EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

03 February 2015

Case Document No. 4

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

OBSERVATIONS BY THE INTERNATIONAL ORGANISATION OF EMPLOYERS (IOE)

Registered at the Secretariat on 30 January 2015

International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores

SUBMISSION ON THE MERITS OF COLLECTIVE COMPLAINTS No. 106/2014, No. 107/2014

Geneva, 30 January 2015

From:

The International Organisation of Employers (IOE)

Avenue Louis Casai 71

CH-1216 Cointrin, Geneva

Considering collective complaints No. 106/2014, No. 107/2014 lodged by the Finnish Society of Social Rights v. Finland on 22 May 2014;

Considering the letter from Mr. Henrik Kristensen, Deputy Head of the Department of the European Social Charter, Council of Europe, dated 21 November 2014, inviting the IOE to formulate its submissions on the merit of Complaints No. 106/2014, No. 107/2014 , among others, in application of Article 7.2 of the Additional Protocol to the European Social Charter;

The IOE, to which the Confederation of Finnish Industries (EK) is affiliated, herewith refers its submission on the merits of complaints No. 106/2014, No. 107/2014 .

Outline

1. GENERAL OBSERVATIONS ON THE MERITS OF THE COMPLAINTS

1. The present submission is a formulation on the merits of the three collective complaints lodged by the Finnish Society of Social Rights before the European Committee of Social Rights in relation to the application in Finland of Articles 12 (the right to social security) and 24 (the right to protection in cases of termination of employment) of the European Social Charter (ESC) (revised).
2. The IOE first wishes to emphasise that the three complaints are drafted in a very general manner, often in a disparaging tone, and without concrete evidence and supporting data.
3. For instance, sentences such as "*in spite of the Constitution unfair and unlawful dismissals are quite general in Finland"* or "*employees are valuable only if they contribute to profits, otherwise they are laid-off mercilessly"*, do not provide an accurate picture of the situation in Finland and tend to unjustifiably incriminate enterprises by depicting them as entities whose sole aim is "*the maximisation of profits"*.
4. The complainant openly criticises the Finnish labour regulatory framework despite the important role played by the social partners during its drafting procedure and prior to the adoption of the labour laws. All laws dealing with the employment relationship and social security issues (related to the employment relationship) are subject to an effective tripartite consultation.
5. Such a system underpins the Finnish industrial relations structure and has proven particularly fruitful in terms of labour laws being discussed and agreed.
6. The fact that the complainant's views are based on assumptions and opinions, rather than on data and empirical evidence, and that they often contain incorrect references to Finnish legislation, make it difficult for the Committee of Social Rights to assess whether the Charter has been violated or not.
7. The IOE believes that the claims of the Finnish Society of Social Rights that the Government of Finland is in breach of its obligations under Articles 12 and 24 of the European Social Charter are therefore unfounded. The IOE is providing with this submission the necessary evidence to validate this statement and to show that the generalisation upheld by the complainant is largely unfounded and biased.

2. SPECIFIC COMMENTS ON COMPLIANCE WITH THE EUROPEAN SOCIAL CHARTER

1. The IOE firmly rejects the complainant's conclusions that Finnish legislation is in breach of the ESC.

2. Concerning the upper limits to compensation in cases of unfair dismissal and the lack of legislative provisions on reinstatement, the Finnish legislative framework provides a system "*of a high enough level to dissuade the employer and make good the damage suffered by the employee*".

3. As detailed below, an assessment of conformity based solely on the establishment of a cap on compensation, regardless of the variety of instruments available to the employee to seek redress in case of unfair dismissal, is very restrictive and does not find support in Article 24 of the Charter.

4. Regarding economic grounds for dismissal, the Finnish legislative framework provides detailed and comprehensive regulation for the termination of employment based on "*the operational requirements of the undertaking, establishment or service*" and includes an obligation on the employer to offer an alternative job and provide training.

5. Finnish labour courts are then called upon to revise whether the necessary preconditions for valid grounds for termination have not been satisfied or whether the employer has failed to determine whether other employment would be available for the employee.

6. On the unsatisfactory level of the social security system in Finland, the legislative framework is inclusive and offers a high level of protection by any comparable EU standard.

