

The Wider Implications of ASLEF v UK – Trade Union Autonomy

The case of ASLEF v UK was not restricted to matters concerning members of political parties being expelled or excluded from unions, still less a member of the BNP.

Of course, it was a consequence of ASLEF the union doing the right thing in 2002 in expelling an activist member of the BNP - A thoroughly objectionable man whose beliefs were the antithesis of the objects of the union and the views of many in the union.

But ASLEF v UK was essentially a claim by the union to the ECtHR that s174 was an unnecessary restriction on the union to conduct itself by reference to its own rules and the UK breached the union's rights of freedom of association. Restrictions like these are not applied to any other organisations.

The union was not able to argue the wider principle of trade union autonomy before the Strasbourg Court. We were stuck with presenting a case on the facts that led to the decision against them by the second ET.

Nevertheless, the court said this: "In the exercise of their rights under Article 11 § 1 unions' must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union."

And

"Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join."

Further the Court referred to the European Committee of Social Rights of the Council of Europe, which is the supervisory body of the European Social Charter 1961 (1996), which has held: the situation in the United Kingdom is not in conformity with Article 5 of the Social Charter in relation to sections 15, 65, 174 and 226A.

Article 5 European Social Charter says:

“All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.”

Article 11 European Convention on Human Rights and Fundamental Freedoms – to give its fuller title – the directly relevant Article in the ASLEF case says:

“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 as are prescribed by law and are **necessary** in a democratic society in the interests of national security or public safety...or morals or for the protection of the rights and freedoms of others.”

And then there's ILO Convention 87 on the Right to Organise and the related ILO Convention 98 - 60 years old this year.

Up to the Charter of Fundamental Rights of the European Union 2000 - Article 12 - also covering freedom of assembly and of association, including the right of everyone to form and to join trade unions for the protection of his or her interests.

We say it follows from this right that there must be a right to bargain collectively – there’s no point in us having a right to the union to protecting our interests if we can’t engage in collective bargaining.

And the third element must be the right to strike. We cannot engage in effective collective bargaining without the right to withdraw labour.

Whilst the court of EU – the ECJ in Luxembourg – moves in one direction in the cases of Viking, Laval, Ruffert and Luxembourg, the ECtHR seems to be moving in the other direction more recently in the cases of Demir and just over a week ago in Yapi-Yol Sen.

The sections of the 1992 Act referred to in the ASLEF – the ones where the United Kingdom is not in conformity with Article 5 of the European Social Charter case were these...

Section 15 TULR(C)A 1992 – “It is unlawful for property of a trade union to be applied ...towards the payment for an individual of a penalty which has been or may be imposed on him for an offence or for contempt of court”

That covers anything from a strict liability criminal offence relating to a lorry driver’s load to payment of a fine for contempt in relation to industrial action.

Section 226A - relating to the notice of ballot and sample voting paper for employers – whereby the trade union must take such steps as are reasonably necessary to give 7 days notice of the ballot and 3 days before a copy of the sample voting paper. In the notice the union must include all that information to enable the employer to help the employer to identify the employees – the first dreaded matrix. The second notice comes at the point the union calls action. The whole process has been criticised by international bodies as amounting to an unnecessary and unjustifiable interference with trade unions.

Under electoral law errors and worse in relation to a ballot can only be successfully criticised in court if the result would be affected – not so the interference with unions seeking act for their members to protect their interests.

Then there is s65 relating to the right of individuals to take action against a union if they are “unjustifiably disciplined” by the union. But an individual is unjustifiably disciplined by a trade union if the conduct consists in one of a list beginning with the failure to participate in or support a strike or other industrial action.

Section 65 overlaps with section 174 which restricts unions’ ability to expel or exclude members. One aspect of s174 confirms that person cannot be expelled or excluded for conduct covered by s65.

{Their Lordships, in particular Lord Anthony Lester QC, the Liberal Democrat human rights expert, and with the support of former TGWU general secretary Lord Bill Morris, chose to focus on the rights of individual members and the fear they may be abused by the union, instead of the clear statements on collective rights set out by the Court. They concentrated on paragraph 43 of the ASLEF case, which reads: “Such abuse might occur, for example, where exclusion or expulsion from a trade union was not in accordance with union rules or where the rules were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship.” Ironically harping back to a time when s174 protected individuals to undermine the closed shop.

Back to the “ASLEF” judgment and we see the court says: “By way of example, it is uncontroversial that religious bodies and political parties can generally regulate their membership to include only those who share their beliefs and ideals.”

Compare also the golf club and the employer...with the position of trade unions.

Unions also have the Certification Officer, the application of the law of contract, its rules and common law concepts of natural justice and the like.

Having said that Charles Barrow's 2002 book *Industrial Relations Law* (page 65) argues "legal action by the disgruntled minority member who wishes to sue their own union [is] more likely to fail." (That's not quite his intention in context perhaps...).

But he refers back to the case of *Foss v Harbottle* in 1843. Barrow comments on the "The courts [desire] to refrain from intervention in the domestic affairs of the union..." He says it is not only based on the rule in *Foss v Harbottle*, but "evidence of... a wider principle of association law which justifies a decision to decline to intervene in certain internal matters of a trade union."

Where are we now with the new duty under the Employment Act 2008 where the decision to exclude or expel must be taken in accordance with the Union's rules, that the notice of the proposal to exclude or expel must be given along with the reasons, that the individual must have a fair opportunity to make representations and those representations by the individual in respect of that proposal must be not considered fairly...?