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COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 14327/88

Dennis Sibson
against
the United Kingdom

Report of the Commission

(Adopted on 10 December 1991)

Strasbourg

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is Dennis Sibson, a British citizen born in 1929 and resident in Middleton. He is represented before the Commission by Mr. M. Beattie of Messrs. Davies Arnold Cooper, solicitors, of London and Brussels.

3. The Government are represented by their Agent, Mr. Nigel Parker of the Foreign and Commonwealth Office.

4. The case concerns the applicant's complaint that as a result of his refusal to join a trade union he lost his job. It raises issues under Article 11 of the Convention.

B. The proceedings

5. The application was introduced on 17 October 1988 and registered on 28 October 1988.

6. On 9 November 1989, the Commission decided, pursuant to Rule 42 para. 2 (b) of its Rules of Procedure, that notice of the application should be given to the respondent Government and that they should be invited to present their written observations on the admissibility and merits of the application.

The Government sent their written observations on 8 March 1990. The applicant's representative submitted the applicant's written observations in reply on 20 August 1990.

7. The Commission granted the applicant legal aid on 18 May 1990.

On 3 December 1990, the Commission decided, pursuant to Rule 50 (b) of its Rules of Procedure, to invite the parties to make further submissions at a hearing on the admissibility and merits of the application.

At the hearing, which was held on 9 April 1991, the applicant was represented by Mr. Bowers, of counsel, and Mr. Beattie, Solicitor. The Government were represented by Mr. Nigel Parker as Agent, Mr. Eadie, Counsel, and Mr. Kilgariff and Mr. P. Parker, Advisers.

8. On 9 April 1991, the Commission declared the application admissible.

9. The parties were then invited to submit any additional observations on the merits of the application. On 10 June 1991, the Government submitted additional submissions on the case. On 20 September 1991, the applicant submitted additional observations.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reactions, the Commission now finds that there is no basis on which a friendly settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
E. BUSUTTIL
A. WEITZEL
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.C. GEUS
M. PELLONPÄÄ
B. MARXER

The text of the Report was adopted by the Commission on 10 December 1991 and is now transmitted to the Committee of Ministers in accordance with Article 31 para. 2 of the Convention.

12. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

1) to establish the facts, and

2) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

13. A schedule setting out the history of the proceedings before the Commission is attached hereto as APPENDIX I and the Commission's decision on the admissibility of the application as APPENDIX II.

14. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. Particular circumstances of the case

15. The applicant was employed by Courtaulds Northern Spinning from November 1973 as a heavy goods driver. He was based at their depot in Greengate. In or about March 1985, a fellow driver, Mr. D., allegedly accused the applicant of having stolen funds while he was branch secretary of the Transport and General Workers Union (hereafter the T.G.W.U.). The applicant lodged a complaint with the local T.G.W.U. branch but the complaint was dismissed by the branch panel of adjudication. Dissatisfied with that decision, the applicant resigned as a member of the T.G.W.U. on 24 July 1985. He joined the United Road Transport Union instead. Under the mistaken conviction that there was a "T.G.W.U. closed shop agreement" at that depot, the drivers of the applicant's place of work ostracised him. Between July and October 1985 Courtaulds attempted unsuccessfully to resolve the dispute. Mr. D. offered to state that he did not believe that the applicant had stolen from union funds. This was not acceptable to the applicant who took the position that he would only rejoin the T.G.W.U. if he received an apology. In November 1985, the union threatened Courtaulds with strike action unless the applicant either rejoined the union or moved from Greengate to another depot 1 ½ miles away at Chadderton. On 8 November 1985, the applicant was told by Courtaulds that he had the choice of rejoining the union or moving to work at the Chadderton depot a mile away. The applicant refused these alternatives and resigned from his job that day alleging constructive dismissal. He considered that the conditions at the Chadderton depot would have been less advantageous since, inter alia, he would have been given a different lower-grade lorry and used for short runs rather than long distance journeys, with a resulting reduction in income of 20 %. The personnel manager had however assured the applicant that he could keep his lorry and that he would have the opportunity to earn similar wages.

