

The right to organise prevails over economic freedom

The European Transport Workers Federation

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On the 10th of June the European Court of Human Rights issued an important decision on the Holship case involving the Norwegian Confederation of Trade Unions (LO) and the Norwegian Transport Workers' Union (NTF) vs Norway.

The decision makes a very valuable point on workers' rights: it states that the freedom of establishment is not a counterbalancing fundamental right to freedom of association.

The case started in 2013 from a dispute in the Port of Drammen between dock workers and the shipping company Holship Norge AS, which attempted to break the existing agreement on pay and working conditions by employing casual workers at the port to load and unload their ships, despite not being party to the framework agreement.

As a consequence, the NTF decided to organise a boycott of all shipping in Drammen involving Holship, later determined to be lawful by the courts of first instance.

Holship appealed to the Supreme Court, which ruled the boycott unlawful in 2016, stating that the company's right to freedom of establishment under the European Economic Area (EEA) law might be infringed by the boycott, as giving priority to workers employed via the administration office in the port of Drammen was a restriction on the freedom of establishment.

The Supreme Court concluded, in a split decision, that the priority on recruiting as demanded by the NTF was not sufficiently justified and did not satisfy the requirement to ensure a fair balance between freedom of establishment and the fundamental right to collective action. Therefore, the boycott was judged unlawful.

The Norwegian unions subsequently appealed the European Court of Human Rights (hereafter "the Court") for violation of article 11 of the European Convention on Human Rights, which protects the freedom of assembly and association.

Although the Court has not identified any breaches of article 11 by the Norway's Supreme Court in the particular circumstances of this case, the decision includes a crucial point on workers' rights: it states that the freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality.

This statement represents a key point to the trade union movement, which has always argued that trade union rights cannot be subordinated to the economic freedoms of EU law.

The Court emphasises that there is a clear hierarchy of rights, with those of workers taking precedence over economic freedoms. The Court notes that for a collective action to achieve its aim, it may have to interfere with internal market freedoms such as those at issue in the case. The Court fundamentally observes that when implementing their obligations under EU or EEA law, the Contracting Parties have to ensure that restrictions imposed on Article 11 rights do not affect the essential elements of trade union freedom, without which that freedom would become devoid of substance.

Commenting on the judgement, Terje Samuelsen, Chair of the ETF Dockers' Section:

“It has now been established that Norway cannot use EEA law as an argument for not fulfilling the obligations in the ECHR, including the protection of the right to strike. This is an important decision for the entire European trade union movement. The Court has clarified that the internal market freedoms in the EEA (and EU) cannot be seen as equal rights to the freedom of association in the ECHR. Trade union rights cannot be subordinated to the economic freedoms of EU law.”