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The right to strike under threat – a European Taff Vale?

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The right to strike under threat – A European Taff Vale?

SOLIDARITY Editor Martin Wicks examines the implications of two recent injunctions against strike action.

The recent injunctions issued against strike action by UNITE and the RMT have grave implications for the whole trade union movement. They place a question mark over the right to strike. There were two main parts to these judgements: ‘irregularities’ in the balloting process and a new concept of ‘proportionality’ (which has no precedent in UK law) based on European Union law and judgements by the European Court of Justice (ECJ) relating to the Laval and Viking cases.

Postal ballots

One of the changes in employment law which Thatcher introduced in 1993 was the obligation to carry out a postal ballot for industrial action, to render it legal. Under this legislation the unions had to provide to the employer a list of members they were balloting, in order that they (the employer) could ‘prepare for strike action’. Whilst a union might not necessarily want to give an employer a list of members, check-off (or paybill deduction of union subs) was the most common means of paying them. It was a simple process. A union had to hand over a list of names and NI numbers.

When New Labour came to power in 1997 they amended the balloting regulations. Most unions considered the ending of the obligation to provide the names of their members to an employer as a gain. However, in its place a union had to provide a list of grades and numbers being balloted, as well as workplace locations with the numbers of staff in each grade at each location. This was a real sting in the tail. New Labour’s amendment of employment law has worsened the situation and opened unions to the increasing threat of injunctions to prevent strike action because of balloting ‘irregularities’.

If your membership is on check-off (paying subs from their wages) then a union can simply provide a list of members and NI numbers. Today, however, it is more common for unions to offer the choice for their members to pay either by check-off or by Direct Debit. These means there is more scope for ‘irregularities’.

In the recent case of UNITE at British Airways, the injunction was issued, in part because they had balloted members who had been made redundant. The regulations say that only those who qualify to be balloted should be. Redundant staff do not. However, the judgement did not take any account of the fact that the numbers involved could not have had any material impact on the outcome of the ballot since over 90% of staff voted for strike action. Section 232B of the 1992 Trade Union & Labour Relations (Consolidation) Act says that when a union makes “accidental mistakes” in terms of those who are balloted, on a scale unlikely to affect the outcome, this will not invalidate the procedure.

In the case of the RMT, the injunction, again, was in part issued because of ‘irregularities’ in balloting. Network Rail said that because the RMT had provided inaccurate information on workplaces and grade numbers then people had been balloted who should not have been. Since the ballot result was close there was more scope for Network Rail to suggest that ‘irregularities’ could have produced a No vote.

“The rail operator (Network Rail) argued that the closeness of the vote meant that the votes of just 112 of 4,556 signallers balloted could have changed the result. The company presented a string of alleged irregularities including 11 “phantom” signal boxes that should not have featured in the ballot.”

In addition 23 workplaces were supposedly “excluded from the vote”, 12 were “included where there are no RMT members”, and at 67 locations the RMT “balloted more members than there are employees”. This was patently absurd. The inaccurate information could have no bearing on the outcome of the ballot since the union balloted members at their home addresses. It cannot ballot people who aren’t members. Moreover, Network Rail does not know which of their staff pay union subs by Direct Debit, so how it could have known there were ‘no RMT members’ at 12 locations is a mystery.

Hence, whatever the motivation behind the change in the balloting regulations they have made it more difficult to take strike action without falling foul of the law, even when the information a union has to provide does not impact on the outcome of the ballot.
In real life some members who should get a vote do not, and some who should not do. All it requires is for a member to fail to inform a union of a change of grade, or a change of address. In the case of the RMT the locations and numbers are irrelevant to the conduct of a ballot, accept insofar as the provision of this information is a hoop through which the union has to jump.

Of course the difficulties that a union may face in overcoming these hurdles will depend on the industry their members work in and whether it is a local or national dispute. What is clear now is that a national strike is more and more difficult because the information that a union has to provide is more complicated. In the case of Network Rail, signal boxes are small workplaces, around 1,000 of them (according to its 2007 Business Plan), usually with a small numbers of workers in each of them. To keep accurate information up to date is, as Bob Crow has said, like painting proverbial the Forth Bridge; the job is never finished.

It is high time that the unions recognised that the change in balloting regulations by the New Labour government has presented a big problem for us; one which has to be addressed. Notwithstanding the labour movement campaign for the repeal of the anti-union legislation as a whole, there is an urgent need for an amendment to these balloting regulations so that trades unions do not have to provide such detail. It should be sufficient that they inform a company of the grades/categories of staff they are balloting. Any management knows who these are. Moreover, a trade union should not have to provide information in order to assist a management in undermining a strike.

