



## **Unite the union response to DTI/BERR Consultation: “ECHR Judgment in ASLEF v UK – Implications for trade union law”**

Response due 8 August 2007 to [harjinder.kaur@dti.gsi.gov.uk](mailto:harjinder.kaur@dti.gsi.gov.uk)

### **1. Introduction**

- 1.1. **Amicus the Union and the Transport and General Workers’ Union recently merged to form the UK’s largest union, Unite, with 2 million members.**
- 1.2. Workers associate for the better protection of their economic and social interests. This is the fundamental purpose of a trade union. Association is necessary to seek to redress the imbalance in bargaining between the individual worker, on the one hand, and the state and those who hire labour on the other.

### **2. Executive Summary**

- 2.1 Freedom of association is recognised as a fundamental right for people throughout the world. An example is article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This was the vehicle used to develop the argument in the case of ASLEF v UK.
- 2.2 The implications of the judgment in that case are much wider than the consultation paper contemplates. The Employment Simplification Bill represents a greater opportunity to right wrongs and redress defects than currently envisaged.
- 2.3 The matters considered as “implications” in the consultation paper were known before the judgment was delivered and pre-dated the lodging of the case. The arguments in the papers presented before the ECtHR were believed to be sound before the case was brought. They concern the unjustifiable and unnecessary interference in the operation of trade unions, particularly in the UK.
- 2.4 For these purposes, many of our comments are confined to s.64 to 67 and s.174 to 177 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA). These sections should be repealed to comply with Article 11.
- 2.5 Unite the union wants the removal of unjustifiable unnecessary interference with trade unions. It is prepared for international standards to be the primary standard by which such interference is judged.

## Fundamental Legal Principles

- 3.1 The issue is relatively straightforward. Article 11 of the ECHR is set out at paragraph 32 of the judgment. This is replicated in other international treaties and conventions ratified by the UK. These include:
- International Labour Organisation (part of the United Nations) Convention 87
  - European Social Charter 1961 – article 5
- 3.2 The ECHR can be enforced through the European Court of Human Rights (ECtHR) in Strasbourg as happened in the case of ASLEF v UK.
- 3.3 The argument for the union was that s.174 TULCRA was an unnecessary restriction on the exercise of the right and fundamental freedom of association and “the right to draw up their own rules and to administer their own affairs”<sup>1</sup>, which has been expressed in previous cases. The Government’s response was to say that the interference was justified as necessary in a democratic society for the protection of the rights and freedoms of others.
- 3.4 It happened that in the case of ASLEF v UK, the facts related to Mr Lee, a member of the BNP, who the union expelled, when his views were contrary to those of the union. Section 174 sought to prevent such expulsion and apply substantial sanctions if the union did expel Mr. Lee or someone like him.
- 3.5 It was not possible to apply on wider grounds, but that does not prevent the case having wider application, particularly when that application is startlingly obvious.
- 3.6 In 2004 the European Committee of Social Rights (ECSR) repeated the extent to which it believed that the UK violated the European Social Charter. Article 5 relates to the right to organise and is the equivalent of Article 11 of ECHR. The judgment in ASLEF v UK quotes the earlier observations of the ECSR at paragraph 23. It concludes that “in light of the provisions of [TULRA] referred to above (sections 15, 65, 174 and 226A) the situation in the United Kingdom is not in conformity with Article 5 of the Charter.”
- 3.7 In the 2004 report, the specific quote relating to s.174 is virtually identical to the observations on s.65 for example, except that there have been no changes to s.65 between the report in 2002 and that of 2004.
- 3.8 The provisions at s.174 to 177 and s.64 to 67 are closely related. The former concerns “unjustifiable discipline” and the latter deal with expulsion and exclusion. Both concern the unions’ ability to administer their own affairs in relation to their members. Section 174 TULCRA 1992 specifically refers to s.65 for conduct that does not justify expulsion or exclusion. This was not the case until 1993
- 3.9 The text of s.174 in 1992 is set out at appendix 1. It was not until 1993 that the provisions looked like they do now. Prior to that date the effect of s.174 was primarily to address the closed shop or union membership agreements and s.65 to undermine the efficacy of industrial action by prohibiting discipline of members who undermined industrial action.

