UK IMPLEMENTATION OF THE POSTED WORKERS DIRECTIVE 96/71

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(1) Introduction

This paper 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 European Union (EU) enlargement and the cases recently decided by the ECJ.

Prior to 1996, Conservative Governments sought to resist attempts to adopt a PWD. They were opposed to European measures which might inhibit the ability of UK employers to post workers to other EU Member States.

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* Professor of Labour Law, University of Bristol. I owe thanks to Olaojo Aiyegbayo for providing research assistance between December 2009 – February 2010, which entailed gathering primary materials used in the preparation of this national case study, and also to Lydia Hayes, who prepared a preparatory research paper relating to UK treatment of migrant workers in April 2010. This paper draws on my report for the ETUI on ‘The Impact of ECJ decisions on UK Industrial Relations’ now published in A. Bücker and W. Warneck (eds.), Viking – Laval – Rüffert: Consequences and Policy Perspectives, (Brussels: European Trade Union Institute, 2010), 99-120. All opinions, errors and omissions are my own.


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

4 Case C-319/06 Commission v Luxembourg [2008] ECR I-4323 (hereafter Luxembourg).
The Labour Government which came to power in 1997 eventually purported to implement the PWD, but did so by simply extending the application of UK legislation, that is, by removing jurisdiction clauses. There was no specific legislation introduced which sought 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 explicit UK 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 (which performed the function of what is now the UK Supreme Court) 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 workers as opposed to a ‘ceiling’. UK legislation operates to protect posted workers to the extent that such workers can enforce their statutory rights by recourse to the UK employment tribunals system and the domestic courts. In this way, it could be said that UK law prevents the undercutting of UK statutory labour standards (going beyond mere minimum levels of pay), thereby preventing social dumping and unfair competition. However, it is also arguable that the heavy reliance on private enforcement of legislation by posted workers may diminish the efficacy of what appears to be fairly generous legal protection. It should also be noted that UK trade unions have not been satisfied with the form that implementation of the PWD had taken and have, 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 EU enlargement and the Laval quartet of ECJ judgments, it is possible to identify key legal issues, which will have to be addressed by the new Conservative and Liberal Democrat Coalition Government, which entered office in May 2010. First, 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. Second, the arguments made by unions that service contracts should only be awarded to contractors prepared to honour the terms of established collective agreements, for example in relation to preparations for the Olympic Games, would seem to be undermined by the ECJ judgment in Rüffert. Third, 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 the ex-Prime Minister Gordon Brown in 2008 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 wild-cat industrial 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 the legal principles established in Laval.

Trade union calls for reform and pleas from various backbench Members of Parliament (MPs) seem to have fallen on deaf ears. That is to say, they have been largely ignored by the past Labour and current Coalition Governments. Indeed, there seems to be an underlying determination across the political spectrum not to address (or at least not explicitly) any of the current outstanding legal issues associated with posted workers.

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

5 Also see Case C-271/08 Commission v Germany, delivered 15 July 2010, unreported, which confirms that the award of public contracts should be determined by EU public procurement standards, even where this is contrary to the terms of collective agreements.
Conservative Governments between 1982 and 1997 were interested in limiting forms of government regulation and did not contemplate any national legislative solution to problems posed by workers posted to the UK prior to 1996. This may also be explained by the fact that the UK predominantly was, at that time, an exporter rather than an importer of cheap labour (through the provision of services in other European countries).

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, was ratified by the UK in 1950 but was denounced in 1982 by the then Conservative Government. Any constraints on public procurement were subsequently imposed by virtue of EC law.6

The UK initially opposed the 1991 draft Posted Workers Directive, ‘on the grounds that it might prove costly to UK business’.7 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 then Conservative Government in office, Ann Widdecombe, was that the proposed Directive was ‘anti-competitive and would impede the operation of the Single Market’.8

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.9 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

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7 V. Keter, ‘Posted Workers’ House of Commons Library, Standard Note SNB/BT/301 2 February 2009, 2.
8 Letter from Ann Widdecombe to Jimmy Hood MP, 29 November 1994, cited in Keter (2009), n.7 above, 2.
the posted workers directive to see whether there is any prospect of breathing life into that initiative’. 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. There was to be no regulatory action taken by the Government as this would not be ‘in proportion to the problem’.

Indeed, the preoccupation of that Conservative Government 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 [Posted Workers] 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 motion was passed by a vote of 152 in favour to 56 against.

