

Case Reports

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European Works Council: appropriate training and expert advice (IR)

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Summary

An Irish Workplace Relations Commission ('WRC') decision has provided guidance on the right of European Works Council ('EWC') members to appropriate training and expert advice and assistance.

This case involved complaints under the Transnational Information and Consultation of Employees Act 1996 ('TICEA'). The complainant was the chair of the Verizon EWC but employed by Verizon France SAS. The complainant claimed that Verizon Ireland had contravened the TICEA by failing to discharge (1) the costs of EWC members attending an external training conference in Hamburg and (2) an invoice submitted by an expert engaged by the EWC for expert advice and assistance.

The following were among the issues considered by the WRC adjudication officer:

1. Whether the protections of TICEA are afforded to employee representatives on an EWC who live or are appointed outside of Ireland (and whose central management or its representative are located in Ireland).
2. Whether the WRC had jurisdiction to hear the complaints where subsidiary requirements were in place.
3. Whether online training provided by Verizon Ireland amounted to appropriate training within the meaning of TICEA.
4. Whether additional training provided at an external conference was necessary and appropriate, and if so, whether Verizon Ireland was obliged to cover the cost of this training where internal training had already been provided.

5. Whether Verizon Ireland was obliged to discharge an invoice submitted by an expert for services provided to the EWC.

Legal background

TICEA transposes Directive 2009/38/EC (Recast) on the establishment of European Works Councils (the 'Directive') into Irish law.

Under TICEA, central management is required to provide EWC members with "the means required to apply the rights arising from the Directive". TICEA further provides that EWC members must be provided with "appropriate training by their employers without loss of wages" in so far as it is necessary for the exercise of the representative duties in a transnational setting. The provision of training is also referred to in the Directive, although there is no definition of 'training' in either TICEA or the Directive.

Where there is no EWC agreement in place between members and central management, subsidiary requirements (as set out in the second schedule to TICEA) will apply. Where subsidiary requirements apply, central management must inform and consult the EWC on an annual basis about transnational matters. In this regard, TICEA provides that the operating expenses of an EWC are borne by the central management and that central management must provide EWC members with "such financial and other resources as are necessary to enable them to perform their duties". In particular, the "cost of ongoing meetings ... and the accommodation and travelling expenses of members ... shall be met by central management unless otherwise agreed".

TICEA also provides that the "funding of experts by the central management shall be limited to funding the equivalent of one expert per meeting".

Both TICEA and the Directive provide that central management and the EWC must work in the "spirit of cooperation" with due regard to their reciprocal rights and obligations.

Facts

Following the United Kingdom's withdrawal from the European Union, Verizon nominated Verizon Ireland as the representative of its central management. The Verizon EWC agreement (the 'Charter'), under which Verizon's EWC operated in the United Kingdom, expired in

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October 2020 and the EWC began operating in Ireland under the default subsidiary requirements. In his evidence, the complainant outlined how a vacuum of expertise arose following the expiry of the Charter and, as a result, the EWC needed (a) the input of an expert on various matters and (b) appropriate training.

Expert engagement

The complainant outlined that the EWC needed expert advice in relation to the constituent meeting of the EWC (including a review of the minutes), subsidiary requirements, a legal assessment of a non-disclosure agreement, the information and consultation on a corporate transaction and the status of UK employees post-Brexit. Verizon's EWC members engaged Dr Altmeyer of the EWC Academy to provide expert advice and assistance on these matters, without seeking prior approval for the costs from Verizon Ireland.

When presented with an invoice for € 11,220 from the EWC Academy, Verizon Ireland refused to discharge all the incurred costs (including the cost for reviewing meeting minutes and advice relating to an aborted corporate transaction), although it did offer to pay some of the other costs, subject to an agreement between the parties. The complainant submitted that there was a question as to whether central management had provided the 'means' required to apply the rights arising out of the Directive.

Provision of training

Verizon Ireland had organised training for EWC members in May 2021, which consisted of presentations focusing on the work of the EWC under Irish law. This training was provided virtually due to the Covid pandemic. Four of the EWC members did not believe the training was sufficient and sought pre-authorisation for their costs to attend an EWC training conference in Hamburg in September 2021. Verizon Ireland's position was that the Hamburg conference was neither necessary nor appropriate, given that 'extensive' training had already been provided to the EWC members. The EWC members attended the Hamburg conference, despite Verizon Ireland informing them in advance that the costs would not be reimbursed.

During the hearing, the complainant argued that the online sessions organised by Verizon Ireland had been information sessions and not training, and that not all the questions raised by EWC members during the sessions had been answered. He described expecting the sessions to give him a 'toolbox' setting out where parties could take a case to and recent case law, but the sessions did not give him this. The EWC members asked for the slides of the online training, which were not provided. The complainant described the Hamburg conference as providing a toolbox, for example in respect of confidential information.

Decision of the WRC

Before setting out his decision on the substantive complaints, the adjudication officer addressed several preliminary and jurisdictional matters.

Jurisdiction – territoriality

The adjudication officer found that TICEA does not contain any territorial restrictions and does not differentiate between community-scale undertakings situated in Ireland or those whose representative agent has been designated as being in Ireland. Therefore, protections afforded to employees' representatives under the Directive must be made available to all employees' representatives whose central management is situated in Ireland or where a representative agent has been appointed in Ireland, irrespective of where the employee representative lives or if their undertaking is situated in another Member State (presuming that central management or its representative are located in Ireland).

