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UK IMPLEMENTATION OF THE POSTED WORKERS DIRECTIVE 96/71

Tonia Novitz
University of Bristol

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Tonia Novitz*

(1) Introduction

This analysis of UK labour law examines UK implementation of the Posted Workers Directive 96/71/EC (PWD), in the light of the jurisprudence of the European Court of Justice (ECJ) in what has come to be known as ‘the *Laval* quartet’: the cases of *Viking*,¹ *Laval*,² *Rüffert*³ and *Luxembourg*.⁴

The first part of this paper outlines briefly the position of the UK Government in the process leading up to adoption by the European Community (EC) of the PWD. The second part then examines the extent of initial implementation of the Directive in the UK. The third and final part of the paper highlights current issues confronting the UK following the cases recently decided by the ECJ.

Initially, the Conservative UK Government, prior to 1996, sought to resist attempts to adopt the PWD. Concern was expressed that such a measure would restrict the operation of a ‘free’ European labour market. Moreover, the Government opposed measures which might inhibit the ability of UK employers to post workers to other EC Member States.

The UK New Labour Government which eventually purported to implement the PWD did so by straightforwardly extending the application of UK legislation removing jurisdiction clauses. There was no specific legislation which ought to give particular regulatory effect to the PWD.

Due to this fairly *ad hoc* approach to the extension of UK employment legislation to posted workers, there is no specific time limit on posting workers. Following also from the lack of specific legal implementation of the PWD, there are no registration or control measures which apply to posted workers in the UK. However, third country nationals cannot use posting to evade ordinary UK immigration law. It is evident from parliamentary debates and from a case decided in the House of Lords that it was understood that the UK was in full compliance with the terms of the PWD, on the basis that the Directive was understood to specify a ‘floor of rights’ for posted

* Professor of Labour Law, University of Bristol. I owe thanks to Olajo Aiyegbayo for providing research assistance between December 2009 – February 2010, which entailed gathering primary materials used in the preparation of this national case study. This paper also reflects my report for the ETUI on ‘The Impact of ECJ decisions on UK Industrial Relations’. All opinions, errors and omissions are my own.

¹ Case C-438/05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line* [2007] ECR I-10779; [2008] All E.R. (EC) 127; [2008] I.R.L.R. 143 (hereafter ‘*Viking*’).

² Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; [2008] All E.R. (EC) 166; [2008] I.R.L.R. 160 (hereafter ‘*Laval*’)

³ Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989 (hereafter ‘*Rüffert*’).

workers as opposed to a ‘ceiling’. Nevertheless, trade unions were not satisfied with the form that implementation of the PWD had taken and, in particular, expressed frustration at the failure of the UK to make any provision under Article 3(8) of the PWD for extension of collective agreements in the construction sector.

In the period following the *Laval* quartet of ECJ judgments, it is possible to identify key legal issues, which will have to be addressed by the next UK Government (be it Labour or Conservative). Firstly, the legality of the transposition of the PWD into UK domestic law has been cast in doubt, now that we know that the entitlements set out in the Directive are to be regarded as a ‘ceiling’ and not a ‘floor’. In particular, the judgment in *Luxembourg* makes it clear that the UK’s extension of employment legislation to posted workers regarding matters which go beyond the list in Article 3(1) is to be regarded as violating the terms of the PWD. Secondly, the terms of public procurement, for which trade unions are arguing, in particular as regards service contracts for the Olympic Games would seem to be highly problematic, given the ECJ judgment in *Riiffert*. Moreover, the ability of trade unions to call industrial action in relation to matters concerning posted workers is significantly limited due to the *Laval* judgment. The consequence would seem to be extreme frustration on the part of workers that has led to wild-cat action, some of which has had extreme nationalistic undertones.

The motto ‘British jobs for British workers’ used by Gordon Brown to describe the creation of opportunities in terms of training (or so it is claimed) has been converted into more xenophobic sentiment focused on competition for work. Unions assert that workers are only seeking fair competition for access to work and prevention of ‘under-cutting’ by service providers which will be to the detriment of posted workers and UK workers alike. However, this belies the popular appeal of the far-right British National Party (BNP) which has sought to be actively involved in recent action. The opportunity for mainstream UK unions, which have long been opposed to a BNP presence in unions, to represent their membership and quell their fears is hampered by *Laval*.

Union calls for reform and indeed those of various backbench MPs in the UK parliament seem to be ignored by both the Conservative and Labour parties at present. Indeed, there seems to be a grim determination on both sides of the political spectrum not to address any of the current outstanding legal issues, including the potential utilisation of opportunities under Article 3(8). This is not part of their election manifesto and we do not know what will happen after that.

(2) The UK position prior to adoption of the Posted Workers’ Directive

There was never a national solution attempted or even seriously proposed in relation to the difficulties posed by workers posted to the UK prior to 1996. ILO Convention No. 94, which makes provision for award of public works contracts, by reference to wages and terms and conditions set by collective agreement, arbitration award or national legislation, had been ratified by the UK Government in 1950 but was denounced in 1982 by the then Conservative Government. Any constraints on public procurement were imposed by virtue of EC law.⁵

⁵ Directive 92/13/EEC and Directive 89/665/EEC.

The UK initially opposed the draft Posted Workers Directive, as published in 1991 ‘on the grounds that it might prove costly to UK business’.⁶ There was also concern over the legal base, namely what were then Articles 57 and 66 of the EC Treaty, designed to remove obstacles to provision of services in the single market. The objection of the then responsible minister of the Conservative Government in office, Ann Widdecombe, was that the proposed Directive was ‘anti-competitive and would impede the operation of the Single Market’.⁷

Back in 1995, there was appreciation in the House of Commons debates that foreign-based recruitment companies were acting unscrupulously in the UK. Such companies were recruiting British workers to work abroad, asking that they provide a deposit of a sizable sum upon payment of which it would emerge that such jobs did not really exist.⁸ Notably, these jobs were outside the EU, but it was suggested at that time that: ‘Effective action will require co-operation between European Union member states if we are to deal with the problem satisfactorily.’ The hope was expressed by at least one MP that there would be a chance, under the French presidency, of ‘another look at the posted workers directive to see whether there is any prospect of breathing life into that initiative’.⁹ However, Ann Widdecombe, for the Conservative Government of the time, stated that ‘European legislation will not help in dealing with the tiny minority of fraudsters who come within the terms of the debate.’ Instead, the Government would boost its poster and leaflet campaign.¹⁰ There was to be no regulatory action taken by the Conservative Government at the time as this would not be ‘in proportion to the problem’.¹¹

Indeed, the preoccupation of the Conservative Government at that time with deregulation and promotion of free markets meant that a motion was made in March 1995: ‘That this House takes note of European Document No. 7484/93, relating to the posting of workers; and endorses the Government’s view that the present text of the draft Directive is bureaucratic, anti-competitive and protectionist in nature, and that it would erect barriers to a free market and damage the effective operation of the Single Market.’ This was passed by a vote of 152 in favour to 56 against.¹²

The fear of the Government, which emerged in subsequent debates, was that the PWD would prevent British workers ‘being able to offer their labour freely in any place in that European market’.¹³ The comment made by the relevant Government minister was that ‘when European Employment Ministers meet, although supposedly

⁶ V. Keter, ‘Posted Workers’ House of Commons Library, Standard Note SNB/BT/301 2 February 2009, 2.

⁷ Letter from Ann Widdecombe to Jimmy Hood MP, 29 November 1994, cited in V. Keter, ‘Posted Workers’ House of Commons Library, Standard Note SNB/BT/301 2 February 2009, 2.

⁸ House of Commons debates, 22 February 1995, 12:59pm, per John Hutton.

⁹ *Ibid.*

¹⁰ House of Commons debates, 22 February 1995, per Ann Widdecombe.

¹¹ *Ibid.*

¹² House of Commons debates, 6 March 1995, 9:33pm.

¹³ House of Commons debates, 4 April 1995, Social Affairs Council, Oral Answers to Questions – Employment, per Michael Portillo. See also House of Commons debates, 4 April 1995, Oral Answers to Questions – Unemployment, per Ann Widdecombe: ‘we must all compete equally in Europe, which is why we are determined that no unfair burden of regulations puts us at a competitive disadvantage and that we will not have our workers stifled, as they would have been under the posted workers directive’. For these reasons, Michael Portillo was still opposed to adoption of the PWD in June 1995.

unemployment is meant to be top of their agenda, they spend much of their time discussing directives which would make it more difficult for people to get jobs in Europe and more difficult to move from country to country'.¹⁴ Notably, this was a time when the UK did not even have a national minimum wage applicable to workers, a point on which the minister was challenged.¹⁵ Moreover, one might observe that a PWD would in no way impede free movement of UK workers and wonder whether the Conservative Government was rather more interested in protecting the ability of British service providers to competitively offer their services in other EC countries.

(3) Implementation of the Posted Workers Directive in the UK

There is little doubt that the PWD could have had much greater impact on UK law than it in fact did. On the trade union side, '[a]mong the three main construction unions in the UK, the Union of Construction, Allied Trades and Technicians argued that the Directive should give all employees the right to the terms of sectoral collective agreements in preference to any national legal minimum wage, regardless of the legal status of the agreement, and that it should cover the self-employed',¹⁶ but this was never done.

The Conservative Government in place up until 1997 saw the adoption of the PWD as a failure in their European negotiations for deregulation of the internal market. The Labour Government, which came into power in 1997, also did not address the issue directly. Instead, the first significant steps taken to implement the Directive arose in the broader process of reform of industrial relations legislation by an Employment Relations Act of 1999. This envisaged, *inter alia*, amendment of section 196 of the Employment Rights Act 1996, which had up until that date limited the application of that legislation to employees who ordinarily worked in Great Britain. This was to be simplified, for '[i]nternational law and the principles of our domestic law are enough to ensure that our legislation does not apply in inappropriate circumstances'. This would also have 'other significant advantages': 'It extends employment rights to employees temporarily working in Great Britain and thus facilitates the implementation of the posting of workers directive, which otherwise would require further regulations later this year...'¹⁷ In addition, a 'parallel change' was made to the Trade Union and Labour Relations (Consolidation) Act 1992, 'removing the territorial restriction in that Act on rights to be consulted about mass redundancies'.¹⁸

This became the route followed by the Labour Government, which did not adopt particular legislation designed to implement the PWD. What the UK did gradually was to repeal legislative provisions regarding territorial limitations which would otherwise have denied protection to posted workers. This is anomalous. '[O]nly the

¹⁴ *Ibid.*

¹⁵ House of Commons debates, 4 April 1995, Social Affairs Council, Oral Answers to Questions – Employment, per Kevin Barron, who noted that the Ministers at the Social Affairs Council agreed with a national minimum wage.

¹⁶ 'Thematic feature – posted workers' available at: <http://www.eurofound.europa.eu/eiro/2003/06/tfeature/uk0306106t.htm>.

¹⁷ House of Commons debates, 26 July 1999, 3:43pm, per Ian McCartney (Minister of State (Competitiveness), Department of Trade and Industry).

¹⁸ *Ibid.*

UK and Ireland have not introduced legislation specifically to transpose the Directive into their domestic law.’¹⁹

The list of other statutory employment law provisions which apply to posted workers listed on the Department for Business, Innovation and Skills (BIS) website is as follows:²⁰

Working Time Regulations 1998
 National Minimum Wage Act and Regulations 1998
 Sex Discrimination Act 1975
 Race Relations Act 1976
 Disability Discrimination Act 1995
 Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
 Employment Equality (Sexual Orientation) Regulations 2003
 Employment Equality (Religion or Belief) Regulations 2003
 Health and safety legislation (primarily the Health and Safety at Work etc Act 1974 and the Management of Health and Safety at Work Regulations 1999)
 legislation regarding employment of children.

This seems to be in excess of the prescriptions of Article 3(1) of the PWD, but prior to the *Laval* quartet, there was little indication that this constituted a breach of the Directive or Article 49 EC (now Article 56 TFEU), as indicated below.

(a) *‘Technical’ issues*

** Is there a time limit on what is deemed as posting?*

Posted workers are essentially expected to be temporary workers by virtue of the PWD, Article 2(1) of which says that: ‘For the purposes of this Directive, “posted worker” means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.’

However, in the absence of specific legislation implementing the PWD in the UK, there is no specified time limit in the UK as to what will be deemed ‘posting’. Rather, various requirements for ‘qualification’ are imposed on access to certain employment rights. For example, protection from unfair dismissal is, in most circumstances, only available after one year’s continuous employment.

In debates regarding the ‘Services Directive’, there has been some Parliamentary discussion of what is to be regarded as ‘temporary’. For example, Mark Platt from the Confederation of British Industry (CBI), giving evidence before the House of Lords Select Committee on European Union in 2005, suggested that one should understand the term ‘temporary’ as being ‘opposed to established’, but conceded that this was ‘an area that still needs more work’.²¹ It may also be useful to observe that representatives from UNICE took a different view, also accepting that the term ‘temporary’ was

¹⁹ Select Committee on European Scrutiny, Thirty-Third Report, 25 July 2003.

²⁰ <http://www.berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19313.html>.

²¹ House of Lords, Select Committee on European Union, Minutes of Evidence, Examination of Witnesses, Questions 41-59, answer to Q55.

difficult to define, but that ‘there is one limit which exists in European rules. It is the rule that in the field of social security a posted worker can only remain affiliated to the regime of the country of origin for a maximum duration of 24 months. That seems to indicate that the EU legislator considers that anything beyond 24 months is no longer purely temporary’.²²

* *What kind of registration- and control measures were put in place initially?*

The UK may be regarded as being particularly generous in its treatment of posted workers, in that it does not impose licensing and authorisation requirements which are imposed by other EU Member States.²³ In response to the Commission Communication of 2006 regarding the scope of registration and control mechanisms,²⁴ the Parliamentary Under-Secretary of State for Employment Relations in the Department of Trade and Industry, Jim Fitzpatrick, commented that: ‘We will not have to change our control measures, as we do not place unjustifiable or disproportionate requirements on foreign companies temporarily posting their workers to the UK... monitoring and sanctions for non-compliance with the employment rights specified by the Posted Workers Directive is identical to that available to domestic workers...’²⁵ He did however accept that, while the Government had in place, material posted on the web providing advice on posting of workers, the Government would look at best practice in other EU Member States and explore ways ‘to improve content and accessibility of the UK information’.²⁶

There has been an attempt, very recently, to rely on the PWD to regularise the right to work of third country nationals in the UK. This was the case of *R. (on the application of Low) v Secretary of State for the Home Department* which was decided by the Court of Appeal in January 2010.²⁷ An Irish company, ‘Rising Sun’ had employed certain restaurant workers which it had allegedly ‘posted’ to the UK as consultants and suppliers of staff. Three of these workers were not permitted to work in the UK due to previous infringements of UK immigration law. It was held by the Court of Appeal that Article 49 EC (as was) nor the PWD served to regularise their employment by Rising Sun in the UK. In this respect, the *Luxembourg* judgment was relied upon since it would seem to require²⁸ that the situation of the workers is lawful in the EU country of establishment ‘as regards matters, such as residence, work permit and social coverage’ and permit the host country to check by the least restrictive or intrusive means possible that this is so.²⁹ The Court of Appeal accepted, by virtue also of *Commission v Germany*,³⁰ that the host country had to act proportionately and not unduly restrictively when monitoring the lawful and habitual

²² House of Lords, Select Committee on European Union, Minutes of Evidence, Examination of Witnesses, Questions 380 – 397, answer to Q 382 per Thérèse de Liederkerke.

²³ House of Commons European Scrutiny Committee, 30th Report of Session 2006-7, para. 3.18, cited by Barnard (2009) n.30 above, 132.

