COUNCIL OF EUROPE CONSEIL DE L'EUROPE

02/03/2010 RAP/RCha/NE/III(2010)Add

REVISED EUROPEAN SOCIAL CHARTER

Comments from the
Netherlands Trade Union Confederation FNV
and the National Federation of Christian Trade Unions
in the Netherlands CNV
on the
3rd National Report on the implementation of
the European Social Charter (revised)

submitted by

THE GOVERNMENT OF THE NETHERLANDS

(Articles 2, 4, 5, 6, 21, 22, 26, 28 and 29
for the period 01/01/2005 – 31/12/2008)

_____

Report registered by the Secretariat on 17 February 2010

CYCLE 2010

Comment of the FNV on article 5 ESCh.

Regarding the right to organize of article 5 of the Charter the FNV has already sent its comments on the impact of the judgments of the EC Court of Justice in the cases Laval and Viking to the Committee, and it invites and would welcome the government to present its opinion on the matters involved.

Comment of the FNV on article 6 par. 4 ESCh.

In 2007 and 2008, 13 judgments concerning the right to collective action were published on public sources (paper or internet). With one exception, i.e. the High Court case that is mentioned in the government's report, these were all judgments of the Lower Courts. The judge ruled all the collective actions on first instance as covered by article 6 par. 4 ESCh. In five cases the judge ruled that a limitation was appropriate under article G ESCh., in the other cases the request by employers and/or third parties to rule the actions unlawful was denied. These were not calm years, the collective actions (not all were strikes) took place in; private companies, public transport, the police, the fire brigade, the airport Schiphol and in the harbor of Rotterdam. It is remarkable that , where strike action often took place in one and the same sector, the judgments sometimes turned out admissive, and then inadmissible. The ratio cannot easily be found in the facts of the cases. Obviously all cases were judged within the legal frame of the ESCh. However, only in four Lower Court cases did the judge explicitly mention the Committee's Conclusions on the use of the proportionality principle within the framework of limitations to the right to collective actions.

One case which concerned a granted limitation of the announced collective action dealt with the security of embassies by police personnel. Proportionality was not the issue and the Court decided that the police activity concerned an essential service in the light of the prevention of terrorist attacks, clearly within the limits of provision G ESCh. In all the other cases where the Court denied the trade unions the right to collective actions, the Courts applied different forms of a principle of proportionality. In one case concerning public bus transportation the Court ruled that for a period of two months a strike could only take place outside the rush hours, a complete strike was dismissed as disproportionate (KG Rb. Groningen 10-06-2008, LJN:BD3691). The judge considered that after two months there would be a new situation in which another analysis might be appropriate. Another Court ruled on work stoppages in a company that had announced a possible restructuring of the company due to the loss of required services from a large business partner (KG Rb. Arnhem 21-11-2007, LJN:BB9501). The employer considered these actions by the workers who were supported by their trade union unlawful and premature, because they might lead to a deterioration of the relationship with the business partner at stake. The Court started out with proclaiming that it should essentially act with restraint because of the rule of law. After that however, the Court totally casted that reluctance aside and stated: 'Although it is in essence not to the Court to decide when parties have truly reached a limit in the negotiation process, the Court in this case decides that [the employer] shall have until January 2008 (five weeks) to negotiate without the pressure of collective actions'. Consequently the trade unions are denied any possible lawful form of collective action that might lead to any interruption of the production process. In another case concerning an announced strike by pilots, the Court did not even mention article G ESCh. It. The Court ruled the strike unlawful and ordered arbitration where the parties themselves had not brought that forward (KG Rb. Haarlem 25-08-2008, LJN:BE9210).

In its report the government refers to the Conclusions of the Advocate-general in a High Court case, it concerns a strike that seriously affected telecom communication between the Dutch Antilles island Aruba and the rest of the world. Indeed the Advocate –general mentions the ECSR Conclusions, but the High Court does not repeat the arguments. Not in the least because they are essentially not relevant to the case as any (principle of) proportionality is not at issue.

These cases, and also the (seven) other cases where requests for restrictions of the right to collective action were denied, show that the Courts often act inconsistently where the application of the limitation grounds of article G ESCh. are concerned. Even on occasions where the Court shows that it is aware of the Committee's discerning comments concerning the use of a principle of proportionality, there is often no follow-up in the Court's motivation. Right after that acknowledgement, the Courts are still very much inclined to follow their usual path and motivate a limitation with the use of the proportionality principle. Very often the Courts merely pay lip service to the Committee's comments and do not properly apply the rightful alternative motivation.