7. The Government supplied exhaustive information in its replies to Collective Complaint No. 88/2012 lodged by the Finnish Society of Social Rights on similar issues.

8. Further details on the mentioned elements are provided in paragraphs 2.1, 2.2 and 2.3.

2.1 The Finnish legislative system and practice are not in violation of Article 24 of the Charter on the upper limit for compensation and reinstatement (Complaint No. 106/2014)

1. As mentioned by the complainant, the basic legislative framework related to unjustified dismissal relies on the Constitution of Finland. According to Section 18 of the Constitution: "*Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice. The public authorities shall take responsibility for the protection of the labour force. […] No one shall be dismissed from employment without a lawful reason*"[1].

2. Although there is no Constitutional Court in Finland, the Finnish Parliament is competent to examine the conformity of drafted law with the Constitution prior to the adoption of the law. It is not accurate to simply assert, as the complainant does, that "*in practice this Constitutional rule has not much weight or meaning".*

3. Further regulation to implement the Constitutional provision is provided for by the Employment Contract Act[2] under Chapter 7. According to Section 1 of Chapter 7, "*The*

[1] The Finnish Constitution: https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf
[2] Act No. 55/2001, amendments up to 398/2013 included: http://www.finlex.fi/en/laki/kaannokset/2001/en20010055.pdf

employer shall not terminate an indefinitely valid employment contract without proper and weighty reason". Sections 2 and 3 of Chapter 7 list the grounds on which termination of employment is justified, as well as those grounds that do not represent a "proper and weighty reason". Further details are provided in the following Sections of Chapter 7 of the same Act.

4. Chapter 12 of the Employment Contract Act defines what happens when there is a "groundless termination of an employment contract": "*If the employer has terminated an employment contract contrary to the grounds laid down in this Act, it must be ordered to pay compensation for unjustified termination of the employment contract. If the employee has cancelled the employment contract on the grounds laid down in chapter 8, section 1, arising from the employer's intentional or negligent actions, the employer must be ordered to pay compensation for unjustified termination of the employment contract. The exclusive compensation must be equivalent to the pay due for a minimum of three months or a maximum of 24 months. Nevertheless, the maximum amount due to be paid to shop stewards elected on the basis of a collective agreement or to elected representatives referred to below in chapter 13, section 3, is equivalent to the pay due for 30 months. Depending on the reason for terminating the employment relationship, the following factors must be taken into account in determining the amount of compensation: estimated time without employment and estimated loss of earnings, the remaining period of a fixed-term employment contract, the duration of the employment relationship, the employee's age and chances of finding employment corresponding to his or her vocation or education and training, the employer's procedure in terminating the contract, any motive for termination originating in the employee, the general circumstances of the employee and the employer, and other comparable matters. […]".*

5. With reference to upper limits set for compensation, the IOE recalls that, as underlined by the Finnish Government in its report of 5 January 2012 in the case of an unjustified termination of employment, the compensation of between three and 24 months' salary established in the Employment Contract Law does not have a fixed and definitive ceiling, as the dismissed employee may seek redress and further compensation through the Tort Liability Act (No. 412/1974); the Non-Discrimination Act (No. 21/2004); the Act on Equality between Women and Men (No. 609/1996) and the Act on Cooperation within Undertakings (No. 334/2007). The compensations granted through these laws are not mutually exclusive; it is ultimately the Court that, called to adjudge a claim for unlawful dismissal, determines the compensation amount.

6. Moreover, these Acts do not establish maximum compensation to be paid to employees (except for the Act on Cooperation within Undertakings – No. 334/2007). Based on this element, the complainant's information is technically incorrect when indicating the legislation on non-discrimination. In greater detail:

   - There is no ceiling for compensation when discrimination is linked to dismissals (see the renewed Non-discrimination Act (1325/2014) paragraph 23§ and 24§, and the Act on Equality between Women and Men (609/1986), paragraph 11§).
   - The ceiling to which the Society refers in the Act on Equality between Women and Men only concerns discrimination when hiring people.