²⁴ Commission Communication: Guidance on the posting of workers in the framework of the provision of services COM(06) 159.

²⁵ House of Commons, Select Committee on European Scrutiny, Thirtieth Report, 4 April 2006, para. 13.10.

²⁶ *Ibid.*, para. 13.10.

²⁷ [2010] EWCA Civ 4, unreported judgment of 14 January 2010.

²⁸ See *Luxembourg*, para. 46.

²⁹ [2010] EWCA Civ 4, unreported judgment of 14 January 2010, para. 26.

³⁰ Case C-244/04 *Commission v Germany* [2006] ECR I-885.

employment of the posted workers in the country of establishment, but that the UK was acting appropriately to seek to deport these employees. Moreover, the Irish company could not rely on Article 49 EC for abusive or fraudulent ends.³¹

(b) *Overarching issues*

* *Discussions on legality in national law*

There has been no legal challenge, as yet, to UK implementation of the PWD. There are no court cases where litigants have sought to do so and no serious discussion of the same in legislative debates.

There have been a number of cases relating to the scope of provisions amended in 1999. These explain that the scope of the extraterritorial provisions amended in 1999 to comply with the PWD have effect even as regards those persons who are not posted workers. The leading authority is the judgment of Lord Hoffmann in the House of Lords in *Lawson v Serco Ltd*, with which the four other Law Lords sitting concurred. In that case, it was noted that section 196 of the Employment Rights Act 1996 had been amended so as to comply with the PWD, but that the territorial scope of section 94(1) of that Act (relating to unfair dismissal) had to be regarded as a discrete matter of statutory interpretation.³² It was acknowledged that unfair dismissal was not covered by the ‘mandatory nucleus’ in Article 3(1) of the PWD, but the Court accepted that section 94 could nonetheless be said, by virtue of the wording of the statute, to apply to a limited category of expatriate employees beyond the scope of situations envisaged for compliance with the PWD.³³ It is evident that the House of Lords considered that the PWD provided merely a floor of rights above which any EU Member State was free to provide more extensive protections. This is evident from Lord Hoffmann’s conclusions on ‘double claiming’:³⁴

‘Finally I should note that in the case of expatriate employees, it is quite possible that they will be entitled to make claims under both the local law and section 94(1). For example, the foreign correspondent living in Rome would be entitled to rights in Italian law under the Posted Workers Directive and although the Directive does not extend to claims for unfair dismissal Italian domestic law may nevertheless provide for them. Obviously there cannot be double recovery and any compensation paid under the foreign system would have to be taken into account by an employment tribunal.’

This authority continues to be applied. An example is the recent unreported case of *British Airways Plc v Ms E C N Mak & Others*,³⁵ where the Employment Appeal Tribunal took note that: ‘It is right to say that the change effected by the 1999

³¹ [2010] EWCA Civ 4, unreported judgment of 14 January 2010 at para. 47: ‘The truth... is that the Irish company has no employees lawfully present as such in Ireland and has posted none to the UK. The whole thing is a charade...’

³² *Lawson v Serco Ltd* [2006] 1 All E.R. 823; [2006] ICR 250; [2006] I.R.L.R. 289 at para 14 and para 27.

³³ Applied in *Leslie Anderson v Stena Drilling Pte Limited*, unreported, No. UKEATS/0080/04/RN, Employment Appeal Tribunal, 17 August 2006, 2006 WL 2524780 before The Honourable Lady Smith (Sitting Alone).

³⁴ *Lawson v Serco Ltd* [2006] 1 All E.R. 823; [2006] ICR 250; [2006] I.R.L.R. 289 at para 41..

³⁵ Appeal No. UKEAT/0055/09/SM, Employment Appeal Tribunal, 20 January 2010, unrep., at paras 26 – 28.

Regulations (SI 3163/1999), initially limiting the exclusion in [section 10(1) of the Sex Discrimination Act 1975 and section 8(1) of the Race Relations Act 1976] by removing the word ‘mainly’ from the expression working ‘wholly or mainly outside Great Britain’ was prompted by the PWD. The explanatory note to those Regulations, to which Ms Tether drew our attention, is helpful. It explains that the Regulations extend the application of the relevant provisions to posted workers, as defined in the PWD (Directive 96/71/6C).’ However, the case concerned cabin crew on a route between Hong Kong and the UK and the issue as to whether these employees were ‘posted workers’ was considered, ultimately to be ‘sterile’. ‘Whether or not the Claimants are to be regarded as posted workers is nothing to the point. Section 10(1) does not restrict its protection to posted workers. The Directive may have caused the original amendment to the legislation, but it applies equally to all employees who are covered by s.10(1).’ There is again no suggestion in that case that UK law is in breach of EU law in providing more extensive protection than that available under the PWD.

* *Discussions on conformity with EC/EEA law*

The 2003 Commission Communication on the implementation of the PWD³⁶ took the view that the UK had not adequately transposed the Directive into national law. The posting situations covered and the rights derived from the PWD were not clearly defined in national law and the jurisdiction clause in Article 6 of the Directive was not properly implemented. In particular, the Commission referred to two recent European Court of Justice cases, *Commission v Greece*³⁷ and *Commission v Netherlands*.³⁸

Nevertheless, it is evident that the Labour Government (at that time still under Tony Blair) had no intention of altering the UK legal position. The then Minister for Small Business and Enterprise at the Department of Trade and Industry, Nigel Griffiths, relied upon the general principle, said to be established by the ECJ in those cases, that ‘transposition of a Directive need not require a separate legal instrument’, provided that:

- national law guarantees that national authorities will effectively apply the Directive in full
- the legal position is sufficiently clear and precise; and
- individuals are made fully aware of their rights and, where appropriate, may rely upon them before the national courts.’

He therefore contended that there was no clear case for reassessment of UK transposition of the PWD.³⁹

By November 2004, it was evident that the Commission had not contacted the Government on this matter and the then Minister for Employment Relations, Consumers and Postal Services at the Department of Trade and Industry, Gerry Sutcliffe, was adamant that this was because UK law was in compliance with the PWD.⁴⁰

³⁶ Commission Communication on the implementation of Directive 96/71/EC (Posting of Workers) in the Member States COM(03)438.

³⁷ Case C-365/93 *Commission v Greece* [1995] I ECR 499.

³⁸ Case C-144/99 *Commission v Netherlands* [2001] I ECR 3541.

³⁹ Select Committee on European Scrutiny, Thirty-Third Report, 25 July 2003.

⁴⁰ Select Committee on European Scrutiny, First Report, Minister’s Letter of 17 November 2004.

Following the Commission Communication of 2006,⁴¹ the Government made clear its position that the PWD had been ‘fully implemented’ in the UK because ‘[a]ll employment law applies to workers posted here’.⁴² There was no appreciation that the UK was confined to the nucleus of requirements in Article 3(1) of the PWD.

** Effects on/for social partners and industrial relations*

It seems that it was only after the PWD was implemented that the impact of posting of workers on job prospects for British workers and the issue of undercutting of local wages was raised in earnest in Parliamentary debates. For example, in 2004, questions were asked as to the impact that the PWD was having on ‘(a) the job prospects for British workers in the United Kingdom and (b) the wage levels of migrant workers in the United Kingdom. Mr Sutcliffe was again charged with the responsibility to respond stating that: ‘We have no reason to believe that its implementation has adversely affected the job prospects of British workers in the UK. Unemployment in the UK fell from 5.9 per cent in the three months ending October 1999 to 5.0 per cent in the three months ending October 2003 (ILO Unemployment Figure, Labour Force Survey ONS). UK employment rights are applicable to all workers, regardless of country of origin, so migrant workers are protected in the same way as other workers by the National Minimum Wage.’⁴³

It was clear that trade unions were not wholly satisfied with the manner in which the PWD had been implemented, especially in relation to the lack of provision made under Article 3(8) for collective agreements in the construction sector. There was a notable lobby seeking reform to protect the jobs of British construction workers in the UK.⁴⁴ This issue arose in Parliamentary debates in December 2003, Mr Sutcliffe denying that any implementation of the PWD in this matter would be appropriate given the UK’s ‘voluntarist system of collective employment relations’. He did however confirm that he met the TUC ‘periodically to discuss various issues, including matters relating to the construction industry’ and that he would meet with the Transport and General Workers Union in two days’ time and would be ‘discussing the Posting of Workers Directive among other issues’.⁴⁵

By 2007, the TUC was concerned by the pending *Viking* and *Laval* litigation: ‘The TUC does not believe that social policy and labour law or industrial relations systems adopted in Member States should be subject to or “trumped” by free movement principles.’⁴⁶ At that same time, the TUC was voicing concern that the UK Government had failed to implement the PWD effectively. Their statement to the Commission indicated that: ‘The lack of separate posting of worker regulations means that awareness of the protections for posted workers is very limited in the UK. The

⁴¹ Commission Communication: Guidance on the posting of workers in the framework of the provision of services COM(06) 159.