The fear of the then 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’. The comment made by the relevant Government minister was that ‘when European Employment Ministers meet, although supposedly 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’. Notably, this was a time when the UK did not even have a national minimum wage applicable to workers,

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10 Ibid.
12 Ibid.
13 House of Commons debates, 6 March 1995, 9:33pm.
14 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.
15 Ibid.
a point on which the minister was challenged.\textsuperscript{16} Moreover, one might observe that a PWD would in no way impede independent free movement of UK workers and wonder whether the Conservative Government was rather more interested in protecting the ability of British commercial providers to competitively offer their services in other European countries.

\textbf{(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’,\textsuperscript{17} but this was never done.

The Conservative Government, in office 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, in power from 1997 to 2010, 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, \textit{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

\footnotesize{\textsuperscript{16} 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.}

\footnotesize{\textsuperscript{17} ‘Thematic feature – posted workers’ available at: http://www.eurofound.europa.eu/eiro/2003/06/tfeature/uk0306106t.htm.}
further regulations later this year…’ 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’.

This became the route followed by this and subsequent Labour Governments, which did not adopt particular legislation designed to implement the PWD. Instead, gradually, there was repeal of legislative provisions regarding territorial limitations which would otherwise have denied protection to posted workers. This is anomalous. ‘[O]nly the UK and Ireland have not introduced legislation specifically to transpose the Directive into their domestic law.’

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

- 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)

This advice would now have to be updated to take account of the Equality Act 2010, but there is now no contemporary advice available on government websites. The only reference point is listed as ‘archived’ material. The reason would seem to be the

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18 House of Commons debates, 26 July 1999, 3:43pm, per Ian McCartney (Minister of State (Competitiveness), Department of Trade and Industry).
19 Ibid.
change of government in May 2010 and substantial restructuring of government
departments (and their responsibilities) which is now taking place.

The list provided in 2009 was clearly in excess of the prescriptions of Article 3(1) of
the PWD. However, prior to the Laval quartet of cases, 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 with an employer.

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’.22 It may also be useful to observe that representatives
from UNICE took a different view, also accepting that the term ‘temporary’ was
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

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

* 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. In response to the Commission Communication of 2006 regarding the scope of registration and control mechanisms, the then 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…’. 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.’

There has been an attempt, very recently, to rely on the PWD in litigation 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. 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

23 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.
25 Commission Communication: Guidance on the posting of workers in the framework of the provision of services COM(06) 159.
26 House of Commons, Select Committee on European Scrutiny, Thirtieth Report, 4 April 2006, para. 13.10.
27 Ibid., para. 13.10.
work in the UK due to previous infringements of UK immigration law. It was held by the Court of Appeal that neither 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 require 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. The Court of Appeal accepted, by virtue also of Commission v Germany, that the host country had to act proportionately and not unduly restrictively when monitoring the lawful and habitual 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.

(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 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

29 See Luxembourg, para. 46.
31 Case C-244/04 Commission v Germany [2006] ECR I-885.
32 [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…’
statutory interpretation. 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. 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’:

‘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, where the Employment Appeal Tribunal took note that: ‘It is right to say that the change effected by the 1999 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/EC).’ However, the case concerned cabin crew on a route between Hong Kong and the UK and the issue as to whether these employees were

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35 Lawson n.33 above at para 41.
‘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 law

The 2003 Commission Communication on the implementation of the PWD\textsuperscript{37} 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 ECJ
judgments, \textit{Commission v Greece}\textsuperscript{38} and \textit{Commission v Netherlands}\textsuperscript{39}

Nevertheless, it is evident that the Labour Government at that time 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 very cases, that ‘transposition of a
Directive need not require a separate legal instrument’, provided that:

\begin{itemize}
\item national law guarantees that national authorities will effectively apply the
\textit{Directive in full}
\item the legal position is sufficiently clear and precise; and
\item individuals are made fully aware of their rights and, where appropriate, may
\textit{rely upon them before the national courts.}'
\end{itemize}

He therefore contended that there was no clear case for reassessment of UK
transposition of the PWD.\textsuperscript{40}

\textsuperscript{37} Commission Communication on the implementation of Directive 96/71/EC (Posting of Workers) in
the Member States COM(03)438.
\textsuperscript{39} Case C-144/99 \textit{Commission v Netherlands} [2001] I ECR 3541.
\textsuperscript{40} Select Committee on European Scrutiny, Thirty-Third Report, 25 July 2003.
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.\footnote{Select Committee on European Scrutiny, First Report, Minister’s Letter of 17 November 2004.}

