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ADJ-00035766

ADJUDICATION OFFICER DECISION

Adjudication Reference: ADJ-00035766

Parties:

	Complainant	Respondent
Parties	Pavel Macho	Verizon Ireland Limited

Representatives	Tony Kerr SC instructed by Dr Herta Däubler-Gmelin, Schwegler rechtsanwälte	Tom Mallon BL instructed by Síobhra Rush, Lewis Silkin Solicitors

Complaint:

Act	Complaint Reference No.	Date of Receipt
Complaint to the Workplace Relations Commission pursuant to section 17A of the Transnational Information and Consultation of Employees Act	CA-00046937-001	02/11/2021

Dates of Adjudication Hearing: 22nd June, 22nd and 23rd September, 3rd and 4th November 2022

Workplace Relations Commission Adjudication Officer: Kevin Baneham

Procedure:

On the 2nd November 2021, the complainant referred a complaint pursuant to the Transnational Information and Consultation of Employees Act. The complaints were referred to adjudication on the 22nd June and the hearing continued on the 22nd and 23rd September and the 3rd and 4th November 2022.

The hearing was held remotely. The complainant was represented by Tony Kerr SC instructed by Dr Herta Däubler-Gmelin, Schwegler rechtsanwälte. The complainant was accompanied by fellow members of the Verizon European Works Council, who also took complaints, Kevin Rodgers, Jan Fröding and Jean-Phillipe Charpentier. Dr Werner Altmeyer also gave evidence on the complainants' behalf.

The respondent was represented by Tom Mallon BL instructed by Síobhra Rush, Lewis Silken solicitors. Alan O'Rourke and David Hopper, Lewis Silken also attended. Dragos Voinescu and Michele Minnebo of Verizon attended as witnesses.

The evidence of Mr Macho is set out below. The evidence of Mr Rodgers, Mr Fröding and Mr Charpentier is set out in their respective decisions and the evidence of Mr Altmeyer is set out in the latter decision. The evidence of Mr Voinescu is set out below as are the legal submissions of the parties.

In accordance with section 41 of the Workplace Relations Act, 2015 following the referral of the complaint to me by the Director General, I inquired into the complaint and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaint.

Background:

The complainant is a member of the Verizon European Works Council ('EWC'). He is based in Czechia and his direct employer is Verizon Czech s.r.o. Following the exit of the United Kingdom from the European Union, Verizon nominated Verizon Ireland as the representative of central management. The Verizon European Works Council agreement ('the Charter') expired on the 20th October 2020 and the EWC is operating under the subsidiary requirements as set out in the Annex to Directive 2009/38/EC (the 'Directive').

Summary of Complainant's Case:

On affirmation, the complainant outlined that he was elected to the EWC in January 2021 by the 500 or so employees of Verizon Czech. He took the Dublin training as an introduction and it consisted of basic information. He was completely new to works council roles and was not a member of a union. He saw the leaflet for the Hamburg conference and saw it as an opportunity to acquire further knowledge and to effectively represent his fellow employees.

The complainant could not recall whether there was discussion about confidential training at the Dublin training. These presentations were not interactive. He found the Hamburg sessions to be helpful, for example the session on how to hold an effective meeting. This had definitely improved his skill set. He sought approval for his attendance at Hamburg from local management, which he obtained. His travel expenses were paid to him by his employer. The conference and hotel fees were not paid and were outstanding.

In cross-examination, the complainant said that he was aware that the respondent had informed the EWC Chair that central management would not reimburse costs to attend the Hamburg conference. The complainant said that it was not clear to him that this applied to the whole group. In his application to local management, the complainant used the word 'compulsory' as it was very important for him to gain the necessary knowledge. No one had told him that it was compulsory. Local management approved his expenses, via a manager in the UK and a Vice-President in the US. In a phone call with a member of central management, he was criticised for attending the conference.

In re-examination, the complainant said that he was not comfortable with attending the meeting with local HR without any agenda and with it being about Hamburg. The complainant was informed that there would be disciplinary action if he did it again. He outlined that the same HR business partner had approved his application but then gave him the warning.

Submissions of the complainant

The following legal submissions were advanced by Mr Kerr on behalf of the complainant. The complainant emphasised Recital 33 of the Recast Directive that employee representatives must receive the training they require. 'Training' is not defined in the definitions article (Article 2). Article 7 set out when subsidiary requirements applied, and Article 1(d) of Annex 1 set out that a Select Committee of at most five members would be elected by an EWC. Article 10 provided for the role and protection of employee representatives, including that they have 'the means required to apply the rights arising from the Directive'. Article 10(4) specifically referred to the provision of training. It was submitted that the protections offered by Article 10 applied to all situations, whether there was an agreement in place or whether subsidiary requirements applied. This was an individual right of each member of the EWC. The EWC itself does not have legal personality.

In respect of the Act, the complainant referred to the definition of 'expert' which the Irish legislation restricted to a 'natural person' and this was not in compliance with the Directive. The Act did not impose any extra-territorial limitation on claims, and it would be absurd if only employee representatives based in Ireland could claim under the Act in respect of an EWC seated in Ireland. The Act does not define 'training' and there is dispute between the parties whether the Dublin training amounted to training. The complainant stated that there was the option of referring the question of a definition for 'training' to the CJEU under Article 267.

The complainant pointed to section 3(3) as an unusual provision and the legislative transposition of Marleasing conforming interpretation. This required that the Act be construed to give effect to the Directive, having regard to the provisions of the Directive including its preamble. The complainant raised the question of whether a WRC adjudication officer could be considered a 'court' in the context of interpreting section 3(3).

