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briefing note

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Strikes over foreign labour – what's really going on?

Unofficial industrial action and the row over foreign labour continue to make the headlines, and yet there is much confusion about what is actually going on and who or what is to blame.

The discussion is confused because on the one hand, unions claim that domestic workers have been discriminated against by Total, since the company's sub-contractor brought over an entire foreign workforce to the UK.

At the same time, the conflict seems to be more of a general discussion on the possibility of workers from other EU countries undercutting domestic wages and working conditions.

Much has been made of the impact of recent European Court of Justice rulings and the EU's Posted Workers' Directive on the rights of workers posted abroad. Yet, in reality the key issue is the EU's basic principle of free movement of services. This allows companies to employ foreign workers over British workers, as long as they pay them the UK minimum wage. Freedom of movement is one of the fundamental 'four freedoms' contained in the EU treaties – and often highlighted as one of the main benefits of EU membership.

The issue is therefore far more fundamental than the specifics of ECJ rulings and the Posted Workers' Directive. In fact, both the Directive and the Viking and Laval cases have very little impact on the current situation in the UK.

Confusion number 1: The 1996 Posted Workers' Directive

A "posted worker" should not be confused with a migrant worker. A posted worker is employed in one EU member state but sent by his employer on a temporary basis to carry out his work in another member state. A migrant worker, on the other hand, goes to another member state to seek work and is employed there. The estimated number of posted workers in the EU is currently around 1 million – 15,000 of them are thought to work in the UK.[1]

The Posted Workers' Directive grew out of a need to balance the free movement of services with the protection of workers – both principles found in the EU treaties – in particular with regard to Article 49 of the EC Treaty. This article requires the abolition of

[1] See http://ec.europa.eu/employment_social/labour_law/postingofworkers_en.htm

restrictions on the freedom to provide services anywhere in the EU, including activities of an industrial, commercial, craft or professional nature.

The Directive sought to address which terms and conditions should apply to posted workers – those of the home country (the country of origin) or those of the host country. It was also an attempt to prevent what was perceived as "social dumping" – whereby foreign workers are paid less and therefore 'undercut' local workers.

The Directive was proposed as a result of experiences in the German construction sector in the 1990s. According to the German construction industry and building union IG Bau, at its height, 400,000 German construction workers were unemployed in Germany, while 400,000 foreign workers were actively employed in the sector – including 60,000 workers from the UK.[2]

The 1996 Posting of Workers Directive, which came into force in 1999, essentially states that workers employed by a company ("the posting company") established in one member state and who are posted temporarily to another member state ("the host State") in order to provide a service should be subject to the minimum employment conditions of the host state.

The Directive requires each member state:

- to ensure that the posting company guarantees the posted worker any mandatory terms and conditions of employment in the host country (such as minimum paid holidays; minimum wages; and standards of health and safety at work);
- to designate liaison offices or competent national bodies to implement the Directive;
- to tell other member states and the Commission the identity of the liaison offices or competent bodies;
- to make provision for cooperation between its public authorities responsible for monitoring terms and conditions of employment and the authorities of other member states;
- to make available information about any mandatory terms and conditions of employment;
- to make provision for compliance with the Directive and, in particular, ensure that adequate procedures are available to workers to enforce their rights under the Directive; and
- to transpose the Directive into national law.[3]

According to the UK Government, the Directive is fully implemented in the UK.[4]

Significantly, the Directive included specific provisions for the construction sector. Apart from the generally applicable statutory and regulatory provisions mentioned above, the

[2] Cited in http://www.amicustheunion.org/PDF/Final_NECC_National_Agreements_Posted_Workers_Directive_October_2005.pdf
[3] See http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/41-xxx/4105.htm
[4] See, http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/41-xxx/4105.htm

Directive states that collective agreements should apply to all workers in the construction sector – even when the foreign company itself has not signed up to the agreement.[5]

Importantly, at present in the UK, collective agreements in the construction sector are deemed to be 'voluntary' and are not 'legally binding', meaning that the provisions in the Posted Workers' Directive relating to collective agreements do not apply in the UK. Instead, the UK's minimum conditions are in effect the minimum wage of £5.73. In contrast, in many member states across the European Union, collective agreements in the construction industry apply also to companies that have not themselves signed up to them, which as said, is taken in to consideration in the Posted Workers Directive.

