EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

19 June 2015

Case Document No. 6

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

RESPONSE OF THE FINNISH SOCIETY OF SOCIAL RIGHTS TO THE GOVERNMENT'S SUBMISSIONS

Registered at the Secretariat on 15 May 2015

Suomen sosiaalioikeudellinen seura ry.
- Socialrättsliga sällskapet i Finland r.f.

Council of Europe

F6/0/5 Strasbourg Cedex

France

Mr Henrik Kristensen

Debuty Head of the Department of the European Social Charter

Debuty Executive Secretary of the European Committee of Social Rights

ESC 41, LV/KOG

Collective complaint 106/2014 due to that Finnish legislation along the opinion of our Association violates the Article 24 in the European Social Charter

Registered at the Secretariat on 30 April 2014

Responses of our Association to the Government´s submissions

10 May 2015

Finnish Society of Social Rights

Finnish Society of Social Rights sends you respectably the attached response to the Government´s submissions.

The person taking care of this complaint in the Society is:

Mr Yrjö Mattila, chairman of the Society

Address: Koukkutie 4,

17200 Vääksy

Finland

E-mail: yrjo.mattila@kela.fi

Tel. +358407154166

I Admissibility

The submissions of the Government of the admissibility

1. In its submissions the Government of Finland has questioned the right of our Association to make complaints in social rights concerning our complaint No. 106/2014. The main grounds of the Government are the following:

2. The present complaint has been lodged by the Finnish Society of Social Rights (Suomen Sosiaalioikeudellinen Seura r.y. – Socialrättsliga Sällaskapet I Finland r.f. ("the applicant association")

3. In accordance with Article 2 § 1 of the Additional Protocol of 1995 providing for a System of Collective Complaints to the Social Charter, any Contracting State may declare that it recognizes the right of any other representative national non-governmental organization within its jurisdiction which has particular competence in the matters governed by the Charter to lodge it with the European Committee of Social Rights.

4. Finland has ratified the Additional Protocol providing for a System of Collective Complaints (Finnish Treaty Series 75-76/1998) on 17 July 1998 and made a declaration enabling national non-governmental organizations to submit collective complaints on 16 August 1998.

5. The Committee has in its admissibility (hyväksyttävyys) decision 14. May 2013 – concerning the applicant association´s complaint no. 88/2012 – assessed its "representativity" as required by Article 2 § 1 of the Protocol.

6. In that decision, having considered the applicant organization´s social purpose, competence, scope of activities, as well as the actual activities performed, the Committee found that the applicant association was representative within the meaning of Article 2 of the Protocol.

7. According to Articles 2 § 1 and 3 of the Additional Protocol, national non-government organizations may submit complaints only in respect of those matters in respect of which they have been recognized as having particular competence.

8. With regard to the recognition of particular competence of a non-governmental organization, your Committee has previously e.g. examined the statute of an organization and the detailed list of its various activities relating to the Articles of the Charter covered by the relevant complaint. (Complaint No. 30/2005, Marangopoulos Foundation for Human Rights (MFHR) v. Greece, decision on admissibility of 10 October, para. 15).

9. Nothing in the rules of the applicant association, nor anything in the list of previous activities found on the applicant association´s website (found at ssos.nettisivu.org) point to the applicant association´s particular competence in relation to the right to protection in cases of termination of employment protected under Article 24 of the Charter.

10. The Committee in its last admissibility decision in relation to the applicant organization (Finnish Society of Social Rights v. Finland, Complaint No. 88/2012, and decision on Admissibility, 14 May 2013) neglects to attach significance to the question of recognized and particular competence. Instead the Committee considered general competence in relation to social rights, in toto, to be sufficient when it stated that "the Association´s sphere of activity concerns in a general way the protection of social rights including social security rights. Consequently, the Committee finds that the Finnish Society of Social Rights has particular competence with the meaning of Article 3 of the Protocol as regards the instant complaint." (para.12).

11. Obviously, this has lead the applicant association to be of the erroneous opinion that the Committee has issued it with not more than a blank-cheque vis—a - vis the admissibility of its complaints, as is evident from the complaint file where the applicant association states that "in our previous complaint (Complaint 88/2012) the Committee noted that our association is admissible to make complaints to the Committee of Social Rights.

12. Such an idea is incorrect and rests on a, at best, questionable legal interpretation of Articles 2 § 1 and 3 of the Additional Protocol. This is because both of these provisions lay emphasis on the recognized particularity of expertise required from the representative national non-governmental organization.

13. According to the Explanatory Report to the Additional Protocol, (Explanatory Report to the 1995 Protocol) (para. 21), this recognized particularity of expertise in turn needs to be discerned in as similar manner as that of international non-governmental organizations.

14. Such an assessment then requires that that Committee needs to firstly be of the view that applicant non-governmental organizations are able to support their applications with detailed and accurate documentation, legal opinions, etc. in order to draw up complaint files that meet the basic requirements of reliability.

15. However, as is stated in the explanatory report in relation to international non-governmental organizations, this fact alone does not relieve the Committee "from the obligation to ascertain that the complaint actually falls within the field in which the NGO concerned has been recognized as being particularly competent."

16. As the present case concerns a significantly different question than the applicant association´s previous complaint 88/2012 which concerned Article 12 of the Charter, the Government observes that the Committee is obliged by the provisions of the Additional Protocol to undertake an ascertainment of the recognized particular competence of the applicant association on the basis of the information submitted to it.

17. In light of this, observation on the provisions and interpretation of the Additional Protocol, any general statement by the Committee to any organization providing for a blank-cheque vis-à-vis the admissibility of its complaints is legally impossible and against the objective purpose of the whole mechanism created by virtue of the Additional Protocol.

18. In this respect, the Government underlines that in the circumstances of the present case there are serious doubts of an even greater magnitude compared to the applicant association´s previous complaint (complaint no. 88/2012), as regards the so-called recognized particular competence of the applicant association in the specialized area of protection in cases, like the present one, concerning the determination of employment.

Comments of our Association to the Government´s submissions on admissibility

19. The name of our association is *Finnish Society of Social Rights (in Finnish and in Swedish: Suomen Sosiaalioikeudellinen Seura r.y. - Socialrättsliga Sällskapet i Finland r.f.)* and it is called as "association" in this complaint.

