EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

03 February 2015

Case Document No. 2

Finnish Society of Social Rights v. Finland
Complaint No. 107/2014

SUBMISSIONS BY THE GOVERNMENT ON ADMISSIBILITY AND THE MERITS

Registered at the Secretariat on 5 January 2015

Ministry for Foreign Affairs of Finland
Unit for Human Rights Courts and Conventions

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Helsinki, 5 January 2015

Complaint No. 107/2014
FINNISH SOCIETY OF SOCIAL RIGHTS (FSSR) v. FINLAND

Sir,

With reference to your letters of 26 May and 11 August 2014, I have the honour, on behalf of the Government of Finland, to submit the following observations on the admissibility and merits of the aforementioned complaint.

I. ADMISSIBILITY OF THE APPLICATION

I.1 General

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

2. The Government notes that 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 recognises the right of any other representative national non-governmental organisation within its jurisdiction which

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has particular competence in the matters governed by the Charter, to lodge against it complaints with the European Committee of Social Rights.

3. The Government observes that 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 organisations to submit collective complaints on 16 August 1998.

I.2 Admissibility criteria and their application

4. The Government notes that the Committee has in its admissibility decision of 14 May 2013 - concerning the applicant association's complaint no. 88/2012 - assessed its "representativity" as required by Article 2 § 1 of the Protocol. In that decision, having considered the applicant organisation'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.

5. The Government notes, however, that according to Articles 2 § 1 and 3 of the Additional Protocol, national non-government organisations may submit complaints only in respect of those matters in respect of which they have been recognised as having particular competence.

6. With regard to the recognition of particular competence of a non-governmental organisation, your Committee has previously, *e.g.*, examined the statute of an organisation 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 2005, para. 15).

7. In this respect, the Government notes, that 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.

8. Further, the Government also observes that the Committee in its last admissibility decision in relation to the applicant organisation ." (*Finnish Society of Social Rights v. Finland,* Complaint No. 88/2012, decision on Admissibility, 14 May 2013) neglects to attach significance to the question of *recognised* 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 within the meaning of Article 3 of the Protocol as regards the instant complaint." (para. 12). 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-à-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."

9. The Government submits that such an idea is incorrect and rests on a, at best, questionable legal interpretation of Articles 2 § 1 and 3 of the Additional Protocol.

10. This is because both of these provisions lay emphasis on the recognised particularity of expertise required from the representative national non-governmental organisation. According

to the Explanatory Report to the Additional Protocol, (*Explanatory Report to the 1995 Protocol)* (para. 21), this recognised particularity of expertise in turn needs to be discerned in a similar manner as that of international non-governmental organisations. Such an assessment then requires that that Committee needs to firstly be of the view that applicant non-governmental organisations 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. However, as is stated in the explanatory report in relation to international non-governmental organisations, this fact alone does not relieve the Committee "from the obligation to ascertain that the complaint actually falls within a field in which the INGO concerned has been recognised as being particularly competent."

11. 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 Addition Protocol to undertake an ascertainment of the recognised particular competence of the applicant association on the basis of the information submitted to it. In light of this, observation on the provisions and interpretation of the Additional Protocol, any general statement by the Committee to any organisation providing for a blank-cheque vis-à-vis the admissibility of its complaints is legally impossible and against the objective and purpose of the whole mechanism created by virtue of the Additional Protocol.

12. 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 recognised particular competence of the applicant association in the specialised area of protection in cases, like the present one, concerning the determination of employment.

I.3 Contents of the present complaint

13. 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.

14. 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.

15. In this respect, the Government notes that the claim of the applicant association fulfils the requirement set out in Article 4 of the Additional Protocol.

II. MERITS

16. The Government observes that the heart of the complaint of the applicant association rests on its allegation that Finland allows for dismissals and redundancies that are in violation of Article 24 of the Charter (Revised) on the basis that the numerous unreferenced and unsubstantiated practices referred to by the applicant association do not constitute valid reasons for dismissal.

17. Therefore, due to this unsubstantiated and abstract nature of the complaint of the applicant association the Government will in response outline in detail the relevant provisions of domestic law in order to show that as opposed to the allegation presented by the

applicant association both in cases of individual and collective dismissals the position of employees is safeguarded as required by the European Social Charter.

II.1 Regulation of dismissal for financial and production-related reasons under the Employment Contracts Act

18. Chapter 7 of the Employment Contracts Act (55/2011) contains provisions on the grounds for dismissal for financial and production-related reasons. Chapter 7, Section 3 of the Act stipulates the following:

    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.