The Posted Workers' Directive was meant to address social dumping

The Posting of Workers Directive went further than existing provisions in the Treaties, as well as EU case law, by enshrining a set of clearly defined protective rules for workers in Community law.

During the 1990s the Conservative Government fought against the introduction of the Posted Workers' Directive, believing that it would disadvantage British firms, mostly in the construction industry, by forcing them to abide by national agreements on pay and social protection and thereby making working abroad less attractive.

Germany, and most other member states, on the other hand, believed it was essential to stop sub-contractors hiring skilled workers in low-wage countries to undercut the going rates of pay and conditions in more prosperous parts of the EU.[6]

In Britain it was nicknamed the 'Auf Wiedersehen' Directive, and commentators at the time focused almost exclusively on the impact on British firms and workers abroad, rather than on the potential impact for foreign companies and workers operating on British soil.

As Wolfgang Munchau, writing in the Times, said in 1994, "the practical consequences [of the Directive] are hardly earth-shattering, and, in a few months' time, everybody will wonder what the fuss was all about."[7]

The UK managed to block the Directive when it was first tabled in 1994, with the support of Ireland, Portugal and Greece, but it was eventually passed by qualified majority vote in 1996.

The British Government, led by Employment Minister Michael Portillo, attacked the Directive as "protectionist."[8]

Howard Davies, Director-General of the CBI at the time, said the Posted Workers' Directive was "anti-competitive and inconsistent with the principles of a single market". Referring to several of the EU's social policies, including the Directive, "he said we

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[5] Where these are based on 'collective agreements or arbitration awards which have been declared universally applicable', see http://www.eurofound.europa.eu/eiro/2003/06/tfeature/gr0306104t.htm
[6] Guardian, 6 December 1994
[7] Times, 6 December 1994
[8] Times, 23 December 1994

would prefer as would all other European employer federations to see them withdrawn."[9]

Meanwhile, German Employment Minister Norbert Blum, who was leading calls for the Directive to be passed, said: "I want to make clear that the posted-workers directive constitutes a critical element for the European Union. We would otherwise fall back into the 19th century. The principle has to be: the same wage for the same job".

He also argued that the German public would grow increasingly hostile towards the EU, if foreign labour was allowed to compete in Germany, undercutting local wage agreements and social security rules.[10]

The proposal was also supported by the unions. When it was blocked in 1995, then-Secretary General of the TUC John Monks said "Mr Portillo is supporting a cowboys' charter for Europe's worst bosses. British interests would be best served by supporting this directive and providing decent minimum employment standards."[11]

In other words, the Directive was perceived as upgrading employment protection for workers – which is exactly what today's strikers and unions in the UK are calling for now. The media and politicians are claiming that it is the Directive itself which is problematic, when in fact it is designed *to stop* workers from being undercut. When it was passed, the Directive was seen as a response to unrestricted freedom of services and a counterforce to social dumping.

It is therefore misleading and dishonest for politicians to blame the Directive for the current row over foreign workers.

Confusion number 2: the court cases

Adding to this confusion, the media, politicians and the unions have repeatedly referred to a series of rulings from the European Court of Justice, arguing that these have led to discrimination of domestic workers or the undercutting of wages – or both.

The Government in particular has been keen to lay the blame with the European Court of Justice, evoking complicated rulings by the court which few people understand, no doubt in an effort to distract attention from Gordon Brown's now infamously misjudged pledge to provide "British jobs for British workers."