16. The applicant applied to the Industrial Tribunal. By a decision dated 21 July 1986, the Tribunal held that he had been unfairly dismissed. The Tribunal found that the proposal by Courtaulds to transfer the applicant elsewhere in order to avoid an industrial dispute was unreasonable and not for genuine operational reasons and that the whole basis of the dismissal was the applicant's exercise of his express right not to belong to a trade union.

17. Courtaulds appealed to the Employment Appeal Tribunal which on 16 January 1987 dismissed its appeal. The Employment Appeal Tribunal found that there was no implied term in the applicant's contract which reasonably required the applicant to work at the Chadderton depot and agreed with the Industrial Tribunal's conclusions.

18. Courtaulds appealed further to the Court of Appeal which on 25 March 1988 held that there was an implied term in the applicant's contract that his employer could direct him to work at any place within a reasonable daily reach of his home. Exercise of this right was not dependent on the existence of "genuine operational reasons" as held by the Industrial Tribunal. The Court held that Courtaulds were therefore within their contractual rights in requiring the applicant to transfer to a nearby depot, that there was no unfair or constructive dismissal in these circumstances and that the applicant must be considered as having resigned. The Court stated:

"If reasonable, the parties would, in my judgment, have been likely to agree the term which Browne-Wilkinson J. in Jones (at p. 480 para. 16) described as the 'lowest common denominator', namely a power in the employer to direct the employee to work at any place within reasonable daily reach of Mr. Jones' home - and I would add for any reason. I cannot see how Mr. Sibson could reasonably have objected to a term giving the contract this limited degree of flexibility when he entered the employment in 1973. If the evidence had disclosed any special circumstances which as at that time made it a matter of importance to him that he should continue to be based at Courtauld's Greengate depot rather that at (say) Chadderton, the Industrial Tribunal would no doubt have said so."

19. On 15 April 1988 the applicant applied for legal aid to appeal to the House of Lords. On 30 June 1990 legal aid was granted for the purpose of obtaining counsel's opinion on the merits of an appeal. Counsel advised on 8 August 1988 however that the applicant would not be granted leave to appeal. Further legal aid was accordingly refused on 19 August 1988 in view of Counsel's opinion that there were no reasonable prospects of success.

B. Relevant domestic law and practice

20. Sections 23 and 24 of the Employment Protection (Consolidation) Act 1978 ("the 1978 Act") provide, so far as relevant, as follows:

"23 (1) ... every employee shall have the right not to have action (short of dismissal) taken against him as an individual by his employer for the purpose of -

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so; or

(b) preventing or deterring him from taking part in the activities of an independent trade union at any appropriate time, or penalising him for doing so; or

(c) compelling him to be or become a member of [any union or of a particular trade union or of one of a number of particular trade unions]

...

24 (1) An employee may present a complaint to an industrial tribunal on the ground that action has been taken against him by his employer in contravention of Section 23 ...

(3) Where the tribunal finds the complaint well-founded it shall make a declaration to that effect and may make an award of compensation ..."

21. Section 54 (1) of the the 1978 Act states that (subject to exceptions not relevant to this case) "every employee shall have the right not to be unfairly dismissed by his employer". Part V of the 1978 Act then details the nature of this right and the remedies available for those who are unfairly dismissed: reinstatement, re-engagement or compensation.

22. At the relevant time, Section 58 (1) (c) of the 1978 Act, as amended by Section 3 of the Employment Act 1982, provided that:

> "Subject to subsection (3), the dismissal of an employee by an employer shall be regarded for the purposes of this Part as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee - ...
>
> (c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions or had refused or proposed to refuse to become or remain a member."

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

23. The Commission declared admissible the applicant's complaint that the compulsion imposed on him to join a trade union or to move to another depot was contrary to his rights under Article 11 of the Convention.

B. Point at issue

24. Accordingly, the issue to be determined is whether there has been a violation of Article 11 of the Convention.

C. Article 11 of the Convention

25. Article 11 of the Convention provides that:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and 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, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. ..."

26. The applicant complains that his right to freedom of association has been violated in that he was penalised for refusing to join the T.G.W.U. He states that the compulsion exercised - to join the T.G.W.U. or to move to another depot - was in violation of the negative freedom of association guaranteed under Article 11 of the Convention. He alleges that the move would have had adverse consequences for his salary - a drop of 20 % - and would have meant more unfavourable working conditions. He submits that the United Kingdom is in violation of Article 11 since it failed to protect him from this compulsion.