20. Our association is a bilingual society concentrating in all kinds of social rights. It is based in Helsinki, Capital of Finland, but the scope and members of the association cover the whole Finland as it is a national NGO.

21. The association is established and founded 16.3.1999. At the same year the Register of Associations of Finland has officially registered it to the Register of Associations. We include a fresh register document of the Register of Associations concerning our association and the persons who are entitled to represent and act on its behalf. (Add 1). Our association is active and expert in the area of all kind of social rights covered in the Charter (Revised). This expertise can be seen from the codes of our Association. (Add 2 unfortunately only in Finnish).

22. Along the codes of our Association the purposes of our Association are a) to promote juridical research of social questions, b) to develop social jurisprudence as social rights are a special area of legal science and c) promote co-operation between researchers, officials and NGO`s both in Finland and also internationally.

23. To reach the goals mentioned above our association organises lectures, seminars, congresses and education sessions, makes motions and proposals to officials and gives statements in social right legal motions and practices co-operation with colleagues abroad and operates and acts other ways similar to former activities in order to reach and achieve its the goals.

24. At the time our association was founded (1999) Finland had not ratified the Charter (Revised) so it was impossible to take to the codes a task to make complaints to the Committee of Social Rights.

25. In spite of that this task can be read from our rules indirectly "to promote juridical research of social questions". One way to promote social questions it is to clarify the compliance of legislation and practice in Finland with the in 2002 ratified Social Charter (Revised) by making complaints which the revised Charter made possible.

26. Also to raise complaints can be classified as operating "similar to former activities" along the codes of our Association. To raise complaints of the potential violations of the Charter (Revised)

promotes both juridical research of social questions, develops social jurisprudence as a special legal science and promotes co-operation between researches, officials and NGO`s both in Finland and internationally.

27. The Merits in 88/2014 have raised much interest in other NGO`s and also researches have taken contact to our Association after the Merits were allowed to publish to the public in February 2015. By making complaint in 106/2014 we are heading ahead on this path outlined by the code of our Association. By this way we are also doing co-operation internationally in social rights as said in our code.

28. As we have said in our complaint the Charter (Revised) has been ratified in Finland by the Parliamentary law and along our interpretation the Articles of the Charter have the power of law in Finland which also the courts and other officials should apply directly. Unfortunately this is not the case in Finland yet. The complaints made by our Association clarify how existing law should be implemented in Finland and by this ways our Association carries out its main goal: to promote social rights in Finland in accordance and spirit of the code.

29. Opposite to what the Government has noted, the code of our Association implicates our association´s representativeness *as national non-governmental organization which has particular competence in the matters governed by the Charter to lodge it with the European Committee of Social Rights".*

30. Also the qualification of members of our board show particular competence in all social rights, including labour relations. The board is full of experts in social rights as can be seen e.g. from the CV of the chairperson of the Association a Vice Judge, Lis.Jur and Doctor of Social Sciences, Senior Researcher (Social Insurance Institution) *Yrjö Mattila* (Add 3).

31. Mattila has during his 43 years at work has been 13 years as a full time trade union lawyer handling various labour law cases in general courts and Labour Court and written articles on labour law. The last one was in 2013 concerning EU flexibility rules in relation to collective dismissal protection in various countries. In 2014 Mattila has published a book "Income security" (Toimeentuloturva), which covered extensively Finnish social security system.

32. Also there are many other experts in our board like the vice-chairperson *Eila Sundman* who is a former leading social worker in the largest Central Hospital of Finland. Mrs Sundman has been active within Finnish social workers' union and by this way knows well Finnish labour law acting also as a patient ombudsman.

33. The other member of our board is Jur. doctor *Laura Kalliomaa-Puha.* She is an expert in informal carer´s social rights, which are very near social rights in labour relations. As a well-known expert Laura has been called as a professor of social law to Tampere University where she starts her work on August this year.

34. Other expert in our board is lawyer *Timo Mutalahti* who knows very well labour law and social rights in employment relations. Timo is a former trade union lawyer and is now starting as a HR director in A-Klinikka Foundation (over 800 employees). As a personnel director he has to know keenly labour law and social rights within it. Our secretary *Marjatta Kaurala* is an "Ombudsman for offenders' in Kriminaalihuollon tukisäätiö (Support Foundation for ex-convicts). She knows well the difficulties and in some cases even discrimination that ex-convicts meet in seeking work. The permanent advisor of the governing body, Vice Judge *Marjo Tervo* is a former trade union lawyer and another permanent advisor and association´s science expert Jur. doctor *Kalevi Ellilä* has been a municipal jurist implementing social rights in labour relations on employer´s side.

35. The membership of our association is open to all who are interested in social rights. A remarkable part of our members are lawyers or social scientists specialized in social rights. Still a specialization to social rights is not a must in our Association. An interest in social right matters is enough to membership regardless of the profession or education.

36. *To sum up*: A particular competence and expertise in labour relations, labour law and social rights exists within our Association. One part of our activities concern social rights in labour relations, which is the topic in this complaint 106/2014. The protection against illegal dismissals is one and quite essential part of social rights. The interest and activities of our Association include also these employment related social rights.

37. Our Association emphasizes that *the concept of social rights* should not be reduced to a so narrow space that only labour market partners would be entitled to make complaints of the Article 24 in the Charter (Revised). Our view is that the employment related social rights like protection against illegal dismissals are one and essential part of this concept and it should not be separated from other social rights covered in the Charter (Revised). We see that our association as a neutral institution has an opportunity to assess the social rights within labour relations without taking part from our position. Due to that we are the right organisation to make complaints also in dismissal protection matters.

38. If the right to make complaints in dismissal protection is denied from our Association we cannot see which other association in Finland could be more "recognized particularity of expertise" in these matters outside trade unions or employers' associations. Labour market players are not making complaints, because they have been involved in the preparations of Labour Law in tripartite committees/working groups- The preparation of Employment Contracts Act (55/2001) has also been carried out this way

39. As an conclusion: The admissibility of our Association is clear in this complaint 106/2014.

II Relation of the present complaint

The submission of the Government

31. The Government notes that according to Article 4 of the Additional Protocol providing for a System of Collective Complaints, a complaint must relate to a provision of the Revised Charter

accepted by the Contracting Party concerned and indicate in what respect the latter has not ensured the satisfactory application of this provision.