Section 7 gave the Minister the power to make Regulations, including in respect of expenses borne by central management. The Second Schedule applied to subsidiary requirements and specifically referred to the assistance of experts of the EWC's choice as 'necessary for it to carry out its tasks'. The respondent was relying on the provision of there being one expert per meeting to maintain that an expert was only required for a meeting. This interpretation, however, was not supported by the Directive. This issue could also form part of a reference.

The complainant outlined that the current situation was not one of the three scenarios envisaged by section 13 of the Act. Referring to section 17, the complainant outlined that section 17(1) was a classic anti-penalisation provision. Section 17(1A) referred to the provision to employee representatives of the 'means' to apply the rights arising from the Directive; the question here is whether central management provided the required means. Section 17(2) states that employee representatives should be afforded 'such reasonable facilities', and the question is whether this had occurred in this instance. This amounted to another 'open norm' to interpret in line with the Directive. It was submitted that this was not limited to meetings with central management but applied to all meetings.

Section 17(6) referred to the provision of 'appropriate training'. There was the question of what was meant by appropriate training and who is to provide it. In *Ashford Castle* (LCR18820), the Labour Court held that it was the union who should provide training and not the company. The complainant outlined that the Report of Experts was a document the adjudication officer could have regard to as there was no disclaimer that it was not the opinion of the European Commission. The complainant referred to the discussion in section 11 regarding training. This included that central management could not refuse reasonable training requests in circumstances where the training is 'necessary'. The complainant contrasted Hamburg and Dublin, with Dublin covering 6.5 hours and Hamburg was longer. The Report of Experts held that training need not always be provided by management. EWC members should not bear the cost of training. Here, the employee representatives had differing levels of experience. The complainants in these cases paid the costs of attending the Hamburg Conference or are liable for the costs.

The complainant outlined that the open norms set out in the Directive were replicated in the Act. In respect of the redress provision, the complainant referred to the possibility of a course of action as well as the uncapped financial jurisdiction, albeit this must be interpreted with regard to the 'limited jurisdiction' set out by the Supreme Court in *Zalewski v Workplace Relations Commission* [2021] IESC 24. The questions to be answered were Dublin and Hamburg training within the meaning of training in the Directive? What did 'appropriate and necessary training' mean for each complainant? The respondent had not undertaken any individual assessment of the complainants' training needs, apart from the reference to the EWC Chair being a speaker at the Hamburg conference.

The complainant outlined that Hamburg involved detailed consideration of the handling of confidential information. The importance of this issue was highlighted by this being the respondent's first concern when it mentioned a possible commercial transaction. This topic was touched on during the Dublin

training. The Dublin presentations were not circulated, and this diminished the value of the presentations.

The complainant outlined that the Dublin training was only a first step and the only further training provided by the respondent was one hour of training on financial information. An assessment had to be made on the nature and effectiveness of training. The Dublin training was not brief or superficial, but questions were answered brusquely with one speaker saying that he was not their advisor. The complainants acquired knowledge and skills from the Hamburg training and gained valuable and effective insights into problem solving.

The complainant outlined that in the *Sofidel* case (Tuscany Court of Appeal 11th June 2020), the employer was ordered to pay the costs of the EWC. There was an inequality of arms as the respondent had access to expert assistance. The EWC did not have a budget. The complainant outlined that the spirit of cooperation infused the entirety of the Act and was reflected in section 16 and Article 9. It was submitted that section 17A(b) could include an order to pay costs (as a course of action).

There was no case law arising from Article 10 of the Directive nor related to 'training'. It was submitted that the adjudication officer has the power to disapply but also to fill in the gaps regarding training. In respect of the *IMPACT* judgment (C-268/06), the CJEU had held that a decision could not be *contra legem*, while the UK had reinterpreted the wording of the Directive by reading words in.

In reply to the respondent, the complainants outlined that they had referred to the Directive not anticipating this current situation as opposed to this invoking an issue of jurisdiction. The respondent could not rely on the principle of ejusdem generis to narrowly interpret 'facilities' to only time off and payment. A single word could not create a generis. The complainants outlined that section 17 could not be limited by sections 18 and 20. It was submitted that the complainants were not looking for a blank cheque. The question of what resources were necessary and appropriate had to be adjudicated upon objectively. The complainants had presented evidence why the expert was necessary for the EWC. It was submitted that Mr Macho was penalised for seeking 'reasonable facilities'. The relevant respondent email regarding the pending Hamburg conference had not been sent to members individually. Neither the Act nor the Directive defined 'means' and whether it meant financial, technical support etc It was submitted that the failure to discharge the invoice was a failure to provide 'means'.

Summary of Respondent's Case:

Evidence of Dragos Voinescu

On affirmation, Mr Voinescu said that he was the EMEA industrial relations lead and part of central management. There were 20 countries on the EWC, with Ireland, Czechia, Germany and France having the highest number of employees. The Dublin training was held remotely as they were anxious to provide the training in the context of the pandemic. He and Ms Minnebo delivered the first session. It was a new EWC and newly established under Irish law. The purpose of the training was to set out everyone's role under Irish law and that it had been absolutely necessary to provide training. Participants had been asked for their points and to engage. He outlined that the respondent is committed to providing the additional training suggested by the participants, including on interpreting financial data. Mr Voinescu stated the amount spent on the Dublin training.