The right to collective action was denied in three out of twelve cases with the application of a form of the proportionality principle. Although the number of cases is limited we can carefully extrapolate that to 25% of cases. It is the opinion of the FNV that the efforts to improve the compliance to the ECSR Conclusions as presented in the government report, have been grossly insufficient and have not lead to any results.

In the report the Government stipulates that legislation on this subject is not necessary because the legal doctrine is developed and also guarded by the Courts. There are indeed large benefits to this system. However, if the Courts fail to properly implement the Committee's conclusions concerning the appropriate application of the Charter, the State has to step in and ensure these rights. If it does not do so, it supports the system in which workers are denied their fundamental and constitutional right to use collective action in order to defend their justified interests.

Comment of FNV on article 29 The right of workers to be informed and consulted in collective redundancy procedures

The Collective Redundancies Act stipulates the an employer who want to terminate the employment contract of 20 employees within 3 months has to inform the trade union and the UWV Werkbedrijf. Included in the definition of the number of employees are contracts for which the employer has requested annulment by the Court under article 7:685 of the Civil Code. In recent times, employers have circumvented this obligation by offering some of their employees a contract that ends the labour contract. The employer who does this evades his obligations to the collective in times of restructuring, a situation for which the law was written. According to the FNV, this practice consists of an improper implementation of the EU directive that was the primary source for the Act, as well as breach of article 29 of the ESCh. The FNV urges the government to make an end to this practice.

CNV Internationaal

POSTADRES
Postbus 2475
3500 GL Utrecht
BEZOEKADRES
Tiberdreef 4
3561 GG Utrecht
TELEFOON
030 - 751 1260
FAX
030 - 751 1109
INTERNET
www.cnv.nl
E-MAIL
internationaal@cnv.nl

POSTREKENING
1255300
BANKREKENING
69.91.12.451

Ministerie van Sociale Zaken en Werkgelegenheid
Direct Internationale Zaken
Drs. L.C. Beets
Postbus 90801
2509 LV Den Haag

AFDELING
Internationaal
DOORKIESNUMMER
1268
E-MAIL
m.vrieling@cnv.nl

PLAATS
Utrecht
DATUM
3 december 2009

ONS KENMERK
2426/mwmv
UW KENMERK
IZ/IZ/2009/25227

BETREFT
22ste rapportage Europees Sociaal Handvest

Geachte meneer Beets,

Met dank voor de ontvangen concept-rapportage, maken we van de gelegenheid gebruik om een aantal opmerkingen ten aanzien van de rapportage te plaatsen ten behoeve van het definitieve rapport. In verband met het faciliteren van het verdere proces geef ik de opmerkingen hieronder in het Engels weer.

Paragraph 4 – Reduced working hours or additional holidays for workers in dangerous or unhealthy occupations.

page 6 and 7

1. In this paragraph it is mentioned that there is compensation for workers in heavy jobs. I n the governments report they also observe that this is a problem that social partners have to take care for. So there is no legislation that gives compensation to this workers. Only if social partners have negotiated about it.

   The act of labour hours is changed in 2007. After this change workers can work more hours on one day than before. In the report they only take account of work at night and some off- shore work. CNV doesn't agree with that because there are more specific jobs you have to take care of.

2. There is a lot of legislation for workers in dangerous and unhealthy occupations. That doesn't mean that the legislation is also very strict.

   Not all instructions are formulated in legislation. This is an important issue for workers representatives. They have asked for a clear standard setting in legislation.

   It takes too long to come to an agreement about limits between the health council and the social economic council. Until now there is only one advise of the health council about extreme heat. The discussion about limits workers can lift, takes already more than 20 years. Therefore a clear standard setting in legislation is necessary.

Article 29
The description of the general legal framework is right. In practice we see however a problem. It happens often in situations of collective redundancies, that employers do not consult workers representatives because they stay below 20 workers. In that case employers make individual contracts with workers and do not inform the workers representatives.

met vriendelijke groeten,
CNV Vakcentrale

Margreet Vrieling
Beleidsadviseur

Cc Mw. Van Wezel FNV
Dhr. C. Renique VNO-NCW
Dhr. M. de Heer MHP