

APPLICATIONS 30668/96, 30671/96, and 30678/96

JOINT SUBMISSION BY LIBERTY AND THE TRADES UNION CONGRESS

1. The TUC comprises 78 independent trade unions representing 6.8 million working people in Britain. This makes it the authoritative voice of the British trade union movement. Liberty is one of the UK's leading civil liberties and human rights organisations. It has developed considerable experience in both representing clients before the European Court of Human Rights and in providing written comments to the court in respect of cases before it.
2. The TUC and Liberty welcome the opportunity to submit a Third Party Intervention to the Court in these cases, in accordance with leave of the Court granted by letter dated 29th November 2000. The focus of this research is twofold: firstly, the collective Trade Union rights protected under Articles 10, 11 and 14 of the Convention; and secondly, a comparison of the way in which the rights of the individual have been dealt with in similar circumstances in other jurisdictions, particularly those outside the remit of the Council of Europe.
3. We would like to thank Professor Keith Ewing of King's College London for drafting the first part of this submission, and Brian Langstaff QC and Paul Epstein of Cloisters Chambers for drafting the second half.

1. COLLECTIVE TRADE UNION RIGHTS

The Grounds of Violation: Trade Union Action

4. We submit that British law at the time of the events giving rise to this application inhibited trade unions in their desire to protect the occupational interests of their members by trade union action. Employees were free to join trade unions and to take part in their activities. But the employer's consent was necessary if trade unions were to represent their members at the workplace in any capacity whatsoever. British law permitted trade unions to exist and to deal with employers, in the latter case only if the employer consented. But it did not make this possible where the employer refused, no matter how high the level of support. In its Observations on the Merits of the Application, the UK Government has, however, pointed out that there are ways in which trade unions could take action to protect the occupational interests of their members:
 - (1) by organising industrial action to protect their members' interests in the workplace;
 - (2) by providing a range of services to their members, including legal assistance; and
 - (3) by engaging in the political process by seeking to influence the content of legislation.
5. We have serious reservations about these Observations by the UK Government, which on some points are misleading, particularly in so far as they relate to the law and practice at the time of the events to which this application relates.
 - So far as industrial action is concerned, it is seriously misleading to use the language of rights in this context. There is no 'right to organise industrial action [which] is protected by domestic law'. A worker

who goes on strike will almost certainly be in breach of his or her contract of employment;¹ at the time of the events in this application a worker who was dismissed for going on strike would have no protection from unfair dismissal if all the other strikers were also dismissed;² and in practice it was increasingly the case that striking workers were dismissed and left without a remedy.³ Indeed the position on ‘the right to organise industrial action’ was such that British law was found to be and continues to be in serious breach of ILO Convention 87, and the Social Charter of 1961.⁴

- So far as services to members are concerned, there are difficulties here too. We believe that trade union action for the purpose of article 11 means action which is unique to or conducted mainly by trade unions. It means that Contracting States must permit and make possible some form of action which relates to the core activity of trade unions which is regulating relations between employers and workers, whether by workplace representation or by collective bargaining. Trade unions may of course wish to undertake additional activities. But the fact that trade unions undertake such activities in common with other service providers does not make this trade union action;⁵ nor does it absolve the Contracting States of its duties to permit and make possible distinctively trade union action. Legal assistance to members is of no benefit if there is no legal right to enforce.
- So far as political action is concerned, it is not clear how heavily the Government can rely on this as a form of trade union action in this case. One of the critical features of the National Union of Belgian Police case is that although the union had no right to be consulted, it had a right to make representations, and there was no evidence that it was ignored. It is a matter of public record that the Council of Europe’s Committee of Independent Experts has already acknowledged the difficulties encountered by the TUC in establishing a constructive dialogue with the government in office at the time of the events giving rise to this application.⁶ It is also the case that the union of which one of the applicants was a member (**NUJ**) does not have a political fund, and is therefore forbidden by British law from engaging in the full range of political activities.⁷

The Grounds of Violation: ‘For the Protection of his Interests’