32. The Government observes that the applicant association alleges that the situation in Finland in respect to the right to protection in cases of termination of employment is not in conformity with Article 24 of the Charter.

33. In this respect, the Government notes that the claim of the applicant association fulfils the requirement set out in Article of the Additional Protocol.

Comments of our association to the submission of the Government

34. Our association agrees with the submission of the Government

Merits

III On the existence of an upper limit of 24 months´ salary as compensation for unlawful dismissal: the submission of the Government

The Government´s submission

35. The Government observes that the applicant association has incorrectly cited the 2012 conclusions of the Committee of Social Rights in relation to the question of the existence of an upper limit of 24 months´ salary as compensation for unlawful dismissal.

36. While the Committee does state that "any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed", the Committee does not find in its conclusion on Article 24 that the situation in Finland is not in conformity with that Article in relation to this question.

37. This is because while Employment Contracts Act (55/2001) expressly takes a stand on minimum and maximum limits to an employer´s liability under that Act, the Employment Contracts Act is not the only piece of domestic legislation that deals with this issue and that needs to be considered when assessing the existence or not of a claimed upper limit of compensation.

38. Along the Government submission this arrangement is again accepted by the Committee in its 2012 Conclusions. In this regard the relevant provisions are as follows:

39. If an employment contract has been terminated on discriminatory grounds, compensation under Section 11 of the Act on Equality between Women and Men (609/1986) may be ordered in addition to compensation under Chapter 12, Section 2 of the Employment Contracts Act, if gender has been the ground for the discrimination. The compensation has no ceiling but is subject to a minimum amount.

40. If an unlawful termination of an employment also fulfils the criteria of discrimination defined in the Non-Discrimination Act (21/2004), compensation may be imposed for the discrimination under Section 9 of the Act.

41. Any payment of compensation under both the Act on Equality between Women and Men and the Non-Discrimination Act does not prevent the injured party from claiming compensation for financial loss on the basis another Act. Thus compensation payable under both the Act on Equality between Women and Men and the Non-Discrimination Act may be ordered in addition to the compensation payable under Chapter 12, Section 2 of the Employment Contracts Act. The different types of compensation are intended to make up for the suffering caused by the indiscrimination. Ordering such compensation does not presume an intentional or negligent act or evidence of the amount of the immaterial damage.

42. If an unlawful termination of an employment relationship is found to fulfil the essential elements of a work discrimination offence under the Criminal Code, damages under Tort Liability Act may be imposed in criminal proceedings. According to the Tort Liability Act, damages may be ordered for both loss of income and suffering caused by the violation. The Act does not bind the ceiling of the damages to a maximum.

Comments of our Association:

43. We refer to the Constitution of Finland § 18 mom. 2: "*No one is allowed to dismiss from work without a reason based on law*". This constitutional rule should direct the legislation in Finland, but unfortunately the assessing of constitution is done only in political level and the general, local courts or even Labor Court do not refer to constitution in deciding dismissal cases.

44. The court cases concerning dismissals are quite general in Finland. The courts do not condemn the maximum of 24 months' salary, normally just a part of it. In many cases the compensations of the illegal dismissals are not proportionate to the losses and the compensations condemned are not sufficiently dissuasive for employers.

45. The maximum compensation in the law does not response to the whole losses of the victim contrary to the main principles of Tort liability. The real compensations vary between responding 6-12 months´ salaries due to that courts are reluctant to condemn the maxim, rather half of it and the major part of the damage stays mostly as the burden of the victim.

46. Due to that the compensation condemned is taxable the net sum which the victim may be less than half of the condemned sum depending on the tax per cent of the victim. Most often in the current employment situation the victim shall stay unemployed long time after dismissal receiving first income-related unemployment compensation from unemployment fund for 500 days and after that labor market subsidy. If there is not a clear insult happened in connection of dismissal a remarkable part of the condemned salary is paid to the unemployment fund as s substitution of unemployment allowance benefit paid after dismissal to the victim. The dismissed person receives only the rest of which is taken also tax. Normally this net sum that the victim receives is in maximum half of the condemned sum.

47. Most employees know that they will not get the whole reimbursement to their own use due to that unemployment fund and taxation take a big part of the reimbursement. Due to that they may not be eager to complain even in clear illegal dismissals if they are not assisted from trade union. The

taxation is not carried out only in those cases that the dismissal has specially insulted the victim. In that case the lost salary is condemned separately from the insult remuneration and the latter is tax-free income. In practice this kind condemnations are however quite rare and the total condemnation cannot override 24 months´ salary.

48. The 24 month maximum clearly constrains the possibility to condemn full compensation of the illegal dismissal and the rest of damage stays as the burden of the victim due to that. There is no real reason for this constraint which deviates from the principle of full liability of damages which is otherwise accepted within the indemnity justice. It is said that causality between the illegal dismissal and the damage would break off after two years, but in the employment circumstances to-day this claim is not true. Especially in the case that an aged employee is dismissed illegally, the result of this incident may follow the victim much longer than two years, in some cases all the rest of the life of the victim. Now in most cases the process of illegal dismissals is run first in the low court (käräjäoikeus) and then in Appeal Court (hovioikeus). It may take two years before the decision from Appeal Court is received and during that time the victim receives income-related unemployment allowance from the unemployment fund. After the final decision the victim receives the deducted (payment to unemployment fund and tax) compensation, but to many victims the biggest damage from the illegal dismissal starts when the victim begins to receive labour market subsidy. The 24 months´ break-up in causality after two years is not true, because most dismissed unemployed seek desperately new work, but cannot find it.

49. The real losses for the illegally dismissed employee starts when the 500 days income-related unemployment allowance have been passed and the employee transfers live in the dependence of Labor Market Subsidy. Our association refers to the Merits 88/2014 and note that the amount of labour market subsidy does not respond the obligations of art. 12.1. in the Charter (Revised) as Committee has noted in Merits 88/2014. The solution is that the employer should compensate also the income gap between former salary and the amount of labour market subsidy. The 24 months´ maximum in Employment Contracts Law is however an obstacle in this and the burden of the consequences of the illegal dismissal transfers from the employer to the victim against the principles of the full reimbursement of the damage which principle is in force in other cases.

