



Third Case Unlucky: Ramifications of Ruffert

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Ruffert¹ is the third in the line of recent cases in which the European Court of Justice subordinates collective labour law rights and interests to economic freedoms to provide services under the EC Treaty. The Court repeats its analysis from the **Laval**² case: the Posted Workers Directive (the “PWD”) sets out an exhaustive list of maximum protections which a Member State, to which workers of an employer established in another Member State are posted, is entitled to impose. In the **Laval** case, it was industrial action by Swedish unions that was found to infringe the right to provide services. In **Ruffert**, it is the inclusion of contract compliance conditions in public procurement contracts that not only infringes the right to provide services, but is also unlawful solely because the contract compliance conditions exceeded the protections laid down in the PWD.

The Facts

A German authority awarded the contract to build a prison to a contractor on terms which required it to ensure that wages were at least at the level of the minimum provided for in a collective agreement which applied to building work in the public sector. Those terms were in accordance with relevant principality law on the award of public procurement contracts.

The contractor engaged a sub-contractor established in Poland for part of the work. It paid wages to workers posted from Poland to the principality at a rate lower than that provided for in the German collective agreement.

The German authority terminated the contract and sought to enforce a penalty clause against the contractor. The liquidator of the contractor claimed damages from the German authority claiming that the relevant principality law was incompatible with the freedom to provide services set out in Article 49 of the EC Treaty.

Judgment

The PWD sets out the minimum terms and conditions which Member States must ensure are applied to workers posted to their territory from another Member State. Those

minimum conditions, such as in relation to minimum rates of pay, must be as provided for under national law, or under collective agreements which have been “declared to be universally applicable”. The PWD then sets out criteria for determining whether collective agreements are to be regarded as universally applicable.

The European Court of Justice found that the relevant German principality law did not itself prescribe a minimum rate of pay. The minimum rate of pay was whatever was provided for in the collective agreement. It then decided that the collective agreement was not universally applicable since it only covered contracts in the particular principality, and even then, only contracts in the public sector.

The minimum rates of pay to which the German authority had sought adherence by its contractor and its Polish sub-contractor did not, therefore, count as minimum conditions which had to be protected according to the Directive.

The Court did expressly consider Article 3(7) of the PWD which permits Member States to apply terms and conditions of employment to posted workers which are more favourable than the standards of minimum protection under the PWD. But it found that a Member State is not entitled to make the provision of services in its territory conditional on the observance of terms and conditions which go beyond the rules for mandatory protection. Accordingly, the derogation permitted by Article 3(7) did not apply.

The Court therefore concluded that, because the minimum rates of pay did not require protection under the PWD, and the more favourable terms were not permitted by Article 3(7), the relevant provisions of German principality law, and the corresponding provisions in the building contract, were not permitted by EU law.

The Court then went on to say that its decision was confirmed by consideration of Article 49 – the right to provide services in another Member State. Infringement of an employer’s freedom to provide services can be justified by the objective of ensuring the protection of workers. But that justification did not apply because the relevant collective agreement only covered a limited geographical area and did not apply to private sector contractors.

...And now fourth case unlucky

The **Ruffert** decision has been followed now by a fourth case. The European Court of Justice delivered its judgment in **Commission v Luxembourg** on 19 June 2008. This was a case brought by the European Commission against Luxembourg in relation to the application of its national labour laws to workers posted to it from another Member State.

Article 10 of the PWD provides that the mandatory protections required by it do not preclude Member States from applying, compatibly with the EC Treaty, to undertakings from its own territory and from other Member States, terms and conditions outside of the mandatory protections "in the case of public policy provisions".

Luxembourg labour law provided that various matters associated with the employment relationship constituted "mandatory provisions falling under national public policy...". These matters included the terms of the written contract of employment and minimum rates of pay "and automatic adjustment to reflect changes in the cost of living". The laws expressly provided that these mandatory provisions applied equally to workers posted to Luxembourg by employers established in another Member State, and contained a procedure under which employers posting workers to Luxembourg had to register individual details of those workers with the Luxembourg authorities and that documents relating to those workers had to be retained by an agent actually in Luxembourg.