'Proportionality'

If the balloting regulations constitute a major problem, especially in relation to strikes on a national scale, the two judgements lost by UNITE and RMT, indicate an even greater obstacle to the organisation of industrial action. The judgement in relation to BA, as far as I am aware, marks the first time that a British judge has issued an injunction in part because the action proposed by a union (it had said it would organise a 12 day strike) was deemed to be 'disproportionate'.

Mrs Justice Cox said: “A strike of this kind over the 12 days of Christmas is fundamentally more damaging to BA and the wider public than a strike taking place at almost any other time of the year.”

Likewise in the judgement on Network Rail’s application for an injunction against the RMT’s strike, the question of proportionality was one of the grounds on which the injunction was granted.

"Charles Bear QC, the lawyer for Network Rail, convinced the High Court to intervene with the injunction by saying that the industrial action would cause a lot of damage to the already stricken economy. He explained that it was needed to prevent unlawful action, which would have the same effect as cancelling 80% of Britain’s rail services. Bear continued that this would damage businesses that depend on rail services for transport and freight, adding that it would also damage the claimant itself and train operating companies."

In fact in British law there is no precedent for a judge to rule on the legality of industrial action on anything other than whether it constitutes a ‘trade dispute’ (a very narrow definition introduced by Thatcher) and whether a union has followed the balloting regulations. However, as a result of the Lisbon treaty the Charter of Fundamental Rights has to be applied in Britain. Any contradictions within the Charter, or questions of interpretation are subject to determination by the ECJ. The British government, it should be remembered, opposed the right to strike being a ‘fundamental right’!

Readers may recall the ECJ judgements known as the Laval and Viking cases (see box). In these, the ECJ was considering the apparent contradiction between two Articles in the Charter. Article 15 reads:

“Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.”

Article 28 refers to “the right of collective bargaining and action”.

“Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”
It is the apparent conflict between the right to strike and the “right of establishment and to provide services” which the ECJ considered.

The focus in the media and in the trades unions on these cases was on the implications for the employment of foreign labour as a means of undermining national agreements. Imported contract labour was being paid at rates lower than other workers in the country in question. Obviously the trades unions were concerned to ensure that the 'rate for the job' should be paid regardless of the nationality of the workers. Howevser, the Posted Worker Directive offers no more protection than the minimum wage rate of the country into which a worker is posted.

What did not receive much attention, however, was the fact that in the Laval judgement the question of the 'proportionality' of the strike action was one of the reasons for the action being ruled as illegal.

Whilst it is more general in European countries to have the legal right to strike, enshrined in law, this right is dependent upon whether the proposed action is judged to be ‘proportionate’ or not. The ECJ has held that unions have a fundamental right to strike under European law, but industrial action may have to be “justified” by “balancing it against employers’ rights to the freedom of movement and goods”.

British judges are now taking into account ECJ judgements in determining whether or not to grant injunctions to stop industrial action,

The BALPA case

Prior to the BA and RMT injunctions, in March 2008 BALPA members voted for strike action against British Airways decision to set up a subsidiary based in Europe. BALPA sought to prevent the company undermining wages by employing pilots on lower wages that BA paid their staff in the UK. BA sought an injunction based on the argument that the action would be illegal as a result of the Laval and Viking judgements. BA claimed that, should the work stoppage take place, it would claim damages estimated at £100 million. Under these circumstances, BALPA did not follow through with the strike, stating that it would risk bankruptcy if it were required to pay the damages claimed by BA. So the threat from BA was not tested in court, but it was sufficient to make BALPA back down.

As a result BALPA submitted an application to the International Labour Organisation concerning the British government's failure to meet the requirements of ILO Convention 87, which covers the right to freedom of association and the right of unions to organise workers.

The UK Government response to BALPA's application said that it was “misdirected and misconceived because any adverse impact of Viking and Laval would be a consequence of the European Union law, to which the United Kingdom is obliged to give effect, rather than of any unilateral action by the United Kingdom itself”. The Government also said that that BALPA's application was “premature because it remains unclear what, if any, impact the Viking and Laval judgements would have on the application of trade union legislation in the United Kingdom”. The Government added that these judgements were not likely to have much effect on trade union rights because they were only applicable where the freedom of establishment and free movement of services between Member States were at issue. This has proved to be false.