50. Normally when somebody damages or affects harm to other either deliberately or with negligence he/she has to pay a full compensation for the damage. So in lieu with that when a dismissed employee has to transfer from income-related unemployment protection to the dependence of labor market subsidy also the difference of income level has to be compensated as a follow-up of the illegal dismissal. Labor market subsidy does not contribute the person´s future pension so that the consequences of the illegal dismissal may extend to the pension age of the dismissed person. Unfortunately this is not the case in Finland. The 24 months´ maximum compensation prevents to set the employer to full responsibility of the illegal dismissal.

51. Even if the employee would find a new job but with a lower salary it would be proper that the employer would cover the income gap between the old and new salary, because the change is a consequence of the illegal dismissal.

52. In the current situation in Finland even the full 24 month´s compensation is very rare. The real compensation level in illegal dismissals varies from 3 till 12 months´ salary though in many cases during the process it is obvious that the person will be a long time unemployed even aftyer the court decision. The 24 months´ maximum in the law has the consequence that the courts are careful in setting compensations. Only if the court finds out that the employer has insulted deeply the employee in dismissing illegally is condemned a tax-free immaterial damage besides lost income.

53. Our association agrees with the opinion of the Committee. In the conclusions on Finland´s the Committee has noted that: "*In Finland the compensation for unlawful dismissal is not proportionate to the loss suffered by the victim and it is not sufficiently dissuasive for employers in Finnish system*". This conclusion is especially apposite in the cases when an elderly employee has been dismissed illegally. Most often the 6-12 salary (of which is made considerable deductions) is just a part of the vast damages that the illegally dismissed has to suffer. The aged dismissed person (45-50 years) has special difficulties to find a new job after illegal dismissal and the consequences of the dismissal may affect for many years even decades in some cases.

54. E.g.: If a female shop-seller´s aged 50 years employment contract has been illegally terminated she may receive a compensation 15 000 euros responding her 10 months' salary (if her monthly salary has been 1 500 euros.) Of that compensation she has to pay 2 500 – 3000 Euros as a tax and if she has been unemployed till the decision and received e.g. 9000 Euros as unemployment allowance 75 per cent of the compensation (may be 6 500 Euros) is condemned straight to the unemployment Fund as a substitution of the allowance she has received. The sum she finally gets as a compensation "to hand" is perhaps 6000 Euros at maximum. With this money she has to struggle when entitlement to income-related allowance stops after 500 days and she transfers to live in the dependence of labour market subsidy (see Merits 88/2014). As said before only in some cases the courts condemn remedy for immaterial damage. Also the courts may decide that the substitution to the Unemployment Fund of the allowance paid is less than 75 per cent of the allowance but these cases are rare.

55. The use of the dismissal process to the illegally dismissed shop employee was quite small. She would have received 9000 Euros as unemployment compensation from unemployment fund without any process. There is always an option that the employee would have lost her dismissal case in the court. In that situation the court would have obliged the female aged shop-seller to pay the process costs of the employer. These costs could reach up over 10 000 Euros depending how much time the advocate of the employer has used to the case. This possibility makes employees cautious to complain if they do not get legal aid from their trade union.

56. The Government in its submission demanded that our Association should bring up court cases. Due to that we present some cases which support our complaint. The cases are from the Supreme Court of Finland (KKO), from regional Appellation Courts (Helsingin, Itä-Suomen, Rovaniemen, Vaasan, Turun HO) and from special labour law court, Labour Court (TT):

> KKO 2014:98 a home electricity machine salesman had been dismissed due to the weak achievements in his job. The sales per cent of the salesman had been low. The court noted that the dismissal on this ground was illegal. The compensation condemned by the responded 8 months´ salary of the salesman.

KKO 2015:7 A post officer had been dismissed on economic and productive reasons due to the termination of the employer´s post handling contract with a client. To the dismissed officer was offered a new job with lower salary and the officer turned down the offer. In the court the dismissal was noted illegal and the employer was obliged to pay a compensation which responded 10 months' salary of the officer. The court divided the condemned sum so that the sum responding 5 months' salary was regarded as a compensation of the lost salary after dismissal. From this part the sum which responded 75 % of the allowance during 5 month unemployment after dismissal went straight to the unemployment fund. The other half was condemned as immaterial damage due to the insult in connection with dismissal. This part the officer received as a whole without unemployment allowance or tax reducing.

Helsingin HO 14.11.2014, T. 2181 This case was a dismissal of two employees with economic and productive reasons. The dismissals were noted illegal in the court. The appellation court condemned a compensation for the dismissed two employees responding their 5 months´ salary.

Rovaniemen HO 4.2.2015 T. 60: A firm dismissed on old part-timer and hired new ones to his post. The court noted that the dismissal was illegal. Compensation to the dismissed was responding 5 months' salary.

Itä-Suomen HO 20.3.2015 T. 182: A employment contract of the carpenter had been terminated on economic and productive reasons after he had taken contact to trade union. The court noted that his work had not diminished substantially and the dismissal on collective reasons was illegal. As a compensation for illegal dismissal the appellation court condemned a compensation responding the carpenter´s 6 month salary. The carpenter had been unemployed 1,5 years during the process (lower court-appellation court) and the carpeter´s unemployment still went on when the appellation court gave its decision.

Helsingin HO 14.11.2014 T. No 2181: In this case there was a termination of employment contract of two employees with economic and productive reasons. In the appellation court the dismissals were noted illegal due to that the employer had not heard the employees of the reasons of the dismissal before the contracts were terminated. The other reason was that the employer could not bring proof that he would not have taken new employees to the company for the same kind of work before and after dismissals as was the work of the dismissed employees. Both two employees were on sick leave during the dismissal. So the dismissal was noted illegal, but the claim of the employees that they were discriminated, was discarded. The sick leave and unemployment had gone on during the process with one of the dismissed while the other employee had found a new job. Still compensation of the illegal dismissal for both of the employees responded their 5 months´ salary.

Helsingin HO 25.11.2014 T. no 2262: A secretary had been dismissed with economic and productive reasons. The appellation court noted that there were neither economic nor productive nor individual reasons for the dismissal. The dismissal was noted illegal and due to that the appellation court condemned a compensation responding 5 months' salary of the secretary.

Helsingin HO 5.3.2015 T. 313: An employee had been late at work and used Internet and phone for own use. He was dismissed for those reasons and the lay-off was noted illegal in the court which condemned a compensation responding 3 months' salary.