⁴² House of Commons, Select Committee on European Scrutiny, Thirtieth Report, 4 April 2006, para. 13.8.

⁴³ *Hansard*, House of Commons, 7 January 2004, Col. 380W.

⁴⁴ Material for lobby held on 2 December 2003: http://brickman.dircon.co.uk/cons_lobby.htm, cited at V. Keter, ‘Posted Workers’ House of Commons Library, Standard Note SNB/BT/301 2 February 2009, 8.

⁴⁵ *Hansard*, House of Commons, Written Answers for 9 December 2003, Col. 451W.

⁴⁶ TUC Submission to the European Commission, House of Lords – European Union – Minutes of Evidence, March 2007.

absence of a Government agency gathering information relating to the number of workers posted to the UK at any one time also undermines the enforcement of the Directive. Further the TUC has concerns about the narrow territorial tests which apply to different UK employment legislation, which have the effect of excluding posted workers from their entitlements under the Directive. The absence of legally enforceable sectoral agreements in some industries, in particular construction, means that the spirit of the Directive is not observed within the UK. Migrant workers are often paid less than UK workers for doing the same job.⁴⁷ Nothing seems to have been done to address these concerns in anticipation of the ECJ judgments.

(4) Post the *Laval* Quartet

(a) Problem issues at the current stage

At present in the UK, there are at least three crucial issues which remain unresolved. The first is whether the transposition of the PWD into UK domestic law is in violation of the principles established in the *Luxembourg* judgment. The second is whether there is now any scope in the UK for terms of public procurement to make reference to terms established by collective agreement following the judgment in *Rüffert*. The third is the extent to which the ability of trade unions to call industrial action is curtailed by the principles stated in the *Laval* judgment. The linkage between these issues and the Services Directive 2006/123/EC will also be addressed. This paper concludes by discussing the implications of the latter as regards British industrial relations, in the light of the apathy of the two main political parties in relation to these issues.

(b) Legality

**Legality of transposition of PWD into UK law following Luxembourg*

Legislation implementing the PWD in the UK would more generally seem to be in actual breach of the reading of that Directive in *Laval* and *Luxembourg*. Current UK legislative protection for posted workers goes beyond the ‘nucleus of mandatory rules’ in Article 3(1) of the PWD. This is in clear breach of the interpretation adopted in respect of Article 3(7) of the PWD in *Laval*. While that provision states that paragraphs (1) to (6) of Article 3 ‘shall not prevent application of terms and conditions more favourable to workers’, the ECJ has indicated that it is only to apply:

- (i) to the situation where service providers from another EU member state voluntarily sign a collective agreement in the host state which offers superior terms and conditions to employees; and
- (ii) to the situation where the home state laws or collective agreements are more favourable to workers.⁴⁸

Nor does it seem that the UK rely on the ‘public policy’ exception in Article 3(10), which the ECJ considers can be ‘relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society’, to which end the EU member state

⁴⁷ *Ibid.*

⁴⁸ C. Barnard, *The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law* (2009) 38(1) *Industrial Law Journal* 122, 127.

relying on the provision must present ‘appropriate’ and ‘precise’ evidence, indicative of the expediency and proportionality of the measure taken.⁴⁹

The decision in *Luxembourg* certainly casts doubt on whether current UK legislation, which enables posted workers to make a claim in respect of a ‘written statement’ and to challenge discrimination on grounds of part time and fixed term work. Since this protection has to be regarded as being adequately implemented in the home state, there are no grounds to provide additional protection in the host state.⁵⁰ Nor does it seem that a conflict of laws approach, based on the terms of the Brussels Regulation,⁵¹ necessarily assists posted workers, given that Article 19 indicates that an employer originating from an EU Member may be sued either in the courts in which the employer is domiciled or where the employee habitually carried out work. Again, this provision can only be overcome by consent of the employer to an agreement on jurisdiction, which may be difficult to obtain.⁵² Catherine Barnard’s conclusion is that ‘it is very unlikely that the UK will be able to continue applying all of its labour laws to posted workers as a general rule’ and this seems to be fair.⁵³ Her prognosis is that, after the politically sensitive Irish referendum on the Lisbon Treaty, both Irish and UK implementation of the PWD may well be called into question by the European Commission. As noted above, there has been no litigation on this issue as yet in the UK and no sign that the UK Government will take any anticipatory legislative action on this issue.

Barnard reports on how the UK Government responded, prior to the decision in *Luxembourg*, to a pre-infraction letter from the Commission.⁵⁴ She notes the argument put forward that the rights set out in the ERA and elsewhere are usually subject to a qualifying period and therefore truly ‘temporary’ posted workers are usually excluded from protection. This explanation must be understood in the light of Article 2(1) of the PWD, which states that a ‘posted worker’ means ‘a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works’. As we have no clarity from case law of the ECJ as to what will constitute ‘a limited period’, the UK’s argument may have some weight, but perhaps not in respect of entitlement to a written statement which is not subject to the qualifying periods imposed elsewhere in relevant legislation.

It might also be observed that this rather bold stance is somewhat belied by the statement made in August 2007 by Pat McFadden, Minister of State for Employment Relations and Postal Affairs for the new Department for Business, Enterprise and Regulatory Reform, made to the House of Lords European Union Committee. In that statement, again in advance of the judgment delivered in the *Luxembourg* case, it seems that the Government had begun to appreciate that the way in which the PWD was implemented in the UK was, ‘in effect, an “over-implementation”’ and that they were ‘unlikely to make a compelling argument on the grounds of public policy provisions’, such that ‘our arrangements are technically incompatible with the

⁴⁹ *Luxembourg*, paras. 50 - 51.

⁵⁰ *Luxembourg*, paras 57 - 58.

⁵¹ Brussels Regulation 44/2001 (OJ [2001] L12/1)

⁵² C. Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law’ (2009) 38(1) *Industrial Law Journal* 122, at 131-2.

⁵³ *Ibid.*, 132.

⁵⁴ *Ibid.*

Directive'. Moreover, the Government would 'undertake to scrutinise the full range of employment law to identify what goes beyond the provisions of the directive'.⁵⁵ In 2009, a House of Commons report noted that, rather than the UK, 'the European Commission is currently reviewing the application and enforcement of the Directive'.⁵⁶ This appears to have been treated as a reason for UK inaction.

**Campaign for public procurement – the effect of Rüffert?*

There has been a campaign for public procurement to be utilised to ensure fair wages for building contractors in connection with the Olympic Games, and the use of British workers, rather than agency workers.⁵⁷ However, the current UK Government has yet to agree to the imposition of these terms and such measures would go beyond those principles formally agreed in 2008 between the UK Trades Union Congress (TUC) and the London 2012 Organising Committee (LOCOG).⁵⁸ Moreover, the case of *Rüffert* would seem to preclude such a measure. There have been some impressive arguments suggesting that apparent barriers to use of public procurement to hire local labour or impose other terms and conditions of employment are capable of being overcome,⁵⁹ but this would seem to require some active commitment on the part of the UK government to overcome such obstacles. This is notably lacking. Keith Ewing has argued for the Government to initiate legislation under Article 3(8) of the PWD, which provides that 'in the absence of a system for declaring collective agreements or arbitration awards to be of universal application' (as in the UK),

'Member 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 throughout national territory...'

