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

COURT (CHAMBER)

CASE OF SIBSON v. THE UNITED KINGDOM

(Application no. 14327/88)

JUDGMENT

STRASBOURG

20 April 1993

In the case of Sibson v. the United Kingdom[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. MATSCHER,
Mr C. RUSSO,
Mrs E. PALM,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr F. BIGI,
Sir John FREELAND,
Mr M.A. LOPES ROCHA,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 October 1992 and on 24 March 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 21 February 1992, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 14327/88) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Mr Dennis Sibson, a British citizen, on 17 October 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 11 (art. 11) of the Convention.

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[*] The case is numbered 4/1992/349/422. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mr F. Matscher, Mrs E. Palm, Mr A.N. Loizou, Mr J.M. Morenilla, Mr F. Bigi and Mr M.A. Lopes Rocha (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr C. Russo, substitute judge, replaced Mr Cremona, whose term of office had expired and whose successor at the Court had taken up his duties before the hearing (Rules 2 para. 3 and 22 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the Delegate of the Commission and the applicant's lawyers on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received on the dates indicated:

(a) from the Government, a memorial (15 and 22 June 1992) and observations on the applicant's claims under Article 50 (art. 50) of the Convention (20 October);

(b) from the applicant, a memorial (22 June), a letter supplementing that memorial (11 August) and a statement of costs claimed under Article 50 (art. 50) (21 September).

In a letter of 18 August the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing. On 26 August the Commission filed a document which the Registrar had sought from it on the President's instructions.

5. As directed by the President, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 October 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mrs A. GLOVER, Legal Counsellor,
Foreign and Commonwealth Office, *Agent*,
Mr J. EADIE, Barrister-at-Law, *Counsel*,
Ms A.-M. LAWLOR, Administrator,
Department of Employment,
Mr P. KILGARRIFF, Legal Adviser,
Department of Employment, *Advisers*;

- for the Commission

Mr B. MARXER, *Delegate*;

- for the applicant
Mr J. BOWERS, Barrister-at-Law, *Counsel*,
Mr M. BEATTIE, Solicitor.

The Court heard addresses by Mr Eadie for the Government, Mr Marxer for the Commission and Mr Bowers for the applicant, as well as a reply to a question put by the President. Both the Government and the applicant filed a written reply to a question put by the Court.

6. The Registrar received, on 9 November 1992, further observations from the Government on the applicant's claims under Article 50 (art. 50) and, on 20 January 1993, the applicant's comments on those observations.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Events leading up to the termination of the applicant's employment

7. Mr Sibson, who was born in 1929, was employed by Courtaulds Northern Spinning Ltd, formerly Courtaulds Northern Textiles Ltd, ("CNS") from November 1973 as a heavy goods vehicle driver. He was based at its depot at Greengate, Lancashire, together with between forty and fifty other drivers. His services gave complete satisfaction at all times.

8. Until the events giving rise to the present case, the applicant was a member of the Transport and General Workers Union ("TGWU"); from 1981 to 1984 he was its branch secretary. In 1985 all the other non-managerial employees at Greengate save one belonged to that union. At that time, however, that depot was not a "closed shop" (see paragraph 17 below). Indeed, the later of two statements of his terms of employment furnished to the applicant specified that he had the right to be a member of no trade union and that he would be informed if this right came to be modified by the conclusion of a closed shop agreement.

9. In March 1985 a fellow driver, Mr D., allegedly accused Mr Sibson of having "milked the funds" of the union whilst he was branch secretary. The applicant subsequently lodged with the local TGWU branch a complaint to the effect that Mr D. had "disseminated false statements tending to depreciate" him as one of its officers, but it was dismissed by the branch adjudication panel on 20 July 1985.

Mr Sibson was so dissatisfied with that decision that he resigned from TGWU by letter of 24 July and joined the United Road Transport Union instead. Some of his fellow drivers immediately ostracised him and others obstructed him in the performance of his work.

10. Between July and October 1985 CNS attempted in vain to resolve the dispute. After a period of "uneasy peace", a substantial majority of the TGWU members at Greengate voted, on 12 October, in favour of (a) a closed shop agreement with CNS and (b) industrial action if Mr Sibson continued in employment at that depot after 25 October.

