

**Decisions of the  
European Court of Justice:  
Implications for UK  
labour law**

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## **Introduction**

1 There have now been four major decisions of the European Court of Justice which have important implications for British labour law. These decisions cut across activity currently permitted in British law, and could operate to constrain other activities which trade unions and others anticipate they may lawfully pursue. The former relates to various forms of collective action to protect jobs and conditions of employment; the latter relate to the ability of trade unions to negotiate living wage agreements in local government and elsewhere, including projects connected with the Olympics.

## **Legal Provisions**

2 The problems arise partly as a result of the EC Treaty, Article 43, which applies to the freedom establishment. This means that the nationals of one Member State should not be restrained from setting up business in another Member State. Also important is Article 49, which deals with the freedom to provide services. This means that the nationals of one Member State should not be restrained from providing services in another Member State.

3 The other major legal instrument (though it has not been relevant in all four cases) is the Posted Workers' Directive 96/71/EC. For this purpose, a posted worker means a worker who for a limited period carries out his or her work in the territory of a Member State other than the State in which he or she normally works (article 2). Article 3 of the Directive makes provision for the terms and conditions of employment of posted workers.

4 Workers posted from one Member State to another are entitled to be paid the minimum terms and conditions relating to a number of prescribed matters (such as pay and working time). Minimum conditions for this purpose are those which are laid down by:

- law, regulation or administrative provision, and/or
- collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8,

5 Thus, not all collective agreements are covered for the purposes of the Directive but only those 'which have been declared universally applicable'. This is defined by article 3(8) of the Directive to mean collective agreements (i) which must be observed by all undertakings in the geographical area and in the profession or industry concerned; or (ii) collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or (iii) collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout the country.

## The ECJ Decisions

6 As already indicated, there are four decisions of the European Court of Justice since 11 December 2007 which have a bearing on British domestic law. The cases are concerned in different ways with the free movement of businesses throughout the EU, and the impact on established terms and conditions of employment.

- *Case C-438/05, Viking Line v ITF (11 December 2007)*

The Court held that although protected by domestic labour law (in that case the Finnish Constitution), industrial action may be unlawful under EU law if it breaches the terms of the EC Treaty, Article 43. The case concerned industrial action by Finnish unions and the ITF against a Finnish company proposing to re-flag in Estonia, where terms of employment were lower than in Finland.

- *Case C-341/05, Laval v Svenska Byggnadsarbetareförbundet (18 December 2007)*

The Court held that, although protected by Swedish national law, (i) industrial action by Swedish unions, (ii) designed to compel a Latvian contractor to pay Swedish rates determined by a Swedish collective agreement to his Latvian workers employed on Swedish building sites (iii) may be unlawful under EU law if it breaches the terms of the EC Treaty, article 49.

- *Case C 346/06, Ruffert v Land Niedersachsen (3 April 2008)*

The Court held that a Polish sub-contractor: (i) could not be required by the law of Lower Saxony, (ii) to pay his workers posted from Poland, (iii) the terms of a collective agreement in force, at a site where the work was being carried out. Such a requirement (even though imposed by law) was held to breach the provisions of the Posted Workers' Directive.

- *Case C-319/06, Commission v Luxembourg (19 June 2008)*

The Court held that the government of Luxembourg had acted in breach of EC Treaty, Article 49, and the Posted Workers' Directive, on a number of grounds. The Court effectively held that the Directive was both a floor and a ceiling, and that it was not possible in that case to require by legislation adherence to collective agreements other than those covered by Article 3(8) of the Directive.

