European Association of Labour Court Judges
Nineteenth Annual Congress
12th & 13th June 2015

"Workers' Rights versus the business imperative – the clash between the social and economic dimensions"

Held at the Scandic Marina Conference Centre Helsinki

FINAL REPORT

1. Introduction

The 19th Congress of the EALCJ took place at the Scandic Marina Conference Centre, Helsinki, on the 12th and 13th June 2015 with the support of the Finnish Labour Court. The title of the Congress was –

“WORKERS RIGHTS VERSUS THE BUSINESS IMPERATIVE – THE CLASH BETWEEN THE SOCIAL AND ECONOMIC DIMENSIONS”.

The Congress was attended by 30 delegates from 14 countries of the EU and the EEA. The theme proved to be a very productive one. Judges are trained not to think in terms of such generalisations, but to decide each case of its merits. But it is very valuable to sit back and reflect on the extent to which this conflict (if it is a conflict) between the welfare of the employee and the economic success of the enterprise is reflected in our courts and way in which we balance the claims of the employee to protection against the desire of the employer to maximise profit.

2. Opening Session

The Congress was opened by the President of EALCJ Miran Blaha, President of the Labour Court of Slovenia in the Scandic Centre on the quayside of Helsinki at the historic heart of this magnificent city.

The Opening Address was given by Minna Helle, Conciliator for Finland and the Keynote Address was given by Ulla Liukkunen Professor of Labour Law and Private International Law at the University of Helsinki. These Addresses were followed by Technical Sessions chaired and conducted by the delegates on (1) the reasons to justify the dismissal of an employee for economic reasons, (2) the posting of workers, its impact on the decision in *Laval* and the avoidance of “social dumping”, (3) the role of the Labour Court Judge in respect of dismissal on economic grounds with a final plenary session to bring all our discussions together.

Minna Helle gave us a very valuable insight into the role of the National Conciliator, how her work related to the Labour Court and an overview of the kind of disputes which were coming before her and the way in which many of them were resolved. This was a valuable insight into the “Nordic Model” of industrial relations, based on co-operation and conciliation, though not without its problems.

The Congress took place in the shadow of the continued opposition of the Nordic countries to the judgments of the ECJ in *Laval* and *Viking,* both cases concerning the conflict between the freedoms of movement, of services and of establishment, on the one hand, and the right to strike and to carry out industrial action, on the other. At one point the “shadow” of *Viking* became a literal reality as one of their ships slid into its berth beside us.

Prof Ulla Liukkunen put forward a trenchant defence of the actions of Nordic unions seeking to protect employee rights enshrined in widely respected collective agreements (which were not, in law, universally applicable) from businesses and employees from newer members of the EU, where lower standards of employment and wages are the norm and whose workers were keen to break into the Nordic market. This conflict was presented as a battle between "fundamental human rights" to strike and take industrial action and "exploitation of workers" i.e. the employees of the Estonian and Polish employers.

3. Dismissal for economic reasons

Part one of the first technical session considered the question: “What reasons are valid to justify the dismissal of an employee for economic reasons?” In particular with reference to a company that has become bankrupt or is making heavy losses as compared to a company that simply wants to strengthen its economic position.

During this session a number of themes were explored and delegates were able to discuss and identify areas where there is a commonality of approach, and areas where there is a great deal of variation across the countries represented.

The following were considered:

- What procedural legal requirements are imposed on employers contemplating collective dismissals for economic reasons?
- What is meant by an economic reason?
- The extent to which a national Labour Court can scrutinise an economic, business decision

There was discussion about the criteria used to select employees for dismissal if there is a collective redundancy situation and about the extent to which the Labour Courts can preserve the employment relationship where there is a dispute over dismissal. Those discussions continued during the third technical session and are summarised in that part of this report.

(a) Procedural requirements

The position regarding collective dismissals based on economic grounds was broadly the same in every European country and was in conformity with the EU Collective Redundancies Directive (98/59/EC) although in Hungary and the U.K. the question of whether the Directive has been fully implemented nationally has arisen (see below).

There is a duty to inform and consult. The employer is to provide information to the trade union or to employee representatives at a point when meaningful consultation about possible ways of avoiding dismissals can take place. However, once the required information has been provided and collective consultation has taken place, it is up the employer as to whether to dismiss or not. Put another way, providing the employer has complied with the procedural requirements, dismissals can be made. However, if the employer fails to do so, then a collective challenge can be brought.

The report to the Congress by Hungary highlighted the fact that the Directive may not have not been fully implemented nationally because the Hungarian Labour Code only provides

for consultation with the Works Council – it does not impose an obligation to consult with the trade unions or employee representatives if there is no Works Council.

In the UK, a problem area has been the question of when the obligation to consult is engaged. The national legislation provides that the obligation to collectively consult if an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. Claims were brought by shop workers whose employment was terminated because their employers became insolvent due to the economic recession. The issue was whether a claim for a protective award could be made by workers who were employed by a retail chain with many stores nationally but who were based in shops with less than 20 members of staff. Two references were made to the CJEU – one by an Industrial Tribunal in Northern Ireland and the other by the Court of Appeal in England & Wales[1]. A third reference was made by Spain. The CJEU held that "establishment" is the unit to which the employees are assigned, which did not assist the shop workers[2].

The procedural question which had been covered in the reports was framed as follows: "Is there an obligation to contact the trade union or minister of social affairs?"

This encompassed the issue of when such an obligation would arise. The Directive does not impose an obligation on an employer with fewer than 20 employees in total and only imposes the obligation if a certain number of redundancies may be made. If 20 redundancies are to be made at one establishment the Directive imposes a 90 day consultation period. If that is not the case, there is a 30 day consultation period but the Member States have three options for calculating the number of redundancies which would trigger it. Similarly, where there is a collective redundancy situation, the Directive obliges employers to forward certain information to "the competent public authority" if there are to be collective redundancies falling within the remit of the Directive. These are, of course, minimum standards and the number of employees who must be at risk of redundancy to trigger these obligations can vary as the examples below illustrate.

In the Netherlands if a collective dismissal of 20 or more employees is to take place within a period of 3 months the employer must inform the trade union and also notify an administrative body linked to the Ministry of Social Affairs.

In Austria the position is quite complicated. An employer must give 30 days' notice to the Regional Labour Market Service if 5 or more employees aged 50+ are at to be given notice of risk of redundancy. An employer must also do so if he regularly employs 20 to 100 employees, and 5 or more to be given notice. Also, dependent on the number of regular employees, the Regional Labour Market Service must be given notice if 5% or 30 people are to be given notice.

