BEERG HRPA HR POLICY ASSOCIATION HR POLICY GLOBAL

Newsletter

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In this week's issue:

EWC: Amazon signs European Works Council Agreement

Amazon has signed a European Works Council Agreement with a Special Negotiation Body representing Amazon employees from across the European Union, including the UK. It comes into force on July 1 next.

The agreement was signed in Dublin last week.

Amazon received a request to begin the process in 2018. It could have defaulted to the Subsidiary Requirements (the minimalist model imposed when management and an SNB cannot reach agreement) in 2021 after the three-year negotiating period allowed for in the legislation came to an end. But because the negotiations had been disrupted by Covid, the parties preferred to pause the discussions until they could resume in-person meetings.

While the SNB process was conducted under Luxembourg law, the EWC agreement will be subject to Irish law. Amazon, as a US company, preferred to work in an English language country, with a common law system. Some highlights:

- *Management agreed to include representatives from the UK, despite Brexit.*
- *There will be one, face-to-face meeting a year between management and the EWC. But the EWC can request a second meeting.*
- *There will be additional "virtual meetings" between management and the select committee.*
- *"Exceptional circumstances" – such as collective redundancies – will be trigged if proposed decisions impact on at least 5% of the company's European workforce, or at least 7% in each of two countries.*
- *The EWC may use an expert to assist at meetings for up to 15 days in any one year. The expert must live in an EU country and be able to work across the EU.*

- *Outside of meetings, EWC members can have 24 hours off work each year for EWC activities. They will also be entitled to 4 days individual training over four years, along with one day's collective training.*

An innovative feature of the agreement is the establishment of a three-person panel to adjudicate disputes. Either side will nominate one member of the panel. The chair will be drawn from an agreed list. If the findings of the panel are not accepted, the dispute can be referred to the Irish courts.

To the best of our knowledge, the Amazon agreement is the first to be finalised under Irish law since Brexit saw multiple US and UK companies move their EWCs from the UK to Ireland. It sets a benchmark for future deals.

Speaking for management, Alan Wild, European Labor Relations Director, " … welcomed the agreement and the compromises made by both sides to make it possible. The agreement is one thing but more important is to start the EWC in a positive spirit."

EWCs: Brexit and UK experts

Earlier this week, the Johnson government in the UK announced that it planned to bring forward legislation that would allow it to disavow parts of the Northern Ireland Protocol, an intrinsic element of the UK's Withdrawal Agreement, an international treaty between the UK and the European Union, that set out the terms on which the UK left the EU. If the UK pushes ahead the EU is likely to respond with "counter-measures" that could lead to a trade war between the EU and the UK.

While all things Brexit are now of interest only to a relative few, me included, what will catch the attention of BEERG member companies with EWC's under Irish law is how the UK breaking an international treaty will reflect on the standing of UK "experts" advising such EWCs. For example, how would the Irish Labour Court take to being instructed on European employment law by an "expert" from a country engaged in a trade war with the EU? It seems to us, and has for some time, that the position of UK EWC "experts" will become increasingly untenable as time goes by. A clash between the EU and the UK over the Northern Ireland Protocol will only make the position even more untenable.

Interestingly, the just concluded Amazon EWC agreement (first story) has the following language:

> *The Expert supporting the Employee Representatives for the purpose of the Amazon EWC should reside, have permission to work in one of the EU countries, and be knowledgeable about European Works Councils.*

We expect to see such language become more common in EWC agreements in the future.

EWCs: Significant Austrian ruling

According to the union-side consultancy, EWC Academy, last March the Vienna Labour and Social tribunal handed down a judgement in the long-running dispute between the EWC and management in the packaging company, Mayr-Melnhof Packaging. At the time of writing the full judgement is not available, only the summary from the EWC Academy, which was involved in the case, so

there may be some "gloss" on their report, but it is still likely to be fairly accurate. We quote their report below".

