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Laissez-faire and the closed shop

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Roger Webster worked for British Rail. On 3rd June 1976 he was sacked. British Rail had introduced a closed shop agreement under which everyone covered by the agreement had to join a trade union. Roger Webster was one of 54 who decided that they would rather lose their jobs than join up.

With fellow ex-employees Noel James and Ian Young, Roger Webster took his case to the European Court of Human Rights. On 13th August this year the three railmen won. The 21-judge court decided by an 18-3 majority that the sackings were a breach of their human rights, in particular the right of freedom of association laid down in article 11 of the European Convention of Human Rights.

The court said that compulsion to join a union might not always be contrary to the Convention. "However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before introduction of any obligation to join a particular trade union. In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11. For this reason alone, there has been an interference with that freedom as regards each of the three applicants."

In the wake of the Strasbourg case there has been renewed clamour for legislation against the closed shop. It seems likely that the government will take action in the autumn, possibly increasing the compensation paid to closed shop victims under the unfair dismissal legislation.

Helen Jackson, a London University Ph.D. Student who collects closed shop agreements, has suggested in a recent article in *The Times* that there should be a Bill to compensate all who lost their jobs under closed shops.

NEUTRAL INSTITUTION

For many years the closed shop was a neutral institution. There were no laws directly for it or against it. There was no unfair dismissal legislation. If you were fired you could usually claim pay for your contractual notice period, but no more. Whether you were sacked for belonging to a union, for not belonging to a union, or because the boss didn't like the colour of your eyes, your rights were governed only by your contract. That had been the position almost continuously ever since the earliest days of lawful trade unions.

Closed shops existed then and were fought over much as they are today. An Irish butcher named Quinn employed some non-union workmen. Trade union officials, led by Mr Leatham, insisted that he sack the non-unionists. Quinn refused, whereupon the union persuaded Quinn's chief customer to stop dealing with him, by threatening to call out the customer's own employees.

That dispute ended up in court, and reached the House of Lords in 1901. The Law Lords, in a unique decision, held that the closed shop was not an objective that could be legitimately pursued and decided that Quinn was entitled to damages for conspiracy against him.

The effect of that decision was nullified by the Trade Disputes Act of 1906. Even during the five years in which the decision stood as a precedent it did not prevent employers and unions operating closed shops by agreement.

From 1906 to 1971 the closed shop remained legal, except that in one lawsuit decided in 1964 a non-unionist BOAC draughtsman successfully sued trade union officials who had persuaded BOAC to fire him. However, the facts of the case were untypical, the reasoning of the Law Lords was strained and the precedent set was nullified by the Trade Disputes Act 1965.

CONSCIENCE CLAUSE

In 1971 the Conservative government introduced the Industrial Relations Act. Remembered mainly as an unsuccessful attempt to bring unions within a strict regulatory framework, the Act also introduced for the first time the concept of unfair dismissal. Derived from the recommendations of the International Labour Organisation, the unfair dismissal laws provided that, whatever your contract might say, if your employer did not have a good reason for dismissing you then you could claim compensation from him through an industrial tribunal. What constituted a good reason was laid down in the Act.

The architects of the Act had to lay down what should happen when someone was dismissed for not joining a union. Fair or unfair? Unfair, they said in 1971, introducing for the first time a form of conscience clause.

In 1974 a Labour government took power, pledged to repeal the Industrial Relations Act. This it did, then promptly re-enacted the parts establishing unfair dismissal rights in the Trade Union and Labour Relations Act 1974. There were some changes. This time dismissal for not belonging to a trade union was fair, unless you could show that you objected on grounds of religious belief to being a member of any union whatsoever, or on any reasonable grounds to being a member of a particular union.

In 1976 the government tightened up the conscience clause so that it allowed only religious objections. When this measure passed through Parliament Lord Hailsham warned that it could be a breach of the European Convention on Human Rights. He was proved right when Webster, James and Young won their cases this year. (It is interesting to speculate what the decision of the European Court of Human Rights would have been if a case had been brought in the days before there was any employment protection.)

Last year the Conservative government widened the conscience clause to allow objections on grounds of conscience or other deeply held personal conviction, gave blanket protection to employees who are non-unionists when a closed shop is introduced and required 80% acceptance for the introduction of new closed shops. It also limited immunity in tort where blacking is aimed at compelling union membership. That is the position today.

