



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF SCHMIDT AND DAHLSTRÖM v. SWEDEN

(Application no. 5589/72)

JUDGMENT

STRASBOURG

6 February 1976

In the Schmidt and Dahlström case,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and Rules 21 and 22 of the Rules of Court, as a Chamber consisting of the following judges:

MM. G. BALLADORE PALLIERI, *President*,

H. MOSLER,

J. CREMONA,

G. WIARDA,

P. O'DONOGHUE,

Mrs. H. PEDERSEN,

Mr. S. PETREN,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 September 1975 and 19 January 1976,

Delivers the following judgment which was adopted on the last-mentioned date:

PROCEDURE

1. The Schmidt and Dahlström case was referred to the Court by the European Commission of Human Rights (hereinafter referred to as "the Commission"). The case originated in an application against the Kingdom of Sweden lodged with the Commission by two Swedish subjects, Mr. Folke Schmidt and Mr. Hans Dahlström, on 9 June 1972.

2. The Commission's request, to which was attached the report provided for under Article 31 (art. 31) of the Convention, was lodged with the registry of the Court on 9 October 1974, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the Kingdom of Sweden recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a failure on the part of the Kingdom of Sweden to comply with the obligations binding on it under Articles 11 and 14 (art. 11, art. 14) of the Convention.

3. The President of the Court deemed it conducive to the proper administration of justice to constitute a single Chamber to consider both the present case and that of the Swedish Engine Drivers' Union (Rule 21 para. 6). On 15 October 1974, the President of the Court drew by lot, in the

presence of the Registrar, the names of five of the seven judges required to sit as members of the Chamber, Mr. S. Petrén, the judge of Swedish nationality, and Mr. G. Balladore Pallieri, the President of the Court, being ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges so selected were Mr. H. Mosler, Mr. E. Rodenbourg, Mr. A. Favre, Mr. G. Wiarda and Mr. P. O'Donoghue (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Mr. Favre died in November 1974 and Mr. Rodenbourg in October 1975; they were replaced by Mr. J. Cremona and Mrs. H. Pedersen, substitute judges.

Mr. G. Balladore Pallieri assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Swedish Government (hereinafter referred to as "the Government") and of the delegates of the Commission regarding the procedure to be followed. By an Order of 31 October 1974, the President of the Chamber decided that the Government should file a memorial within a time-limit expiring on 14 February 1975 and that the delegates should be entitled to file a memorial in reply within two months of receipt of the Government's memorial.

The Government's memorial was received at the registry on 17 February and that of the delegates on 26 March 1975.

5. After consulting, through the Registrar, the Agent of the Government and the delegates of the Commission, the President decided by an Order of 2 June 1975 that the oral hearings should open on 25 September.

6. On 22 September 1975, the Court held a preparatory meeting to consider the oral stage of the procedure. On this occasion the Court compiled a list of questions which it sent to the parties appearing before it, requesting them to supply the required information in the course of their addresses. The Court also requested the Commission to produce a certain document.

7. The oral hearings were held in public at the Human Rights Building in Strasbourg on 25 September 1975.

There appeared before the Court:

- for the Government:

Mr. H. DANELIUS, Head of the Legal Department

at the Ministry for Foreign Affairs,

Agent;

Mr. B. HÅRDEFELT, Chief Legal Adviser

at the Ministry of Finance,

Mr. G. NORMARK, Chief Legal Adviser

at the National Collective Bargaining Office,

Mr. O. BERGQVIST, Legal Adviser

at the Ministry of Labour,

Advisers;

- for the Commission:

Mr. J.E.S. FAWCETT,
Mr. J. CUSTERS,
Mr. F. SCHMIDT, Professor

*Principal Delegate,
Delegate,*

at the University of Stockholm and applicant, assisting the
delegates under Rule 29 para. 1, second sentence.

The Court heard the addresses of Mr. Fawcett and Mr. Schmidt for the Commission and Mr. Danelius for the Government, as well as their replies to questions put by the Court and several judges.

At the hearing the Commission produced the document recently called for by the Court.

THE FACTS

8. The applicants are Swedish citizens. Mr. Folke Schmidt is a professor of law at the University of Stockholm and Mr. Hans Dahlström is an officer in the Swedish Army.