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<sup>1</sup> ASLEF v UK paragraph 38

3.10 It was not until November 1993 that the closed shop was finally outlawed. (The first measures against the closed shop were taken in 1980.) It is interesting to note the observations by the ECtHR in paragraph 50 of the judgment in ASLEF v UK in relation to the closed shop. Any justification by the UK Government to rely on Article 11 (2) for restricting unions' ability to administer their own affairs went at the time of the introduction of the provisions in 174 in their current form (subject to the minor amendment in 2004, which served little useful purpose).

### **The rights of others**

4.1 Trade unions respect the rights of others, including their members. Unite the union and other unions would only consider expulsion, exclusion and discipline in extreme instances and for the protection of the greater good.

4.2 Unions would not seek to discriminate on grounds of gender, or sexual orientation, race, disability, religion, or age. To do so is in breach of other legislation in any event.

4.3 Unite the union must be entitled to demand that it is free from interference otherwise.

4.4 There is also a role for the Certification Officer to help members challenge their union. This is often abused. Further, the courts can take action primarily in relation to contractual questions arising between a union and its members.

4.5 Since 30 April 2007, the regulations relating to religion and belief were changed, so that the Employment Equality (Religion or Belief) Regulations 2003 no longer apply to "religion or *similar* belief". The dropping of the word "similar" may present problems in the context of jurisprudence in UK law relevant to the issues in ASLEF v UK. In *Baggs v Fudge*<sup>2</sup>, a case before the Employment Tribunals (ET), a BNP member who claimed fascism was a "belief", was turned away on the basis that it could not be a *similar* belief to a religion. Unite expects another challenge to unions by members of the BNP, or others with similar beliefs.

4.6 The question of simplification and better regulation in this context is only served by repeal of the provisions relating to s.65 and s.174. A member of Unite, Kevin Larkin, sought to use the "unjustifiable discipline" provisions against the union recently<sup>3</sup>. He walked out of a hearing at the ET frustrated at the explanation from the Chair of the ET that "unjustifiable discipline" was nothing more than a legal fiction and had nothing to do with his perception that the union had disciplined him unjustifiably. The case was a waste of his time, that of the union and of the Tribunal Service.

4.7 Mr. Lee in challenging ASLEF sought to argue that in expelling or excluding him the union interfered with his right to associate freely and his right to free speech. This was rejected even by the UK Employment Appeal Tribunal, though they could not decide the case on that basis. The EAT quoted Lightman J in the case of *RSPCA -v- Attorney General and Others*<sup>4</sup> where he said this: "...the Society has a legitimate interest in excluding those whose reasons for joining may render their membership contrary to the interests of the Society...that freedom embraces

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<sup>2</sup> Employment Tribunal (Bristol), Case No. 1400114/05

<sup>3</sup> Employment Tribunal (Nottingham Mr K Larkin V Amicus (Amicus) - Case 2600953\2006E

<sup>4</sup> *RSPCA -v- Attorney General and Others* [2001] 3 All ER 530 at paragraph 37(b)

the freedom to exclude from association those whose membership it honestly believes to be damaging to the interests of the Society.” This case referred back to the case of *Cheall v UK* referred to in paragraph 38 of the judgment in *ASLEF v UK*.

- 4.8 Unite the union questions how many times these points need to be reaffirmed, before the UK Government accepts the broader principle. For the consultation paper to put up the arguments in paragraphs 4.1, 4.2 and 4.3 and conclude that “only those aspects of section 174 of the 1992 Act which refer to political party membership and activities need to be changed to ensure compliance with Article 11”, is either false or delusional.

