BEERG | The Brussels European Employee Relations Group

Newsletter

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In this week's issue:

EWCs: UK court decides EWC member was wrongly excluded from office

David Hopper, who was recently made a Partner at Lewis Silkin in London, writes*: Despite the Brexit transition period ending months ago, the UK's Central Arbitration Committee (CAC) has continued to hear complaints made whilst EWCs were still governed by UK law (as reported on in earlier BEERG newsletters this year). Whilst its earlier decisions have mainly focused on Brexit-related issues, in *Walgreens Boots Alliance* the CAC has decided complaints on a number of issues that could arise in the context of any EWC.

In May 2020, WBA voluntarily met with its EWC on its proposed global finance transformation project. During the meeting, WBA provided its EWC with highly confidential information on slides that indicated that the information on them was confidential. However, the slides were not later provided to the EWC and a dispute later arose as to whether WBA had in fact communicated that the information was confidential due to alleged translation issues during the meeting.

In July 2020, the Spanish member of the EWC wrote to all Spanish employees and passed on WBA's confidential information. In response, WBA excluded him from future EWC meetings. After WBA and the EWC failed to resolve matters between themselves, the EWC complained to the CAC.

The CAC first had to decide whether the Spanish member of the EWC had been wrongly excluded from office. After examining the relevant slides, the CAC accepted that they had been marked as confidential. However, the CAC decided that, because the wording on confidentiality meant that it had not been given "greater prominence" on the relevant slides, as it was in a smaller font, the member of the EWC had not been put on notice that the information was confidential.

It also decided that WBA had failed to "adequately communicate" that the information was confidential during the meeting as this was not clear enough from the meeting's minutes. As a result, the CAC decided that the confidential information had not been properly restricted, the Spanish member of the EWC had therefore not breached a confidentiality restriction and so WBA had wrongly excluded him from the EWC.

The CAC also had to decide an additional complaint that WBA had failed to provide the EWC with sufficient translation facilities at the meeting in May 2020 and on other occasions. The CAC accepted that WBA had not been required to hold those meetings under the terms of its EWC Agreement. It also recognised that WBA had been keen to engage more frequently with its EWC than required, albeit without having to incur additional translation costs for doing so.

However, the CAC decided that there was "no shared understanding" on the status of the extra voluntary meetings and that the EWC Agreement didn't expressly provide that WBA didn't need to provide all usual facilities at them, even though it wasn't legally required to hold the meetings at all. As a result, the CAC decided that WBA had again breached its EWC agreement.

BEERG COMMENT

This decision is very fact specific and has been made by a court in a country that is no longer part of the EU. It's direct relevance to companies with EWCs in countries such as Ireland is therefore limited.

However, the case was brought on behalf of the WBA EWC by the EWC Academy, a consultancy based in Germany which we are aware is involved with other EWCs operating in countries such as Ireland. The issues of confidentiality and translation are also ones that frequently arise in practice irrespective of which laws govern an EWC.

This case is therefore a good reminder of the importance for all businesses of always being clear on what is and is not confidential information, and the rules that apply if a business is going above and beyond its minimum EWC obligations when trying to "do the right thing" from a labour relations perspective.

It seems to us that some of the decisions that the CAC has recently handed down, such as on the volume of information that EWCs can request; that separate decisions in separate countries should be aggregated and labelled "transnational"; and the one discussed above on confidentiality, add little to what EWCs can actually do, which is simply to offer a non-binding opinion on the issues under discussion. Taken together, these decisions increase the bureaucratic complexity of the process and will push companies to avoid doing anything but the bare minimum. Agreements will become more complex and tightly drawn.

Because of Brexit, the involvement of the CAC in EWC disputes is now coming to an end and with it its "goldplating" of provisions of the Directive and its over-expansive interpretation of the texts of agreements. It is to be hoped that if and when disputes come before the Irish Labour Court the Court will take a more pragmatic view of matters and realise that what is important is dialogue between the parties rather than box-ticking procedures and unending information demands, often pushed by EWCs at the urging of fee chasing consultancies. An "Irish reset" to a more realistic view of the role of EWCs would be more than welcome.

