Workers' Rights and the European Court of Justice Judgments. (2007/2008)

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1. **Cases:**

Viking	C-438/05	December 11th 2007
Laval	C-341/05	December 18th 2007
Ruffert	C-346/06	April 3rd 2008
Luxembourg	C-319/06	June 19th 2008

It important to make the point at the outset, that whatever view is taken on the likely impact of European Court of Justice decisions on Workers' Rights arising from the above cases, – there can be no possibility of any further progress on this and on the issue of collective bargaining rights – until the Lisbon Treaty is ratified and the Charter of Fundamental Rights becomes a part of primary European Union law.

There were two issues of concern raised with regard to workers' rights during the last Lisbon Treaty Referendum Campaign in June 2008 which were as follows:-

- There were concerns raised by SIPTU that the Government was unwilling to advance the issue of collective bargaining rights for workers that arose out of the Supreme Court decision in the IMPACT/Ryanair to overturn the Labour Court decision, under the Industrial Relations (Miscellaneous Provisions) Act, 2004.

- There were also concerns raised in relation to the European Court of Justice decisions in the Viking, Laval, Ruffert and later the Luxemburg cases. These concerns were that the Court was giving priority to the "economic freedoms" over the rights of workers to collective bargaining and strike action.

In the case of the issue of collective bargaining rights, there was a very significant development in a Turkish case in November 2008, when the European Court of Human Rights in Strasbourg declared the right to collective bargaining to be a human right covered by Article 11 of the European Convention on Human Rights.

Article 11 states:

1. **"***Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of their interests.*

2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

Previously the Court of Human Rights had not gone as far as giving a right to collective bargaining under the European Convention of Human Rights. In a previous UK case between Wilson and the NUJ v the United Kingdom, it had said that even if collective bargaining was not indispensable for the effective enjoyment of the trade union freedom, it must be one of the ways in which trade unions could be enabled to protect their member's interests.

It explicitly stopped short of holding that Article 11 gave an actual right to collective bargaining. However the Court held in that case that the use of financial incentives by employers to induce employees to surrender the right to union representation for collective bargaining was a breach of Article 11.

Now the Court has gone further again, and stated that Article 11 actually confers a right to collective bargaining as well.

Arising from the Good Friday Agreement, the provisions of the European Convention of Human Rights were transposed into Irish law through the European Convention on Human Rights Act 2003.

This does not, however, automatically override the interpretation of the Irish Constitution given in the Ryanair case. It does however now make Ireland in breach of Article 11 of the European Convention on Human Rights just as it was already in breach of the ILO Convention No. 98 on collective bargaining rights.

The Charter of Fundamental Rights of the European Union contains an explicit right to collective bargaining in Article 28. This is drawn from the Council of Europe Social Charter 1961, and the Community Charter of the Fundamental Social Rights for Workers 1989, rather than from Article 11 of the European Convention on Human Rights.

It is very likely that once the Lisbon Treaty is ratified and the Charter becomes primary European Union law that a suitable case can be taken to the Labour Court and be referred to the European Court of Justice. This would need to be a case affecting Community

Directives or a domestic case with a transnational dimension. A purely domestic case on pay and conditions could not be referred to the European Court of Justice. A successful outcome in such a case would automatically overturn the Supreme Court decision in the Ryanair case, as Community law as decided by the European Court of Justice takes precedence over the Irish Constitution.

In that respect ratification of Lisbon to secure the Charter of Fundamental Rights as primary EU law is essential to advance the case for collective bargaining rights.

In the Turkish case before the European Court of Human Rights in Strasbourg (Demir and Baykara), the trade union members involved had been required to forego the benefits of a collective agreement on pay negotiated by their trade union due to an auditor's report declaring it to be illegal. The Court concluded that arising from developments in labour law nationally and internationally that the right to collective bargaining, "*has in principle become one of the essential elements of the right to form and to join trade unions for the protection of one's interests"*

2. <u>European Court of Justice Cases</u>

Except for the Viking case, the contentious European Court of Justice cases were all concerned with the European Union Posting of Workers Directive of 1996, (96/71/EC), which was designed to give protection for workers posted to work in other member states of the European Union. The Posting of Workers Directive was transposed into Irish law through Section 20 of the Protection of Employees (Part-time Work Act) 2000. The legal basis for this Directive was Article 47, concerned with the rights of establishment and the provision of services rather than the usual social policy legal basis such as Article 137.

