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The individual in international law—Human rights and freedoms—Right to form and join trade unions—Whether creating obligations for State in its capacity as employer—Right to strike — Non-striking members of striking union denied retroactive application of pay award—Whether a violation of right to form and join trade unions—Whether discrimination—European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 11 and 14

SCHMIDT AND DAHLSTRÖM CASE

European Court of Human Rights. 6 *February* 1976

(Chamber composed of: Balladore Pallieri, *President;* Mosler, Cremona, Wiarda, O'Donoghue, Mrs Pedersen and Petrén, *Judges*)

SUMMARY[1]: *The facts:*—The Applicants, Swedish nationals, were, respectively, a professor of law and an army officer. They were members of two trade unions affiliated to two of the main federations representing Swedish State employees. In 1971, after the expiry of one collective agreement and during negotiations for a new agreement, the Applicants' unions called selective strikes not affecting the sectors in which the Applicants worked. The Applicants thus did not come out on strike. They complained that on conclusion of the new agreement they, as members of the "belligerent" unions, were denied certain retroactive benefits paid to members of other trade unions, and to non-union employees, who had not participated in the strikes.

Proceedings before the Commission

The Applicants alleged breaches of Articles 11[2] and 14[3] of the Convention. The applications were declared admissible and the Commission, in its report of 17 July 1974, stated its opinion:

—that Article 11(1) might legitimately extend to cover State responsibility in the field of labour-management relations and provide some protection for unions against interference by employers;

[1] Prepared by Mr. C. H. R. Thornberry.

[2] Article 11 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 to 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

[3] Article 14 provides that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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—(by nine votes to one), that the Government's policy of denying retroactive benefits to non-striking members of belligerent unions did not in the circumstances infringe the Applicant's right, under Article 11(1), to form and join trade unions;
—that in view of the preceding finding, it was not called upon to examine whether the action complained of was justified under Article 11(2);
—(by eight votes to one), that the differential treatment complained of was in the circumstances justified as an aspect of industrial relations policy and that there had been no violation of Article 14 read in conjunction with Article 11(1).

Proceedings before the Court

The Commission referred the case to the Court in order to obtain a decision as to whether the facts disclosed any breach of the Convention. The Court decided to constitute a single Chamber to deal with this matter and with the *Swedish Engine Drivers' Union* case.[4]

Held (unanimously):—that there had been no breach either of Article 11 or of Articles 11 and 14 taken together.

As to Article 11:—The Court took the view that the Convention at no point made a distinction between the functions of a Contracting State as the holder of public power, and as employer; and held that Article 11 was binding upon the State as employer. It was unnecessary to consider an allied submission that the Convention could not impose upon the State obligations which were not incumbent upon private employers. Article 11(1) did not secure any particular treatment of trade union members by the State, such as the right to retroactivity of benefits resulting from a new collective agreement. Such a right was not indispensable to the effective enjoyment of trade union freedom and in no way constituted an element necessarily inherent in a right guaranteed by the Convention.

As to the Applicants' submission that the application to them of the principle of non-retroactivity tended to discourage them from thenceforth availing themselves of their right to strike (which, in their submission, was an "organic right" included in Article 11), the Court recalled that in the *Belgian Police* case[5] it had held that the Convention gave each State a free choice of means to ensure compliance with the purpose of Article 11. The right to strike was one of the most important of such means. It was not an unqualified right either under the Convention or the European Social Charter. The Court held that the Convention required that under national law trade unionists should be enabled, in conditions not at variance with Article 11, to strive through the medium of their organisations for the protection of their occupational interests. There was no indication that the Applicants had been deprived of this capacity.

There being no breach of a right guaranteed by Article 11(1) it was unnecessary to consider Article 11(2) (pp. 14-16).

[4] See below, p. 19.
[5] 57 *I.L.R.* 262.