*See: www.lewissilkin.com/en/three-new-partners-across-employment-and-commercial-practices

GDPR: Axel Voss MEP on EU's love-hate relationship with data protection

Derek Mooney ***writes:*** In a short but important opinion piece for the EU Politico website the German CDU/EPP member of the European Parliament's Legal Affairs Committee and legal policy spokesperson for the European People's Party (EPP): Axel Voss MEP writes about what he terms Europe's "*love-hate relationship with its landmark data protection legislation, the General Data Protection Regulation (GDPR)".*

Mr Voss, who was one of the team of shadow rapporteurs which oversaw the parliamentary scrutiny of the GDPR legislation almost a decade ago, offers a candid assessment of its impact to date, saying that while it has been a clear win for Brussels, setting data protection rules and levelling the global playing field, it has also been a huge headache for the average business, organization and citizen.

Voss says that the GDPR is seriously hampering the EU's capacity to develop new technology and desperately needed digital solutions, for instance in the realm of e-governance and health. He neatly encapsulates the EU's GDPR dilemma in two lines, saying:

> *"While the creation of our golden standard of data protection is a great achievement, it has come to be seen as something untouchable that ranks above all other legal interests and fundamental rights, with no exception."*

And

> *"For many political players, data protection has evolved into an absolute right that outweighs all other interests. They argue that even small and proportionate privacy interferences for the good of all — like distributing the coronavirus vaccine — are unjustified."*

He states clearly that the EU must now rethink data protection in a more balanced way – and seems to favour a more risk-based approach – something which we in BEERG advised at the outset.

Voss proposes that the EU

> *"…increase the processing of depersonalized, mixed and nonpersonal data. That can be achieved by simply promoting the use of techniques allowing anonymity or the use of pseudonyms, and by giving businesses the legal certainty to share more data voluntarily. This would already largely enable the development of digital solutions from AI to tracing apps."*

He also says that:

> *"We also need to offer more guidance and exemptions for smaller businesses, startups and organizations. If only large digital companies have the expertise and capabilities to easily implement the GDPR, this consolidates their monopolies even further."*

> *"Finally, we need a clear, common approach to implementing GDPR rules, rather than letting each member country and national data protection authority go their own way. All this can be fixed if we revise the GDPR, remove most derogations and streamline the interpretations."*

Concluding, he explains why these changes must be made now and not wait longer to see how things play out, as many EU politicians suggest. He says that *"this wait and see approach does not work in the digital age, where technology moves so much faster than our ability to legislate"* and urges his colleagues to "*find a more balanced approach to data protection that protects our rights without creating unnecessary barriers to the digital innovation that is essential to our future."*

Over the three years since May 2015, when the GDPR became fully enforceable in EU Member States, we reported, with increasing concern, on how the GDPR has steadily become a target for bureaucratic capture by overly zealous Data Protection Authorities (DPA), while privacy fundamentalists constantly demand that its scope and extent be expanded.

We have seen the perpetual state of confusion regarding data transfers to the US with companies waiting to see the latest opinion or view from DPAs, individual European courts, and the Court of Justice of the European Union (CJEU). The same thing could well happen with data transfers to the UK if the adequacy decision proposed by the Commission is blocked or subsequently overturned by the CJEU. Brexit does not need to be made any more complicated than it already is.

We have seen the creeping attempts by some data authorities to erode the concept of the one-stop-shop and to deem every GDPR data breach an offence and to hold the company entirely liable, regardless of the cause of the breach or whether there was a deliberate management decision. There appears to be an obsession with fining companies, rather than working to fix problems.