The European Commission brought proceedings against Luxembourg. It argued that the employment-related matters made mandatory in relation to posted workers exceeded the authority of the PWD and that the registration and document retention requirements infringed the principle of freedom to provide services under Article 49 of the EC Treaty.

The Court confirmed that the list of matters in respect of which Member States could afford protection set out in the PWD was exhaustive. It then dealt with Luxembourg's contention that the employment-related matters which the national law was designed to protect were covered by Article 10 of the PWD and that it was open to Member States to define the concept of public policy. The Court ruled that the concept of public policy is not to be determined by Member States, "since the latter are not free to impose unilaterally all the mandatory provisions of their employment law on suppliers of services established in another Member State." According to the Court, the public policy exception was a "derogation from the fundamental freedom to provide services which must be interpreted strictly."

Accordingly, the Court ruled that Luxembourg had failed to fulfil its obligations under the PWD by seeking to define the

protected employment-related areas as matters of public policy. The Court then went on to find that the registration and monitoring arrangements required by national law infringed the freedom to provide services, in part due to the lack of certainty as to what exactly was required by Luxembourg law.

Ramifications

In the **Ruffert** and **Luxembourg** cases, the European Court of Justice has applied the principles it developed in the **Laval** case to declare collective labour law protection incompatible with the PWD and Article 49 of the EC Treaty.

The logic is Kafkaesque, and is best illustrated by the Court's reasoning in the **Luxembourg** case. The Court leaps from the perfectly acceptable statement that the PWD sets out a list of matters in respect of which Member States are required to "ensure" protection for posted workers, to the conclusion that that list is an "exhaustive" list of matters in respect of which the Member State "may give priority".

A cherished goal for trade unions has long been the inclusion of fair employment clauses in public procurement contracts. Such clauses would set contract compliance standards in terms of wages and other terms and conditions, and in relation to equalities duties.

The extent to which fair employment clauses, and consideration of non-economic matters in the award of public contracts, are permitted by UK and EC procurement law has long been a matter of controversy. In the **Beejentes**³ case, the European Court of Justice did not per se strike down the criterion of the company's ability to employ the long-term unemployed. Likewise, in the **Commission v France** case⁴, the European Court of Justice refused to strike down a criterion linked to alleviating local unemployment. But, in the **Cambridge University**⁵ and **BFI Holdings**⁶ cases, the Court seemed to suggest that non-economic considerations could not be taken into account in public procurement processes.

The **Ruffert** and **Luxembourg** cases certainly do not advance the case for fair employment clauses in public procurement contracting. They introduce the additional potential pitfalls of non-compliance with the PWD and Article 49 of the EC Treaty.

But they do not spell the end for fair employment clauses. Recital 33 of the Procurement Directive⁷ provides that contract performance conditions are compatible with that Directive provided that they are not discriminatory and are set out in the contract notice and documents. Criteria not linked to economic factors are therefore expressly envisaged by the Procurement Directive.

Furthermore, the Advocate General in the **Ruffert** case thought that the infringement of the contractor's rights

under Article 49 of the EC Treaty could be justified by the policy objective of protecting workers against social dumping. That conclusion was not adopted by the Court, but the opportunities for justification of infringements of Article 49 rights will need to be developed in future cases.

1 **Dirk Ruffert v Land Niedersachsen** Case C-346/06, ECJ
2 **Laval un Partneri** [2007] ECR I-0000
3 **Gebroeders Beentjes BV v Netherlands** [1988] ECR 4635
4 **Commission v France** Case C-225/98, unreported
5 **R v HM Treasury ex parte the University of Cambridge**, unreported 3 October 2000

6 **Gemeente Arnhem, Gemeente Rheden v BFI Holdings** [1998] ECR I-6821
7 EC Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supplies contracts and public services contracts