Alan Johnson has said that "These various judgments have distorted the original intention and we need to bring in fresh directives to make it absolutely clear that people cannot be undercut in this way."[12]

Labour MP Peter Hain exemplified the confusion when he said that something had gone "badly wrong" with the UK's labour laws, arguing that the time had come to stop "gold

[9] Times, 3 December 1994
[10] Times, 27 November 1994
[11] PA, 27 March 1995
[12] http://www.independent.co.uk/news/uk/home-news/wildcat-strikes-over-foreign-workers-expected-to-spread-1522971.html

plating" EU legislation and to "stand up for the rights of British workers". He said the way the EU law had been implemented had not "adequately protected local workers".[13]

On 2 February 2009 the Times newspaper wrote: "The unions are desperate to overturn two European rulings, known as the Viking and Laval cases, which prevent them from protesting against companies that bring in foreign workers and undercut collective bargaining agreements. The European Council, including Britain, committed itself to the status quo as recently as December 17."[14]

The TUC has stated that "There is much concern among unions at recent decisions of the European Court of Justice - particularly the Viking-Laval cases - that appear to allow companies to undermine existing pay, working conditions and pensions by moving workforces around Europe in this way. European governments must close this legal loophole that drives a huge hole through social Europe."[15]

However, extraordinarily, no one has bothered to look at the details of the actual court cases. In fact, it remains far from clear what impact these court cases will actually have in the UK in terms of undercutting domestic wages.

The Viking case

The December 2007 case concerned a ferry company, Viking, which ran services between Finland and Estonia under the Finnish flag. The company decided to employ Estonian labour and re-flag their ferries under the Estonian flag, allegedly so that it could pay out lower wages.

In response, the Finnish Seamen's Union (FSU) warned Viking that it might take collective action while the International Transport Workers' Federation (ITF) asked their members not to start negotiations with Viking unless they "re-flagged".

How did the court rule?

The ECJ recognised the right to take collective action, including the right to strike, as a fundamental right under EU law, as stated in the Charter of Fundamental Rights of the European Union.[16]

The Court focused on the protection of workers, arguing that this was a legitimate interest which could serve to restrict the freedom to provide services in the EU.

However, it also made clear that collective action comes with certain restrictions – it must have a legitimate aim, respond to what is in the public interest and be proportionate to the aim. The ECJ effectively ruled that it is up to national courts to decide whether the collective action undertaken is justified, but it also provided strict guidelines to the national courts on how to rule in those cases. According to the ECJ, the key question to

[13] http://www.independent.co.uk/news/uk/home-news/wildcat-strikes-over-foreign-workers-expected-to-spread-1522971.html
[14] http://business.timesonline.co.uk/tol/business/industry_sectors/construction_and_property/article5636276.ece
[15] http://www.tuc.org.uk/law/tuc-15925-f0.cfm
[16] See the ECJ's decision http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79928788C19050438&doc=T&ouvert=T&seance=ARRET

be answered by national courts is whether the jobs and conditions of employment are really under serious threat by the behaviour of the foreign enterprise.[17]

One of the more significant aspects of the ruling was also that employers can now take trade unions to court, to get a judgement on the legality of a collective action (so-called horizontal direct effect).

The ruling was cautiously welcomed by the unions. The European Trade Union Confederation (ETUC), said that although this was a specific maritime case,

> "the ECJ also confirmed explicitly that the EU is not only about an internal market and the abolition of obstacles to free movement of business and labour, but also a Community with a policy in the social sphere, and that market freedoms must be balanced by social policy objectives, such as the improvement of living and working conditions and social dialogue."[18]

General Secretary of the ETUC John Monks said: "This judgement clearly gives protection to unions acting at local and national level when challenging the freedom of establishment of companies. However, it is less clear about transnational trade union rights."[19]

Shortly after the ruling, the ITF, Viking Line and the Finnish Seamen's Union announced that a negotiated settlement had been reached by all three parties involved and the case had therefore been dropped before going back to the national courts.[20]

In many ways, this case was merely a prelude to the Laval case.

The Laval case

Also in December 2007, The Laval judgement developed the earlier position set out by the Viking ruling, and addressed at length the application of the Posted Workers' Directive. It is therefore the most significant case on the issue of transnational provision of services.

In 2004, a Riga-based construction company, Laval, won a public tender in Sweden to renovate a school in Vaxholm, near Stockholm. Laval posted 32 workers in Stockholm to refurbish the school.