In Belgium, in addition to informing the trade union or works council, and engaging in consultation, the administration must also be informed at least 30 days before dismissals take place. If not complied with, the obligations are subject to criminal penalties and fines.

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[1] *Lyttle & others v Bluebird UK Bidco 2 Ltd* ITFET/555/12 & *Usdaw v Ethel Austin Ltd* [2014] EWCA Civ 142

[2] *Lyttle & others v Bluebird UK Bidco 2 Ltd; Cañas; USDAW* C-182/13, C-392/13 & C-80/14

In Italy there was no special procedure for economic dismissals until 2012 but since then the employer has been obliged to give notice of his intention to dismiss to a public office, which has the task of trying to conciliate. If this is not successful, the employer can file a lawsuit for the dismissal, and the validity is assessed by a Labour Court Judge.

In Slovenia, in addition to obligations to inform and consult, an employer must notify the Employment Service of Slovenia. There is additional protection for disabled employees at risk of redundancy – the employer must retain their services, unless incapable of doing so. If the disabled employee is dismissed, a commission assesses whether the employer was in fact incapable of finding alternative work for them to do. There is also additional protection for pregnant women and women who are breastfeeding a child under one year old.

(b) An economic reason

There was a general discussion about what is meant by an economic reason. An employer must give a reason, but does it have to be sound or good?

It was agreed that a distinction can usefully be drawn between cases where the reason for dismissal is with the aim of improving efficiency and those where the work available for the employee has diminished substantially and permanently. In some cases the distinction cannot be clearer; in others it is very unclear. A decision to re-shape an organisation, undertaking, establishment or service may be the outcome in either case. Reorganisation could result in outsourcing of the work or, as highlighted in the Ireland report, a decision to carry on business with fewer or no employees.

Delegates considered that problems could arise when dismissals are made with the aim of strengthening the economic position in the company. Is the chance of doing so by improving efficiency and effectiveness through organisational change sufficient to justify dismissal? The answer may vary depending on whether the decision is made with the aim of avoiding heavy losses or with the sole aim of increasing profitability in a situation where no losses are being incurred. Between those two extremes there is the situation where the aim is to ensure that the company remains competitive by reducing costs in order to ensure it is profitable in the future. This could be by reducing the number of employees or, more controversially, by replacing existing employees with less well paid employees.

The Netherland delegates referred to a case where a company which was in a good economic position restructured with the aim of simply increasing profits and this was held not to be a good reason for dismissing employees. Italy and other countries reported a similar approach by the Labour Courts. In Greece, in cases where a decision has been taken to re-organise and to make dismissals, the Labour Court is empowered to evaluate whether there is another way of tackling the problem. In the U.K. and Ireland however, it is possible to restructure and make dismissals if the sole aim is to increase profitability. Similarly, in the Czech Republic, an employer does not have to be able to show heavy losses and may dismiss in order to improve efficiency and profitability. By contrast, in Italy, current jurisprudence is that the aim of increasing profits is not a sufficient reason to dismiss if the company is in a good economic position.

In situations where an economic reason may give rise to a valid dismissal, many countries have adopted the same system as Italy, where the employer has to check whether other suitable work is available and to offer it to the employee, who is then obliged to accept it. If the employer does not do so such a dismissal is unlawful, and can be challenged before the Labour Court.

(c) To what extent can the national Labour Court scrutinise an economic, business decision?

There was discussion as to where the line is to be drawn between decisions by employers which should not be scrutinised and those where the Labour Court can become involved. It was suggested that there may be situations when the Court should become involved and others where it does not. Underpinning these discussions was the question: "What is a business decision?"

There was also discussion about the extent to which there are limits to the economic reasons as a ground for dismissal and whether an employer has to document serious problems in order to show that a dismissal is for economic reasons.

The point was made by a number of delegates that Judges may not be best equipped to decide how a business should be run. Clearly the more "hands on" a Judge is expected to be, the more likely it is that expert evidence may be required.

An example given by the delegate from Norway was illustrative of the above issues. In the 1980s a decision had been taken to close a steel mill in Oslo and to move it half way to the North Pole. The mill was publicly owned but run as a private concern. Before any dismissals had been made, employees disputed the anticipated dismissals as being unfair. There was a question as to whether they had standing to do so. The Supreme Court said that they did because if the decision was implemented there would be no more work for them in Oslo. The second question was whether the decision to move the mill was based on sound economic reasons. Detailed calculations were presented to the Court on this point, but the Court declined to scrutinise the business decision and said the proposed dismissals were for economic reasons and were valid. It was not for the Court to look at whether there were sound business reasons because an employer has the right to make bad economic decisions. During the discussions about this case it emerged that there could be a political element to the decision because the Government wanted more work to be available in the northern part of Norway.

In the report from Hungary it was made clear that the Court cannot examine whether an employer's decision to reorganise and make redundancies is efficient, reasonable or a good choice – that is a business decision for the owner and/or managers of the business. The U.K. delegates also reported that it is well-established in U.K law that Judges are not best equipped to decide how a business should be run, and cannot interfere in business decisions. As long as there is a genuine business reason, which does not need to be a sound decision economically, an employer can dismiss employees fairly. In addition, the employer does not have to be struggling financially for an economic dismissal to be fair. There may however, be a line between a business decision and the effect which that decision has on a particular employee. By way of example, the introduction of assembly lines, increased mechanisation and computerisation are all business decisions which can lead to collective redundancies, but which could also impact on some individuals more

than others (e.g. persons with disabilities) which could give rise to claims by individuals which could properly be upheld by the U.K. Labour Courts. However, one of the difficulties is that usually there is no way for a challenge to be brought until after the decision has been implemented i.e. after dismissal has taken place.

The Ireland delegates reported that the position was similar to that in the U.K. As a general rule redundancy dismissal is regarded as fair. It was suggested that the definition of redundancy is an anomaly because the concept was incorporated in 1960s before the concept of unfair dismissal was introduced. The legislation was introduced for the purpose of protecting employees who were dismissed by providing financial compensation. Consequently the legislation contains a broad definition of redundancy, which encompasses a wide range of circumstances in which redundancies can be made for economic reasons. There are limitations in consequence of the definition and it has led to concerns about the "race to the bottom" (i.e. employees being made redundant and replaced by contractors at lower rates of pay). However, because of TUPE this could give rise to a successful claim for unfair dismissal.

Similarly, in Austria and Italy it is legal for an employer to outsource or get rid of a non-profitable part of the enterprise. However, as noted above, in Italy pure profitability will not be a valid reason to dismiss if a company is in a good economic position.

