COMMITTEE OF MINISTERS
COMITÉ DES MINISTRES

COUNCIL OF EUROPE
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MINISTERS' DEPUTIES Resolutions **CM/ResChS(2017)7** 14 June 2017

Resolution CM/ResChS(2017)7

Finnish Society of Social Rights v. Finland
Complaint No. 106/2014

(Adopted by the Committee of Ministers on 14 June 2017
at the 1289th 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 29 April 2014 by the Finnish Society of Social Rights against Finland;

Having regard to the report transmitted by the European Committee of Social Rights containing its decision on the merits, in which it concluded:

- ***by 7 votes to 4, that there is a violation of Article 24 of the Charter, on the issue of compensation;***

  As regards the allegation that Finland is in breach of Article 24 of the Charter on the grounds that the Employment Contracts Act provides for a limit on the amount of compensation that may be awarded in the event of an unlawful dismissal, the government maintained that employees may, in addition to the Employment Contracts Act, seek compensation for unlawful dismissal under the Non-Discrimination Act and the Act on Equality between Women and Men. However, only persons dismissed on discriminatory grounds may seek compensation under these legislative provisions. In a case of unfair dismissal, without a discriminatory element, it is not possible to claim compensation under them.

  The government highlights that employees, who have been unlawfully dismissed, may in addition seek compensation under the Tort Liability Act. However, the Tort Liability Act does not apply in all situations of unlawful dismissal, and is only applicable in restricted situations. In particular, it does not apply in respect of contractual liability or liability provided for in another statute, unless otherwise specified. Therefore, the Tort Liability Act does not provide an alternative legal avenue for the victims of unlawful dismissal not linked to discrimination.

  The upper limit on compensation provided for by the Employment Contracts Act may result in situations where the compensation awarded is not commensurate with the loss suffered.

[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.

- ***unanimously, that there is a violation of Article 24 of the Charter on the issue of reinstatement.***

  As regards the allegation that Finland is in breach of Article 24 of the Charter on the grounds that it is impossible for the courts to order reinstatement, while Article 24 does not explicitly refer to reinstatement, it refers to compensation or *other appropriate relief. Other appropriate relief* should include reinstatement as one of the remedies available to national courts or tribunals (see Conclusions 2003, Bulgaria), with a view to placing the employee back into an employment situation no less favourable than he/she previously enjoyed. Whether reinstatement is appropriate in a particular case is a matter for the domestic courts to decide.

  The obligation provided for by the legislation to re-employ employees made redundant for financial or production-related reasons should the employer recruit employees during the following nine months, cannot be regarded as a substitute for reinstatement as it has a limited scope of application.

Having regard to the information communicated by the Finnish delegation at the meeting of the Rapporteur Group on Social and Health Questions (GR-SOC) of 23 March 2017 (see Appendix to the resolution),

1. takes note of the statement by the Finnish Government and the information it has provided on the follow-up to the decision of the European Committee of Social Rights (see Appendix to this resolution);

2. looks forward to Finland reporting, at the time of the submission of the next report concerning the relevant provisions of the Revised European Social Charter, on any new developments regarding the implementation of the Revised European Social Charter.

Appendix to Resolution CM/ResChS(2017)7

Address by the Representative of Finland at the meeting of the Rapporteur Group on Social and Health Questions (GR-SOC) of 23 March 2017
Finnish Society of Social Rights v. Finland, Complaint No. 106/2014

Comments by the Government of Finland

“In its decision adopted on 8 September 2016 concerning Collective Complaint No. 106/2014, Finnish Society of Social Rights v. Finland, the European Committee of Social Rights considers that the legislation of Finland is in violation of the provisions of Article 24 of the Revised European Social Charter on the grounds that:

- the Finnish Employment Contracts Act provides that the maximum amount of compensation that may be awarded by courts for unlawful dismissal may not exceed the equivalent of 24 months salary, and that

- the Finnish legislation does not provide for reinstatement in the event a dismissal has been found to be unlawful.

The government appreciates the constructive dialogue with the Committee and wishes to draw your attention to some circumstances in support of the position taken by Finland in this matter. The government considers that the Finnish legislation reflects the tri-partite agreement in the Finnish labour market. Furthermore, in the government’s view, practical and legislative details described below should be taken into account when assessing the questions at hand.

COMPENSATION FOR GROUNDLESS TERMINATION OF EMPLOYMENT

National legislation

Chapter 12, Section 2 of the Employment Contracts Act regulates the compensation that may be ordered to be paid to an employee for the groundless termination of his or her employment contract. The compensation is determined in accordance with Section 2 in those cases where the employer has terminated or cancelled the employment contract contrary to the grounds laid down in more detail in the Act.

According to Chapter 12, Section 2 of the Act, the compensation to be paid must be equivalent to the pay of the employee due for a minimum of three months and a maximum of 24 months. The maximum amount of compensation to be paid to shop stewards or elected representatives is equivalent to the pay due for 30 months. This provision of the Act has been effective since 2001. It created a uniform compensation mechanism for different cases of terminating employment (financial and production-related grounds for termination vs. grounds related to the employee's person).