At a meeting on 21 October between Mr Dear, the personnel manager of CNS, and the branch committee of the union it was agreed that the strike threat would be lifted if the applicant either rejoined TGWU or was employed on driving work not based at Greengate. On 22 October the applicant told Mr Dear that he would rejoin the union only if he received an apology from Mr D. and that he would not accept the alternative proposed by Mr Dear, namely a move to Chadderton, a depot about 1½ miles away from Greengate. In a letter of the same date to the applicant, Mr Dear summarised the discussions to date; stated that CNS were contractually entitled to transfer the applicant to Chadderton, where his earnings would be similar to those at Greengate; denied that the move would be a demotion; and expressed the hope that the applicant would give serious thought to his position because "[his] dismissal [was] a possibility".

11. Further meetings were then held, with the participation of a senior official of the Advisory, Conciliation and Arbitration Service. The applicant declined to accept as an apology a certain statement to be signed by Mr D. As regards a transfer to Chadderton, the applicant expressed concern about conditions there, in particular his fear - which Mr Dear assured him was groundless - of losing his current lorry and allowances for nights spent away from home; he also said that he could not face the aggravation from other drivers which he was sure would continue at that depot.

At a final meeting on 8 November 1985 the applicant declined to accept either of the alternatives then put before him - working at Greengate after rejoining TGWU or moving to Chadderton - and suggested that the management should dismiss him. Mr Dear refused to do that, and added that if the applicant reported to Greengate for work, he would be sent home without pay. Mr Sibson, citing his solicitor’s advice that that would constitute constructive dismissal (see paragraph 19 below), then said that he would resign with immediate effect, which he did by letter of the same date. He did not take up Mr Dear’s further offer, dated 14 November, of employment at Chadderton with the same opportunity for earnings and expenses as previously.

B. Domestic proceedings taken by the applicant

12. Mr Sibson then lodged with the Industrial Tribunal a complaint of unfair dismissal (see paragraph 18 below) against CNS and TGWU. In the grounds for his application he stated that he had "been ‘constructively dismissed’ for refusing to accept ‘action short of dismissal’" (see paragraph

20 below). His representative in these proceedings was not legally qualified, legal aid not being available for this purpose.

CNS and TGWU contended that a closed shop agreement was in existence (which would have made any dismissal fair; see paragraph 18 below). CNS also denied that there had been either constructive dismissal or action short of dismissal. Mr Dear admitted in cross-examination the absence of any operational reason for moving the applicant to Chadderton, the sole purpose being to avoid a strike; had a strike not been threatened, CNS would have retained him at Greengate and not put any pressure on him to rejoin TGWU.

By decision of 21 July 1986, the Industrial Tribunal unanimously accepted the complaint of unfair dismissal; it did not deal with the merits of the allegation of action short of dismissal. It found that Mr Sibson was entitled to refuse to rejoin TGWU because there was no closed shop agreement in force; that the request that he move to Chadderton was not reasonable since it was not made for genuine operational reasons but solely to avoid a strike; that CNS had no right to suspend the applicant without pay; that he was therefore entitled to treat himself as dismissed; and that the dismissal was unfair because its only motive was his exercise of his express right not to belong to a union. The tribunal reserved the question of remedies for further consideration, the applicant having opted for re-engagement (see paragraph 18 below).

13. On 16 January 1987 the Employment Appeal Tribunal, by a majority, dismissed an appeal by CNS on points of law. It found that the Industrial Tribunal had not erred in law, misdirected itself or reached an unreasonable conclusion.

14. On 25 March 1988 the Court of Appeal unanimously upheld an appeal by CNS on a point of law, confined to the question whether Mr Sibson had been constructively dismissed. It found that there was an implied term in his contract that his employer could - for any reason - direct him to work at any place within reasonable daily reach of his home; the Industrial Tribunal had erred in law in holding that this right could be exercised only if the direction were reasonable and that this condition would not be satisfied unless the direction was made for genuine operational reasons. Lord Justice Slade stated, as regards this implied "mobility term":

> "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 be based at ... Greengate ... rather than at (say) Chadderton, the Industrial Tribunal would no doubt have said so."

The Court of Appeal concluded that CNS had acted within its contractual rights in requiring the applicant to transfer to a nearby depot and that he could not be regarded as having been constructively dismissed. No question of unfair dismissal therefore arose.

15. On 15 April 1988 Mr Sibson applied for legal aid to appeal to the House of Lords. On 30 June legal aid was granted for the purpose of obtaining counsel's opinion on the merits of an appeal. On 8 August counsel advised that there were no reasonable prospects of success and that leave to appeal would not be given. Further legal aid was therefore refused on 19 August.

