submission

by the Institute of Employment Rights

Joint Committee on Human Rights

Employment Relations Bill 2004
Trade Union and Labour Relations (Consolidation) Act 1992, s 174

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THE INSTITUTE OF EMPLOYMENT RIGHTS

Introduction

1. A growing concern for a number of trade unions in recent years has been the threat of infiltration by far right organisations, including in particular the British National Party. Several trade unions have encountered difficulties in trying to exclude or expel members of such organisations. Applications have been made against two of these unions (ASLEF and UNISON) to employment tribunals on the ground that the exclusion or expulsion breached the Trade Union and Labour Relations (Consolidation) Act 1992, s 174. More such applications are likely. A copy of *British Nationalist*, January 2003, which is published by the BNP for its members, contained the following report:

> **Cases!**
>
> The BNP's legal team is now pursuing no fewer than 20 legal cases. All the cases taken on represent the easiest actions likely to bring the greatest reward… Even better, our Legal Department is now running the cases of four activists who were sacked from their unions for BNP membership. The four are now looking at the receipt of some very substantial compensation for the illegal actions of their far-left union bosses. This is most important. If you are not a member of a (left wing) union, then join… those looking to be thrown out of their union and then getting a big five figure payout should make it known to the local union lefty (there's always one!) that they are BNP members and may (even better!) be standing as candidates for the BNP. Watch the union lefties squeal and [then] delight in being chucked out of the union. You haven't got long to get on this particular gravy train, because the far-left loonies will soon stop their persecution of us once they find out just how expensive it can be!…

Section 174 of TULRCA 1992 was introduced by the Trade Union Reform and Employment Rights Act 1993, s 14 and it sits uneasily with the rights of trade unions and their members under article 11 of the ECHR. In the Employment Relations Bill currently before Parliament, the government has proposed an amendment to s 174, ostensibly to protect trade unions. Our concern is that the amendment does little to change the existing law and that it does not go far enough to protect the Convention rights of trade unions and their members.

The Trade Union and Labour Relations (Consolidation) Act 1992

2. The relevant provision of the 1992 Act dealing with the exclusion and expulsion of members is section 174, as amended in 1993, as described above. The amended s 174 provides that

> (1) An individual shall not be excluded or expelled from a trade union unless the exclusion or expulsion is permitted by this section.
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> (2) The exclusion or expulsion of an individual from a trade union is permitted by this section if (and only if) –
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> > a) he does not satisfy, or no longer satisfies, an enforceable membership requirement contained in the rules of the union,
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> > b) he does not qualify, or no longer qualifies, for membership of the union by reason of the union operating only in a particular part or particular parts of the Great Britain,
> >
> > c) in the case of a union whose purpose is the regulation of relations between its members and one particular employer or a number of particular employers who are associated, he is not, or is no longer, employed by that employer or one of those employers, or
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> > d) the exclusion or expulsion is entirely attributable to his conduct.
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> . . . .
>
> (4) For the purposes of subsection (2)(d) 'conduct', in relation to an individual, does not include –
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> > a) his being or ceasing to be –
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> > > i) a member of another trade union,
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> > > ii) employed by a particular employer at a particular place, or
> > >
> > > iii) a member of a political party, or
> >
> > b) conduct to which section 65 (conduct for which an individual may not be disciplined by a trade union) applies or would apply if the references in that section to the trade union which is relevant for the purposes of that section were references to any trade union

3. It will be noted that so far as it relates to exclusion or expulsion for political activities, section 174 applies only to membership of a political party. There are two points here. The first is that it does not apply to forms of action short of exclusion or expulsion, such as denying the members of a particular organisation the opportunity to stand for office in the union. This is subject to

TULRCA, s 47 which provides that no member of a trade union 'shall be unreasonably excluded from standing as a candidate' in the executive and other elections to which the 1992 Act applies. But although no candidate for these elections can be required to be a member of a political party (s 47(2)), it does not follow that membership of a particular political party may not be a bar to being eligible to stand. The second point to arise in relation to s 174 is that it applies only to membership of a political party, so that it would be possible to exclude or expel someone because he or she promotes the activities of the party in a manner that may be offensive. For example, section 174 would not prevent a trade union from excluding or expelling someone because he or she engages in racist or fascist activity or promotes racist or fascist practices or beliefs. The significance of this distinction is highlighted by Lee v ASLEF, EAT/0625/03/RN, a judgment delivered on 24 February 2004 which is considered below.