The Swedish trade union, Byggnads, demanded that Laval signed up to a new collective agreement on the terms defined by the union.

In Sweden, collective and wage agreements are not regulated by law. Instead they are negotiated by the "social partners" (employer and employee organisations) without any state interference. This is in contrast to the UK which now has a legislated minimum wage. In addition, in the Swedish construction sector new wage agreements are agreed upon for each project of new construction.

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[17] See http://www.etui-rehs.org/en/Headline-issues/Viking-Laval-Rueffert-Luxembourg
[18] See http://www.etuc.org/a/4376
[19] See http://www.itfglobal.org/news-online/index.cfm/newsdetail/1842
[20] See, http://www.itfglobal.org/news-online/index.cfm/newsdetail/1842

Byggnads demanded that Laval sign up to a collective agreement for the particular construction site in which the local terms and pay applied, including an obligation to pay the Latvian workers the *average local* wage for construction workers. Laval refused to sign the agreement, arguing that it had already signed up to a collective agreement with its Latvian union – which included wages above the agreed minimum wage for the construction sector in Sweden.

In response to Laval's refusal to sign the agreement, Byggnads picketed Laval building sites on 2 November 2004. Byggnads also received backing from the Swedish Electricians' Union, and eventually six additional unions. This sympathy action would have been illegal under UK law.

Laval took the case to the Swedish Labour Court asking for the action to be ruled unlawful. Struggling to cope with the blockade, the company went bankrupt shortly afterwards, putting the Latvians out of work. A Swedish company completed the refurbishment of the school.

Byggnads maintained that Swedish legislation – under the so-called *Lex Britannia* – allowed unions in the country to take industrial action to force a foreign company to sign a Swedish collective agreement.[21] The Swedish Labour Court referred the case to the ECJ, asking whether the trade unions' actions were compatible with the Posted Workers' Directive.

What did the Court rule?

In the ruling, echoing the Viking case, the ECJ recognised the right of trade unions to undertake collective action, *including* sympathy actions, as a fundamental right under EU law. It also recognised that the blockade of Laval building sites served the purpose of protecting Swedish workers against possible social dumping, which, it argued, "may constitute an overriding reason of public interest" under the Posted Workers' Directive.[22]

However, it argued that the Swedish labour provisions which Laval were facing – particularly in terms of the requirement to pay the *average local wage* – were unclear and arbitrary. In the Court's opinion, the fact that Laval was asked to sign up to an agreement on ambiguous and unclear grounds constituted a barrier for foreign companies to enter the Swedish market. This ambiguity made it "less attractive" for foreign companies to do business in Sweden.[23]

Therefore, the Court clearly stated that collective action is allowed under the Posted Workers' Directive when foreign firms fail to comply with the minimum standard or then they're threatening the basic working conditions of the host country. However, in the case of Sweden, *it was not clear what that minimum standard actually was*, making the collective action unlawful. The Court argued,

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[21] See http://www.eurofound.europa.eu/eiro/2008/01/articles/EU0801019I.htm

[22] See the ECJ's decision, http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79928781C19050341&doc=T&ouvert=T&seance=ARRET

[23] See http://www.euractiv.com/en/socialeurope/unions-frustrated-court-ruling-posted-workers/article-169235

> "where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay."[24]

What were the issues in Laval?

It is extremely important to keep in mind that the Laval case a) centered on the definition of "Social Dumping" and b) was driven by the specifics of the Swedish labour market model – specifics within that particular model which related to the construction sector.

First, the Swedish union demanded that Laval sign up to a new collective agreement, effectively saying that the agreement signed by the company in Latvia was not valid in Sweden, despite this agreement eventually accommodating the minimum agreed wage. Several employer organisations maintained that this constituted discrimination against Laval, as Swedish law forbids strikes on the basis of one collective agreement replacing another.