9. The applicants are members of trade unions affiliated to two of the main federations representing Swedish State employees, namely the Swedish Confederation of Professional Associations (Sveriges Akademikers Centralorganisation, abbreviated to SACO) in the case of Mr. Schmidt and the National Federation of State Employees (Statstjänstemännens Riksförbund, abbreviated to SR) in the case of Mr. Dahlström.

In 1971, after expiry of one collective agreement and during negotiations for a new agreement, the applicants' unions called selective strikes not affecting the sectors in which worked the applicants, who thus did not come out on strike. Mr. Schmidt and Mr. Dahlström complain that on conclusion of the new agreement, they, as members of the "belligerent" unions, were denied certain retroactive benefits paid to members of other trade unions and to non-union employees who had not participated in the strikes.

General background

10. For more than a hundred years, workers and employers in the private sector in Sweden have traditionally enjoyed the right to form and join trade unions and associations and to take action in defence of their occupational interests without interference by the State.

Certain principles of labour law which had evolved in practice were codified in 1928 and 1936 by the following legislation:

- (i) the 1928 Collective Agreements Act (lag om kollektivavtal);
- (ii) the 1928 Labour Court Act (lag om arbetsdomstol); and
- (iii) the 1936 Act on the Right to Organise and Negotiate (lag om förenings-och förhandlingsrätt).

11. The 1928 Collective Agreement Act deals with collective labour agreements between employers or employers' associations and trade unions.

It specifies in particular the legal effects of such agreements. For example, the parties may not take strike or lock-out action in regard to an issue regulated by a collective agreement in force between them.

12. The 1928 Labour Court Act contained rules governing the composition, jurisdiction and procedure of the Labour Court. The Labour Court was competent to hear cases of alleged violation of the 1936 Act on the Right to Organise and Negotiate. It also had jurisdiction in disputes relating to the interpretation or application of collective agreements, but proceedings could only be brought by a party to the agreement in issue. Unions or non-union employees to whom such an agreement had been made applicable (paragraph 17 below) were obliged to bring their disputes before the ordinary courts or administrative courts, as the case might be.

13. The above-mentioned Act of 1936 guarantees two distinct rights to the parties on the labour market, namely the right to organise and the right to negotiate.

The right to organise is defined in Section 3 of the Act as being the right of employers and employees to belong to an employers' organisation or a trade union, to exercise their rights as members of that organisation or union, and to work for an organisation or a union or for the formation of an organisation or a union, without interference or pressure by the other party. The Act specifies that the right to organise shall be considered as being violated "if measures are taken either by employers or by employees to constrain any employee or employer, as the case may be, to refrain from becoming a member of, or to resign from, an association, to refrain from exercising his rights as a member of an association, or to refrain from working for an association or for the formation of an association, and likewise if measures are taken either by employers or by employees calculated to cause prejudice to an employee or employer, as the case may be, on the ground that such employee or employer is a member of an association, exercises his rights as a member of an association or works for an association or for the formation of an association".

The only way in which such associations enjoy the protection of the Act is that they may be awarded damages if the other party violates the right to organise of an individual member in such a way that the violation is to be regarded as intervention in the affairs of the association.

The right to negotiate is defined in Section 4 of the 1936 Act as being "the right to institute negotiations regarding conditions of employment or relations between employers and employees in general". It imposes on the other party an obligation to enter into negotiations, to attend meetings for negotiations and, where necessary, to make proposals for the settlement of the issues involved. This provision is applicable to all trade unions.

14. Prior to 1966, the State determined the wages and conditions of employment of its employees in the event of a breakdown of the negotiations between the State and the employees.

As from 1 January 1966, the 1965 State Officials Act (statstjänstemannalag) has virtually assimilated State employees to employees in the private sector as regards trade union rights, strikes, lock-outs, etc. The Act made the 1928 Collective Agreement Act, the 1928 Labour Court Act and the 1936 Act on the Right to Organise and Negotiate applicable in the public sector. Furthermore, the Act provided for collective agreements to be concluded, subject to certain exceptions, between the National Collective Bargaining Office (Statens Avtalsverk, hereinafter referred to as "the Office"), representing the State as employer, and the organisations of State employees. The Ministry of Finance has a nominee on the governing board of the Office.