Relevant International Law by which the United Kingdom is bound

4. Section 174 of the 1992 Act has been found to breach two international treaties to which the United Kingdom is a party. These are ILO Convention 87 and the Council of Europe's Social Charter of 1961. The violation of international treaties in this way has become even more important following the decision of the European Court of Human Rights in Wilson and Palmer v United Kingdom [2002] IRLR 128. It will be recalled in that case that the Court thought these treaties 'relevant' in the construction of the European Convention on Human Rights. But even before the Wilson and Palmer decision, ILO Convention 87 was said by the now defunct European Commission of Human Rights to be relevant in the construction of the Convention (Cheall v United Kingdom (1986) 8 EHRR 74). The European Court of Human Rights has also been guided in other cases before Wilson and Palmer by the Social Charter in interpreting Convention rights (Sigurjonsson v Iceland (1993) 16 EHRR 462). It has also been strongly influenced by other international treaties in other cases: Jersild v Denmark (1994) 19 EHRR 1

ILO Convention 87

5. The relevant provision of ILO Convention 87 is article 3. This provides that

> 1 Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> 2 The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

The question whether TULRCA 1992, s 174 (as amended by the 1993 Act) is consistent with Convention 87 has been considered by the ILO Committee of Experts on a number of occasions. Indeed the TUC has complained that one effect of s 174 is to prohibit 'union rules which exclude members of racist or totalitarian political organisations' (ILO, Committee of Experts 1995/65th session). For its part the Committee has expressed concern that the section may have a 'serious impact on the right of union members to determine the make up of their organisation in accordance with its objectives' (ILO, Committee of Experts, 1998/69th session). It would be fair to say, however, that although the Committee of Experts has expressed concern about section 174, this has been mainly because of its impact on the ability of trade unions to exclude or expel members to give effect to decisions of the TUC Disputes Committee, operating under the TUC Disputes Principles and Procedures.

6. The Committee of Experts has accepted that it may be possible consistently with Convention 87 to have in place restrictions on trade union membership rules which are designed to protect the human rights of workers. Thus:

> While the Committee has previously noted that the right of organisations to draw up their constitutions and rules must be subject to the need to respect fundamental human rights and the law of the land and that thus means that it would not be inconsistent with the requirements of the Convention to require that union rules not discriminate against members or potential members on grounds of race or sex, it seems that section 14 of the 1993 Act limits union rules beyond such fundamental considerations
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> (ILO, Committee of Experts 1995/65th session)

But although the Committee of Experts thus permits legislation requiring trade unions to respect the human rights of workers, it has not effectively addressed

the TUC's concerns about the right of trade unions to exclude or expel members because of their membership of racist or totalitarian organisations. This is very different from the exclusion or expulsion of people because of their sex or race, a human rights issue to which the Committee referred, and which no trade union would want to compromise. The latter is also very different from the exclusion or expulsion of people who are believed to be infiltrating the trade union for improper reasons. A trade union is surely entitled under Convention 87 to take defensive steps to protect its integrity in such a situation.

Council of Europe Social Charter 1961

7. The relevant provision of the Social Charter is article 5. This provides that

> With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

The Social Rights Committee of the Council of Europe has considered the question whether TULRCA 1992, s 174 is consistent with article 5 on five occasions and has unequivocally found that s 174 is inconsistent with the Charter.

8. The Social Rights Committee has not drawn the distinction of the kind that is evident above in the reports of the ILO Committee of Experts. According to the Social Rights Committee:

> Section 14 [of the 1993 Act] introduced changes to the right to membership of a trade union (sections 174 to 177 of the 1992 Act). The Committee noted that section 14 permitted the exclusion or expulsion of an individual from a trade union in only four restrictively listed cases (section 174) and that heavy financial penalties were provided for in the event of failure to comply with section 174 (section 176). One of the grounds for refusal of application to join or for exclusion was the behaviour of the person concerned (section 174(2)(d)). The Committee wished to know what this meant in practice.