Mr Voinescu outlined that they first heard about the Hamburg conference in July 2021. The EWC Chair had mentioned this during the informal meeting in July. This was followed by the August email. He had asked the EWC Chair to explain the need for further training after the Dublin training. The respondent declined the request for further training, and it was irrelevant that the trainer was the EWC Academy. Their concerns related to content and not the identity of the trainer. Mr Voinescu said that there was a process for getting approval and he considered that none of the complainants had obtained approval.

Mr Voinescu said that the EWC was entitled to have an expert, but central management needed to know the cost and extent of the expert's involvement. He had no issue with the expertise of Dr Altmeyer or the EWC Academy. He had spoken with the EWC Chair about setting up the EWC Academy as a 'vendor' and this was when he first became aware that the expert had undertaken work for the EWC. He was aware of the appointment of the expert in January 2021 but not that work had been undertaken between then and July. In April 2021, central management had alerted the EWC of a possible commercial transaction. At this time, the EWC Academy informed the respondent that there was nothing to bill for at that stage. Mr Voinescu said that they were very surprised to later receive the invoice and the information about the work undertaken since January. While they had raised concerns about the constituent meeting being held at an early stage, the respondent had modified its approach and decided to work with the body. He outlined that the respondent was ready to pay for the work but needed common ground and to understand what was covered. As set out by email, the respondent had agreed to pay some of the invoice but not all. They objected to paying for checking the minutes as this was an internal meeting and

not one with central management. Minutes were required for the latter and not the former. The respondent had sought the internal rules as the expert had invoiced for them and so that the respondent was aware of binding rules, for example on the use of substitutes. Their concern was to assess the extent of work undertaken by the expert and not the terms themselves.

Mr Voinescu outlined that the EWC was entitled to an expert for every meeting with central management. EWC members were entitled to participate in internal meetings during working time. The respondent had not just complied with the law but gone beyond this. They were seeking common ground on what needed to be covered and what the rules of engagement should be. There had been a 'meet and greet' in June where they discussed a named transaction. He confirmed that he had been involved with Mr Macho's local employer. He acknowledged that Mr Macho was new to the EWC but was aware of the company position regarding training. Mr Macho had pursued this internally and had taken information out of context.

In cross-examination, Mr Voinescu confirmed that the email of the 5th October 2021 sent to Mr Macho was sent on his instructions. He outlined that local HR had not been aware of all the details and he had referred to Mr Macho providing wrong information to management. Mr Voinescu said that he had attended some of the Dublin training but left to give space to the EWC members. Confidential information was covered at the training, and he understood that there had been a discussion with the speakers on this topic. It was put to Mr Voinescu that there was no discussion of the issues raised by Mr Macho on the 6th October 2021, i.e. practical handling of confidential information and of the impact on EWCs of the pandemic; he replied that one of the Dublin speakers had addressed confidential information. The respondent decided that Mr Macho should pay for the participation costs. Every employee was provided with a Code of Conduct and there would be the outcome described in the letter if he acted in this way again. Mr Macho had escalated his participation in the training and omitted to say that central management had provided a clear position, which was not shared with line management. The emails to line management were not copied and this indicated that this was something he wanted to hide. The respondent could not establish that this had been done on purpose.

Mr Voinescu accepted that he had raised the concern about proceeding with the first meeting as not all elections were complete. He accepted that he had raised the issue of confidentiality in the email about the named transaction. There were well-established rules about handling confidential information. He had suggested dates for the information and consultation session regarding the named transaction. He gave the EWC an early heads up, but the transaction did not proceed so there was no information and consultation session.

Mr Voinescu said that the respondent was not willing to support further training costs as they had already provided extensive training which encompassed everything they thought was necessary. He said that paying for the Hamburg training was not appropriate at the time. There was then no need for training on the pandemic and they had wanted to ensure that everyone had basic knowledge of the work of the EWC under Irish law. They had wanted to talk to the EWC about training needs and the issue with Hamburg was the additional cost on top of the Dublin training. He outlined that in September 2022, the respondent had provided the EWC with training on financial information in a one-hour online session.

In respect of the internal rules, Mr Voinescu said that he had wanted to assess the amount of work done on the rules as the respondent was asked to pay for it. He outlined that it was the role of central management to check that the work invoiced was carried out. The Irish legislation does not address the role of substitutes on an EWC, and this had been addressed in the lapsed agreement. He, therefore, wished to see what the internal rules provided. There was no provision preventing the respondent's access to the internal rules but there was a 'no' from the start.

In re-examination, Mr Voinescu said that it was normal to check for value for money and to ensure that expenditure was approved. About one third of those in attendance in Dublin had attended the Hamburg training.

Submissions of the respondent

For the respondent, Mr Mallon outlined that the 'spirit of cooperation' set out in the Directive was a two-way street. Consultation, by definition, meant the establishment of dialogue and an exchange of views between both parties. There must be dialogue about costs before they are incurred. It was submitted that the respondent had acted in the spirit of cooperation by giving early notice of the commercial transaction. A new agreement has not been agreed between the parties. It was submitted that if the complainants are correct in respect of Article 7, then there is no access to the Workplace Relations Commission.

Section 17(1A) imposes the obligation on the employer to provide to the EWC what is required by the Directive. The provision of reasonable facilities included time off but was not limited to it. Section 17(6) set out the obligation on the employer to provide training and this was reflected in Recital 33 of the Directive. The statute reflects the wording of Article 10(4) of the Directive, so this was correctly

transposed. The statute could have said that it was for the employee to determine what training should be provided but it did not do so. It was submitted that the claims in respect of the Hamburg conference must fail as this was not training provided by the employer. The respondent had informed the complainants that the costs would not be reimbursed before the conference. Consideration had been given by the respondent to all complainants. It was submitted that a complainant could not enforce a right retrospectively and incur the cost and require the employer to pay for it afterwards.

