

**Resolution CM/ResChS(2012)3
Collective Complaint No. 59/2009
by the European Trade Union Confederation (ETUC), *Centrale générale des syndicats libéraux de Belgique* (CGSLB), *Confédération des syndicats chrétiens de Belgique* (CSC) and *Fédération générale du travail de Belgique* (FGTB) against Belgium**

*(Adopted by the Committee of Ministers on 4 April 2012,
at the 1139th meeting of the Ministers' Deputies)*

The Committee of Ministers,¹

Having regard to Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints;

Taking into consideration the complaint lodged on 22 June 2009 by the European Trade Union Confederation (ETUC), *Centrale générale des syndicats libéraux de Belgique* (CGSLB), *Confédération des syndicats chrétiens de Belgique* (CSC) and *Fédération générale du travail de Belgique* (FGTB) against Belgium;

Having regard to the report transmitted by the European Committee of Social Rights, in which it concluded, *inter alia*, by 8 votes against 4 :

(beginning of quote)

(i) that the right to collective action is recognised under Belgian law

The mere fact that Belgian statutory law does not recognise the right to strike does not in itself constitute a violation of the Charter as long as such a right is guaranteed in law and in fact through an established and undisputed case law of the domestic highest courts.

The fact that the Belgian Court of Cassation does not explicitly refer to Article 6§4 of the revised Charter when establishing the right to strike, does not amount to a violation of the revised Charter. Nevertheless, when the task of implementing the State's obligations resulting from the Charter, in the absence of statutory law, rests on the case law of domestic courts, the latter need be reasonably precise and exclude contradictions.

Article 6§4 of the revised Charter encompasses not only the right to withholding of work, but also other relevant means, *inter alia*, the right to picketing. Both these components deserve consequently a comparable degree of protection.

Picketing activities will usually be accepted as lawful as long as they remain peaceful in nature. The right to collective action as guaranteed in Article 6§4 appears to be recognised. The fact that picketing activities are legally based, although not included in the judge-made "right to strike", does not appear in itself incompatible with the Charter, as long as the same level of protection is effectively guaranteed to all aspects included within the scope of Article 6§4.

¹ In accordance with Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints, the following Contracting Parties to the European Social Charter or the revised European Social Charter have participated in the vote: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and United Kingdom.

(ii) that there is a restriction on the exercise of the right to strike

The exercise of the right to strike necessitates striking a balance between the rights and freedoms, on one side, and the responsibilities, on the other, of the natural and legal persons involved in the dispute.

If the picketing procedure operates in such a way as to infringe the rights of non-strikers, through for example the use intimidation or violence, the prohibition of such activity cannot be deemed to constitute a restriction on the right to strike as recognised in Article 6§4.

On the other hand, where picketing activity does not violate the right of other workers to choose whether or not to take part in the strike action, the restriction of such activity will amount to a restriction on the right to strike itself, as it is legitimate for striking workers to attempt to involve all their fellow workers in their action.

The obstacles to the functioning of strike pickets posed by the operation in practice of the “unilateral application procedure” under Belgian law should be understood as constituting a restriction on the exercise of the right to strike as laid down in Article 6§4 of the Charter.

(iii) that there is no justification for this restriction

Pursuant to Article G, a restriction on the exercise of a right recognised by the Charter can be seen as compatible with the Charter if it fulfils the following conditions:

- it must be prescribed by law;
- it must pursue one of the aims set out in Article G;
- it must be proportionate to the aims pursued.

a) restrictions are not prescribed by law

In providing that restrictions on the enjoyment of Charter rights must be “prescribed by law”, Article G does not require that such restrictions must necessarily be imposed solely through provisions of statutory law. The case law of domestic courts may also comply with this requirement provided that it is sufficiently stable and foreseeable to provide sufficient legal certainty for the parties concerned. The decisions of the domestic courts adopted under the emergency relief procedure, as brought to the Committee’s attention by the parties to the complaint, do not meet these conditions. In particular, inconsistencies of approach appear to exist as between similar cases, and the case law lacks sufficient precision and consistency so as to enable parties wishing to engage in picketing activity to foresee whether their actions will be subject to legal restraint.