> While noting that section 14 appeared to strengthen the right of every individual to join the trade union of his choice, the Committee was concerned at the considerable restrictions put to the right of trade unions to establish their own rules and choose their members.
>
> (Social Rights Committee, Conclusions XIII-iii (1996))

> On the question of the right of trade unions to choose their own members and representatives, the Committee refers to the concern expressed in its previous conclusion about section 14 of the 1993 Act which considerably restricts the right of trade unions to establish their own rules and choose their members, permitting the exclusion or expulsion of an individual from a trade union in only four restrictively listed cases.
>
> (Social Rights Committee, Conclusions IV-i (1998))

> As regards the right of a trade union to choose own members and representatives, the Committee refers to its previous comments on sections 174 – 177 of TULRCA 1992 (inserted by section 14 of the Trade Union Reform and Employment Rights Act 1993) which restricts the grounds upon which a trade union may exclude or expel an individual. The Committee remains concerned about these provisions as they represent a substantial inroad into the freedom of trade unions to manage their own affairs and again concludes that the situation is not in conformity with the Charter.
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> (Social Rights Committee, Conclusions V-i (2000))

> Section 174 of the 1992 Act limits the grounds on which a person may be refused admission to or expelled from a trade union to such an extent as to constitute an excessive restriction on the right of a trade union to determine its conditions for membership and goes beyond what is required to secure the individual right to join a trade union
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> (Social Rights Committee, Conclusions XVI-i (2002))

> In its previous conclusion the Committee considered that Section 174 of the 1992 Act limited the grounds on which a person might be refused admission to or expelled from a trade union to such an extent as to constitute an excessive restriction on the right of a trade union to determine its conditions for membership, and went beyond what was required to secure the individual right to join a trade union. Since the situation remains unchanged the Committee again concludes that this provision is not in conformity with the Charter
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> (Social Rights Committee, Conclusions XVII-i (2004))

The Social Rights Committee has thus formally concluded on several occasions – most recently on 6 April 2004 - that the United Kingdom is in breach of the Social Charter because of TULRCA, s 174, as well as for a number of other reasons.

Relevant Provisions of the European Convention on Human Rights

9. The main provision of the ECHR which is relevant is article 11. This provides that:

> 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2 No restrictions shall be placed on the exercise of these rights other than such are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police, or of the administration of the State.

There are no decisions of the European Court of Human Rights which deal with the question of interference with the internal affairs of a trade union. However, the matter has been considered by the European Commission of Human Rights, before it was abolished when the 11th Protocol to the Convention was implemented. There are two such decisions. Our main concern is with Cheall v United Kingdom (1986) 8 EHRR 74 which we consider in para 10 below. But for completeness we would also direct attention to NALGO v United Kingdom, Application No. 21386/93. In this case it was held that the legislation prohibiting trade unions from expelling members who refuse to take part in industrial action (now TULRCA 1992, s 64) was not in breach of article 11. In a poorly reasoned decision – which is not directly relevant - the Commission held that such restrictions fell within the margin of appreciation. But that was before the seminal decision of the European Court of Human Rights in Wilson and Palmer which has emphasised the need to have regard to other treaties in construing article 11.

Trade Union Right to Freedom of Association

10. Trade unions as well as trade union members have rights to freedom of association under article 11: Wilson and Palmer v United Kingdom [2002] IRLR 128. That right to freedom of association implies a freedom on the part of trade unions to determine their own rules. The point was made forcefully by the European Commission of Human Rights in Cheall v APEX (1986) 8 EHRR

74 where the applicant complained that he had been expelled from a trade union (APEX) to comply with a TUC Disputes Committee ruling. His complaint that the expulsion breached article 11 was held to be inadmissible, with the Commission taking the view that

> The right to form trade unions involves, for example, the right of trade unions to draw up their own rules, to administer their own affairs and to establish and join trade union federations. Such trade union rights are explicitly recognised in arts 3 and 5 of ILO Convention No 87 which must be taken into account in the present context.

In the same case the Commission said

> The right to join a union for the protection of his interests cannot be interpreted as conferring a general right to join the union of one's choice irrespective of the rules of the union. In the exercise of their rights under art 11(1), unions must be free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union.

11. These decisions are clearly of direct relevance to the restrictions in TULRCA, s 174. By prohibiting a trade union from excluding or expelling people because of their association with other organisations, the legislation raises questions about the Convention rights of the trade union. And by interfering with the rules of the union and by denying the union the freedom to determine who is eligible for membership, the legislation would appear to violate the right of the trade union to freedom of association under article 11. The only question for consideration would be whether such a restraint on the Convention right of the trade union could be justified under article 11(2) as being prescribed by law and necessary in a democratic society for the protection of the rights and freedoms of others, namely in this case the members of the BNP. This is a matter considered in para 13 below.

