21/06/2010 RAP/Cha/DK/XXIX(2010)Add2

EUROPEAN SOCIAL CHARTER

Comments from KRIFA
on the
29th national Report on the implementation of
the European Social Charter

(Articles 4, 5 and 6 of the European Social Charter
for the period 01/01/2005 – 31/12/2008)

Report registered by the Secretariat on 18 June 2010

CYCLE XIX-3 (2010)

krifa
Kristelig Fagbevægelse

The European Committee of Social Rights

Denmark's 29th report

A Shadow Report with Comments

From the Independent Danish Union Kristelig Fagbevægelse

June 2010

Kristelig Fagbevægelse
Engboulevarden 30
8960 Randers SØ

Tlf. 8911 2233
Fax 7227 7200

pol.sekr@krifa.dk
www.krifa.dk

Introduction

This shadow report will focus on the situation of employees in Denmark who are members of so-called independent unions like Kristelig Fagbevægelse.

The term "independent union" will be used about trade unions that are not part of any of the 3 trade union confederations (hovedorganisationer) in Denmark.

Trade unions in Denmark that are part of one of the 3 trade union confederations will be termed "traditional unions". Parties to collective agreements are most commonly the traditional unions and the employers or employers associations – the traditional social partners. Thus, a traditional trade union is typically the union having the right to enter collective agreements with the employer or employer's association in question.

Article 4, paragraph 2 and 4:

The right to just conditions of work – a law of the minimum

In Denmark, there is no general regulation of remuneration for overtime work. Also, there is no general regulation of notice periods with regards to termination of employment as well as a number of other important areas with regard to an individual employment relationship.

It depends on the kind of employment and the relevant legislation whether the individual employee has the right to protection against unreasonable unlawful dismissal, reasonable periods of notice etc. Besides of relevant legislation, there may be a collective agreement governing the employment relationship in question deciding on the rights of the individual employee.

However, although collective agreements in Denmark cover 100 % of the public labour marked, only around 60 % of the private labour marked is covered by collective agreements.[1] Around 40 % of private employees therefore do not have rights according to collective agreements but will have varying rights according to legislation depending on the kind of their employment.

For both employees and employers, there is a need for improved transparency and overview of rules on the labour marked. It would therefore be appropriate to enact

[1] Steen Scheuer og Morten Larsen: LO-dokumentation 2/2000

a law of the minimum for employees guaranteeing all employees the same basic rights.

An employee law would be a minimum act meaning that existing rights and conditions in individual contracts, special legislation or in collective agreements will not be reduced.

The following subject matters would be appropriate to govern in a minimum act, guaranteeing all employees the same basic rights. It should be noted that many of the following rights are already established in Danish law – but in many different acts and not necessarily for all kinds of employment. E.g. everybody has the right to holiday - but not everybody has the right to absence due to child's first day of illness.

General rights:

1. Right to freedom from discrimination and right to effective redress after discrimination
2. Right to freedom of association and organisation
3. Right to be represented by ones own trade union as well as a right to tell about ones own wage and working conditions
4. Children's freedom from work

Rights with regard to the entering of an employment relationship:

1. Right to protection against the obtaining of health information by the employer
2. Right to written information about working conditions

Rights during the employment relationship

1. Right to rest and reasonable working hours
2. Right to health and safety at work
3. Right to wage during illness
4. Right to pay during public holidays
5. Right to notice of overtime work
6. Right to take time of in lieu of wages or remuneration for overtime work
7. Right to holiday
8. Right to equal pay
9. Right to maternity and paternity leave
10. Right to paid absence due to the child's first day of illness
11. Right to absence due to special circumstances of the family
12. Right to labour marked pension partly paid by the employer
13. Right to freedom of speech
14. Right to protection of private life

Rights in relation to the termination of the employment relationship

1. Right to information and notice in case of large scale lay-offs
2. Right to financial compensation for non-compete clauses
3. Right to a mutual notice of termination of at least 1 month unless otherwise agreed upon or established by law

4. Right to a written dismissal
5. Right to a written explanation for the dismissal
6. Right to protection against dismissal due to mergers and acquisitions
7. Right to protection against and compensation for unreasonable and unlawful dismissal

Question: Why are employees falling outside the scope of special legislation and collective agreements not guarantied basic rights on the labour marked by way of a law of the minimum?

Article 4 compare with article 5:

The right to a fair remuneration without discrimination on account of union membership

The following comments and questions deal with the situation on the public labour marked. Since 1997, "New Salary" has been implemented in the municipalities and regions of Denmark and lately within the central administration as well.