In the Czech Republic the cases where the Court has not accepted that dismissal is fair are usually those where there is an absence of causal nexus between the organisational change and the dismissal. This is also the case in Belgium – it is not for the Judge to assess the economic position of the company, the Court's role is limited to asking whether economic reasons are a pretext for dismissal. Similarly, it was noted in the Luxembourg report that an employer's discretion to dismiss is subject to exception if the dismissal is not linked to a reorganisation and is only a pretext or has been exercised with "blameworthy lightness". In Hungary, an employee may be dismissed "for reasons in connection with the employer's operations" and consequently dismissals on economic grounds are not subject to any special criteria and could encompass dismissals where the sole aim is increased profitability. Interestingly there is better protection for fixed-term workers whose contracts cannot be terminated for economic reasons unless liquidation or bankruptcy proceedings are in progress.

In contrast to most of the countries represented at the Congress, the Courts in Greece, Luxembourg and Norway appear to have a wider remit to examine the economic reasons put forward.

In Greece although employers have the right to make economic decisions the Court is able to decide whether the economic reasons put forward are valid. This is especially the case if a company has received government grants or where the number of proposed dismissals is so high as to affect wider society. An example was given of a case where the Court looked at whether there was a loss; whether the restructure be justified because of losses; whether the new structure was sound; and whether the employer had explored all ways of avoiding dismissals.

In the report produced by Luxembourg, it was noted that there have been many decisions of the Labour Court which have found dismissals to be unfair because the economic reasons were not indicated with sufficient precision, but that recently a more

understanding approach has been taken towards dismissals for economic reasons – the owner of a company is solely responsible for business risks and therefore, on the other hand, may take all measures that seem to him to be compatible with the company's interests, including dismissals.

In Norway, although there is no requirement for the employer to be making losses, its economic situation is of relevance to the Labour Court. The Court does not question the business decision but does evaluate the weight to be attached to the decision. Thus more drastic measures may be lawful if the company has serious financial problems. In effect, a balance is struck between the needs of the employer and the employee.

Many of the delegates present expressed the view that it would be difficult and demanding for the Court to review the economic reasons for a business decision, and could require expert evidence.

The position in Austria was very different to any of the other countries, because expert input is required in every dismissal case which is brought in the Labour Courts. The Austrian delegate explained that very few dismissals result in court proceedings. Collective dismissals are referred to, and resolved by, the regional labour agency. An individual employee can take legal action over being dismissed, but in practice many do not because it is necessary to show that their dismissal caused them social hardship for it to be potentially unfair. In addition, each side must pay their costs and the losing party must compensate the winner. The process is complicated. The first stage is for the employee to establish that loss of employment amounts to social hardship. This requires that expert opinion confirms that the employee is likely to be unemployed for more than seven months and/or to earn about 20% less. This assessment is made by a Judge sitting with a labour market expert. If social hardship is not established, the claim will fail at stage one. The second stage is for the Court to examine the reasons for dismissal (e.g. economic reasons or factors personal to the employee, such as conduct), and to decide whether they are sufficient. If not, the employer will lose at stage two. The third stage is for the Court to weigh up the effect of the dismissal on the employee as compared to the interests of the employer. It was noted that this process makes it difficult to predict the outcome in any given case.

(d) Summary

Firstly, as to the procedural requirements imposed on employers contemplating collective dismissals on economic grounds, it was clear from the national reports and the discussions around this topic that all of the countries represented at the Congress have national provisions on information and consultation, although the trigger points may vary. Most national legal systems impose an obligation to notify a competent authority – usually a regional or national body with responsibility for employment issues and knowledge of the labour market. Most countries impose a penalty on an employer who does not comply with its legal obligations – this may be in the form of compensation to individual employees and/or a fine and/or a criminal penalty.

Secondly, as to what is meant by an economic reason – the consensus was that this covers two different scenarios, albeit that the distinction is not always clear: the employer who is making losses or will make losses if cost savings are not made, and the employer who simply wishes to restructure to increase productivity and profitability.

There was a consensus amongst most, but not all, countries represented at the Congress that the role of the Labour Court is to determine whether the organisational change is for a real and genuine reason, but that it cannot examine the soundness of the decision taken by the employer - it is not necessary for it to be a good or sound business decision.

Thirdly, in most countries the Labour Court will not scrutinise the economic situation of the employer, and many Judges present felt it would be a difficult task to do so, and that Judges are not generally well equipped to do so. However, there are some legal systems where a greater degree of scrutiny is adopted.

4. Replacing employees with external agency workers

The Agency Workers Directive[3] had two principal objectives (1) to remove restrictions or prohibitions on the hiring of agency workers contained in the national legislation of many of the Member States and (2) to ensure that agency workers received equal treatment to that accorded to people working in the same enterprises who are directly employed. There was, therefore, a difference of approach between the judges of countries where employers were restricted in the ability to engage agency workers, either by collective agreements or by law, and those countries where there were no such restrictions.

Many countries, including Austria, Belgium, Finland, Luxembourg and Greece have laws which restrict the engagement of agency workers to situations where the requirement is strictly temporary. Thus, in Belgium there is a maximum period for a temporary agency work contract, which can be further restricted by collective agreement. And in Italy, the use of agency workers can be excluded completely by a collective agreement, though this is not the case in Luxembourg

The Directive states in its title and definitions that it applies only to temporary agency work. However, Regulation 4 makes it clear that any prohibition or restriction of temporary work can be justified only on the grounds of “general interest” relating to the protection of the employees and the “need to ensure that the labour market functions properly and abuses are prevented”. All Members States had to review their practices and report back by 5 December 2011.

The Directive applies not only to restrictions imposed by law, but also to those imposed by collective agreements. The Review, however, in respect of collective agreements, was undertaken by the social partners. Since these were the people who had agreed the restrictions in the first place, it is unsurprising that, for the most part, they upheld the existing restrictions.

The European Court of Justice has found in *AKT v Shell Aviation Finland*[4] that clause 4 does not impose any enforceable obligation on national courts to look into the justification for any restriction. The obligation is imposed solely on the Member States and, if they choose to retain their existing restrictions then it will be for the Commission to bring any enforcement action alleging that their “justification” is flawed. However, there was much

[3] 2008/104/EC
[4] C-533/14

uncertainty among the delegates about the effect of the *AKT* judgment and about how wide a discretion is left to the member states in implementing Article 4.

