

editorial

The Closed Shop – A Threat to Freedom?

While the European Court of Human Rights in its judgment in the "British Rail" case was careful to confine its attention to the concrete cases before it, there is no doubt that the judgment casts serious doubts on the compatibility of union closed shops with the right of freedom of association enshrined in Art 11 of the European Convention on Human Rights.

The cases concerned three British Rail employees whose employment had commenced before British Rail entered into a closed shop agreement with three trade unions in 1975. The three employees refused for their own personal reasons to join any of the trade unions concerned. Their employment was eventually terminated by British Rail in 1976. Because their objections were not found to be on grounds of religious belief (the only available exception under the Trade Union and Labour Relations Act 1974) industrial tribunals held their dismissals to be fair.

In the Green Paper on Trade Union Immunities (Cmnd 8128), the Government expressed the view that if the Employment Act 1980 had been in force at the relevant time, the British Rail case would not have arisen. There is no doubt that s 7 of the Act has improved employees' position in this respect in that an employee may now refuse to join a union which operates a closed shop on the grounds of conscience or other deeply held personal convictions – also persons who were employed prior to the closed shop agreement taking effect are permitted not to join a trade union. New closed shop agreements also, of course, now have to be approved by 80 per cent of the work force concerned in a secret ballot.

This does not meet the point, however, that under the Convention closed shops may be, in principle, against the right of freedom of association. This hinges on a point of interpretation on which the Court was divided: whether

alongside the express positive freedom of association provision there should be read an implied negative right not to associate. A case could be brought in the future against the British Government by an employee who is dismissed under the closed shop provisions as amended by the 1980 Act for refusing to comply with a closed shop agreement – in this event the British Government would need to face the issue of principle head on.

Here, as in other fields, the "European" approach conflicts with a major feature of our industrial relations system which has a long history. It may be asked whether international commissions should seek to interfere with our social institutions in this way. However, this form of interference is something which must be accepted if one is to pay more than lip service to concern for the protection of human rights. In other less tolerant societies than our own, repressive measures may be institutionalised and then be shown to be a major part of the country's systems and to have a long history; this would not of course be regarded as exempting such measures from condemnation. While closed shops are, since the 1980 Act, applied relatively liberally in Britain, some of the safeguards could be removed by subsequent legislation and there is no doubt that this is an area of law in which there have been quite violent pendulum swings of policy.

The Government are now reviewing whether further changes should be made to the rules governing closed shops. In our view it would be more fruitful for the various political parties to agree a non-partisan approach on this matter and for the Government to secure a general acceptance of the changes already made by the 1980 Act. If, however, at a future time it should be held by the Strasbourg Court that the 1980 Act does not go far enough on closed shops, then one would hope that the British trade union movement would not tarnish its international reputation by opposing necessary further reforms.