Previously, salary was almost exclusively based on seniority or length of service. With "New Salary", a larger part of local salaries today depends on other criteria as well. "New Salary" rests on collective agreements between the traditional union and the public employer. The criteria for allocation of "New Salary" vary in the different collective agreements. Common characteristics are, however, as follows:

1. The total salary for allocation is agreed upon every year between the public employer and the traditional union.
2. Every year local negotiations are held concerning the allocation of salary to individual employees. This applies to employees who are members of the traditional union and to employees who are not members.
3. The allocation of salary has to be followed by reasons.
4. The traditional union is obliged to negotiate the salary for non-members as well as members.

It is often a custom that public employees themselves propose that they should be awarded a certain allowance. Before pay negotiations, the public employer usually puts forward specific criteria for the allocation of allowances as well as deadlines for sending in proposals.

It is against the public principle of equality and objectivity for the public employer to attach importance to employee membership or non-membership of particular unions when allocating allowances.

In spite of that, members of independent unions experience that they don't have the same access to a fair remuneration as members of traditional unions. They experience that the traditional unions entering the collective agreements as well as their shop stewards - who have to negotiate the salary and allowances for all

employees - do attach importance to union membership when they allocate salary and allowances.[2]

Case-law of the European Court of Human Rights stipulates that a union and its members must be free to seek to persuade the employer to listen to what it has to say on behalf of its members.[3] It also follows that a union must be free to strive for the protection of its member's interests. Finally it follows that individual members of unions have a right, in order to protect their interests that their union should be heard.[4]

In Denmark, there is a right for salaried employees to demand negotiation of the allocation of salary through their own union.[5] Most public employees have the status of salaried employee and thus should have a right to negotiation of salary though their own union.

In real life, however, independent unions are not included in the negotiation of "New Salary". The collective agreements dealing with "New Salary" have established a negotiation system solely based on the traditional social partners.

The right to be represented by ones own union in the negotiation of fair remuneration is thus an illusion for a large number of employees being members of independent unions.

Question: Why are independent unions not allowed to negotiate "New Salary" on behalf of their members on the public labour marked?

According to the collective agreements governing "New Salary", the local allocation of salary and allowances has to be followed by reasons. According to Danish case-law, however, there is no obligation on the public employer to explain why an individual employee has not been awarded an allowance.[6] This means that it is difficult to access whether reasons like union membership that are not objective have been included in the decision-making on allowances.

According to collective agreements as well as the public principle of equality and objectivity, the shop stewards are also obliged to negotiate salary on behalf of non-members of the traditional union. Members of independent unions experience however, that they are excluded from information meetings about the allocation of allowances held by the shop steward of the traditional union.[7]

Public employers are under an obligation to secure that the individual employee gets information about criteria for the allocation of salary as well as relevant deadlines.[8] The reality, however, is that some public employers have not established the structures to secure that employees either though the shop

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[2] Institut for Menneskerettigheder, Diskrimination på grund af fagforeningsmedlemskab, Udredning nr. 7 (2009), page 25-31.
[3] Wilson, National Union of Journalists and others v. the United Kingdom, judgment of 2 July 2002, par. 44.
[4] Wilson, par. 42.
[5] Salaried Employees Act, article 10 par. 2.
[6] UfR 2005.2111 H.
[7] Udredning, page 29.
[8] UfR 2002. 1927 Ø.

stewards/unions or through their own personnel departments get such necessary information about pay and allowances.

The consequence is that members of independent unions experience a lack of information about criteria for the awarding of allowances and deadlines for the proposals. In such cases it is, however, extremely difficult to initiate legal proceedings against neither the traditional union nor the public employer.

The right to information from the traditional union can only be enforced in the industrial dispute system. A case against the union for breaching the duty to inform is therefore only to be initiated by the public employer. The reason is that the public employer is the other part of the collective agreement. And such case is very unlikely to be started.

In theory, it is possible for an individual employee to start a case against the public employer for breaching the duty to inform. In actual life, it is difficult for en individual employee to lift the burden of proof and to document that considerations of union membership were involved in a concrete negotiation between the public employer and the traditional union.

Question: Why does the public labour marked in Denmark not establish structures that guarantee the full information to all employees about salary, criteria for the allocation of allowances as well as about relevant deadlines?