A number of points are clear from these judgments:

- Trade Unions can only insist on and take collective action to secure the core pay and conditions set out in the Posting of Workers Directive if they have been made legally enforceable. Despite the wording of the Posting of Workers Directive which allows more favourable terms, the European Court of Justice will only accept minimum pay rates being covered. This appears to be because the European Court of Justice considers that the undertaking posting the workers must have legal certainty in respect of the obligations that it needs to comply with.

- The European Court of Justice has clearly set out in the Viking judgment that strike action to prevent social dumping is legal. It did however in the same judgment introduce the concept of proportionality in relation to the taking of industrial action. It is not possible to conclude at this stage whether this will pose an actual problem in practice as the Viking case was settled prior to the final judgment.

- Many of the difficulties in the Laval, Ruffert and Luxemburg Judgments arose because the Posting of Workers Directive had not been properly transposed into domestic law in the countries concerned.

3.The Four European Court of Justice Judgments

Viking, Laval, Ruffert and Luxembourg

The four judgments are summarised below, and their implications assessed. They are set out in date order of their issue by the Court

3(a)Viking

Viking Line ABP v **the** International Transport Workers Federation (ITF)
and Finnish Seaman's Union (FSU).
Case No C-438/05 Judgment issued 11 December 2007

This case concerned a Finnish company operating a ferry, the Rosella, between Helsinki and Tallinn (Estonia). The company was in competition with Estonian ferries paying lower wages. They wished to reflag their vessel to avail of the lower pay and conditions that would apply in Estonia. Having failed to pursue the matter successfully due to Union threats of strike action, the Company took both the ITF and the FSU to the High Court in London (Head Office of ITF) in August 2004 following the accession of Estonia to the European Union in May that year.

The Company claimed a breach of their rights under Article 43 on Freedom of Establishment. The Unions claimed that they were entitled to threaten strike action to protect their members' interests. The High Court gave an injunction and on appeal it was referred to the European Court of Justice. Both the Danish and Swedish Governments in their observations stated that as a fundamental right, the right to strike falls outside Article 43. The Irish, German and Finnish Governments supported the Unions case on the grounds that it was justified by the objective to protect workers interests which constituted an overriding reason of public interest, (Para 76).

The Court set out that even though the right to strike was a fundamental right, it can none the less be subject to certain restrictions, pointing out that this was the case at national level, (Para 44).

The Unions had made reference to the Court's judgment in the Albany case (para 59 of Albany) when it was accepted that certain restrictions on competition policy are inherent in collective agreements, and that the social policy objectives pursued by such agreements would be seriously undermined if they were subject to the Treaty Article 81(1) on competition. In Albany the European Court of Justice held that collective agreements were outside the scope of competition policy, (Para 60 of Albany).

However in Viking the European Court of Justice made it clear that that reasoning cannot be applied in respect of the fundamental freedoms in Title 111 of the Treaty. It went on to show that the case law of the Court already held that collective agreements were not outside the provisions on free movement of persons and services. (Para 53 and 54 of Viking)

The Court made clear that a restriction on freedom of establishment can be accepted provided it pursues a legitimate aim compatible with the Treaty and that it is justified by overriding reasons of public interest. (Para 75)

Because the Community has a social as well as economic purpose, the four freedoms must be balanced against the objectives of social policy.

The decision of the European Court of Justice in Viking was that collective action which restricted freedom of establishment under Article 43 can be justified to protect workers, provided that it is suitable to attain the objective and does not go beyond what is necessary to achieve it.

The Advocate General's Opinion (dated 23rd May 2007) was very similar except that it makes a reference to the need to avoid partitioning of the labour market that would have the effect of impeding the hiring of workers from one Member State to protect the jobs of members in another Member State. The FSU had issued Press Releases referring to the need to protect Finnish jobs.