II. RELEVANT DOMESTIC LAW

16. The relevant domestic law in force at the time of the events giving rise to the present case may be summarised as follows.

A. Closed shops

17. A closed shop is an undertaking or workplace where there is in existence a "union membership agreement", that is an agreement or arrangement between one or more trade unions and one or more employers or employers' associations having the effect in practice of requiring employees of a certain class to be or become members of a specified union (section 30 of the Trade Union and Labour Relations Act 1974, as amended).

B. Unfair dismissal

18. The Employment Protection (Consolidation) Act 1978 ("the 1978 Act") provided that, subject to exceptions not relevant to the present case, "every employee shall have the right not to be unfairly dismissed by his employer" (section 54); the remedies for unfair dismissal were compensation or, if the individual concerned so elected and if the Industrial Tribunal in its discretion so decided, reinstatement or re-engagement (section 68). In determining whether to make a reinstatement or re-engagement order, the tribunal had to take into account, inter alia, whether it was practicable for the employer to comply therewith (section 69).

Under section 58(1)(c) of the 1978 Act, as substituted by section 3 of the Employment Act 1982:

> "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."

By way of exception to the foregoing, section 58(3) of the 1978 Act laid down the basic rule that, if a "union membership agreement" (i.e. a closed shop; see paragraph 17 above) was in existence, the dismissal of an employee for refusal to become or remain a member of a specified union was to be regarded as fair. With effect from 26 July 1988 - that is, after the events giving rise to the present case - this provision was repealed by the Employment Act 1988.

In determining whether or not a dismissal was unfair, an Industrial Tribunal was directed to take no account of pressure exercised on the employer to dismiss the employee, for example by threatening to strike; however, a third party, such as a trade union, which had exercised such pressure because the employee was not a member of a union could be joined as a party to the proceedings and ordered to pay the whole or part of any compensation awarded to the employee (sections 63 and 76A of the 1978 Act).

C. Constructive dismissal

19. The notion of constructive dismissal was encapsulated in section 55(2)(c) of the 1978 Act, which provided:

> "... an employee shall be treated as dismissed by his employer if ... the employee terminates [his] contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

It does not suffice, in this connection, that the employer's conduct is unreasonable; it must amount to a significant breach going to the root of the contract of employment or showing that he no longer intends to be bound by one or more of its essential terms (per Lord Denning, Master of the Rolls, in Western Excavating (E.C.C.) Ltd v. Sharp [1978] Industrial Cases Reports 221, construing an earlier but identical provision).

D. Action short of dismissal

20. Section 23(1)(c) of the 1978 Act, as amended by section 10(4) of the Employment Act 1982, conferred on an employee (defined by section 153(1) of the 1978 Act so as to include a person whose employment had ceased) a right "not to have action (short of dismissal) taken against him as an individual by his employer for the purpose of compelling him to be or become a member of any trade union or a particular trade union ...".

The remedy in well-founded cases was compensation, which might extend beyond financial loss to such matters as injury to reputation and feelings, of such amount as the tribunal considered just and equitable in all the circumstances. Provisions relating to the existence of a closed shop and to the exercise of pressure on the employer, akin to those applicable in the

context of unfair dismissal (see paragraph 18 above), also applied in this area.

PROCEEDINGS BEFORE THE COMMISSION

21. In his application (no. 14327/88) lodged with the Commission on 17 October 1988, Mr Sibson alleged that the compulsion imposed on him to join TGWU or to move to another depot was contrary to his rights under Article 11 (art. 11) of the Convention.

22. By decision of 9 April 1991, the Commission declared the application admissible. In its report of 10 December 1991 (Article 31) (art. 31), the Commission expressed the opinion, by eight votes to six, that there had been no violation of Article 11 (art. 11). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS MADE TO THE COURT

23. At the hearing on 26 October 1992, the applicant requested the Court "to uphold the admissibility of the complaint, to uphold the complaint under Article 11 (art. 11) and to grant full compensation under Article 50 (art. 50) ...".

The Government, for their part, invited the Court to hold "that the application is inadmissible by virtue of the provisions of Article 26 (art. 26) of the Convention or, alternatively, that there has been no violation of Article 11 (art. 11)".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

24. The Government pleaded that on two grounds, which they had raised before the Commission, Mr Sibson's application was inadmissible by virtue of the provisions of Article 26 (art. 26) of the Convention, which reads as follows:

[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 258-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

"The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."