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As to Articles 11 and 14 taken together:—Despite the absence of a breach of Article 11, Article 14 was pertinent, as the subject of the complaint, namely, the witholding of retroactive benefits (which in itself fell outside the scope of Article 11), was linked to the exercise of a right guaranteed by Article 11, namely, the freedom to protect the occupational interests of trade union members by trade union action. In this regard the Court referred to its previous Judgments in the *Belgian Linguistic*[6] and *Belgian Police*[7] cases. The Court found the Government's objective expressed in the maxim ''a strike destroys retroactivity'' to be legitimate. It had no reason to believe that the Government had other, ill-intentioned, aims. As to the fact that the Applicants themselves had not been on strike, it noted the financial and psychological support afforded by the non-striking members of a union to those participating in selective strikes on its behalf. This reasoning would clearly not apply to non-union employees or employees belonging to organisations other than those which had gone on strike (pp. 16-17).

The following is the text of the judgment of the Court:

[4] PROCEDURE

1. The Schmidt and Dahlström case was referred to the Court by the European Commission of Human Rights (hereinafter referred to as ''the Commission''). The case originated in an application against the Kingdom of Sweden lodged with the Commission by two Swedish subjects, Mr. Folke Schmidt and Mr. Hans Dahlström, on 9 June 1972.

2. The Commission's request, to which was attached the report provided for under Article 31 of the Convention, was lodged with the registry of the Court on 9 October 1974, within the period of three months laid down by Articles 32 § 1 and 47. The request referred to Articles 44 and 48 and to the declaration made by the Kingdom of Sweden recognizing the compulsory jurisdiction of the Court (Article 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a failure on the part of the Kingdom of Sweden to comply with the obligations binding on it under Articles 11 and 14 of the Convention.

3. The President of the Court deemed it conducive to the proper administration of justice to constitute a single Chamber to consider both the present case and that of the *Swedish Engine Driver's Union*[8] (Rule 21 § 6). On 15 October 1974, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven

[6] 45 *I.L.R.* 114.
[7] 57 *I.L.R.* 262.
[8] See below, p. 19.]

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[5] judges required to sit as members of the Chamber, Mr. S. Petrén, the judge of Swedish nationality, and Mr. G. Balladore Pallieri, the President of the Court, being *ex officio* members under Article 43 of the Convention and Rule 21 § 3 (b) of the Rules of Court respectively. The five judges so selected were Mr. H. Mosler, Mr. E. Rodenbourg, Mr. A. Favre, Mr. G. Wiarda and Mr. P. O'Donoghue (Article 43 *in fine* of the Convention and Rule 21 § 4). Mr. Favre died in November 1974 and Mr. Rodenbourg in October 1975; they were replaced by Mr. J. Cremona and Mrs. H. Pedersen, substitute judges.

Mr. G. Balladore Pallieri assumed the office of President of the Chamber in accordance with Rule 21 § 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Swedish Government (hereinafter referred to as ''the Government'') and of the delegates of the Commission regarding the procedure to be followed. By an Order of 31 October 1974, the President of the Chamber decided that the Government should file a memorial within a time-limit expiring on 14 February 1975 and that the delegates should be entitled to file a memorial in reply within two months of receipt of the Government's memorial.

The Government's memorial was received at the registry on 17 February, and that of the delegates on 26 March 1975.

5. After consulting, through the Registrar, the Agent of the Government and the delegates of the Commission, the President decided by an Order of 2 June 1975 that the oral hearings should open on 25 September.

6. On 22 September 1975, the Court held a preparatory meeting to consider the oral stage of the procedure. On this occasion the Court compiled a list of questions which it sent to the parties appearing before it, requesting them to supply the required information in the course of their addresses. The Court also requested the Commission to produce a certain document.

7. The oral hearings were held in public at the Human Rights Building in Strasbourg on 25 September 1975.

There appeared before the Court:

—for the Government:

Mr. H. Danelius, Head of the Legal Department at the Ministry for Foreign Affairs, *Agent;*
Mr. B. Hardefelt, Chief Legal Adviser at the Ministry of Finance,
Mr. G. Normark, Chief Legal Adviser at the National Collective Bargaining Office,

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Mr. O. Bergqvist, Legal Adviser at the Ministry of Labour, *Advisers;*

[6] *—for the Commission:*

Mr. J. E. S. Fawcett, *Principal Delegate,*
Mr. J. Custers, *Delegate,*
Mr. F. Schmidt, Professor at the University of Stockholm and applicant, *assisting the delegates* under Rule 29 § 1, second sentence.

