EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

16 February 2007

Case document No. 3

Federation of Finnish Enterprises
v. Finland
Complaint n° 35/2006

WRITTEN SUBMISSIONS FROM THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 16 February 2007

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

Mr Régis Brillat
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Helsinki, 16 February 2007

Collective Complaint No. 35/2006
Federation of Finnish Enterprises v. Finland

Sir,

With reference to your letter of 11 December 2006, I have the honour on behalf of the Government of Finland, to submit the following observations on the merits of the aforementioned complaint.

GENERAL

1. The present collective complaint has been lodged with your Committee by the Federation of Finnish Enterprises (*Suomen Yrittäjät, Företagarna i Finland*).

2. The Government notes that the complaint was declared admissible by your Committee on 5 December 2006.

Complaint

3. The Federation of Finnish Enterprises alleges that the situation in Finland is not in conformity with Article 5 of the Revised European Social Charter. It is alleged that the freedom to organise is violated on the grounds that Finnish legislation stipulates that national employers' organisations may conclude collective agreements which provide for the opportunity to derogate from certain provisions of the labour legislation through local agreements. This applies to employers belonging to national employer organisations only. Employers not members do not have this possibility.

4. The Government contests this allegation.

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RELEVANT DOMESTIC LAW

Freedom of association in the domestic legislation

5. The freedom of association including the freedom to form an association without a permit, to be a member or not to be a member of an association and to participate in the activities of the association are guaranteed by Section 13 of the Constitution of Finland (*perustuslaki, grundlagen*; 731/1999).

6. The provision on the freedom of association of the Employment Contracts Act (*työsopimuslaki, arbetsavtalslagen*; 55/2001) complements the aforementioned provision of the Constitution. Its purpose is, in particular, to ensure the freedom to form trade unions although the general phrasing of the provision indicates that it is to protect other freedom of association as well.

7. According to Chapter 13, Section 1 of the Employment Contracts Act employers and employees have the right to belong to associations and to be active in them. They also have the right to establish lawful associations. According to the provision, employers and employees are likewise free not to belong to any of the associations referred to above. Prevention or restriction of this right or freedom is prohibited. Therefore, both the positive and negative right of association have been ensured by mandatory legislation. This is evident from Chapter 13, Section 1, subsection 2 of the Employment Contracts Act according to which any agreement contrary to the freedom of association is null and void. In this way, the fact that the provision on the right of association is mutually binding has been ensured; the mandatory nature of the provision under Chapter 13, Section 6 of Employment Contracts Act protects the employee only.

8. The freedom of association means, *inter alia*, that exercising the freedom may not have detrimental consequences. Participating or not participating in trade union activities or lawful industrial actions are not acceptable grounds for dismissal or discrimination in the working life. The negative freedom of association is mutually binding, so, not being organised may not be detrimental to the employer, either.

Other provisions

9. Besides the aforementioned Employment Contracts Act, the Working Hours Act (*työaikalaki, arbetstidslagen*; 605/1996) and the Annual Holidays Act (*vuosilomalaki, semesterlagen*; 162/2005) are annexed to these observations as pdf-files.

AS TO THE LAW

Collective agreements and the right to organise

10. The right to organise constitutes the cornerstone for collective agreements; the system of collective agreements may be regarded as built on the principle of the freedom to form trade unions as well as the negotiation relationships established by the exercise of this freedom.

11. The judicial frameworks for collective agreements are laid down in the Collective Agreements Act (*työehtosopimuslaki, lagen om kollektivavtal*; 436/1946) which defines the rights and obligations of the parties bound by collective agreements.

12. In Finland, the minimum terms and conditions for employment relationships are largely defined by the collective agreements in force.

13. An employer bound by a collective agreement by virtue of being a member of an employer association or being independently a party to a collective agreement is, under the Collective Agreements Act, obligated to observe the collective agreement as far as the minimum terms and conditions of employment relationships are concerned.

14. The organised sector or the so-called sector the parties of which are bound by the regular terms and conditions of collective agreements covers the majority of the Finnish labour market, that is, over three quarters of it.

15. National collective agreements regarded as generally applicable have been applied, under the provision on the general applicability of the Employment Contract Act as the minimum terms and conditions to the non-organised sector, for about 30 years.

16. The present system of general applicability is based on Chapter 2, Section 7 of the Employment Contract Act. The said Act includes a provision on the precedence of a generally applicable collective agreement over the terms of an individual employment contract: any term of an employment contract that is in conflict with an equivalent term in the generally applicable collective agreement is void, and the equivalent provision in the generally applicable collective agreement shall be observed instead.

17. A sector-wide national generally applicable collective agreement has been established as an instrument to implement and guarantee the minimum terms and conditions of employment relationships to be observed in the sector referred to in the collective agreement.

