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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

9 May 2014

Case Document No. 7

***Bedriftsforbundet* v. Norway**
Complaint No. 103/2013

ADDITIONAL OBSERVATIONS ON ADMISSIBILITY BY THE GOVERNMENT

Registered at the Secretariat on 7 May 2014

ATTORNEY GENERAL - CIVIL AFFAIRS

The European Committee of Social Rights
Executive Secretary
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Your reference	Our reference	Date
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ADDITIONAL OBSERVATIONS ON ADMISSIBILITY

BY THE KINGDOM OF NORWAY

to

THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

in

Case of Bedriftsforbundet v. Norway
(Complaint No. 103/2013)

1 INTRODUCTION

(1) Reference is made to the Executive Secretary's letter of 31 March 2014 in which the Kingdom of Norway has been invited to submit additional observations on the admissibility of the complaint by 7 May 2014.

(2) These observations respond to the additional observations submitted by the complainant on 10 February 2014 and the complainant's submissions of 14, 25 and 29 November 2013.

(3) It is recalled that the complaint alleges a consistent and long term practice at Norwegian ports, according to which dock workers must be members of the Norwegian Transport Workers' Union (NTF) in order to gain employment, see Complaint of 4 September 2013 p.1. The complainant asserts that this alleged practice violates workers' freedom of organisation and therefore constitutes a breach of Article 5 of the European Social

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Charter. In subsequent submissions the complainant has asserted that the Norwegian authorities has been familiar with and condoned this practice.

(4) While these factual assertions lack any foundation, it appears that the complainant now has sufficiently indicated the *grounds* for its complaint within the meaning of Article 4 of the Additional Protocol. However, for reasons set out in the following the Government maintains that the complaint does not fulfil the requirements in Article 1§c of the Additional Protocol and should therefore be rejected as inadmissible. Should the complaint nevertheless be held admissible, the Government will subsequently submit observations on the merits of the case as further instructed by the Committee.

2 ARTICLE 1§C OF THE ADDITIONAL PROTOCOL

2.1 Introduction

(5) In the written observations of 7 November 2013, the Government emphasised that Article 1§c of the Additional Protocol reserves the right to submit complaints to "representative national organisations of employers and trade unions". In the absence of sufficient evidence to form an opinion on whether the complainant fulfilled this requirement, the Government questioned the admissibility of the complaint.

(6) Bedriftsforbundet has since reiterated that the complaint is admissible and have lodged several submissions in support of its claim:

- First, that "Bedriftsforbundet has been recognized by all governments of Norway the last 20 years as being representative for small and medium sized companies" (second paragraph of the complainant's letter to the Committee on 29 November 2013);

- Second, that it is "the consultation body for all important cases for business" (second paragraph of the complainant's letter of 29 November 2013 and its attachments 1 and 1B);

- Third, that the organization has "3996 member companies" as of January 2014 (section 1 of the complainant's letter to the Committee of 10 February 2014 and its attachment 2.

(7) The evidence submitted in support of these assertions consists inter alia of the following documents:

- A letter of 10 June 2013 from the Norwegian Ministry of Finance, which invites the complainant to be part of a "consultative forum" for the purpose of aiding the Royal Commission regarding corporate tax revisions in light of new international development.

- An e-mail of 29 November 2013 from Mr. Oluf M. Mohn, representing the Ships and Terminal Operators Association of Oslo, which states in its last sentence that "Bedriftsforbundet is a representative organization of employers in Norway".

- A letter of 6 November 2014 from Mr Lars-Erik Sletner, CEO of Bedriftsforbundet, stating that "[i]n January, Bedriftsforbundet had 3996 members spread across all 19 regions of Norway".

(8) In its submission of 29 November 2013 (attachment 4), the complainant also enclosed a letter from the Confederation of Norwegian Enterprise (NHO) to the Norwegian Ministry of Labour. Although that letter does not shed much light on the issue of admissibility, the Government nevertheless considers it appropriate to make the Committee aware of the views submitted by NHOs counterpart, the Norwegian Confederation of Trade Unions (pages 8-11 concern admissibility):

Appendix 1: Letter from The Norwegian Confederation of Trade Unions to the Ministry of Labour 18 November 2013 (Norwegian original)

Appendix 2: Letter from The Norwegian Confederation of Trade Unions to the Ministry of Labour 18 November 2013 (English translation).

2.2 Assessment

(9) The Government observes at the outset that the complainant's assertions are still largely unsubstantiated. Reference is inter alia made to the statements of Mr Mohn and Mr Sletner, see paragraph 7 above, neither of which is accompanied by any evidence to support the claims made.

(10) Other assertions are accompanied by evidence which does not justify the claims made. Reference is made to the letter from the Ministry of Finance inviting the complainant to join a consultative forum for certain tax matters, which hardly justifies the assertion that Bedriftsforbundet "has been recognized by all governments of Norway the last 20 years as being representative for small and medium sized companies" and that it is "the consultation body for all important cases for business". More importantly, such an invitation – extended to various entities which may provide insights in tax matters pertaining to enterprises – does not entail that the complainant is recognised as falling within the scope of "representative national organisations of employers and trade unions."