- *Does central management have to pay for only one expert?* The tribunal is of the opinion that the EWC may call on several experts, provided that they are commissioned for different areas of expertise required and the fees charged are within reasonable limits.
- *Is the expert mandate linked to a specific person?* According to the tribunal, legal persons cannot be prevented from acting as experts. The mandate is then carried out by various (freelance or permanent) employees of a consultancy firm. If a natural person is appointed as an expert, e.g., an individual lawyer, he is allowed to use an assistant to fulfil the mandate.
- *Must the EWC always use the cheapest advisor?* According to the tribunal, the EU Directive does not require the EWC to choose the cheapest advisory option, e.g., free advice from trade union officials. In a matter as complex as EWC law, the central management must bear costs of external professionals specialised in this type of advice to a reasonable extent.
- *Is the EWC entitled to company visits abroad including interpreters?* The legal regulations in Austria expressly provide that representatives of the EWC are to be granted access to company establishments. The court ruled that a personal, oral briefing of the employees on site can therefore also take place and that the costs for the visit of the EWC chairperson to an English plant, including interpreter fees, must be borne by the management.
- *May the EWC commission a legal opinion?* In order to clarify legal issues and justify positions to the central management of such a large and internationally active group, an opinion from an expert specialized in the field of EWC law is necessary and must be paid for by the company.
- *Can the EWC conclude legally valid contracts with interpreters and consultants?* As in France, local works councils in Austria have their own budget from which they can pay e.g., lawyers. However, this does not apply to European works councils, which do not have their own budget. Therefore, the tribunal also had to clarify whether an EWC has at least partial legal capacity and property rights. The ruling is based on case law in Germany. According to this, the EWC is able to conclude valid contracts with service providers within the scope of its legal duties, which lead to an obligation for central management to bear the costs.

A decision by an Austrian tribunal has no legal force outside Austria. Nevertheless, expect to hear this judgement referred to during negotiation over new agreements or the renegotiating of existing ones.

France: Court upholds "Macron Grid"

Last week, France's Court of Cassation, one of its highest courts, put the issue of the so-called "Macron Grid" beyond doubt. Individual judges have no discretion to depart from it because they think it might breach the International Labour Organization Convention on Termination of Employment. The Court said the law did not breach the Convention and judges are strictly bound to work within its compensation framework.

In France, if a judge finds that a dismissal, including a collective dismissal, is without **"***cause réelle* et *sérieuse"* (real and serious cause) – and they often do – they can award compensation to the dismissed employee to make up for the harm resulting from the loss of employment. Over the years, the payments awarded by judges varied considerably from court to court and region to region.

In 2017, an Ordinance (No. 2017-1387 of 22 September 2017) changed the rules significantly. Known as the "Macron Grid" (*barème Macron*), judges were constrained to award compensation based on minimum and maximum amounts set in terms of number of months' salary, depending on the employee's seniority.

The "Grid" was designed to give certainty to employers and employees dismissal compensation and to eliminate "unfairness" between courts and regions. But unions and union-side lawyers hated it.

Despite court ruling that it was in conformity with the French Constitution, they suggested to judges that it breached international laws, such as Article 24 of the European Social Charter and Article 10 of International Labour Organization Convention No. 158 on Termination of Employment. This gave first instance and appeal judges the latitude to depart from the Grid notably in cases where they felt the grid did not allow them to compensate employees entirely for the prejudice involved in losing their job, especially for employees with little seniority, for which the upper part of the grid is on the low side.

The Court of Cassation has now ruled that:

- *The compensation scale for employees dismissed without "cause réelle et sérieuse" does not contravene Article 10 of Convention No. 158 of the International Labour Organization (ILO).*
- *Judges have no discretion and must apply the Grid.*
- *Art 24 of the European Social Charter is irrelevant as the Charter does not have direct effect.*

However, as the grid does not apply to cases of discrimination, bullying or working time issues, this leaves plenty of scope for litigation around these issues.

Commenting on the decision, Joel Grangé, from the Paris-based law firm, Flichy Grange, said: "*This decision not only secures the exposure in case of litigation on unfair dismissal but also makes it much easier to find amicable solutions before the trial.*"

Here are some links to posts by Flichy Grangé on the issue: English Français Français

GDPR Fines: EDPB invites comments on latest guidelines on fines

Derek Mooney ***writes:*** The European Data Protection Board has just published its latest guidelines for EU member state supervisory authorities on harmonising the methodology used by these authorities when calculating the size of penalties for GDPR breaches. These latest set guidelines featuring five specific steps, was adopted by the EPDB on May 12, updates the 2016 is available to download HERE.

