

ASLEF response to Dti consultation document:

'ECHR Judgement in ASLEF v UK Case – Implications for Trade Union Law',
May 2007.

INTRO

ASLEF is the union involved in the ASLEF v UK case. It is a union of 18,500 members who are UK train drivers.

General

We are concerned about the extremely limited scope of the Dti consultation. We are also concerned about the lack of recognition of the general common law principles and statute which apply to trade unions. We understand why the Government needs to look in particular at section 174 because that was the section of the law about which the ECHR made adverse comments but there is a need to see the regulation of trade unions in the general common law and legislative content. British trade unions are well regulated, some might argue over regulated.

Trade unions are organisations with constitutions and rules. They admit members in accordance with those rules. Some trade unions for example the large general unions have a very wide membership across many different occupations in both the private and public sector. Other trade unions operate only in the public sector and others (like ASLEF) have a membership restricted to a particular grade or category of workers, in ASLEF's case train drivers.

When a member joins a trade union s/he agrees to abide by the rules of the union as agreed from time to time. The union agrees to provide certain levels of services primarily of a collective bargaining or representational nature but also some additional services like legal and insurance services. The rule book sets out the contract between the trade union and its members. If a member is dissatisfied with her/his trade union or alleges they have not abided by their contract made in accordance with the trade union's rules then breach of contract actions are possible.

If a dispute arises about discipline of a member then the member not only has rights to complain using the civil courts or s/he can utilise the office of the Certification Office to achieve a resolution of the complaint. The Trade Union and Labour Relations (Consolidation) Act 1992 sets out the scope of the Certification Officer's jurisdiction which includes matters of discipline.

The Certification Officer also has a role in regulating trade unions, ensuring they are established properly, and make annual returns about various matters.

Other statutes and laws also apply to trade unions. Trade Unions are subject to appropriate safeguards parallel with those which employers are subject to. Trade Unions can not discriminate against members on the grounds of their:

Race- section 11 RRA 1976; Sex – section 12 SDA 1975; Disability – section 13 DDA 1995; Religion and Belief – Reg 15; Sexual orientation – Reg 15; Age -Reg 18. There is no prohibition in law generally about political belief (save in NI with Fair Employment legislation).

The above shows that trade unions are well regulated both in common law and statute ,and it is ASLEF's view that in the light of the ECHR decision there is no continuing purpose for section 174.

Context in which section 174 was originally enacted

In support of this argument we consider that it is important for the Dti to look at the context in which section 174 was originally enacted and the political reasons for it. The provisions of the 1992 Act were enacted by a Conservative Government hostile to trade unions, which sought to break trade union influence and in particular eradicated the closed shop. There is a different political landscape in 2007 and the Dti should not miss the opportunity to completely repeal section 174 which no longer has any continuing purpose.

Section 174 was a legislative attempt by the Government to prevent trade unions excluding or not admitting members on the basis of their political belief. The provisions were aimed at mainstream political parties not the far right parties who now seek to exploit the legislation. Compensation was accordingly set very high not only to show the then Government's disapproval of exclusion on political grounds but also to reflect the fact that if you worked in a closed shop industry and were excluded your union as a result of your political beliefs you would not only lose your union membership but your job. These circumstances no longer apply. Indeed as the ECHR commented, in their judgment, Mr Lee never claimed he suffered any detriment as the result of his exclusion from ASLEF, and there was no apparent prejudice suffered by Mr Lee in terms of his livelihood or in his conditions of employment. In fact Mr Lee gets the benefit of ASLEF's negotiations with the company in which he works without having to pay any subscription at all.

ASLEF concludes that the political circumstances in which the section was enacted no longer applies and rather than tinkering with the wording of the section, the Government should take the opportunity to introduce clarity to the law in this area and abolish the section.

Options proposed

Two options are proposed in the consultation document. We have considerable reservations whether either will assist to clarify the law following the decision in ASLEF v UK or are in accordance with the spirit of letter of the decision.