27. The Government submit that there has been no direct interference with the applicant's freedom of association by the State. They consider that the only ground of State responsibility is the allegation that the United Kingdom failed through the legal system to secure that freedom against interference by other private individuals, such as his employer. In that respect, they submit that the legislative framework provided adequate protection - through an action for unfair dismissal where an employee has been dismissed for refusing to join a trade union or through proceedings for action short of dismissal taken against him for that reason.

28. The Commission notes that the actions leading to the dismissal of the applicant were primarily the responsibility of the applicant's employer and the trade union. Where, however, the domestic law makes

lawful the treatment complained of, the Commission finds that the responsibility of the respondent State may be engaged in particular cases.

29. The Commission recalls that the rights guaranteed under Article 11 of the Convention protect first and foremost against State action. In the case of Young, James and Webster (Eur. Court H.R., Young, James and Webster judgment of 13 August 1981, Series A no. 44, pp. 22-23, paras. 53-55) the European Court of Human Rights held, however, that the negative aspect of a person's freedom of association did not fall completely outside the ambit of Article 11 and that this provision could not be construed as permitting every kind of compulsion in the field of trade union membership. The Court has held that for the rights under Article 11 to be effective the State must protect the individual against any abuse of a dominant position by trade unions (loc.cit. p. 25, para. 63). The Court has indicated that compulsion to join a particular trade union may not always be contrary to the Convention (loc.cit. p. 23, para. 55). Abuse might, in the Commission's opinion, occur, for example, where the consequences of failure to join a trade union resulted in exceptional hardship such as dismissal (see Nos. 13537/88 and 13538/88, Dec. 7.5.90, to be published in D.R.).

30. The Commission has considered therefore whether on the facts of the case the legal system of the United Kingdom has failed to protect the applicant from compulsion contrary to his rights under Article 11 of the Convention.

31. The Commission recalls that the present applicant was given a choice by his employer of moving to another depot nearby or of joining a particular trade union at his current place of work. The applicant, however, resigned claiming constructive dismissal. The Commission recalls that the applicant alleges that the move would have been significantly detrimental. The Government submit that the applicant did not raise these matters in the unfair dismissal proceedings and that his employer had assured him that he would not suffer from the move.

32. The Commission notes that under United Kingdom legislation the applicant was afforded a remedy if he could establish that he was dismissed for refusing to become a member of a particular trade union (Section 58 of the 1978 Act). In the proceedings which the applicant brought alleging unfair dismissal on this basis, the Court of Appeal found that the applicant's employer had a contractual right to require him to work at another site within reasonable daily reach of his home. It considered the motive of the employer in exercising this contractual right was irrelevant. Accordingly it held that there had been no unfair or constructive dismissal on the ground of refusal to join a trade union and that the applicant must be considered as having resigned.

33. In implying a mobility term into the contract of employment, the Court of Appeal applied the test of what the parties to the contract of employment would have probably agreed at the time it was signed if they were being reasonable. The Court of Appeal found no reason why the applicant would have reasonably objected to such a term and that no special circumstances had been disclosed indicating why he would have considered it important to stay at one depot rather than another. The Commission notes that the applicant did not raise the allegations that the move would have materially affected his conditions

of employment, which might have been significant to the court in assessing whether the implied term was a reasonable one. The Commission finds no indication that the decision of the Court of Appeal was unreasonable or arbitrary. The Commission therefore finds that although the applicant was unsuccessful in the proceedings it has not been established that the remedy under Section 58 failed to offer protection to employees who can prove that they have been dismissed as a result of refusing to join a trade union.

34. The Commission also notes that a remedy exists for employees who suffer detrimental consequences short of dismissal for the same reason (Section 23 of the 1978 Act). The Commission notes that the applicant did not pursue this remedy since he wished, on principle, to be reinstated rather than to receive compensation. The obligation of the United Kingdom however is to provide an adequate legislative framework of safeguards against abuse: it is not in violation of this obligation if an applicant who alleges abuse, fails to prove his case before the domestic courts or chooses one remedy rather than another. The Commission accordingly finds no indication in the present case that the United Kingdom has failed in its obligation to provide protection to the applicant against interference with his negative freedom of association contrary to Article 11 of the Convention.

D. Conclusion

35. The Commission concludes, by 8 votes to 6, that there has been no violation of Article 11 of the Convention.

Secretary to the Commission

(H.C. KRÜGER)

President of the Commission

(C.A. NØRGAARD)

DISSENTING OPINION
of Mr. L. Loucaides
joined by MM. J. A. FROWEIN, C. L. ROZAKIS and F. MARTINEZ

I am unable to agree with the decision of the majority in this case and I find that there has been a violation of Article 11 of the Convention for the following reasons.

It is clear from the facts of the case that the basis of the applicant's loss of his job was the exercise of his right not to belong to a trade union. His employer gave him a choice of moving to another depot nearby or to join a particular trade union at his current place of work. The applicant did not wish to join the trade union in question or to accept the proposal of transfer which would have adverse consequences on his salary and his working conditions. Therefore he resigned, claiming constructive dismissal.

In the proceedings which the applicant brought alleging unfair dismissal, the Industrial Tribunal and Employment Appeal Tribunal found that the proposal to transfer the applicant to avoid an industrial dispute was unreasonable and not for genuine operational reasons and that the whole basis of the dismissal was the exercise of the applicant's right not to join a trade union. In overruling this decision the Court of Appeal held tha there was an implied term in the applicant's contract that his employer could direct him to work at any place within a reasonable daily reach of his home and that the motive for exercising this right was irrelevant.

I consider that the motive of the applicant's employer in exercising his contractual right to transfer the applicant to another place of work is a decisive element in determining whether the loss of the applicant's job amounted to an unjustified interference with his freedom of association under Article 11.

It appears established that the transfer of the applicant was not made for genuine operational reasons but for the sole purpose of avoiding an industrial dispute because of the applicant's refusal to join a particular trade union. Therefore such transfer, even though made in exercise of a contractual right cannot, in my opinion, be interpreted otherwise than as an indirect pressure on the applicant to join the trade union in question against his will. The abuse of the relevant contractual right of the employer of the applicant in this case is obvious.

In the light of the above, I find that the situation imposed on the applicant, which led him to resign, i.e., to join the T.G.W.U. trade union or to move to another depot, violated his right to freedom of association. In this respect I take into account the fact that the applicant's fellow employees insisted on imposing a closed shop situation although such an agreement did not exist.

Contracting States are under an obligation to ensure by their legislation that individuals are not penalised in the above manner as a result of their refusal to join a trade union. Since, on the contrary, the domestic law of the respondent State made lawful the aforementioned treatment of the applicant, I find that the responsibility of the respondent State is engaged for the breach of the Convention following from it.

DISSENTING OPINION
of Mr. E. Busuttil

I find myself unable to subscribe to the view of the majority that the United Kingdom Government has not failed in its obligation to provide protection to the applicant against interference with his negative right to freedom of association contrary to Article 11 of the Convention.

It is of course true that what was at issue in the present case was not the "closed shop" system as such, i.e. the system as operated by employers and unions in virtue of a union membership agreement or arrangement as defined in Section 30 of the Trade Union and Labour Relations Act, 1974. From the decisions of the Industrial Tribunal and Employment Appeal Tribunal, it is plain that no such union membership agreement or arrangement was in being at Greengate. The union in this case sought to create ad hoc a closed shop situation in order to compel the applicant to re-join the union, The union took the law into its own hands and attempted to force the hand of the employer by threatening strike action unless the applicant either re-joined the union or was moved from Greengate to a neighbouring depot.

This was a situation broadly parallel to that obtaining in Young, James and Webster where the Court stated:

> "... it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11; and that each and every compulsion to join a particular trade union is compatible with the intention of that Article. To construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee."
> (Eur. Court H.R., Young, James and Webster Judgment of 13 August 1989, Series A no. 44, p. 22 para. 54).

The Court came to the conclusion in that case that a threat of dismissal involving loss of livelihood is a most serious form of compulsion which strikes at the very substance of the freedom guaranteed by Article 11.

