanced by the employer where central management is situated in the United Kingdom, because the enforcement procedures of **amended TICER** would not apply in the case of UK central management, but only to deemed UK central management. That would not be consistent with the provisions of the **European Union (Withdrawal) Act 2018**, s7A and 7C read with Articles 126 and 127 of the Withdrawal Agreement.

Conclusion

42. The CAC did not err in law in concluding that it had jurisdiction to consider the complaint of the EWC. The appeal is dismissed.