Implications for Trade Unions of the Right not to Associate

12. The other issue that arises here is the related question of the right of non association. Although there is no express right in the ECHR not to associate with others, the right of non association cannot be completely excluded: Young, James and Webster v United Kingdom (1982) 4 EHRR 28. That proposition was established in cases where individuals complained that they were being forced to associate with organisations (trade unions) against their

wishes. It is difficult to resist the conclusion that the same principle ought to be capable of being asserted by the association which objected to being compelled to associate with individuals against its wishes, by being compelled to retain them in membership, or by being compelled to take them into membership. Although the scope of the right not to associate is unclear, it applies in circumstances where the individual is being compelled to associate with others in a manner that is 'contrary to his convictions'. The point was established in Young, James and Webster v United Kingdom (1982) 4 EHRR 28 where the first and third named applicants objected to membership of railway trade unions for political reasons. An individual is thus free not to associate with an association because he or she does not like its political views. It is difficult to resist the conclusion that the same principle ought to be capable of being asserted by the association. The association ought to be free not to associate with individuals whose extreme views run contrary to the principles and policies of the association.

13. The only issue here is whether a restraint on this right of the trade union could be justified under article 11(2), as explained in paragraph 11 above. Here it would have to be shown that it is necessary to subordinate the right of the union under article 11 in order to protect the right of the individual worker who has been excluded or expelled. But for this to succeed it would have to be shown that the union had abused a dominant position (Cheall v United Kingdom, above), or perhaps that the individual had suffered loss of livelihood as a result (Young, James and Webster v United Kingdom, above). With the end of enforceable closed shop arrangements, however, it would be very difficult for the individual to show that he or she has suffered any serious burden as a result of his or her exclusion or expulsion. But even if this could be shown, it is not clear that the right to membership of an extremist political party is a right which article 11(2) could be invoked to protect. This is because – for example – the promotion of racist views does not attract the protection of the Convention: Jersild v Denmark (1994) 19 EHRR 1 where the Strasbourg Court emphasised the need to combat racial discrimination in all its manifestations. If – as is sometimes claimed – the BNP is a racist organisation, membership of that party would not be a right which could trump

the right of trade unions to determine who is eligible for membership of the trade unions in question.

No Justification for Restraining Trade Union Freedom of Association

14. Of course, article 11 does not protect any reason an association or an individual might have for refusing to associate with each other. Article 11(2) provides permissible limitations on the 11(1) freedom. Plainly, domestic law requiring that any refusal to membership or expulsion from membership must be in accordance with the contract between the members (i.e. in a trade union case, the rulebook) would be likely to be held to be a restriction on the article 11(1) freedom which was justified as proportionate and necessary in a democratic society for the protection of the rights and freedoms of others in accordance with article 11(2). For the same reason, domestic law precluding a refusal to admit or a decision to expel on grounds of sex, race, ethnic origin etc would be likely to be held to be a justified restriction under article 11(2) even if it did not amount to a free standing limitation on article 11(1). But, it is submitted, there are no conceivable grounds which make it necessary in a democratic society to bar unions from expelling members of fascist parties: the rights and freedoms of such individuals are unaffected by the union's expulsion save only that they do not get the benefits of association which the members of the trade union are entitled to confine to their own membership.

15. Political parties are themselves examples of other kinds of association which have freedom guaranteed by article 11 (as various decisions of the European Court preventing the government of Turkey banning political parties show). Political parties usually bar from membership anyone who is a member of another political party, particularly one to which it was opposed. It would be absurd if a political party could not refuse admission to a person or expel a member who was a member of an opposing or different political party. In fact such refusal does not contravene article 14 of the Convention. There is no legal distinction which could support trade unions being denied precisely the same freedom to the same extent. Indeed it is the case that across Europe trade unions are commonly closely linked to particular political parties. It would be illogical if a political party could refuse admission to a person who

was a member of an ideologically opposed political party but a trade union closely linked to that party could not.