Vaasan HO 2.9.2014 T 650: A marketing salesman was dismissed and the dismissal was noted illegal. The salesman had worked over 30 years in the firm which dismissed him and the termination of the salesman´s employment contract the salesman had been unemployed over 3 years. The unemployment was going on while the appellation court gave its decision. As a compensation of the illegal dismissal the appellation court condemned a sum which responded 8 months´ salary of the former salesman.

Vaasan HO 10.7.2014 T. 571: An employee had been dismissed due to the improper messages he had sent to his foreman. The court did not find this to be a true and heavy reason to terminate the employment contract of the employee. The appellation court noted the dismissal illegal and condemned a compensation responding 7 months´ salary of the employee.

Itä-Suomen HO 6.10.2014 T. 694: An employment contract of a salesman had been dismissed on economical and productive grounds. The appellation court noted the dismissal to be illegal and condemned a compensation responding 12 months´ salary of the salesman.

Rovaniemen HO 26.9.2014 T. No 451: A temporary employment contract of a cook who had been employed in the Catering enterprise had been terminated due to the claimed competitive act. The appellation court found out that there were not enough grounds to the termination of the temporary employment contract. Due to that the court condemned a compensation responding 3 months' salary of the cook.

Rovaniemen HO 4.2.2015 T. No 60: A decoration firm hired new employees and dismissed an old part-timer. The dismissal was noted to be without legal grounds by the court. The compensation condemned by the court responded 5 months' salary though the employee had demanded a sum responding 24 months' salary.

TT 2011-144: A firm which produced decor elements to ships dismissed a salesman with economical and productive reasons. The Labour Court noted the dismissal illegal and condemned a compensation responding 7 months' salary of the salesman.

TT 2011-86: A firm had dismissed a female clerical employee on economical and productive reasons. She had served 20 years the firm that dismissed her. After the dismissal she had not found s new job. The Labour Court found the dismissal to be illegal and the compensation which was condemned responded 11 months' salary of the former clerical employee.

As is seen from court decisions above, the normal compensation which the courts (both Supreme, Appellation and Labour Courts) condemn of illegal dismissals varies 3 – 12 month salary, the medium responding 7-8 months´ salary of the dismissed employee. Much is not left "to hand" to the employee when is taken account taxes and the part which is condemned straight to the Unemployment Fund if the employee is unemployed after dismissal and receives allowances for that. Very rarely is condemned tax-free immaterial condemnation.

57. The reason to this sad result to the illegally dismissed employee is the provision in Employment Contracts Act (55/2001) (Työsopimuslaki, http://www.edilex.fi/lainsaadanto/20010055) Section 12 paragraph 2 and 3 in which is ruled that if the compensation condemned on illegal dismissal is a compensation of lost salary after dismissal and the dismissed employee has received unemployment allowance since then, the condemned compensation has to be diminished 75 per cent of the income-related unemployment compensation paid after the dismissal and 80 per cent of paid basic unemployment allowance or labour market subsidy.

58. The court can decide of the smaller deduction or leave it out completely if it is reasonable considering the amount of the compensation, economic or social conditions of the employee or the insult the employee has faced. Our Association notes that the court decisions were these provisions are applied are difficult to find. We note that the provisions are rarely used and do not protect employees effectively.

59. In normal cases a big part of the compensation is paid to the Unemployment Fund or to Social Insurance Institution (Kela) if the dismissed person has received labour market subsidy after dismissal. In some cases the part which goes to the employee "at hand" may be nothing and that the situations where the behaviour of the employer is seen so hurting (insulting) that there is

condemned an immaterial remedy (tax-free). The threshold to these decisions seems to be on a really high level in Finnish juridical praxis:

> Itä-Suomen HO 2.10.2014 T. No 694: A sales and marketing employee had been dismissed with a ground " lack of trust". The appellation court did not find this a true and heavy reason for the dismissal. Nor was there economic or productive grounds to the dismissal. After the employment had terminated the former sales and marketing employee had been unemployed 2 years receiving unemployment benefit from the Unemployment Fund. The appellation court noted the dismissal illegal and condemned as a compensation which responded 12 months' salary of the former salesman.
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> However due to that the salesman had received unemployment allowance during his unemployment the whole compensation sum was decided by the court to be paid wholly to the Unemployment Fund. The appellation court did not condemn any immaterial remedy due to that the Court did not regard the insult from the dismissal to the employee to be serious enough to the employee.
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> So the result of the whole process was that the illegally dismissed employee got the same unemployment allowance that he would have received without complaining. If he had lost the case, he would have been obliged to pay the process costs of the employer (may be 10 000 euros).
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> Turun hovioikeus 13.10. 2014 T. No 1100 : A haulage company had laid-off an employee claiming that the employee had violated the work times in the firm. In the court the employee proved that the exceptional working times he had obeyed had been agreed separately between him and his foreman.
>
> The appellation court noted the dismissal to be illegal and condemned a a compensation responding 7 months' salary. Still thoug there was full proof in the court that the dismissed driver had not violated working times and there was a separate contract between him and foreman the appellation court did not noted the conduct of the employer to had been had not been so hurting (insulting) towards the employee that there would be reason enough to condemn a separate immaterial remedy. So also in this case part of the compensation was substituted to the Unemployment Fund and the driver got only the rest – taxes.

Our Association points out that almost all the court cases we have described here are from the years 2014 – 2015. They bring out clearly the juridical praxis currently applied in Finland.

60. Due to the legislation which gives very little remedy to the employee in illegal dismissals many employees do not take their case to the court, though they suspect that they have been laid-off illegally. This encourages the employers to dismiss more loosely because they suspect that there are no consequences even if the dismissal is illegal. This concerns especially dismissals on economic and productive reasons in which dismissals "en masse" are everyday life in Finland. Hundreds of employees are laid-off daily with the grounds like "to save costs" or "increase productivity" in undertakings which show huge profits in their assets. The Government of Finland supports enterprises in these operations if the lay-offs bring more profit to shareholders. We come back to those problems in our responses to the Complaint 107/2014.

