Labour law, fundamental rights and social europe

Law

Introduction

The right to take collective action is a fundamental human right of a worker under European Union (EU) law. Individuals are thus provided with the right to take collective action in the event that there is a conflict of interest, including strike action.[1] This is provided for under Article 28 of the Charter of FundamentalHuman Rightsof the EU and states that all individuals have a right of collective bargaining and action. Limitations to this right are provided for under Article 52 of the Charter, yet such limitations must be provided for by law and mustrespectthe essence.

They must also be subject to the principle of proportionality and necessary to protect the rights and freedoms of others.[2] The freedom of establishment, as set out in Article 49 (ex Article 43 TEC) of the Treaty on the Functioning of the EU (TFEU), restricts Member States from prohibiting the freedom of establishment of nationals from other Member States. Individuals therefore have the right to carry on economic activity in other Member States as self-employed persons and are therefore provided with the ability to manage undertakings with companies or firms as defined under Article 54 of the TFEU.[3]

These provisions did not clarify the rights of workers sent to work in another Member State on a temporary basis a lack of consideration as to how the balance between the right to collective action and the right to economic freedoms was to be balanced was not being made.[4] Nevertheless, these issues was addressed by the Court of Justice in 2007 and 2008 when a series of cases came before the Court questioning these provisions. These were the

Laval[5] case, the Ruffert[6] case, the Commission v Luxemburg[7] case and the Viking[8] case, also referred collectively as the “ Laval Quartet”. This study will critically assess the extent to which the European Court of Justice (ECJ), in the Laval Quartet series of cases, has struck the correct balance between protecting the right to collective action under EU law and protecting the rights of free movement of services and establishment.

The Laval Quartet Cases

It was ruled by the ECJ in the Viking case that collective action relating to the reflagging of a vessel from Finland to Estonia was not excluded from the scope of Article 49 TFEU on the right of establishment. And, that Article 49 is capable of conferring rights on private undertakings which may be relied upon when conflict arises against a trade union. It was also found that a collective action would constitute a restriction on the right of establishment, although it may be justified if there is an overriding public interest to impose such a restriction.[9] This decision appears to provide some flexibility under the provisions, in the event that the public interest requires it and demonstrates that industrial action, that is justifiable and proportionate, can co-exist with free movement rights even if restrictions are being placed upon that freedom. The Court in the Laval case held that Article 56 TFEU and Article 3 of the Posting of Workers Directive restricts trade unions from attempting to force a provider of services established in another Member State to enter into negotiations about rates of pay and working conditions through collective action. It was argued by the Court that the collective action could not be justified since the demands must be transparent so as to not render it difficult to determine the obligations to which he must comply.

[10] Arguably, this suggests that if the demands were transparent; it is likely that they would have been justified and therefore permitted. This seeks to ensure fairness is being created and ultimately provides a balance between the two competing interests. It is clear from both of these cases that a balance can be struck between social policy objectives and economic freedoms, by applying the principle of proportionality. It has been said that this concept provides an element of uncertainty, nonetheless, and that in the end this principle will prevent or at least make collective action more difficult.[11] The Court in the Ruffert case held that the demand to pay wages according to a collective agreement did not comply with the Posting of Workers Directive, as interpreted under Article 56 TFEU. This was due to the fact that the wages were not fixed, a requirement under the Directive, and that the collective agreement that was provided for in the Public Procurement Act in Lower Saxony was not applicable.[12] The interrelationship between the social protection of workers and fundamental economic freedoms was examined by the ECH who made it clear that a protection which is not required by the Directive cannot be justified under Article 49 on the worker protection ground.[13]

The Court in the Commission v Luxembourg case held that there was afailureby Luxembourg to implement the Posting of Workers Directive, especially Article 3. 10, in a correct manner and that the public policy exception derogated from the freedom of services principle, which must be interpreted strictly.[14] It has been said that the decision in this case emphasises how serious the ECJ is about facilitating the free movement of service provisions under Article 49.[15] This is largely beneficial for

businesses and helps advance the economy, yet it could be said that this is at the expense of labour laws.[16] However, because labour laws will be provided with the relevant protections where necessary, it is evident that the balance is not completely one-sided. Arguably, the interpretations of Articles 43 and 56 of the TFEU and the Posting of Workers Directive have been clarified significantly by the ECJ, yet it is debatable whether this removes all of the difficulties.[17] Nevertheless, the relationship between collective action and freedom of establishment and services does appear to be a lot clearer as a result of these decisions and it is now evident that collective action will not always be considered a restriction on the right of establishment and free movement of services. Instead, it will depend largely upon the facts of the individual case and whether such actions can be justified.[18] There is a fairer approach to take and seems the only was an appropriate balance can be attained. The ECJ recognised that the right to take collective action formed an important part of EU law, however, they also identified the restrictions that could apply to this right. The Posting of Workers Directive, which provides protection to employees being sent to work in other Member States, was considered exhaustive by the Court, which means that the provisions under this Directive must be adhered to by all Member States so as to ensure that the rights and working conditions of posted workers can be guaranteed. This is necessary in avoiding the so-called “ social-dumping” whereby Foreign Service providers undercut local services providers because of lower labour standards.[19] It was clear that the ECJ took this right extremely seriously and did not tolerate any deviations from this. However, because the material content of the Directive is not harmonised, Member States are free to interpret the content in a way

they think fit. This could lead to ambiguity and unfairness since Member States may interpret the Directive in a way that avoids their obligations under the Directive.[20] The ECJ’s interpretation of the Posting of Workers Directive is likely to have serious consequences for Member States who base their regimes on the collective bargaining model. Under this model Member States, such as Sweden and Denmark, provide trade unions with the exclusiveresponsibilityto safeguard flexible levels of wages and employment conditions for all employees.[21]