The ILO committee of Experts had this to say in considering BALPA's application:

“The Committee observes with serious concern practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the Viking Laval, creates a situation where the rights under the Convention cannot be exercised. While taking due note of the Government's statement that it is premature at this stage to presume what the impact would have been had the court been able to render its judgement in this case given that BALPA withdrew its application, the Committee considers, to the contrary, that there was indeed a real threat to the union's existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless. Finally, the Committee notes the Government's statement that the impact of the ECJ judgements is limited as it would only concern cases where freedom of establishment and free movement of services between Member States are at issue, whereas the vast majority of trade disputes in the United Kingdom are purely domestic and do not raise any cross-border issues. The Committee would observe in this regard that, in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of
employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.”

It therefore recommended to the UK government that:

“In light of the observations that it has been making for many years concerning the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice, and bearing in mind the new challenges to this protection as analysed above, the Committee requests the Government to review the TULRA and consider appropriate measures for the protection of workers and their organizations to engage in industrial action and to indicate the steps taken in this regard.”

The British government, of course, is a signatory to the ILO Conventions.

Whilst the British unions have been forward in praising and relying on European legislation as progressive, and a means of pressuring a British government to carry out legislation in line with European law (especially in relation to 'social rights'), what we have here is European law being imposed in such a way that the very right to strike is under threat. Daniel Ornstein and Herbert Smith (Employment Lawyers Association), in line with the ILO assessment, are right when they say:

“These two rulings impose substantive new restrictions on the lawfulness of industrial action and require the UK courts to adopt a new approach to the grant of injunctive relief, at least where there is a direct international element. Moreover, they may also apply where there is very little or even no direct international element. There is therefore every reason to conclude that Viking Line and Laval have provided employers with a potent new weapon with which to oppose industrial action.” (Our emphasis)

Those unions that supported the Lisbon treaty will see their members now paying the price in relation to employment law. Underlying the Laval and Viking judgements is the fact that the Lisbon treaty enshrines in law the predominance of the market, and open competition. Industrial action can be deemed a restraint on trade, on the “right of establishment”. The UK government, as we know, refused to allow its people to vote on whether or not to accept the Lisbon treaty. So fundamental changes in law were pushed through without any democratic mandate.

The defence of the right to strike, therefore, requires that we campaign against any determination by judges of the economic impact of the action taken by workers. Strike action is a means of economic pressure on a company. To accept the institutional and ideological concept of 'balance' means to accept perpetual interference by judges when workers have balloted for industrial action. An application for an injunction, once not very common, would become a usual occurrence.

2008 TUC

At the TUC Congress in 2008 a composite resolution on the ECJ judgements expressed the view that with these judgements EU law was “subjugating fundamental collective rights, including collective bargaining and to take industrial action, to the rights of employers and business”.

Derek Simpson, moving a Composite resolution on this issue, was certainly right when he said at the 2008 TUC Congress, referring to the Laval and Viking judgements:

“It now transpires that the most recent judgements by the European Court of Justice cause, perhaps, the biggest challenge to the trade union movement in a century, far worse than Thatcher's laws, striking at the very heart of collective bargaining, damaging unions' abilities to fight for improvements in working conditions and making it not only preferable for employers but giving them legal protection to introduce cheap labour into any sphere, any sector and any corner of the economy.

...unless we reverse the European Court of Justice's decisions, we are back in the dark days.”

In the same debate Bob Oram from UNISON said:
“UNISON believes that the ECJ is unaccountable. We believe it is politically driven. Its recent decisions undermine our collective ability and collective rights even further than the disgraceful Thatcher attacks which are still on the statute books.

The situation is quite simple, comrades. The EU is committed to extending the internal market. That is privatisation to you and me. The Court, through these rulings, has seriously undermined our ability to defend our members against further attacks. The employers' right to freedom of establishment trumps the right to strike leaving us defenceless against the EU's drive to liberalise markets and institutionalise social dumping.”

The Composite resolution called on the General Council to:

i) develop a strategy and take action to counter the impact of these decisions;

ii) take urgent steps to meet with UK government ministers to obtain their support for legislative changes which ensure more comprehensive protection for social rights in Europe;

iii) work with the ETUC to maintain pressure on the EU to bring about legislative change; and

iv) organise a mass lobby of MEPs to secure support for legislative change.