It was submitted that the Act sets out several enforcement mechanisms and it was not possible to import to section 17 wording contained elsewhere in the Act. Where an employer refused to provide training, this would be subject to a section 17 complaint and section 17(6) was limited to the training or lack of training provided by the employer. It was submitted that if Dublin was not training, then nor was Hamburg. It was submitted that training is the acquiring of knowledge and that teaching and training could not be segregated out. There could not be any doubt that what was provided in Dublin about Irish law and the Irish system constituted training. The respondent outlined that the complainants could not have a blank cheque regarding training. There must be cooperation and consultation. The complainants had a remedy in light of a dispute. It was reasonable for the respondent to make decisions in respect of resources and such a decision would be subject to a process.

The respondent outlined that there must be communication and an explanation in respect of the costs of the expert. The statute envisaged the involvement of one expert at each meeting and did not extend to meetings of the EWC. It was the complainants' position that they were entitled to an expert at internal EWC meetings and not just with the employer. The Act did not provide for this. It was submitted that the Act sufficiently and appropriately transposed the Directive into Irish law.

It was submitted that an adjudication officer does not have jurisdiction as the matter of the EWC Academy invoice arose from the claimed contravention of paragraph 6 of the subsidiary requirements Annex. This was not provided for in section 17(1A) and (2). There was nothing in section 17 that referred to the costs of an expert and this matter did not fall within the jurisdiction of section 17 and 17A. If this arose from a transposition issue, this would be a *Francovich* claim.

The respondent outlined that it was willing to make part of the payment of the expert's expenses. Relying on the Labour Court recommendation in *Nortel* (RIC101), such expenses must be reasonable and necessary. The expenses related to the position of the UK could not be claimed as UK law no longer applied. There was no basis to compare the expired Charter with the Directive. The respondent questioned the need for expert advice on the position of the UK delegates and the view of the UK Government in this regard was irrelevant. UK employees were not within the new scheme.

In respect of the invoice dealing with the internal rules and the NDA discussion, the respondent stated that it was entitled to see whether there was value for money. The EWC Chair was not acting on the respondent's behalf and the respondent did not have sight of the internal rules to know what the Chair's powers were. It submitted that there must be the spirit of cooperation in all these matters. The respondent outlined that information and consultation on the named commercial transaction did not take place as the project did not progress. If a date had been proposed or documentation circulated, the engagement of the expert would probably have been justified, but this did not happen. This element of the complaint was entirely unmeritorious. In respect of the sale of a business, the respondent outlined that it relied on the confidentiality of the transaction not to disclose this information. There was, therefore, no need for an expert. It was not reasonable or appropriate to engage this expert in respect of legal issues concerning Irish law.

The respondent submitted that the adjudication officer could not adopt the jurisdiction to decide this case as subsidiary requirements applied. There were other mechanisms under the Act to give effect to the Directive, for example offences and arbitration as well as the jurisdiction of the High Court. The respondent submitted that the onus of proof was on the complainants. The adjudication officer must be clear that they have jurisdiction. While section 17(6) covered the costs of training, this could not be applied retrospectively.

The respondent submitted that there was no need to refer this case to the Court of Justice of the European Union. The normal meaning of 'training' should be applied, in particular as applied in the industrial relations context. The respondent outlined that Mr Macho was not penalised as the respondent had acted correctly. Mr Macho had omitted information in his approach to local management. It was submitted that sections 18, 20 and 21 gave enforcement powers so there was no need to read anything into section 17.

Findings and Conclusions:

These are complaints pursuant to the Transnational Information and Consultation of Employees Act 1996 (the 'Act') arising from the Verizon European Works Council. The respondent, Verizon Ireland, has been designated as representative agent by central management. The complainants are members of the European Works Council and are directly employed by undertakings in their respective Member States (France, Denmark, Sweden and Czechia). None live in Ireland nor are directly employed by Verizon Ireland.

These are complaints pursuant to section 17 of the Act, which in turn transposes Article 10 of Directive 2009/38/EC (the 'Directive'). This includes that employee representatives have the means required to apply the rights arising from the Directive. Recital 34 of the Directive refers to employee representatives having the same protection and guarantees by legislation and practice as the 'country of employment'. Section 17 of the Act includes a standard anti-penalisation clause.

The Workplace Relations Commission is a 'court or tribunal' per Article 267 of the Treaty on the Functioning of the European Union (see *Z v A Government Department* C-363/12). In *Minister for Justice & Equality v Workplace Relations Commission* (C-378/17), the CJEU held that the WRC was 'a national body established by law to ensure the enforcement of EU law' which encompasses the obligation to disapply national law that is contrary to EU law. In *Zalewski v Workplace Relations Commission* [2021] IESC 24, the Supreme Court held that the adjudication of complaints by a WRC adjudication officer amounts to the administration of justice within the meaning of Article 37 of the Constitution. WRC adjudication officers decide complaints under 54 statutes, many of which transpose Directives. The WRC is an organ of State but not a court for the purposes of applying the European Convention on Human Rights per the Act of 2003.

There is no fee to refer a complaint to the Workplace Relations Commission. There is no provision for legal costs in this area of law, so a winning party is not entitled to recover their costs against the other party, and vice versa, the losing party will not owe legal costs to the winning party. Evidence is given under oath or affirmation and can be cross-examined. While the adjudication officer has a duty to inquire, there is a burden of proof, generally on the complainant. Hearings can be held in-person, remotely or hybrid, subject to a range of factors. The hearing in this case was heard remotely.