61. If the employee has taken his/her case to the court and loses it may the consequenses of this "courage" be devastating to his/her personal economy. In discarding the complaint the courts normally oblige the employee to pay all the employer´s process costs without regarding the economic situation of the often unemployed dismissed employee. The amount of process costs may rise to big sums if the process has been first on low court (käräjäoikeus) and then by appeal in the apppeal court (hovioikeus) because normally in the appeal court the case may "start again" and the witnesses may have to hear a second time. Of this problem of process costs the following example:

> Helsingin hovioikeus 23.4.2014 T. No 904: The employer, a big Finnish airline company Finnair Oyj, had had in service a female check-in official who had been on sick-leave many times. Ultimately the company dismissed her claiming as ground to dismissal that the working capacity of the official had weakened essentially and permanently. In the time of dismissal the official had served 16 years Finnair Oyj and she regarded the grounds for dismissal not strong enough.
>
> The official complained her dismissal in the court and required a compensation responding 18 months' salary for the illegal dismissal. After the case had been handled in the low court (käräjäoikeus) court and after appellation in the appellation court (hovioikeus) the decision was that the dismissal due weakened working capacity was legal and the officials complaint was discarded. However this was not enough to the official whose health had weakened. The obliged the official to pay in total 18 000 Euros to Finnair Oyj as process costs. Of this sum 13 000 Euros were the costs of Finnair in low court and the rest 5000 euros costs in the appellation court.
>
> We don´t know how this official could go on her living after this kind of losses and obligations.

62. The weak position of illegally dismissed employees affects variously to employees in different ages. The most serious consequences of the illegal dismissals meet aged employees whose possibilities to find new job after illegal dismissal are almost non-existent. If the person is in the age of 45 or older the employers are not interested to hire them and the unemployment is permanent to many of them. The unemployment rate in Finland is over 10 per cent and in many big cities (e.g. Lahti, Jyväskylä, Pori) over 20 per cent due to that factory work has diminished sharply. So to many illegally dismissed aged employees have to live many years in the dependence of labour market subsidy, which is unreachable to decent life (see Merits 88/2014) and many of them has to fetch their food from bread queue which become longer and longer as the poverty increases in Finland. Currently there are 900 000 citizens in Finland who live in poverty along the official statistics. The Government of Finland is not willing to raise the basic benefits so that they would facilitate a decent life but instead receives EU food assistance so that there is food to be delivered to people bread queue. (See more on this in the response of our Association in Complaint 108/2014) .

63. Referring the descriptions above we have the opinion that we have shown proof enough to support the complaint that a maximum of 24 months in compensations in illegal dismissals is not in conformity with the art. 24 on the Charter (Revised).

Tort Liability Act, Non-Discrimination Act and the Act on Equality between Women and Men, Submission of the Government

Submission of the Government

64. The Government of Finland has noted in the submission that the victim may also seek redress under other legislation than labour such as *the Non-Discrimination Act, the Act on Equality Between Women and Men or the Tort Liability Act* in the case of illegal dismissal.

Comments of our Association:

65. The possibility to demand compensation of unlawful dismissal along Tort Liability Act (Vahingonkorvauslaki 31.5.1974/412 http://www.edilex.fi/lainsaadanto/19740412.pdf) is impossible because there is the special provision in the Employment Contracts Act (55/2001)

(Työsopimuslaki, http://www.edilex.fi/lainsaadanto/20010055) in Section 12 § 1 mom. 2 and § 2 mom. 1. In that provision there is ruled uniquely and with no exceptions that the compensation in illegal dismissal cases is a remedy responding the victim`s salary between 3 – 24 months.

66. This provision means that if the employer has dismissed the employee illegally breaking the rules of Employment Contracts Act Labour Contract Law, the compensation is counted along the rules of Employment Contracts Act Labour Contract Law and Tort Liability Act is not applied.

67. Along the Employment Contracts Act (55/2001) chapter 12 § 1 mom. 1 the principles of Tort Liability Act (Vahingonkorvauslaki) can be applied if the employer does do some damage to the employee deliberately or carelessly. This provision concerns other harm than illegal dismissals. Due to that the employees do not have an option to choose between Tort Liability Act and Employment Contracts Act (55/2001) in requesting remedy from unlawful dismissals.

68. Those other acts mentioned in the Government's submission *Non-Discrimination Act* (Yhdenvertaisuuslaki 20.1.2004/21) and the *Act on Equality between Women and Men* (Laki naisten ja miesten tasa-arvosta 8.8.1986/609) do have their own compensation provisions and these laws may be applied in connection with illegal dismissal if in dismissal is question on discrimination or violation of equality. Our Association however emphasizes that in these situations remedies are fixed together with the compensations along Employment Contracts Act (55/2001) and the result normally does not exceed the 24 months´ salary maximum.

69. If these two laws concern the situation of illegal dismissal (case that remedy would be requested separately along two laws (e.g. Employment Contracts Act (55/2001 e.g. the dismissal is discriminative or the dismissal violates the equality between men and women) the remedies may be assessed separately but in the final decision both remedies are fixed together.

70. Along the Non-Discrimination Act (http://www.edilex.fi/lainsaadanto/20040021) 9 § those who are guilty to have broken the Non-Discrimination Act (e.g. the employer has discriminated somebody in hiring work force or discriminated somebody in the connection of dismissal) may be be condemned to a fine and in addition the employer shall be condemned to pay a remedy to the discriminated person. The amount of the remedy is assessed along the severity of the violation of the law but there exists a maximum of 15 000 euros.

71. Employment Contracts Act (55/2001) (Työsopimuslaki, http://www.edilex.fi/lainsaadanto/20010055) Section 12 § 2 mom. (last sentence) rules that in deciding the compensation on illegal dismissal the court has to take account the remedy condemned from the same act along the Non-Discrimination Act (9 §).

72. In practice due to the provision above both remedies are fixed together and the maximum of 24 month will never be exceeded in spite of two separate laws applied in the case illegal dismissal.

73. In the Act on Equality between Women and Men (http://www.edilex.fi/lainsaadanto/19860609). 11 § the person who has violated the equality between men and women has to pay a remedy to the injured person. The amount of the remedy is fixed in the law as a sum between 3 240 – 16 210 euros along the seriousness of the violation.

74. This violation of equality between Women and Men can take place in connection with illegal dismissal, but in practice the courts take account both remedies in the final decision. As far as we know the final compensation has never exceeded the 24 months´ salary (See praxis underneath) so that the 24 months´ ceiling pointed out by the Committee in its former conclusions is the real ceiling in all dismissal cases.