At the 2009 Congress reaffirmed its opposition to the ECJ rulings and reiterated that the Lisbon Treaty “exacerbates attacks on trades unions by handing greater power to the ECJ to interpret disputes concerning the Charter of Fundamental Rights.” But there was nothing in the General Council report on this, or on the implementation of the 2008 resolution. If indeed we are “back in the dark days” and collective trade union rights have been “subjugated...to the rights of employers and business”, what happened to the campaign?

The European TUC response

In the wake of the Laval and Viking judgements the ETUC has called for changes in European law to overcome the impact of the Laval and Viking judgements. In a speech to the Employment and Social Affairs Committee of the European Parliament, ETUC General Secretary John Monks said:

“We are now left with not knowing what is “proportionate” action and what is not. Presumably a court will define “proportionality” in the context of each case, so creating intolerable uncertainty for unions involved in virtually any case of industrial action over migration and free movement, a naturally growing area for disputes as Europe integrates its labour and services markets. In some member states, the right to strike is a first rank constitutional right and this is now at risk. So, generally, is trade union autonomy.

So we are being told that the right to strike is a fundamental right but not so fundamental as the EU's free movement provisions."

In response to these judgement the ETUC has called for “A social protocol confirming that the single market exists to serve social progress, that fundamental social rights have priority, that enterprises cannot circumvent national laws and practices in order to engage in unfair competition on pay and working conditions ..."

In October 2008 the European parliament voted through by a large majority, a report drafted by Jan Andersson (European Socialist Party) on challenges to collective agreements in the European Union. With this report the EP “expressed deep concerns” about the rulings of the ECJ in the Viking, Laval, Rüffert and Luxembourg cases.

The EP said that economic freedoms, such as the freedom to provide services, are not superior to fundamental rights, such as the right of trade unions to take collective action. Furthermore, it emphasised the right of the 'social partners' to ensure non-discrimination, equal treatment, and the improvement of living and working conditions of workers. The EP called on the Commission to prepare the necessary legislative proposals which would assist in preventing conflicting interpretation in the future and for a “re-assertion in primary law of the balance between fundamental rights and economic freedoms”, in order to help avoiding a race to lower social standards.

John Monks said:

“This vote shows clearly that the EP has succeeded in finding a compromise that allows for safeguarding the European Social Model and for protecting the industrial relations systems in the Member States, and I thank all those Members of the EP that understood the importance of this issue for the future of Europe and worked hard to get this report adopted. Fair competition between companies and respect for collective bargaining is an interest and
concern that all trade unions share in Europe, be it in the ‘old’ or the ‘new’ Member States. *I particularly welcome the fact that the EP is looking at ways to re-establish an adequate balance between fundamental social rights and economic freedoms.* The ETUC renews its call to the EU institutions to give serious and urgent consideration to the adoption of a social progress protocol to be attached to the EU treaties." (Our emphases)

There is, however, a fundamental problem with this approach. The single market was conceived as a means of Capital in Europe competing in the global market place. Moreover, the ‘free market’ foundation of the EU leads in the direction of turning public services into commodities, for they restrict the right of private businesses to enter these ‘markets’. (The Blair/Brown government, of course, has sought to remedy this by creating a ‘health market, where none existed, to invite private companies in.)

Since Monks and the ETUC’s position is coloured by the illusion that the ‘single market’ can serve ‘social progress’, it is no surprise that they view the purpose of such a protocol, which the ETUC wants to be legally binding, to be to “restore balance between economic market freedoms and fundamental rights”.

What exactly does “balance” between ‘social rights’ and ‘economic freedom’ mean? The very idea of ‘balance’ is a recipe for judicial intervention in the determination of whether a strike is legal or not. What right has a judge to determine whether or not workers who have voted for strike action should take it? The unelected judiciary is overriding the democratic decision of workers, who in any case have the cards stacked against them.

The EU and the ETUC accept that unions and employers have interests in common. The ‘European social model’ is based on the idea of ‘social partnership’. Trades unions that support such an outlook accept that the unions have an interest in helping their employers to compete successfully in the ‘single market’ and the global market. The concept of ‘balance’ between social rights and economic freedoms has a similar foundation. Support for social partnership marked an abandonment of the idea of class struggle and the fundamental conflict of interests between unions and the employers. For trades unions to call for ‘balance’ means accepting the right of judges to determine the legality or otherwise of industrial action on criteria *which is rooted in a free market outlook*.