Assessment

In this European Court of Justice judgment which is the only one of the four not concerned with the Posting Workers Directive, but was concerned solely with a conflict between the Treaty freedoms and the fundamental right to strike, the Court has upheld the right to strike to protect workers interests even where it restricts one of the four freedoms.

In summary, collective action to prevent social dumping is permissible. A possible concern in the judgment is the reference to the principle of proportionality, which is a consistent European Court of Justice theme in their judgments. If applied too rigidly to "workers demands" it could cause problems. However it is may be more of a theoretical than a practical problem

This Viking judgment can be preferred as the definitive judgment; as it has ruled on the issue in a case that was not complicated by other factors such as the failure to properly transpose the Posting of Workers Directive which arose in the other three judgments.

3(b).Laval

Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet and Others
Case No C-341/05
Judgment issued 18 December 2007

This case is the one that has caused the most controversy, because the strike action was considered by the European Court of Justice to be illegal.

This case concerned Article 12 (prohibition of discrimination on grounds of nationality), and Article 49 (freedom to provide services) of the Treaty, along with the Posting Workers Directive (96/71/EC).

Laval was a building company registered in Riga, Latvia. It posted 35 workers to work on the construction of a school in Vaxholm, Stockholm. The workers were (65%) members of the Latvian Building Workers trade union and it had concluded a collective agreement to cover the posting to Sweden. The Swedish building workers trade union demanded that Laval sign a collective agreement, and pay an hourly rate of €16. Signing a collective agreement would also involve paying the Union (Swedish) 1.5% of gross pay for their pay review, and a further 6.7% in insurance premiums (to a fund for accident compensation etc) Laval offered less than €16 per hour, and a dispute began in November 2004 with the Swedish building unions imposing a blockade on the site, which is legal in Sweden. The workers returned to Latvia and in January 2005 all Laval's sites in Sweden were subject to a blockade and the Company went bankrupt in March.

The case was referred to the European Court of Justice and the Swedish unions claimed that it was an attempt by the Company, to escape their obligations under Swedish law, by trying to take advantage of Community law.

The Court noted that the dispute arose when Laval refused to pay the pay rate demanded even though Sweden had no minimum pay rates, and the other conditions sought went beyond, or were not covered by the Swedish Law on the Posting of Workers which transposed the Posted Workers Directive (PWD). The Court summarised this as seeking to "*force a provider of services established in another Member State to enter into negotiations with it on rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not covered in the Directive"* (PWD) (Para 53)

The Court noted that Sweden had not availed of any of the methods set out in the Posted Workers Directive to cover minimum pay rates. There are 3 options, under PWD 3(1) minimum pay rates or under 3(8) either collective agreements declared universally applicable, or those declared generally applicable to a specific industry. This arose because pay in Sweden is a matter for collective bargaining between the Social Partners and they have never had a minimum wage. The Court held that not having availed of the

provisions of the Posting of Workers Directive; a Member State is not entitled, pursuant to that directive to impose on undertakings established in other Member States, negotiations at the place of work on a case by case basis. (Para 71)

Even though the Posting of Workers Directive in Article 3(7) does not prevent the application of more favourable terms, the Court held that this does not allow the Member State *"to make the provision of services in its territory conditional on the observance of terms and conditions which go beyond the mandatory rules for minimum protection."* (Para 80) However, in the next paragraph the Court made it clear that a different situation could arise where an undertaking was signing a collective agreement with its own posted workers.

The Court went on to review the issues of fundamental rights that arise in a similar manner to the Viking judgment, and explicitly stated that the right to collective action to protect workers against social dumping, can justify a restriction on one of the fundamental freedoms guaranteed by the Treaty.

The Court then found that a Member State cannot claim a public interest objective for the protection of workers and require undertakings from other Member States to enter into negotiations on pay where it is impossible or excessively difficult in practice to determine its obligations. Similarly a trade union cannot take strike action, except to enforce minimum pay rates, and cannot demand negotiations seeking conditions better than those covered by the Posting of Workers Directive or terms related to matters not covered (pay review, insurance etc).

The Court also ruled on a second question which arose because under Swedish law once a collective agreement is signed, strike action is prohibited, but in this case Laval had signed a collective agreement in Latvia with its own building workers trade union, but yet was subject to strike action. The Court ruled that this was discrimination on grounds of nationality that could not be justified.