The Court heard the addresses of Mr. Fawcett and Mr. Schmidt for the Commission and Mr. Danelius for the Government, as well as their replies to questions put by the Court and several judges.

At the hearing the Commission produced the document recently called for by the Court.

THE FACTS

8. The applicants are Swedish citizens. Mr. Folke Schmidt is a professor of law at the University of Stockholm and Mr. Hans Dahlström is an officer in the Swedish Army.

9. The applicants are members of trade unions affiliated to two of the main federations representing Swedish State employees, namely the Swedish Confederation of Professional Associations (*Sveriges Akademikers Centralorganisation,* abbreviated to SACO) in the case of Mr. Schmidt and the National Federation of State Employees (*Staistjänstemännens Riksförbund,* abbreviated to SR) in the case of Mr. Dahlström.

In 1971, after expiry of one collective agreement and during negotiations for a new agreement, the applicants' unions called selective strikes not affecting the sectors in which worked the applicants, who thus did not come out on strike. Mr. Schmidt and Mr. Dahlström complain that on conclusion of the new agreement, they, as members of the ''belligerent'' unions, were denied certain retroactive benefits paid to members of other trade unions and to non-union employees who had not participated in the strikes.

General background

10. For more than a hundred years, workers and employers in the private sector in Sweden have traditionally enjoyed the right to form and join trade unions and associations and to take action in defence of their occupational interests without interference by the State.

Certain principles of labour law which had evolved in practice were codified in 1928 and 1936 by the following legislation:

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(i) the 1928 Collective Act (*lag om kollektivavtal*);
(ii) the 1928 Labour Act (*lag om arbetsdomstol*); and [7]
(iii) the 1936 Act on the Right to Organise and Negotiate (*lag om förenings-och förhandlingsrätt*).

11. The 1928 Collective Agreement Act deals with collective labour agreements between employers or employers' associations and trade unions It specifies in particular the legal effects of such agreements. For example, the parties may not take strike or lock-out action in regard to an issue regulated by a collective agreement in force between them.

12. The 1928 Labour Court Act contained rules governing the composition, jurisdiction and procedure of the Labour Court.

The Labour Court was competent to hear cases of alleged violation of the 1936 Act on the Right to Organise and Negotiate. It also had jurisdiction in disputes relating to the interpretation or application of collective agreements, but proceedings could only be brought by a party to the agreement in issue. Unions or non-union employees to whom such an agreement had been made applicable (paragraph 17 below) were obliged to bring their disputes before the ordinary courts or administrative courts, as the case might be.

13. The above-mentioned Act of 1936 guarantees two distinct rights to the parties on the labour market, namely the right to organise and the right to negotiate.

The right to organise is defined in Section 3 of the Act as being the right of employers and employees to belong to an employers' organisation or a trade union, to exercise their rights as members of that organisation or union, and to work for an organisation or a union or for the formation of an organisation or a union, without interference or pressure by the other party. The Act specifies that the right to organise shall be considered as being violated

> if measures are taken either by employers or by employees to constrain any employee or employer, as the case may be, to refrain from becoming a member of, or to resign from, an association, to refrain from exercising his rights as a member of an association, or to refrain from working for an association or for the formation of an association, and likewise if measures are taken either by employers or by employees calculated to cause prejudice to an employee or employer, as the case may be, on the ground that such employee or employer is a member of an association, exercises his rights as a member of an association or works for an association or for the formation of an association.

The only way in which such associations enjoy the protection of the Act is that they may be awarded damages if the other party violates the right to organise of an individual member in such a way that the violation is to be regarded as intervention in the affairs of the association.

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The right to negotiate is defined in Section 4 of the 1936 Act as being

> the right to institute negotiations regarding conditions of employment or relations between employers and employees in general.

[8] It imposes on the other party an obligation to enter into negotiations, to attend meetings for negotiations and, where necessary, to make proposals for the settlement of the issues involved. This provision is applicable to all trade unions.