19. Chapter 7, Section 4 of the Act stipulates as follows:

    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 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.

20. When these sections are then read together with Section 1 of Chapter 7 of the Employment Contracts Act, it is evident that the regulation of the grounds for collective dismissal consists of in the aggregate:
    1) the general provision requiring that the reason for dismissal must be proper and weighty;
    2) the provision that the offered work must have diminished *substantially* and permanently for reasons referred to in Chapter 7, Section 3(1) of the Act; and
    3) the provision that the employer must offer other work to the employee *and* provide the employee with any training that the offered new work duties may require.

21. According to *the general provision* in Chapter 7, Section 1, the employer must not terminate an employment contract *"without proper and weighty reason"*. Any grounds for dismissal for financial and production-related reasons, too, must fulfil the requirements under the general provision, although such grounds are not to be considered from the perspective of reasonableness, as distinct from grounds for individual dismissal related to the employee's person.

22. The most essential factors to be taken into account in the overall consideration are the degree of the diminution of work, the duration of the employment relationship and the real opportunities of the employer (the enterprise, or the enterprise having control in a group) to offer the employee other work and to provide him or her with any training that the offered new work duties may require.

23. The Employment Contracts Act requires that the work must have diminished in the manner referred to in Chapter 7, Section 3 of the Act, *for financial or production-related reasons or reasons arising from reorganization of the employer's operations*. The reasons may arise from external factors, e.g., declined demand, outdated

products of the enterprise, or stepped-up competition, but also from the employer's measures, such as redirecting the business operations. The provisions on grounds for dismissal for financial and production-related reasons do not restrict the employer's right to wind up, cut down or expand its business operations. A managerial solution or decision, e.g., a decision to outsource some operations, to start subcontracting or to use leased manpower, may constitute a ground for dismissal for financial and production-related reasons. A decision to start leasing manpower does not automatically prove a lack of grounds for collective dismissal. This is the case when circumstances permit the conclusion that leased manpower is not used for the purpose of circumventing the protection of the employer's own employees against dismissal (judgment of the Labour Court, *2007:103*). Collective dismissal must not even partly be based on the employee's person or behaviour.

24. According to Chapter 7, Section 3(1) of the Employment Contracts Act, a dismissal is lawful if the work offered under the employee's employment contract has diminished. However, the work may have diminished for multiple direct causes: the work may really have run out because of reduced orders or unprofitability, or it may have been divided between other employees (for financial reasons). Moreover, the opportunities to offer work may have weakened. This means that the employer, on grounds of the overall business performance showing a loss, may be entitled to dismiss some employees even if their work has not diminished.

25. According to the Employment Contracts Act, the preconditions for dismissal are fulfilled if the employee's work has diminished both substantially and permanently at the same time. If the work has diminished only substantially but not permanently, the employer is entitled to lay off the employer on the conditions stipulated in Chapter 5, Section 2(1) of the Act. If the work has diminished only permanently but not substantially, the employer must equally take

measures alternative to dismissal. Primarily, the employer must examine whether it could offer the employee some other suitable work in addition to the diminished work, and if this is possible, offer him or her this other work.

26. In the Employment Contracts Act and the related case-law, the connection between the substantial and the permanent diminution of the work has meant that the longer the scarcity of work can be expected to continue, the more justifiable it is to consider the scarcity of work substantial, and *vice versa*. In each employment relationship the length of the period of notice to be observed by the employer influences the overall consideration of the matter.

27. Even if the employee's work diminishes or has diminished substantially and permanently, the employer must not terminate the employment contract, if the employee can be placed in or trained for other tasks. The obligation of the employer to offer the employee other work instead of dismissing him or her remains unchanged throughout the validity of the employment relationship.

28. The Employment Contracts Act does not limit the territorial scope of the employer's obligation to offer work. The employer's departmental borders or other organisational borders do not reduce the obligation to offer work. The obligation usually also extends to any possible units that the employer may have elsewhere Finland, if suitable work is available there. However, Chapter 13, Section 7 of the Act stipulates that national employer and employee associations are entitled to reduce, by collective agreements, the territorial scope of the obligation to offer work.

29. The obligation to offer work under the Employment Contracts Act applies both to permanent relocation and to offers of temporary work. In the case of temporary work, the obligation to offer work continues, and the purpose is that the employee should be placed permanently in tasks corresponding to his or her employment

relationship, unless the employer and the employee agree mutually about other work.