The Advocate General's opinion of 23rd May 2007, while reviewing all of the issues of balancing fundamental rights and freedoms had proposed that the collective action was lawful provided it was intended to prevent social dumping and improve conditions for the posted workers.

Assessment

The Laval case is very specific to its own circumstances, and is not a basis for drawing firm conclusions on the direction that the European Court of Justice is heading when it comes to issues covering 27 different industrial relations systems. In that regard Viking must be preferred as holding that collective action to prevent social dumping is permissible. Unlike Viking in Laval the workers involved were not members of the trade union taking the action.

In the Laval case the Posting of Workers Directive was not properly transposed in Sweden. The Swedish Inquiry on Laval has since (report last December 2008), recommended that Sweden use Section 3(8) of the Posting of Workers Directive to cover, collective agreements that are generally applicable in the area or industry to allow the particular method of industrial relations in Sweden to be compatible with Community law. This avoids the need to introduce a minimum wage.

A key issue for the Court was that the undertaking had no certainty as to what requirements it needed to comply with, in order to conduct business in Sweden. It therefore took a restrictive interpretation of the Posting Worker Directive and only allowed terms that it covered and that were transposed in Swedish law.

In an Irish context, the blockade would have been illegal anyway. Potentially for some industries the Posting of Workers Directive in Ireland would not cover pay other than the statutory minimum wage. Article 3(8) as in Sweden may need to be looked at here. However, most EU nationals who come here are seeking work, and only a minority are posted.

3(c)Ruffert

Dick Ruffert, liquidator of Objeckt und Bauregie Gmbhand Co.kg, **v** Land Niedersachsen
Case No C-346/06
Judgment issued 3 April 2008

Land Niedersachsen awarded Objekt a contract for work on the building of a prison. They subcontracted some work to a Polish subcontractor who subsequently came under suspicion of having employed workers below the pay rate that was provided for in the Buildings and public works collective agreement. Land Niedersachsen terminated the contract for this reason. The German Courts then had to consider if penalty clauses in the contract were operable and the European Court of Justice was asked if requiring undertakings when lodging a tender to commit to paying collective agreement pay rates constituted a restriction on the freedom to provide services. The inferences from the German Court making the reference was that this could constitute a failure to allow an undertaking from another Member State to make use of its competitive advantage, (Para 14). In paragraph 37 the Court gave some support to this view by repeating a point made by the Advocate General that the requirement to pay German wage rates may place an "*additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State",* but without adding the Advocate General's subsequent paragraph that it was nonetheless justified.

However, the main issue in this case was (similar to Laval) that the collective agreement was not covered under any of the 3 options in the Posting of Workers Directive to ensure legally enforceable pay and conditions. (Para 26) The Court also had an issue with the idea that a worker's terms and conditions would be covered on a public works project but not a private one. (Para 40)

It therefore ruled that it was an unacceptable restriction under Article 49, to have the contracting authority only allow tenders from undertakings that agreed to pay the minimum wage in force where the services are performed.

The Advocate General's opinion of 20th September 2007 took a contrary position.

Assessment

This case is probably the most difficult to assess. It is a much shorter judgment than either Viking or Laval, and it is not clear what judgement the Court formed on the comment set out by the German Court referring the case, that a requirement to pay German wages causes the undertaking to lose their competitive advantage.

The main problem however was that the collective agreement was not covered by the Posting of Workers Directive. Both the Viking and Laval judgments were by the Grand Chamber, with exactly the same personnel. Ruffert was by the smaller Second Chamber, and it did not deal with the issues raised in the same depth. The key issue was the Posting of Workers Directive and it would probably be unwise to draw any further firm conclusions from the judgment at this stage. Also at a meeting with an ICTU delegation in July 2009 Commissioner Spidla said that all the issues raised had been resolved in Germany.

3(d)Luxembourg

Commission of the European Communities **v** Grand Duchy of Luxembourg.
Case C-319/06
Judgment issued 19 June 2008

This case concerned the manner in which the Grand Duchy of Luxembourg had transposed the Posting of Workers Directive into domestic law. It had failed to properly provide for daily rest periods for workers. There were also a range of issues which the Commission argued should not have been included in the legislation transposing the Posting Workers Directive.

