Information Note on the Court's case-law No. 38

January 2002

UNISON v. the United Kingdom (dec.) - 53574/99

Decision 10.1.2002 [Section III]

Article 11

Article 11-1

Form and join trade unions

Prohibition of strike organised by trade union: *inadmissible*

The applicant is a trade union for public service employees. In 1998, the University College Hospital in London (UCLH) was negotiating to transfer part or parts of its business to private companies which were to erect and run a new hospital for it. The taking over of this activity by private companies involved most of the employees of UCLH being transferred to these companies. The applicant union tried to obtain from UCLH an assurance that the private companies would offer to the transferred employees the same protection and rights as those existing for UCLH personnel, but UCLH refused to accede to this request. The applicant union called a strike but the High Court, on an application by UCLH, issued an injunction prohibiting the strike. The court noted, *inter alia*, that the dispute related to future terms and disputes with an unidentified future employer which as such were not covered by the relevant legislation on strikes. The appeal lodged by the applicant union was unsuccessful and the House of Lords rejected its petition for leave to appeal.

Inadmissible under Article 11: While Article 11 includes trade union freedom as a specific aspect of freedom of association, it does not secure any particular treatment of trade union members by the State. There is no express inclusion of a right to strike or an obligation on employers to engage in collective bargaining. At most, Article 11 may be regarded as safeguarding the freedom of trade unions to protect the occupational interests of their members. While the ability to strike represents one of the most important of the means by which trade unions can fulfil this function, there are others. Moreover, Contracting States are left with a choice of means as to how the freedom of trade unions ought to be safeguarded. In the present case, the prohibition of the strike had to be regarded as a restriction on the applicant's power to protect the occupational interests of its members and therefore disclosed a restriction on the freedom of association. It was not disputed that the measure was prescribed by law. As to the legitimate aim pursued by the impugned measures, the employer UCLH could claim that its ability to carry out its functions effectively, including the securing of contracts with other bodies, might be adversely affected by the actions of the applicant and accordingly the measures taken to prevent the strike concerned the rights of others, namely those of UCLH. The necessity of the measure remained to be determined. The applicant claimed that the new employer would be in a position to give notice of dismissal while offering new contracts on less advantageous terms and that, to the extent that a transferee company was bound by any existing recognition of the applicant or existing collective agreements, this company would be able to repudiate them. As regards the applicant's first argument, the transferee company could face actions for unfair dismissal by any employee threatened with such a measure. As regards its second argument, any

employer, including UCLH, has the ability, in appropriate circumstances, to de-recognise a union or repudiate a collective agreement, which has not been made legally enforceable. Therefore, it appeared to be a risk faced by all trade unions and their members under the legal framework in force. Furthermore, under legislation which recently entered into force (Schedule 1A to the Trade Union and Labour Relations (Consolidation) Act 1992), the applicant could, provided certain conditions were complied with, compel an employer to recognise it for the purposes of collective bargaining. The applicant strongly objected to the Government's policy whereby public bodies were encouraged to buy services from, or contract out functions to, private companies. Although it was understandable that employees faced with transfer from a public service to the private sector felt vulnerable, it was not for the Court to determine whether this method of providing services was a desirable or damaging policy. The applicant was able to take strike action if the UCLH took any step itself to dismiss employees or change their contracts prior to the transfer and it could seek to take action against any transferee company that in the future threatened the employment of its members or to de-recognise the applicant. While the applicant emphasised that this might involve individual strike action against a number of different companies in the future, as opposed to one large hospital trust before the commercial transfer started, this did not necessarily imply that they were deprived of the possibility of an effective action in the future. As regards the argument that the applicant's interests in protecting its members ought to weigh more heavily than the UCLH's economic interest, the impact of the restriction on the applicant's ability to take strike action was not shown to place its members at any real or immediate risk of detriment or of being left defenceless against future attempts to downgrade pay or employment conditions. When, and if its members were transferred, it could continue to act on their behalf as a recognised union and negotiate with the new employer in ongoing collective bargaining machinery. However, it could not claim under the Convention a requirement that an employer enter into, or remain in, any particular collective bargaining arrangement or accede to its request on behalf of its members. Therefore, the respondent State did not exceed the margin of appreciation accorded to it in regulating trade union action and the prohibition on the applicant's ability to strike could be considered as a proportionate measure and necessary in a democratic society for the protection of the rights of others, namely UCLH: manifestly ill-founded.