7. The IOE wishes particularly to emphasise the following two paragraphs[3] from the Government report mentioned above: "***Most of the damages to be awarded for termination of employment – both for individual and for financial and production-related reasons – consist of compensation for material loss***. *The most important criterion for measuring material loss is the loss of earnings by the employee due to termination of employment. If the employee is still without work at the time of court proceedings, the foreseen financial loss due to the (estimated) continuance of unemployment may be taken into account in addition to the actual loss accumulated by the time the amount of the total loss is determined.* ***In the case of termination of employment due to other than production-related and financial reasons, compensation is also awarded for immaterial loss***. *The amount of immaterial loss is determined by the extent the termination has infringed on the employee's person. The more the illegal termination has infringed on the employee's person, the greater the amount of immaterial loss*". (emphasis added)

8. On the right to compensation, the complainant alleges that "*the normal compensation determined by the court is varying 6-12 months' salary and the employee is obliged to pay 30%-50% tax from compensation".* Such a generalised argument is not supported by public statistics. Compensation concretely depends on a case-by case evaluation, based on innumerable variables and taking into account the factors enumerated in the Employment Contract Law (for instance the estimated time without employment and estimated loss of earnings, or the duration of the employment relationship). Additionally, the alleged applicable taxation of 30-50 per cent is even less consistent with any available statistics, considering that the progressive Finnish taxation system is based on a tax rate commensurate with the basic worker's income. Furthermore, compensations awarded for discriminatory reasons are not subject to any taxation.

9. This legislative framework has been subject to the evaluation of the European Committee of Social Rights, which in 2012 expressed its concerns and requested more information from the Government[4]. Prior to this, the Committee stated in 2008 that Finnish legislation was "*not in conformity with Article 24 of the Revised Charter on the grounds that the compensation for unlawful termination of employment is subject to an upper limit*".

10. The IOE wishes to underline that according to Article 24 of the European Social Charter (revised), *"[w]ith a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise: […] the right of workers whose employment is terminated without a valid reason to* ***adequate compensation or other appropriate relief****. […]".* In addition, the Appendix to the Charter clarifies that*: "It is understood that compensation or other appropriate relief in case of termination of employment without valid reasons shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions*". (emphasis added)

11. In the "Digest of the Case Law of the European Committee of Social Rights" the Committee affirms that "***compensation systems are considered appropriate if*** *they include the following provisions: a) reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body; b) the possibility of*

[3] Pages 67 and 68 http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Finland7_en.pdf
[4] Published in January 2013 : http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Finland2012_en.pdf

reinstatement; c) ***and/or*** *compensation of a high enough level to dissuade the employer and make good the damage suffered by the employee*". (emphasis added)

12. From the IOE's perspective, this view does not follow the textual meaning of the Charter and risks not properly considering the unintended consequences that such extensive reading may have on the economic and social stability of many European countries. It can also be counterproductive for employment growth, and especially for job seekers pertaining to vulnerable groups (the elderly, youth, etc.).

13. The conclusion that all national legislation containing upper limits for compensation in cases of unlawful termination of employment runs counter to Article 24 of the Charter is very restrictive and conflicts with the reality in a consistent number of Council of Europe member countries.

14. The IOE therefore respectfully solicits the European Committee of Social Rights to consider these implications when evaluating the conformity of national legislation and practices with Article 24 of the Charter.

15. In particular, the IOE believes that the Committee could assess the "adequateness" of compensation by focusing on the "*compensation of high enough level to dissuade the employer and make good damage suffered by the employee*". This focus is preferable to the principle of uncapped compensation for the following reasons:

    a) In general labour law, the special employment relationship between employer and worker is not always considered a standard contractual relationship (such as that derived from a purchase agreement, or similar). The Committee seems instead to refer to "adequate compensation" as the exact reimbursement of the damages suffered by the worker in the event of unlawful dismissal. That is why any ceiling on compensation would prevent the workers from being "adequately compensated". However, in many European Union countries "adequate compensation or other relief" is realised through an indemnity, aimed at dissuading the employer and making good the damage suffered by the employee. Upper limits are not in themselves meant to be in violation of Article 24 of the Charter.

    b) Legal certainty is fundamental for companies when making a decision about establishing or restructuring a business. It allows for adequate risk management and for an improved control over costs. This is especially the case in judicial systems with a very slow response. Legal uncertainty in systems without upper limits set for compensation for unfair dismissals could be highly prejudicial, in particular to small and medium-sized enterprises (SMEs).