1. Requirement for posted workers to have a contract of employment. The Court found that this was a matter for the Member State of origin.

2. Prior notification procedure for documentation to be supplied for monitoring purposes by Luxembourg Labour Inspectorate. The Court held that this was an unnecessary restriction under Article 49

3. The requirement to keep an agent in Luxembourg. The Court also found that this was an unnecessary restriction.

A central issue was the question whether under the public policy provisions of Article 3 (10) of the Posting of Workers Directive, Luxembourg could provide for automatic wage indexation to the cost of living.

The Court ruled that public policy provisions must be strictly interpreted and can only be relied on if there is a genuine and sufficiently serious threat to a fundamental interest of society. It viewed the approach by Luxembourg as by implication seeking to impose its wage determination system on undertakings which posted workers to Luxembourg, and said that Luxembourg had merely cited general objectives without providing any evidence as to why indexation was necessary. This did not meet the required legal standard the Court said.

Assessment

This case was largely about technical issues to do with the Posting of Worker Directive. It was decided by the First Chamber. The approach of the European Court of Justice is clearly that service providers must have certainty, and no unnecessary red tape when seeking to do business in another Member State. This would appear to be the reason why it will only accept minimum pay and conditions that are legally binding in the host country. There are no specific implications for Ireland from this judgment.

4. Position of the European Commission and the European Trade Union Confederation.

The European Commission issued a statement in April 2008 setting out that despite the European Court of Justice Decisions, its view remained that there was no conflict between workers rights and the internal market, and that the decisions did not jeopardise Members States choice of organisation of industrial relations including the Nordic Model.

Concerns persist however, and the European Trade Union Confederation has called for a Social Protocol that would ensure that in a conflict situation the rights of workers took precedence over economic freedoms. At the December 2008 European Council, the Irish Government secured a commitment to a declaration on the importance attached to workers' rights as part of its package of measures necessary to hold a second referendum. This was agreed as a Declaration on Workers' Rights at the European Council in June 2009.

From discussions with Commissioner Spidla it clear that he is opposed to the reopening of the Posting of Worker Directive – as the potential for a new/old Member State divide was clear and the outcome of any re-opening could not be predicted. He did, however, support the idea of an inter – institutional agreement between the Council / Commission / Parliament on workers' rights and could support a Social Protocol, though he doubts that agreement could be received on this. In that regard his position is that there is no hierarchy of rights, i.e., workers right are not subservient to economic rights.

The European Trade Union Confederation has proposed a draft for a Social Protocol, set out in Article 3 (1) and (2) of their submission,

(1) **"***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. <u>In case of conflict fundamental social rights shall take precedence</u>"*

(2) *"Economic freedoms cannot be interpreted as granting undertakings the right to exercise them for the purpose or with the effect of evading or circumventing national social and employment laws and practices or for social dumping"*

It is probably unlikely that a Social Protocol along these lines would be accepted by all 27 Member States particularly given the attitude of the UK Labour Government.

The so called Monti clause created in the 1998 Regulations in respect of free movement of goods was also inserted into the Services Directive to ensure that workers rights to collective action on terms and conditions were not compromised by the Directive:

"*This Directive does not affect terms and conditions of employment, including maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay as well as health, safety and hygiene at work, which Member States apply in compliance with Community law, nor does it affect relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect Community law, nor does it apply to services provided by temporary work agencies. This Directive does not affect Members States' social security legislation.*

However, a Monti clause in a Directive does not have the same status as primary law. A Social Protocol which gave a clear status in primary law to workers' rights would be preferable. Given the likely opposition particularly from the UK, the most that could be achieved would be a Social Protocol that made clear that workers rights were not subservient to the so called "economic freedoms" in the Treaty. In any event, the Charter of Fundamental Rights of the European Union acquiring the status of primary law will achieve this.

<u>5. Main Issues at European level</u>

The Viking judgment clearly allows for strike action to prevent social dumping.

However it introduced a concept of proportionality which is a difficult concept in industrial relations.