Article 5

The right to organise and the freedom from discrimination on account of trade union membership

As documented in the Shadow Report by KRIFA from September 2009, members of independent unions in Denmark experience discrimination and/or harassment because of their trade union membership.[9] Reference is made to the report on discrimination on the basis of trade union membership published by the Danish Institute of Human Rights in August 2009.[10]

Danish law does contain a protection against trade union discrimination.[11] The protection, however, only applies when it comes to access to employment and dismissal. During the time of employment, the law offers no protection against discrimination on account of trade union membership.

On the public labour marked, the principle of equality and objectivity, however, does not allow the employer to discriminate or to give preferential treatment to individual employees based on their trade union membership. But elsewhere, the law does not prohibit discrimination during the time of employment.

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[9] European Social Charter, Comments from KRIFA on the 29th National Report on the implementation of the European Social Charter. Council of Europe 15/02/2010.
[10] Udredning nr. 7 (2009).
[11] The Act on Protection against Dismissal due to Association Membership.

There is a need for the strengthening of the legal right to organize, hereunder the freedom to freely choose a trade union. There is also a need to strengthen the legal protection against discrimination on the basis of trade union membership.

The public labour marked has the strongest legal protection against discrimination on the basis of trade union membership. In spite of that, the problems of experienced pressure and discrimination seem to be even more widespread on the public labour marked than on the private.

There is thus a need for a better enforcement of the law to secure a more effective and real life protection against pressure and discrimination on account of trade union membership. This is especially the case within the public labour marked.

Question: Why is the legal protection against discrimination on account of trade union membership so weak during the time of employment? And why is the law so weakly enforced on the public labour marked?

Article 6, paragraph 1

The right to joint consultation between employees and employers

The Danish collective bargaining system is based on a division of labour between the legislator and the social partners with the legislator traditionally intervening as little as possible in the regulation of pay and working conditions.

The Danish society is to a large extent organized through councils, boards and commissions. When councils and boards on the labour marked are established, it is always members from the traditional social partners who are appointed. Independent unions like Krifa do not have any access to such councils and boards. This means that the interests and points of view of the large groups of individuals who are organized outside the traditional unions are not taken into consideration.

Question: Why are independent unions and their members kept outside influence in the important tripartite discussions and cooperation between the social partners and the government?

Article 6, paragraph 2

The right to voluntary negotiations between employees and employers

The Danish labour marked has traditionally been characterized by having a high union density. Within later years there has been a development meaning a decrease of union density in the traditional unions and an increase of union density in the independent unions. Krifa has received many new members during the last couple of years and is today the fifth largest union in Denmark.

In 2008 the total union density was 69,0 % (in 2009 it was 67,9). Without the independent unions, the union density in 2008 was 63,5% (in 2009 it was 62,2 %). It is thus a myth that the union density in Denmark should be as high as 80 % as is often argued.[12]

In spite of that development, the organization of and the structures on the labour marked have not changed. The regulation of wages and working conditions are still based on the assumption that the union density in the traditional unions is very high.

There is no recognition of the fact that alternative and independent unions exist on the labour marked. Unorganized individuals and independent unions are kept out of the various labour markedt councils and boards. Only traditional social partners are officially regarded as parties on the labour marked. Alternative and independent unions are thus almost completely excluded from official influence.

Question: Why are the structures on the Danish labour marked still based on a situation that no longer exists (high union density and the sole existence of traditional unions)?

Article 6, paragraph 4

Right to collective action in cases of conflicts of interest

In Denmark, trade unions have a fundamental right to take industrial action against employers. The main rule is that industrial action and sympathy action can be called on employers who have not yet concluded collective agreements. If there is already a collective agreement between one of the traditional unions and the employer or an employer association, other unions will not initiate a strike.

However, according to practice by the Danish Labour Court, industrial action can be taken against an employer who has concluded a collective agreement with a union, if the union is an independent union like Krifa. In this situation, a traditional union taking industrial actions against an employer does not have to document a need for a new and different collective agreement, nor does the traditional union need to have own members working for the employer in question.

The so-called "peace-obligation" therefore does not apply when the party to the collective agreement is an independent union.

An industrial action is often very harmful for both the employer and the employees who have already voluntarily entered into a collective agreement.

The purpose of such industrial actions initiated by traditional unions towards

[12] FAOS, Jesper Due and Jørgen Steen Madsen, Endeløs – Fagbevægelsens nedtur fortsætter, 29th May 2009.

employers who are already party to collective agreements with for example Krifa seems unclear since both employees and the employer voluntarily have agreed upon the collective agreement already in place. It may be that the traditional unions want to secure their privileged status of unions having the right to enter collective agreements with employers or employer's association.

Question: Why is it legal for a traditional union to take industrial action against an employer who has already entered into a collective agreement with an independent union?