INTERNATIONAL HUMAN RIGHTS
LouvainX online course - prof. Olivier De Schutter

READING MATERIAL
related to: section 4, sub-section 1: The duty to protect and waiver of rights

Eur. Ct. HR (2nd sect.), ***Wilson, National Union of Journalists and Others v. the United Kingdom*** **(Appl. nos. 30668/96, 30671/96 and 30678/96), judgment of 2 July 2002 (final on 2 October 2002):**

[The applicants are employees and unions to which they belong. The individual applicants were offered by their employers to sign a personal contract and lose union rights, or accept a lower pay rise. They allege that the law of the United Kingdom, by allowing the employer to de-recognise trade unions, fails to ensure their rights to protect their interests through trade union membership and to freedom of expression, contrary to Articles 11 and 10 of the Convention. In addition, the individual applicants complain that United Kingdom law permitted discrimination by employers against trade union members, contrary to Article 14 of the Convention taken in conjunction with Articles 10 and 11.]

41. The Court observes at the outset that although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. In the present case, the matters about which the applicants complain – principally, the employers' de-recognition of the unions for collective-bargaining purposes and offers of more favourable conditions of employment to employees agreeing not to be represented by the unions – did not involve direct intervention by the State. The responsibility of the United Kingdom would, however, be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention (see Gustafsson v. Sweden, judgment of 25 April 1996, Reports of Judgments and Decisions 1996-II, pp. 652-53, § 45).

42. The Court reiterates that Article 11 § 1 presents trade union freedom as one form or a special aspect of freedom of association (see National Union of Belgian Police v. Belgium, judgment of 27 October 1975, Series A no. 19, pp. 17-18, § 38, and Swedish Engine Drivers' Union v. Sweden, judgment of 6 February 1976, Series A no. 20, pp. 14-15, § 39). The words “for the protection of his interests” in Article 11 § 1 are not redundant, and the Convention safeguards freedom to protect

the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the

trade union should be heard (see National Union of Belgian Police, cited above, p. 18, §§ 39-40, and Swedish Engine Drivers' Union, cited

above, pp. 15-16, §§ 40-41). Article 11 does not, however, secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure the right to be heard (see National Union of Belgian Police, cited above, pp. 17-18, §§ 38-39, and Swedish Engine Drivers' Union, cited above, pp. 14-15, §§ 39-40).

43. The Court notes that, at the time of the events complained of by the applicants, United Kingdom law provided for a wholly voluntary system of collective bargaining, with no legal obligation on employers to recognise trade unions for the purposes of collective bargaining. There was, therefore, no remedy in law by which the applicants could prevent the employers in the present case from de-recognising the unions and refusing to renew the collective-bargaining agreements (…).

44. However, the Court has consistently held that although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions. The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union

and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured (see Swedish Engine Drivers' Union, cited above, pp. 14-15, § 39; Gustafsson, cited above, pp. 652-53, § 45; and Schettini and Others v. Italy (dec.), no. 29529/95, 9 November 2000).

45. The Court observes that there were other measures available to the applicant trade unions by which they could further their members' interests. In particular, domestic law conferred protection on a trade union which called for or supported strike action "in contemplation or furtherance of a trade dispute" (see paragraph 29 above). The grant of the right to strike, while it may be subject to regulation, represents one of the most important of the means by which the State may secure a trade union's freedom to protect its members' occupational interests (see Schmidt and Dahlström v. Sweden, judgment of 6 February 1976, Series A no. 21, p. 16, § 36, and UNISON, cited above). Against this background, the Court does not consider that the absence, under United Kingdom law, of an obligation on employers to enter into collective bargaining gave rise, in itself, to a violation of Article 11 of the Convention.

46. The Court agrees with the Government that the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests. Furthermore, it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State

to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers.

47. In the present case, it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation. The corollary of this was that United Kingdom law permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or restraint on the use by employees of union membership to protect their interests. However, as the House of Lords' judgment made clear, domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union.

48. Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of criticism by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association (see paragraphs 32-33 and 37 above). It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the

respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants.