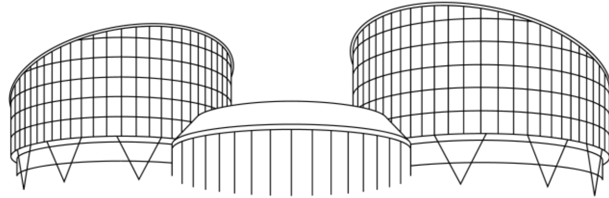

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

Application no. 31045/10
National Union of Rail, Maritime and Transport Workers R.M.T.
against the United Kingdom
lodged on 1 June 2010

STATEMENT OF FACTS

The applicant, the National Union of Rail, Maritime and Transport Workers ("RMT."), is a trade union based in London. It is represented before the Court by Thompsons Solicitors, a law firm in Manchester.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

In support of its complaint that the right to strike is excessively circumscribed in domestic law, the applicant has provided two practical examples.

(i) The EDF case

This case involved the company EDF Energy Powerlink Ltd., which was under contract to manage, operate and maintain the electrical power network used by London's underground transport system. The applicant was one of several trade unions recognised by the company for the purposes of collective bargaining. In all, the company employed some 270 staff at three different sites, the biggest one being Tufnell Park with 155 staff. The applicant states that it had 52 members there at the relevant time. The company would not have known which of its employees were members of a trade union, as it did not deduct union subscriptions from staff wages.

Between June and September 2009, the applicant and the company held several rounds of negotiation on pay and conditions of service. Dissatisfied with the company's offer, the applicant decided to embark on industrial

action and on 24 September it gave the requisite ballot notice to the company (see under relevant domestic law below). The notice described the category of workers that would be voting on industrial action as “Engineer/Technician” and stated how many of such were based at each site. The following day the company wrote to the applicant, stating that it did not recognise the term “Technician” (it categorised its workers in a more precise way - fitters, jointers, test room inspectors, day testers, shift testers, OLBI fitters). It considered the ballot notice served on it was not compliant with the relevant statutory provisions. The applicant replied on 2 October, maintaining that the term used was sufficient to allow the company to know which employees were concerned, thereby meeting the purpose of the relevant provisions of law.

Following a further exchange of correspondence between the two sides, the company applied to the High Court for an injunction to restrain the applicant from calling industrial action on the basis of the ballot. The injunction was granted by Blake J on 23 October 2009.

The judge rejected the applicant’s argument that the statutory requirement unduly restricted the exercise of its right to call industrial action, relying on the Court of Appeal’s recent decision in *Metrobus Ltd. v. Unite the Union.* He also rejected the argument that since the procedure was still at an early stage it would be premature to put a stop to it. Instead he considered the risk of unlawful strike action to be sufficiently imminent to justify the injunction. Given the sector involved, the implications of a shutdown would be substantial, with widespread ramifications elsewhere. Addressing the question whether the applicant had in fact given sufficient indication of the category of staff that would be balloted, the judge found that it had not, since the union’s members at Tufnell Park included persons working at different trades. The applicant was not under an absolute duty, but instead a duty to do its reasonable best to provide sufficient information to the company. The fact that it used its own system of job classification was relevant but not decisive. Similarly, the fact that a union might not record or possess such information could be a highly material consideration, but not necessarily a decisive one. The applicant had accepted that it was practicable for a union to supply the necessary information in the context of a small employment place – it was therefore neither onerous nor unreasonable to require it to do so. Finally the judge observed that while there was as yet no stated intention on the part of the applicant to call a strike (the ballot not having taken place), there was a clear nexus between the failure to provide the requisite notice and the employer’s ability to respond to the situation either by making preparations for a work stoppage or seeking to persuade employees not to vote for industrial action. The applicant’s failure to comply with the statutory requirements was therefore not a mere technical or immaterial breach.

Application for permission to appeal was refused on the papers on 24 November 2009. Renewed application for permission to appeal was refused on 26 January 2010, by which point the industrial dispute between the applicant and EDF had been resolved.

Following the granting of the injunction against the strike, the applicant set about gathering the precise job descriptions of the workers concerned and included these in a fresh notice of a strike ballot, the result of which

supported industrial action. This went ahead in December 2009 and January 2010. EDF made an improved offer on 7 January 2010 which was accepted by the applicant's members and took effect as a collective agreement as from 1 April of that year.