30. According to the Employment Contracts Act the employer must, if possible, offer the employee primarily equivalent work in accordance with the employment contract. Chapter 7, Section 4(1) of the Act stipulates that if the employer cannot offer such work, it must offer other work equivalent to the one under the contract, *i.e.*, work that somehow resembles the work under the contract. If no such work is available, either, the employer must examine whether the employee could be offered some other work equivalent to his or her training, professional skill or experience, *i.e.*, work which the employee has not performed for the employer earlier but which the employee could manage on the basis of his or her training, professional skill or experience after a reasonable training period or after the training referred to in Chapter 7, Section 4(2) of the Employment Contracts Act.

31. On the basis of Chapter 9, Section 3(1) of the Employment Contracts Act the employer must, at its own initiative, examine the availability of work that could be offered to an employee at risk of dismissal, and the employee's capacity to manage this work.

32. The obligation of the employer to offer other work may, depending on the case, require that the employer rearranges or redistributes work duties, makes internal transfers or takes other measures in order to arrange work for an employee at risk of dismissal, to the extent this is possible, taking account of the employer's other employees. On the other hand, the employer is not required to make any arrangements that differ essentially from its ordinary operations.

33. The remuneration for the offered new work or the other related terms of employment need not correspond to those of the earlier work under the employment contract, but are determined on the

basis of the offered work. The employer cannot fulfil its obligation under Chapter 7, Section 4(1) of the Employment Contracts Act by making an offer that is inappropriate from the perspective of the employee's education and training, skills or experience or the terms of employment.

34. The obligation of the employer to offer other work is part of the protection of employees against dismissal. The obligation of the employer to re-employ a dismissed employee, laid down in Chapter 6, Section 6 of the Employment Contracts Act, is secondary in relation to the obligation to offer other work: when it comes to access to other available work, an employee who has an employment relationship always has precedence over the employees referred to in Chapter 6, Section 6.

35. If the employer, instead of dismissing an employee, can offer him or her work other than the one under the employment contract, but if the employee would not be able to perform the work after a customary introduction to it, as usually arranged at the beginning of a new employment relationship, the employer must provide the employee with training required by the new work duties. The training must be appropriate and reasonable from the perspective of both parties to the employment contract. The obligation to provide training encompasses vocational updating, further training and retraining. The employer's obligation to provide training may arise only if the employee has the necessary basic vocational skills or basic capacities, including the basic education and training necessary for the new work.

36. The training arranged by the employer must be 1) customary considering the nature of the branch in question, 2) customary considering the employer's financial and operational opportunities, 3) customary considering the size of the workplace (the employer), 4) necessary for the work and suitable for the employer's needs, 5) feasible to the employer, and 6) suitable for

the employee considering his or her vocational skills, earlier experience and suitability for the work.

37. The provisions of the Employment Contracts Act on the obligation to offer work, together with the provisions on the obligation to provide training, require the employer to take some kind of preventive measures to avoid lay-offs or dismissals by training employees,*e.g.*, to use new working methods, machines and devices.

38. Chapter 7, Section 3(2) of the Employment Contracts Act concretizes the existence or lack of grounds for collective dismissal by two examples: No ground for dismissal for financial or production-related reasons exists at least when 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. The main purpose of the provision is to prevent attempts by the employer to disguise reasons for dismissal related to the employee's person behind financial or production-related reasons.

39. The financial and production-related reasons referred to in Chapter 7, Sections 3 and 4 of the Employment Contracts Act do not exist, either, if no actual reduction of work has taken place as a result of work reorganization (Chapter 7, Section 3, sub-section 2(2)). The provision refers to changes that work reorganization has caused in the quantity or type of the employee's work under the employment contract. These changes may result from changes in courses of work or operation and acquisitions of machines, devices etc., which do not as such reduce the amount of work but change the competence requirements concerning the employee, e.g., so that the person no longer manages the changed tasks or courses of work. In such cases the out-datedness of the employee's skills does not in itself entitle the employer to dismiss the employee, if it is possible, on the basis of the employee's existing skills and learning

capacity, to retrain the employee for the changed work. In such situations the employer may be obliged to take the above-mentioned preventive measures to ensure the continuity of the employment relationship.