25. The first matter relied on by the Government - which was denied by the applicant - was that he had not raised in the domestic proceedings the allegation, made by him before the Convention institutions, to the effect that his conditions of employment at the Chadderton depot would have been less favourable than those at the Greengate depot. Although the Government did not accept the accuracy of that allegation, they asserted that if it had been made in the domestic proceedings and had been held to be well-founded, it would probably have had a significant impact on the Court of Appeal's determination of the question whether a mobility term was to be implied into the applicant's contract of employment (see paragraph 14 above).

26. The second matter relied on by the Government - which was likewise denied by the applicant - was that in the domestic proceedings he had not contended, as an alternative to his plea of unfair dismissal, that he had been subjected to "action short of dismissal" (see paragraph 20 above). He had thereby, according to the Government, decided to forgo any right to compensation if the domestic tribunal held that he had not been dismissed.

27. The present case involves no direct interference on the part of the State. If the matters complained of by Mr Sibson constituted an infringement of his rights under Article 11 (art. 11) of the Convention, the responsibility of the United Kingdom would nevertheless be engaged if that infringement resulted from a failure on its part to secure those rights to him in its domestic law (see the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, p. 20, para. 49). It appears to the Court that both preliminary objections raise issues that are closely linked to those that would have to be examined if it proved necessary to determine whether there had been such a failure. It therefore joins the Government's plea to the merits.

II. ALLEGED VIOLATION OF ARTICLE 11 (art. 11) OF THE CONVENTION

28. Mr Sibson alleged that, since United Kingdom law provided no meaningful remedy for a person, such as himself, who had suffered a detriment as a result of his not belonging to a particular trade union, he had been the victim of a violation of Article 11 (art. 11) of the Convention, which reads:

"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."

This allegation was contested by the Government and was not accepted by a majority of the Commission.

29. In arriving at its conclusion in the case of Young, James and Webster that there had been a breach of Article 11 (art. 11), the Court held that although compulsion to join a particular trade union may not always be contrary to the Convention, a form of such compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association guaranteed by Article 11 (art. 11) will constitute an interference with that freedom (ibid., pp. 22-23, para. 55).

In the Court's opinion, the facts of the present case are such that it can, as was argued by the Government but disputed by the applicant, be distinguished from that of Young, James and Webster. It notes in the first place that, unlike Mr Young, Mr James and Mr Webster (ibid., pp. 23-24, para. 57), Mr Sibson did not object to rejoining TGWU on account of any specific convictions as regards trade union membership (and he did in fact join another union instead). It is clear that he would have rejoined TGWU had he received a form of apology acceptable to him (see paragraphs 10-11 above) and that accordingly his case, unlike theirs, does not also have to be considered in the light of Articles 9 and 10 (art. 9, art. 10) of the Convention. Furthermore, the present case is not one in which a closed shop agreement was in force (see paragraph 12 above). Above all, the applicants in the earlier case were faced with a threat of dismissal involving loss of livelihood (see the judgment of 13 August 1981, Series A no. 44, p. 23, para. 55), whereas Mr Sibson was in a rather different position: he had the possibility of going to work at the nearby Chadderton depot, to which his employers were contractually entitled to move him (see paragraphs 10 and 14 above); their offer to him in this respect was not conditional on his rejoining TGWU; and it is not established that his working conditions there would have been significantly less favourable than those at the Greengate depot (see paragraph 25 above).

Having regard to these various factors, the Court has come to the conclusion that Mr Sibson was not subjected to a form of treatment striking at the very substance of the freedom of association guaranteed by Article 11 (art. 11).

30. There has accordingly been no violation of that provision. In these circumstances, it is not necessary to determine the questions reserved in paragraph 27 above.

FOR THESE REASONS, THE COURT

Holds by seven votes to two that there has been no violation of Article 11 (art. 11).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 April 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinion of Mr Morenilla, joined by Mr Russo, is annexed to the judgment.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE MORENILLA, JOINED BY JUDGE RUSSO

1. I regret to be unable to agree with the reasoning of the majority and with its conclusion that there has been no violation of Article 11 (art. 11) of the Convention in the present case. The facts, established in paragraphs 7 to 15 of the judgment show, on the contrary, that Mr Sibson's freedom of association was violated as a result of the compulsion exerted by his employer threatening either to move him to another place of work or to suspend him without pay if he did not rejoin the union that he had previously abandoned. In my view the termination of the applicant's contract of employment that followed his refusal to join a union against his will amounts to a relevant and unjustified interference with his rights under Article 11 (art. 11) for which the United Kingdom is responsible, in accordance with Article 1 (art. 1) of the Convention, since the infringement resulted from the failure of the United Kingdom to fulfil its positive obligation to adapt the legal system in order to secure that freedom.