15. The 1965 legislative reform was facilitated by the centralised structure of the Swedish trade union movement; one factor which greatly contributed to its adoption was the conclusion in December 1965 of a Basic Agreement on Negotiations' Procedure (slottsbacksavtalet) between the Office and the four main trade union organisations of State employees, namely:

- (i) the State Employees' Union (Statsanställdas Förbund, abbreviated to SF and known prior to 1 July 1970 as Statstjänarkartellen),
- (ii) the National Federation of State Employees (SR),
- (iii) the Swedish Confederation of Professional Associations (SACO),
- (iv) the Civil Servants Section of the Central Organisation of Salaried Employees (Tjänstemännens Centralorganisations Statstjänstemannasektion, abbreviated to TCO-S).

According to the information at the disposal of the Court, these federations represent the large majority of Swedish State employees: more than 450,000 out of the 500,000 whose terms of employment are negotiated by the Office. About forty trade unions are affiliated to these organisations. The few independent trade unions represent only about 2,000 State employees in all.

Insofar as they are union members at all, university teachers and army officers generally belong to SACO and SR respectively. These two organisations, which are respectively open to staff possessing a university degree or the school leaving certificate (the equivalent of the baccalauréat), recently merged after the case had been brought before the Commission.

According to the trade unions' own published figures, the number of SACO members in respect of whom the Office conducts collective negotiations was about 48,800 in 1971 and 1972; it rose to 51,800 in 1973 and was between 53,600 and 53,700 at the end of 1974. The university teachers' union affiliated to SACO had between 1,800 and 1,900 members in 1971, between 1,900 and 2,000 in 1972, between 2,100 and 2,200 in 1973 and between 2,300 and 2,400 at the end of 1974. SR had 19,200 members in 1971, 19,800 in 1972 and about 20,000 at the end of 1973. The army officers' union affiliated to SR had between 6,900 and 7,000 members in

1971, 7,300 in 1972 and between 7,400 and 7,500 at the end of 1973; it would appear that in August 1975 its membership had fallen to about 7,100 or 7,200.

16. Clause 4 of the above-mentioned Basic Agreement provides that negotiations with a view to concluding a collective agreement shall be conducted on the employees' behalf by the "main organisation" concerned, unless the Office and the "main organisation" agree otherwise.

17. The Royal Order of 30 June 1965 relating to Certain Public Collective Agreements (KK om vissa statliga kollektivavtal m.m.) includes the following provisions:

Article 3

"Collective agreements as to such conditions of employment or service as are determined by the King-in-Council or by Parliament shall be concluded conditionally on the agreement being sanctioned by the King-in-Council."

Article 4

"An Authority which is bound by a collective agreement shall apply the provisions of the agreement to any employee within the occupational group and region to which the agreement refers, notwithstanding that the employee is not covered by the agreement or by any other applicable collective agreement."

18. Collective agreements in Sweden are normally concluded for a period of two or three years. For various reasons, however, the new collective agreement is often concluded some time after the previous agreement has expired. In such cases, the new agreement has often specifically provided that its terms shall apply retroactively as from the date of expiry of the previous agreement. In the case of a strike during the bargaining period, on the other hand, employers - both in the public and private sector - have customarily refused to grant retroactive benefits in order to deter unions from taking industrial action in the future (application of the principle that "a strike destroys retroactivity").

19. Negotiations in the public sector of the labour market are centralised in that they are conducted by the federations on behalf of their member unions. Moreover, strikes and other collective action may not be taken by the different trade unions independently but rather on the basis of a decision by, or after receiving the approval of, the federation concerned, which chooses and designates in accordance with its pre-arranged policy or tactics those of its members who are to take part in the action. According to the present practice, the negotiations between the Office and the federations result in one single agreement which regulates the increase in salaries, the grading of different categories of employees, working hours, various salary allowances, etc., and which applies, as a result of Article 4 of the Order referred to above (paragraph 17), to all categories of State employees,

including those who are not represented by the federations. The agreement is normally signed by all the federations.

The question whether an individual employee has any means of challenging his union's decision to go on strike is a matter exclusively governed by the internal rules of the union concerned. These may provide for a right to ask for a secret ballot or for other rights to object to the union's decisions to take industrial action.

20. The law described above at paragraphs 10 to 17 has in recent years undergone various changes which, being subsequent to the facts at issue, are not relevant for the present case.