40. Chapter 7, Section 4 of the Employment Contracts Act also contains a provision on the obligation of employers to offer work in a group of enterprises. 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 new work as an alternative to dismissal, the employer must find out if it is possible to meet the obligation to provide work and training by offering the employee work in other enterprises or corporate bodies under its control. The applicability of the provision requires the exercise of *de facto* control, which may manifest itself as joint personnel administration of the group of enterprises (*e.g.* joint recruitment, pay administration, (real) work by employees in different enterprises of the group etc.), as well as similar branches and consistent business operations of the enterprises.

41. Chapter 7, Section 4(3) of the Employment Contracts Act refers to a group of two or more enterprises, regardless of their legal form. The group may consist of limited liability companies, cooperatives or different small enterprises. Moreover, an individual entrepreneur may be a member of a group of enterprises.

II.2 PROCEDURAL RULES FOR COLLECTIVE DISMISSALS

42. Chapter 9 of the Employment Contracts Act regulates procedures for dismissals. Prior to terminating an employment contract on collective grounds, the employer must at the earliest possible stage explain to the employee to be dismissed the grounds for terminating the employment and the alternatives to the termination, as well as

the employment services available from the relevant employment and economic development office. If the termination concerns more than one employee, the explanation may be given to a representative of the employees or, if no such representative has been elected, to the employees jointly.

43. According to the Employment Contracts Act the employer must, without delay, notify the employment and economic development office of all dismissals to be made on collective grounds where at least ten employees are to be dismissed. The notification must specify the number and occupations or work duties of the employees to be dismissed and the dates when their employment relationships will expire. Furthermore, the employer is obligated to inform the employees of their right to an employment plan referred to in the Act on Public Employment and Business Service (*916/2012*). These measures for so-called change security are intended to ensure the re-employment of dismissed employees.

44. In enterprises falling within the scope of the Act on Co-operation within Undertakings (*334/2007*), the provisions of the Act on the duty to negotiate apply instead of the provisions of the Employment Contracts Act. If the employer is considering to serve notice of termination or lay-off one or more employees or to reduce the employment contract of one or more employees into a part-time contract, the employer must issue a written proposal for negotiations in order to commence the co-operation negotiations and employment measures at the latest five days before the negotiations begin. The Act on Co-operation within Undertakings also regulates the information to be provided by the employer, and the content and fulfilment of the duty to negotiate.

45. The co-operation negotiations must deal with the grounds for and effects of the measures to reduce the labour force, the principles or plans of action, and the different options of limiting the number of employees affected by the reductions and of alleviating the

consequences of the reductions to the employees. If the reductions of the labour force contemplated by the employer concern fewer than ten persons, the employer is considered to have fulfilled the duty to negotiate once 14 days have elapsed since the commencement of the negotiations, unless otherwise provided in the co-operation negotiations. If the reductions of the labour force concern at least ten employees, the employer is considered to have fulfilled its duty to negotiate once at least six weeks have elapsed since the commencement of the negotiations, unless otherwise provided in the co-operation negotiations. However, the negotiation period is 14 days in an undertaking normally employing at least 20 but fewer than 30 employees in an employment relationship.

46. In disputes over the sufficiency of grounds for dismissal the employer must prove that the dismissal was based on grounds stipulated by law.

47. The Employment Contracts Act stipulates liability for damages as a legal consequence of an employer's terminating an employment contract unlawfully. The legislation on unemployment security ensures financial security to dismissed employees.

III. CONCLUSION

48. Referring to the aforementioned observations on the admissibility of the complaint, the Government notes that in relation to the representativity of the applicant association as well as the formal requirements listed under Article 4 of the Additional Protocol there exists nothing to object to in the present complaint.

49. But the Government has serious doubts as to whether the applicant association meets the threshold of recognised particular

competence required by the Additional Protocol, as outlined above. The Government is of the strong view that the Committee must undertake an assessment of the recognised particular competence of the applicant association in relation to the right to protection in cases of termination of employment, which forms the subject matter of the present complaint.

50. In respect to this assessment, and on the basis of the information provided by the applicant association in its complaint file, as well as on its website, the present applicant association does not have that recognised particular competence.

51. In respect of the merits of the complaint the Government notes that when in the present case the situation of the relevant Finnish domestic legislation is assessed holistically and comprehensively, the position of employees is safeguarded as required by the Charter.

52. Therefore there is no violation of the Charter in the present case.

Accept, Sir, the assurance of my highest consideration.

Arto Kosonen
Director,
Agent of the Government of Finland
before the European Court of Human Rights