In February 2009, an Early Day Motion was put before the House of Commons specifically requesting such an initiative, stating that the PWD is 'woefully inadequate to deal with present trends' towards subcontracting designed to evade hire of British and local labour: 'it is being misinterpreted by many construction companies to their advantage'. The motion called on 'the Government to heed the call of the construction trade unions that a solution to the current problems will only be found when a register of mandatory universally applicable collective agreements is established, which would end the exploitation and undercutting of workers in this and other industries in

⁵⁵ *Hansard*, House of Lords, Correspondence with Ministers May to October 2007, European Union Committee 'Posting of Workers to Another Member State: Guaranteeing the Protection of Workers' (11052/07).

⁵⁶ V. Keter, 'Posted Workers' House of Commons Library, Standard Note SNB/BT/301 2 February 2009, 2.

⁵⁷ 'Construction Workers Protest Over Jobs At 2012 Olympic Site', 6 May 2009, available at: http://www.build.co.uk/construction_news.asp?newsid=93200

⁵⁸ 'London 2012 and UK unions agree to work together for 'inspirational' Games' available at: <http://www.london2012.com/news/media-releases/2008-09/london-2012-and-uk-unions-agree-to-work-together-for-inspirational-games.php>.

⁵⁹ C. McCrudden, *Buying Social Justice* (Oxford: Oxford University Press, 2006); C. Barnard, "'British Jobs for British Workers": The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' (2009) 38 *Industrial Law Journal* 245.

the UK and elsewhere in Europe.’⁶⁰ However, it is evident that the CBI is not convinced by arguments that collective bargaining arrangements should apply to posted workers.⁶¹ Moreover, the UK Government has denied that any such reform is contemplated.⁶²

**Restrictions on industrial action by trade unions following Laval*

Trade unions cannot organise industrial action to address the terms and conditions of posted workers, despite the express statement in the *Laval* judgment that ‘in principle’ trade unions have the right to initiate secondary action to prevent ‘social dumping’.⁶³ The Court, in *Laval*, has restricted the scope of legitimate objectives in the context of a dispute over recognition of a union in respect of posted workers. In this setting, the Court treated as illegitimate industrial action aimed at establishing workplace bargaining, which would then lead to negotiations over minimum pay. This was seen as being too uncertain and therefore too onerous for the provider of services,⁶⁴ in breach of the PWD.⁶⁵ This approach would seem to have since been affirmed by subsequent judgments delivered in the *Rüffert* and *Luxembourg* cases.⁶⁶

This, then, constitutes a key exception to the basis on which UK legislation establishes the existence of a lawful ‘trade dispute’, which determines the legitimacy of objectives of industrial action. The relevant UK statutory provision makes specific reference to an entitlement to take industrial action which relates wholly or mainly to ‘the recognition by employers or employers’ associations of the right of a trade union to represent workers’ in negotiation or consultation or other procedures relating to terms and conditions of employment.⁶⁷ The employers of posted workers will, it seems, be exempt from this fundamental tenet of UK labour law, in that it would seem that the Posted Workers Directive prevents a trade union from seeking to place pressure on them to ‘recognise’ the union and enter into collective bargaining. Indeed, trade unions seem to be discouraged from calling such action,⁶⁸ in particular due to the threat of potentially unlimited liability which may arise if they do so.⁶⁹

⁶⁰ Early Day Motion EDM 789, Alan Meale, 11 February 2009.

⁶¹ *Hansard*, House of Commons, Home Affairs Committee, ‘Managing Migration: Points-based System’ Examination of Witness (Questions 104 – 119), per Mr John Cridland, Q106 and Q112.

⁶² House of Commons, Oral Evidence of 9 and 11 March 2009 before European Scrutiny Committee on ‘Free Movement of Workers in the EU’, Fourteenth Report of Session 2008-9, Report, together with formal minutes and oral evidence, printed 25 March 2009, p. 5.

⁶³ *Laval*, at para. 107.

⁶⁴ *Viking*, para 110. One would expect the Court to take the same view of any attempt to impose compulsory statutory recognition on the employer of posted workers, seeking to supply services abroad. Cf. TULRCA, Schedule A1.

⁶⁵ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] O.J. L18/1.

⁶⁶ P. Davies, ‘Case C-346/06 *Rüffert v Land Niedersachsen* [2008] IRLR 467 (ECJ)’ (2008) 37 *Industrial Law Journal* 293.

⁶⁷ TULRCA, section 244(1), especially para. (g).

⁶⁸ See *Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No. 87* drafted by John Hendy QC, available at: <http://www.balpa.org/Document-Library/Industrial-Issues/BALPA-ILO-Application-2009-01-26.aspx> (Hereafter *Application by the British Air Line Pilots Association to the International Labour Organisation*).

⁶⁹ K. Apps, ‘Damages Claims Against Trade Unions after Viking and Laval’ (2009) 34 *European Law Review* 141.

The situation would appear to be that the foreign service provider which hires posted workers may voluntarily enter into an agreement with a trade union, but cannot be subjected to industrial action pushing for negotiations towards such a collective agreement. This will make it almost impossible for the terms and conditions of posted workers to be governed by UK collective agreements, given that there is no mechanism under UK law to declare collective agreements or arbitration awards ‘universally applicable’ or to require that terms and conditions are set for posted workers under ‘generally applicable’ collective agreements or those concluded with the ‘most representative’ employer.⁷⁰

It is just possible that UK courts, when applying the ECJ judgment in *Laval* could be mindful of two recent cases decided at Chamber level by the European Court of Human Rights, which indicate that interference with the right to strike needs to be justified with reference to article 11(2) of the European Convention on Human Rights 1950.⁷¹ However, the treatment of these cases in the Court of Appeal case of *Metrobus*⁷² suggests that the UK courts do not give much weight to them. There, the complex statutory procedural requirements that are strictly imposed on trade unions which seek to call industrial action were considered to be proportionate and justifiable under Article 11(2). It should be added the members of the Court did not seem to be even convinced that such justification was strictly necessary. So, while the ILO Committee of Experts considers that the way in which the *Laval* judgment interacts with UK labour legislation is such as to violate freedom of association and Convention No. 87, this is not necessarily the view which UK courts are likely to endorse.⁷³

(c) The Services Directive connection

In 2005, in the context of consideration of the draft Services Directive, the Report of the House of Lords Select Committee on European Union concluded that: ‘The only way ... that workers from a different Member State would be able to undercut host country workers is if it were customary for employment to be provided on more generous terms than the legal minimum.’ The Committee accepted that in the UK ‘there are some examples of such collective agreement that offer better employment conditions than the minimum required and which are not legally binding agreements’. It was accepted by the Committee that concerns of undercutting were related to the PWD and the extent that this ‘fails to address the particularity’ of the national system of guaranteeing employment rights. This was not the fault of the draft Services Directive.⁷⁴

⁷⁰ See M. Hall, ‘Posted Workers’ (2003) available on <http://www.eurofound.europa.eu/eiro/2003/06/tfeature/uk0306106t.htm>.

⁷¹ *Affaire Dilek et Autres v Turquie* (App nos 74611/01, 26876/02 et 27628/0) Judgment of 17 July 2007 (available only in French); and *Enerji Yapi-Yol Sen v Turkey* (App no 68959/01) Judgment of 21 April 2009 (available only in French).

⁷² [Metrobus v Unite the Union \[2009\] EWCA Civ 829; \[2009\] WLR \(D\) 279.](#)

⁷³ See comment of the Committee of Experts 2010 on UK compliance with ILO Convention No. 87 – attached as Appendix 1.