Option A – amend s174 to exclude any reference to special category of conduct relating to political party membership and activities

Option B – retain special category of conduct relating to political party membership and activities but significantly amend the rights not to be excluded or expelled for such conduct

Option A

The consultation document suggests that this would significantly simplify wording of s174 and “provide trade unions with much greater autonomy in deciding their membership”. The Dti further points out there would be no safeguards against possible abuse but says that safeguards may not be necessary as there is no evidence that trade unions would make use of greater freedom by expelling members of mainstream political parties. Whilst the consultation points out that an aggrieved member could seek legal redress by bringing a breach of rule claim before the courts it does not refer to the Certification Officer’s jurisdiction in disciplinary matters involving trade unions.

We accept that s174 is convoluted and confusing as it is currently drafted and was so before the 2004 amendments (although they add even more confusion). Trade Unions current focus is on recruitment and organising of membership in workplaces, and this position has always applied. Trade unions rarely exclude or expel and generally only in extreme circumstances. The only evidence of the numbers of expulsions is from the BNP’s own publicity from 2003 where they cite 5 expulsions of BNP members. Trade Unions rarely have cases of expulsion and this action is only undertaken in the rarest of cases. Unions generally and understandably prefer to use lesser sanctions for breaches of rules.

Option B – specify particular safeguards against abuse providing for conditions specifying that the union’s decision would be unlawful unless:

- (a) the political party membership or activity concerned was incompatible with a rule or objective of the union, and
- (b) the decision to expel was taken in accordance with union rules or established procedure

The Dti says that these safeguards are based on reasoning of Court which noted the need for the trade union to avoid arbitrary behaviour and to act in accordance with its rules. The consultation document points out many union rule books refer to racist, xenophobic or extremist political behaviour as unacceptable to the union so little adaptation would be required. The document argues members and potential members would gain because they would be properly informed of the potential consequences of their political actions. Even the Dti suggest that this option might create grey areas and give scope for legal action to arise about precise meaning of a union’s rules or objectives.

We consider this option is unworkable and unnecessary. As we point out above safeguards already exist in the jurisdiction of Certification Officer (s108A) where a member has the right to apply to CO about matters including (b) disciplinary proceedings by the union.

We do not see why there is also the need for a separate right to complain to an Employment Tribunal and obtain declaration. It is accepted that the Certification Officer cannot order compensation but he can order the trade union to take such steps to remedy breach which is a practical remedy for an aggrieved member. We refer again to the absence of any detriment shown by Mr Lee - he had no losses so there can be no possible need for compensation.

No continuing purpose for s174?

In ASLEF v UK ECHR says that s174 amounts to an excessive restriction on trade union's rights to determine their own membership conditions. The UK Government in their submission accepted s174 represented interference in Article 11 rights. These comply with Article 11(2) "prescribed by law" and "necessary in a democratic society"

The consultation says there is no evidence that trade unions would make use of greater freedom by expelling members of mainstream political parties. Furthermore, if a trade union breaches own its own Rules its members have the right to go both to Courts and the Certification Officer (see above).

We see no need for this level of regulation of trade unions. There is no evidence advanced either in the consultation, in the Government's submissions in the ASLEF case or indeed in our experience that trade union members have any awareness of this jurisdiction. We consider the continuation of section 174 in any redrafted version amounts to unnecessary over- regulation and red tape. From our experience more trade union members bring claims against their unions in relation to discrimination law, than in this jurisdiction.

Unjustifiable discipline – section 64

We also consider the Government should take this opportunity to repeal section 64 as well, which also infringes trades unions rights to autonomy. The ratio of the ECHR can easily be applied to the unjustifiable discipline jurisdiction.

If as the ECHR says ASLEF Article 11 should be read as right to choose not to associate as well as associate, the same must hold good for unjustifiable discipline provisions subject always to a members' right to take action either under CO's jurisdiction or in courts.

Conclusion

We consider the consultation is very timid and fails to properly implement the decision of the ECHR. We consider the Government should take the opportunity to repeal both sections 174 and 64 and 65.

In ASLEF v UK, the ECHR says the UK Government must strike a balance between members' rights and those of the union. However, the consultation

paper options still in our view do not strike the appropriate balance to free Trade Unions from red tape and further Trade Union autonomy

Keith Norman, General Secretary, ASLEF