We therefore welcome Mr Voss's comments and support them fully. We know he has had a deep interest and long involvement in developing data privacy policy. Indeed, Mr Voss was one of the MEPs who gave the legitimate concerns of business a fair hearing at the time the GDPR was going through Parliament. He has a deep understanding of both the intricacies of GDPR and the needs of the real world. We look forward to engaging with him, and his colleagues, to ensure that GDPR works genuinely for all.

We would advise BEERG member companies to make concerns they have with the GDPR known to Mr Voss.

Trade Unions: Rethinking outreach in telework era

According to IndustriAll Europe, telework "is here to stay and unions need to learn how to organise workers online and address their concerns". Isabelle Barthès, industriAll Deputy General Secretary, says:

> *"Teleworkers must be able to enjoy the same rights as all other workers, including the right to join a union, collective bargaining and training. By using innovative means of communication, unions can reach teleworkers and show that collective action is the best way to address their concerns."*

Drawing on the Unions 21 report IndustriAll believes that:

- *New forms of effective online communication enable unions to engage with more workers, listen to their concerns, and understand their needs.*
- *Unions need to rethink their communication methods, upgrade and refine their infrastructure, and train the staff and union reps.*
- *Making it easier to join the union should include a user-friendly online joining system.*
- *Integrating social media (particularly Facebook Messenger) into the union's formal communication channels recognises the fact that increasing numbers of members contact their union in this way.*
- *Email remains the quickest way to share information with workers. This requires a comprehensive and up-to-date register.*
- *Retention work is valuable: going through a list of recently resigned members and calling them has led to a healthy number re-joining the union.*
- *Visibility is important: lots of people have joined because they have been impressed by the role the union has played in fighting for the industry.*

For more details of IndustriALL's position on telework, see here

UK: Unite under pressure over £100m hotel and conference centre

The UK trade union, Unite, is under growing pressure to commission an independent review into the spending of almost £100m of members' money on building a hotel and conference centre. Len McCluskey (pic), general secretary of Unite, is also facing questions as to why the development's main construction contract was awarded to a company owned by a friend.

The project in Birmingham, which includes new union offices, was intended to save on hotel rooms and conference bills. Yet after an initial estimate of £7m, the building costs ballooned to £57m before construction even began. Now complete, Unite has confirmed the total expenditure on the project is more than £98m.

The development's key contract was awarded to Liverpool-based Flanagan Group, a firm run by McCluskey's long-time friend, Paul Flanagan. A health and safety contract was awarded to SSC, a company owned by David Anderson, the son of the former Liverpool mayor, Joe Anderson.

Mr Flanagan and both David and Joe Anderson have been arrested on suspicion of bribery as part of a Merseyside Police corruption investigation not linked to Unite.

In response to press enquiries, a spokesperson for Unite said: "As with all construction projects, and especially one of this scale, costs will have risen over the duration of the project. Unite's refusal to use cheaper, under-paid, non-union labour added to the costs, as did our decision to add a floor to the hotel and up the classification from three to four star."

McCluskey stands down as Unite general secretary within months, after 10 years in the role. See here

Brexit: Update on UK rules on employing EU nationals

Andrew Osborne and colleagues at Lewis Silkin write:, The Home Office has provided UK employers with further details about which actions they may take when checking the right to work of EEA nationals (EEA = EU plus Norway, Iceland and Liechtenstein) and their family members during the post-transition grace period from 1 January 2021 to 30 June 2021 (for further details see "Q&A: right-to-work checks beyond 2020" and "Right-to-work checks for EEA nationals during first half of 2021").

The guidance is contained in an updated version of Right to work checks: an employer's guide, which was published on 17 March 2021. Topics covered include:

- checking right-to-work documentation issued under the Immigration Rules; and
- carrying out retrospective right-to-work checks for existing employees.

The key points to note include the following:

- The Home Office has acknowledged that employers may want to:
    - ensure the stability of their workforce during the grace period; and
    - help employees to obtain the appropriate immigration status that they need to be able to work in the United Kingdom beyond the grace period.