Facts of the particular case

21. In 1969 a global agreement for the years 1969 and 1970 was concluded by the Office and the four federations. When this period expired on 31 December 1970, the parties were still engaged in negotiations regarding the new global agreement. No agreement was reached and a Commission of Conciliation was appointed, but negotiations before it broke down as well. Consequently, SACO and SR proclaimed selective strikes which became effective on 5 February 1971 and involved about 4,000 members. This resort to strike action, which was quite lawful (see paragraphs 11 and 14 above), did not apply to university teachers or the Army so that neither Mr. Schmidt nor Mr. Dahlström took any part in the strikes.

The Office retaliated and, on 19 February 1971, about 30,000 members of SACO and SR were locked out. This affected all university teachers belonging to SACO, including Mr. Schmidt, and some officers belonging to SR, but not Mr. Dahlström. New strikes and lock-outs were proclaimed, but did not become effective. On 12 March 1971, an Act was promulgated which gave the King-in-Council power to order the prolongation of certain collective agreements for a period of six weeks, but not extending beyond 25 April 1971, provided that collective industrial action threatened vital public interests. By virtue of this Act the previous collective agreement was reinstated on 13 March 1971 for a period of six weeks and all strikes and lock-outs terminated forthwith.

22. Subsequent negotiations before the Commission of Conciliation resulted in June 1971 in a new global agreement for the years 1971 to 1973. According to this agreement, certain posts were upgraded and the salary scales were generally increased retroactively as from 1 January 1971. Clause 18, however, provided for an exception in this respect:

"Officials who were members between 1 January and 12 March 1971 (or any part of this period) of organisations that organised industrial action for any part of this period, shall not be entitled from 1 January to 12 March 1971 to the increased wage benefits applicable under the agreement, unless the Collective Bargaining Office decides otherwise. This declaration also concerns other officials if they took part in any such industrial action."

23. The agreement was only signed by TCO-S and SF. SACO and SR refused since they considered the terms unacceptable. The agreement, and in particular clause 18, was nevertheless applied to their members by virtue of Article 4 of the above-mentioned Royal Order (paragraph 17).

According to the applicants, during the negotiations SF and TCO-S had urged that the non-retroactivity clause should not be included in the agreement and expressed the opinion that it properly belonged to an agreement between the State and the two organisations concerned, SACO and SR. SF and TCO-S declared this expressly and inserted a reservation in the record before putting their signatures to the agreement. TCO-S had, however, attempted to entice to itself some members of SACO, which was in its opinion a purposeless organisation, and had in fact written to the applicant Schmidt in this vein.

24. As a result of the agreement, members of SACO and SR, insofar as they were upgraded, did not receive the higher salary for the period from 1 January 1971 to 12 March 1971, nor did they benefit from the general increase in the salary scales during the same period, regardless of whether or not they had been on strike. State employees who were not members of SACO or SR but who had all the same participated in the strike, were also refused the benefit of retroactivity.

The exception clause applied to both applicants as members of SACO and SR, even though they themselves had not gone on strike at all. Mr. Schmidt was affected for the period from 1 January to 19 February 1971, being the date when he was locked out and thus deprived of his salary. Mr. Dahlström, who was upgraded under the new agreement, was affected for the whole period up to 12 March 1971. During these periods the applicants performed work for a lower salary than that paid to other employees who were in the same salary brackets but not members of SACO or SR. Their financial losses amounted to Kr. 300 and Kr. 1,000 respectively.

25. Mr. Schmidt, following the conclusion of the collective agreement, gave notice to the Office that, through his special treatment in regard to wages, his right to organise had been violated. When the Office nevertheless refused him the benefit of retroactivity, SACO and SR brought an action against the State before the Labour Court under the 1936 Act on the Right to Organise and Negotiate, seeking on behalf of the applicants (and a third person who was also a member of SR), *inter alia*:

(i) a declaration that the measures taken by the Office constituted a violation of the applicants' right to organise and that this involved an interference with the affairs of SACO and SR;

(ii) a declaration that clause 18 of the agreement of June 1971 was of no effect in regard to the applicants;

(iii) an order that the State pay compensation to the applicants for financial loss and infringement of their right to organise.

SACO and SR asserted that the State had infringed their members' right to organise as guaranteed in Section 3 of the 1936 Act since, with regard to retroactive wage benefits, they were subjected to special treatment in comparison with members of TCO-S and SF and non-union officials. The Office denied any such infringement since members of SACO and SR had been refused the benefit of retroactivity only for the reason that the State wanted to maintain the principle that "a strike destroys retroactivity". A comparison between SACO and SR members, on the one side, and members of TCO-S and SF and non-union officials, on the other, did not provide any basis for the conclusion that the State acted on such a basis or with such a purpose as was envisaged by Section 3 of the 1936 Act.

26. In its judgment of 22 December 1971, the Labour Court unanimously rejected the claim of the applicants' unions. The Court first confirmed the parties' common view that the right to organise did not exclude the possibility for the State to enforce the principle that a strike destroys retroactivity. The adoption of such a position, and its enforcement after a conflict, were not to be regarded in themselves as an attack on the right to organise. Furthermore, the employer's duty to respect this right did not include any obligation in principle to pay equal wages to union and non-union employees or to members of different organisations. The mere fact that different wages were accorded to different groups of employees did not by itself lead to the conclusion that a measure violating Section 3 had been employed. However, any favouring either of members of the organisation which reached agreement or of non-union employees, with the aim of exercising against the members of the other organisation the type of pressure envisaged in Section 3, would constitute a violation of that provision.

The Court then found that no such purpose on the part of the State could be established. In particular, no support had appeared for the idea that the State intended to induce members of SACO and SR to switch over to TCO-S and SF. In this context, the Court assumed that the latter organisations would also have been refused retroactivity if they had organised industrial action during the process of negotiations.

With respect to non-union employees the Court found that the reason why they were granted a special benefit had nothing to do with their position as being non-union. Any procedure designed to refuse the benefit of retroactivity generally to non-union employees in sectors where SACO and SR were dominant or representative obviously could have become very complicated and time-consuming. Moreover, no recognised norms existed for determining such sectors, and the concept of representation was ambiguous and disputed. The Court then referred to the State's failure to negotiate an agreement which would exclude retroactivity to all non-union employees within the sectors in which SACO and SR were representative. In this respect the Court considered that the facts of the case did not support

the conclusion that this failure showed any intention on the part of the State to violate the right to organise. Otherwise, the State would, as soon as one federation organised industrial action, be barred from upholding the principle that a strike destroys retroactivity in any other way than by refusing retroactive validity for agreements concluded with respect to all employee organisations. Such a general limitation of the State's possibilities of upholding the principle could not be based on Section 3 of the 1936 Act.

In the case before it, the Court did not consider the granting of retroactive benefits to non-union employees who had not been on strike as proof of any purpose to violate the right to organise. In the Court's opinion, the parties had not been able to present anything more than quite uncertain information on the total number of non-union officials or on their field of employment. The Court indicated that the plaintiffs' view concerning the State's purpose in its treatment of non-union officials might have appeared more reasonable if it had been possible to show that the large majority of non-union officials were active within the main field of activity of SACO and SR. Conversely, it would be less reasonable to take notice of the treatment of the group of non-union officials if these could primarily be classified within the field of recruitment of SF and TCO-S. The uncertainty in regard to these circumstances argued, in the Court's conclusion, in favour of the States declaration that its purpose did not extend beyond upholding the principle that a strike destroys retroactivity.

27. In their application, lodged with the Commission on 9 June 1972, the applicants complained that in the particular circumstances the implementation of the Government's policy regarding payment of retroactive benefits had amounted to preferential treatment, in particular in comparison with non-union employees, and had consequently violated Article 11 (art. 11) of the Convention.

The Commission declared the application admissible by a decision of 18 October 1972.

During the examination of the merits, the applicants relied on Article 11 (art. 11) and also Article 14, read in conjunction with Article 11 (art. 14+11).

28. In its report of 17 July 1974, the Commission:

(i) confirmed its opinion, previously expressed in the report in the Swedish Engine Drivers' Union case, that Article 11 para. 1 (art. 11-1) may legitimately extend to cover State responsibility in the field of labour-management relations and thus to provide some protection for unions against interference by employers;

(ii) expressed the opinion:

- by nine votes to one with one abstention, that the Government's policy of denying retroactive benefits to non-striking members of belligerent unions did not in the circumstances infringe the applicants' right, under Article 11 para. 1 (art. 11-1), to form and join the trade unions;

- that in view of the preceding finding, the Commission was not called upon to examine whether the action complained of was justified under Article 11 para. 2 (art. 11-2);

- by eight votes to one with two abstentions, that the differential treatment complained of was in the circumstances justified as an industrial relations policy and that there had been no violation of Article 14 read in conjunction with Article 11 para. 1 (art. 14+11-1).

The report contains a separate concurring opinion.