6. The second reason why we say there has been a breach in this case relates to the phrase ‘for the protection of his interests’, an important phrase in article 11 which the Court has emphasised on several occasions is not ‘redundant’. In this case, there is a clear and obvious breach of article 11 in the sense that the applicants were the victims of discrimination because they wanted to continue to have their interests protected. As explained by Lord Lloyd of Berwick in the **WILSON & PALMER** case, British law protects only ‘trade

¹ Miles v Wakefield Metropolitan District Council [1987] 1 All ER 1089: ‘Any form of industrial action by a worker is a breach of contract’ (Lord Templeman, at p 1097)

² Employment Protection (Consolidation) Act 1978, s 62. See now Trade Union and Labour Relations (Consolidation) Act 1992, ss 237 – 238, as amended by Employment Relations Act 1999, s 16 and sch 5. In the case of ‘unofficial action’ discriminatory dismissals of strikers are permitted.

³ See for example, ILO, 277th Report of the Committee on Freedom of Association, Case No 1540 (United Kingdom), para 47 et seq

⁴ This is fully explained in the submissions by the applicants

⁵ For a good example of this distinction in British domestic law, see Chant v Acquaboats Ltd [1978] ICR 643

⁶ Council of Europe, Committee of Experts, Conclusions XII – (1989 – 90), p 50

⁷ The law in force at the time was the Trade Union Act 1913, as amended by the Trade Union Act 1984, Part III. See now Trade Union and Labour Relations (Consolidation) Act 1992, ss 71-95

union membership as such', and not 'the use of trade union services',⁸ with the result that the discrimination against the applicants in this case was not unlawful under domestic law. But the ECHR sets a higher standard: it provides protection for the right to (i) 'form and join trade unions' and (ii) 'for the protection of his interests'. People who form and join trade unions and people whose interests are protected by trade unions should not suffer disadvantage as a result. It would be a rather empty and hollow right to form and join trade unions for the protection of one's interests if having done so one could lawfully be victimised as a result. Yet this is precisely what the British government is pressing the court to conclude.

Employees who do not enjoy the benefits of trade union membership often cannot, in practice, rely on statutory employment protection. For some years the National Association of Citizens Advice Bureaux has been receiving evidence of an increasing number of employment problems in the UK. The evidence shows that in many cases the relationship between the individual employee and the employer is not equal. Often, even where there is statutory protection, 'an employee will not complain or attempt to assert his or her rights'.⁹

7. The right to be a trade union member for the protection of one's interests does not only impose a duty on the part of the State to enable the union to be heard (albeit by indeterminate means): it must also impose a duty on the part of the State to ensure that the worker is not penalised because he or she is a trade union member or his or her interests are being protected by trade union membership. On this basis and on the facts of this case, there was a clear breach of the applicants' rights under article 11. Quite simply, the personal freedom of the applicants in this case was infringed because they wanted to continue to have their interests protected by a trade union, and for no other reason. If they had each agreed to relinquish the collective agreement and to have their terms and conditions of employment governed by individual contract, they would not have suffered the discrimination and disadvantage which they did. Had they agreed to no longer have their interests governed by terms negotiated on their behalf by their trade union, they would not have been treated as they were. But for the fact that their interests were protected by a trade union, the applicants would not have suffered any disadvantage.

Conclusion: The Responsibility of the British Government

8. Both Liberty and the TUC believe that this case raises questions of critical importance for trade union members in Britain and elsewhere, and that it raises questions of equally critical importance about the scope and extent of the protection of freedom of association guaranteed by article 11 of the ECHR. The workers in this case were penalised for wanting to continue to have their interests protected by a trade union with which they had associated: it is difficult to conceive of a more serious breach. The responsibility of the British government under the Treaty is to ensure that workers are protected from such discrimination and that such discrimination is not permitted by the law. The British government failed to discharge that responsibility. But in addressing this point it is important to recognise that the breach of the applicants' right to freedom of association in this case is to be seen in the wider context of close and detailed statutory

⁸ *Associated Newspapers Ltd v Wilson* [1995] 2 All ER 100, at p 117

⁹ "Hard Labour", National Association of Citizens Advice Bureaux (August, 1990)

regulation of trade union activities generally since 1980. Regulation which has only been relaxed in some of its more extreme aspects since 1997. The violations of the applicants' rights in this case are also to be seen in the wider context of detailed and persistent findings of the international human rights community that British labour law is in systemic and systematic breach of freedom of association guarantees in international treaties other than the ECHR.