- Employers are advised that they may invite individuals who have been granted status under the EU Settlement Scheme or the post-Brexit immigration system to evidence their right to work using the Home Office online service. However, during the grace period, employers cannot insist that individuals prove their right to work using the online service.
- Employers are not required, but are allowed, to carry out retrospective right-to-work checks on existing EEA national and EEA family member employees, as long as these are conducted in a non-discriminatory way in accordance with the Home Office's code of practice on avoiding unlawful discrimination while preventing illegal working.
- If EEA nationals (and presumably their family members, although this is not stated in the guidance) cannot provide documents in a retrospective check to the standard required to establish a statutory excuse, employers should contact the Employer Checking Service.
- From 1 July 2021, the requirements for right-to-work checks for EEA nationals will change and evidence of UK immigration status will be required using the Home Office's online service, subject to limited exceptions.
- New guidance on the requirements for right-to-work checks from 1 July 2021 will be published by the Home Office ahead of this date.

Meanwhile, the London *Times* reports that three British tradesmen have been fined and deported from Germany as "unregistered workers". Officials from the customs authority in Stuttgart inspected the paperwork of five workers who were fitting out a sports shop on behalf of a Slovenian company. The men were told that they did not have sufficient documentation to justify their stay in the country.

Thomas Seemann, the spokesman for the customs office in Stuttgart, told *The Times* that although the three Britons had not been prosecuted, they had to pay an upfront fine before they were deported. "The official accusation against the men is that they were working illegally in the Federal Republic of Germany, as they did not have a place of residence or the correct paperwork," Seemann said. "Based on this, they had to deposit a 'financial security' for the expected penalty. The public prosecutor's office in Stuttgart will determine how high the penalty will be.

Brexit: Independent Commission to assess trade impacts launched

UK politicians from across the party divide, along with business people and academic and other experts, have established an independent *UK Trade and Business Commission* to consider the country's future trade relationships focused on but not limited to the EU.

The goal is to understand the UK's trading position, in particular the changes that took place on January 1, and consider ways in which it can be improved. The Commission will take written and verbal evidence, and report periodically on findings. It is jointly chaired by Hilary Benn MP and Peter Norris, Chair of Virgin Group.

While not an official body, it is hoped that its findings and reports will be persuasive and will influence government policy and negotiating positions. The Commission is interested in hearing from companies and individuals. You can find out more at https://tradeandbusiness.uk. The expert advisor to the Commission is David Henig, who has spoken at BEERG meeting and with whom we recorded a BEERG Byte earlier this year.

Elsewhere, a survey from EY and London First's looks at Brexit-related operational disruption and its implications for long-term business outlook. It finds:

- *Three quarters of businesses surveyed experienced some degree of disruption following the end of the transition period, and half of those expect it to continue over the long-term.*
- *Supply chain, customs, tax, VAT and regulatory change were the most common areas causing disruption.*
- *The impact of Brexit may not yet be fully realised for businesses which rely on attracting EU talent or business travel to the EU; this is particularly true for regulated services.*

Ireland: Code of practice on the "right to disconnect"

From April 1, all employees officially have the Right to Disconnect from work and "have a better work-life balance", after Tánaiste and Minister for Enterprise, Trade & Employment Leo Varadkar brought in a new Code of Practice. The Code comes into effect immediately and applies to all types of employment.

The Right to Disconnect gives employees the right to switch off from work outside of normal working hours, including the right to not respond immediately to emails, telephone calls or other messages. There are three rights enshrined in the Code:

- *The right of an employee to not have to routinely perform work outside their normal working hours.*
- *The right not to be penalised for refusing to attend to work matters outside of normal working hours.*
- *The duty to respect another person's right to disconnect (e.g., by not routinely emailing or calling outside normal working hours).*

Because the Code is flexible, "employees will have more options to work outside of traditional hours, which many people have availed of during the pandemic. And it reflects the fact that many Irish employees are part of a global network, requiring contact with colleagues around the world".