(ii) The Hydrex situation

For its second example the applicant describes the situation involving a company called Hydrex Equipment (UK) Limited (Hydrex). In August 2007, a group of about 20 employees were transferred to Hydrex from another company called Fastline Ltd, which was involved in the maintenance and construction of railway lines, working for another company, Jarvis Plc, which held the contract for this work with the infrastructure owner, Network Rail. Hydrex was not related to either Fastline or Jarvis, but was largely dependent on them for contract work.

The applicant had members among the employees transferred from one company to the other. These were concerned about the possible impact of the transfer on their terms and conditions of employment. In late 2009, Hydrex notified the applicant of its intention to terminate the employment of the transferred workers and to re-hire them on less favourable terms and conditions. The two sides failed to reach a collective agreement and the applicant took steps to call strike action. The first strike took place on 6-9 November 2009. Hydrex maintained its position, prompting the applicant to call a second strike for later that month. This was suspended when Hydrex invited the applicant to a collective bargaining meeting that led to an improved offer. This was however rejected by the applicant's members on 4 December 2009.

The applicant states that at this point it would have wished to call upon its members employed by Fastline and Jarvis to take solidarity action in support of their 17 colleagues at Hydrex who, on their own, were unable to exert any significant industrial pressure on the company. The applicant's members in the other companies were not only sympathetic to the situation of their colleagues at Hydrex, but also concerned that their own terms and conditions might be reduced later on. The applicant considers that broader strike action would have caused Hydrex to capitulate to its demands to preserve its members' interests. However, since the law of the United Kingdom does not permit secondary action of this sort, it could not lawfully take such a step on its members' behalf, which would have exposed both the union and its individual members to legal consequences.

There was no further industrial action at Hydrex, since it was clear that the company was able to maintain its operations in spite of a strike, by redeploying other employees. The applicant's members at Hydrex had no option but to work under the new terms put forward by the company, which they have done under protest ever since.

B. Relevant domestic law

In relation to the EDF case, Blake J referred to the following provisions of the Trade Union and Labour Relations (Consolidation) Act 1992:

"Section 226(1) An act done by a trade union to induce a person to take part, or continue to take part, in industrial action

(a) is not protected unless the industrial action has the support of a ballot, and

(b) where section 226A falls to be complied with in relation to the person's employer, is not protected as respects the employer unless the trade union has complied with section 226A in relation to him."

"Section 226A (1) The trade union must take such steps as are reasonably necessary to ensure that—

(a) not later than the seventh day before the opening day of the ballot, the notice specified in subsection (2), ...

is received by every person who it is reasonable for the union to believe (at the latest time when steps could be taken to comply with paragraph (a)) will be the employer of persons who will be entitled to vote in the ballot.

(2) The notice referred to in paragraph (a) of subsection (1) is a notice in writing—

(a) stating that the union intends to hold the ballot,

(b) specifying the date which the union reasonably believes will be the opening day of the ballot, and

(c) containing—

(i) the lists mentioned in subsection (2A) and the figures mentioned in subsection (2B), together with an explanation of how those figures were arrived at, or

...

(2A)The lists are—

(a) a list of the categories of employee to which the employees concerned belong, and

(b) a list of the workplaces at which the employees concerned work.

(2B) The figures are—

(a) the total number of employees concerned,

(b) the number of the employees concerned in each of the categories in the list mentioned in subsection (2A)(a), and

(c) the number of the employees concerned who work at each workplace in the list mentioned in subsection (2A)(b).

...

(2D) The lists and figures supplied under this section, or the information mentioned in subsection (2C) that is so supplied, must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it complies with subsection (1)(a)."

In relation to the Hydrex situation, the statutory protection against liability in tort regarding acts done "in contemplation or furtherance of a

trade dispute" (section 219 of the 1992 Act) is confined, by section 244 of the same Act, to "a dispute between workers and their employer". Secondary action is expressly excluded from statutory protection by section 224 of the Act, which defines it as follows:

> "2) There is secondary action in relation to a trade dispute when, and only when, a person—
>
> (a) induces another to break a contract of employment or interferes or induces another to interfere with its performance, or
>
> (b) threatens that a contract of employment under which he or another is employed will be broken or its performance interfered with, or that he will induce another to break a contract of employment or to interfere with its performance,
>
> and the employer under the contract of employment is not the employer party to the dispute."