There was also some uncertainty among the delegates about the extent to which the court could look critically at a collective agreement which restricted the use of agency workers, but overall it seems that the Directive has had a limited impact on the approach of member states where there is a tradition of restricting or prohibiting the use of agency workers in particular sectors.

There was also concern that employers were using "economic reasons" in order to dismiss established workers in order to replace them with agency workers or out-sourced workers or, indeed, sham self-employed workers. Particular concern was expressed about whether agency workers can be used to replace employees who were on strike. It seems clear that many countries have provisions which specifically restrict this.

The Preamble to the Directive seems to indicate that part of its aim was to encourage "a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security". However, this seems to be demonstrably an area where different EU countries have different provisions ranging from giving complete freedom to employers to engage agency workers, or severely restricting their use to special, short-term occasions.

The principal aim of the Agency Workers' Directive was to give horizontal protection to agency workers to provide equal protection to that enjoyed by permanent workers of the same employer, or working at the same enterprise. The entitlement is to the benefit of the conditions of employment that would apply if they had been directly employed by the user undertaking. There was little criticism of the effectiveness of the rights given to Agency workers by the principal Directive in cases where there were comparable workers. However, one problem discussed was whether a person directly employed by the hiring business can be a comparator for the temporary worker employed by or engaged by the agency. There seems little doubt that this is so.

There are also problems, particularly in the UK and Ireland about who is liable in the event of dismissal or removal of the agency worker from the end user's site. This has led to Irish law providing that the agency worker is deemed to be employed by the end user, so that the end user is liable in the event of unfair dismissal.

Bigger problems can arise where the entire workforce consists entirely of agency workers, where protection may be limited to rights enshrined in law, such as the statutory minimum wage, which does not apply in all countries.

As we have discussed in the past, there is a lot of manipulation by employers in attempting to by-pass the rights of both "traditional" employees and agency workers, particularly in relation to by-passing collective agreements. The existing Directives only provide limited protection. In some countries, such as the Netherlands, the emphasis has moved to attempts to protect workers engaged under sham self-employment contracts.

5. Posted workers

The second technical session concerned the impact of the Posting of Workers Enforcement Directive 2014 on the ECJ judgments in *Laval* and *Viking.*

The Posted Workers Directive was intended to give some protection to people moving from one country to another while retaining their employment contracts from their country of origin. Such people are entitled to the rights of workers in the place they are working in so far as they are part of the law, or contained in collective agreements that are of universal application. This has caused some resentment in Hungary where lorry drivers working in Germany had to be paid the higher minimum wage set the German government, thereby losing their competitive edge. There was, however, general acceptance of the principle that employers should not be entitled to by-pass protective national legislation or universally applicable collective agreements by importing foreign workers engaged under less protective contracts permitted by neighbouring states. The argument relates to whether they should be allowed to undercut workers of the host country at all.

Posted workers are only part of the overall workforce of migrant workers, which exist in all EU and EEA states. Migrant workers from outside the EU can be restricted by individual states in accordance with national law by visa restrictions and work permits, but migrant workers from within the EU taking advantage of the right of free movement of workers tend move from the lower wage economies, such as Hungary, the Baltic States, the Czech Republic, Greece to higher wage economies such as the Nordic States, Germany and the Netherlands. In relation to posted workers, the distinction is between migrant workers who find employment in the host countries and posted workers who are employed in one country and then moved to another country.

The host countries set out above (and several others) tend to have a wide acceptance of collective agreements and strong unions to ensure that those collective agreements are complied with throughout the sector. This applies to migrant workers, who, therefore, cannot in practice undercut native workers except in industries (such as restaurants and cafés) where collective agreements do not apply. EU migrant workers are also found in the grey economy, where, though the employment is not illegal, not all the rules are complied with by the employers.

The employers of posted workers may wish to win contracts in the host country, the example given being drivers employed by Hungarian or Polish employers who ply their trade in Germany or Scandinavia. Under the Posted Workers Directive they have to comply with the labour laws of the host country, but not with collective agreements which are not, by law, universally applicable (the *ergo omnes* principle).

The biggest problem discussed at the Congress, however, was the *Viking* problem, where posted workers were placed in a situation where, whilst their employers complied with the laws of the host country, they were seen to be challenging long-accepted norms within the host country as to pay rates, pension rights etc. when those norms were not based on legal rights or universally applicable collective agreements. Article 3 of the Posted Workers' Directive did not require employers to comply with the collective agreements of the host country because the terms of the collective agreements were not "universally enforceable". This gave a business advantage to incoming employers against host country employers and also meant that posted workers were a cheaper source of labour than local workers with comparable skill sets. Unable to enforce this issue by law the Finnish unions tried to impose the higher standards by secondary picketing (which is lawful in Finland),

but the ECJ stopped them, saying that the right of Estonian companies to provide services in Finland trumped the right to take industrial action.

This judgment, together with *Laval*[5], however has caused considerable concern among several member states, particularly those with the most jealously protected labour systems. It was strongly felt in many countries, notably Finland and Norway, that the *Viking* and *Laval* judgments of the ECJ were wrong and that they conflicted with the constitutional right to strike, because they prevented union members from picketing sites operated by the foreign employers where the posted workers were employed.

Accordingly the Posting of Workers Enforcement Directive[6] came into force in June 2014. This requires Member States to empower their competent authorities (ie their Labour Ministries) to safeguard the legal rights of persons who may be affected by posted workers being drafted in (ie the resident workforce) in order to prevent abuse of the system. This Directive has not yet been considered by the ECJ or, indeed, by the national Supreme Courts. It is clearly intended to ease the resentment felt by various host countries, but there was no clear view as to whether host countries are now free to insist that posted workers comply with collective agreements, or at least that unions have a right to take direct actions to ensure such compliance.

We were told, however, that unhappiness has been expressed by the employers in countries exporting labour that it is unfair, in a free market, that they are forced to pay their employees more for working abroad than they would for working at home.

In so far as the status of posted workers provides some benefits to foreign employers over employers in the host country, there have been problems, exemplified by Hungarian workers working in the Netherlands, that the employers were not genuine Hungarian businesses, but were post-box companies established in Hungary solely for the purpose of recruiting employees to work in the Netherlands. This is an EU wide problem.

It is clear that the freedom of movement for workers and enterprises is a central part of the EU and provides added competitiveness to the host country as well as providing opportunities for advancement to workers from the posting countries. However, these opportunities also provide challenges to hard-fought collective rights achieved by the host countries and, also, challenges the employers within the host countries who are faced with competitors from other EU/EEA countries.

