

## United Kingdom

### ***Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (ratification: 1949)***

The Committee notes the comments made by the British Airline Pilots' Association (BALPA) dated 22 October 2008, supported by the International Transport Federation (ITF) and Unite the Union, and the Government's reply thereto. The Committee notes in particular that BALPA refers to two recent decisions of the European Court of Justice (ECJ), *International Transport Workers' Federation and the Finnish Seaman's Union v. Viking Line ABP (Viking)* and *Laval un Partneri v. Svenska Byggnadsarbetareförbundet (Laval)* which held that the right to strike was subject to restrictions under the European Union law where its effect may disproportionately impede an employer's freedom of establishment or freedom to provide services. BALPA asserts that these judgements have negatively impacted upon their rights under the Convention.

In particular, BALPA explains that it decided to go on strike, following a decision by its employer, British Airways (BA), to set up a subsidiary company in other EU States. While efforts were made to negotiate this matter, in particular the impact that the decision would have upon their terms and conditions of employment, all attempts were unsuccessful and BALPA members overwhelmingly voted to go on strike. The strike action was, however, effectively hindered by BA's decision to request an injunction, based upon the argument that the action would be illegal under *Viking* and *Laval*. In addition, BA claimed that, should the work stoppage take place, it would claim damages estimated at £100 million per day. 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. BALPA expresses its deep concern that the application of *Viking* and *Laval* by the UK courts will result in injunctions against industrial action (and dismissal of workers) if a strike's impact on the employer is judicially determined to outweigh the benefit to workers.

The Committee notes the Government's indication in its reply that BALPA's application is 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 further asserts that BALPA's application is 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 adds that these judgements would not likely have much effect on trade union rights because they are only applicable where the freedom of establishment and free movement of services between Member States are at issue. Moreover, the impact of the principles they set forth may differ considerably depending upon the facts of the case. There have been no subsequent analogous cases at the ECJ level, nor have there been any decisions by the UK domestic courts as to whether and to what extent the new principles might represent an additional restriction on the freedom of trade unions to organize industrial action in the United Kingdom. Finally, the Government indicates that it is not obvious that the current limit on damages in tort would be bypassed or overridden in a *Viking*-based claim since that limit has a sound basis in the protection of the freedoms of trade unions which would be taken into consideration if the limit were challenged as contrary to the European Union law.

The Committee first wishes to recall more generally its previous comments, in which it has noted the limitations on industrial action in the United Kingdom, including that it remains a breach of contract at common law for workers to take part in strike action and that trade union members are protected from the common law consequences (dismissal) only when the trade union has immunity from liability, i.e. when the strikes are in contemplation or furtherance of a trade dispute, which would not include secondary action or sympathy strikes (section 224 of the Trade Unions and Labour Relations (Consolidation) Act, 1992 (TULRA)). The Committee has asked the Government in this regard to indicate the measures taken or envisaged so as to amend the TULRA, with a view to broadening the scope of protection available to workers who stage official and lawfully organized industrial action.

With respect to the matter raised by BALPA, the Committee wishes to make clear that its task is not to judge the correctness of the ECJ's holdings in *Viking* and *Laval* as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers' freedom of association rights under Convention No. 87.

The Committee observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in

mind a notion of freedom of establishment or freedom to provide services. The Committee has only suggested that, in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body (see 1994 General Survey on freedom of association and collective bargaining, paragraph 160). The Committee is of the opinion that there is no basis for revising its position in this regard.

The Committee observes with *serious concern* the 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* and *Laval* judgements, 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.

*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.*