Conforming interpretation

In line with Marleasing principles, section 3 of the Act contains provisions that require a conforming interpretation of the Act with the Directive. Section 3(2) and 3(3) provide as follows:

'(2) A word or expression used in this Act that is also used in the Directive has, unless the context otherwise requires, the same meaning in this Act as it has in the Directive.

(3) In construing a provision of this Act, a court shall give it a construction that will give effect to the Directive, and for that purpose the court shall have regard to the provisions of the Directive, including its preamble.'

Section 3, therefore, requires that the provisions of the Act be interpreted in line with their meaning in the Directive and in such a way as to give effect to the Directive. The Act does not define or restrict 'court' and so, I find that the above interpretative provisions apply to a WRC adjudication officer.

Jurisdiction – territoriality

The Act does not contain any territorial restriction, unlike other statutes, for example the Unfair Dismissals Act. It does not differentiate between those community-scale undertakings (or groups of undertakings) situated in Ireland (per Article 4.1 of the Directive) or those whose representative agent has been designated as being in Ireland (per Article 4.2). It, therefore, follows that the provisions of the Act apply to both categories, i.e. those which are situated here and those whose central management is not situated in Ireland and where a representative agent has been appointed in Ireland.

Following on from the findings that the Act has no territorial restriction and does not differentiate between Article 4.1 & 4.2 categories of central management, the protections afforded to employee representatives under the Directive must be available to all employee representatives whose central management is situated in Ireland or where a representative agent has been appointed in Ireland. This applies irrespective of where the employee representative lives or if their undertaking is situated in another Member State, presuming, of course, that central management or its representative are located in Ireland. The location of the representative agent of central management must have some legal effect.

As noted, recital 35 refers to the protection for employee representatives exercising their functions under the Directive. Per section 3(3) of the Act and giving effect to the provisions of the Directive, all employee representatives whose central management is situated in Ireland and those whose central management has nominated a representative situated in Ireland fall within the scope of protections offered by the Act.

This is a finding of jurisdiction in respect of Ireland and obviously not a finding in respect of jurisdiction in another Member State (in these cases, France, Denmark, Sweden and Czechia). It is a finding regarding jurisdiction in Ireland and not a finding of exclusive jurisdiction.

Jurisdiction – subsidiary requirements

The respondent submitted that I did not have jurisdiction to hear the complaints as subsidiary requirements were in place following the lapsing of the Verizon Charter in October 2020 and the migration of the EWC from the UK to Ireland. While the Second Schedule to the Act sets out how subsidiary requirements operate in the absence of an agreement between central management and employee representatives, it was submitted that any contravention was outside the scope of the redress provision (section 17).

I find that as a matter of law, the redress provision in section 17 of the Act encompasses European Works Councils operating under subsidiary requirements, including situations such as the one operating in this instance. I, therefore, have jurisdiction to decide these complaints. I make this finding for the following reasons.

First, the Directive imposes qualification criteria in order for its provisions to apply, including transnationality across Member States and number of employees (Article 2(1)(I)). Second, at Article 2(1)(h), it provides for the establishment of a European Works Council both in respect of Councils established by the employer per Article 1(2) or the provisions of Annex I (subsidiary requirements). Third, the Directive does not limit the protections available to employee representatives according to the type of European Works Council; the protections in Article 10 are available to all employee representatives. There is nothing in the Directive that suggests that these protections are not available to employee representatives whose European Works Council is one to which subsidiary requirements apply. Applying section 3(3), I give effect to these protections by finding that section 17 encompasses situations subject to subsidiary requirements, including situations such as the one operating in this instance.

For completeness, I note that the definition of 'European Works Council' in section 3 is the Council established per the Second Schedule of the Act, i.e. further to section 13 and subsidiary requirements. The Irish statute labels the body constituted by an agreement between central management and employee representatives to be an 'European Employees' Forum', a descriptor not used in the Directive. Section 17 is clear that it applies to both European Works Councils and European Employees' Forums.

Importance of information and consultation

Information is defined in both the Act and Directive as follows *'(a) 'information' means transmission of data (including relevant information) by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it, and*

(b) information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to—

(i) undertake an in-depth assessment of the possible impact, and

(ii) where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings.'

Consultation is defined in the Act and Directive as *'the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings'*

The employee's right to information and consultation is provided for across various Directives, including Directive 2009/38/EC. It is underpinned by Article 27 of the Charter of Fundamental Rights, which provides *'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices. Everyone is equal before the law.'*

The EWC Directives were promulgated in recognition that national information and consultation provisions might not be sufficient where important decisions regarding the undertaking were taken in other countries. The shortcomings of the original 1994 Directive were highlighted during the 1990s by the Renault closures in Vilvoorde, Belgium and elsewhere. There are current European Parliament proposals to revise the Directive and strengthen its provisions. The existing measures seek to ensure that adequate and timely information is provided to employee representatives and that there is effective consultation and dialogue.

For completeness, I note the Code of Practice on Information and Consultation (SI 132/2008), but that this applies to information, consultation and standard rules (equivalent to subsidiary requirements) arising from national information and consultation procedures. The Code of Practice was issued following the transposition of Directive 2002/14/EC by the Employees (Provision of Information and Consultation) Act, 2006. The promulgation of a Code of Practice is a policy matter for the Department of Enterprise, Trade and Employment. A Code of Practice could be promulgated to address the Transnational Information and Consultation of Employees Act, including addressing the situation where there is no agreement between central management and employee representatives. A Code of Practice could also address information and consultation across the seven Directives that provide for employee information and consultation, albeit they are not defined in precisely the same way. An adjudication officer is required to have regard to any Code of Practice applicable in a case.

