



**Documentation:  
Legal personality of the P&O  
European Works Council (EWC)**



There is a unique case in the UK regarding a legal decision: In April 2002, employee members of the P&O EWC initiated a complaint to the Employment Appeal Tribunal in London under the Transnational Information and Consultation of Employees Regulations (TICER) 1999, which implement the EWCs Directive in the UK. The complaint concerning the company's alleged failure to inform and consult the EWC properly over the plan to close the ferry routes into Zeebrugge was subsequently withdrawn, because the employee side of the P&O EWC had no resources of its own and it proved impossible to raise the necessary funding.

To pursue the case of P&O, the representatives are reliant on the trade unions within the company. Since this is a transnational matter, trade unions in a number of countries represented on the EWC have to be consulted via the European Transport Workers' Federation (ETF) based in Brussels. There are considerable logistical problems and all of this makes the process more complex, says the TUC in a letter to the tribunal.

At a preliminary hearing of the case on 28 June 2002 it was also questioned whether the employee side, as opposed to the full EWC, had the legal standing to be able to pursue a complaint. Due to the fact that the management is also part of the EWC an enforcement is not possible because "you can not take a legal act against yourself". For this reason sanctions against the management could not be taken. It would cost a horrendous sum to start another (legal) attempt.

Where the EWC includes representatives of management (which is the case in the great majority of UK-based companies), it is unlikely that the whole EWC (as opposed to the employee side) will agree to pursue such a case. This is a potentially significant problem that is likely to arise again in the future. The issue was highlighted in the UK government's July 2003 discussion paper on the UK experience of EWCs. Although a number of respondents commented on this aspect of the TICER, the government has not indicated that it is prepared to change the law on this point.

Further information:

Government seeks views on EWCs ahead of review of Directive, European Industrial Relations Observatory (EIRO), August 2003  
<http://www.eurofound.europa.eu/eiro/2003/08/inbrief/uk0308102n.htm>

Government responds to consultation on UK experience of EWCs, European Industrial Relations Observatory (EIRO), June 2004  
<http://www.eurofound.europa.eu/eiro/2004/06/feature/uk0406105f.htm>

Appeal No. EAT/0459/02

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS



At the Tribunal  
On 28 June 2002

Before

**THE HONOURABLE MR JUSTICE LINDSAY (PRESIDENT)**

(AS IN CHAMBERS)

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P & O EUROPEAN FORUM (EUROPEAN WORKS COUNCIL)

APPELLANT

THE PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY

RESPONDENT

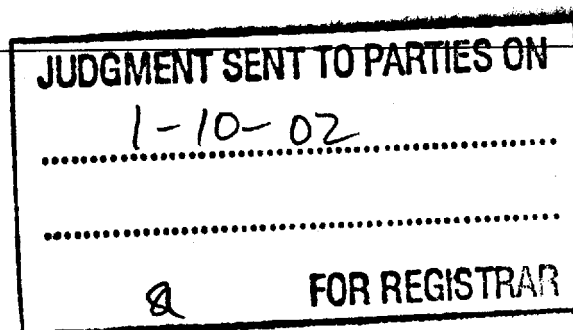
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Transcript of Proceedings

JUDGMENT

MEETING FOR DIRECTIONS

Revised



## APPEARANCES

For the Appellant

MR N CLARK  
(TUC Representative)  
Trade Union Congress  
Congress House  
Great Russell Street  
London WC1B 3LS

For the Respondent

MR SWIFT  
(of Counsel)  
Ashurst Morris Crisp  
Solicitors  
Broadwalk House  
London  
EC2A 2HA

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**THE HONOURABLE MR JUSTICE LINDSAY (PRESIDENT)**

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1 Before me, the parties and the Employment Appeal Tribunal move into what is  
uncharted territory, that of the **Transnational Information & Consultation of Employees  
Regulation 1999**, sometimes abbreviated to **TICER**. The application is as to costs, as I shall  
C later explain, but one has to begin by looking at the Regulations that entitle complaint to be  
made and the nature of the complaint that here was made.

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2 Regulation 21 of **TICER** is headed:

“Disputes about operation of European Works Council or information and consultation  
procedure”

It provides, as far as is relevant as follows:

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“(1) Where –

(a) a European Works Council or information and consultation procedure [has]  
been established under regulation 17; or

(b) a European Works Council has been established by virtue of regulation 18, a  
complaint may be presented to the Appeal Tribunal [*and that is defined as the Employment  
Appeal Tribunal*] by a relevant applicant who considers that, because of the failure of a  
F defaulter, the terms of the agreement under regulation 17 or, as the case may be, the  
provisions of the Schedule, have not been complied with.