In short, it epitomises the “clash between the social and economic imperatives” which is the subject of this Congress. Thus, the issues created by the Posted Workers’ Directive, as a matter of European law, are only part of the wider issues of migrant workers exercising their rights of freedom of movement, establishment and services.

6. Role of the Judge in dismissals for economic reasons

The third technical session considered the role of the Labour Court Judge in respect of dismissals on economic grounds.

[5] 341/05 A case involving Latvian building workers, working in Sweden
[6] 2014/67/EU

A number of specific questions were addressed by delegates when producing their national reports. These questions were discussed in depth during the third technical session. As with the other sessions, there were issues on which a common approach was taken across the countries represented at the Congress, and issues where there was a marked difference in approach.

The questions which were debated were as follows:

- Does the Judge have an unlimited discretion as to what is fair, or is that discretion limited, if so in what ways?
- What kinds of criteria are used to select employees for dismissal if there is a collective redundancy situation?
- Is there ever a need to have expert evidence?
- Does the financial capacity of the employer make any difference to the level of compensation?
- To what extent can the Labour Court preserve the employment relationship pending the resolution of a dispute over an actual or contemplated dismissal?

(a) Fairness and the exercise of discretion

In his introduction to this topic, the delegate from the Czech Republic posed the thought-provoking question: “Is fairness a philosophical concept? Is it governed by equity and, if so, what are its limits?”

From the discussions which had taken place during the earlier technical sessions it was apparent that there is no uniform answer. So, for example, there are specific matters, such as the employer’s right to make economic decisions, which are generally not reviewed by the Labour Courts. There are also specific matters which are generally reviewed by the Labour Courts, for example the question of whether the reason put forward is genuine and, if so, whether there is a causal link between the reason and the dismissal. There are also some matters where the approach taken varies from country to country. In the U.K. and Ireland an employer need not show that dismissal was necessary to ensure business viability. In other countries, if the employer is profitable, the Court may find a dismissal is unfair.

In Italy there is very little discretion. In an individual dismissal for economic reasons, the role of the Judge is limited to ensuring that the post no longer exists and that the reason put forward is genuine. The Judge cannot examine whether the decision to remove the post was economically justified. The Italian Constitution provides that it is an employer’s right to make decisions about the size and structure of the enterprise. When there is collective dismissal the same basic principle applies - it is not the role of the Judge to say whether part of the organisation should close. The aim of the proceedings is to encourage the social partners (the employer and the trade unions) to discuss the proposed dismissals and reach agreement. If the trade unions agree that dismissals should be made, selection criteria are established, and the Judge reviews whether the criteria agreed were followed in choosing the workers to dismiss. If an agreement is not reached, the proceedings are dealt with by a public authority (the local agency for labour), which facilitates an agreement. Any dismissals which result from the agreement can be reviewed by the Judge to ensure the agreed criteria were followed.

By contrast to the position in Italy, the report from Luxembourg explained that the Labour Court has an unlimited discretion to evaluate the economic grounds put forward by the employer. If the employer fails to put forward the economic reasons for reorganisation or restructuring which sufficient precision, the dismissal will be unfair. It was also explained that case law has held that a profitable employer who decides to close down an unprofitable branch of his business can dismiss fairly, so long as the Court is satisfied by the economic grounds put forward.

In most other countries the amount of discretion is somewhere in between the two extremes above. In the Czech Republic, the Court must be satisfied that there is a genuine economic reason (e.g. reduction in work or restructuring to improve efficiency and profitability). Similarly, in Slovenia, the Court examines whether the economic reason put forward is genuine but may take expert evidence in order to determine that question.

In the U.K. if an employer establishes a genuine reason, the Court's role is confined to assessing whether it was open to a reasonable employer to dismiss. Thus, if selection criteria were too subjective or were inconsistently applied, a dismissal could be unfair.

In Ireland, even if there is a genuine redundancy situation and a fair selection process is followed, a dismissal would still be unfair if there is any departure from custom and practice in the industry as a whole (such as failure to consult about the process).

In Finland the role of the Labour Court is confined to disputes arising from collective agreements and the grounds for a collective dismissal are regulated in some detail. The Judge has a margin of discretion. An example was given of a restructuring resulting in dismissals which are challenged because other people have been taken on to carry out similar roles. The Judge examines the demands of the old and new roles in order to decide whether the dismissals were fair.

In Austria, the discretion is quite wide. As noted previously, the Labour Court does not deal with collective dismissals. If individual dismissals are made, the Court will not scrutinise the economic decision taken by an employer but can decide whether dismissal is a legal way of achieving the economic aim. So, for example, there have been cases whether the Court decided that other measures, such as reducing overtime, should have been taken instead.

In Greece, although discretion is not unlimited, the Court can take into account whether dismissal is necessary; appropriate; in good faith; in accordance with the principle of proportionality; and can also take into account the economic and social circumstances of the employee who is to be dismissed. The Court may also look at whether other options were available i.e. was dismissal a last resort. A different process applies for collective dismissals, which can be triggered by quite a low number of proposed dismissals (5 out of 20 employees). In such cases, to dismiss lawfully, an employer must submit a declaration to the Supreme Labour Consul who will consider the economic justification put forward, which may be approved or not.

In Norway a broad assessment is made as to whether dismissal is justified.

Similarly, in the Netherlands, the discretion is wide – the judge is free to decide whether to allow the employment contract to be rescinded, the test being whether the employer could show the reason put forward was “likely” to be the true reason. The role of the Judge is no different in respect of individual or collective dismissals on economic grounds - the Judge looks to see if there is a true reason to dismiss. However, the point was made in the report from the Netherlands that as from 1 July 2015 the position will change. More detailed instructions will apply to the Court’s decision about whether to accept a dismissal or not, which could result in that freedom being reduced. During the discussions it was also explained by delegates from the Netherlands that before 1 July 2015 the granting of permission to dismiss loses its validity if within a period of six months the employer took on someone else in the same function. After 1 July 2015 this will be slightly broader, because permission will be invalid if someone is taken on to do the same tasks, which is wider than “the same function”.

(b) The criteria used to select employees for dismissal if there is a collective redundancy situation

Across all of the countries represented at the Congress, there is an expectation that selection criteria should be used in collective redundancy situations assuming that the object is to restructure or downsize rather than a closure of the operation. In many countries the way this is achieved is via negotiation with the trade unions, the Works Council or the employee representatives. In some countries collective agreements may apply to an entire sector and are nationally negotiated. In a few countries (such as the UK and Ireland) case law has been the dominant mechanism for identifying the type of criteria which should be used. In the Netherlands, legislation identifies the selection criteria to be applied, but also provides for alternative criteria to be used if set out in a collective agreement.