'Spirit of cooperation'

The 'spirit of cooperation' permeates the Act and the Directive. In section 12(1), the Act exhorts parties to negotiate in a spirit of cooperation. Section 16 provides that parties should work together in a spirit of cooperation: *'The central management and the employees' representatives, in the framework of an arrangement for the information and consultation of employees (being either a European Employees' Forum or an information and consultation procedure) or a European Works Council, shall work in a spirit of co-operation with due regard to their reciprocal rights and obligations.'*

This reflects the references to 'spirit of cooperation' in the Directive (Articles 6 and 9). The 'spirit of cooperation' is obviously not defined as a precise legal term but refers to due regard for the parties' reciprocal rights and obligations. Many of the issues in dispute in this case would normally be dealt with in an agreement but there is now no such agreement. It follows that a 'spirit of cooperation' is particularly relevant in circumstances where there is no agreement and subsidiary requirements apply.

The remit of section 17

Section 17 of the Act (and Article 10 of the Directive) address the role and protection of employee representatives. Section 17(1) is a standard protection from penalisation clause and reflects Article 10(3) and Recital 34. The section refers to their status as employee representatives or their 'reasonable activities' in the role.

Reflecting Article 10(1), section 17(1A) sets out that members of the EWC shall be provided with 'the means required to apply the rights arising from the Directive'. As set out in the above submissions, much in this case arises from the interpretation of these words. Section 17(2) sets out that employee representatives shall be afforded 'reasonable facilities' to carry out their functions as employee representatives, including time off. Section 17(3) makes clear that the protection from penalisation and 'reasonable facilities' applies in particular to meetings with central management. Section 17(4) provides that an employee representative will be paid wages for any period of absence where they are performing functions associated with the employee representative role.

Section 17(5) sets out the respondent's obligation to inform employee representatives of the content and outcome of any information and consultation procedure. Section 17(6) states that 'in so far as it is necessary for the exercise of their representative duties', employee representatives shall be provided with 'appropriate training by their employers without loss of wages.'

Expenses

Section 6 of the Act sets out the financial obligations of central management arising from the operation of a European Works Council. The section provides:

'(1) The operating expenses of the Council, including a select committee where one is established, shall be borne by the central management.

(2) The central management concerned shall provide the members of the Council with such financial and other resources as are necessary to enable them to perform their duties in an appropriate manner.

(3) In particular, the cost of ongoing meetings and arranging for interpretation facilities and the accommodation and travelling expenses of members of the Council and its select committee shall be met by the central management unless otherwise agreed.

(4) The funding of experts by the central management shall be limited to funding the equivalent of one expert per meeting.'

This reflects provisions in the Directive, including Annex 1 article 6.

Definition of 'expert'

The Act defines 'expert' as 'a natural person, and may be the holder from time to time of a named office or position in a body corporate or other body or organisation.' The Directive does not define 'expert' and nor does it restrict the definition to a natural person.

The expert in this case is Dr Altmeyer and the invoices are submitted on his behalf by EWC Academy GmbH, a registered company in Hamburg. In line with section 3(3) of the Act, I interpret 'expert' broadly to include situations such as this one. Dr Altmeyer is a natural person and an expert within this definition, irrespective of whether he invoices or is paid via the company. A narrower interpretation which required that all transactions occur directly with the natural person would undermine the effectiveness of the Directive, as it would reduce the pool of experts available to EWCs. Natural persons would find it more difficult to act as experts without the protections of limited liability afforded by company law.

I note the judgments of the Court of Appeal and High Court in *Friends of the Irish Environment CLG v The Legal Aid Board* ([2023] IECA 19, [2023] IECA 63 and [2020] IEHC 454). The judgments address the definition of 'person' in the Civil Legal Aid Act 1995 to find that this only applied to natural persons and not companies. While 'person' is defined by section 18 of the Interpretation Act 2005 as including a company, the judgments held, for the reasons set out therein, that the 'person' referred to in the Civil Legal Aid Act was only a natural person. I distinguish this authority for the reasons below.

There may be an issue that defining 'expert' as being a natural person would undermine the effectiveness of the Directive if it excluded experts who provided professional services via a company (and raise a transposition issue with the Act). I, however, find that Dr Altmeyer fell within the definition of 'expert' in the Act as he is a natural person who provided his expertise to the EWC. His standing as 'expert' within the ambit of the Act is not precluded by his invoicing via a company and being paid via the company. If necessary, this is a broad interpretation supported by section 3(3) of the Act.

Involvement of the expert at the EWC

Section 6(4) of the Act outlines the provision of one expert per meeting. I take this to mean one expert per meeting with central management. This expertise is required because of the complexity and transnational nature of the issues addressed by the EWC, for example handling confidential information. This section reflects the terms of Article 5(6) of the Directive. An agreement between an EWC and central management could set out when and how the EWC can access its own expert.

The complainant outlined that in addition to the right of having an expert attend the meeting with central management, the services of an expert falls within the ambit of the 'means' required by the EWC. I note that the UK Employment Appeal Tribunal made an award on these lines in the 2020 Verizon litigation (UKEAT/0053/20/DA).

Definition of 'training'

One of the significant improvements made to the 2009 Directive was the explicit right to training without loss of pay. This is set out in Article 10(4) and referred to in recital 33 of the Directive. It is clear that members of an EWC have a right to receive training and this is without loss of remuneration. In order to foster the effectiveness of the Directive, I find that the right to training, new to the Directive, encompasses two aspects: one to obtain training and a second that this should be without loss of pay. A failure to provide either or both can be subject to enforcement procedures under Article 10, which in Ireland, occurs via section 17 of the Act.