While it is the employer who is responsible for managing adherence to working time rules, "individual responsibility on the part of employees is also required", including "being mindful of other colleagues' right to disconnect or cooperating with any employer mechanism to keep a record of hours worked".

Full details of the code can be found here

EU: Minimum wage proposal runs into Danish opposition

In an interview with *Bloomberg*, Danish Employment Minister Peter Hummelgaard Thomsen said sovereignty over labor market laws has always been a condition of Denmark's EU membership. He said Denmark is ready to fight the EU to maintain that independence and is opposed to the Commission's proposed legislation on "adequate" minimum wages in EU member states.

In October, the Commission published its proposal for a new directive that would require all member states to establish procedures for "adequate" minimum wages. The directive doesn't specify any salary levels and seeks to oblige members states where collective bargaining coverage is under 70% to develop

an action plan to promote it. As we in BEERG have previously pointed out, what exactly is meant by collective bargaining, the parties entitled to be involved, and the processes and procedures to be used, would all have to be very carefully defined and agreement among the 27 member states on such a sensitive matter may not easily be come by. The difficulties around union recognition and collective bargaining in Ireland alone stand witness to that.

In the 1970s, Danish labor unions agreed to EU membership based on an assumption "that handing over authority to the EU would not endanger the Danish labor market model," Hummelgaard Thomsen said. But the EU Commission's insistence on an EU-wide framework for minimum wages has triggered "frustration and concern" in Denmark, as the country wakes up to the fact that Brussels "could potentially intervene in something very, very sacred to us," he said.

Hummelgaard Thomsen says the answer to the widening income gap is for more countries to embrace the kind of unionized collective bargaining model that Denmark has, rather than a legislated minimum wage. Denmark is not the only concerned about the minimum wage legislation. Sweden, whose prime minister is himself a former union leader, has also voiced concerns. Last month, it organised a letter from a number of other member states opposing the directive.

Data Privacy: Is every data breach really a data breach + Mailchimp issues

Derek Mooney ***writes:*** Is a data breach always a data breach? No – it is not. Though we have seen reports over the past few weeks of serious large data leaks from Facebook, LinkedIn and Clubhouse (a new audio social media platform) all three technology companies insist that the "leaks" were not data breaches, but are data scrapes, as the datasets published only contains public profile information.

Scraping is the automated collection of publicly available information from webpages. In a 6 April statement Facebook described the scraping of datasets from its site as: *"…another example of the ongoing, adversarial relationship technology companies have with fraudsters who intentionally break platform policies to scrape internet services".*

Several data protection authorities across the EU now say they are looking into these cases with. Italy's data regulator announcing on 8 April it has started a probe into the leak. The Luxembourg data protection authority also announced it has been in contact with the Irish Data Protection Commission (DPC), which is the lead regulator for LinkedIn. The DPC was in communication on 8 April with LinkedIn about the leak which saw public information from 500 million LinkedIn user profiles was up for sale on a hacking forum. LinkedIn says that it:

> *"determined that [the dataset] is actually an aggregation of data from a number of websites and companies… It does include publicly viewable member profile data that appears to have been scraped from LinkedIn. This was not a LinkedIn data breach, and no private member account data from LinkedIn was included in what we've been able to review."*

MEANWHILE a controversial decision by the Bavarian data protection authority (BayLDA) that MailChimp's operations are not legal under GDPR raises very serious questions for almost all US software applications that process personal data of EU citizens as the decision draws heavily from the recent Schrems II ruling.