In addition, the expression “prescribed by law” includes within its scope the requirement that fair procedures exist. The complete exclusion of unions in practice from the so-called “unilateral application” procedure poses the risk that their legitimate interests are not taken into consideration. Unions may only intervene in the procedure after an initial binding decision has been taken and the collective action has been stopped. As a result of the unilateral nature of this procedure, the judge “may” summon other affected parties, but if he elects not to do so, the decision can be taken without such parties making submissions at the initial hearing or in its immediate aftermath. As a result, unions may be obliged to initiate collective action again, or else must go through a time-consuming appeal procedure. Consequently, the exclusion of unions from the emergency relief procedure may lead to a situation where the intervention by the courts runs the risk of producing unfair or arbitrary results. For this reason, such restrictions to the right to strike cannot be considered as being prescribed by law.

b) restrictions do not pursue one of the aims set out in Article G

Furthermore, any restriction on the right to strike may not go beyond what is necessary to pursue one of the aims set out in Article G. The application of such procedure as described above may intend to pursue the aim of protecting the right of co-workers and/or of undertakings, but in its practical operation goes beyond what is necessary to protect those rights by reason of the potential lack of procedural fairness.

Therefore, the Committee considers that Belgian law does not provide guarantees for employees participating in a lawful strike within the meaning of Article 6§4 of the revised Charter.

Conclusion

The restrictions on the right to strike constitute a violation of Article 6§4 of the revised Charter, on the ground that they do not fall within the scope of Article G as they are neither prescribed by law nor do they pursue one of the aims set out in Article G.

(end of quote)

Having regard to the information communicated by the Belgian delegation during the 1132nd meeting of the Ministers' Deputies,

1. takes note of the statement appended hereto made by the respondent government on the follow-up to the decision of the European Committee of Social Rights and welcomes the (legislative and other) announced measures and the authorities' commitment to bring the situation into conformity with the Charter;
2. looks forward to Belgium reporting, at the time of the submission of the next report concerning the relevant provisions of the European Social Charter, that the situation has been brought into conformity.

Appendix to Resolution CM/ResChS(2012)3

Statement made by the Representative of Belgium during the 1132nd meeting of the Ministers' Deputies (1 February 2012)

The Belgian Government has studied the report by the European Committee of Social Rights of 16 September 2011 and is intending to take account of its content.

The report points out that:

- court intervention in a collective dispute is only permitted under Article 6, paragraph 4, of the revised European Social Charter where it is geared to protecting citizens against violence along picket lines or safeguarding the right of workers not to join a strike;
- case law does not always respect the aforementioned limitations, and is therefore not sufficiently consistent;
- the unilateral application procedure, as currently applied, does not provide sufficient safeguards, particularly because it precludes an adversarial debate.

The Belgian Government will therefore be studying, in consultation with the social partners, what follow-up action might be taken on the ECSR report.

The government is thus well aware of the underlying problems, and would like to point out here that as long ago as 2001/2002, the then Employment Minister put forward a proposal (see Belgian Government Written Submissions, p. 36) for acceding to the wishes of the workers' organisations, which had also originated the complaint at the time.

Subsequently, in order to avert legislative intervention, the workers' organisations took a parallel initiative in 2002, in consultation with the employers' organisations. This so-called "gentlemen's agreement", under which the workers' organisations called on their members to refrain from violence during collective disputes and to respect the periods of notice for strike action, and the employers' organisations invited their members to avoid taking judicial action on collective disputes, is still being disregarded.

In November 2008, the Employment Minister asked the social partners represented in the National Labour Council for an evaluation of this agreement. This has still not produced any results.

The Employment Minister will therefore be asked to transmit the Committee's report to the social partners represented in the National Labour Council so that it can be annexed to his previous request for an evaluation of the "gentlemen's agreement on strike action".

Furthermore, the Minister of Justice will be invited to draw the judicial authorities' attention to the findings of the ECSR report.