9. At the time of the events giving rise to this application, workers had no right to be represented, nor did they have a general right to be consulted collectively by their employer in matters affecting their employment. Unlike many countries in Europe there is no procedure in English law for workers to be consulted through bodies such as works councils (as in Germany and the Netherlands) or enterprise committees (as in France).
10. We welcome the fact that there have been a number of important changes to British Labour law introduced since the general election in 1997. The Employment Relations Act 1999 introduces a new right for workers to be accompanied by a trade union official in grievance and disciplinary cases,¹⁰ and a new right for trade unions to be recognised for limited collective bargaining purposes provided that a number of conditions are satisfied: the legislation does not apply to businesses employing 20 or fewer people, an application may not be made where there is already a trade union (which in some circumstances may not be independent) with bargaining rights, and if the employer resists the application, the union must show majority membership in the bargaining unit, failing which majority support in a secret ballot in which at least 40% of the members of the bargaining unit vote in favour of recognition.¹¹ But although these provisions are extremely welcome (subject to reservations about some of the details), it is a matter of great regret that the law which gives rise to the present application has not been changed in all of its material aspects. If the events giving rise to the present applications were to be repeated today, workers such as the applicants would still have no remedy in domestic law.

2. COMPARISON OF INDIVIDUAL RIGHTS

11. The following analysis examines whether the situation in WILSON & PALMER could have arisen and been decided in the same way in other jurisdictions, particularly those outside the Council of Europe. There can be no doubt that those countries whose economy and society reflect the European model will look to this case for guidance on the interpretation of the right to freedom of association and protection from discrimination in exercising that freedom.

Australia

12. Industrial relations are currently governed by the Workplace Relations Act 1996. Prior to that, the relevant legislation was the Industrial Relations Act 1988. Though the 1996 Act is less favourable to trade union members than the 1988 Act, it still provides greater protection than the British legislation.

¹⁰ Employment Relations Act 1999, s 10

¹¹ *ibid*, s 1, and Schedule 1

13. Under the 1996 Act, in May 2000, a full bench of the Federal Court of Appeal heard an appeal from the decision of a single Court of Appeal judge to grant the Australian Workers' Union an injunction to restrain a company from unlawful behaviour¹². The facts of the case are strikingly similar to those of WILSON & PALMER but the judicial response was very different. The terms and conditions of employees were regulated by an 'award'¹³ and a series of collective agreements. The employer offered each employee an individual contract. These contracts contained a number of terms and conditions not available to award employees.
14. The Court found there was a serious issue to be tried as to whether the employer had induced employees to stop being members of their union, contrary to section 298M of the Act¹⁴. In considering the meaning of trade union membership the Court compared the approach of the UK, by looking at Lord Lloyd's opinion in WILSON & PALMER, with the approach taken by the United States Supreme Court. No final opinion was expressed but the injunction was allowed to stand. Mr Justice Gray, the judge who initially granted the injunction, stated:
- "The concept of union membership contemplated by the employer would be a mere shell. It would be devoid of any meaningful benefit to the employees who retained it, because they would be unable to exercise their rights as members to engage in collective bargaining as to their terms and conditions."*¹⁵
15. In United Firefighters Union v Country Fire Authority¹⁶ the respondent employer created a new classification of "Operations Officer". Appointment to the job depended on signing an individual contract that excluded union representation. The seven members of the union who refused to sign were performing the functions of an Operations Officer but without the improved status and salary. This situation is entirely comparable with the present one: workers were offered more money on the condition that they signed new contracts that excluded union representation. The Court found that this breached the Act¹⁷.
16. A decision of the Australian Industrial Relations Commission provides further insight. It was decided under the 1988 Act but the reasoning employed by the Commission would still be valid today. In Australian Manufacturing Union v Alcoa of Australia Ltd and others¹⁸ ("the Weipa Case") the central dispute was the company's policy of offering individual contracts to employees. These agreements contained terms and conditions generally in excess of what the company was prepared to offer award employees who would not sign the contracts. The union submitted that it should be able to bargain collectively without members being discriminated against on the basis of their preferred form of bargaining. They stated they did not seek a prohibition of the staff contract system, but a level playing field. The

12 Australian Workers' Union v BHP Iron Ore Ltd [2000] FCA 430

13 The federal award system operates by the union serving a 'log of claims' on the employer; the employer is obliged to respond by either accepting or rejecting the demands. If the claims are rejected, then a tribunal attempts to resolve the dispute by conciliation. If that fails, the tribunal will make a final award to which both parties are bound. The Workplace Relations Act has made arbitration by the federal tribunal a measure of last resort but otherwise, the award system is largely unchanged from that under the Industrial Relations Act 1988.