Following the Commission Communication of 2006,\footnote{Commission Communication: Guidance on the posting of workers in the framework of the provision of services COM(06) 159.} the then 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’.\footnote{House of Commons, Select Committee on European Scrutiny, Thirtieth Report, 4 April 2006, para. 13.8.} 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 (the year that EU enlargement was to take place), questions were asked as to the impact that the PWD was having on ‘(a) the job prospects for British workers in the UK and (b) the wage levels of migrant workers in the UK’. 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.’\footnote{Hansard, House of Commons, 7 January 2004, Col. 380W.}

It was clear that, by this time, 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.45 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 national Trades Union Congress (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’.46

(4) Post EU enlargement and the Laval quartet

(a) Problem issues at the current stage

By 2007, following EU enlargement, the TUC was evidently very concerned by the pending Viking and Laval litigation and was expressing the view that the UK Government had failed to implement the PWD effectively. The TUC presented an independent statement to the European Commission in 2007 to the effect that British unions considered that there was a lack of awareness in the UK of the protections for posted workers, indicating that this might well be attributable to ‘the lack of separate posting of worker regulations’. Too much was left to the individual posted worker to identify and seek private enforcement of their employment rights, which was complicated by narrow ‘territorial tests’ regarding the scope of their legislative entitlements. This seems to be confirmed by a study conducted by the UK Equality and Human Rights Commission (EHRC) into treatment of migrant workers in the UK meat processing industry. The EHRC found that ‘lack of English language skills often means that workers do not understand their employment status or the rights they have’.47

46 Hansard, House of Commons, Written Answers for 9 December 2003, Col. 451W.
Further, the TUC noted that ‘the 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’. Finally, ‘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.’\(^{48}\) Nothing seems to have been done to address these concerns in anticipation of the ECJ judgments.

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, following the judgment in *Rüffert*, for the award of service contracts to be made conditional on compliance with the terms of established collective agreements. 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 three main UK 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 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 violation 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.\(^ {49}\)

Nor does it seem that the UK can 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 relying on the provision must present ‘appropriate’ and ‘precise’ evidence, indicative of the expediency and proportionality of the measure taken.\(^ {50}\)

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.\(^ {51}\) Nor does it seem that a conflict of laws approach, based on the terms of the Brussels Regulation,\(^ {52}\) 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.\(^ {53}\) 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 comment.\(^ {54}\) Her prognosis is that, following the politically sensitive Irish referendum on the Lisbon Treaty, the European Commission might be more proactive in calling into question both Irish and UK implementation of the PWD. As noted above, there has been no litigation on this issue as yet in the UK and no sign that the new UK Coalition Government will take any anticipatory legislative action on this issue.


\(^{50}\) *Luxembourg*, paras. 50 - 51.

\(^{51}\) *Luxembourg*, paras 57 - 58.

\(^{52}\) Brussels Regulation 44/2001 (OJ [2001] L12/1)


\(^{54}\) *Ibid.*, 132.
Barnard reports on how the then UK Labour Government responded, prior to the decision in *Luxembourg*, to a pre-infraction letter from the Commission.\(^{55}\) 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, the then Minister of State for Employment Relations and Postal Affairs for a 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 Directive’. Moreover, the Government would ‘undertake to scrutinise the full range of employment law to identify what goes beyond the provisions of the directive’.\(^{56}\) 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’.\(^{57}\) This appears to have been treated as a reason for UK inaction.

*Campaign for extension of collective agreements – the effect of Rüffert?*

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\(^{55}\) *Ibid.*

\(^{56}\) *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).

\(^{57}\) Keter (2009) n.7 above, 2.
There has been a campaign for the award of service contracts to be made conditional on respect for the terms and conditions established in the industry through collective agreement. This concern has been focussed on building contracts connected with the Olympic Games. The Olympic Delivery Authority (ODA) has commissioned research about employment on the Olympics site, which is arguably currently the largest construction project in Europe, with activity likely to reach a peak of 20,000 available jobs. An early ODA survey identified 4,434 workers on the Olympic Park of whom only 20% lived in the London area. There are now however suspicions that, in fact, only one in eight jobs on site have gone to local workers, following a freedom of information request by a local resident, the response to which revealed that, from a total of 6,227 workers, only 1,230 workers lived locally, including 412 who reported themselves as ‘foreign’.

Keith Ewing and John Hendy have argued that the Government should 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

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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 the UK and elsewhere in Europe.’

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). It is also evident that the CBI is not convinced by arguments that collective bargaining arrangements should apply to posted workers. While it is possible 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, this would seem to require some active commitment on the part of a UK government to overcome such obstacles, which is notably lacking. The Labour Government in the lead up to the 2010 election refused to contemplate any such reform. There is, as yet, no indication that the new Coalition Government will do so.