(2) In this regulation “failure” means an act or omission and a failure by the local  
management shall be treated as a failure by the central management.”

Just pausing there, those are defined terms.

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“3 In this regulation “relevant applicant” means –

(a) in the case of a failure concerning a European Works Council, either the central  
management or the European Works Council; or

(b) in the case of a failure concerning an information and consultation procedure,  
H either the central management or any one or more of the information and consultation  
representatives,

and “defaulter” means the persons mentioned in sub-paragraph (a) or (b) against whom the  
complaint is presented.”

I think that is all I need for immediate purposes.

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3 Mr Swift, who appears on behalf of what would have been the Respondent had the case gone forward, but which is, on this application for costs, the Applicant, P&O, (more fully the Peninsula and Oriental Steam Navigation Company) claims that this is a case which falls with 21(1)(a). I am bound to say I have doubts whether that is the case - it might be instead, a (1)(b) case - but for the moment that does not matter. He claims that the complaint is as to a failure within 21(2) and that hence one looks to see who is to be a relevant Applicant under (3)(a) or (b). There is no case made before me that this is a (3)(b) case. It therefore seems to me to be a (3)(a) case or nothing. On the face of it therefore, it seems to me, that the Applicant needs to be either the European Works Council or Central Management. Well, it plainly is not a claim by Central Management and therefore, as it seems to me, needs to be a claim, if there was any relevant appropriate complaint at all, by the European Works Council. So far that is merely background.

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4 On 25 April 2002, what purported to be an application, falling purportedly within TICER, was made. Papers were sent to the Employment Appeal Tribunal. Because it is the first case of its kind, no form had been prescribed for it and the complaint was made by way of an adaptation of the conventional Form 1A Notice of Appeal. It is not an appeal, because, in this particular area, the jurisdiction of the Employment Appeal Tribunal is an original jurisdiction.

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5 The completed form says. 'the Appellant is P & O European Forum (EWC), Mike Gibbons' then an address is given for Mr Mike Gibbons. What was required there to be completed in the form was not only the name of the Appellant but the address of the Appellant. The way it is set out, with the name Mike Gibbons underneath P & O European Forum (EWC), suggests to my mind that the complainant is intended to be P & O European Forum (EWC) but

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A that its address for contact is by way of Mr Mike Gibbons of the given address. I do not think  
in the ordinary way one would read that and take it that Mr Gibbons was personally a claimant.  
B No address was given for the P & O European Forum (EWC), which would have had to have  
been done had P & O European Forum not been represented as at the address given for Mike  
Gibbons. It then says at paragraphs 2 and 3:

C "2 Any communication relating to this appeal may be sent to the appellant at (appellant's  
address for service, including telephone number if any)

Nick Clarke, TUC, Congress House, Great Russell Street, London, WC18 3LS.

D 3 The appellant appeals from ... *[and of course all along this is inappropriate because it is not  
an appeal, but what has been typed in there is - ]* Complaining under Clause 21, of the  
Transnational Information and Consultation of Employees Regulations 1999 (TICER).

At paragraph 4 there are some crossings out and it appears to read:

E "The parties to the proceedings other than the applicant are ....

P & O

Peter Smith, 79 Pall Mall, London, SW1Y 5EJ."

F Presumably, Peter Smith is intended to be a contact at P & O rather than a separate party, to that  
extent reflecting the way in which P & O European Forum (EWC) and Mike Gibbons had been  
completed in paragraph 1. Then in paragraph 5 it says:

G "A copy of the CAC's decision, declaration or order appealed from ... *[and, of course, that is  
entirely inappropriate, but what has been typed in is -]*

In cases under these regulations the EAT are the court of first instance, with no requirement  
to apply to the CAC first."

H The grounds on which the appeal is brought - again, of course, inappropriate - is typed in as  
follows:

"P & O failed to adequately consult and inform the P & O European Forum, as set out in the  
agreement establishing a European Works Council under Clause 17 of TICER, regarding the  
transnational restructuring of the ferry operations."