14. Prior to 1966, the State determined the wages and conditions of employment of its employees in the event of a breakdown of the negotiations between the State and the employees.

As from 1 January, the 1965 State Officials Act (*statsjänstemannalag*) has virtually assimilated State employees to employees in the private sector as regards trade union rights, strikes, lock-outs, etc. The Act made the 1928 Collective Agreement Act, the 1928 Labour Court Act and the 1936 Act on the Right to Organise and Negotiate applicable in the public sector. Furthermore, the Act provided for collective agreements to be concluded, subject to certain exceptions, between the National Collective Bargaining Office (*Statens Avtalsverk,* hereinafter referred to as "the Office"), representing the State as employer, and the organisations of State employees. The Ministry of Finance has a nominee on the governing board of the Office.

15. The 1965 legislative reform was facilitated by the centralised structure of the Swedish trade union movement; one factor which greatly contributed to its adoption was the conclusion in December 1965 of a Basic Agreement on Negotiations' Procedure (*slottsbacksavtalet*) between the Office and the four main trade union organisations of State employees, namely:

(i) the State Employees' Union (*Statsanställdas Förbund,* abbreviated to SF and known prior to 1 July 1970 as *Statsjänarkartellen*),
(ii) the National Federation of State Employees (SR),
(iii) the Swedish Confederation of Professional Associations (SACO),
(iv) the Civil Servants Section of the Central Organisation of Salaried Employees (*Tjänstemännens Centralorganisations Statsjänstemannasektion,* abbreviated to TCO-S).

According to the information at the disposal of the Court, these federations represent the large majority of Swedish State employees: more than 450,000 out of the 500,000 whose terms of employment are negotiated by the Office. About forty trade unions are affiliated to these organisations. The few independent trade unions represent only about 2,000 State employees in all.

Insofar as they are union members at all, university teachers and

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army officers generally belong to SACO and SR respectively. These two organisations, which are respectively open to staff possessing a university degree or the school leaving certificate (the equivalent of the *baccalauréat*), recently merged after the case had been brought before the Commission.

According to the trade unions' own published figures, the number of SACO members in respect of whom the Office conducts collective negotiations was about 48,800 in 1971 and 1972; it rose to 51,800 in [9] 1973 and was between 53,600 and 53,700 at the end of 1974. The university teachers' union affiliated to SACO had between 1,800 and 1,900 members in 1971, between 1,900 and 2,000 in 1972, between 2,100 and 2,200 in 1973 and between 2,300 and 2,400 at the end of 1974. SR had 19,200 members in 1971, 19,800 in 1972 and about 20,000 at the end of 1973. The army officers' union affiliated to SR had between 6,900 and 7,000 members in 1971, 7,300 in 1972 and between 7,400 and 7,500 at the end of 1973; it would appear that in August 1975 its membership had fallen to about 7,100 or 7,200.

16. Clause 4 of the above-mentioned Basic Agreement provides that negotiations with a view to concluding a collective agreement shall be conducted on the employees' behalf by the "main organisation" concerned, unless the Office and the "main organisation" agree otherwise.

17. The Royal Order of 30 June 1965 relating to Certain Public Collective Agreements (*KK om vissa statliga kollektivavtal m.m.*) includes the following provisions:

Article 3

Collective agreements as to such conditions of employment or service as are determined by the King-in-Council or by Parliament shall be concluded conditionally on the agreement being sanctioned by the King-in-Council.

Article 4

An Authority which is bound by a collective agreement shall apply the provisions of the agreement to any employee within the occupational group and region to which the agreement refers, notwithstanding that the employee is not covered by the agreement or by any other applicable collective agreement.

18. Collective agreements in Sweden are normally concluded for a period of two or three years. For various reasons, however, the new collective agreement is often concluded some time after the previous agreement has expired. In such cases, the new agreement has often specifically provided that its terms shall apply retroactively as from the date of expiry of the previous agreement. In the case of a strike during the bargaining period, on the other hand, employers—both

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in the public and private sector—have customarily refused to grant retroactive benefits in order to deter unions from taking industrial action in the future (application of the principle that a ''a strike destroys retroactivity'').