TWO QUESTIONS

The debate on the closed shop taken place almost entirely within the context of the unfair dismissal legislation. The issues have been the width of the conscience clause, the amount of compensation that should be paid to closed shop victims and whether they should be entitled not merely to compensation but also to keep their jobs. Yet only ten years ago the unfair dismissal legislation did not exist. Before then there was no question of anyone having the right to keep a job, or to be compensated on dismissal. Confusingly, many present day opponents of the closed shop who advocate compensation for its victims also say that they want to see the right to claim unfair dismissal abolished. In the current state of the closed shop debate that inconsistency has received no attention.

Thus the closed shop question falls naturally into two parts. Firstly, should unfair dismissal legislation exist? If yes, what should be the position of closed shop victims? If no, then secondly, should a closed shop victim have a common law right to sue through the ordinary courts?

The question of unfair dismissal legislation can be disposed of simply. In a society founded on consent, in which the only liabilities are those for which you contract voluntarily or incur through aggressing against others, an employer who dismisses his employee can be liable only for his obligations under the employment contract. Unfair dismissal is supra-contractual: a legislative overlay creating obligations irrespective of contract. It has no place within a *laissez-faire* contractarian frame-work.

The second question is whether the closed shop should be unlawful at common law. The question is best approached by considering the contrasting concepts of acts and purposes. In a free society, you are left

to pursue your own chosen purposes by the use of lawful (non-invasive) acts. Authority does not outlaw purposes. only coercive acts. The closed shop is a state of affairs, a purpose to be achieved.

It is not an act. It is an end that can be achieved without visiting compulsion on anyone. Therefore the closed shop as such should not be illegal.

DISMISSAL NOT COERCION

But this does not entirely dispose of the matter. For the threat of dismissal is often viewed as compulsion. The European Court of Human Rights certainly believed that, at any rate where dismissal would entail loss of livelihood.

The choice facing a closed shop victim under threat of dismissal is extremely unpalatable. Yet it is still a real choice. Neither of the options open to the victim, join the union or be sacked, involves the coercive threat to life, limb or property that would deprive the choice of its voluntary character. It is not a "your money or your life" pseudo-choice. It is not compulsion dressed up as choice. It really is choice, albeit an unpleasant one.

Closed shop victims often complain that their contracts made no mention of joining a trade union and that their employers are dishonouring their contracts if they later require them to join a union. it is an understandable grouse. But if you sign a contract under which you agree that you can be dismissed on notice, there is no breach of contract if you are dismissed on notice, whatever the motive that may lie behind the dismissal.

HAYEK'S ARGUMENT

One further argument has to be considered. Professor Hayek argues that the closed shop is inherently coercive. According to Hayek you are coerced if you are not free to pursue your own ends and they are replaced by someone else's ends, someone whose purposes you have no choice but to serve by your actions. In this sense Hayek views the closed shop as coercive, the victim being deprived of the freedom to pursue his own ends and being pressed into the service of those of his trade union masters.

It is questionable whether the closed shop in fact falls within Hayek's definition of coercion. Hayekian coercion seems to entail a complete deprivation of choice, which the very existence of men who have chosen to lose their jobs under the closed shop indicates is not the position in that situation. It would take massive coercion of other kinds to ensure that someone dismissed under a closed shop was completely prevented from subsisting and thus deprived of choice in a Hayekian sense.

But in any event there is a serious problem with Hayek's definition of coercion. By introducing the notion of substituted ends, Hayek opens a can of worms in which a variety of behaviour could be described, even if not by Hayek, as coercive. The definition approaches dangerously near the confusion (of which Hayek himself is a foremost critic) of freedom to do something with possessing the means to do it. If you do not have the means to achieve your chosen ends, are not your ends being replaced by those of someone who has the means, such as money with which to pay your wages, to ensure that your actions serve his ends? Hayek would argue that this is not coercion. But his definition could lead others to argue that it is, by which time Hayek may not be here to defend his own interpretation. If Hayek's definition is wrong, then his description of the closed shop as coercive may also be wrong.

If the closed shop is not inherently coercive, if the choice faced by closed shop victims is real, albeit unpleasant, and if closed shops can be achieved by non-coercive means, then it follows that the closed shop should be treated by the law as it was for many years, as a neutral institution neither favoured nor disfavoured. Some employers would operate union shops, others non-union shops. Yet others would permit their employees to join unions, but would not insist on it.

Like the freedom to make a million, the freedom to make a closed shop should merely exist.