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European Employment Law Briefing

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CASES

The right to take industrial action can be a fundamental right of overriding public interest. However, industrial action will only be a valid restriction on an employer's EC treaty rights where it is justified by the public interest and is proportionate.

In this edition, we report two cases on the hot topic of "social dumping", whereby employers take advantage of lower wage rates in one member state than apply in another. Both cases concern the legality, or otherwise, of actions taken by trade unions to combat this practice.

In ***International Transport Workers' Federation v Viking Line ABP***, Viking Line, a Finnish operator of ferry services between Helsinki and Tallin, Estonia, owned the passenger ferry *The Rosella*. *The Rosella*'s crew were members of the Finnish Seamen's Union (the "FSU"). The route was operating at a loss because of competition from Estonian vessels and Viking Line wished to "reflag" the ferry by registering her in Estonia and reducing labour costs by entering into a new collective agreement with a trade union in Estonia. The FSU, supported by the International Transport Workers' Federation (ITWF), based in London, sought to prevent Viking Line from doing so and threatened strikes and boycotts if Viking Line moved without preserving its Finnish wage levels.

The FSU asked the ITWF to send out a circular to all affiliated unions requesting that they should not enter into negotiations with Viking Line. As a result, Viking Line commenced proceedings in the English High Court seeking an injunction against ITWF requiring the withdrawal of the circular. The Court found in favour of Viking Line, ITWF then appealed to the Court of Appeal.

***UK referral to the European Court of Justice* ("ECJ")**

The Court of Appeal lifted the injunction, holding that the right to take industrial action is a fundamental right protected by the EC Treaty. However, the Court also referred certain questions to the ECJ, essentially asking whether the unions' action improperly restricted Viking Line's right to freedom of establishment under Article 43 of the Treaty of Rome.

ECJ's decision

The ECJ held that collective action in order to induce an undertaking to enter into a collective agreement, the terms of which would deter it from exercising its freedom of establishment, could be a breach of Article 43. Such a restriction could only be accepted if it pursued a legitimate aim, was justified by reasons of public interest and was proportionate.

The protection of workers was deemed to be a legitimate interest which could justify a restriction on the freedom of establishment. However, the ECJ held that when deciding whether the trade union's action was, ultimately, proportionate regard should be had to national rules and collective agreement law and the question of whether the union had other means at its disposal which were less restrictive of the freedom of establishment and whether those means had been exhausted.

What do employers need to consider?

Unfortunately, this case was settled before the Court of Appeal made its decision following the ECJ's findings and referral back to the UK. However, following this case and the ***Laval*** case reported below, it would seem that the rights to freedom of establishment and to provide services restrain, to some extent, the ability of trade unions to take industrial action to enforce claims for wages above minimum rates because existing national laws may well be deemed sufficient to protect legitimate aims (such as protecting employees' rights) meaning that such strikes and boycotts may not be deemed proportionate.

The second case on this issue is ***Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet and others***. A Latvian company, Laval, posted Latvian workers to Sweden to work on building sites operated by a Swedish company which was owned by Laval. These companies refused to enter into a tie-in agreement to the Swedish collective agreement for the building sector (which guaranteed certain minimum levels of pay). As a result, the public works trade union blockaded the sites to which they supplied workers. The Swedish company could no longer operate and was declared bankrupt and the Latvian workers returned home.

Laval sought a declaration that the collective action had been unlawful since it breached Article 49 of the Treaty of Rome which provides for the freedom to provide services. Laval also claimed compensation. The Swedish court made a referral to the ECJ.

ECJ's decision

The ECJ held that the union's action did constitute a restriction on Laval's freedom to provide services under Article 49. As in ***Viking***, the ECJ held that such a restriction could in principle be objectively justified. However, given that the Swedish government had already enacted legislation providing for minimum conditions of employment in respect of posted workers (as required by the EC Posted Workers Directive) and the fact that Swedish law made no provision for a minimum wage or the applicability of Swedish collective agreements to posted workers, collective action aimed at obliging Laval to observe the terms of a collective agreement providing for better working conditions could not be objectively justified.

A rule requiring employees to work more than a 'threshold' number of overtime hours in a month in order to qualify for

overtime pay was detrimental to part time workers.