C. Relevant international law and practice

1. The European Social Charter

The applicant has referred to successive conclusions of the European Committee of Social Rights on the implementation by the United Kingdom of Article 6 § 4 of the European Social Charter, which guarantees the right to strike. The relevant parts of the Committee's most recent assessment of the situation in the United Kingdom read as follows (Conclusions XIX-3, 2010, pp. 261-263):

> "In its previous conclusions (Conclusions XVII-1, Conclusions XVII-1) the Committee found that lawful collective action was limited to disputes between workers and their employer, thus preventing a union from taking action against the de facto employer if this was not the immediate employer. It furthermore noted that British courts excluded collective action concerning a future employer and future terms and conditions of employment in the context of a transfer of part of a business (University College London NHS Trust v UNISON). The Committee therefore considered that the scope for workers to defend their interests through lawful collective action was excessively circumscribed in the United Kingdom. Given that there have been no changes to the situation, the Committee reiterates its finding that the situation is not in conformity with Article 6 §4 of the Charter in this respect.
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> ...
>
> The Committee considered in its previous conclusions (Conclusions XVII-1, XVIII-1) that the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive (even the simplified requirements introduced by the Employment Relations Act (ERA)2004). As there have been no changes to the situation, the Committee reiterates its finding that the situation is not in conformity with Article 6 §4 of the Charter in this respect.
>
> ...
>
> The Committee concludes that the situation in the United Kingdom is not in conformity with Article 6 §4 of the Charter on the following grounds:

— the scope for workers to defend their interests through lawful collective action is excessively circumscribed;

— the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive;

— the protection of workers against dismissal when taking industrial action is insufficient.”

2. The International Labour Organisation

The applicant has also referred to successive findings of the ILO Committee of Experts on the Application of Conventions and Recommendations. Regarding the matters raised in this case, the position of the Committee of Experts was stated in the following terms in an individual observation to the United Kingdom in 2009 regarding ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise (1948):

“Immunities in respect of civil liability for strikes and other industrial action (sections 223 and 224 of the TULRA). The Committee’s previous comments concerned the need to protect the right of workers to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute, and to participate in sympathy strikes provided the initial strike they are supporting is itself lawful. The Committee takes note of the Government’s indication that it has no plans to change the law in this area as it considers it essential under its system of decentralized industrial relations that it should remain unlawful for a trade union to organize any form of secondary industrial action. The Committee notes that according to the TUC, the decentralized nature of the industrial relations system makes it more important for workers to be able to take action against employers who are easily able to undermine union action by complex corporate structures, by transferring work, or by hiving off companies. ***In this connection the Committee recalls once again that workers should be able to participate in sympathy strikes, provided the initial strike they are supporting is lawful, and to take industrial action in relation to social and economic matters which affect them, even though the direct employer may not be a party to the dispute, and requests the Government to indicate in its next report any measures contemplated to amend sections 223 and 224 of the TULRA in keeping with this principle.***

...

Notice requirements for industrial action. In its previous comments, the Committee had taken note of comments made by the TUC to the effect that the notice requirements for an industrial action to be protected by immunity were unjustifiably burdensome. The Committee notes that according to the Government, a number of measures have already been taken to simplify sections 226–235 of the TULRA and 104–109 of the 1995 Order; moreover, as part of a plan published in December 2006 to simplify aspects of employment law, the Government explicitly invited trade unions to come forward with their ideas to simplify trade union law further. Since then, the Government has held discussions with the TUC to examine their ideas to simplify aspects of the law on industrial action ballots and notices. These discussions are ongoing. The Committee notes that in its latest comments, the TUC notes that there has been no progress in this reform. ***The Committee requests the Government to indicate in its next report progress made in this regard.”***

COMPLAINT

The applicant complains under Article 11 of the Convention that its right to protect the interests of its members is violated by reason of the abridgements of the right to strike in the law of the United Kingdom, with specific reference to the ballot notice requirements and the ban on secondary action as illustrated by the cases referred to above.

QUESTION TO THE PARTIES

In relation to the events described involving the Hydrex company, has there been a violation of the applicant’s rights under Article 11 on account of the prohibition on secondary action?