There is a marked difference in approach across the EU/EEA as to the kind of selection criteria used. At one end of the spectrum, criteria are expected to be objectively measurable and linked to job performance, whereas at the other end of the spectrum social factors are given a great deal of weight. The examples below illustrate this.

In Norway selection criteria are not defined my national legislation. Instead they are set out in collective agreements, most of which include “Last In First Out” (“LIFO”) and also give considerable weight to the skills and qualifications required. Courts are expected to respect the provisions of collective agreements; to balance the interests of employer and trade union; and not to seek to fully control the choice the employer has made. Some employees, such as pregnant employees, or employees on sick leave enjoy stronger protection against dismissal. Other social factors, such as age, economic situation and disability can be taken into account when selecting employees for redundancy dismissal. The Judge examines whether the criteria are fair and justified, and whether they have been followed.

In Finland selection criteria are also laid down in collective agreements. The most important criterion is how skilled and important the workers are to the undertaking – they will have priority. Secondary criteria are family responsibilities and length of service.

In Hungary, selection criteria are usually set out in collective agreements. They are at the employer’s discretion so long as the principle of equal treatment is not violated and there is

no “wrongful exercise of rights”. The latter is defined as any act intended to or leading to the injury of the legitimate interests of others, restriction on the enforcement of their interests, harassment, or the suppression of their opinions. This appears to import human rights principles into the setting of selection criteria.

In Ireland and the UK selection criteria (with the exception of length of service) are designed to measure the quality of the employee’s job performance and value to the organisation (such as performance – which can be more heavily weighted than other criteria; transferrable skills; development potential; absence; and disciplinary record). Social factors are not taken into account at all. An employee’s personal circumstances are not taken into account either, unless the principle of equal treatment requires that some of the criteria are adjusted (e.g. to accommodate disadvantage caused by disability) or there is additional statutory protection (in the UK women on maternity leave have greater protection in a redundancy situation).

In Slovenia selection criteria are usually set out in collective agreements but national legislation also provides that when defining selection criteria the following shall be taken into account: professional education and/or qualifications and/or necessary additional knowledge and skills: work experience; job performance; length of service; health condition; social status; and whether the employee is a parent with three or more minor children or is the sole wage earner in a family with minor children. Similarly, in Greece, skills and qualifications are important, but social factors are also taken into account.

In Austria, an employer is obliged to inform the Works Council in advance, and the Works Council may object to particular dismissals on grounds of social hardship – different social factors may be argued in any given case.

In Italy the law provides for age, continuity of employment and family situation as general selection criteria. The jurisprudence generally maintains that fairness and “bona fides” are the fundamental criteria to be adopted, so that the dismissal of the youngest employee with has no family or parental responsibilities would be deemed valid.

In the Netherlands the approach to selection criteria is interesting. The employer has to obtain permission before dismissing employees. Until 2006 LIFO was used. However, since then employees are put in age groups (15-25; 25-35; 35-45; 45-55; 55+) and an equal number from each group is selected – giving the employer less choice – sometimes no choice at all depending on the number of people to be selected and the number of people in each of the age groups. It was explained that as from 1 July 2015 it is possible to lay down alternative criteria in a collective agreement.

In the report from Belgium it was noted that there are many categories of protected workers, for whom reasons for dismissal are limited. An employer has discretion over selection criteria, subject to the principle of equal treatment. A legislative provision which was not yet in force will require employers to allocate dismissals proportionately based on age group in cases of collective dismissals other than those resulting from bankruptcy, liquidation or closure.

Delegates from countries where social factors are not taken into account, questioned whether being required to do so means that an employer has to retain the least useful and

least productive employees. The delegates from the Netherlands explained that if an employer is looking to dismiss underperforming, less productive employees, rather than deem the situation a collective redundancy, he is likely to "restructure", which enables new job roles and job descriptions to be used as the basis on which employees are retained or dismissed. There was a general consensus that a restructure may frequently be a pretext to jettison those employees who, for whatever reason, are poorly performing and/or less productive.

It is fair to say that delegates from countries where the emphasis is on usefulness to the employer, were surprised by the approach taken to age in Italy, and by the age quota system used in the Netherlands (and soon to be adopted in Belgium). It was suggested that there was a risk that such dismissals might be seen to be unlawful age discrimination. However, it became clear that this has not, in practice presented such problems in those countries. For example, it was explained that because direct and indirect age discrimination can both be objectively justified, the age quota system in the Netherlands is seen as socially justified with the aim of avoiding more young people being dismissed than older people. It was observed that young people believe that older people have better rights and it is important to avoid a split in society.

As to the latter point, it was noted that in the UK the position has changed dramatically as regards working age: there is no national retirement age and the Court of Justice of the European Union has expanded the remit of what can amount to objective justification. Consequently the case law has evolved but the legislation is left in limbo. An example was given that in the university sector the pension scheme was changed so that nobody has to retire and full pension contributions are paid for employees aged 65+, so that each month their pension pot is increased. This creates a potential problem for the future, especially in circumstances where changes to public sector pension schemes mean that younger employees will never be able to enjoy the same level of benefits as those in their mid-fifties or older.

During the debates around criteria which measure performance and those which provide additional protection for employees who are more vulnerable for a variety of social reasons, it was observed that the historical context is important. 1963 ILO 119 on termination makes the formal distinction between usefulness to the enterprise and reasons personal to the employee. The old ILO agenda referred to discrimination as a prohibited reason, whereas more recently protected characteristics are matters to be weighed in the balance for the types of discrimination where objective justification is possible. Another change is that an employer's scope to make proactive business decisions to increase profitability and reduce labour costs is now fully recognised across the EU and EEA. Consequently the position has moved on from the late 1960s and the 1970s because different and conflicting agendas are in play, notably the equality agenda and the agenda of increased economic freedom and choice.

It was noted that the jurisprudence in most countries is based on private law contractual provisions but that there is an inequality of bargaining power in the individual employment relationship. It was also noted that collective bargaining between the social partners can be at the expense of the rights of individual employees and may not promote the equality agenda. By way of example, trade unions have not been historically favourable to the interests of women or to foreign workers.

(c) Use of expert evidence

It was clear from the reports that most of the countries represented at the Congress have Labour Courts where experts' evidence is rarely, if ever, used in the context determining the fairness or otherwise of an economic dismissal.