AS TO THE LAW

29. Mr. Schmidt and Mr. Dahlström complain that under clause 18 of the collective agreement of June 1971, as members of organisations having proclaimed selective strikes, namely SACO and SR, they were denied retroactivity of certain benefits, even though they themselves had not gone on strike. The Office, it was submitted, had thereby acted unfairly to the prejudice of the applicants as compared with non-union officials and members of unions, such as TCO-S and SF that had refrained from strike action. Violation was alleged of Article 11 (art. 11) of the European Convention, considered both on its own and in conjunction with Article 14 (art. 14+11).

30. Having come to the conclusion that no such breaches had occurred, the Commission referred the case to the Court, emphasising the importance of the questions that arose therein on the interpretation and application of the Convention.

I. AS TO THE ALLEGED VIOLATION OF ARTICLE 11 (art. 11)

31. Article 11 para. 1 (art. 11-1) of the Convention reads: "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."

32. In its main submission, the Government maintained that, generally speaking, the primary purpose of the Convention is to protect the individual against the State as holder of public power, but that the Convention does not oblige the State to ensure compliance with its provisions in private law relations between individuals. Article 11 (art. 11), it was contended, provides no departure from this rule. Furthermore, the applicants were attacking not the Swedish legislative, executive or judicial authorities, but rather the National Collective Bargaining Office and thus the "State as employer". In the sphere of work and employment conditions, the

Convention cannot impose upon the State obligations that are not incumbent upon private employers.

According to the Commission, on the other hand, the disputed decision adopted by the Office may in principle be challenged under Article 11 (art. 11), even if the Office fulfils typical employer functions.

33. The Convention nowhere makes an express distinction between the functions of a Contracting State as holder of public power and its responsibilities as employer. In this respect, Article 11 (art. 11) is no exception. What is more, paragraph 2 in fine of this provision (art. 11-2) clearly indicates that the State is bound to respect the freedom of assembly and association of its employees, subject to the possible imposition of "lawful restrictions" in the case of members of its armed forces, police or administration.

Article 11 (art. 11) is accordingly binding upon the "State as employer", whether the latter's relations with its employees are governed by public or private law. Consequently, the Court does not feel constrained to take into account the circumstance that in any event certain of the applicants' complaints appear to be directed against both the Office and the Swedish State as holder of public power. Neither does the Court consider that it has to rule on the applicability, whether direct or indirect, of Article 11 (art. 11) to relations between individuals *stricto sensu*.

34. The Court notes that while Article 11 para. 1 (art. 11-1) presents trade union freedom as one form or a special aspect of freedom of association, the Article does not secure any particular treatment of trade union members by the State, such as the right to retroactivity of benefits, for instance salary increases, resulting from a new collective agreement. Such a right, which is enunciated neither in Article 11 para. 1 (art. 11-1) nor even in the Social Charter of 18 October 1961, is not indispensable for the effective enjoyment of trade union freedom and in no way constitutes an element necessarily inherent in a right guaranteed by the Convention.

35. As far as their personal freedom of association is concerned, the applicants have retained this freedom both as of right and in fact despite the measure complained of; for they have remained members of their respective trade union organisations. Although the applicants only complained to the Commission in their own names, the Court notes in passing, in the light of the information provided at the public hearing on 25 September 1975, that clause 18 of the collective agreement of June 1971 was not followed by any decline in the membership of either SACO or SR.

36. The applicants further consider that the aforementioned clause 18 tended to discourage them from thenceforth availing themselves of their right to strike, which is, in their submission, an "organic right" included in Article 11 (art. 11) of the European Convention.

The Court recalls that 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 (National Union of Belgian Police judgment, 27 October 1975, Series A no. 19, p. 18, para. 39). Article 11 para. 1 (art. 11-1) nevertheless leaves each State a free choice of the means to be used towards this end. The grant of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article 11 (art. 11), may be subject under national law to regulation of a kind that limits its exercise in certain instances. The Social Charter of 18 October 1961 only guarantees the right to strike subject to such regulation, as well as to "further restrictions" compatible with its Article 31, while at the same time recognising for employers too the right to resort to collective action (Article 6 para. 4 and Appendix). For its part, the 1950 Convention requires that under national law trade unionists should be enabled, in conditions not at variance with Article 11 (art. 11), to strive through the medium of their organisations for the protection of their occupational interests. Examination of the file in this case does not disclose that the applicants have been deprived of this capacity.