In ***Voss v Land Berlin***, Ms Voss was employed by Land Berlin as a part-time teacher working 23 hours a week. Full time employees worked 26.5 hours per week. Mrs Voss also worked between 4-6 hours per month overtime. German law on civil servant working hours required that all employees (full or part-time) must work more than 5 hours' overtime a month before they could claim overtime pay. The practical effect was that Ms Voss received less pay for working, say, 26.5 hours per week than a full-time employee. This is because between hours 23-26.5, Mrs Voss was not paid because she had not worked 5 hours overtime. On the other hand, hours 23-26.5 for a full-time employee would be normal working time and they would be paid in the normal way. Ms Voss commenced proceedings against Land Berlin on the basis that such a practice breached Article 141 of the EC treaty (which establishes equal pay between men and women) because it was detrimental to part-time working and more women than men work part-time. The case was referred to the ECJ by the German Higher Labour Court on this issue.

ECJ's decision

The ECJ stated that there would be unequal treatment wherever the overall pay of full-time employees was higher than that of part-time employees for the same number of hours worked, as in this case. As such, Article 141 may be breached unless such treatment can be justified by objective factors wholly unrelated to discrimination based on sex. The question of objective justification was sent back to the German court to be answered.

What do employers need to consider?

In most cases overtime rates are higher than standard rates and part-time workers are legally entitled to premium overtime rates only once they have worked the same number of hours that a full-time worker would have to work in order to receive such rates (Regulation 5(4) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000). However, this case has implications for employers who require part-time employees to perform unpaid overtime (regardless of whether, as in this case, there is a threshold above which overtime is paid).

A previous decision of the ECJ suggested that where both part-time and full-time workers were required to work a certain number of additional hours on top of their normal working time to qualify for overtime (as in this case), the threshold number of hours ought to be pro-rated for part-time employees to reduce any detriment suffered. However, assuming that such a practice affects more women than men (which is generally accepted due to the larger number of female part-timers), this case suggests that to structure payments in this way will still be discriminatory unless it can be justified. The ECJ has effectively found, therefore, that a part-time worker must be paid at least the normal rate of pay for all overtime worked, at least up until the normal working hours of a full-time employee regardless of any threshold that is applied to full-time employees. Certainly this is the least risky approach although it may cause administrative difficulties and resentment from full-time employees.

Female workers protected from dismissal related to in vitro fertilization

In ***Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG***, Ms Mayr was a waitress who was dismissed on two weeks' notice. At this time, Ms Mayr had undergone IVF but the transfer of the fertilized ova into her uterus was not scheduled to take place until a later date. Ms Mayr brought a claim under an Austrian law which prohibited dismissal during pregnancy. Her employer argued that she was not pregnant at the time of dismissal. The Austrian court referred the case to the ECJ, asking whether a woman who undergoes IVF is a "pregnant worker" for the purposes of the EC Pregnant Workers

Directive if, at the time of being given notice of dismissal, her ova had already been fertilised and in vitro embryos thus existed, but had not yet been implanted.

ECJ's decision

The ECJ decided that, in cases of IVF, pregnancy begins only at the date of implantation. Part of the reason for this decision was that in some Member States fertilised ova may be frozen for a number of years. As such, any other decision could lead to a scenario where a woman was protected from dismissal for a number of years, even if implantation never occurred.

However, having held that the Pregnant Workers Directive did not apply, the ECJ drew an analogy between women undergoing IVF treatment and pregnant women, since both conditions affect only women. Therefore, it held that where a woman is in the advanced stages of IVF treatment (ie the ova have been fertilised), the EC Equal Treatment Directive precludes the dismissal of that woman if the dismissal is based on the fact that she has undergone such treatment.

What do employers need to consider?

Whilst this was a referral from an Austrian court, UK courts and tribunals are required to interpret UK law in accordance with EC Directives and ECJ decisions. A woman dismissed or subjected to any less favourable treatment because she has undergone IVF treatment will, therefore, be able to claim direct sex discrimination under s.1 of the Sex Discrimination Act.

NEWS

Checking the immigration status of employees transferred to an employer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

On 29 February 2008, new rules were introduced regarding the nature of the checks which must be made by employers when enquiring into an applicant's immigration status. Employers found employing illegal workers may be issued with a civil penalty of up to £10,000 per worker.

The Border and Immigration Agency has now issued Summary Guidance stating that employers who acquire staff as a result of a TUPE transfer have a grace period of 28 days to make the appropriate document checks following the date of the transfer.

As a result, employers who acquire such employees under TUPE should at the very least review the personnel files of all transferring employees to see what checks the transferor carried out and cure any deficiencies within 28 days.

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