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6 So, the appeal grounds, or complaint grounds more properly, are set out in just a little less than three lines of typing. It is dated 25 April 2002, and against the printed word 'Signed' it says – 'Mike Gibbon on behalf of P & O European Works Council – as Chairman'. That was accompanied by, and to some extent explained by, a letter from the TUC to the Employment Appeal Tribunal of 26 April 2002, but which apparently was sent to P & O with the application form which I have been describing. It says:

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**"On behalf of the P & O European Works Council (employees side) we [that is the TUC] would like to make a complaint to the Employment Appeal Tribunal on the ground that the company is not consulting adequately with the European Works Council over the plans to close the ferry routes into Zeebrugge.**

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**To this effect [in other words, presumably, making a complaint on behalf of the P & O Works Council employees side] please find enclosed the signed Form 1A, Notice of Appeal made pursuant to regulation 21 of the Transnational Information and Consultation of Employees Regulations 1999.**

**The grounds upon which this appeal is brought are that P & O failed to adequately consult and inform the P & O European Forum as set out in the agreement establishing a European Works Council under Clause 17 of the TICER, regarding the transnational restructuring of the ferry operations. [There, the letter simply repeats paragraph 4 of the form of application].**

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**In cases under these regulations, the EAT is the court of first instance, with no requirement to apply to the CAC.**

**Should you need further information, please let us know as soon as possible given the urgency of the situation"**

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7 That generated a Notice of Appearance of 17 May 2002 signed by Mr Smith, as Director, Communications and Strategy, at P & O, so he would, as it would seem, have understood that he was not intended personally to be a party but merely was a contact name at P & O. It sets out, in just short of six pages of typing, a description of the Respondent as the Peninsular and Oriental Steam Navigation Company. It indicates that it intends to resist the application. It gives grounds for resistance. It begins by saying:

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**"The Applicant has given no particulars of the grounds upon which it is alleged that the Respondent has failed adequately to consult and inform the Forum regarding the transnational restructuring of the ferry operations."**

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It goes on to say:

B

**“The Respondent is applying for a Meeting for Directions in this case, pursuant to reg. 24(1) of the Employment Appeal Tribunal Rules, at which the Respondent will apply for an order that the Applicant adequately particularises its complaint.**

**Until the Applicant gives particulars of its complaint, it is not possible for the Respondent properly to set out its grounds of resistance...”**

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But, for all that, it attempts an explanation and a denial that no doubt would have been more fully particularised had particulars come from the Applicant.

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8 There were then a couple of letters from Mr Gibbons indicating that he wished to amend his original complaint to include a further complaint. On 17 May 2002, Ashurst Morris Crisp, as solicitors to the Respondent P & O Company, wrote to the Employment Appeal Tribunal asking that there should be a Meeting for Directions in the case. The case had been fixed for hearing on or about 28 June 2002. That was plainly an appropriate step, given that this was the first type of case ever falling within this description.

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9 There was then an application on 24 June 2002 appearing to be by the European Works Council. It is a letter from the TUC signed by “Nick Clark, Policy Officer, European Union and International Relations Department” asking that the hearing fixed for 28 June should be postponed. The letter says:

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**“As you are aware, under TICER, a complaint regarding an alleged failure to fulfil the terms of an agreement on transnational information and consultation may only be made by the European Works Council itself. However, this body of lay representatives has no resources of its own, and is therefore reliant on the representative trade unions within the company. In the case of P&O, there are four representing UK-based workers, but since this is a transnational matter, trade unions based in a number of other countries are also involved. Ireland, Germany, France, Belgium, Netherlands, Spain and Italy are all represented on the EWC, and the relevant unions in these countries have therefore to be consulted, via the European Transport Workers Federation (the ETF) based in Brussels.**

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**All of this makes the process of seeking instructions more complex than would normally be the case, particularly since we are proceeding without prior precedent. I would, therefore, request that the hearing be postponed for at least two weeks in order for the process of instructing counsel to be completed.”**

A That request for an adjournment was declined. There is a letter of 24 June from the  
Employment Appeal Tribunal to Mr Clark at the Trade Union Congress saying that the matter  
B had been referred to the Registrar; the matter was to remain in the list for hearing on 28 June  
and no provision was made for any form of adjournment or postponement.