Coverage of compensation

As regards the coverage of compensation, in paragraph 53 of its decision, the Committee states that there may be situations where the compensation provided for by the Employment Contracts Act is not necessarily commensurate with the loss suffered by the employee because of the groundless termination of the employment contract.

The Committee, however, does not specify these situations in more detail.

In the government's view, the sums of compensation under Chapter 12, Section 2 of the Employment Contracts Act are sufficient and the compensation is also conducive to ensuring compliance with the Act.

The Employment Contracts Act sets a lower limit for the compensation. In practice, this means that when an employer terminates an employment contract without a valid reason, the Act obligates the employer in all cases to pay the employee compensation equivalent to the pay due for a minimum of three months. The statutory lower limit for the compensation is not proportional to the amount of any possible material damage incurred by the employee or for instance to the length of the employment relationship. On the contrary, the employee is always entitled to compensation equivalent to the pay due for a minimum of three months, even if he or she had not suffered any material damage. Furthermore, even if the groundlessly terminated employment relationship had lasted less than three months before the termination, it entitles the employee to compensation equivalent to the pay due for a minimum of three months.

The government notes in this connection that compensation under Chapter 12, Section 2 of the Act covers both material and immaterial damage incurred by the employee. If the amount of the compensation were proportional to the amount of the real damage caused to the employee – as the decision of the Committee would require − the sums of compensation could in fact be lower than they are at present. If the compensation were determined in proportion to the amount of the real damage, courts would have a narrower margin of discretion in determining the amount of the compensation. Now, in contrast, the Employment Contracts Act obligates courts to take account of a number of circumstances when determining the amount of compensation.

According to the Employment Contracts Act, for example the following factors must be taken into account in determining the amount of compensation: estimated time without employment for the employee, his or her estimated loss of earnings, the remaining period of a fixed-term employment contract, the duration of the employment relationship, the employee's age and chances of finding employment corresponding to his or her vocation or education and training, the employer's procedure in terminating the contract, any motive for termination originating in the employee, the general circumstances of the employee and the employer, and other comparable matters. The government proposal for the Act (HE 157/2000 vp, p. 119) states expressly that the Act does not list exhaustively the factors to be taken into account. Moreover, in determining the amount of compensation, the damage already incurred by the employee for the groundless termination of employment must be taken into account, but also his or her possible future financial losses must be assessed.

The government is of the view that because a wide range of different factors are already taken into account in determining the amount of compensation, abolishing the upper limit of the compensation would have no relevance to the real coverage of the costs incurred by the employee.

The decision of the Committee is problematic from the perspective of causality, too. In practice, the interpretation made by the Committee in its decision would mean that the employer's responsibility might continue even years after the termination of employment.

In the government's view, however, the causal connection between the groundless termination of employment and the damage incurred by the employee cannot continue for an unlimited period. The legislation would be exceptionally strict if the employee, for instance on grounds of his or her unemployment, could claim compensation from the employer even after many years since the termination of a short employment relationship.

It is appropriate for the parties to a dispute over the termination of employment to have the matter settled as soon as possible. Under Chapter 13, Section 9, subsection 3 of the Employment Contracts Act, compensation for a groundless termination of employment must be claimed within two years of the date on which the employment ended. The maximum compensation, equivalent to the pay due for 24 months, contributes to encouraging the parties to refer the dispute to a court within a reasonable period.

The government wishes to draw attention to the fact that the employee is not deprived of economic security after the termination of the employment relationship. If the employee is unemployed, he or she is covered by the unemployment security scheme.

REINSTATEMENT

As regards the issue of reinstatement, in paragraph 55 of its decision, the Committee states that, in addition to compensation, other appropriate remedies should be available to national courts or tribunals to place the dismissed employee back into an employment situation no less favourable than he or she previously enjoyed. The Committee mentions reinstatement as one such remedy.

Taking into consideration the wording of the Article 24 and other international treaties, the government however questions whether reinstatement should *de facto* be included in Article 24.

As the Committee states in its decision, the Employment Contracts Act makes no provision for reinstatement. However, the parties to an employment relationship are always free to agree about reinstatement.

In fact, the previous Employment Contracts Act contained a provision on alternative compensation, according to which courts were obliged to examine on request whether it, in a dispute situation, was possible to continue an employment relationship or to reinstate an already dismissed employee. If the employment was continued or the employee was reinstated, the court had to assess the need for and amount of possible alternative compensation.

The provision on alternative compensation was repealed in 2001 as it was problematic to apply in practice. No claims for continued employment or reinstatement were ever made, because in practice it is impossible to continue employment in a dispute situation.

In the government's view, practical matters should be given significance when interpreting Article 24. Finland cannot be expected to enact legislation that, on the basis of earlier experience from many decades, will not work in practice.

By contrast, when it comes to employment relationships in the public sector, it is possible and even appropriate to continue employment and reinstate employees. Public service employment relationships differ from private ones in many respects. Matters related to public service offices are based on underlying administrative decisions: all public offices are established, abolished and filled by decision of public authorities. Private employment relationships, on the other hand, are based on contracts. Moreover, public service employment relationships are governed by legislation and obligations different to those regulating private employment relationships, and matters concerning public service employment are usually litigated in administrative courts.

The government takes note of the Committee's views and will maintain the issue in the review report and examine ways to address the violations found by the Committee.”