Strikes, Collective Agreements and Freedom to Provide Services: Case C-341/05

The Laval Case

After the judgment in Case C-438/05 *Viking* on the freedom of establishment we noted up recently, here's the judgment in Case C-341/05 *Laval un Partneri Ltd* on the free movement of services.

In its judgment in Case C-438/05 the Court of Justice held that Article 49 EC and Directive 96/71 on the posting of workers preclude a trade union from attempting by means of strikes and other forms of collective action such as blockades from forcing a provider of services established in another member State to enter into negotiations with it on rates of pay for posted workers and to conclude a collective agreement for more favorable terms than those resulting from the applicable legislation.

In May 2004, Laval, a Latvian company, posted workers from Latvia to work on building sites in Sweden. The work was carried out there by a subsidiary, L&P Baltic Bygg AB. In June 2004, Laval and Baltic Bygg, and the Swedish building and public works trade union, Svenska Byggnadsarbetareförbundet, began negotiations with a view to determining the rates of pay for the posted workers and to Laval's signing the collective agreement for the building sector. But they couldn't agree. In September and October, Laval signed collective agreements with the Latvian building sector trade union, to which 65% of the posters workers were affiliated. Presumably, the going Latvian rates were lower than the Swedish rates even with the extra benefits included for travel, meals and accommodations. Because it failed to reach an agreement with Laval in Sweden, the Swedish union Byggnadsarbetareförbundet began collective action in November 2004 by blockading all of Laval's sites in Sweden. Added to which, the Swedish electricians' trade union joined in with a sympathy action, the effect of which was to prevent electricians from providing services to Laval. None of the members of those trade unions were employed by Laval. After work had stopped for a certain period, Baltic Bygg was declared bankrupt and the posted workers returned to Latvia.

Laval then brought proceedings in the Swedish courts. It sought a declaration on the unlawfulness of the collective action and for compensation for the damage suffered. The Swedish court then asked the Court of Justice if EC law and in particular Article 49 EC and Directive 96/71 precludes trade unions from taking collective action in the circumstances of the present case.

The Court begins by examining the possibilities available to the member States for determining the terms and conditions of employment applicable o posted workers. It held that Directive 96/71 does not allow the host member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. Directive 96/71 expressly lays down the degree of protection which undertakings established in other Member States must guarantee, in the host Member State, to the workers posted to the territory of the latter.

The Court held that while the right to take collective action must be recognised as a fundamental right which forms an integral part of the general principles of EC law, such a right cannot render otiose the rest of EC law and the freedoms it grants. Consequently, the right of trade unions of a member State to take collective action to force undertakings established in other Member States into negotiations with the trade unions in order to ascertain minimum wage rates and to sign a collective agreement – the terms of which go beyond the minimum protection guaranteed by Directive 96/71 – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services.

The question remained whether such a restriction could be justified. The Court held that in principle it was because the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest. But, in a case such as the present one, the Court held that the employer of posted workers employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host member State. Thus collective action cannot be justified with regard to the public interest objective of protecting workers where the negotiations on pay which that action seeks to impose on an undertaking established in another member State to enter into form part of a national context in the host state that is too open ended and without precise and clear provisions, such that it is impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay.

The Court also held that the Swedish trade unions must take account of the collective agreements negotiated in Latvia. It held that national rules which fail to take into account of collective agreements to which undertakings that post workers to Sweden are already bound in the member State in which they are established, give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.