### **The Options in the Consultation Paper**

- 5.1 It follows from the observations above that neither Option (A) nor Option (B) will comply with Article 11 or any of the similar provisions in charters and treaties that are concerned with fundamental human right and freedoms.
- 5.2 In addition both options will detract only marginally from the burden on unions as businesses and either will permit continual interference with the rights and freedoms for unions to “fix their own rules and choose their own members”<sup>5</sup>.
- 5.3 It also follows that if Unite had to choose the **best of two under achieving options**, it would choose Option (A).

### **Conclusion**

- 6.1 If the UK Government is at all serious “that it must amend trade union law to ensure that the violation of Article 11 is removed<sup>6</sup>”, then it must repeal sections 64 to 67 and sections 174 to 177 of TULRCA 1992.
- 6.2 It should go further. For example it should attend to s.15 and s.226A to deal with direct criticisms of the European Committee of Social Rights at the very least. Society should go further to develop human rights and collective freedoms.
- 6.3 The goals of “simplification” and “better regulation” should apply no less to trade unions. The Chairman of the Better Regulation Task Force has written: “Given that trade union members can opt out of the political fund and that there is legislation in place governing the funding of political parties, which identifies the political expenditure of individual unions, is it still valid to ask trade unions to ballot all their members every ten years? The conditions which apply to these ballots, including the adoption of lengthy and complex rules for the holding of each ballot, are as strict as those applying in union elections. This makes the political fund ballots very costly both financially and in terms of resources.”
- 6.4 Unions should be free to pursue otherwise legitimate objectives free from interference. As discussed in relation to s64 and s174, this is a “freedom” issue.
- 6.5 Now it is time to stop unions, particularly in the UK, being treated as the problem, when Unite and other unions like it are part of the solution to unjustifiable and unpopular differences between rich and poor, problems with health and safety and other issues that we have at the core of our being. Unions have every

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<sup>5</sup> Report of European Committee of Social Rights of the Council of Europe 2002 p. 684

<sup>6</sup> Consultation Paper paragraph 4.1

justification to continue to assert their fundamental human rights and freedoms for those they represent. Unite welcomes any further dialogue to in relation to its fundamental rights, obligations and beliefs.

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Appendix 1

Trade Union and Labour Relations Act 1992, before it was amended in 1993

**174.** —(1) A person who is, or is seeking to be, in employment with respect to which it is the practice, in accordance with a union membership agreement, for the employee to belong to a specified trade union, or one of a number of specified trade unions, has the right—

(a) not to have an application for membership of a specified trade union unreasonably refused, and

(b) not to be unreasonably expelled from a specified union.

(2) A "union membership agreement" means an agreement or arrangement relating to employees of an identifiable class which—

(a) is made by or on behalf of, or otherwise exists between one or more independent trade unions and one or more employers or employers' associations, and

(b) has the effect in practice of requiring the employees of the class to which it relates (whether or not there is a condition to that effect in their contract of employment) to be or become members of the union or one of the unions which is or are parties to the agreement or arrangement or of another specified independent trade union.

Employees shall be treated as belonging to the same class if they have been identified as such by the parties to the agreement, and they may be so identified by reference to any characteristics or circumstances whatever.

(3) A trade union shall be treated as "specified" for the purposes of, or in relation to, a union membership agreement if it is specified in the agreement or is accepted by the parties to the agreement as being the equivalent of a union so specified.

(4) For the purposes of this section—

(a) an application for membership of a trade union which is neither granted nor rejected before the end of the period within which it might reasonably have been expected to be granted if it was to be granted, shall be treated as having been refused on the last day of that period, and

(b) a person who under the rules of a trade union ceases to be a member of the union on the happening of an event specified in the rules shall be treated as having been expelled from the union.

(5) A person who claims that an application by him for membership of a trade union has been unreasonably refused, or that he has been unreasonably expelled from a trade union, in contravention of this section, may present a complaint to an

industrial tribunal.

(6) The question whether the trade union acted reasonably or unreasonably shall be determined in accordance with equity and the substantial merits of the case.

In particular, a union shall not be regarded as having acted reasonably only because it has acted in accordance with the requirements of its rules or unreasonably only because it has acted in contravention of them.