10 C However, at a late stage (and it was a late stage) a letter was written to the Employment  
Appeal Tribunal on 26 June 2002 from the TUC. It is signed by Nick Clark, Policy Officer. It  
says:

D **"As I pointed out in my letter of 24 June, there are considerable logistical problems in  
coordinating so many parties in order to support a body which would otherwise have no  
resources (the P&O EWC, or European Forum). It has not proved possible for this  
coordination to [be] completed in order to ensure that the EWC would be represented at the  
meeting for directions on 28 June, so I will be advising the EWC that they must withdraw  
their complaint.**

**Please take this letter as confirmation of that withdrawal of complaint. Should you need a  
formal confirmation of this from the Chair of the EWC, please let me know."**

E There has, as yet, I think, been no formal dismissal on withdrawal. Notice of that letter to the  
Employment Appeal Tribunal was given to Ashurst Morris Crisp, as P & O's solicitors, and  
F that generated another letter of 26 June that said:

**"We are writing further to the fax dated 26 June 2002 from the TUC, as representatives of the  
P&O European Forum (European Works Council) withdrawing the Applicant's complaint in  
the above matter."**

G Pausing there, it is plain that Ashurst were understanding the TUC to be representatives "of the  
P&O European Forum (European Works Council)".

H **"We anticipate, in the circumstances, that the Employment Appeal Tribunal will move to  
dismiss the Applicant's complaint upon withdrawal by the Applicant.**

**We are writing to confirm, and to put the Applicant's representative upon notice, that the  
Respondent will be seeking an order that the Applicant pays the Respondent's costs incurred  
in connection with this matter and/or, in the alternative, the TUC will be ordered to meet the  
costs incurred by the Respondent in this matter.**

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The Respondent will be proposing to make its application for costs at a meeting for directions scheduled. for 10:30 a.m. on 28 June 2002. The Respondent's time estimate is 30 minutes."

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Given that the beginning of the letter indicates that the understanding of Ashurst is that the TUC was acting as representatives of the European Works Council, their later reference to their seeking an order that the Applicant pays the Respondent's costs would seem therefore to have as a natural intendment that it was to be an order for costs against the European Works Council.

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11 Today, all that I have had in front of me is the application for costs which that letter indicates is intended to be made. It does, as it seems to me, give rise to real problems. The first of the problems is whether there ever was a proper complaint capable of being accepted by the D  
Employment Appeal Tribunal and needing therefore properly to be answered by P & O. That the European Works Council itself is a relevant applicant has been seen from Regulation 21(3) of TICER, but here, as I mentioned earlier, Mr Mike Gibbons signs "on behalf of P & O E  
European Works Council – as Chairman" and yet the claim is described in the accompanying letter as being on behalf of the P & O European Works Council employees' side. I have real doubt about whether there ever was a proper complaint. There seems to an element of doubt about whether Mr Mike Gibbons is indeed Chairman of the European Works Council as such, F  
or merely an officer or Chairman of the "employees' side". The employees' side as such would, first of all, not seem to be a legal entity of any recognised character, but in any event would not be a relevant applicant within Regulation 21(3) of TICER. Faced with doubts as to G  
whether there was a proper complaint and exactly who the complainant was, Mr Swift argues that the form which I read out was a valid complaint by Mr Gibbons on behalf of the employees' side and that that entitled him - because he recognises that it is only against a party H  
that there is jurisdiction to award costs in the Employment Appeal Tribunal - to lay claim as to costs against Mr Gibbons personally, and secondly, if it is a difference, against Mr Gibbons in his capacity as Chairman of the employees' side in a representative role. If the claim for costs

A is against Mr Gibbons personally, or indeed, against him but in some particular capacity, then the question arises about whether notice has adequately been given to Mr Gibbons.

B 12 Mr Clark has attended today. He is not a lawyer, but, as the description of him I read  
C out earlier indicates, is an officer of the TUC. He attended solely in order to cope with the  
D alternative form of claim which P & O solicitors had indicated, namely, a claim for costs  
E against the TUC. It was only after hearing Mr Swift acknowledge that there could be no order  
for costs against the TUC as such that he found that, in a sense, he need not have come. He  
says that he has not caused any notice to be given to Mr Gibbons and does not feel that he was  
today representing Mr Gibbons. Moreover, as I mentioned earlier, on a fair reading of the letter  
indicating the nature of the application for costs, it would not seem to contemplate within it an  
award against Mr Gibbons in any capacity. The letter from Ashurst of 26 June 2002 makes no  
mention of Mr Gibbons. They wrote to the TUC as representatives not of Mr Gibbons but of  
the European Works Council.