14 Section 298M provides that an employer must not, whether by threats or promises or otherwise, induce an employee to stop being a member of a trade union.

15 [2000] FCA 39, para 46.

16 Industrial Relations Court of Australia, unreported, 24 December 1996, cited *ibid.*, para 28.

17 It was contrary to s298K(1)(b) in that the employer had injured the employees in their employment by reason of their union membership and s298K(1)(c), in that the employer had altered the position of the employees to their prejudice by reason of their union membership.

18 [1996] 63 IR 138

company stated that it was not opposed to employees becoming and remaining members of the union. It claimed the staff contract system was introduced to improve plant performance.

17. The Commission stated, amongst other things, that union members who had wished to exercise their collective bargaining rights had been discriminated against. Award employees, regardless of their performance, would never achieve the same benefits as other staff employees because the only way to do so was to sign the individual contract and forego collective bargaining. The Commission made clear that the decision was not an attempt to restrict the use of staff contracts operating along side, or in conjunction with, the award system. Their involvement was only warranted when there was an identifiable unfairness in their operation or they are found to be inconsistent with the Act. Except that the UK had no provision equivalent to awards and no rights to representation, this final part of the decision is very similar to that of Lord Justice Dillon in the Court of Appeal in WILSON & PALMER. He stated:

*“this decision does not dispute an employer’s right to derecognise a union and make changes in consequence in the terms and conditions of the employee’s employment. The employer only enters a potential danger area if he offers a douceur to employees who will support his policy which is to be withheld from those who are not prepared to support it”.*¹⁹

Canada

18. The Canada Labour Code (“CLC”, RS 1985) governs industrial relations for those employees categorised as ‘federal’. The individual Provinces set their own laws for all other workers. References below to the Labour Relations Act (“LRA”, 1995) of Ontario and the Labour Relations Code (“LRC”, RS 1996) of British Columbia are used as typical examples of the Canadian approach.
19. Once a trade union has been certified, the employer has a duty to bargain collectively with it in good faith²⁰. ‘Certification’ means that workers have voted for collective bargaining and for the union to represent them in the bargaining process. Employers have attempted to use the tactics employed in WILSON & PALMER to persuade employees not to choose union representation. However, federal and state legislation provide that where a trade union has applied to be certified²¹ the employer cannot, without the consent of the union, alter pay, any other term or condition of employment or any right or privilege of the employees until either the application has been withdrawn or failed or until a period after the union has been certified²². In O.N.A. v Belleville General Hospital²³, the Ontario Labour Relations Board confirmed that this included the situation where workers affected by certification do not have their terms of employment altered but those not involved receive improved terms.
20. Once the union is certified as the bargaining agent of the employees, it is the exclusive representative of all the employees and the employer cannot interfere by bargaining directly with the employees.²⁴ Furthermore, if there is evidence of the employer persuading employees to abandon collective bargaining, the relevant

¹⁹ [1994] ICR 97, 110-111

²⁰ S50(a) CLC; s16,17 LRA; s11(1) LRC.

²¹ The process by which the union will then represent all the workers in that unit.

²² S24(4) CLC; s86(2)(a) LRA; s32(1)LRC.

²³ [1994] OLRB Rep 904

²⁴ CLC s94(1), s36(1); LRA s70, s73(1); LRC s6(1)

Labour Relations Board can refuse to decertify the union. In CAW-Canada v Canadian National Railway²⁵ the union opposed a buyout of certain employees. The employer communicated with the employees about the plan and the union's objections. The union filed a complaint alleging a violation of s94(1) of the CLC. It was held that the primary function of s94(1) was to protect viability of the union and its role as exclusive bargaining agent. By communicating directly with the employees, the employer had undermined the union's efforts to represent members. In UFCW, Locals 175 and 633 v Pharmaphil²⁶ the company president offered incentives directly to workers to decertify the union and in so doing breached s70. This situation is comparable to that in the present case, because decertification means a rejection of collective bargaining.