*Restrictions on industrial action taken 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’. 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

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61 Early Day Motion EDM 789, Alan Meale, 11 February 2009.
63 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.
66 Laval, at para. 107.
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, in breach of the PWD. This approach would seem to have since been affirmed by subsequent judgments delivered in the Rüffert and Luxembourg cases.

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. 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, in particular due to the threat of potentially unlimited liability which may arise if they do so.

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

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67 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.
70 TULRCA, section 244(1), especially para. (g).
‘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.\(^{73}\)

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.\(^{74}\) However, the treatment of these cases in the Court of Appeal case of *Metrobus*\(^{75}\) 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. The *Metrobus* case is widely regarded as demonstrative of the ease with which UK courts grant interim injunctions, namely with reference primarily to the convenience of the employer.\(^{76}\)

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 does not seem to be the view which UK courts are likely to endorse.\(^{77}\)

**(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

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\(^{77}\) See comment of the Committee of Experts 2010 on UK compliance with ILO Convention No. 87 – attached as Appendix 1.
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.78

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.79

In January 2006, the then 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

78 House of Lords, Select Committee on European Union, Sixth Report, Chapter 7: ‘Will There Be a
Race to the Bottom?’, 2005, paras 143 – 147.
79 Ibid., para. 202. Note that this is the Select Committee’s emphasis.
continue to apply to posted workers who work temporarily in the UK for a foreign
service provider. 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’. The Provision of Services
Regulations 2009, which implements the Services Directive, contains provisions
which may make it easier to scrutinise the treatment of posted workers, such as the
duty placed on service providers to make contact details and other information
available (Regulations 7 and 8), but otherwise provides explicitly that the freedom to
provide services (guaranteed in Regulation 24) does not apply to matters covered by
the PWD (Regulation 25(c)).

(d) Effects on industrial relations

The ‘chilling effect’ which the Laval quartet has had on UK industrial action is ably
illustrated by the dispute between British Airways (BA) and the British Air Line
Pilots Association (BALPA). This case was, as noted previously, the subject of
comment by the ILO Committee of Experts on the Application of Conventions and
Recommendations, in relation to UK compliance with ILO Convention No. 87.

BALPA had voiced concern over the terms and conditions under which pilots would
be employed by a new British Airways (BA) subsidiary, ‘Open Skies’, which was to
operate out of other European states on US routes. The union’s fear was that terms
and conditions for Open Skies pilots (and the mode of granting seniority) would
undercut and thereby undermine the established terms and conditions of current BA
‘mainline’ pilots. BALPA did concede that inferior terms and conditions might need
to be applicable to pilots employed by Open Skies and did accept the desirability of a
separate bargaining unit for those pilots. However, BALPA did not receive the
assurances and guarantees they desired.

80 Hansard, House of Lords, 26 June 2006, Col. WA197.
81 http://www.berr.gov.uk/whatwedo/europeandtrade/europe/services-directive/page9583.html.
82 See Application by the British Air Line Pilots Association to the International Labour Organisation
(above) and Appendix.
A strike ballot was held, in which 93% of those BALPA members eligible to vote did so and 86% of those voting were in favour of a strike. BALPA then requested intervention by the ACAS in the hope that the weight of opinion in favour of collective action might lead the employer, BA, to make certain concessions. However, at the end of ACAS talks and with no settlement reached, BALPA gave seven days notice of industrial action. BA responded by arguing that any strike action taken would be unlawful by virtue of the principles established by the ECJ in *Viking* and *Laval*; so BALPA applied to the High Court for a declaration of the legality of their action. The hearing began on 19 May 2008, but was discontinued on 22 May 2008 after BALPA realised that, regardless of the outcome, the case would progress on appeal to the Court of Appeal and House of Lords, with the prospect of further reference to the European Court of Justice. No collective action was therefore taken.

A complaint was made on behalf of BALPA to the ILO Committee of Experts on the basis that the practical effect of the *Laval* quartet on UK unions was to diminish their access to the right to strike. The Committee agreed that there was cause for concern. UK law relating to the manner in which an employer can seek (and gain) an injunction in UK courts, when compounded with the principles elaborated upon by the ECJ in the *Viking* and *Laval* judgements, created a situation where the rights to which the union and its members were entitled under Convention No. 87 could not be exercised. ‘The impact upon the possibility of …workers … 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.’