F 13 It seems to me that it would be quite improper to make an order for costs against Mr  
G Gibbons, either personally or in some representative capacity, without proper notice having  
been given to him. Even if there was an application for adjournment, which there has not been,  
in order more fully to give notice to Mr Gibbons, the question would still remain whether there  
was a proper application in the first place, and, if there was not, whether any order for costs,  
certainly beyond the elementary costs of a letter simply saying there is no relevant claim, would  
be here appropriate. One might be able to see a case for the modest costs of a letter saying  
there no valid claim had been made. However, I would apprehend, although we have not got  
H the figures, that Mr Swift would be asking for something a good deal more comprehensive than  
that.

A 14 In the circumstances I have explained, and given the doubts I have set out in relation to  
the position of the true nature of the claim, if any, and of the claimant, and of the failure to give  
B notice to Mr Gibbons personally, or in any capacity, it seems to me that it would not be  
appropriate for me to make any Order under the jurisdiction which I do have, which is in Rule  
34 of the **Employment Appeal Tribunal Rules**. Accordingly I make no Order for costs.

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Mr Swift

D *Sir, could I just confirm that the Order on the Hearing for Directions will confirm that the  
application is dismissed upon withdrawal?*

Mr Justice Lindsay

E *Well, the difficulty about that is that, if the complaint was made by Mr Gibbons, I really need  
something from Mr Gibbons before I withdraw it. If the TUC can get instructions from Mr  
Gibbons simply to withdraw it, that would seem to be a sensible thing to do. There is absolutely  
no point in pursuing a case that no one wants to pursue, or at least a case which the Applicant,  
F whoever the Applicant is, does not wish to pursue.*

Mr Swift

G *Sir, I'm sorry to raise it, but as Mr Clark is here it would seem to be an appropriate moment, I  
am now completely confused as to who is representing who. Throughout these proceedings the  
TUC have claimed to be acting on behalf of someone, whoever it is or whatever it is. They  
write a letter bringing a claim. They write a letter withdrawing a claim. Sir, what does my  
H client need in order to be able to be satisfied that this claim is withdrawn, beyond Mr Clark's  
letter of 26 June?*

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Mr Justice Lindsay

*I think the answer must be that it would be appropriate for Mr Clark, on going back to his office, to get instructions from Mr Gibbons, such as entitle him, on Mr Gibbons behalf – because you say it is a complaint by Mr Gibbons – so that notice of its withdrawal can be given and it can then be dismissed on that withdrawal.*

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Mr Swift

*Sir, again, I can see that, but clearly there is a further problem here, in that you rightfully raise in your judgment the question of who can actually make the application under these Regulations. Sir, I got the impression from your judgment that although you did not express a final view that in fact you were erring towards the view that only the Works Council itself*

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.....

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Mr Justice Lindsay

*Well, simply because that is what the Regulation says.*

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Mr Swift

*Sir, if that is right, the only reason I raise this... I am keen from my client's point of view for there finally to be a line drawn under this application, either today or as soon as possible.*

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Mr Justice Lindsay

*I agree.*

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Mr Swift

*Sir, in that situation it seems .....*

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Mr Justice Lindsay

I suppose it does not have to be Mr Clark and the TUC. If a letter, or fax was received from Mr Gibbons purporting to be in the same capacity as he started, namely on behalf of the P & O European Works Council - as Chairman, saying that he wished to withdraw the claim and would be content for it to be dismissed on withdrawal, that would suffice would it not? I could then dismiss it on that indication and you would then have no further possibility of having to answer anything under that claim.

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Mr Swift

Sir, I am wondering whether there is an alternative possibility? If it is the case that in fact the European Works Council means the European Works Council employees' side of it, so, on that basis, clearly the claim itself would fall within the ruling of abusive process. So would you dismiss it on that basis this morning, because if Mr Gibbons has no entitlement to bring the claim one could simply dismiss it on that basis now and one has a clear line drawn under it ...

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Mr Justice Lindsay

Well, I don't think I'd be very happy about describing it as an abusive process without hearing what Mr Gibbons had to say on the subject.

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Mr Swift

Sir, an abusive process in the sense that he had no capacity in which to bring the claim, not an abuse in any ..... sense, but in the sense that he had no standing to bring the claim.