    c) Regulation of termination of employment at international level (ILO Convention No. 158[5]) equally refers in its Article 10 to "*adequate compensation or such other relief as may be deemed appropriate*". The reading of this provision by the ILO Committee of Experts has been more flexible compared to that of the European Committee of Social Rights. Indeed, the IOE wishes to underline that if law and practice allow compensation to be set inadequately high, it can become a significant financial risk for enterprises. Certain enterprises may be

[5] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158
Article 10 reads as follows: *If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.*

discouraged from implementing the lay-offs necessary to staying competitive and viable, whereas others may refrain from creating new jobs and hiring workers. Therefore, in determining adequate compensation in law and practice, the needs of sustainable enterprises, in particular SMEs, should be fully taken into consideration. A useful instrument is the provision of reasonable maximum amounts for compensation.

16. To conclude on this point: the regulatory framework in Finland on compensation in cases of unfair dismissal is "*of high enough level to dissuade the employer and make good damage suffered by the employee*" and is therefore in line with the provision of Article 24 of the Charter.

17. With reference to the easiness to "get rid of elderly employees due to the low compensation" cap, there is no tangible example to support this allegation in the complaint and concrete data is lacking. The IOE will comment shortly on this element in paragraph 2.3.

18. Regarding the lack of legislative provisions on reinstatement, the IOE reiterates that the "adequateness" of compensation can be assessed by focusing on the "*compensation of high enough level to dissuade the employer and make good damage suffered by the employee*". The possibility of reinstatement is not mentioned in the Charter text and is not always the best solution in practical terms.

19. The complainant often mentions the difficulty for the dismissed worker to acquire any kind of income after unfair dismissal but neglects to comment on the substantial social benefits available in Finland.

20. In particular, a 500-day earnings-related unemployment benefit scheme, among others, exists in Finland along with the labour market subsidy. This scheme covers almost all unemployed in Finland, with an average compensation of around 50-70 per cent of the monthly salary received prior to dismissal. In addition to these forms of compensation, Finland has a very extensive social security system covering housing and medical costs[6] for example.

2.2 The Finnish legislative system and practice are not in violation of Article 24 of the Charter on the economic ground for dismissal (Complaint No. 107/2014)

1. As mentioned in paragraph 2.1.1, Chapter 7 of the Finnish Employment Contract Act[7] specifies the legal grounds for termination of employment. Sections 3 and 4 deal with "Financial and production related grounds for termination" and the obligation for the employer to offer an alternative job and provide training[8].

[6] One can find out more about the Finnish social security system from the webpage of Social Insurance Institution of Finland KELA - http://www.kela.fi/web/en

[7] Act No. 55/2001, amendments up to 398/2013 included: http://www.finlex.fi/en/laki/kaannokset/2001/en20010055.pdf

[8] Section 3 reads as follows: "*The employer may terminate the employment contract if the work to be offered has diminished substantially and permanently for financial or production-related reasons or for reasons arising from reorganization of the employer's operations. The employment contract shall not be terminated, however, if the employee can be placed in or trained for other duties as provided in section 4. At least the following shall not constitute grounds for termination: 1) either before termination or thereafter the employer has employed a new employee for similar duties even though the employer's operating conditions have not changed during the equivalent period; or 2) no actual reduction of work has taken place as a result of work reorganization*".
Section 4 "*Employees shall primarily be offered work that is equivalent to that defined in their employment contract. If no such work is available, they shall be offered other work equivalent to their training, professional skill or experience. The employer shall provide employees with training required by new work duties that can be deemed feasible and*

2. With regard to the practical application of this law, the Government reported in 2012 that "*courts are often called upon to consider whether the employer has failed to determine whether other employment would be available for the employee to be dismissed, and whether the employer has failed to offer such employment. In such cases, the necessary preconditions for valid grounds for termination are not deemed to have been satisfied and compensation is awarded. In general, the criterion for the amount of compensation is the actual loss or damage incurred by the employee that has been dismissed. It is seldom that the amount of compensation awarded is anywhere near the maximum of 24 months' pay. It appears that the number of cases concerning dismissal based on financial or production-related grounds is not very high*".