Secondly, Byggnads demanded that the Latvian workers were to be paid the *average local wage*. In fact, the ultimatum given by Byggnads to Laval involved a wage of SEK 145 per hour – the national average wage for a Swedish construction worker that year was SEK 133 per hour.[25] In addition, Byggnads demanded that Laval committed to an hourly wage *before* signing the agreement, despite the fact that in Sweden the negotiation order between the social partners is always the other way around.[26]

The issue was further complicated by Sweden having defined "social dumping" to mean any agreement signed by a foreign company which provided for less than the average pay in any given sector. In effect, this meant that Swedish companies were already guilty of social dumping themselves, as many Swedish construction workers were paid less than the average wage.

All of this meant that a strong case was being built that Swedish unions had clearly discriminated against the Latvian company, as they had demanded Laval sign up to an agreement which exceeded the standards required for its Swedish counterparts.

The final issue was that of proportion. Laval had employed 32 Latvians and Russians to refurbish the school in Vaxholm. The blockade, however, was in the end carried out by seven different unions and was backed by 1.2 million workers spread out over 40,000 construction sites.[27] The end result was that Laval was forced into bankruptcy.

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[24] http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79928781C19050341&doc=T&ouvert=T&seance=ARRET
[25] See http://www.arbetsdomstolen.se/upload/pdf/Ab133.pdf
[26] Zaremba, Maciej. "Del 2: Skolbygget blev ett europeiskt ödesdrama". Dagens Nyheter, 11 november 2005, see http://www.dn.se/DNet/jsp/polopoly.jsp?d=1058&a=486076
[27] Zaremba, Maciej. "Del 2: Skolbygget blev ett europeiskt ödesdrama". Dagens Nyheter, 11 november 2005, see http://www.dn.se/DNet/jsp/polopoly.jsp?d=1058&a=486076

All of this means that this is a terrible case to point to as an example of how "recent Court decisions" have undercut domestic wages in the UK and set a precedent for social dumping. Imagine the precedent that would have been set should the ECJ have ruled in favour of Byggnads!

A much more valid observation is that the ECJ should have taken the easy way out, sending the case back to the Swedish Labour Court on the basis that the issue of industrial action is not in the Treaties and therefore not a competency of the ECJ, nor the EU.

How relevant is Laval to the current strikes?

As described above, the specifics of the Court case differ substantially from the ongoing conflict over foreign workers in the UK, begging the question of how much of a precedent it has actually set:

1. The UK does not have the same labour market model, particularly in terms of collective agreements – which the Laval case centered around. The basic pre-condition for a "British Laval case" is not in place. In any case, it is still not established what Total is actually paying the Portuguese and Italian workers.

2. The UK has legislated minimum wages, meaning that the lack of clarity of basic wage levels that the ECJ was seeking to address in the first place is not an issue in the UK. If the UK, hypothetically, wishes to "upgrade" its minimum standard for posted workers, it would be faced with a fundamentally different dilemma than that concerning the self-regulating Swedish labour market model.

3. Industrial relations legislation in Sweden differs substantially, including the right to secondary action. As seen, the actions taken by the Swedish unions would have been illegal in the UK. If anything, the ECJ clarified the fundamental right of unions to take strike action.

   In fact, in the Laval and Viking cases, the ECJ made a reference to the Charter of Fundamental Rights for the first time, despite it not yet being legally binding. In Britain, the Charter is one of the most controversial aspects of the still-to-be ratified Lisbon Treaty. The Charter would establish the "right to collective action" for the first time in the EU treaties, which has led to speculation that this would extend social and labour rights in the UK. Brian Bercusson, labour law professor at King's College, has suggested that the ECJ's reference to the Charter in the Laval case could "have enormous implications" for the UK. He said, in the UK "it was never made clear that there in fact was a fundamental right to strike protected by EU law."[28]

All of this means that if, hypothetically, the Laval case was to be overturned, it is very hard to see how the concerns of the current strikers in the UK would be addressed.[29]

[28] TCO-Tidningen 14 June 2007, see http://www.tcotidningen.se/Sites/TCOTidningen/templates/Article.aspx?id=6381

[29] Similarly, it is not clear that the other court cases that are being referred to in the press apply directly to the current situation. The so-called Ruffert case concerned demands for collective agreements vis-à-vis public procurement. The ECJ ruled that workers on public sector contracts cannot be subject to different demands on collective agreements to those employed in the private sector. Again, this is not particularly

What exactly do the unions want to change then?