75. As a proof of what is said above our association refers to the cases given by the highest court in Finland, the Supreme Court (KKO). The cases we refer are KKO: 2010:74, 2010:93, 2013:10, 2013:11 and 2014:47. In addition to those decisions there also decisions from appellation courts and from these decisions we refer to the following decisions: Itä-Suomen HO (Eastern Finland Appellation Court) 4.7.2014 R 14/20/20, Helsingin HO (Helsinki Appellation Court) 15.4.2015 T 15/11/116432. These decisions show how difficult it is for the complainant to proceed successfully equality or discrimination cases, because the threshold and obligation to bring proof is set very high to the complainant in Finland. Due to that the "possibility to demand remedy along other laws than Employment Contracts Act", much emphasized in the Government´s submission, can be regarded more theoretical than practical in the opinion of our association.

76. In the cases mentioned above the charges of discrimination are either discarded or if the complaint has been accepted in the court the remedy of the violation of Non-Discrimination Act is a formal, very small sum of money even compared to the compensations of illegal dismissal along Employment Contracts Act. The fines condemned to those who have been guilty to discrimination are also very low which reflects the attitude of Finnish courts towards this kind of violations. The policy is the same as in illegal dismissal: something formal but not real punishments or remedies. The victim has to stay always empty handed because of the attitudes of Finnish courts. The victims do not get a real and concrete remedy for the offenses they have met, just some small "pocket-money". Our Association has not found any court case where the compensation of illegal dismissals would be even near 24 months´ salary even if Employment Contracts Act and Act on Equality between Women and Men or Non-Discrimination Act has been applied in the same case.

> KKO 2010:74 concerned discrimination of a female priest. The discrimination was noted in the court, but a penalty to the discriminator was a very small fine. The injured female priest did not get any remedy though the violation of Act on Equality between Women and Men was clearly noted in the court process.
>
> KKO 2010:93 concerned equality between Men and Women in the amount of salaries in the same work. The Supreme Court noted that the employer has to pay equal payments of the same work to all employees regardless of their gender but still no compensation was condemned to those female employees who had been discriminated.
>
> In the cases KKO 2013:10 and 2013:11 the Supreme Court decided that no discrimination had taken place. Those two cases show how high is the threshold to the complainant to bring proof of the alleged discrimination. The complaint is discarded right away if the proof brought by the complainant is not regarded to be full enough.
>
> In the case KKO 2014:47 there was a complaint concerning discrimination due to the age. The complaint was discarded in the court, because there was noted that the employer had had an objectively grounded reason to discriminate the aged employee.

Eastern Finland appellation Court (HO) 4.7.2014: A representative of the town was condemned to 20 day fines due to the discrimination of an employee. This employee had made complaints of the working conditions in the elderly care. The representative of the town as an employer had announced that the complainant will not be employed any more in that elderly care unit. The court noted that a discrimination taken place and condemned the small 20 day fine to the representative of employer without any remedy to the victim.

Helsingin hovioikeus (HO) 15.4.2015; T 15/116432; the manager of the firm had dismissed a female employee who had returned from maternity leave. The dismissed complained and alleged the manager of discrimination. The appeal court discarded the complaint of the female employee and released the manager from the discrimination charge. Still the low court had noted that the manager had been guilty to discrimination and condemned the manager to pay 1 500 euros as a remedy of suffering to the victim due to discrimination.

77. In addition to the above said our association notes that the court cases concerning violation of the equality between genders seem most often to appear in those situations when personnel are hired and there exists a competition between applicants. In the following we present examples of application of law in these situations:

Supreme Court (KKO) 1996: 140, Supreme Court (KKO) 1996:141 and Supreme Court (KKO) 2005:24:

In all these three cases women applicants had raised s complaint with a reason that a man had been hired before them. In the mind of the complainants they as applicants were more experienced and competent to the job than the men elected.

In all three cases the women based their complaints to the Act on Equality between Women. The result was that the complaints were discarded totally in all three cases and the complaining women did not get any remedy. The Supreme Court noted that the employers had had acceptable reasons to hire men before women.

Supreme Court (KKO 2009:78). In this case there were representatives of both genders complained of hiring. All those who complained of the decision of hiring based their complaint to the Act on Equality between Women and Men. The result, again, was that all complaints were discarded. There was not proof enough in the court of the violation of equity.

78. All the cases described above support our view that the Act on Equality between Women and Non-Discrimination Act has not much relevance in practice in Finland. In Finnish courts it is very difficult to reach a positive decision in the equity or discrimination complaints. Concerning our complaint of 24 months´ maximum in illegal dismissals these other laws, emphasized heavily by the Government in the submission, have no impact.

79. Our association admits that the remedies based on Non-Discrimination Act or the Act on Equality Between Women and Men can be condemned besides the remedy along Employment Contracts Act in illegal dismissal, but it does not change anything concerning our complaint. The remedies are fixed together, remedies from other laws are very low and still the 24 months´ maximum stays. Tort Liability Act is not applicable besides Employment Contracts Act in illegal dismissal cases.

80. In the opinion of our association there exists a violation of article 24 of the Charter (Revised) due to the existence of 24 months´ maximum of remedies in the Employment Contracts Act (55/2001) in spite of the other laws described above. The compensation maximum prevents to condemn the damage to the victim of illegal dismissal and it is not sufficiently dissuasive for employers.

On the reinstatement of employees

Submission of the Government

81. The Government concedes in the submission that the applicant association is correct in stating that the Employment Contracts Act does not provide for reinstatement of employees.

82. The Government, however, disagrees with both the applicant association as well as the 2012 Conclusion of the Committee of Social Rights that such a situation constitutes a violation of Article 24 of the Charter.

83. While the old Employment Contracts Act did contain a provision on so-called alternative compensation applicable in reinstatement cases, it never worked in practice.

84. No reinstatements were made under the provisions, because of the special nature of employment relationships.

85. If an employer considers that no prerequisites exist for continuing an employment relationship and therefore decides to terminate it, no such prerequisites usually exist after legal proceedings, either.

86. An agreement about reinstatements is, of course, possible. In such cases the parties agree about the procedure and conditions of reinstatement.

87. The intention has been to facilitate the re-employment of employees. The change security model based on the Employment Contracts Act was introduced in order to make transfers from one work to another as flexible as possible in connection with dismissals for financial or productive – related reasons.