16. Of course, article 11 would no doubt be breached if the State through domestic legislation precluded members of a particular political party from joining a particular or any trade union. But interference by a third party (whether the State or another) in an individual's and an association's freedoms to associate with each other is wholly different qualitatively to the association's (and the individual's) freedom to choose with whom it will and will not associate. The jurisprudence of the European Court of Human Rights shows that the freedom under article 11 to belong to a political party is protected as against third parties which are not associations exercising their own freedom of association but are interfering in the freedom of association of the individual. So there may be breach of article 11 if an employee is dismissed by her employer for membership of a political party: Vogt v Germany (1995) 21 EHRR 205 at 63-38, 60. Even so such a dismissal will not be in breach where the aims of the political party are incompatible with the aims of the employer: Van der Heijden v Netherlands (1985) 41 DR. 264 (ECommHR) (anti-immigrant activist dismissed from Foundation for the welfare of immigrants). But the situation is wholly different where no third party is involved and an association is exercising its freedom of association not to admit a person with distasteful (to the association) political allegiance.

17. In these latter cases the relationship between the unwanted individual and the association is not one of employment but of actual or potential membership. The relationship turns on the very subject matter of freedom of association. If the association does not want the individual in membership they are simply exercising their freedom of association. In such a case the individual, it is submitted, cannot rely on his or her membership of some other association (political or not) to override the freedom of the association which does not want him or her in membership because of his or her membership of the other association. By the refusal of membership he or she is not prevented from exercising his or her freedom of association with his or her political party and no question of article 11 would arise unless it could be shown that the refusal of trade union membership deprived the applicant of a

livelihood or led to some other substantial penalty. The same is true of the freedom of expression inherent in membership of a political party and which is protected by article 10. But refusal of membership by a trade union or by a political party because an individual is a member of another political party is not an infringement of the individual's article 10 or 11 freedom: the excluded person can continue in membership of his or her political party and express his or her support for it. An infringement of the article 10 freedom (and hence article 14) might only arise in such a case if the consequence of non-membership of the union or party would be the loss of livelihood or some other substantial penalty.

Relevant Decisions under Domestic Law

18. The question of trade unions being compelled to take into or retain people in membership has arisen in the English courts on a number of occasions both before and after the Human Rights Act 1998 came into force. The main case before the Act came into force is Cheall v APEX [1983] ICR 398 which was considered by the domestic courts before being considered by the European Commission of Human Rights, as described above. Mr Cheall complained in domestic legal proceedings that the expulsion was unlawful, partly because it was contrary to public policy on the ground that it was in breach of article 11 of the ECHR. The argument was dismissed by Bingham J at first instance, but accepted by the Court of Appeal where Lord Denning said that the English courts should give effect to the principle in article 11 which he read to mean 'the right of every man to join a trade union of his choice for the protection of his interests'. This argument was, however, decisively rejected by the House of Lords where Lord Diplock said 'freedom of association can only be mutual; there can be no right of an individual to associate with other individuals who are not willing to associate with him'. As a result it was held that APEX were free to exclude Mr Cheall who had been recruited from TGWU ACTTS in breach of the TUC Disputes Principles and Procedures. What this reveals is that while an individual may have a right to associate with others, it is a right only to the extent that the others are prepared to associate with him or her. The latter also have rights of freedom

of association, and these would be violated if the association were compelled to associate with people whose views or activities it found to be offensive.

19. Since the Human Rights Act came into force, a decision which may have a bearing on the issues relating to s 174 is RSPCA v Attorney General [2001] 3 All ER 530. Here the court was concerned with whether the Society could adopt a membership policy to exclude members of the fox hunting fraternity who were thought deliberately to have infiltrated the organisation. One question before the court was whether any such policy would be consistent with the Convention rights of those who would be excluded from the Society, assuming that the RSPCA was bound by the Human Rights Act to respect Convention rights. Lightman J expressed the position very clearly and took the view that the Society could not be compelled to accept or retain in membership people believed to be operating in a manner contrary to its interests. Whatever the rights of the individuals, the Society itself also had rights (the right to freedom of association) which had to be acknowledged. He said:

> The proposed criterion for exclusion relates to the reason for joining the Society: the Society has a legitimate interest in excluding those whose reasons for joining may render their membership contrary to the interests of the Society. What really is in question in this case is not the freedom of speech or thought of members or applicants for membership, but the freedom of association, under art 11 of the European Convention on Human Rights, of the Society itself: that freedom embraces the freedom to exclude from association those whose membership it honestly believes to be damaging to the interests of the Society (see Cheall v UK (1986) 8 EHRR 74 and Gaiman's case ([1971] Ch 317 at 331). (p 547).