37. Having thus established no infringement of a right guaranteed by paragraph 1 of Article 11 (art. 11-1), the Court is not called upon to have regard to paragraph 2 (art. 11-2), on which in any case the Government stated it did not rely.

II. AS TO THE ALLEGED VIOLATION OF ARTICLES 11 AND 14 TAKEN TOGETHER (art. 14+11)

38. Article 14 (art. 14) is worded as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

39. Despite finding no breach of Article 11 (art. 11), the Court must ascertain whether the difference in treatment, characterised by the applicant as discriminatory, infringed Articles 11 and 14 art. 14+11) taken together. While the granting of retroactivity of salary increases or other benefits in itself falls outside the scope of Article 11 para. 1 (art. 11-1) (cf. paragraph 34 above), in the present circumstances it is linked to the exercise of a right guaranteed by the said provision, namely the freedom to protect the occupational interests of trade union members by trade union action. The Swedish State has in fact selected collective bargaining, the concluding of collective agreements and the recognition of the right to strike as three of the means of making possible the conduct and development of such action by trade unions in both the public and private sectors. Moreover, it was in the wake of a strike, following bargaining and within the framework of a

collective agreement that the Office adopted the conduct complained of by the applicants. Accordingly, Article 14 (art. 14) is pertinent in the present context. In connection with both this question and the criteria to be adhered to, the Court refers to the judgments it delivered in the "Linguistic" case (23 July 1968, Series A no. 6, pp. 33-35, paras. 9-10) and, subsequently, in the National Union of Belgian Police case (27 October 1975, Series A no. 19, pp. 19-20, paras. 44-47).

40. The applicants challenge under Articles 11 and 14 (art. 14+11), read together, the distinction under which they were allegedly victimised in comparison with non-union officials and officials belonging to unions other than SACO and SR, notably TCO-S and SF.

Clause 18 of the collective agreement of June 1971 accorded retroactivity of benefits to these officials except insofar as they had been on strike. In support of the difference of treatment thus established between the applicants and their non-striking colleagues, whether non-union or members of other unions, the Government invoked the principle, which is traditional in Sweden and in itself uncontested by the applicants, according to which "a strike destroys retroactivity".

The Court deems the application of this principle to be legitimate and it has no reason to believe that the State had other and ill-intentioned aims. In particular, the Court finds it inconceivable that the Office sought to induce the members of SACO and SR to cease all trade union membership. On the contrary, as emphasised by the Government and the Commission and as demonstrated by the Swedish Engine Drivers' Union case, its policy was to encourage the organisation of workers in large and centralised trade union federations. The file in the present case does not indicate either that the Office wished to incite the members of what were indeed federations of consequence, that is SACO and SR, into defecting to TCO-S and SF.

41. Certainly, clause 18 of the collective agreement of June 1971 denied retroactivity of benefits even to those members of SACO and SR, including the two applicants, who had continued to carry out their professional tasks during the period in question. Nevertheless, the Government and the Commission did not err in stressing the solidarity that prevailed between the various members of these two organisations when engaged in a concerted campaign of selective industrial action. While some members were participating in person wherever strikes had been proclaimed, the other members, though discharging their duties in sectors unaffected by strike action, were providing financial and psychological support for this action.

This reasoning clearly does not apply to non-union employees or employees belonging to organisations other than SACO or SR, who had not gone on strike. Consequently, the Court cannot accept the applicants' argument that the benefit of retroactivity should have been refused - or,

alternatively, granted - to all staff in sectors where SACO or SR were representative.

42. Furthermore, the Court does not consider that the principle of proportionality, as defined in the two previously cited judgments of 23 July 1968 and 27 October 1975, has been offended in the present case.

III. AS TO THE APPLICATION OF ARTICLE 50 (art. 50)

43. The Court, having established no failure to comply with the requirements of the Convention, finds that in the present case the question of the application of Article 50 (art. 50) of the Convention does not arise.

FOR THESE REASONS, THE COURT,

Holds unanimously that there has been no breach either of Article 11 (art. 11) or of Articles 11 and 14 (art. 14+11) taken together.

Done in English and French, the French text being authentic, at the Human Rights Building, Strasbourg, this sixth day of February one thousand nine hundred and seventy-six.

Giorgio BALLADORE PALLIERI
President

Marc-André EISSEN
Registrar