2. To explain my position. I must say first that, in agreement with Judges Ganshof van der Meersch, Bindschedler-Robert, Liesch, Gölcüklü, Matscher, Pinheiro Farinha and Pettiti in their concurring opinion in the case of Young, James and Webster v. the United Kingdom (judgment of 13 August 1981, Series A no. 44, p. 28), my understanding of Article 11 (art. 11) is that "the negative aspect of freedom of association is necessarily complementary to, a correlative of and inseparable from its positive aspect. Protection of freedom of association would be incomplete if it extended to no more than the positive aspect. It is one and the same right that is involved".

Therefore, it is not a question of recognising a new right not included in Article 11 (art. 11) , but of merely interpreting this provision in accordance with the ordinary meaning given to the term "freedom" in the context and in the light of its object and purpose, in conformity with Article 31(1) of the Vienna Convention of 23 May 1969 on the Law of Treaties (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 14, para. 29, and the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 24, para. 51). In this respect, Article 20 of the Universal Declaration of Human Rights, when defining the right to freedom of association, expressly declares in paragraph 2 that "no one may be compelled to belong to an association". The omission of that clause in the European Convention should not be interpreted, in my view, as limiting the exercise of that right: the Convention - according to its Preamble - was created as a step towards the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights with the aim of "the maintenance and further realisation of human rights and fundamental freedoms."

It should also be mentioned that the legislation in the member States, including the United Kingdom's Employment Act 1988 (paragraph 18 of this judgment), the recent case-law of the Intergovernmental Committee relating to Article 5 of the European Social Charter and Recommendation 1168 (1991) of the Parliamentary Assembly of the Council of Europe to amend this Article, all recognise that the right to join an organisation also implies the right not to join.

3. In Young, James and Webster the Court nevertheless did not consider it necessary to answer the question pleaded by the parties as to whether or not Article 11 (art. 11) of the Convention guarantees a "negative right" of not being compelled to join an association. But it recalled, however (ibid., para. 52), that "the right to form and to join trade unions is a special aspect of freedom of association", adding that "the notion of a freedom implies some measure of freedom of choice as to its exercise". In the same paragraph of the said judgment, the Court also stated that even assuming, for the sake of argument, that the general rule stated in Article 20 para. 2 of the Universal Declaration of Human Rights was deliberately omitted from the Convention, "it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 (art. 11) and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 (art. 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". And, finally, as to the necessity of the measure taken against an employee for refusing to join a specific trade union, in paragraph 63 of its judgment the Court said that "a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".

4. In my view, the arguments of the majority (paragraph 29) not only seem to disregard an evolutive interpretation of Article 11 (art. 11) - eleven years after the Court's judgment in Young, James and Webster - in the light of present-day conditions (see the above-mentioned Johnston and Others judgment, p. 25, para. 53) according to the developments referred to above. They also narrow the doctrine of the Court as set forth in the previous case by diluting the concept of compulsion to one of "treatment" and by not considering the pressure exerted on Mr Sibson to join a union against his will, which resulted in a loss of his livelihood, as striking at the very substance of his freedom of association.

5. The majority has based its opinion on the fact that the present case can be distinguished from that of Young, James and Webster. The main arguments are that Mr Sibson did not object to rejoining the trade union (TGWU) on the basis of any specific conviction; that this case was not one in which a closed shop agreement was in force, and "above all" that Mr Sibson was not faced with a threat of dismissal involving loss of livelihood

since he had the possibility of going to work at another nearby depot, to which the employers were contractually entitled to move him, and where his working conditions had not been clearly shown to be significantly less favourable. Having regard to these various distinguishing factors, they come to the conclusion that "Mr Sibson was not subjected to a form of treatment striking at the very substance of the freedom of association guaranteed by Article 11 (art. 11)".