88. Thus, the purpose of the change security measures connected with dismissals for financial or production-related reasons is to speed up and facilitate the re-employment of the dismissed employees.

89. The model includes paid leave for dismissed employees for searching new jobs, intensive provision of information by the employer, the preparation of an action plan jointly with the employees for searching new jobs, intensive provision of information by the employer, the preparation of action plan jointly with the employees to promote employment, and an employment plan prepared by the relevant employment and economic development office.

90. Other change security services provided by the employment and economy administration include information and guidance meetings and special groups for new job seekers, web-based job search services, personal job search services, labor market training and specific projects in the context of mass dismissals.

91. Chapter 6, Section 6 of the Employment Contracts Act stipulates on the re-employment of dismissed employees. The said section stipulates that if an employee is given notice for financial or production-related reasons and the employer needs employees within nine months of termination of

the employment relationship for the same or similar work as the dismissed employee had been performing, the employer must offer work to this former employee if the employee continues to seek work via an employment and economic office.

92. The obligation of the employer to offer work safeguards the position of dismissed employees in situations where the former employer needs employees again. The employment relationship concluded on the basis of the re-employment obligation is a new relationship and thus does not amount to a reinstatement of the employee.

93. Finally, the unemployment security scheme based on collective funding, safeguards the financial position of dismissed and unemployed employees. The scheme replaces the severance pay scheme applied by some other states.

Comments of our Association:

94. The submissions of the Government do not change the fact that the lack of reinstatement in our legislation forms a remarkable shortcoming in Finnish labor law system. Our association has the opinion that this shortage forms a violation of art. 24 in the Charter (Revised).

95. A compensation responding some months´ salary as a consequence of illegal dismissal is not enough to the dismissed employees especially in the current employment situation in Finland. Currently there are over 500 000 unemployed people in Finland. Of those people 100 000 or even more have been unemployed at least one year. When the unemployment time prolongs there happens a transfer from income related unemployment to the dependence of labour market subsidy to many unemployed. The transfer means a drastic drop in income . As the Committee of Social Rights has noted (Merits 88/2014) the level of labour market subsidy is so low that it does not gurantee a decent life to the unemployed. Due to that a remedy in money is not at all enough for those illegally dismissed. A legal basement for reinstatement would be needed urgently.

96. If those employees who have been illegally dismissed would have a chance to reinstatement they could be pleased even without any monetary compensation of the dismissal. In the current situation a permanent job is always much more valuable than any compensation in cash. Especially if the illegally dismissed employee is over 45 years old who has much difficulties to find a new job, the possibility to reinstatement would be “more valuable than gold”. A reinstatement would also be the best option to the most of employers as it can be an option to monetary compensations. To reinstate the employee is normally much cheaper solution to the employer than pay compensations.

97. The old Employment Contracts Act did not work because the employers were reluctant to reinstate. The old law did not oblige the employer to take the dismissed employee back, it was just one option which was not used. If the legislation had been more compelling the reinstatements would have taken place “en masse” during the old law.

98. The change security model based on the Employment Contracts Act does not guarantee a new job to the dismissed. The legislation just facilitates new job seeking during the notice time and none of those “tools” described in the Government´s submission brings a new job to the illegally

dismissed. Besides: Dismissals based on individual reasons are not in the sphere of change security model, only collectively based dismissals are included in change security.

99. In the Government´s submission is said that "the system´s aim is the transfers from one work to another as flexible as possible in connection with dismissals for financial or productive – related reasons". Our association can agree with that aim but reality has changed. The transfer from one work to another is currently difficult due to lack of new jobs. Change security is a good system if there are jobs elsewhere but if not, the system does not help the dismissed.

100. In the Government´s submission is referred to the chapter 6, Section 6 in the Employment Contracts Act which stipulates the re-employment of dismissed employees in 9 months after employment termination. Our association notes that the system of re-employment does not substitute reinstatement and besides the provision does not cover illegal dismissals. Only if the employment contract has been terminated on financial or production-related reasons re-employment is in force and since the beginning of 2015 the municipalities and no-profit associations have had deviations from re-employment.

101. In the Government´s submission is said that the unemployment security scheme based on collective funding, safeguards the financial position of dismissed and unemployed employees and the scheme replaces the severance pay scheme applied by some other states. Our association disagrees with this argument since the unemployment security scheme is not a safeguard due to its shortages. The income-related unemployment security lasts only 500 days (400 days if the work history is under 3 years). Besides, now there is going on a lively discussion amongst politicians and employers that the 500 days should be shortened to 250 days in order to "spur" more the unemployed to find a new job. Our association has the opinion that this kind of change would be a serious violation of the Art. 12.1 and 12.3. in the Charter (Revised).

102. Our association views that severance pay is needed urgently to facilitate the situation of those employees who are laid-off "en masse" in Finland of to-day. Severance pay would direct the planning of employers to search other targets to savings than throwing own employees to the street "en masse" as is going on now in Finland. Severance pay, if it existed in Finland, would facilitate the situation of the dismissed, but the best way to promote the situation of the dismissed in a crucial way would be a compelling reinstatement if the court has found the dismissal as illegal.

103. Our association reminds that in Merits 88/2012 the Committee of Social Rights stated the level of labor market subsidy to form a violation of the art. 13.1 in the Charter (Revised). After the publication of the Merits nothing has happened in Finland and new cuts to social security are to be waited.

104. In the opinion of our association there exists a violation of article 24 of the Charter (Revised) because Finland has not applied a system of re-instatement system within labour legislation.

Cordially and with high respect

Suomen sosiaalioikeudellinen seura ry.

- Socialrättsliga sällskapet i Finland r.f.

Finnish Society of Social Rights

http://ssos.nettisivu.org/

Helsinki 10.5.2015

Yrjö Mattila — Chairman

Marjatta Kaurala — Secretary

Adress: Koukkutie 4,

17200 Vääksy, Finland

E-mail: yrjo.mattila@kela.fi, Tel. +358407154166

Add 1) a Document of the Register of Associations

Add 2) Code of our Association

Add 3) CV of Chairman *Yrjö Mattila*

All court cases referred in this response are to be found (in Finnish) from websites www.Finlex.fi or www.edilex.fi and especially concerning the Supreme Court (KKO) http://www.edilex.fi/kko/ennakkoratkaisut/)