European Trade Union Confederation (ETUC)
Confédération européenne des syndicats (CES)

Rüffert C-346/06
Judgment summary

Circumstances of the case

The Law of Land Niedersachsen, Germany, on the award of public contracts obliges tenderers to public contracts to undertake in writing to pay their employees at least the remuneration prescribed by the collective agreement at the place where services are performed. The company Objekt und Bauregie GmbH & Co secured a public contract for building work in Niedersachen, which it subcontracted to a Polish firm, with an undertaking that it would ensure compliance with wage rates already in force on the site through collective agreement. When it was discovered that the 53 posted workers were in fact earning 46.57% of the applicable minimum wage for the construction sector in a way of sanction the Niedersachsen authority withdrew the contract, and demanded payment of contractual penalties. The company took legal action as a result.

The German Court of Appeal referred the case to the European Court of Justice (ECJ) on 18 July 2006 in order to determine whether public procurement rules in Niedersachsen are incompatible with the freedom to provide services in the EU. The referring Court suggested that Article 49 of the Treaty prohibits the demand to pay wages "that are at least at the level of the wages that are foreseen on the basis of the collective agreement that applies to the place where the work is done", because these are higher than the mandatory minimum wage that would otherwise be applicable, and more in general this kind of public procurement obligation would prevent foreign service providers from competing on the basis of lower wages.

Judgment

The ECJ looks essentially at the provisions of the Posted Workers Directive (PWD). With this regard, the Court finds that the rate of pay laid down by the law of Niedersachsen was not fixed in accordance with one of the procedures of the Directive[1].

First, the ECJ states that the law of Niedersachsen cannot be considered as a law implementing the PWD since it does not itself fix any minimum rates of pay.

Secondly, the Court notes that whilst the German transposition of the PWD contains a reference to collective agreements which have been declared universally applicable, the collective agreement at stake in the proceedings has not been taken this way.

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1 Ie:
- by law, regulations or administrative provisions (Art 3.1 first indent); and/ or
- by collective agreements which have been declared universally applicable (Art 3.1 second indent); or in the absence of such system
- by collective agreements which are generally applicable to all similar undertakings in the profession or industry concerned or agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory (Art 3.8 subparagraph 2)

Thirdly, the ECJ considers that the implementation methods contained in Art 3.1 (universally applicable collective agreements) and 3.8 subparagraph 2 (generally applicable collective agreements) are mutually exclusive. In any case, the Court considers that the collective agreement in question is not generally applicable since only a part of the construction sector is covered. Indeed, the law (public procurement law) which gives binding effect to the collective agreement applies only to public contract (and not to private contracts).

The ECJ concludes that the rate of pay imposed by the law of Niedersachsen does not constitute a minimum rate of pay within the meaning of the PWD. The Court further states that the PWD cannot be interpreted as allowing the host Member State to oblige foreign service providers to observe terms and conditions of employment which go beyond the mandatory rules for minimum protection (the PWD is therefore a maximum Directive – this is following the line of reasoning in the Laval judgement).

The ECJ notes in particular that the PWD is to be read in the light of Art 49 and seeks to bring about the freedom to provide services. With this regard, the Court states that applying the minimum wage laid down by the collective agreement in question may impose on foreign service providers an additional economic burden and is therefore capable of constituting a restriction to free movement of services. Such restriction cannot be justified by the objective of ensuring the protection of workers since it applies only to workers employed in the context of public works contracts but not in the context of private contracts. For the same reason, protection for independence in the organisation of working life by trade unions does not constitute an admissible justification. Finally, it has not been established that the financial balance of the social security system would be seriously undermined without the application of the salaries fixed in the collective agreement at stake.

The ECJ concludes that the law of Niedersachsen is incompatible with the PWD, interpreted in the light of Art 49EC.

Full text of the judgment:

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-346/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100