⁷⁴ House of Lords, Select Committee on European Union, Sixth Report, Chapter 7: ‘Will There Be a Race to the Bottom?’, 2005, paras 143 – 147.

On the issue of social dumping, the House of Lords Select Committee further concluded that: ‘The Posting of Workers Directive largely deals with fears expressed either of “social dumping” or of “a race to the bottom”. We think there are safeguards built into the draft Directive and the Posting of Workers Directive that significantly reduce these concerns as far as employed workers are concerned. **The Services Directive would not change the present situation for posted workers in the UK or any other Member State where statutory minimum employment standards are set. Just as now, under the services directive there would be some workers employed with collective agreements above the statutory minimum and others who were not and were therefore cheaper to employ.** The Commission told us that there was a need to make clear that the directive could not “lead to a situation where companies can bring their labour force from a cheaper country and create a sort of unfair competition.. for instance on a building site (Q447). **We do not believe, however, that it is for the directive to get involved in issues of labour –employer collective bargaining relations or in matter such as minimum wage legislation. These are matters for individual Member States and their institutions.**’⁷⁵

In January 2006, the Parliamentary Under-Secretary of State in the Department of Trade and Industry, Lord Sainsbury of Turville confirmed that ‘The EU Services Directive is still under negotiation. One of the UK’s top negotiating aims is to maintain high standards of protection for workers. Under the current proposal, core host country rules, such as minimum wages and health and safety standards, will continue to apply to posted workers who work temporarily in the UK for a foreign service provider.’⁷⁶ It now seems accepted in the UK that the Services Directive has no bearing on the PWD and the two are seldom referred to in conjunction by the Government. Rather, the UK Government is now determined to encourage UK employers to utilise the opportunities that the Services Directive can afford, and has set up ‘an online ‘Point of Single Contact’ for service providers to find out about doing business in the UK and apply for licences online’.⁷⁷

(d) Effects on industrial relations

The effects of unions being unable to call industrial action when posted workers are involved in the dispute has led to a wave of unofficial industrial action. One example was the Alstom dispute, which started in 2008 and remains the subject of contention. This concerned subcontracting arrangements involving construction at two new power stations; Staythorpe in Nottinghamshire and Grain in Kent.⁷⁸ It has only just been revealed that, as suspected by the union, GMB, one of the subcontractors, an Italian company, Somi, was paying its posted workforce substantially less than it had claimed (by 1,300 euros per month) thereby enabling undercutting of local wages.⁷⁹

⁷⁵ *Ibid.*, para. 202. Note that this is the Select Committee’s emphasis.

⁷⁶ *Hansard*, House of Lords, 26 June 2006, Col. WA197.

⁷⁷ <http://www.berr.gov.uk/whatwedo/europeandtrade/europe/services-directive/page9583.html>.

⁷⁸ Mentioned briefly in C. Kilpatrick, ‘Laval’s Regulatory Conundrum: Collective Standard-setting and the Court’s New Approach to Posted Workers’ (2009) 34(6) *European Law Review* 844; and C. Kilpatrick, ‘British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law’ LSE Law, Society and Economy Working Papers 16/2009.

⁷⁹ GMB press statement, ‘Independent Audit Confirms Underpayment of Overseas Workers on Staythorpe Site by Italian Contractor Somi:’ 19 January 2010: <http://www.gmb.org.uk/Templates/PressItems.asp?PrintFriendly=True&NodeID=99462>.

The most notorious example of a dispute involving posted workers is the industrial action taken by workers at the East Lindsey Oil Refinery and in support of their action by other workers throughout the UK. This action commenced in January 2009 following a dispute over the ability of UK workers to apply for jobs which were to be performed in the UK. Their employer at the Lincolnshire oil refinery was TOTAL, a French company, which awarded an Italian company, IREM, the contract to build the plant's de-sulphurisation unit. IREM was awarded the contract on the basis that it undertook to supply its own skilled workforce, consisting of Portuguese and Italian workers, and pay them equivalent wages to the local workforce. These were notably jobs for which local UK workers were not eligible to apply. The workers from Portugal and Italy were brought in on a barge moored in nearby Grimsby, where they would live while performing services for IREM. In effect, they were posted workers, although not agency workers. The industrial action taken at the East Lindsey Oil Refinery was specifically aimed at ending their employment, so that British workers could have the opportunity to do the same work. The incident sparked a number of sympathy walk outs in Grangemouth Oil Refinery, Aberthaw power station, near Barry, South Wales, and a refinery in Wilton near Redcar, Teeside, to name only a few.⁸⁰ The dispute gained national and international media coverage, as workers protested under banners which read 'British Jobs for British Workers'. The far right British National Party (BNP) supported and encouraged the action,⁸¹ even though local activists have denied the significance of BNP involvement.⁸²

In response, TOTAL issued a statement to the effect that:

'We recognise the concerns of contractors but we want to stress that there will be no direct redundancies as a result of this contract being awarded to IREM and that all IREM staff will be paid the same as the existing contractors working on the project. It is important to note that we have been a major local employer for 40 years with 550 permanent staff employed at the refinery. There are also between 200 and 1,000 contractors working at the refinery, the vast majority of which work for UK companies employing local people.

On this one specific occasion, IREM was selected, through a fair and competitive tender process, as the most appropriate company to complete this work. We will continue to put contracts out to tender in the future and we are confident we will award further contracts to UK companies.'⁸³

The position taken by TOTAL was supported by the Labour Government. Peter Mandelson spoke out in the House of Lords in support of EC law governing free movement of workers and services, pointing out how much British workers and business had to gain from the current legal position.⁸⁴

⁸⁰ R. Booth, 'Mediators called in as wildcat strikes spread across UK', *The Guardian*, 31 January 2009.

⁸¹ [BNP Supports Wildcat Strike at Coryton Refinery in Essex](http://bnp.org.uk/category/news/british-jobs-for-british-workers/), see: <http://bnp.org.uk/category/news/british-jobs-for-british-workers/>.

⁸² <http://libcom.org/history/2009-strike-lindsey-refinery-struggle-entangled-nationalism>; and it is claimed that BNP members were thrown off the picket lines: <http://www.socialistparty.org.uk/articles/7254>.

⁸³ A. Gillian and A. Sparrow, 'Strikes spread across Britain as oil refinery protest escalates' *The Guardian* 30 January 2009.

⁸⁴ Statement by Lord Mandelson, House of Lords Deb. 2 February 2009, Vol. 707, C472-4. Reported by A. Sparrow, 'Foreign workers row: Mandelson defends EU labour laws', *The Guardian*, 2 February 2009.

In the House of Commons, Minister for Employment Relations and Postal Affairs, Pat McFadden, reported that he had referred the dispute to ACAS to examine the ‘accusations being aired’. If laws had been broken, then he was committed to ‘take action’.⁸⁵ He noted that: ‘Two key accusations have been made in recent days. The first is that the use of labour from overseas leads to an erosion of wages and conditions for all concerned because these workers are paid less than UK workers. The second is that there is discrimination in recruitment practice against British workers’. He noted that both were denied by TOTAL.⁸⁶ The Government does not however seem to be interested in taking any action as regards underpayment of wages in the Alstrom dispute by Somi and one may wonder what would have been done if this could have been established in the more high profile East Lindsey dispute.