These are generally safeguarded by trade unions by the threat of collective bargaining, which appears to be prohibited by the ECJ in the Laval Quartet. In order to comply with the Court’s views, Sweden and Denmark have been required to review their legislative provisions so that they comply with the decisions that have been made.[22] Significant debates of the Laval Quartet have also taken place in other Member States who have been forced to amend legislative provisions in accordance with these decisions.[23] The Laval Quartet cases also led to developments in international EU law. The European Court of Human Rights made a number of decisions aimed at protecting the rights to freedom of association, that are provided for under Article 11 of the European Convention on Human Rights. Prior to the Laval Quartet cases, Article 11 acted as a safeguard to trade union members, but left trade unions with a free choice as to how this protection would be achieved. However, inDemir and Baykara v Turkey[24]it was stressed by the Court that the interpretation of the Convention must take international law into account and that the right to collective action has become one of the essential elements of the right to form and join trade unions as provided for

under Article 11.[25] However, rhe right to freedom of associated may still be violated if it is deemed necessary in a democratic society and justified on the grounds that it has been prescribed by the law.[26] It is apparent from this decision that the Laval Quartet decisions have had a significant impact upon the way in which EU law is now being interpreted and a number of different strategies have been implemented in recent years to ensure that a balance is capable of being attained between the right to collective action and the right to free movement of services. Hence, it has been said that the decisions have led to better transparency regarding the wages and employment conditions of workers in relation to posted workers.[27] Arguably, it is evident that the Laval Quartet cases where necessary in providing certainty to this area of law, yet it has been said that the Courts have failed to recognise the global nature of trade unions and that a more accurate balance still needs to be attained between " the rights relating to collective action and economic interests in an era ofglobalization."[28]

Consequently, this seems to suggest that whilst the global recognition of freedom of movement has been accorded by the ECJ, the obligations of unions has not been recognised on a global level. However, such recognition is necessary in the new era of globalizations and Courts should recognise the global activities of unions and thus assign particular weight to them in the decision making process.[29] In effect, whilst an attempt to strike a balance between the two competing interests was made by the ECJ, it is argued that the Court did not actually go far enough. Still, it is manifest that the relationship between collective bargaining and free movement of services has been in need of clarification for some time, which has now been done to

a certain extent. Whether the ECJ placed too much favour upon the employee has been the subject of much debate.[30] It has been argued that the decisions produced by the Court were in fact one-sided and that social policy objectives were set aside by the Court.[31] Whether this is justifiable in light of the unfairness employees were capable of being subjected to, however, is likely since it is an important part of the EU that all barriers to trade are removed.[32] The decisions have therefore been considered ground-breaking on the basis that " the ECJ not only subjected an alleged fundamental right to the Treaty provisions on free movement and made it conditional on the satisfaction of a strict proportionality test, but it also applied those provisions to private parties, i. e. trade unions."[33] Arguably, a balance does appear to have been struck by the ECJ between the rights to collective action with the right to free movement of services, yet whether this has been achieved on a global level remains a contestable subject. Hence, it was evidenced by the Court that collective action was a fundamental right that forms an integral part of EU Community law.[34] Nonetheless, it was also noted that no rights are ' absolute' and that such rights may in fact be subject to certain restrictions. In exercising this right, it will be necessary to demonstrate that the restriction of the right to free movement of services can be justified. This flexibility enables a balance to be struck so that each case can be decided on its own individual facts and circumstances. Conversely, it has been argued that whilst the collective action does need to be justified on a case by case basis " those exercising a fundamental freedom of establishment and provision of services did not have to justify their actions in Laval and Viking."[35] In effect, the extent to

which a balance is actually being struck is therefore questionable and it remains to be seen whether further issues arise in the future.

Conclusion

Overall, it is evident that the relationship between the right to collective action and the right to free movement of services was in need of clarification since both interests frequently conflicted. Consequently, it was unclear how EU law was to be interpreted in the event of such confliction. The ECJ does appear to have provided some clarity to this area of law when the Laval case, the Ruffert case, the Commission v Luxemburg case and the Viking case all came before the Court in 2007 and 2008. The so-called " Laval Quartet" now provides a basis to determine how these rights can be enforced and have since led to many States to alter their own national laws to take these new decisions into account. The cases do appear to have clarified the position in respect of Articles 43 and 56 of the TFEU and the Posting of Workers Directive, yet much critique still surrounds the approach that was taken by the ECJ. Consequently, it was made clear by the ECJ that the right to collective bargaining was a fundamental right that must be adhered to by all Member States and that if the right conflicts with the right to free movement, it should only be restricted if it can be justified as being in the public's interest. The ECJ attempted to strike a balance between the two competing interests, yet it remains to be seen whether the underlying issues have been completely eradicated in the new era of globalization.

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