Employment

Govia derailed – appeals to EU law rejected by the Court of Appeal

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Govia GTR Railway Limited v ASLEF [2016] EWCA Civ 1309 was the first occasion on which an application to restrain industrial action based on European Law had been made in an English court. The series of strikes by drivers on Southern Rail set the battleground for the Govia case. Govia's application for an interim injunction to prevent the strikes going ahead was not based on an alleged breach of Part V of the Trade Union and Labour Relations (Consolidation) Act 1992. It was based on the EU fundamental freedoms of provision of services (article 56 TFEU) and freedom of establishment (article 49 TFEU) and the relevant EU case law on industrial action.

The most well-known authorities on this issue are the decisions of the CJEU in Viking Line ABP and Laval. In Viking (an article 49 TFEU case) the purpose of the industrial action was to prevent a Finnish shipping company from reflagging its vessel to Estonia where it would be able to crew the vessel with less expensive Estonian crew. In Laval (an article 56 TFEU case) the aim of the action was intended to compel a building company to accept the terms of a Swedish collective agreement rather than employing Latvian workers on cheaper terms and conditions. In both cases the CJEU concluded that the industrial action was a disproportionate and unlawful interference with the fundamental freedoms enjoyed by the companies. This proportionality analysis is entirely different to the approach to the lawfulness of strike action contained in Part V of TULRCA. Under domestic law, a court will not have regard to the legitimacy of the strike action but will simply ask itself the question of whether there is a trade dispute and whether the balloting requirements set out in Part V has been complied with.

In Govia the train company argued that the industrial action was an unlawful interference with its rights under article 49 (based on the fact of its 35% French ownership) and the rights of itself and the passengers who may seek to use its trains under Article 56. The application for an interim relief was unsuccessful both at first instance and in the Court of Appeal, even with the benefit of both courts applying the relatively low threshold under American Cyanmid; is there a serious issue to be tried?

Dealing first with article 49, Govia sought to argue that the strike action called by the union was likely to discourage the (part) French-owned entity from expanding its operations within the UK. Having reviewed the CJEU decision in Viking, Elias LJ noted that the critical issue was not the effect of the proposed industrial action but the effect on the employer if it had to accept the terms imposed by the unions. The following quotation (taken from paragraph 30) is key:

"It is plain from these paragraphs that the measure which was likely to hinder or make less attractive the exercise of the freedom of establishment was not the mere fact that damage may result from the industrial action; it was the objective which the industrial action was seeking to achieve."

ASLEF's objective was not to prevent Govia from exercising its rights under Article 49. Rather ASLEF was seeking to prevent Govia from extending the scope of driver only operations on its trains.

The same reasoning was applied to the claim pursued under Article 56. It was not the objective of the industrial action to prevent passengers on Govia trains from exercising their Article 56 rights even if that was the effect of such action. The Article 56 claim also failed on the basis that the effect of Article 58 (which took transport services outside the scope of Article 56) could not be evaded by Govia "free-wheeling in the slip stream of their passengers" (see paragraph 51).

What is also important to take from the Court of Appeal's judgment, are its references to the rights of a trade union and its members under Article 11 ECHR. Elias LJ said as follows (at paragraph 44):

"…it would hardly be compatible with the freedom of association or the protection of the right to strike as a fundamental right effectively to put the legality of every strike with cross-border impact into the hands of the courts, with the onus on the union to persuade them that the action was not disproportionate."

The Court of Appeal's focus on the purpose or object of the industrial action will be a considerable relief to trade unions. The decisions in Viking and Laval had been widely understood to mean that if the impact of industrial action was to render the exercise of fundamental freedoms less attractive and this was disproportionate compared to the matters in dispute, the industrial action would be potentially unlawful and the employer could obtain an interim injunction. In addition, unlike disputes under TULRCA, claims by employers based on the EU fundamental freedoms may not be subject to any cap on damages. Until now many trade unions contemplating industrial action in cross-border industries may have decided not to run the risk of an award of unlimited damages.

Whilst it remains to be seen what approach the CJEU (or potentially the Supreme Court, given that Govia are apparently seeking permission to appeal) would take, the judgment in Govia has thawed the chilling effect of Viking and Laval. The prevailing view in the Court of Appeal seems to be that trade unions must be able to enjoy their freedom to call industrial action and the law should not overly fetter this freedom. It follows that trade unions are likely to be more confident in calling strikes, particularly in cross-border industries, in the future at least where the objective, as opposed to the effect, of industrial action is not to interfere with fundamental EU rights.

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