Note also the following observation by the Court on another aspect of the decision:

‘it must be pointed out that the Community legislature intended, by means of point (c) of the first paragraph of Article 3(1) of Directive 96/71, to limit the possibility of the Member States intervening as regards pay to matters relating to minimum rates of pay’. (para 47)

## Implications for British Trade Unions

7 These four decisions are important in different ways for trade unions throughout the EU. For British unions, the implications are principally twofold:

- *Implications for Collective Action*

If industrial action takes place in breach of EC Treaty, Article 43, the employer may sue the union (rather than the Member State), and the fact that the union has complied with domestic law is no defence. This is most likely to be a problem in transport sectors, but could apply elsewhere as well (where businesses are moving from one Member State to another, as in *Viking*)

The issue has already arisen in *BALPA v British Airways* (2008), where BALPA was threatened with legal action if it proceeded with industrial action relating to the company's Openskies initiative, which the union feared would lead to job losses. The action had to be abandoned despite being in full compliance with British law.

The company argued that the union's action violated Article 43 of the EU Treaty. If the industrial action had proceeded the union risked massive legal costs in litigation, as well as the possibility of being sued in damages, with no limit on the amount that could be recovered, leading to the possible bankruptcy of the union. A complaint has been made by BALPA to the ILO: <http://www.balpa.org/News-and-campaigns/News/PILOTS-TO-TAKE-UK-GOVERNMENT-TO-ILO.aspx>.

- *Implications for Living Wage Agreements (including the Olympics)*

Because of the way in which we do collective bargaining in this country (highly decentralised), the United Kingdom is peculiarly vulnerable to the restrictions imposed by the *Ruffert* and *Luxembourg* cases. A contractor from another Member State posting workers to the United Kingdom can be required to comply with collective agreements only if they are 'universally applicable', as defined by the Posted Workers' Directive..

Collective agreements in this country are no longer 'universally applicable' in the way that they are in many of the other EU Member States (where as a result collective bargaining density is much higher). This means that it may be difficult under the Posted Workers' Directive to require contractors from other Member States to do more than pay the national minimum wage, or observe other minimum statutory conditions.

We now have a situation where two-tier arrangements are prescribed by EU law. The effect of *Ruffert* is that contractors from other Member States could not be required to follow a living wage included in a collective agreement. The decision in *Luxembourg* – as matters currently stand - would suggest that the living wage could not be imposed as a matter of local authority or Olympic Development Authority policy.

## Responding to the Decisions

8 There are certain steps that could be taken at domestic level to ease the pain: we could make the interim injunction procedure, so that employers have to establish that they have a very strong case before an interim injunction is granted (as proposed by the TUC in its Trade Union Freedom Bill), and we could set about implementing the 2005 manifesto commitment to establish sectoral forums, which might allow us in some cases to claim that collective agreements meet the universal applicability criteria of the Posted Workers' Directive.

9 Ultimately, however, these decisions can only be addressed effectively at European level, where the one-dimensional neo-liberal agenda by which they are informed needs to be neutralised by a nod in the direction of the European social dimension, which is becoming so deeply submerged that it may be beyond recovery. However, the ETUC has proposed a Draft Social Protocol to the EU Treaty which, although it has serious limitations, nevertheless would provide that -

‘Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress as defined in Article 2. In case of conflict fundamental social rights shall take precedence’.

10 This is an important initiative that will require political support in all Member States. Press reports suggest, however, that this may not be easy to secure. Attempts to link the Protocol to the Lisbon Treaty through the medium of the next Irish referendum appear to have foundered:

‘Britain sought to ensure that any legally binding protocol attached to the EU treaties that offered guarantees to bolster workers' rights did not enable the European Court of Justice to overrule British labour law. Jack O'Connor, General President of SIPTU, Ireland's largest trade union warned "that action to protect people's rights at work is central to any prospect of endorsement of the Lisbon Treaty’.

*(Daily Telegraph, 12 December 2008; See also Irish Times, 12 December 2008).*

The purpose of the Protocol, however, is not to advance workers' rights but to remove a series of judicial attacks on existing rights. The Protocol would simply restore the right of trade unions to do those things which were permitted, even in Britain's very light touch regulatory framework, but which have now been forbidden by unexpected court decisions.