New Zealand

21. The Employment Relations Act 2000²⁷ ("the 2000 Act") provides the legislation governing industrial relations. This current Act replaces the Employment Contracts Act 1991 ("ECA") which included almost identical provisions on the rights of, and protection afforded to, trade union members. Under the 2000 Act, unions have the right to represent their members in relation to any matter involving their collective employment interests²⁸. Section 32(1)(d) provides that the employers must recognise the authority of the union; must not, whether directly or indirectly, bargain with the person who the representative is acting for; and must not do anything to undermine the bargaining authority of the union. Employees have the right to be members of a union "for the purpose of advancing their collective employment interests".²⁹ This right, combined with the rights under s32, gives union membership its natural, common sense meaning: employees join unions for the protection of their employment conditions and the essence of this protection is collective bargaining.
22. There is no relevant case law available on the interpretation of the 2000 Act but decisions made under the ECA would not be affected by the change. Section 32(d) of the ERA 2000 is broadly the same as s12(2) of the ECA³⁰.
23. In Eketone v Alliance Textiles (NZ) Ltd³¹ the employer put forward a proposal for what was described as performance related pay, which was rejected by the union. The employer engaged in questionable tactics including refusing union representatives access to management led meetings for employees, relating to the contract negotiations in which the union had been authorised to act. It was alleged, amongst other things, that the employer's behaviour breached the s12(2) requirement to recognise the union's authority as a bargaining representative.
24. A full bench of the Court of Appeal supported the reasoning of Cooke P. where he stated:

²⁵ (1996), 100 di 50 (Canadian Labour Relations Board)

²⁶ [1994] OLRB Rep 770

²⁷ This Act replaced the Employment Contracts Act 1991.

²⁸ S12(a)(b) and s18(1).

²⁹ s7(a), Employment Relations Act 2000

³⁰ Where any employee or employer has authorised a person, group, or organisation to represent the employee or employer in negotiations for an employment contract, the employee or employer with whom the negotiations are being undertaken shall . . . recognise the authority of that person, group, or organisation to represent the employee or employer in those negotiations.

“I am disposed to think that once a union has established its authority to represent certain employees . . . then the employer fails to recognise the authority of the union if the employer attempts to negotiate directly with those employees. To go behind the union’s back does not seem consistent with recognising its authority . . . Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt whether he can by-pass an authorised representative.”³²

25. In Capital Coast Health Ltd v New Zealand Medical Laboratory Workers’ Union Inc³³, the question arose as to whether the employer had failed to recognise the union’s bargaining authority. The Court of Appeal applied and approved the reasoning on s12(2) in Eketone. In New Zealand Fire Services Commission v Ivamy³⁴, the Court of Appeal stated “If, as in Eketone and Capital Coast Health Ltd cases, there is persuasion of employees to exclude the representative and enter into contracts direct with the employer, then plainly it is persuasion of a kind that it is inconsistent with the employer’s obligation under s12(2).”³⁵

United States of America

26. Section 7 of the National Labour Relations Act (as amended)³⁶ confers on employees rights including “self-organisation, to form, join, or assist labor organisations” and to engage in “other concerted activities for the purpose of collective bargaining or other mutual aid or protection”³⁷. Section 8 deals with the protection of these rights:

(a)(1): employers shall not “interfere with, restrain or coerce” employees in the exercise of their s7 rights;

(a)(3): it is unlawful for an employer “by discrimination in regard to the hire or tenure of employment to encourage or discourage membership in any labor organisation”³⁸.

27. Once a union has been selected for the purposes of collective bargaining by a majority of the employees, the union is the exclusive representative of all the employees for the purposes of collective bargaining.³⁹ It is unlawful for an employer to refuse to bargain collectively with the union⁴⁰ and furthermore, there is a duty to bargain in good faith.⁴¹

28. There is no doubt as to the meaning of membership of a trade union. In United Association of J & A v Borden⁴², the Supreme Court stated that the term “membership” is broad enough to embrace participation in union activities and maintenance in good standing as well as mere adherence to a labour organisation.