6. This reasoning appears to me to be contradictory because it combines opposing arguments based on the employer's right to transfer the applicant to another nearby depot, according to Mr Sibson's contract of employment, and on the applicant's right not to join a union against his convictions, under Article 11 (art. 11) of the Convention. If, as the English Court of Appeal decided (paragraph 14), the case is covered only by the law of contract and Mr Sibson was not unfairly dismissed for refusing to move to the nearby depot indicated by his employer since he failed to show the prejudice that he suffered from such a measure, no question arose as to the reasons for his resignation when he considered himself "constructively dismissed" (paragraph 19); this being the case the reference to Young, James and Webster seems unnecessary since it would not be applicable. If, on the contrary, the present case is covered by Article 11 (art. 11) as interpreted in the previous case, such circumstances are irrelevant and the motive for his transfer becomes an essential issue.

7. I am clearly of the view that the present case is covered by Article 11 (art. 11) of the Convention rather than by the law of contract; it is also my opinion that the particular circumstances surrounding the transfer of Mr Sibson to the depot or the kind of action brought before the United Kingdom's courts are not relevant reasons to depart from the Court's leading case of Young, James and Webster.

8. Several circumstances in this case are certainly different from Young, James and Webster but, in my opinion, the essential circumstances of both cases are the same and, consequently, the present case merits an identical conclusion.

9. With the dissenting members of the Commission, I also think that it is clear from the facts of this case that Mr Sibson, like Mr Young, Mr James and Mr Webster, lost his job without any compensation, after twelve years of working at the Greengate depot to the "complete satisfaction" of his employer (paragraph 7), as a direct result of exercising his right not to belong to a trade union. I also consider that the motive of the applicant's employer in exercising his contractual rights to transfer the applicant is a decisive element in reaching this conclusion. The transfer of the applicant was not made for genuine operational reasons, "the sole purpose being to avoid a strike" (paragraph 12) threatened by his fellow employees if Mr Sibson did not rejoin the TGWU since they had voted for a closed shop which had not existed at Greengate (paragraph 10).

10. As regards Mr Sibson's motives for refusing to rejoin TGWU to the point of not accepting the pressure exerted on him by his employer and his fellow workers and to consider himself "constructively dismissed" (paragraph 19), it further appears from the facts that he was not satisfied with the decision to dismiss a complaint that he had lodged with the local branch of the union, concerning an alleged accusation of appropriation of the funds of the union when he was branch secretary, something that he considered deprecatory (paragraph 9). In my view, his objection was not whimsical or opportunist, but was based on his sense of self-esteem and honour that, in my view, are part of the freedom of association protected by Article 11 (art. 11) and deserve to be treated in the same way as other conscientious objections such as those of Mr Young, Mr James and Mr Webster. Therefore I do not see this point as a reason for departing from Young, James and Webster.

11. As to the seriousness of the compulsion exerted on Mr Sibson, he was placed in the position of either renouncing his conviction and thus being forced to join a union against his will or being suspended without pay or being moved without any valid operational reason to another place that he considered detrimental.

In my view such compulsion, which caused Mr Sibson to lose his job - like Mr Young, Mr James and Mr Webster -, cannot be justified under paragraph 2 of Article 11 (art. 11-2) and amounts to a breach of this provision on the grounds that the United Kingdom failed to protect the applicant's rights.

12. Finally, I believe that the threat of a strike does not justify the necessity in a democratic society of such a measure as that taken by the applicant's employer having regard to the fundamental principle of the rule of law (Klass and Others judgment of 6 September 1978, Series A no. 28, p. 25, para. 55). It violated a fundamental freedom of an employee and clearly amounted to an abusive imposition of a de facto closed shop, where it did not exist, in order to force him to act against the dictates of his conscience. As I have already mentioned, the Court held in paragraph 63 of its judgment in the case of Young, James and Webster that for the rights under Article 11 (art. 11) to be effective the State must protect the individual against any abuse of a dominant position by trade unions.

Unlike the case of Young, James and Webster (ibid., pp. 16, 17 and 18, paras. 35, 39 and 44), when deciding on Mr Sibson's complaint of unfair dismissal and reinstatement in his former position, the Industrial Tribunal unanimously accepted the complaint stating that "the request that he move to Chadderton was not reasonable since it was not made for operational reasons but solely to avoid a strike", and "that the dismissal was unfair because its only motive was his exercise of his express right not to belong to a union" (paragraph 12 of this judgment). The Employment Appeal Tribunal, dismissed the employer's appeal and found that "the Industrial

Tribunal had not erred in law, misdirected itself or reached an unreasonable conclusion" (paragraph 13).