The inability of unions to call industrial action when posted workers are involved in the dispute led in 2009 to a wave of unofficial industrial action. One example was the Alstom dispute, which started in 2008 and remains the subject of contention. This

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84 See appendix.
concerned subcontracting arrangements involving construction at two new power stations; Staythorpe in Nottinghamshire and Grain in Kent.\textsuperscript{85} It has only just been revealed that, (as was 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.\textsuperscript{86}

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.\textsuperscript{87}

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, even though local activists have denied the significance of BNP involvement. Generally, it should be noted that there seems to be a rise in xenophobic sentiment in the UK. For example, despite a poor showing in the 2010 national and local elections, it has been observed that the number of votes cast for the BNP increased three-fold from 2005 – 2010; and concerns have been raised in relation to protests organised by ‘the English Defence League’ established in July 2009, which operates through football supporters’ clubs.

In response to the industrial action which took place at East Lindsey (and elsewhere), 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.’

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

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89 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.
90 For a statement by BNP leader (Nick Griffin) to this effect, see: http://www.facebook.com/topic.php?uid=8644741474&topic=25094. For similar statistics, but a very different viewpoint, see: http://www.workersliberty.org/story/2010/05/27/bnp-when-fascists-fall-out.
business had to gain from the current legal position. In the House of Commons, the then 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’. 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. The Labour Government was not however 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 (as discussed further below).

Mr 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…’

A well-known MP on the then Conservative Opposition Front Bench, Ken Clarke, responded to Mr 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.’ Furthermore, Mr Clarke pointed to the irresponsible use by the Prime Minister

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94 Hansard, House of Commons Debates, 2 February 2009, Col. 579.
95 Ibid.
96 Ibid., Col. 580.
97 Hansard, House of Commons Debates, 2 February 2009, Col.581, per Kenneth Clarke.
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’.  

Mr 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’. This suggests that the Labour Government’s response to its blatant non-compliance was to wait to see whether there will be any amendment to the PWD recommended by the Commission before amending national legislation. Moreover, Mr McFadden 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’. In response to questions from Labour MPs, the Minister 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.

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. However, it is notable that now that new information has come to light on the Alstom case, no statement was made by the outgoing or the new Coalition Government on the matter.

This reticence did not extend to more left wing MPs on the Labour back benches. For example, 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’.  

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. 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...’

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 without their dismissal. A deal was struck whereby 102 jobs were to be made available on-site for which British workers could apply. However, in June 2009 industrial unrest occurred again, when 51 redundancies were made at the Lindsey Oil

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103 Early Day Motion EDM 677, Jon Cruddas, 3 February 2009.
104 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.
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.\(^\text{107}\)

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 \textit{Viking} and \textit{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.\(^\text{108}\) 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, and outside the scope of any statutory immunity from liability.\(^\text{109}\) 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 \textit{Laval}, made this too dangerous a path to be contemplated; the result was that other far right groups instead attempted to involve themselves in the action.\(^\text{110}\)


\(^{110}\) See \url{http://libcom.org/history/2009-strike-lindsey-refinery-struggle-entangled-nationalism}. 
(5) Conclusion: Future Prospects

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.\(^\text{111}\) Nevertheless, it should be added that an absence of registration requirements calls these figures into question. These statistics certainly do not support Mr McFadden’s earlier claim that ‘hundreds of thousands of British workers and companies’ operate elsewhere in Europe.\(^\text{112}\) Furthermore, 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 organise lawful industrial action. 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.\(^\text{113}\)

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.’\(^\text{114}\) ‘In other words, an employer’s right to freedom of establishment trumps the union’s right to strike.’\(^\text{115}\)

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, which may have negligible legal effect, but ‘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

\(^{111}\) *Hansard*, House of Commons, ‘The Prime Minister – Liaison Committee’, 12 February 2009, Q115 per Michael Connarty.

\(^{112}\) *Hansard*, House of Commons Debates, 2 February 2009, Col. 580.


\(^{114}\) *Hansard*, House of Commons, 28 January 2008, Col. 76, per Jon Trickett.

\(^{115}\) *Hansard*, House of Commons, 5 February 2008, Col. 836, per Michael Meacher.
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’. 116

The outgoing UK Labour Government said that it was 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.’ 117 It seems that this Government’s game was one of ‘wait and see’. There has been no official UK 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 new Coalition Government have also been silent on the subject of posted workers, it seems that no policy shift is likely to emerge at least until after the summer recess, and even then only if any reform is proposed at European level or the Commission makes renewed demands for compliance. 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.

116 Hansard, House of Commons, 5 February 2008, Col. 843, per Jon Trickett
117 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

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.*