Arguably, the present case is distinguishable from Young, James and Webster in that the applicant was here given a third choice (apart from re-joining the union or dismissal), namely, to move to another depot, Chadderton, situated about a mile away from Greengate. This third choice, however, can be considered (and was so considered by the applicant) to amount to a repudiatory breach of contract by Courtaulds. On this basis, he proceeded to resign and then claimed constructive dismissal since the resignation had, in his view, been forced upon him by his employer for refusing to join a particular union. If, therefore, dismissal involving loss of livelihood was in Young James and Webster deemed to be in breach of Article 11, a constructive dismissal should, to my mind, be treated on the same footing, for a dismissal, however designated, involves in effect loss of livelihood.

The question however remains whether in the circumstances of the present case there was indeed a 'constructive' dismissal.

The United Kingdom courts examined this question in the slightly different domestic context of unfair dismissal. The Industrial Tribunal and the Employment Appeal Tribunal (whose composition includes persons with practical experience of industrial relations at the work place) came to the conclusion that it was indeed a case of 'constructive dismissal' for failure to join a particular trade union. The Court of Appeal, on the other hand, found that Courtaulds had an implied contractual right to require the applicant to work at another site and that the applicant therefore could not be considered to have been constructively dismissed.

It seems to me, however, that the Court of Appeal have skirted round the issue of freedom of association and based themselves fairly and squarely on a term which they implied into the applicant's contract of employment. By contrast, the other two tribunals firmly grasped the nettle and decided the matter on the basis that Courtaulds were in significant breach of the applicant's contract of employment for seeking to transfer the applicant to another depot against his wishes, when the proposed transfer was being made, not for genuine operational reasons, but to avoid strike action by a union which was relying on a closed shop agreement where none existed. In these circumstances, the applicant was entitled to consider himself dismissed, and did so.

That this was indeed a case of 'constructive dismissal' is abundantly evident from the letter of 25 October 1985 sent by Courtaulds' Personnel Manager Mr Dean wherein, after offering the applicant work at the alternative site, he let him know in no uncertain terms:

> "I hope you will give very serious thought to your position because, as things stand, your dismissal is a possibility, and it is better that such an outcome is understood at this stage."

Furthermore, it was unrealism bordering on wishful thinking for the employer to assume that the matter would have been settled by sending the applicant to work a mile or so away from Greengate. The applicant rightly felt that the drivers at Greengate - virtually a stone's throw away - would continue to harass him and that the transfer to Chadderton would merely postpone the dilemma on which he found himself impaled - namely re-joining the union or dismissal.

Accordingly, the situation was akin to that obtaining in Young, James and Webster where the Court found that similar treatment constituted an interference with Article 11 rights. If anything, the interference in this case was more pronounced in that, while in Young, James and Webster there was a post-entry closed shop agreement in the present case there was no concrete proof of a closed shop agreement or arrangement of any kind. On the contrary, you had here a contract of employment which specifically gave the applicant the right not to be a member of a union and to be notified if the situation changed, which it never did.

There was no pressing social need justifying the interference by the employers with the applicant's negative right to freedom of association for any of the purposes enumerated in Article 11 para. 2. What happened in this case was a blatant abuse of the closed shop system by the union in question - an abuse condoned by the employers and further condoned by the judgment of the Court of Appeal - which struck at the very substance of the freedom guaranteed by Article 11.

Appendix I

HISTORY OF THE PROCEEDINGS

Date	Item
17.10.88	Introduction of the application
28.10.88	Registration of the application
Examination of admissibility	
09.11.89	Commission's decision to invite the Government to submit observations in writing
08.03.90	Government's observations
18.05.90	Commission's grant of legal aid
20.08.90	Applicant's reply
03.02.90	Commission's decision to invite the parties to a hearing
09.04.91	Hearing on admissibility and merits The parties were represented as follows: Government: Mr. Nigel Parker, Agent Mr. Eddie, Counsel Mr. Kilgariff, Adviser Mr. Parker, Adviser Applicant: Mr. Bowers, Counsel Mr. Beattie, Solicitor The applicant
09.04.91	Commission's decision to declare the application admissible
Examination of the merits	
09.04.91	Commission's deliberations on the merits
10.06.91	Goverment's observations on the merits
07.09.91	Consideration of the state of proceedings

20.09.91	Applicant's observations on the merits
3.12.91	Commission's deliberations on the merits and final votes
10.12.91	Commission's adoption of the Report