**A European Taff Vale?**

As a result of the criteria of ‘proportionality’ and the threat of being liable for damages, we have potentially been thrown back to the Taff Vale judgement; a potential European Taff Vale. The Taff Vale judgement of 1903 involved the fining of the ASRS rail union for striking against the Taff Vale Railway Company. The fine was to recompense for the cost of the strike to the company. Whilst the judgement did not dispense with the right to strike it meant that the formal right to strike was worthless because unions could be prosecuted for executing that right, and fined for the cost of their action to the employer. They could potentially be bankrupted for taking any strike action.

In 1906 the Liberal government introduced legislation which created *immunity* from prosecution which meant that the right to strike could be used without fear of a union being bankrupted. The legislation was implemented as a means of the Liberal Party fending off the electoral threat of the young Labour Party, whose growth was given impetus by the Taff Vale judgement. The judgement had deepened the break of the unions with the Liberal Party. The legislation was a concession to the electoral base of support which the Liberals had had amongst sections of the working class. Since then immunity from prosecution has remained the historic protection of the right to strike in Britain, whilst there has been “no positive legal right to strike”.

The parallel with Taff Vale is this. Then the formal right to strike was of little use if a union could be bankrupted for taking advantage of this right. Now, the right to strike is threatened because the concept of ‘proportionality’ enables employers to seek injunctions on such grounds when a group of workers has voted for strike action. Truly ‘a potent new weapon’ against the unions.

What use is the right to strike if you cannot exercise it because a judge determines that your action would be illegal because of the impact it would have on the employer and the economy and ‘consumers’ of goods and services? Mr Beard for Network Rail said that the action of the RMT was disproportionate because of the impact of the action in the context of a recession. What about the impact of a strike by UNISON on patients in the health service, or by the FBU, given the risk of fires? What of the threat of BA to sue BALPA for £100 million? There has been talk of the Tories bringing in legislation to ban strikes in ‘essential services’. In fact they would not need to, for an effective ban could be implemented on the basis of ‘proportionality’.

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What the trade union movement faces, therefore, is the biggest challenge since Taff Vale. It needs to mobilise a campaign to defend the right to strike, to change the balloting regulations so they are not onerous for the unions, and to seek to build a European campaign to challenge the concept of ‘proportionality’ in law.

Neo-liberalism was marked by the attempt to subordinate society to the imperatives of ‘the market’. ‘Proportionality’ is nothing other than attempt to subordinate employment rights to ‘the market’. At stake is the democratic right of workers and trades unions to defend their interests and to challenge the tyranny of their subjugation to the rights of employers and business.

Appendix

**The Viking Case**
The Viking Line shipping company tried to re-flag the ferry *Rosella* to replace its Finnish crew which cheaper Estonians. The Finnish seafarers union and the ITF organised a boycott of Viking. The company claimed it was a breach of its right to the freedom of movement of goods and service. The ECJ held that although the right to take collective action is a fundamental right it can constitute a restriction on the freedom of goods and services so must be justified.

**The Laval case**
A Latvian building company won a contract to build a school in Sweden and brought in Latvian workers. The Swedish union blockaded the firm in order to get them to sign up an agreement to bring their wages up to Swedish levels. The ECJ said that the right to take collective action is a fundamental right but it must not go beyond what is suitable for attaining objectives. Furthermore, it held that action to give workers rights beyond those already given by the Posted Workers Directive cannot be justified. The PWD means that workers can be employed for the minimum wage in a country, even if this is in breach of local agreements negotiated by unions and employers.

**The Ruffert case**
In the Ruffert v Land Niedersachsen, a German company won the contract to build a prison. The contract specified that wages were to be paid at the level collectively agreed for the region. However, the German company subcontracted the work to a Polish company which paid their workers less than half of the German workers on the site. On discovering this, the company terminated the contract and imposed financial penalties. The ECJ decided that the requirement for a minimum salary level was capable of constituting a restriction on trade and was not justified on the grounds of protecting workers or protecting the independence of trade unions. In addition to Article 49 (freedom of establishment) the Posted Workers Directive prevented the requirement for higher wages on contracts for public work where there was no corresponding requirement for private sector contracts.

**The Luxembourg case**
In July 2006, the unelected Commission of the EU brought an enforcement action against Luxembourg in which it claimed that Luxembourg had failed to fulfil its obligations under the PWD and under Article 49 and 50 concerning the freedom to provide services. Luxembourg sought to impose better conditions than the minimum level under the Posted Worker Directive. This was declared illegal.