29. As a result of the protection afforded to employees once they have chosen to be represented by a union, employers have attempted to use the kind of tactics employed in WILSON & PALMER to persuade employees not to choose collective bargaining or once chosen, to withdraw that authority. In NLRB v

³¹ [1993] 2 ERNZ 783

³² *ibid.*, p787. This was strictly obiter because the appeal ultimately failed as, by the time the case was heard, the Court decided that any remedy they could give would be pointless. However, the reasoning was detailed and proved to be a significant guide.

³³ [1995] 1 NZLR 7

³⁴ [1996] 2 NZLR 587

³⁵ *ibid.*, 600

³⁶ First passed in 1935.

³⁷ s157 of the United States Code (“USC”)

³⁸ s158(a)(1) and (d)(3) of USC

³⁹ s159(a), USC

⁴⁰ s8(a)(5), NLRA

⁴¹ s8(d), NLRA

⁴² 83 S Ct 1423 (1963)

Exchange Parts Co.⁴³, an employer conferred on his employees, shortly before a union representation election, overtime and vacation benefits. The Supreme Court held:

*“The danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. The employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.”*⁴⁴

Likewise, in NLRB v Reed and Prince Manufacturing Co.⁴⁵, the fact that many employees who were members of a labour union repudiated the union and signed individual contracts with the employer did not destroy the authority of the union as the representative of the employees, where the individual contracts were the result of an unfair labour practice on the part of the employer.

30. If the employer attempts to interfere with the section 7 right to join a trade union for the purpose of collective bargaining, then this is automatically unfair. The fact that the employer acted without any anti-union bias is irrelevant.⁴⁶ A WILSON & PALMER type offer to employees would contravene both s8(a)(1) and s8(a)(3). In Radio Officers’ Union, CTU v NLRB⁴⁷, the Supreme Court stated that proof of discrimination under s8(a)(3) does not require subjective evidence of employee response where the discouragement can be reasonably inferred from the nature of the discrimination. Where it is shown that discouragement will result from discrimination the employer’s intent is sufficiently established notwithstanding his protestations that he had no such intent.

Italy

31. The relevant legislation is contained in the Statute of Workers’ Rights Act No. 300 of 1970. Breaches of this Act offend both individual and collective rights. Article 14 affirms for all workers the right to form trade unions, to join them and to take part in union activity.
32. The action taken by the employers in WILSON & PALMER would contravene Article 16 of the Act because it prohibits the employer from granting any collective economic benefit which is discriminatory and, amongst other things, discourages union affiliation or participation. Article 15 declares null discriminatory acts that subordinate the employment of a worker to the condition that he ceases to belong to a trade union or otherwise prejudices him because of his union affiliation.⁴⁸
33. The Supreme Court of Italy has also held that the employer, while being allowed to simply refuse to bargain with the unions, cannot legitimately by-pass them and deal directly with the employees.⁴⁹ Such behaviour would contradict the basic purpose of the Act and Article 19 in particular, which is to promote unions as the natural counterpart of the employer.

⁴³ 84 S Ct 457(1964)

⁴⁴ *ibid*, 409

⁴⁵ 118 F2d 874

⁴⁶ NLRB v Burnup & Sims, Inc., 85 S Ct 171 (1964)

⁴⁷ 74 S Ct 323

⁴⁸ See International Encyclopaedia for Labour Law and Industrial Relations (ed Prof. Dr. R. Blanpain), ch. on ‘Italy’ by Prof. Dr. T Treu, p136/137.

⁴⁹ *ibid*, p141

Conclusion

34. The comparisons show that interpreting Articles 11 and 14 of the European Convention on Human Rights in line with the applicants' submissions does not require a radical decision that would put the protection afforded to workers by the ECHR beyond anything already done in other jurisdictions. They recognise that membership of a trade union means more than card carrying; it means membership for the protection of the worker's employment interests vis-à-vis his employer. Indeed, to find that the facts of WILSON & PALMER do not breach the ECHR would leave Europe isolated in international industrial relations.

**TRADES UNION CONGRESS
LIBERTY
January 5th 2001**