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Mr Justice Lindsay

Well, given that you argue that that is not the case and that he might want to argue that that is not the case, it would not be right for me.... Why make it complicated? If he wants to have it dismissed on a withdrawal and does withdraw, why not simply dismiss it on withdrawal?

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Mr Swift

I only make the point in light of the points made in your judgment, which plainly I accept, and I also accept that the submission I made to you this morning on this point did not find favour, so in those circumstances it would appear that it would be possible to draw a line under the proceedings now, rather than have them ..... in whatever form they will, until such time as Mr Gibbons chooses to send the fax. Sir, the difficulty is that my client's understandably, it seems to me properly, from the outset have been of the view that the TUC were effectively acting as representatives. It now turns out that that may or may not be the case, we don't know, but my client is put in a difficult position, is it .....

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Mr Justice Lindsay

I'm not sure it is in a difficult position. Certainly, it won't be in a difficult position if either the TUC authorised by Mr Gibbons direct, or Mr Gibbons direct, indicates that as "on behalf of the P & O European Works Council - as Chairman" he withdraws the complaint laid on 25 April 2002 and invites its dismissal on withdrawal.

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Mr Swift

Sir, can I suggest this then? Mr Clark's letter of 26 June - the final paragraph does say, "please take this letter as confirmation of that withdrawal of complaint". He then goes on to say, "should you need a formal confirmation of this from the Chair of the EWC please let me

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know". Sir, I take it from what you said that you do require a formal confirmation from the Chair of the EWC?

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Mr Justice Lindsay

Well, I don't know about Chair of the EWC, I think I need one on behalf of Mr Gibbons in the capacity in which he lodged it in the first place which is "on behalf of the P & O European Works Council – as Chairman". Whether he is Chairman of the EWC or whether he's Chairman of the employees' side, and if so, what that is, I'm not at all sure, I just don't know.

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Mr Swift

Sir, given that Mr Clark plainly, and I presume still today, as at 26 June was happy to provide that, and I have no reason to think he is not still happy to provide that, may I ask that effectively he undertake to the Tribunal that that confirmation will be forthcoming, say within three working days?

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Mr Justice Lindsay

Well, Mr Clark does not recognise himself as acting for Mr Gibbons, so he can't give an undertaking, but I'm sure he can get in contact and we can see whether, undertaking or not, there is in fact a fax that comes in from Mr Gibbons in the capacity in which he describes himself on the application form withdrawing it and being content for it being dismissed on withdrawal. What I could do, is put it the other way round, Mr Swift. If by next Friday the EAT has not received a notice from Mr Gibbons in the capacity describing himself exactly as he described himself on the application form indicating a wish to withdraw and a contentment with the dismissal on withdrawal, well then by all means restore it next Friday.

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Mr Swift

EAT/0459/02

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*I'm sorry Sir – restore what?*

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Mr Justice Lindsay

*Whatever application you want. That you need clarity to establish whether there is a claim withdrawn or not.*

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Mr Swift

*Sir, with respect, in the circumstances I don't see why my client should be put to that expense.*

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Mr Lindsay

*Very well then, don't have it.*

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Mr Swift

*The point I am making is this, is that it seems to me that in the circumstances the confirmation should be required by order with the consequence that if nothing to the contrary is said the claim will stand as dismissed upon withdrawal. So effectively Sir, what I'm asking you to do today is dismiss the claim on withdrawal, effectively with liberty to apply to Mr Gibbons for a very short period and plainly Sir, if Mr Gibbons does apply, at that stage one would have to wrestle with the very difficult issues of whether he has any basis to make this claim at all.*

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Mr Justice Lindsay

*I think that would be a fair way of doing it. What I could say is that, here and now, as of this moment, the claim is dismissed on an understood withdrawal but that that Order will lie in office until 4.30pm next Wednesday to give Mr Gibbons, or anyone else on the part or purported part of the EWC an opportunity to move to have that Order discharged or varied.*

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*That subject to any such application being made, come 4.30pm on Wednesday, it will automatically issue as an Order without further ado.*

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Mr Swift

*Sir, I'm very grateful.*

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Mr Justice Lindsay

*Mr Clark, I know you don't represent Mr Gibbons, but that would seem to be a not inconvenient way of dealing with it. If you've got any thoughts that you would like to add, let me have them.*

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Mr Clark

*Sir, I feel sure that he will understand what is required of him. I'll make sure that he hears what you said and understands that he should make such a confirmation regarding the complaint that was lodged on 25 April.*

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