The adjudication officer also found that the WRC's jurisdiction is not exclusive and so EWC members may enjoy additional rights under the national laws of the country in which they work.

Jurisdiction – subsidiary requirements

Verizon Ireland submitted that the adjudication officer did not have jurisdiction to hear the complaints as subsidiary requirements were in place. It submitted that any contravention of the second schedule to TICEA (which sets out subsidiary requirements) was outside the scope of TICEA's redress provisions.

The adjudication officer found that the redress provision encompassed EWCs operating under subsidiary requirements and that the WRC had jurisdiction to investigate the complaints.

Substantive complaints

There were two substantive complaints to be addressed in this decision. The adjudication officer noted that much of the case arose from the interpretation of EWC members being provided with "the means required to apply the rights arising from the Directive".

The first complaint related to whether Verizon Ireland was liable to discharge the expert's invoice.

The adjudication officer noted that, apart from being provided with the "means required to apply the rights arising from the Directive", an EWC operating under the subsidiary requirements is entitled to be assisted by one expert per meeting, which they interpreted as meaning one expert per meeting with central management. However, the adjudication officer also noted that the "means required" can also involve an expert assisting an EWC.

While TICEA defines an 'expert' as a natural person, the adjudication officer noted that a narrow interpretation would undermine the effectiveness of the Directive if it excluded experts who provided professional services via a company (and would raise a transposition issue with the TICEA). The adjudication officer therefore

found that Dr Altmeyer's standing as an expert was not precluded by the invoicing and payment of his costs via a company.

The adjudication officer outlined that "procuring billable expert support without even alerting central management that the advice was being engaged could, per the spirit of cooperation, result in this support being outside the 'means' an EWC is entitled to obtain from central management". The adjudication officer outlined that, in this case, had there not been exceptional circumstances (the expiry of the Charter and the migration of the EWC to Ireland), they would have found that the manner in which Verizon Ireland was surprised by the procuring and extent of billable expert support was outside the "means" required of central management. However, given the particular circumstances in early 2021 and the need for expert advice, the adjudication officer found that the EWC was nonetheless entitled to the "means required" and Verizon Ireland should discharge 50% of Dr Altmeyer's invoice. This reflected the lack of notice from EWC members to central management, and the extent of the billable work undertaken.

In assessing this complaint, the adjudication officer accepted Verizon's submission that the reviewing of the internal EWC meeting and the advice regarding UK delegates was not required or reasonable. They further found that the tentative, early notice of a possible future transaction by central management to the EWC did not generate an entitlement of the EWC to consult an expert, in circumstances where it was quickly clear that the transaction would not proceed. However, the adjudication officer found that the EWC was entitled to engage an expert to prepare internal rules and there was no obligation to share those rules with Verizon Ireland. The second complaint related to the expenses the complainant and other EWC members incurred in travelling to and attending the Hamburg conference in September 2021.

The adjudication officer found that the adequacy of training to EWC members should be assessed over the course of a calendar year, and that it ordinarily includes regular, ongoing training. They found that the right to training in the Directive encompasses both training provided by or via the employer, and training where the EWC asserts the right to obtain particular training which can include training by a third-party provider.

The adjudication officer found that the online training organised by Verizon Ireland amounted to training and that it met Verizon's training obligations under the Directive for 2021, noting that it was entirely appropriate that the training covered the Irish legal landscape in light of the migration of the EWC from the United Kingdom to Ireland. They also found that the additional Hamburg training was not required of Verizon Ireland and outlined that the amount of training is a matter the parties could agree on in a future agreement. Further, the adjudication officer outlined that the EWC members attending the Hamburg conference and then retrospec-

tively claiming the cost from central management was not in accordance with the spirit of cooperation required of the parties.

For those reasons, the adjudication officer found that the second complaint was not well-founded.

Commentary

This is the first EWC dispute heard by the WRC notwithstanding that TICEA has been in place since 1996. Prior to Brexit, very few employers had designated an Irish representative of central management. This decision, although currently on appeal to the Irish Labour Court, provides guidance to the 100+ multinational employers who have moved the representative of their central management to Ireland, as well as their EWC members.

In assessing the complaints, the adjudication officer adopted a broad interpretation of TICEA, in particular what the "means required to apply the rights arising from the Directive" should encompass.

The decision demonstrates the clear emphasis that is placed on the spirit of cooperation between EWC members and central management. It indicates that, other than in exceptional circumstances, EWC members should alert central management to both the procuring and extent of billable expert support before engaging an expert. In this case, the adjudication officer found that Verizon Ireland should pay half of the expert's invoice. However, this decision reflects the exceptional circumstances facing Verizon's EWC (namely the Charter having expired and the EWC having become subject to Irish law). Had there not been exceptional circumstances at play, it is not clear what level of award (if any) would have been made.

The decision also makes clear that EWC members must be provided with adequate training each year and that central management are expected to engage with the EWC in relation to the content of training. The decision outlines the expectation that EWC members should seek pre-authorisation before incurring costs associated with attending external training.

Separately, in May 2022, infringement proceedings were opened by the European Commission, having identified a number of 'shortcomings' in TICEA which fail to guarantee the right of workers' representatives or the EWC to go to a national court over disputes related to breaches of the rights and obligations under the Directive. This concerns, in particular, disputes related to the right to request the assistance and presence of an expert at negotiation meetings and disputes relating to confidentiality obligations.

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