(11) It is therefore difficult to escape the conclusion that the complainant still has not submitted evidence which justify its claim of being a representative national organisation of employers within the meaning of Article 1§c of the Additional Protocol.

(12) Without prejudice to the fact that the lack of evidence constitutes sufficient reason to render the complaint inadmissible, the Government will for the sake of completeness provide some observations on the criteria in Article 1§c based on Bedriftsforbundet's *assertions*.

(13) First, it may be recalled, as set out in paragraph 23 of the Explanatory Report, that the requirement for the organisation to be "representative" was deemed necessary in order to "ensure the efficient function of the procedure established by the Protocol and in view of the very large number of trade unions operating in some states". Hence, the Explanatory report stipulates that the assessment of this criterion depends on factors

such as "the number of members and the organisation's actual role in national negotiations".

(14) Further guidance may be gleaned from the Explanatory Reports comments on Article 2 of the Additional Protocol, which according to the Report (paragraph 26) contains the same conditions as Article 1§c :

"With the aim of preserving the efficiency of the machinery of examining collective complaints, NGOs are subject to the same conditions as laid down for international organisations and national organisations of employers and trade unions: they must be 'representative' and particularly 'qualified' in issues covered by the charter."

(15) Turning to the assessment of the claims made by the complainant, the Government has in the absence of other material sought recourse to Bedriftsforbundet's homepage for further information.[1]

(16) It appears that the complainant is foremost an "interest organisation" for small and medium sized enterprises which inter alia disseminates information about the benefits of flexible tax regimes and labour markets rather than a "representative national organisation of employers". It is noteworthy in this context that Bedriftsforbundet is not involved in collective bargaining and is not party to any collective agreements in Norway. The absence of an "actual role in national negotiations" thus militates against acknowledging the complainant as a representative national organisation of employers.

(17) This is also reflected by the fact that Bedriftsforbundet does not figure in official statistics concerning employer organisations in Norway.

Appendix 3: Statistics Norway (SSB) 2012

(18) While acknowledging that the Committee conducts an "overall assessment" of the factors which are relevant for the purposes of Article 1§c of the Protocol, the Government respectfully submits that particular emphasis should be placed on the organisation's role in the system of collective bargaining and collective agreements.

(19) Rights of organisation and collective bargaining constitute pillars of the regulation of labour markets, the fundamental importance of which is reflected in Articles 5 and 6 of the Charter. The logical corollary, as reflected in paragraph 23 of the Explanatory Report, is that it is primarily those organisations having "an actual role in the negotiations" which are representative and well qualified to inform the Committee on these matters.

(20) Furthermore, there is a risk of blurring the lines between Article 1§c and Article 2 if the importance of the organisations actual role in negotiations and collective bargaining is downplayed. This is particularly troublesome as the complaint procedure in Article 2 is optional and several Contracting Parties, including Norway, have not acknowledged complaints by the interest organisations referred to in that Article.

(21) As for the representativeness of the complainant in terms of number of members, Bedriftsforbundet informed in its complaint of 4 September 2013 p.2 that it represents

[1] http://www.bedriftsforbundet.no/bf/Naeringspolitikk/Naeringspolitisk-program

"approximately 3000 small and medium sized businesses". However, absolute numbers does not necessarily shed much light on whether the complainant is a "representative" organisation for employers. For these purposes it is more relevant to consider the proportion of small and medium sized enterprises represented by the organisation. It is therefore noteworthy that the complainant's assertion of 3000 members constitutes only 2.3 % of the total number (130 243) of small and medium sized enterprises (companies with less than 100 employees) registered in Norway.

Appendix 4: Statistics Norway (SSB) 2012

(22) Turning next to the subject matter of the complaint, it may be recalled that Bedriftsforbundet alleges a practice which excludes employment for dock workers which are not members of the Norwegian Transport Workers Union. Hence, the complaint alleges a violation of Article 5 of the Charter concerning the rights of *workers*, whereas the complainant is an interest organisation for *employers*. It seems inherent in the criterion of "representativeness", however, that organisations of employers and trade unions may only complain of violations of rights belonging to the members they "represent", i.e. employers and workers respectively. A different interpretation would appear at odds with the aims of ensuring "the efficient functioning of the procedure established by the Protocol" and reserving complaints to those organisations that are particularly "qualified" in the matters at hand (Explanatory Protocol paragraphs 23 and 26). It would also run counter to principles of locus standi common to most jurisdictions, i.e. requirements of direct and individual concern.

(23) Summing up these observations, the Government invites the Committee to consider whether the present complaint is lodged by a "representative" organisation within the meaning of Article 1§c, taking into account that the complaint is submitted by an interest organisation which does not does take part in actual negotiations in terms of collective bargaining and which represents only a fraction of small and medium sized enterprises, coupled with the fact that the complaint does not allege a violation of rights belonging to the members (employers) that the organisation represents.

3 CONCLUSION

(24) The Government respectfully submits that in the circumstances of the present case the complaint must be rejected as inadmissible as it fails to satisfy the requirement in Article 1§c of the Additional Protocol.

(25) In the event that the Committee should deem the complaint to satisfy the criteria of admissibility, the Government reserves its right to submit written observations on the merits of the case as further instructed by the Committee.

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