What constitutes 'training' was certainly in dispute in this case. The complainants asserted that Hamburg constituted training, while Dublin constituted the provision of information (and not training). There was reference to training involving the provision of a 'tool box'. The respondent asserted that Dublin amounted to training and met its obligations under the Directive.

Training is not defined in the Act or Directive. Recital 33 refers to employee representatives receiving the training 'they require'. I appreciate that the work of an EWC is complex. By definition, it involves transnational corporate decision-making that has significant effects on employees (sale of business units, closures etc). It involves challenges such as dealing with confidential information. It might involve litigation either under section 17 (to the Workplace Relations Commission and on appeal to the Labour Court) or under section 21 (arbitration including via the Labour Court).

'Training' must be given its ordinary meaning. The Collins dictionary defines 'training' as the process of learning the skills needed for a particular job. A significant change in the Verizon EWC in 2021 was its migration from the UK to Ireland. Much of what was delivered in Dublin over two days addressed the Irish legal landscape, including the reality that there had been no section 17 or section 21 processes undertaken by the time of the training (and until the hearing of this case). Given the significance of the migration, it was entirely appropriate that training be provided regarding the Irish legal landscape. There was an obvious dearth of training or information to provide regarding litigation in Ireland because there was simply no litigation to report on.

There is no doubt that Hamburg amounted to training. It involved expert speakers and generally very experienced audience members. There were impressive presentations, for example on handling confidential information. It was held in person, as opposed to the online Dublin training and in person training is more productive, both in the formal sessions, but also informal contact on the margins. There was, however, little reference to Ireland at the Hamburg training. I am not saying that this was an omission in what was offered in Hamburg, but to illustrate that what was provided in Dublin constituted training because it involved new information about the Irish legal landscape regarding EWCs.

Having given 'training' its ordinary meaning, the next question is what reference period should be used in assessing whether employee representatives have been provided with the training necessary for the exercise of their functions. I find that the adequacy of training should be assessed over the course of a calendar year. In an area such as this, there are evolving transnational issues and the resolution of legal disputes. There is a complex and developing set of transnational issues, arising across the Member States, to assess and to provide training on. The concept of 'training' ordinarily includes regular, ongoing training. Applying this ordinary understanding of 'training', I find that the adequacy of 'training' should be assessed over the course of a year. The question, therefore, in this case, is whether the respondent complied with its training obligation set out in Article 10(4) over the course of 2021.

The respondent submitted that the entitlement to training set out in the Act is for training provided by the respondent. The respondent submitted that the right to training did not encompass funds being provided to the EWC to procure training. I find that the right to training in the Directive encompasses both training provided by or via the employer, or training where the EWC asserts the right to obtain particular training. In respect of the first scenario, central management could be in contravention of the Act where it did not provide any training or where the training provided was not effective. The second scenario arises where the EWC identifies a particular training need, which is not addressed by the respondent and for which the EWC seeks to obtain itself. The actions of all parties, however, are subject to the spirit of cooperation. The right to training arises in both scenarios to ensure the effectiveness of the Directive. It encompasses the provision and quality of training provided by or on behalf of the employer. It also encompasses training that the EWC seeks to have provided to it, for example by a third party provider and subject to the spirit of cooperation.

Reference to the Court of Justice

The complainant outlined that a reference could be made to the Court of Justice of the European Union on several of the issues arising in this case. The respondent outlined that a reference was not necessary.

I have set out the issues arising in this case and made findings of law in respect of them. It is a matter for the parties to pursue an appeal if they disagree with the findings of law. This may well encompass a reference to the CJEU in this or another appropriate case. Given the multiplicity and novelty of these issues, the best course of action was for me to determine the issues and for the parties and their lawyers, as they see fit, to progress the issues of law on appeal including any reference to the CJEU.

Findings in relation to this complainant

CA-00046937-001 relates to the expenses the complainant incurred attending the Hamburg EWC conference in September 2021. The other three complainants also make this complaint, and all attended the conference.

While they have taken divergent views on several issues, I accept that the parties have approached all the issues in this case in a bona fide manner and in order that the transnational information and consultation procedures work as intended by the Directive. Issues such as the role of an expert and the provision of training are typically agreed by central management and employee representatives. The parties in this case will be well aware of the advantages of coming to an agreement, and hopefully progress will be made in this regard in the near future.

The second thing to note is the imbalance between central management and employee representatives in any EWC. By definition, central management will be a large, transnational business, with access to resources. This can be contrasted to employee representatives, who are a small number of employees chosen by their peers, or otherwise appointed, to represent them at a transnational level. The EWC does not have legal capacity, nor any budget. Its resource is the representation provided by the employees on behalf of the whole workforce. There is no reality to any provision that the EWC discharge or incur costs in part or in full in respect of dispute resolution etc

One of the issues touched on in the evidence is the respondent's decision not to engage in information and consultation regarding a named transaction (a second transaction did not proceed so the information and consultation did not occur). Whether the former was a contravention of the Transnational Information and Consultation of Employees Act is not a matter for the Workplace Relations Commission. The scope of section 17 and the Workplace Relations Commission relates to the protection of employee representatives and the means for them to discharge their functions.

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This complaint relates to the costs incurred by the complainant in attending the Hamburg conference on the 13th and 14th September 2021. There are two issues: did the respondent provide 'training' to the EWC in 2021 and whether or not Dublin amounted to 'training', did not paying the costs of Hamburg amount to a contravention of the Act.

