SECTION 19 OF THE EMPLOYMENT ACT 2008

Other speakers will be covering the political background to the *ASLEF v Lee* and *ASLEF v UK Government,* a European Court of Human Rights case.

My short slot is concentrating on the amendments to s174 and s176 of the Trade Union & Labour Relations (Consolidation) Act 1992 (**"TULR(C)A"**) contained in the notorious s19 of the Employment Act 2008.

Again, I will not delve into the political machinations that led to the Government doing a complete about-face in the House of Lords and replacing a simple amendment, referred to in their consultation paper as Option 'A'. This would have done away with the distinction in s174 of TULR(C)A between conduct that is "protected conduct". You will recall that the Government, only four years ago, tinkered with s174 to draw a distinction between membership or former membership of a political party which was still an unlawful reason to exclude or expel and participation in the activities of a political party which was not (see s174(4)A and (4)B).

The Government have now produced an unworkable monstrosity of an amendment to the section that adds a whole new layer of complexity to what was already a complex statutory provision which had already been amended twice by the Labour Government, by the Employment Rights (Disputes Resolution) Act 1998 and by the Employment Relations Act 2004.

In my opinion, the new statutory provision is unworkable in practice and probably does not comply with the UK Government's obligations and the European Convention of Human Rights, as explained by the European Court of Human Rights in the *ASLEF* case.

<u>Statutory provision</u>

S19(2) inserts after s174(4)B an additional six clauses (4C to 4H). Taking them in turn, sub-section 4C qualifies the definition of protected conduct in sub-section 4A by allowing a trade union to expel or exclude individuals who belong or did belong to a particular political party if membership of that party is contrary to the rules or objectives of the trade union.

Sub-sections 4D and 4E provide that where the trade union is relying upon "objectives" rather than rules, it must be reasonably practicable for the objective to be ascertained by a person working in the same trade, industry or profession as the excluded individual at the time of the conduct.

Clause 4F then deems that expulsion or exclusion from a trade union remains unlawful if one of the following conditions set out in 4G are met. These exclusions are:-

(1) The decision does not comply with the union rules;

(2) The decision is taken unfairly; and

(3) Loss of union membership will cause the individual to lose his livelihood or suffer other exceptional hardship.

Clause 4A then defines when a decision is taken unfairly and requires:

(a) that the individual must be given notice of the proposal to expel or exclude them, including reasons;

(b) that they must be given a fair opportunity to make representations;

(c) that the union must consider these fairly.

Sub-section 3 of s19 then amends s176 to bring it in line with sub-sections 4D and 4E as to what is ascertainable by someone in a trade or profession.

I wish to acknowledge and commend the recent article by Keith Ewing in the latest Industrial Law Journal (Vol.38 No.1 March 2009 page 50ff) on section 19. It certainly helped me understand the issues and guide me through the maze of clauses.

The effect of all these clauses is as follows:

(i) a trade union may lawfully exclude or expel someone because of their membership of a political party but only if "membership of that political party" is contrary to a rule or objective of the union. If relying upon the objective of the union, the union can only exclude or expel if it is reasonably practicable for the

objective to be ascertained by a person working in the same trade, industry or profession for exclusion and by a member of the union for expulsion;

(ii) even if the decision to exclude or expel is taken in accordance with the rules or objectives of the union and if relying upon objective, that it is reasonably practicable for the objective to be ascertained, then it will still be unlawful to exclude or expel if certain procedural obligations are not complied with first and representations made by the individual are not considered fairly;

(iii) even if the decision is taken in accordance with the rules or objectives of the union and even if the prescribed procedural obligations are met, it will still be unlawful to exclude or expel if to do so will cause the individual to lose their livelihood or suffer "exceptional hardship";

(iv) if the union excludes or expels in breach of these provisions, it will be liable to pay a minimum award of £7,300 compensation to the individual concerned.

Difficulties with the new provision

Other than the complexity of the new legislation, I think it also throws up the following issues:

(1) Can a union rely on a general expulsion rule, such as "bringing the union into disrepute" for the purposes of sub-section 4C or do the union's rules have to have a specific prohibition on membership of a political party?

(2) Can a union rely upon a general objective, such as promoting equality, or do the words "membership of that political party" require a more precise objective?

(3) Is an "objective" of a trade union the same as an "object" in a union rule book?

(4) The procedural requirements in 4H require the person to be excluded or expelled to be given notice of the proposal, the reasons for the proposal and a

fair opportunity to make representations before any decision is taken to exclude or expel;

(5) "Exceptional hardship" in sub-section 4G(c) is not defined.

I leave it to you to judge whether you consider it is exceptional hardship for a BNP member of Unite the Union to be expelled from the union and therefore prevented from obtaining free legal advice under the union's legal advice scheme from myself as one of the retained solicitors.

Conclusion

The Employment Relations Act 2004 provided that a trade union may exclude or expel someone (i) wholly because of their BNP activities; or (ii) mainly because of their BNP activities and partly because of BNP membership and such action remains lawful as the s19 amendments do not affect exclusion or expulsion wholly or mainly for activities.

However, the union will only be able to lawfully exclude or expel someone (i) wholly because of their BNP membership; or (ii) mainly because of their BNP membership and partly because of their BNP activities if they have a rule or objective, they do not act unfairly and follow detailed procedural requirements, and only if no exceptional hardship is caused by the decision.

As a result, my recommendation is that the union should revert to their previous tactics of ensuring that the reason for exclusion or expulsion of a BNP member is said to be because of their conduct and its incompatibility with union rules or union objects and to ignore the provision based on membership. As the editorial in IDS Brief 867 for December 2008 pointed out, the freedom of trade unions to decide whom they wish to associate with in membership contrasts starkly with the freedom of employers to decide such matters. However, there is still the issue to be determined as to whether BNP membership can be said to be a manifestation of a philosophical belief and so capable of protection under the Employment Equality (Religion or Belief) Regulations 2003.

In view of the litigious nature of the BNP and their members, I anticipate it will not be long if there are further challenges.