Case C-341/05 *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, judgment of 18 December 2007

Internal market and free movement – freedom to provide services and collective action initiated by a trade union

The Court rules on the relationship between fundamental rights and the principles of free movement within the internal market.

With a view to operating the sites of a number of construction projects it had successfully tendered for in Sweden, Laval un Patneri, a Latvian construction company, established a subsidiary, L&P Baltic Bygg AB, and posted Latvian workers to that subsidiary in order to carry out the work. Laval also began negotiations with the Swedish building workers' trade union, *Svenska Byggnadsarbetareförbundet*, aimed at fixing the rates of pay for the posted workers and signing the collective agreement for the building sector. However, these negotiations were not concluded. Thus, in the meantime, Laval signed collective agreements with the Latvian building sector's trade union, of which 65% of the posted workers were members. The Swedish trade union then initiated collective action in the form of a blockade at all Laval's building sites in Sweden. After work had been interrupted for a certain period of time, the subsidiary L&P Baltic Bygg was declared bankrupt and the posted workers returned to Latvia.

The *Arbetsdomstolen*, before which Laval had brought an action regarding *inter alia* the legality of the collective action and compensation for the loss suffered, asked the Court of Justice whether the relevant provisions of Community law preclude trade unions from taking collective action, in the circumstances described, in order to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement.

Firstly, the Court stated that Directive 96/71/EC, concerning the posting of workers to another Member State in the framework of the provision of services, allows the host Member State to make the provision of services in its territory by posted workers conditional on the observance of a set of terms and conditions of employment, more specifically mandatory rules for minimum protection provided for in Article 3(1)(a) to (g) of the Directive. This makes it possible to ensure both minimum protection for posted workers and a climate of fair competition between national undertakings and undertakings which provide services transnationally. Furthermore, the Court pointed out that Directive 96/71/EC did not harmonise the material content of those mandatory rules for minimum protection, with the result that each State is free to define that content by law or by collective agreements declared either to be of universal application or, in any event, generally applicable to all similar undertakings in the sector concerned, in compliance with the Treaty and the general principles of Community law.

In this context, the Court found that, in Sweden, the terms and conditions of employment applicable to posted workers are laid down by law, save for the minimum rates of pay which in the construction sector are normally set by means of collective negotiations on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned. The Court took the view that a rate of pay set in this way cannot be imposed under Directive 96/71 EC on undertakings established in other Member States in the framework of the transnational provision of services.

The Court then considered the collective action in the light of Article 49 EC, in so far as that action seeks to force a service provider established in another Member State to enter into negotiations with a view to laying down more favourable terms than the minimum terms required by the Directive. The Court made clear that, as regards the matters covered by Directive 96/71/EC, that directive expressly lays down the degree of protection which the host State is entitled to require undertakings established in other Member States to observe to the benefit of the workers of those undertakings who are posted in the territory of the host State, without prejudice to the right of those undertakings to sign of their own accord a collective agreement in the host Member State or to apply more favourable terms under a collective agreement of the State of origin.

In this context, the Court went on to point out, as it had in the judgment in *Viking* given one week previously, that the right to take collective action constitutes a fundamental right which forms an integral part of the general principles of Community law, but that that right must nevertheless be reconciled with the fundamental freedoms guaranteed by the Treaty, with the result that the exercise of that right may be subject to certain restrictions, in accordance with the principle of proportionality.

It further found that the right to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement, certain terms of which depart from the measures transposing the Directive, is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services.

The Court next considered whether there was any justification based on a legitimate objective in the public interest which was appropriate and proportionate. As in *Viking*, the Court acknowledged that the protection of workers may constitute such an overriding reason of public interest. However, in view of the fact that the immediate objective of the collective action in question was to require Laval to sign the collective agreement for the building sector in order to force it adopt working conditions going beyond the minimum protection provided for in Directive 96/71/EC, the Court took the view that the legitimate objective of protecting workers is sufficiently protected by compliance with the nucleus of mandatory rules for minimum protection in Directive 96/71/EC. It added that such collective actions cannot be justified where negotiations on pay form part of a national context characterised by a lack of provisions which are sufficiently precise and accessible, in order not to render it impossible or excessively difficult for an undertaking of another Member State to determine the obligations with which it is required to comply as regards minimum pay.

The Court concluded by finding that the rules of a Member State which fail to take into account collective agreements to which undertakings that post workers to other Member States are already bound in the Member State in which they are established are likewise contrary to the provisions on the freedom to provide services, whereas agreements concluded in the first Member State are taken into account. This is a case of direct discrimination based on nationality for which there is no justification.