It is a common approach by the European Court of Justice however. For example, in indirect gender discrimination cases – discrimination may be allowed if it can be objectively justified. All the means chosen must be proportionate to the attainment of the

objective. It is a different matter to seek to apply this to industrial relations, but it is not possible to say with any certainty at this stage what if anything this legal concept would mean in practice.

In Laval, the circumstances were somewhat extreme in that the company went bankrupt because there was a blockade of all its sites in Sweden. It did however continue to operate in Latvia. The case also involved discrimination on grounds of nationality because the Latvian union had concluded a collective agreement prior to the posting. Also it may have been seen by the European Court of Justice, as an attempt to in practice restrict free movement of workers.

In the Ruffert and Luxembourg cases it is clear that the European Court of Justice is applying a strict and restrictive (minimum pay rates only) approach to the Posting of Workers Directive.

So clearly there are issues that need to be addressed, – but not on the scale that has been presented by some opponents of the Lisbon Treaty.

There is no evidence to present the European Court of Justice as having an anti worker bias or favouring business interests. In fact it was the European Court of Justice in its first major judgment on Article 119 on equal pay in 1976 (Defrenne v Sabena Case C-43/75) that so clearly set out the social as well as the economic dimension to the Community when it held, *"this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek constant development of the living and working conditions of their peoples ……. This double aim which is at once economic and social shows that the principle of equal pay forms part of the foundations of the community".*

In addition as detailed in two other documents from the Charter Group: ***The Charter of Fundamental Rights of the European Union(from the UN Declaration on Human Rights to the Lisbon Treaty)*** and ***The Importance of the European Union to the development of Workers' Rights in Ireland,*** which are set out on the website (www.thechartergroup.ie) the European Court of Justice has a consistent track record of support for fundamental rights.

It is very evident then that the European Court of Justice has been a progressive institution in the field of fundamental rights and particularly in areas of equal pay , gender equality and heath and safety issues.

It does try to apply simple clear formula in some of its approaches.

For example, in the Cassis de Dijon(C-120/78) judgement, where there was an attempt to limit the sale of a French product in Germany based on alcohol content - the Court took the position - if its legal for sale in one country – it is legal for sale in all.

Applying simple formulae to a complex area like industrial relations with 27 different industrial relations systems is more problematic and it is hardly surprising that their judgments will leave gaps or have aspects that will change over time as the Court becomes more familiar with the industrial relations issues involved. This has been the experience in the gender equality equal treatment field where a very restrictive interpretation of the rules for positive discrimination for women was influenced by the Commission's policy to promote positive discrimination. In the Kalanke(C-450/93) judgment the Court took a very restrictive view of the circumstances where it was allowed, but subsequently relaxed that position in the later Marchall (C-409/95) judgment.

It is probably the case that the European Court of Justice is insisting that the rules for provision of services and free movement of workers under Articles 43 and 49, must have certainty and in the case of pay and conditions this requires that they be legally enforceable. In the Laval case which is the only case where the European Court of Justice declared a strike unlawful, the Union did not represent the workers concerned. It does not automatically follow that workers posted abroad are restricted as regards strike action. Of course the main issue is that local workers could be undercut by cheap labour. The European Trade Union Confederation has already advised affiliates not to negotiate pay rates below the "local norm" for workers being posted abroad. There have been issues where employers tried to use the availability of overseas workers to exploit workers such as in Gama and Irish Ferries. Most workers from other EU countries have come as workers seeking work under free movement provisions rather than been posted here. There is evidence that that has exerted downward pressure on pay, but that is not a result of the European Court of Justice decisions.

6. Issues in Ireland

The Posting of Workers Directive which was transposed in Ireland through Section 20 of the Protection of Employess(Part-Time Work) Act 2001 currently covers the statutory minimum wage and pay and conditions set out in:

- Employment Regulation Orders which arise from Labour Court Joint Labour Committees. There are 18 of these but many, i.e., hairdressing, law clerks, would be very unlikely to be the subject of workers posted from abroad. Some, such as security and catering could be.

- Registered Employments Agreements - there are 67 of these, many inactive and most covering trades in specific towns i.e., Motor Trade, Mushroom growers.