20. Article 11 was most recently considered by domestic courts in Lee v ASLEF, above, which was concerned with the expulsion of the applicant in this case because of his BNP activities. The case is more fully discussed below. For present purposes it is sufficient to note that the union appealed against an employment tribunal ruling that Mr Lee had been unlawfully expelled. The appeal succeeded and the matter was remitted to a differently constituted tribunal. In the course of dealing with the appeal, the EAT considered arguments relating to the compatibility of s 174 with article 11, though it was not in a position to make a declaration of incompatibility, not

being empowered by the Human Rights Act to do so. The EAT admittedly did not feel it appropriate for a number of reasons to express a concluded view on the matter, in a case where both the applicant (Lee) and the union (ASLEF) were claiming the benefit of article 11. Nevertheless, Mr Justice Burton said that 'it would seem to us, on the authorities, that, absent a case of prejudice to livelihood, in this case the Respondent's right of negative association for the Union and its members would seem likely to override the asserted right of association of the Applicant'.

The Government's Amendment

21. On 2 March 2004 the responsible minister (Mr Gerry Sutcliffe) tabled an amendment to s 174 of the 1992 Act during the Standing Committee proceedings of the Employment Relations Bill currently before Parliament. The amendment provides that:

> **Exclusion or expulsion from trade union attributable to conduct**
>
> '(1) Section 174 of the 1992 Act (right not to be excluded or expelled from trade union) is amended as follows.
>
> (2) In subsection (2)(d) for "his conduct" substitute "conduct of his (other than excluded conduct) and the conduct to which it is wholly or mainly attributable is not protected conduct".
>
> (3) For subsection (4) substitute—
>
> > "(4) For the purposes of subsection (2)(d) "excluded conduct", in relation to an individual, means—
> >
> > > (a) conduct which consists in his being or ceasing to be, or having been or ceased to be, a member of another trade union,
> > >
> > > (b) conduct which consists in his being or ceasing to be, or having been or ceased to be, employed by a particular employer or at a particular place, or
> > >
> > > (c) conduct to which section 65 (conduct for which an individual may not be disciplined by a union) applies or would apply if the references in that section to the trade union which is relevant for the purposes of that section were references to any trade union.
> >
> > (4A) For the purposes of subsection (2)(d) "protected conduct" is conduct which consists in the individual's being or ceasing to

be, or having been or ceased to be, a member of a political party.

(4B) Conduct which consists of activities undertaken by an individual as a member of a political party is not conduct falling within subsection (4A)."

(4) In section 176 of that Act (remedies for infringement of right not to be excluded or expelled), after subsection (1) insert—

"(1A) If a tribunal makes a declaration under subsection (1) and it appears to the tribunal that the exclusion or expulsion was mainly attributable to conduct falling within section 174(4A) it shall make a declaration to that effect.

(1B) If a tribunal makes a declaration under subsection (1A) and it appears to the tribunal that the other conduct to which the exclusion or expulsion was attributable consisted wholly or mainly of acting in a way which was contrary to the rules of the union (whether or not the complainant was a member of the union at the time at which he acted in that way) it shall make a declaration to that effect."

(5) In subsection (3)(a) of that section, after "declaration" insert "under subsection (1)".

(6) After subsection (6) of that section insert—

"(6A) If on the date on which the application was made the applicant had not been admitted or re-admitted to the union, the award shall not be less than £5,900.

(6B) Subsection (6A) does not apply in a case where the tribunal which made the declaration under subsection (1) also made declarations under subsections (1A) and (1B)."

(7) In sections 174 and 176 of the 1992 Act references to the conduct of an individual include references to conduct which took place before the coming into force of this section.'.

22. In introducing the amendment, the Minister explained

Our aim is to ensure that unions can deal effectively with far-right political activists who infiltrate their ranks and sow the seeds of hatred and intolerance. I believe that there is widespread support throughout the Committee for tackling this issue. A great deal of detailed scrutiny has gone into the preparation of the amendments. In particular, we carefully considered the human rights implications of changing the law . . .