3. The Finnish practice of labour courts revision on the grounds for dismissal is in line with the practice of many other EU countries such as Germany, Denmark and Ireland.

4. This information on Finnish practice was duly taken into account by the European Committee of Social Rights in its 2012 conclusions on Finland, in which no evaluation of non-conformity with Article 24 of the Charter was expressed.

5. As for the textual provision of Article 24, it mentions as a valid reason for termination of employment the one based on the operational requirements of the undertaking, establishment or service. This is inclusive of situations where the company is subject to economic difficulties as well as implementation of specific business strategies (such as outsourcing). Such strategies can be required to ensure the medium- and long-term survival of the company.

6. Despite this background, the complainant generalises all cases of dismissal on economic grounds: "*employees are dismissed "en masse" though the assets of the firm are excellent and there is not a slightest economic reason to kick-off employees*". Furthermore, this alleged erratic attitude by Finnish employers is, in the complainant's view, taking place at a collective level, with mass dismissal procedures where "*the employee-side has no arms in the negotiation*".

7. The IOE is convinced that Finnish legislation and practice are in compliance with the European Social Charter. It therefore simply refutes the Finnish Society's incorrect statements by pointing out that the involvement of employee representatives is ensured during the collective dismissals procedure. The Act on Co-operation within Undertakings (334/2007) obliges an employer employing more than 30 people to go through co-operation negotiations with employee representatives before taking any action. In particular, the employer shall negotiate the reasons for the action, its effects, as well as possible alternatives, with the wage earners or salaried employees concerned or with their representatives. If an employer neglects these obligations, special sanctions are foreseen.

8. Furthermore, a Cooperation Ombudsman was appointed at the beginning of July 2010 to work in conjunction with the Ministry of Employment and the Economy, and is currently tasked with supervising the compliance of the Act on Cooperation within Undertakings and other legislation relating to personnel participation systems, as well as providing instructions and advice on the application of laws. The Cooperation

---

reasonable from the point of view of both contracting parties. If an employer which in fact exercises control in personnel matters in another enterprise or corporate body on the basis of ownership, agreement or some other arrangement cannot offer an employee work as referred to in subsection 1, it must find out if it is possible to meet the employer's obligation to provide work and training by offering the employee work in other enterprises or corporate bodies under its control".

Ombudsman is also authorised to invite the employer to rectify procedures that violate the law, to bring matters under preliminary investigation, and in certain cases, to demand the court to impose a conditional fine. Further to this, the dismissed employee has priority for re-employment within nine months of the dismissal if the employer is hiring again for the same or a similar post[9].

9. In view of the preceding, Finnish legislation is in conformity with Article 24 of the ESC on the valid ground for economic dismissals.

[9] Chapter 7, sections 3 or 7 of the Employment Contract Act

3. CONCLUSIONS

1. In conclusion, the IOE considers that Finnish legislation is in full conformity with the terms of the European Social Charter.

2. Concerning the upper limits to compensation in cases of unfair dismissal and the lack of legislative provisions on reinstatement, the Finnish legislative framework provides a system "*of a high enough level to dissuade the employer and make good the damage suffered by the employee*".

3. As previously detailed, an assessment of conformity based solely on the establishment of a cap on compensation, regardless of the variety of instruments available to the employee to seek redress in case of unfair dismissal, is very restrictive and does not find support in Article 24 of the Charter.

4. A focus on "*the high enough level of compensation to dissuade the employer and make good the damage suffered by the employee*" is preferable to the principle of uncapped compensation for reasons highlighted in paragraph 15 of this submission.

5. Regarding the economic grounds for dismissal, the Finnish legislative framework provides a detailed and comprehensive regulation for the termination of employment based on "*the operational requirements of the undertaking, establishment or service*" and includes an obligation on for the employer to offer an alternative job and provide training.

6. Finnish labour courts are then called upon to revise whether the necessary preconditions for valid grounds for termination have not been satisfied or whether the employer has failed to determine whether other employment would be available for the employee.

7. Regarding the unsatisfactory level of the social security system in Finland, the legislative framework is inclusive and offers a high level of protection by any comparable EU standard.

8. The Government supplied exhaustive information in its replies to Collective Complaint No. 88/2012 lodged by the Finnish Society of Social Rights on similar issues.