19. Negotiations in the public sector of the labour market are centralised in that they are conducted by the federations on behalf of their member unions. Moreover, strikes and other collective action may not be taken by the different trade unions independently but
[10] rather on the basis of a decision by, or after receiving the approval of, the federation concerned, which chooses and designates in accordance with its pre-arranged policy or tactics those of its members who are to take part in the action. According to the present practice, the negotiations between the Office and the federations result in one single agreement which regulates the increase in salaries, the grading of different categories of employees, working hours, various salary allowances, etc., and which applies, as a result of Article 4 of the Order referred to above (paragraph 17), to all categories of State employees, including those who are not represented by the federations. The agreement is normally signed by all the federations.

The question whether an individual employee has any means of challenging his union's decision to go on strike is a matter exclusively governed by the internal rules of the union concerned. These may provide for a right to ask for a secret ballot or for other rights to object to the union's decisions to take industrial action.

20. The law described above at paragraphs 10 to 17 has in recent years undergone various changes which, being subsequent to the facts at issue, are not relevant for the present case.

Facts of the particular case

21. In 1969 a global agreement for the years 1969 and 1970 was concluded by the Office and the four federations. When this period expired on 31 December 1970, the parties were still engaged in negotiations regarding the new global agreement. No agreement was reached and a Commission of Conciliation was appointed, but negotiations before it broke down as well. Consequently, SACO and SR proclaimed selective strikes which became effective on 5 February 1971 and involved about 4,000 members. This resort to strike action, which was quite lawful (see paragraphs 11 and 14 above), did not apply to university teachers or the Army so that neither Mr. Schmidt nor Mr. Dahlström took any part in the strikes.

The Office retaliated and, on 19 February 1971, about 30,000 members of SACO and SR were locked out. This affected all university teachers belonging to SACO, including Mr. Schmidt,

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and some officers belonging to SR, but not Mr. Dahlström. New strikes and lock-outs were proclaimed, but did not become effective. On 12 March 1971, an Act was promulgated which gave the King-in-Countil power to order the prolongation of certain collective agreements for a period of six weeks, but not extending beyond 25 April 1971, provided that collective industrial action threatened vital public interests. By virtue of this Act the previous collective agreement was reinstated on 13 March 1971 for a period of six weeks and all strikes and lock-outs terminated forthwith.

22. Subsequent negotiations before the Commission of Conciliation resulted in June 1971 in a new global agreement for the years 1971 to 1973. According to this agreement, certain posts were upgraded and the salary scales were generally increased retroactively as from 1 January 1971. Clause 18, however, provided for an exception in this respect: **[11]**

> Officials who were members between 1 January and 12 March 1971 (or any part of this period) of organisations that organised industrial action for any part of this period, shall not be entitled from 1 January to 12 March 1971 to the increased wage benefits applicable under the agreement, unless the Collective Bargaining Office decides otherwise. This declaration also concerns other officials if they took part in any such industrial action.

23. The agreement was only signed by TCO-S and SF. SACO and SR refused since they considered the terms unacceptable. The agreement, and in particular clause 18, was nevertheless applied to their members by virtue of Article 4 of the above-mentioned Royal Order (paragraph 17).

According to the applicants, during the negotiations SF and TCO-S had urged that the non-retroactivity clause should not be included in the agreement and expressed the opinion that it properly belonged to an agreement between the State and the two organisations concerned, SACO and SR. SF and TCO-S declared this expressly and inserted a reservation in the record before putting their signatures to the agreement. TCO-S had however, attempted to entice to itself some members of SACO, which was in its opinion a purposeless organisation, and had in fact written to the applicant Schmidt in this vein.

24. As a result of the agreement, members of SACO and SR, insofar as they were upgraded, did not receive the higher salary for the period from 1 January 1971 to 12 March 1971, nor did they benefit from the general increase in the salary scales during the same period, regardless of whether or not they had been on strike. State employees who were not members of SACO or SR but who had all the same participated in the strike, were also refused the benefit of retroactivity.

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