The Bavarian DPA found that the use of the newsletter mass mailing tool Mailchimp by a Germany company was unlawful as Mailchimp receives email addresses of newsletter subscribers and might qualify as "electronic communication service provider" under US surveillance law as companies using Mailchimp are sending personal data (e.g. email addresses and recipient names) to Mailchimp's servers in the United

States. This excellent blog post from the Dutch law firm Sirius.Legal offers a very comprehensive overview of the case and its implications, but two points do jump out at BEERG:

1. *Is this not a further example of an activist DPA trying to expand the law?*
2. *Rather than looking to ban the use of Mailchimp, wouldn't a better solution be to advise the establishment of a server here that avoids sending EU personal data to US?*

Gig economy: ETUC opposed to creation of "third category" of worker

The European Trade Union Confederation (ETUC) "strongly opposes the creation of a third status between workers and self-employed. Workers do not need a specific (and more limited) labour legislation which is different to the one which applies to workers." The ETUC wants all gig economy workers to be classified as employees and will strongly oppose any legislation from the EU which does not do so.

The confederation's comments came in response to the European Commission's first phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work. According to the ETUC, "recent Court cases and administrative decisions have shown that the platforms are still in breach of the laws regarding the respect of workers' rights and recognise again and again the misclassification of workers as (bogus-) self-employed while the platform behaves, with the help of its algorithmic management tool, as an employer".

The ETUC says it has two objectives:

1. *to win rights for non-standard workers whether they work online or offline (including those in platform companies) and*
2. *to make the digitalisation of the economy compatible with the employment relationship and the respect for fundamental workers' rights.*

You can read the ETUC's full response to the consultation here

BEERG Bytes: The latest Podcast and BEERG meeting videocast

The latest **BEERG Byte** (#22) was released as a Podcast. It features Tom Hayes examining the Irish government's review of collective bargaining and industrial relations structures in Ireland. There is a **BEERG Perspectives** paper to accompany this podcast. Search for "BEERG Bytes" via your favourite **Podcast** search engine such as Spotify or Google or use the links below.

We have also posted a videocast of last Wednesday's BEERG meeting on Covid vaccinations as workplaces return on the BEERG website: **HERE**. It is password protected. BEERG members can access a password **HERE**.

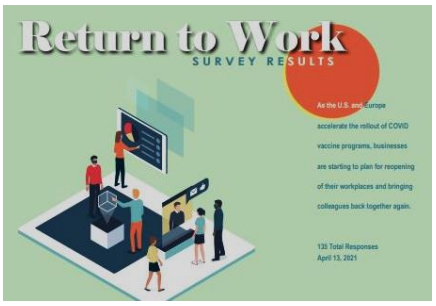
BEERG Bytes from 2021, along with many from 2020, are available online at **www.beerg.com/beergbytes**. You can access our **BEERG Bytes Podcasts at:** **Spotify** / **Google Podcasts** / **Apple Podcasts** / **Anchor RSS**

THE BEERG AGENDA:

BEERG/HR Policy "Return to Work" Survey Report

We are pleased to launch the results of the recent HR Policy/BEERG "Return to Work Survey Report". It is based on 135 detailed responses from BEERG and HR Policy members. You can download a copy HERE.

The survey provides some important insights into how multinational employers will treat the "return to work" quandary. Some of the more interesting results include:



- *The majority of respondents have yet to set a return-to-work date.*
- *Virtually all respondents (91%) plan to utilize a hybrid work environment upon return.*
- *Just under 80% of companies will NOT require vaccination to return to the office.*

The survey covers several other questions such as travel and meeting restrictions and includes significant commentary by members which provides important context to the survey decisions. HR Policy plans to host a webinar on the results and individual company approaches in early May, which will be open to BEERG members. We will circulate details when they are available.

TBC BEERG 2021 Dates for your Diary:

Date	Event	Venue
TBA	BEERG Members' Network Meeting [Oct]	*TBC*
TBA	BEERG Training Programme [Oct]	*TBC*

BEERG Events in 2021:

BEERG meetings and events will remain online-only - up to September 2021.

We will revisit this position after June 2021 in the light of the vaccination programme roll-out across Europe and the US, and official travel advice.