The EDPB is now inviting comments and observations on these new Guidelines and has set 27th June 2022 at the latest date for receipt of comments (sent via this online form). using the provided form. As we highlighted in our *January 2022 Preview* 2021 was a record year for GDPR fines, with IBM's latest research showing that the average cost of a data breach in 2021 had risen from €3.4mio to €3.8mio.

From BEERG's viewpoint the issue is not just with the calculation of these penalties, but with the fairness of their imposition. Should there be administrative fines in every case where there is a data breach? Does every GDPR breach constitute an offence? Shouldn't an offence result from a deliberate or actual misconduct before fines are imposed, and shouldn't the authorities need to prove actual misconduct?

This specific issue has been raised in several German district court rulings which will probably find their way to the CJEU in the coming years – perhaps there they might be added to the increasing argument in favour of addressing the problem of GDPR "application overreach" as identified by CJEU, Advocate General Michal Bobek, and many others.

Gig Economy: Deliveroo cuts union deal

According to UK newspaper reports, an attempt by Deliveroo to deflect criticism of its treatment of delivery riders by signing an agreement with the GMB appears in danger of backfiring. It has been accused by another union of using the GMB deal to endorse its "exploitative business practices", including paying riders less than the minimum wage.

The IWGB union, which represents couriers, said it was a cynical ploy to undermine the appeal it is bringing to the Supreme Court in a case it is fighting for statutory collective bargaining on behalf of Deliveroo contractors.

Under the voluntary partnership agreement, the GMB will have collective bargaining rights on pay as well as consultation rights on areas including riders' health, safety, and wellbeing. The union will also be able to represent individual riders in disputes provided they are GMB members, giving them "a stronger voice". It said the deal recognised that Deliveroo riders were self-employed, a status confirmed in a series of UK court judgments.

However, the IWGB claimed the GMB had "no record of organising couriers" and was simply helping Deliveroo in "undermining the efforts of couriers to pursue their rights through the courts, to organise a voice at work and improve their working lives". The GMB dismissed the IWGB's claims, insisting that the deal would provide "an innovative blueprint" for self-employed workers. However, as of now there is little evidence that the GMB actually has any significant number of members in Deliveroo, raining the question of its legitimacy to do such a deal.

Will Shu, Deliveroo's co-founder and chief executive, said: "Deliveroo has long called for riders to have both flexibility and security and this innovative agreement is exactly the sort of partnership the on-demand economy should be based on."

Meanwhile, in Brussels debate continues around the proposed legislation on the status of platform workers with the Parliament debating the issue today (May 19th) here

Germany: Important ruling on overtime

Paula Wernecke of CMS-HS writes: With this week's ruling by the German Federal Labor Court, employers can for now breathe a sigh of relief: it is the employee who bears the burden of proof regarding overtime Handelsblatt. In light new approaches to working, the German Working Time Act with its strict guidelines is proving to be a major hindrance and seems increasingly out of place:

- *Bureaucracy: companies are already drowning in administrative work; recording working time properly and ensuring compliance with the legal requirements costs a lot of money and time*
- *Work based on trust is an important factor for many employees; however, recording time undermines this trust by creating a sense of constant control*
- *Meeting employees' needs and expectations: the "9-to-5" time frame rarely meets employees' wishes; instead, they want the flexibility to decide their working time as per their needs and personal circumstances*

- *Instead of maximum daily working hours and fixed rest breaks, employees should decide what is best for them, when they feel motivated to work more than 8 hours and when they want to work less, and when it is a good time to take a long lunch break to resume later in the evening. Do the duties of employers have to go so far as to interfere with employees' self-determination?*
- *Protecting employees' health should be the top priority, but it is questionable whether a rigid framework for work is the right way or whether meeting employees' needs is what the legal regulations should consider. The least German lawmakers can do is to use the flexibility provided for in the EU Working Time Directive.*
- *Maximum weekly working hours, for example, are a step in the right direction*

Future Work: France a laggard

According to an Ifop study for the French think-tank Fondation Jean-Jaurès, only 29% of French workers say they work remotely "at least once a week." That compares to 51% of Germans, 50% of Italians, 42% of British workers and 36% of Spaniards.

