SUMMARY

2017/12 Court of Appeal rejects argument that Christmas strikes are unlawful under EU law (UK)

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Legal background

Article 49 of the TFEU makes it unlawful for a state to impose restrictions on the freedom of nationals of one EU member state to establish themselves in the territory of another.

Article 56 of the TFEU makes it unlawful to interfere with the right for individuals to provide

services to, or receive services from, persons situated in other EU member states.

It is well established that these rights can be asserted horizontally against trade unions.

Two binding decisions from the Court of Justice of the European Union, Viking and Laval, and one persuasive decision from the EFTA court, Holship, have held that industrial action will infringe these principles if it is held with the purpose of making the exercise of them less attractive.

Facts

Govia Thameslink Railway ('GTR') owns the franchise to run Southern Rail. Southern Rail had been engaged in a longstanding dispute with the rail union ASLEF about the use of driver-only operated passenger trains. ASLEF had called for industrial action to take place on three days in December 2016, arguing that a second, safety-trained, crew member should always be on board Southern Rail trains.

It was accepted by the parties that ASLEF's call for industrial action was made in furtherance of a trade dispute. It was also accepted that a proper and lawful strike ballot had been held in which ASLEF's members had voted overwhelmingly to strike.

It was estimated that the strike action would affect 600,000 journeys on each day of its duration. This would have caused GTR a loss in the region of £ 20 million and serious reputational damage.

ASLEF had provided an assurance that it would not call out drivers of Gatwick Express trains. The Gatwick Express lines would nevertheless "undoubtedly" be impacted by the industrial action with some 50% of services needing to be cancelled. Thirty-seven percent of passengers travel to Gatwick Airport by rail and 90% of those use GTR's services.

The necessary cross-border element for bringing a claim under Article 49 of the TFEU was met by virtue of a French company owning 35% of GTR's shares. The necessary cross-border element to bring a claim under Article 56 of the TFEU was met by virtue of passengers who would be disrupted being persons who might be impeded in their ability to provide services to, or receive services from, persons situated in other EU member states.

Judgment

The Court of Appeal upheld the judgment of the High Court that the proposed industrial action would not breach the TFEU.

The Court of Appeal undertook detailed analysis of the three authorities upon which GTR

relied. It held that they made it "absolutely plain" that industrial action will only breach the TFEU if the objective of the industrial action is to make less attractive the exercise of the relevant freedom. For example, the industrial action in Viking was unlawful because its purpose was to prevent a Finnish company from reflagging a ship and operating it with a crew retained on less expensive Estonian terms and conditions.

The Court of Appeal held that the "mere fact that damage may result from the industrial action" does not mean that industrial action will necessarily breach Article 49 of the TFEU as every strike makes a country less attractive to foreign companies. The relevant test is instead "to ask whether, if the rules [about which there is a dispute] were laid down by government, they would be an unlawful interference with the freedom of establishment." On the facts in this case, it held that "it is inconceivable that a rule which did not discriminate on grounds of nationality and which required a driver and a guard on all trains to ensure the safe closing of doors rather than just a driver, could be said to constitute a deterrent to freedom of establishment or to make it less attractive".

In respect of Article 56 of the TFEU, the Court of Appeal again held that the relevant factor was not whether damage may result from the industrial action but the objective being pursued by way of the industrial action. It then went on to comment that passengers could of course make their way to Gatwick Airport by other routes during the strike. This meant that it was impossible to say in advance whether the industrial action would interfere with any passenger's ability to travel and that it would be an "extraordinary consequence" for ASLEF to be liable to each passenger who might potentially have been indirectly affected by it.

The Court of Appeal therefore refused GTR injunctive relief preventing the industrial action.

Commentary

This decision arose in the context of a longstanding industrial dispute. It followed earlier attempts in the High Court to challenge the validity of the industrial action under the UK's domestic legislation governing industrial action. It can therefore be seen as a last chance effort, ultimately in vain, by GTR to seek protection from trade union industrial action in the run up to Christmas.

The decision nevertheless provides useful guidance that the circumstances in which a company will be able to rely on the TFEU to prevent industrial action will be limited. Those limited circumstances may well however become more frequent during the next two years as companies move operations, and thereby jobs, from the UK to other EU member states in preparation for Brexit. This case highlights a useful argument upon which other employers may seek to rely and a cautionary reminder for unions seeking to prevent Brexit-induced

redundancies in the UK through industrial action.

Subject: Collective labour law, industrial actions, unions (freedom of establishment)

Parties: Govia GTR Railway Limited – v – The Associated Society of Locomotive Engineers and Firemen

Court: Court of Appeal

Date: 20 December 2016

Case number: [2016] EWCA Civ 1309

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