In Austria, as explained earlier in this report, the Labour Court always takes expert evidence if an individual who has been dismissed claims social hardship. The evidence is given by an expert on the regional labour market. If there is some doubt as to the expert evidence, the Judge might hear from a second expert, but this rarely happens. The question of whether there is social hardship depends on the likely length of unemployment and/or the likely reduction in pay once employment is obtained.

In Luxembourg, expert evidence may be used to decide whether the employer has made out the economic reasons relied on with sufficient precision.

In Greece, the validity of the employer's decision is legally recognised, but the Court's remit in deciding whether dismissal can be justified as a "last resort option" is very wide, and can require expert evidence as to the employer's economic position and the feasibility of options other than dismissal.

By contrast, in the Netherlands, 30,000 cases are referred to the Labour Court involving dismissal on economic grounds and it would be so impossible to hear expert evidence in each case – this compares to an estimated 2,000 cases per year in Austria.

(d) Compensation

The national reports demonstrated that in most countries compensation is assessed by reference to factors such as the likely length of time the employee would have remained in employment if they had not been dismissed, and the amount of time it is likely to take for them to find another job. In Finland, the age of the employee is also taken into account. In Hungary, the Court will also consider whether the employee was in fact being paid the amount specified in their written contract, because frequently this is not the case.

Most countries set a limit on the amount of compensation which can be awarded (In Ireland this is two years' pay, in the UK it is one year's pay, subject to a statutory maximum amount which changes annually).

In some countries the employer's financial situation is a relevant factor (Finland, for example); in other countries it is not relevant (Italy for example). In most countries it will not be relevant unless it impacts on the assessment of the likely length of time the employee would have remained in employment if they had not been dismissed (e.g. if the employer became insolvent and closed its operation at some point after the dismissal of a particular employee took place).

(e) The extent to which the Labour Court can preserve the employment relationship where there is a dispute over dismissal

The delegate from Norway explained that the national Labour Court has the power to preserve the employment relationship[7]. As an interim measure, the dismissal does not take effect until the dispute has been resolved, and this can be the case for a collective dispute or an individual dispute. The interim measures procedure is not limited to cases where a decision has been taken but not implemented. An example was given of a case where a company had closed its operation in Norway and moved production overseas but one employee wanted to continue working. The Court said he had a right to continue to work and the employer was under an obligation to make arrangements to see if he could continue working from Norway.

Employees also have greater protection in the Netherlands. To terminate a contract of employment, the employer must obtain the consent of the employee or obtain approval from an administrative body or the Labour Court. Before 1 July 2015 it was possible for an employer to argue that the dismissal was necessary to reduce costs and remain competitive, but if the argument was not sufficiently compelling, permission could be refused (and was in about 10% of cases). As from 1 July 2015, the employer must provide evidence substantiating its argument that there is an economic reason to terminate the contract. This is likely to make it more difficult to obtain permission to dismiss. Also, as from that date, the employer must first apply to the administrative body for permission. If permission is refused, he may then apply to the Court.

By contrast, other delegates reported that in their countries the possibility of applying to a Court for a order preserving the status quo (whether before or after an economic decision had been implemented) was very limited, or not possible.

The preventative system used in the Netherlands was adopted because there is recognition that it is difficult for an employee to return to the workplace if they have been dismissed for some time. The interim measures procedure also preserves the employment relationship pending resolution of the dispute. Many other countries do not have preventative legal systems.

There was also discussion about the feasibility of reinstatement if a dismissal is found to be unfair. The picture is mixed, as the examples below show.

In the U.K. legally reinstatement is stated to be the primary remedy for unfair dismissal. However, in practice it is rarely ordered because usually it is not feasible to do so. In Ireland reinstatement can be recommended.

By contrast, in Slovenia, if there has been an unlawful termination of employment, the contract of employment still applies and the employee can require to be reintegrated to his previous position and will be compensated for any losses in the meantime.

It was reported that in the Netherlands over a five year period the statistics for 3,000 cases showed that the court refused to give permission to dismiss in 10% of cases, and that reinstatement was ordered in 9% of cases. In the cases where an employer was not given permission to terminate the contract, about 50% of the employees remained employed one

[7] This was also possible in Greece, but no longer is.

year after dismissal and about 50% had left, usually because of reaching a financial settlement to terminate the employment contract.

In Finland, the time taken to get a final decision from the Labour Court is much shorter than for other countries, but, unlike most countries, there is no remedy of reinstatement – the only remedy is compensation.

In Norway if the dismissal is invalid, the employee remains in post until the Court has heard the case – there is no garden leave. There are also cases where reinstatement occurs, but there are no statistics as to how often. For a period of one year (or, if the notice period is six months, one year after the expiry of six months) the employee has a preferential right to seek re-employment. The right is to be re-employed in any position the employee is qualified for - it does not have to be in the same job or on the same salary.

(f) Summary

As had been the case throughout the Congress, the remit of the Labour Courts under national legislation varied quite markedly, with most falling part way along a spectrum defined by two extreme positions.

Firstly, as to judicial discretion, it would be an exaggeration to say that any country gives the Court completely unlimited and unfettered discretion, which is probably no bad thing. There are countries where the Judge has a wide discretion, and where many factors are considered to be relevant. In other countries, the role of the Court is to review the employer's decision but not to substitute its own decision, and to apply tests such as "Was dismissal open to a reasonable employer?" The role of the court may vary depending on whether there is a collective dismissal for economic grounds or an individual one, and in some countries the expectation is that collective disputes will be resolved by a local or regional labour agency brokering a deal between the social partners.

Secondly, as regards criteria used to select employees for dismissal if there is a collective redundancy situation, clearly there is a marked difference in approach (whether legal, ideological or political, or a combination of all three) as between countries where an employer may select employees for dismissal based on their usefulness to his business and countries where social factors carry real weight. There is also the tension between the economic freedom agenda and the equality agenda. As yet unresolved by the CJEU, but clearly important, is the question of when the employer's approach, or even the national approach, falls on the wrong side of the line when it comes to the principle of equal treatment, especially as regard the approach taken to age as a selection criterion. The trade unions, as social partners, may not always ensure the correct balance is achieved because their members may (and often do) have competing interests. Perhaps the approach taken by our hosts in Finland is the middle of the spectrum referred to above – skills and value to the business are the most important factors, but thereafter social factors come in to play.

Thirdly, the consensus was that in most countries expert evidence as to the economic situation of a company will rarely be considered. It is only where the legal system requires the employer to show an economic reason, that such evidence will be relevant. Austria alone has a Labour Court which always considers expert evidence in individual economic

dismissal cases, but not as to the employer's circumstances – instead the issue is whether the employee can show economic hardship having regard to the regional labour market.

