



# **ASSERTING INFORMATION AND CONSULTATION RIGHTS – THE ROLE OF THE INDEPENDENT ADJUDICATOR IN THE UNITED KINGDOM**

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### ***Asserting information and consultation rights – the role of the independent adjudicator in the United Kingdom***

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#### Abstract

Information and consultation of employees and their representatives is an essential feature of employment protection, in particular in times of economic hardship and uncertainties for jobs and working conditions. This fundamental social right<sup>1</sup> has been re-highlighted as a significant component of successful management and anticipation of changes by the European Commission<sup>2</sup>. Numerous European instruments implement and promote such right, notably the Information and Consultation Directive<sup>3</sup>. In the United Kingdom (UK) however the resulting transposing measures, the Information and Consultation of Employees Regulations 2004 (ICER)<sup>4</sup>, have been described as disappointing and weak<sup>5</sup>. The critics lament for example the lack of mandatory duty to inform and consult or the possibility for the relevant actors to opt out of the obligation via pre-existing agreements. It has already been established by empirical studies that the impact of ICER has been relatively feeble, potentially because the law is not cumbersome, but also because of an ambivalent attitude of trade unions towards the regulations<sup>6</sup>.

The application and interpretation of the Regulations were mainly entrusted to the Central Arbitration Committee (CAC), an independent adjudicator already responsible for resolving disputes connected with other collective labour law facets (trade union recognition for example). If infringements are ascertained, an appellate court (the Employment Appeal Tribunal –EAT) can apply fines as penalties. To date there have been a few decisions from the CAC and the

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<sup>1</sup> Community Charter on the Fundamental Rights of Workers 1989, articles 17 and 18 and EU Charter of Fundamental Rights 2000, article 27.

<sup>2</sup> *Restructuring in Europe 2011*, May 2012, p129

<sup>3</sup> Directives 2002/14

<sup>4</sup> SI 2004/3426

<sup>5</sup> For example, K D Ewing and GM Truter, 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' (2005) 68 *Modern Law Review* 626

<sup>6</sup> M Hall, 'EU regulation and the UK employee consultation framework' (2010) *Economic and Industrial Democracy* 55

EAT<sup>7</sup>. This paper aims to test whether the impact of ICER have equally been weak when considering the legal treatment of the regulations by the CAC and the EAT, or whether the decisions show a willingness to apply and interpret the regulations to give greater effect to information and consultation rights. A number of questions will be envisaged when examining the 'judgments' of the adjudicators, including on the identity of the parties seeking redress, on the kind of information and consultation agreements challenged and why, and on the deterrent effect of the remedies. An analysis of case law may also give ammunition to a call for reform in light of the difficulties experienced by parties when trying to establish their rights. Ultimately, turning to adjudicators and judges for promoting fundamental social rights may be significant at a time where European and national policy makers are reducing labour law protection in the name of the economic crisis.

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<sup>7</sup> 43 applications and 23 decisions from the CAC website and annual reports over the last seven to eight years (<http://www.cac.gov.uk/>)