Even those in France who report working remotely appear to do so far less often than their European neighbours. While in Italy, 30% of workers said they teleworked for four to five days a week and 17% for two to three days, in France, the figures are 11% and 14%, respectively. "French people are, most of the time, reluctant to change," says Sonia Levillain, a professor at the IÉSEG School of Management in Lille, observing "This is a stereotype, but it's also a reality."

Here are links to articles we have come across this week on remote work:

- https://www.bbc.com/worklife/article/20220511-the-countries-resisting-remote-work
- https://www.theguardian.com/commentisfree/2022/may/15/remote-working-uk-equal-jacob-rees-mogg
- https://www.irishtimes.com/business/work/managers-struggling-with-challenges-of-hybrid-and-remote-working-1.4868421

THE BEERG AGENDA:

Perspectives on Diversity/ Inclusion in Asia Pacific — Webinar: May 25 @ 10am Beijing Time

Join this informative discussion on how the perspectives of Asia Pacific can be integrated into an organization's D&I strategy, with a focus on Race and Culture in Asia Pacific. This will be an open online meeting.

Book Webinar

New Era of Mexico's Labor Reform — Webinar: May 25 @ 11am EST

Join HR Policy Global guest speakers: Matthew Levin, Director, Office of Trade and Labor Affairs, U.S. Department of Labor, and Carlos H. Romero, Senior U.S. Trade Representative to Mexico, to discuss the impact of USMCA and recent developments of Mexican Labor Reform.

Book Webinar

BEERG/CMS Labor Relations Workshop — CMS office in Frankfurt, May 25 @ 1000H

Cancelled – New meeting date Tues Jan 17, 2023

The CMS/BEERG Global Labor Relations Seminar is on Wed, May 25th from 10am to 4pm,

BEERG Members' Annual Network Summit — Hotel Estela, Sitges Spain: Jun 15 – 17

Our June Summit will have 4 working sessions:

- *EU Employment and Labour Law Legal Landscape,*
- *Disrupting the Disruptors: A Company Case Study,*
- *From the Fax to the Cloud - From Working 9-to-5 to Timeless Work,*
- *Political Perspectives: Europe: Ukraine/Russia; post-election France; A US view*

The full agenda, with the list of guest speakers, is available online

Please note the Hotel Estela is now fully booked for accommodation

Book June meeting

Executive Training: Fundamentals of Global LR — Webinar June 28 – 30

This course of three sessions, over three days, explores the strategic mindset and thought process of a successful global labor relations executive. This course is not an introduction to LR principles, it examines the strategic awareness needed to lead global labor relations.

Book June Webinar

**BEERG/HR Policy Global Members can self-register online for these events via the links supplied. Members who get the "No Tickets Available for Purchase" message online should contact Derek.*

BEERG Dates for your Diary:

Date	Event	Booking Links	Venue
May 25	***HR Policy Global Webinar:*** *Perspectives on Diversity/ Inclusion in Asia Pacific*	*Book Webinar*	*Webinar on Zoom*
May 25	***HR Policy Global Webinar:*** *New Era of Mexico's Labor Reform*	*Book Webinar*	*Webinar on Zoom*
Jun 15 – 17	***BEERG June Members' Network Summit Meeting***	*Book June Summit*	*Sitges/Barcelona, Spain*
June 28 – 30	***BEERG Training:*** *Fundamentals of Global Labor Relations: A Training Program for HR Executives*	*Book June Webinar*	*Webinar on Zoom*
Sept 29/30	***BEERG Members' Network Meeting***	*Book Sept Meeting*	*Brussels, Belgium*
Oct 18 - 21	***BEERG Training:*** *"Managing European Employee Relations in Post-Covid Times"*	*Book Oct Training*	*Sitges/Barcelona, Spain*