Addressing the current section 174, he continued:

The provisions have caused difficulties for unions when tackling the problem of political activists infiltrating their ranks. Let me describe two of them. First, it has not been clear what membership of a political

> party entails. In particular, unions and their advisers have been unsure whether any political activities that it might be possible to view as intrinsic to membership are covered by the expression "membership of a political party". That means that it is unclear whether it is lawful to take measures against members who have been active in promulgating racist political policies. Case law is developing in this area, so it is fair to conclude that the current definition probably does not embrace many, if any, political activities. However, case law has not yet settled down, so some uncertainty remains.
>
> Secondly, difficulties have arisen because cases involving conduct are frequently complex. There may be several reasons why a union chooses to act against an individual, and some reasons may be much more important than others. Some reasons may be given by an official or a committee, while other reasons are given elsewhere in a union's decision-making machinery. However, as the law is currently constructed, the union has acted unlawfully even if membership of a political party was a relatively minor reason for expelling or excluding someone. Therefore, if the union wanted to expel a leading activist of a political party who was prominent in the workplace and outside it, it might easily fall foul of the law if any of the officials involved in the decision to expel an individual had unwisely indicated that that individual should be expelled wholly or partly because they were a member of a political party. In other words, there is plenty of scope in the existing legal formulation for unions to make slight errors that result in an exclusion or expulsion being unlawful.
>
> The new clause deals with those difficulties. Our objective is to provide unions with greater latitude when dealing with political activists. We also want to make the law clearer.

The government may not have succeeded, at least in this last aim. According to one opposition member of the Committee:

> ‘I read it [the amendment] on Friday when it first came in. I read it on Sunday. I read it yesterday, and I read it again this morning. Having read it several times, I find the drafting unintelligible and the purpose vague to the point of obscurity. . . . As the Minister suggested, the Government are proposing to substitute "his conduct" in section 174(2)(d) with the massively cumbersome phrase, "conduct of his (other than excluded conduct) and the conduct to which it is wholly or mainly attributable is not protected conduct", which makes anyone's eyes water’.

23. The effect of the amendment will be to change the law in two principal respects. The first will be to allow trade unions to exclude or expel someone for reasons of their activities as a member of a political party, but not as a member per se. This means that it will be possible to exclude or expel someone who

- Stands as a candidate
- Campaigns in an election
- Speaks or joins a public platform
- Distributes literature
- Writes to a newspaper

The amendment thus draws a distinction between active and passive membership: while the union will be able to exclude or expel the former it will be unable to exclude the individual who is known to be a member of the BNP. It is important to emphasise, however, that the amendment to section 174 will not in itself give the right to exclude or expel. It simply permits trade unions to do so, provided such exclusion or expulsion is authorised by the rules of the union.

24. The other principal change relates to remedies. Under section 176 of the 1992 Act an individual who has been unlawfully excluded or expelled may apply to an employment tribunal. If the complaint is upheld, the individual may subsequently apply to the EAT for an award of compensation. A minimum award of £5,900 applies where the excluded or expelled individual has not been admitted or readmitted to the union. The effect of the government amendment is to remove the minimum award where someone has been excluded or expelled for mainly membership of a political party where there are also other reasons consisting of conduct which is contrary to the rules of the union. But compensation may still be payable. Moreover the minimum award will continue to apply where the sole reason for exclusion or expulsion is membership of a political party contrary to the rules of the union. The government's amendments also provide for compensation under s 174 to be determined by an employment tribunal on the second application rather than the EAT.

An Inadequate Response by the Government

25 These are modest changes which do not begin to address the concerns of international human rights law. A trade union will still be required to take into membership someone who is known to be a member of a political party the policies of which are directly opposed to the interests of the union. As such the amended TULRCA s 174 will still breach both the European Social Charter and the ECHR. The modest nature of these changes is simply reinforced in the light of the decision of the Employment Appeal Tribunal in Lee v ASLEF, above where it was confirmed that as currently drafted, s 174 applies only to membership and not to activities. This means that under the current law a trade union can exclude or expel someone because of his or her activities on behalf of a political party (in this case the BNP) provided that membership alone did not form part of the reason for the exclusion or expulsion.

26. Mr Lee – a train driver – was expelled from ASLEF after it had been discovered that he was standing as a BNP candidate in a local election. Further inquiries revealed that he was 'quite a well known activist in the BNP' and that he had stood before for the party in general elections. He had also written articles for *Spearhead*, the BNP magazine. Further allegations based on information provided by the Bexhill Council for Racial Equality relate to Mr Lee having distributed anti-Islamic leaflets whilst dressed as a priest outside York and Canterbury cathedrals, and to the harassment of a member of the Anti – Nazi League who was handing out leaflets. This included taking photographs, taking car numbers, making 'throat cut' gestures, and following a woman in her car all the way from Bexhill to her home in Dartford where it is alleged that he 'clocked' her house number. The employment tribunal found that Mr Lee admitted taking the photographs, but denied that he had been spoken to by the police.