Fourthly, most if not all of the countries represented at the Congress take a similar approach to calculating compensation for unfair dismissal based on an assessment of financial loss.

Finally, the extent to which the employment relationship can be preserved was very variable. Most, if not all, EU and EEA countries recognise that it can be very difficult to reintegrate an employee who has been unfairly dismissed back to their old role (reinstatement) or into a suitable alternative role (re-engagement).

In countries where the national legislation provides for a preventative approach (such as requiring approval by the court or a public body, or the taking of interim measures) the employee at risk of dismissal enjoys a higher level of protection and consequently is in a much stronger negotiating position. In other countries the possibility of challenging a dismissal before it takes place is limited or non-existent. This means that the employee is in a much weaker bargaining position. It might fairly be said that the preventative approach is much more likely to maximise the employee's prospects of remaining in work. However, even in countries where the fairness of dismissal is judged after it has taken effect, there is great variation as between national legal systems which give an effective right to reinstatement or re-engagement and those where the right is theoretical rather than a reality.

What is clear from the wide-ranging debates during the Congress, is that the national legal systems in most countries require a balance to be struck between the rights of the employer and the employee, but that the scales of justice may tip in very different places.

7. Overall Conclusion

In the end, the balance to be drawn between the business imperative enshrined in the concept of free enterprise and workers' rights enshrined in the "guarantee of adequate social protection" contained in Article 9 of the European Treaty, is a political issue and therefore, by definition, not one which Judges can decide upon.

However, judges are not only human beings, but also citizens of their own national states, as well as of the European Union/EEA. There is, therefore, much to be said for judges discussing these issues on an international basis. The discussions disclosed no ideological conflicts, but only an appreciation of the complexity of the issues which arise in real-life cases which have to be resolved by the courts in accordance with the law, both national and European.

The differences of approach which emerged in respect of such matters as how you select individual employees for redundancy, the balance between the right to strike and the right of free movement of workers, services and enterprises reflected the different national traditions which are part of the diversity, which is central to the EU. But what is clear is that the different approaches are not irreconcilable and that, in general, the problems which arise throughout the national courts of the EU are dealt with similarly by all the national courts. The aim of the Directives is an "approximation" of national laws. It is apparent that

that approximation becomes closer as the years pass and that maturity of the EU develops.

There is no doubt that the balance between the commercial freedoms enshrined in the single market and that desire for a “social Europe” secured by protective labour laws and collective agreements is at the heart of the continuing discussions within the EU. Labour courts exist to enforce the rights of employees, but they have to do so in the context of a global economy which requires flexibility of labour, both nationally and in a trans-national context.

The fury which has greeted the *Viking* and *Laval* judgments comes primarily from the Nordic countries, which have built up, over a long period, an enviable record of co-operation between employers and unions within the social partnership. The difficulty is that not all employees are members of unions or are protected by collective agreements and not all employers are parties to the collective agreements. This leaves a substantial percentage of disadvantaged workers, particularly among migrant workers and racial minorities. That is why the *Viking* and *Laval* cases cannot be seen simply as a conflict between honest workers and greedy (foreign) employers. Nevertheless, many countries outside the Nordic countries are concerned about employee rights being eroded particularly by foreign enterprises exercising their freedoms under the EU treaty.

These conflicts were apparent in all the issues we discussed at the Congress. The first technical session focused on the less controversial, but nevertheless difficult, issue of the circumstances in which an employer is entitled to dismiss a worker for economic reasons, which are not specific to the position of the individual worker. It was apparent from the National Reports that the attitude of national courts had changed and that such dismissals are not now restricted to situations where companies are about to close or have to downsize due to financial pressures, but can now be used where enterprises are seeking to improve efficiency, either by reducing employee numbers or by changing the skill set of employees. It was also widely accepted that company management must be left to decide on what is economically best for their companies and the courts will only interfere where "economic reasons" are used as a pretext for dismissing an individual employee for some other reason, or where the enterprise had not followed proper procedures or had failed to take steps to find other work for the employee selected for potential dismissal. There was also concern that employers were using "economic reasons" in order to dismiss established workers in order to replace them with agency workers or out-sourced workers or, indeed, sham self-employee workers.

The Congress went on, in further technical sessions, to deal with the use of agency workers and posted workers working across borders.

The Agency Workers' directive had a dual objective (1) to remove restrictions imposed by certain member states on Temporary Employment Agencies and (2) to give horizontal protections to agency workers, to give them equal rights with comparable workers employed by the hiring enterprise. There had been some resistance to the Directive from countries which, traditionally, have limited the role of employment agencies and the Commission has produced the Posting of Workers Enforcement Directive of May 2014 due to be implemented by July 2016. We discussed its meaning and whether it altered the judgment in Laval. There was, however, little criticism of the effectiveness of the rights given to Agency workers by the principal Directive in cases where there were comparable workers. However, one problem discussed was whether a person working for the hiring business can be a comparator for the temporary worker employed by or engaged by the

agency. Bigger problems can arise where the entire workforce consists entirely of agency workers, where protection may be limited to rights enshrined in law, such as the statutory minimum wage, which does not apply in all countries.

As we have discussed in the past, it was quite clear that there was a lot of manipulation by employers in attempting to by-pass the rights of both "traditional" employees and agency workers, particularly in relation to by-passing collective agreements. The existing Directives only provide limited protection.

The Posted Workers Directive was intended to give some protection to people moving from one country to another while retaining their employment contracts from their country of origin. Such people are entitled to the rights of workers in the place they are working in so far as they are part of the law, or contained in collective agreements that are of universal application. This caused some resentment in Hungary where lorry drivers working in Germany had to be paid the higher minimum wage in Germany, thereby losing their competitive edge.

The biggest problem, however, as stated above, was the *Viking* problem, where posted workers were placed in a situation where they were seen to be challenging long-accepted norms within the host country as to pay rates, pension rights etc. Article 3 of the Posted Workers' Directive did not require employers to comply with the collective agreements of the host country because the terms of the collective agreements were not "universally enforceable". This gave a business advantage to incoming employers against host country employers and also meant that posted workers were a cheaper source of labour than local workers with comparable skill sets. Unable to force this issue by law the Finnish unions tried to impose the higher standards by secondary picketing (which is lawful in Finland), but the ECJ stopped them, saying that the right of Estonian companies to provide services in Finland trumped the right to take industrial action. There are, however, hints that the attitude of the EU is changing and that the Enforcement Directive is an attempt to give individual countries to take a more protective approach.

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