McFadden also added that: ‘The workers coming here from Italy and Portugal are protected by the EU posting of workers directive, which the UK has implemented fully. It guarantees those workers minimum standards, for example on pay and health and safety, and facilitates the free movement of services within the European Union – a vital market for British companies... Membership of the European Union and taking advantage of the opportunities for trade presented by the EU are firmly in the UK’s national interest... It is important that we respect and guarantee that principle, not least because it guarantees the right of hundreds of thousands of British workers and companies to operate elsewhere in Europe...’⁸⁷

A well-known Member of Parliament on the Conservative Front Bench, Ken Clarke, responded to Pat McFadden by asking: ‘will the Minister confirm with clarity whether the Government believe that the posting of workers directive is satisfactory and working fairly in our interests, or whether they are seeking amendments to it? That has been left quite unclear in all the interviews given by Ministers so far.’⁸⁸ Furthermore, Ken Clarke pointed to the irresponsible use by the Prime Minister Gordon Brown of the phrase ‘British jobs for British workers’ previously, adding that at the time ‘he was more concerned more with his job security than with anybody else’s job security in this country, and that we will all welcome the fact if he never repeats it, no Ministers ever repeats it and no such irresponsible statements are made by any member of the Government at any time in the future.’⁸⁹

Pat McFadden reiterated the Government’s claim that it had ‘fully implemented’ the PWD and observed that ‘as for many such directives, the European Commission has established a group to look at its operation, and we will see if it makes any recommendations’.⁹⁰ This suggests that the Government’s response to its blatant non-compliance is to wait to see whether there will be any amendment to the PWD recommended by the Commission before there is amendment to national legislation. Moreover, he claimed that what the Prime Minister had said ‘quite rightly, was that, as a country we needed to do more to equip the British workforce for the jobs, skills and industries of the future’.⁹¹ In response to questions from Labour MPs, Pat

⁸⁵ *Hansard*, House of Commons Debates, 2 February 2009, Col. 579.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, Col. 580.

⁸⁸ *Hansard*, House of Commons Debates, 2 February 2009, Col.581, per Kenneth Clarke.

⁸⁹ *Ibid.*

⁹⁰ *Hansard*, House of Commons Debates, 2 February 2009, Col.581, per Pat McFadden.

⁹¹ *Ibid.*

McFadden also stressed that ‘it is legal for a European company to contract for work and to say it will use its permanent employees to carry it out’. The issue of discrimination would only arise where new vacancies were advertised and not made available to British workers.⁹² In relation to reports of the dispute at Alstom, which was alleged to be subcontracting to evade payment of a national collective agreement, the Minister indicated that ACAS would also look into that claim.⁹³ However, it is notable that now that new information has come to light on the Alstom case, no statement has been made by the current Government.

These statements, notably, did not stem a flood of criticism from left wing MPs on the Labour back benches. Notable amongst these was an ‘Early Day Motion’ presented by Jon Cruddas which called on the Government ‘to support the European TUC proposals for a Social Progress Protocol to be attached to the EU Treaty..’ and ‘to initiate effective reform of the EU Posted Workers Directive so that employers posting workers to the UK are required to observe the terms of appropriate collective agreements as well as minimum terms laid down in statute’. That motion also recognised that ‘what motivates members of the GMB, UNITE and other trade unions is not protectionism or xenophobia but a desire for fairness’ and sought to congratulate ‘their refusal to allow the British National Party to infiltrate into the action’.⁹⁴

The Advisory Conciliation and Arbitration Service (ACAS) *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute* (2009) was not able to confirm parity of pay levels. ACAS reported instead that (at para. 11): ‘ACAS inspected the contract documentation which commits IREM to pay the going rate, but IREM were not yet in a position to provide evidence that they were doing this.’

ACAS concluded (at para. 23) that there was, therefore no basis on which to conclude that IREM or TOTAL were acting unlawfully, or in a way which could give rise to an allegation of social dumping. However, other commentators have observed that the dispute raised important questions as to the appropriateness of the employers’ conduct, which have gone unanswered.⁹⁵

The Government decided to take this to mean, in their evidence to the House of Commons that ‘[t]he ACAS report on the dispute at the Lindsey oil refinery had found that the employees of the Italian subcontractor, IREM, had the same terms and conditions as local workers under the National Agreement...’⁹⁶

The initial industrial action surrounding the dispute at the East Lindsey Oil Refinery was settled without legal action being taken against the workers concerned and

⁹² *Ibid.*, Col. 583, per Pat McFadden.

⁹³ *Ibid.*, Col. 584, per Pat McFadden.

⁹⁴ Early Day Motion EDM 677, Jon Cruddas, 3 February 2009.

⁹⁵ R. Arthur, ‘*Rüffert and Luxembourg: The Posted Workers’ Directive and ILO Convention No. 94*’ in K.D. Ewing and John Hendy (eds), *The New Spectre Haunting Europe – The ECJ, Trade Union Rights and the British Government* (Liverpool: Institute of Employment Rights, 2009), at 48. Cf. media coverage which reported that ACAS had found that union fears were groundless, e.g. S. Coates, ‘Anti-foreign strikes branded baseless by ACAS’, *The Times*, 17 February 2009.

⁹⁶ House of Commons, Oral Evidence of 9 and 11 March 2009 before European Scrutiny Committee on ‘Free Movement of Workers in the EU’, Fourteenth Report of Session 2008-9, Report, together with formal minutes and oral evidence, printed 25 March 2009, p. 5.

without their dismissal. A deal was struck whereby 102 jobs were to be made available on-site for which British workers could apply.⁹⁷ However, in June 2009 industrial unrest occurred again, when 51 redundancies were made at the Lindsey Oil Refinery in what workers believed was a breach of the deal reached when they returned in February 2009. The workers responded with a spontaneous walk out in protest, without union authorisation or endorsement, and were given an ultimatum to return to work or lose their jobs. Those who did not return were sacked and told to reapply for their jobs. Again, this decision by TOTAL generated a wave of sympathetic action across the UK. Nevertheless, the dispute was, once more, settled without dismissal or further recourse to legal action by the employer and the redundancies made were reversed.⁹⁸

It may be that the employer in this dispute, TOTAL, was not able to avail itself of EC law to bring any kind of action in reliance on the ECJ judgments in *Viking* and *Laval*, as these only contemplate liability of trade unions for industrial action and not private individuals. The former can be regarded as ‘quasi-regulatory bodies’, while individual workers taking wild cat action cannot perform this function.⁹⁹ It should, however, be noted that it was open to TOTAL to seek an interim injunction to prevent the wildcat strike taking place, on the basis that the action taken was in breach of domestic UK common law, namely certain economic torts.¹⁰⁰ Moreover, other employers which were affected by secondary industrial action could have done likewise. They would seem not to have taken such action because it was not conducive to harmonious or productive industrial relations where there was a highly unionised (and activist) workforce. Nevertheless, it is also worth noting that the unions did not wish to risk associating themselves with the industrial action taken, or even calling for a formal ballot on the subject matter of the dispute. The risks of unlimited liability, following *Laval*, made this too dangerous a path to be contemplated.

(e) *Governance perspectives*

It might seem that, in terms of scale, the PWD poses only a small problem for the UK. If the Government is correct, there are 47,000 UK posted workers on contracts in other EU countries and only 15,000 non-British posted workers in the UK.¹⁰¹ However, the PWD and the jurisprudence of the ECJ have had some significant effects on UK industrial relations. In particular, limits have been placed on the competence of unions to represent the legitimate concerns of their members and thereby their capacity to encourage lawful industrial action and discourage wildcat

⁹⁷ P. Wintour, M. Wainwright and A. Stratton, ‘Refinery strike is over - but jobs fight goes on’, *The Guardian*, 5 February 2009.

⁹⁸ G. Wearden, ‘Deal ends Lindsey oil refinery dispute’, *The Guardian*, 26 June 2009; P. Stiff, ‘Lindsey dispute settled as workers reinstated’, *The Times*, 26 June 2009.

⁹⁹ K. Apps, ‘Damages Claims Against Trade Unions after Viking and Laval’ (2009) 34 *European Law Review* 141 at 147. See also broadly in support of this view, P. Syrpis and T. Novitz, ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation’ (2008) 33 *European Law Review* 411 at 420; and see A. Dashwood, ‘Viking and Laval: Issues of Horizontal Direct Effect’ in C. Barnard (ed.), (2007-8) *The Cambridge Yearbook of European Legal Studies* 463 at 536.