27. The matter was referred to the ASLEF Executive Committee where the President (Mr Samways) moved a resolution to expel Mr Lee under the rules of the union. On 19 April 2002 the resolution to expel was passed unanimously. Mr Samways evidence was clearly that Mr Lee had been expelled not because of his membership of the BNP but because of his

activities on its behalf. However, the letter of expulsion to Mr Lee from the general secretary may have given the impression that membership of the BNP – as well as his activities on its behalf – was a factor for the expulsion. Nevertheless the employment tribunal found that the expulsion was unlawful under s 174 for reasons that need not be explored here. On an appeal to the EAT, the appeal tribunal found that the employment tribunal had misdirected itself, and the appeal by the union was allowed.

28. The EAT took the view that s 174 did not prevent a union from excluding or expelling someone because of their activities on behalf of – rather than their membership of – a political party. For this purpose the activities in question need not be linked to membership of the union. In a rather convoluted passage the EAT said:

> The only conduct that is excluded is the conduct of becoming or remaining a member of a Union, and if that conduct formed part of ASLEF's reason for exclusion, as opposed to the applicant's acts or activities or statements, whether as such a member or otherwise, then the expulsion would not have been 'entirely attributable to' *included* conduct.

In remitting the matter to another employment tribunal the EAT instructed the tribunal to determine who and/or what body expelled the applicant on the union's behalf, and what were the reasons for the expulsion. So far as the latter question is concerned, the tribunal was asked to determine whether the expulsion 'was entirely attributable to his conduct, excluding his being a member of the BNP'.

29. In the light of the foregoing, it may well be asked what is the point of the government's amendment? The Lee case suggests that a trade union can already exclude or expel someone for BNP activities if not for BNP membership. It would, however, be quite wrong to see the amendment as being wholly pointless, or to deny that it will be of some assistance to trade unions. Under the existing s 174 an exclusion or expulsion will be unlawful unless it can be shown to be 'entirely attributable' to conduct (which does not include membership of a political party), whereas under the amendment, it will be unlawful only if 'wholly or mainly' attributable to protected conduct (that is to say membership of a political party). The difference is this: a trade union

will act unlawfully under the statute if membership alone was part of the reason for exclusion and expulsion, whereas a trade union will act unlawfully under the amendment if membership alone is the main reason for the exclusion or expulsion. Put another way, a trade union will act unlawfully under the statute unless activities are the sole reason for the exclusion or expulsion, whereas a trade union will act unlawfully under the amendment if activities are only the secondary reason for the exclusion or expulsion. The point was made clear by the minister in Standing Committee:

> . . . we have ensured that any exclusion or expulsion is lawful where a minor reason for it concerns protected conduct, but the main reason concerns other conduct outside the definition of excluded conduct. That means that a union will have acted lawfully if it expels a political activist principally on the grounds of their political activities where a subsidiary factor was the person's political party membership.

Conclusion

30. Although the government's amendment may be seen by some as a welcome initiative, it does not go far enough. It is strongly arguable that section 174(4)(iii) of the 1992 Act breaches the right of trade unions to freedom of association under article 11 of the ECHR for reasons considered above. It deprives the unions of the right under their rules to determine who their members will be. The amendment to s 174 introduced by the minister in Standing Committee eases the liability of trade unions but does not remove it. Trade unions will still be liable to individuals who have been excluded under the rules of the union in question for membership of a political party which is offensive to the union. Trade unions will also be required to accept and retain in membership individuals who are known members of the BNP. There are no other organisations in the United Kingdom – such as churches, political parties, charities, sports clubs or London clubs – which are constrained in the way that trade unions are constrained by s 174 (even after the government's amendment). The provisions prohibiting trade unions from excluding or expelling people because of their membership of a political party should be repealed. Trade unions should be free to admit and expel people in accordance with their own rules. The right to freedom of association has implications for some of the other restrictions on trade union exclusion and

expulsion which are dealt with in s 174. These other provisions of s 174 also represent major restraints on trade union autonomy. They too ought to be repealed, in order to remove the risk of s 174 being declared incompatible by the courts, and the risk also of a ruling against the United Kingdom by the European Court of Human Rights.

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