As set out above, it is clear that Dublin was training within the ambit of the Act. It addressed the Directive, the transposing legislation and the case law. As noted, there was no Irish case law to present. Hamburg represented excellent training, in particular on the challenging issue of confidentiality. Nevertheless, there can be no doubt that the training organised by the respondent in Dublin amounted to training within the ambit of the Directive.

I have found that even if Dublin did amount to training, a complaint of a contravention could be made where it was deemed that this training was insufficient. I have found that this case could be made in respect of training provided by a third party and is not restricted to training provided by the employer. For this case to be made, it would have to be shown that the additional training was required in that year.

I find that the training provided in Dublin met the respondent's training obligations under the Directive for 2021. I have found above that what was delivered in Dublin amounted to training. It was entirely appropriate that the Dublin training covered the Irish legal landscape because of the migration of the EWC from the UK to Ireland. While I appreciate that the training delivered in Hamburg was valuable, this value does not render the quality of the training delivered in Dublin to be insufficient. I accept that confidentiality and the signing of an NDA were important issues for the EWC, which the Hamburg conference addressed in detail and in greater detail than occurred in Dublin. This does not, of itself, mean that what was delivered in Dublin was insufficient. Rather, it was something to address in the delivery of training over subsequent years.

The Dublin training was delivered over two days. It was entirely reasonable for the respondent to prioritise delivery of training online, rather than to wait, or risk, training being delivered in person in the context of the pandemic. I accept that the presentations were not circulated as they ought to have been, but this was an oversight. There is no evidence that the two days of training delivered in Dublin was below the level of training an EWC could be expected to obtain, either via the lapsed Verizon Charter or more generally (see the European Commission Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council (March 2016) which indicates that 1 to 3 days of training per year is typical). I appreciate why the complainants wished to obtain additional training in September 2021, but given the recent Dublin training, the additional Hamburg training in September 2021 was not required of the respondent. The amount of training is a matter the parties could agree on in any future agreement.

Furthermore, I note that the respondent was clear that it would not pay for the costs of attending Hamburg. The approach for the EWC to then take was to submit a complaint of a failure to provide training within the ambit of section 17. It was not to attend the conference and claim the cost retrospectively. This is not in accordance with the spirit of cooperation required of parties.

For completeness, I note that the local employer paid Mr Macho his travelling expenses. Mr Macho was entitled to this payment per the agreement with local management. The above deals with the accommodation and conference costs, which local management did not pay.

For these reasons, I find that this element of the complaint is not well-founded.

I have found that the complainant is not entitled to recover the costs of his attending the EWC Conference in Hamburg. The issue that is specific to Mr Macho was the interaction between central management and his direct employer in Czechia. The complainant was warned about the possibility of disciplinary action.

Mr Macho had applied via local management for funding to go to the conference. This application was forwarded to a senior manager and then to a Vice-President. It was approved and he was paid his travel expenses. The complainant's business case email used the word 'compulsory'. The respondent perceived Mr Macho's actions as a means to circumvent the dealings central management were having with the EWC (where central management had already refused the EWC's request for funding to go to the conference). While I note the basis of the perception, the respondent's actions were not warranted.

I note that Mr Macho was newly elected to the European Works Council. At the hearing, he gave impressive evidence of his enthusiasm and commitment to the role. He was rightly proud of the democratic mandate he and his fellow EWC representative obtained from their colleagues in Ostrava. It is significant that he was a newly-appointed employee representative and joining a EWC where there was

already significant conflict and litigation with central management. He was a stranger to these prior interactions. The complainant was not given a start-up guide or any other information about what was involved in joining an EWC.

I do not accept that the complainant's use of the word 'compulsory' was any attempt to mislead the respondent. The word is used to highlight the importance of the Hamburg conference to the complainant as a newly-elected employee representative. He persuaded senior managers of the validity of his application. The senior managers were not misled by the complainant's email but agreed with the business case he made.

I appreciate that Mr Voinescu's interactions occurred in the context of the wider dispute with the EWC. Article 10 and section 17, however, ensure that employee representatives receive protection in carrying out their duties on the EWC. Employee representatives, in particular those newly elected to an EWC, would be dissuaded from taking on these roles if the protections were not enforced. I find that the interaction with local HR and the warning given to the complainant amount to detriment for the complainant carrying out his role as an employee representative. Even if the complainant took an optimistic interpretation of the position, he sought funding locally out of his commitment to the employee representative role and not as a means of undermining central management. I find that the complainant incurred detriment and was, therefore, penalised in contravention of section 17(1).

As redress, I find that the respondent shall pay to the complainant compensation of €4,000 (or the equivalent in Czech koruna). The respondent, and the direct employer, should expunge any record of the warning given to the complainant for his activities in late 2021 in seeking to attend the EWC Conference in Hamburg.

Decision:

Section 41 of the Workplace Relations Act 2015 requires that I make a decision in relation to the complaint in accordance with the relevant redress provisions under Schedule 6 of that Act.

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I decide that the complaint pursuant to the Transnational Information and Consultation of Employees Act in respect of expenses incurred in attending the Hamburg EWC Conference is not well-founded. I decide that the respondent shall pay to the complainant €4,000 for the act of penalisation and expunge from the record any reference to the warning given to the complainant in his capacity as employee representative and in seeking to attend the EWC Conference in late 2021.

Dated: 14th April 2023

Workplace Relations Commission Adjudication Officer: Kevin Baneham

Key Words:

Transnational Information and Consultation of Employees Act / European Works Council / territoriality / expert / training / penalisation

The Labour Court