There are four National REA's covering:

- Construction
- Printing

- Electrical Contracting
- Drapery and Footwear

These wage rates and conditions would thus be covered but for example in the construction industry the REA wages are a statutory minimum and not the actual rates that are paid.

In areas outside of the ERO's and REA's - it is only the statutory minimum wage that would apply – even though the trade union rates would be higher.

Most workers from other Members States come here seeking work rather than being posted here. It has led to pressure on trade union rates of pay, but it is not an issue covered by European Court of Justice decisions.

There is no obvious sector that may be under threat due to a gap in the transposition of Posting of Workers Directive. However, it is possible that a problem could arise due to workers being posted here at the statutory minimum pay rates and replacing workers covered by a higher rate negotiated under collective bargaining but not legally enforceable.

Following the Swedish Laval inquiry, they decided to use Section 3 (8) of the Posting of Workers Directive to ensure that their agreed trade union rates were covered in future.

This provides for:

> *Collective agreements or arbitration awards which have been declared universally applicable means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.*
>
> *In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Members States may, if they so decide, base themselves on:*
>
> - *collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or*
> - *collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied through national territory.*

This approach may need to be considered to cover any potential gaps here. However it would not be a straightforward approach and could require new legislation. The current agreement Towards 2016 Review and Transitional agreement provides for discussions on this under Section 16 (page 33).

7.Conclusion.

The Irish Declaration on the importance attached to workers rights that was agreed at the June European Council was exactly in line with the commitments set out in last Presidency conclusions last December. It partly used existing text from the Treaty probably to ensure that other countries in particular, the UK could not raise objections. In so far as it is a solemn Declaration on the importance of workers' rights it is important and should be welcomed. It will help to address the concerns that have been raised by the European Court of Justice decisions.

While the European Trade Union Confederation expressed disappointment that their proposal for a Social Protocol was not resolved in the context of the Irish guarantees it was not a surprise. The issues involved are complex. There are very different views on the extent of the problem and it will take time for all of this to be worked out at European level. The European dimension to the issues can only be resolved following discussions at that level and also the case law of the European Court of Justice will probably evolve anyway in a positive way if they follow their usual approach of protecting fundamental rights. A Social Protocol is probably not possible but some form of agreement between the European Institutions i.e., Council/Commission/Parliament that there is no hierarchy of rights, in other words workers rights are not subservient to the so called "economic freedoms" is probably the most likely outcome.

In respect of the issue of Social dumping the Viking judgement is the definitive position, and it is clearly positive from a trade union perspective. The Laval judgement must be viewed in the context that the Posting of Worker Directive was not properly transposed in Sweden. Also the Swedish trade union sought to impose negotiations on terms and conditions outside of those covered in the Directive for workers who were not their members, and who were already covered by a Latvian collective agreement. The fact that the European Court of Justice will restrict the right to strike in these circumstances is not in principle different from circumstances, where under Swedish law a right to strike is restricted once a collective agreement is in force.

The Ruffert judgment is primarily to do with incorrect transposition of the Posting of Workers Directive. However, some of the issues raised in relation to "competitive advantage" would if followed by the European Court of Justice amount to social dumping.However the issues have since been resolved in Germany.The Viking judgment still has to be considered the definitive judgment on this issue unless future judgments prove otherwise. The Luxembourg judgment should be seen as largely to do with technical issues.

The provision in the Posting of Workers Directive that allows for more favourable conditions is unlikely to be allowed by the European Court of Justice where a Member State or a trade union is seeking to apply it to workers who are not in membership.

There are indications in the European Court of Justice judgments that it would take a different view in the case of the workers that are posted to another Member State and are seeking better terms and conditions. However, this issue has not specifically come before the European Court of Justice for a determination.

In an Irish context the issue arises in respect of the possibility for workers being posted in industries not covered by either Employment Regulation Orders or Registered Employment Agreements where only the statutory minimum wage would apply, which would be below the trade union rate. That is why Article 3 (8) may need to be considered here, just as was recommended by the Laval enquiry in Sweden. Here to date most non Irish EU nationals have come here seeking work rather than been posted with a service provider. That could change so the area needs to be addressed and Section 16 of the current national agreement provides for discussions on this matter.

Dated 25 August 2009.