Alan Johnson has said that "We need to bring in fresh directives to make it absolutely clear that people cannot be undercut in this way." But what exactly does this mean?

One proposal, driven by the Socialists in the European Parliament, is to revise the Posted Workers' Directive to make it accommodate for "habitual wages" to apply to foreign workers – rather than just the minimum wages.[30]

However, the Commission has thus far rejected changes to the Directive. And notably, as recently as December 2008 the UK Government said it did not deem changes to the Directive to be necessary.

And as shown in the Laval case, should the Socialists' proposal of "habitual wages" be adopted, that would open a can of worms. The Swedish union, for example, was objecting to Laval paying its workers lower wages than the local average. The unions argued that this constituted "social dumping".

However, by that definition, some of the completely homegrown companies were themselves guilty of social dumping, as some workers are paid a salary below the local, regional or national average.

Take that argument to its logical conclusion and any wage below the average constitutes social dumping. The answer would then spell increased wage harmonisation, meaning continuously raising wage levels.

It's free movement, stupid

On 2 February the Times reported that "Gordon Brown will go to Europe to seek new legal safeguards for British workers in an attempt to head off the growing industrial unrest… The Government will now seek fresh directives to ensure that workers cannot be brought in from overseas on lower salaries and fewer benefits than domestic workers would be entitled to."

However, in practice, the best the UK Government could hope for by going to Brussels would be for a lengthy renegotiation of the Posted Workers' Directive so that it made reference to 'habitual' or 'average' wages, instead of 'minimum' wages. But as we have seen, this would be problematic.

The other option open to the Government would be to increase the minimum wage – making it less attractive for companies to employ foreign workers compared with those on a higher, average wage.

As suggested by the unions T&G, GMB and Amicus in 2005, a third alternative would be to make the national collective agreements (i.e. those in the construction sector) in the

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relevant to what is happening with the current strikes, as this relates to the status and applicability of collective agreements. See the ECJ's decision, http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79919596C19060346&doc=T&ouvert=T&seance=ARRET

[30] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-405.897+01+DOC+PDF+V0//EN&language=EN

UK fully recognised as the prevailing standards, laid down in legislation. This would effectively mean reintroducing Schedule 11 to the Employment Protection Act 1975 and the Fair Wages Resolution 1946 which guaranteed similar requirements for terms and conditions in the UK.[31] The legislation was repealed by the Conservatives in 1979. The question is how much of a political appetite there is for such a solution.

In the end, the harsh reality that UK workers are now waking up to is that, because of EU free movement rules, companies are essentially free to employ foreign workers over British workers, as long as they pay them the minimum wage.

The idea of free movement of labour within the EU is written into the Treaties – meaning that any serious attempt to address the strikers' concerns would require a re-negotiation of the EU Treaties. Ironically, the Posted Workers' Directive was itself a response to a discussion in Germany, similar to the one we now hear in the UK.

Labour MP John Mann has tabled a Commons early day motion "deploring" the use of foreign workers at the Lindsey refinery, and congratulating unions for "exposing this exploitation and the absence of equal opportunities to apply for all jobs".[32]

It is essentially thirty years too late for MPs to be objecting to EU free movement rules. It is dishonest and misleading for the Government to point to complicated rulings by the ECJ in order to explain what is happening, because, as we have seen, these rulings actually have very little impact on the situation in the UK.

As the Guardian has rightly pointed out, when Prime Minister Gordon Brown promised "British jobs for British workers", he could only ever deliver "British jobs for European workers."[33]

Instead of referring to distracting and complex legal discussions, the Government should either clearly defend the principle of free movement within the EU on its merits; or make clear what the alternative is: negotiating a new relationship with Europe.

[31] http://www.amicustheunion.org/PDF/Final_NECC_National_Agreements_Posted_Workers_Directive_October_2005.pdf

[32] PA, 3 February 2009

[33] 2 February 2009