¹⁰⁰ For the economic torts which potentially apply in this scenario, see S. Deakin and G. Morris, *Labour Law*, Fifth Edition (Oxford: Hart Publishing, 2009) at 899 – 917 and on interim injunctions (discussed further below) see 943 - 949.

¹⁰¹ *Hansard*, House of Commons, ‘The Prime Minister – Liaison Committee’, 12 February 2009, Q115 per Michael Connarty.

strikes. The scope for autonomous industrial relations and systems of bargaining has declined, as indeed Brian Bercusson predicted it might if the wrong result was reached in the *Viking* and *Laval* cases.¹⁰²

In Parliamentary debates, there is evidence of serious concern with the ECJ jurisprudence voiced by backbench MPs: ‘The *Viking* and *Laval* cases, which were determined in the European Court of Justice recently, clearly signal that we should hold a debate on a neo-liberal Europe, where corporations can move across the continent uncontested by trade unions.’¹⁰³ ‘In other words, an employer’s right to freedom of establishment trumps the union’s right to strike’.¹⁰⁴

There has also been fierce criticism of the Polish and UK Protocol to the Lisbon Treaty regarding Part IV of the EU Charter of Fundamental Rights as this ‘seems to give a clear nudge and wink to the ECJ that it is right to interpret the hierarchy of rights and responsibilities as it has so far, and that in the minds of at least the British and Polish Governments, it is right to give primacy to the right of companies to trade, sometimes oppressively in relation to their work force, rather than to the right of workers to take collective action’.¹⁰⁵

The UK Labour Government says that it is still waiting from news within Brussels regarding potential responses to the *Laval* and other judgments and review of the PWD: ‘As for the posted workers directive, an expert review has been set up in the European Union to look at the impact of the *Laval*, *Viking* and other judgments, and a group of employers and the work forces are also meeting to review that at the same time. When they reach their conclusions, we will look at what they have to say.’¹⁰⁶ It seems that the Government’s game is one of ‘wait and see’. There has been no official response to the comments of the ILO Committee of Experts on the Application and Conventions and Recommendations (appended to this paper) relating to the impact of *Viking* and *Laval* on UK labour law. As the Conservative Party are also silent on the subject of posted workers, it seems that no policy shift is likely to emerge at least until after the general election in May and any reform is proposed at European level. The *Laval* case seems to have undermined trade unions’ ability to provide democratic representation of workers’ interests. This result is now compounded by the current lack of interest expressed in this issue by any of the major UK political parties.

¹⁰² B. Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) 13 *European Law Journal* 279.

¹⁰³ *Hansard*, House of Commons, 28 January 2008, Col. 76, per Jon Trickett.

¹⁰⁴ *Hansard*, House of Commons, 5 February 2008, Col. 836, per Michael Meacher.

¹⁰⁵ *Hansard*, House of Commons, 5 February 2008, Col. 843, per Jon Trickett

¹⁰⁶ *Hansard*, House of Commons, 4 February 2009, Col. 842 per Gordon Brown; for reiteration of this view see *Hansard*, House of Commons, 5 February 2009, Col. 957, per Pat McFadden, Minister for Employment Relations and Postal Affairs: ‘We supported the European Commission’s proposals to ask its group of experts to examine the operation of the posted workers directive and to ask the social partners at European level to discuss the implications of recent European Court judgments.’ See also *Hansard*, House of Commons, 12 February 2009, Col. 2293W, per Pat McFadden, Minister for Employment Relations and Postal Affairs.

Appendix 1

United Kingdom

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (ratification: 1949)

The Committee notes the comments made by the British Airline Pilots Association (BALPA) dated 22 October 2008, supported by the International Transport Federation (ITF) and Unite the Union, and the Government's reply thereto. The Committee notes in particular that BALPA refers to two recent decisions of the European Court of Justice (ECJ), *International Transport Workers' Federation and the Finnish Seaman's Union v. Viking Line ABP (Viking)* and *Laval un Partneri v. Svenska Byggnadsarbetareförbundet (Laval)* which held that the right to strike was subject to restrictions under the European Union law where its effect may disproportionately impede an employer's freedom of establishment or freedom to provide services. BALPA asserts that these judgements have negatively impacted upon their rights under the Convention.

In particular, BALPA explains that it decided to go on strike, following a decision by its employer, British Airways (BA), to set up a subsidiary company in other EU States. While efforts were made to negotiate this matter, in particular the impact that the decision would have upon their terms and conditions of employment, all attempts were unsuccessful and BALPA members overwhelmingly voted to go on strike. The strike action was, however, effectively hindered by BA's decision to request an injunction, based upon the argument that the action would be illegal under *Viking* and *Laval*. In addition, BA claimed that, should the work stoppage take place, it would claim damages estimated at £100 million per day. Under these circumstances, BALPA did not follow through with the strike, stating that it would risk bankruptcy if it were required to pay the damages claimed by BA. BALPA expresses its deep concern that the application of *Viking* and *Laval* by the UK courts will result in injunctions against industrial action (and dismissal of workers) if a strike's impact on the employer is judicially determined to outweigh the benefit to workers.

The Committee notes the Government's indication in its reply that BALPA's application is misdirected and misconceived because any adverse impact of *Viking* and *Laval* would be a consequence of the European Union law, to which the United Kingdom is obliged to give effect, rather than of any unilateral action by the United Kingdom itself. The Government further asserts that BALPA's application is premature because it remains unclear what, if any, impact the *Viking* and *Laval* judgements would have on the application of trade union legislation in the United Kingdom. The Government adds that these judgements would not likely have much effect on trade union rights because they are only applicable where the freedom of establishment and free movement of services between Member States are at issue. Moreover, the impact of the principles they set forth may differ considerably depending upon the facts of the case. There have been no subsequent analogous cases at the ECJ level, nor have there been any decisions by the UK domestic courts as to whether and to what extent the new principles might represent an additional restriction on the freedom of trade unions to organize industrial action in the United Kingdom. Finally, the Government indicates that it is not obvious that the current

limit on damages in tort would be bypassed or overridden in a *Viking*-based claim since that limit has a sound basis in the protection of the freedoms of trade unions which would be taken into consideration if the limit were challenged as contrary to the European Union law.

The Committee first wishes to recall more generally its previous comments, in which it has noted the limitations on industrial action in the United Kingdom, including that it remains a breach of contract at common law for workers to take part in strike action and that trade union members are protected from the common law consequences (dismissal) only when the trade union has immunity from liability, i.e. when the strikes are in contemplation or furtherance of a trade dispute, which would not include secondary action or sympathy strikes (section 224 of the Trade Unions and Labour Relations (Consolidation) Act, 1992 (TULRA)). The Committee has asked the Government in this regard to indicate the measures taken or envisaged so as to amend the TULRA, with a view to broadening the scope of protection available to workers who stage official and lawfully organized industrial action.

With respect to the matter raised by BALPA, the Committee wishes to make clear that its task is not to judge the correctness of the ECJ's holdings in *Viking* and *Laval* as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers' freedom of association rights under Convention No. 87.

The Committee observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. The Committee has only suggested that, in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body (see 1994 General Survey on freedom of association and collective bargaining, paragraph 160). The Committee is of the opinion that there is no basis for revising its position in this regard.

The Committee observes with *serious concern* the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised. While taking due note of the Government's statement that it is premature at this stage to presume what the impact would have been had the court been able to render its judgement in this case given that BALPA withdrew its application, the Committee considers, to the contrary, that there was indeed a real threat to the union's existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless. Finally, the Committee notes the Government's statement that the impact of the ECJ judgements is limited as it would only concern cases where freedom of establishment and free movement of services between Member States are at issue, whereas the vast majority of trade disputes in the United Kingdom are purely

domestic and do not raise any cross-border issues. The Committee would observe in this regard that, in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.

In light of the observations that it has been making for many years concerning the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice, and bearing in mind the new challenges to this protection as analysed above, the Committee requests the Government to review the TULRA and consider appropriate measures for the protection of workers and their organizations to engage in industrial action and to indicate the steps taken in this regard.