18. In practice, the system ensures that in each sector, the minimum level of salaries, employment security and work protection is the same regardless of whether the employee is in the service by an employer organised or not. On the other hand, the system of general applicability puts employers operating in the same sector in the same

position as far as competition is concerned. The system does not create possibilities for free competition on the terms and conditions of employment relationships.

19. The system of general applicability is first and foremost a system providing for minimum employment conditions that, instead of relying on a separate minimum salary law, is based on a collective agreement mechanism.

20. The obligating nature of the principle of general applicability is based on the unilateral intent of the legislator. Therefore, non-organised employers are not parties to the collective agreement and thereby not bound by the obligations related to the agreement provided for by the Collective Agreements Act.

21. In case an employer observes the collective agreement due to the principle of general applicability and not because of being a party to it, it does not have the right disposed of by a party to the collective agreement to "manage" it, for example by making contracts in the framework of the agreement.

Semi-mandatory provisions of law and the position of non-organised employers

22. The three main Acts on labour law in Finland, the Employment Contracts Act, the Working Hours Act and the Annual Holidays Act, all of them referred to above, allow the nation-wide employer and employee associations to derogate from mandatory provisions (see, i.e., Chapter 13, Section 7, subsection 1 of the Employment Contracts Act).

23. This means that the organisations may derogate from mandatory provisions of law also by weakening the employees' rights. By virtue of Chapter 13, Section 7, subsection 2 of the Employment Contracts Act, the employer may apply such derogations to the employment relationships of employees in whose employment relationships the employer is required to observe the provisions of a collective agreement in accordance with the Collective Agreements Act.

24. The right of nation-wide associations to make separate agreements stems from the repealed Paid Annual Holidays Act of 1960 (199/1960). Since then the legislation has included semi-mandatory clauses with the specific qualification that derogations from the mandatory provisions of law are allowed, provided that they have been agreed upon between nation-wide associations on a given industrial sector.

25. This right to derogate from otherwise mandatory provisions of law has over time been enlarged. This possibility is, however, strictly stipulated by law and concerns (with very few exceptions) only the

nation-wide organisations. It is considered to exist such a balance between the nation-wide organisations that there is no risk to the effect that the aim of the labour legislation, the protection of the employee, would be undermined.

26. As noted above, a national collective agreement may have to be observed on grounds of the principle of general applicability as well.

27. In order that the provisions on collective agreements referred to above, agreed upon based on a specific permission provided for by the Act, could be applied to employees to whom the agreement is applied on grounds of the principle of general applicability, the Acts referred to include provisions on the standing of an employer observing a generally applicable collective agreement in case that this kind of agreement is applied.

28. For example, according to Chapter 13, Section 8 of the Employment Contracts Act, employers who are required to observe a generally applicable collective agreement as referred to in Chapter 2, Section 7, may observe the provisions referred to in Chapter 13, Section 7 within the scope of application of this collective agreement, if such application does not call for a local agreement.

29. By these provisions, an employer observing a generally applicable collective agreement is given the right to apply provisions in collective agreements that have deviated, to the detriment of the employee, from the provisions of the Employment Contracts Act which are otherwise mandatory. With the exception of Section 10 of the Working Hours Act, the right of application does not apply to provisions of collective agreements that presuppose an agreement on the local or company level.

30. Chapter 13, Sections 7 and 8 of the Employment Contract Act places employers observing the collective agreement under the Collective Agreements Act and the provisions on general applicability of the Employment Contract Act in unequal positions in cases in which the parties to the collective agreement have left the application of the collective agreement provision up to a local agreement.

31. From the point of view of the present complaint the question is whether the norms described place employers, depending on whether they are organised or not, on an unequal standing in a way that has a bearing on the negative right to organize?

32. It is true that during the past decade in particular, national labour market organisations have "transferred" some of their regulatory powers to companies within the limits they have prescribed in the collective agreement. In these cases, the power of making decisions, in matters defined by the collective agreement, may be transferred to the local level under conditions agreed upon in such an agreement.

33. When transferring the regulatory powers, the parties to the collective agreement have, in many cases, also determined who are empowered and what kind of measures may be used to negotiate local agreements. By provisions to empower local bargaining the national organisations transfer their own power to the local parties bound by the collective agreement. Local bargaining concluded by means prescribed by the collective agreement makes thus up a part of collective bargaining. To what extent sector-specific collective agreements include provisions for empowering local parties depends largely on the nature of the sector, negotiation relationships and, all in all, the culture of collective bargaining.

34. In connection with the passing of the Employment Contract Act and, subsequently, the Annual Holidays Act, it has been confirmed in Parliament that the system of general applicability defining the minimum terms and conditions for an employment relationship is not in conflict with the negative right to organise provided for in the domestic law.

Differences between organised and non-organised companies/employers

35. There are differences regarding the possibility to make local agreements between on the one hand companies bound by a collective agreement and on the other hand non-organised companies that apply a generally applicable collective agreement.

36. According to the complaint the legislation allows for organised employers and employees to use collective agreements to agree on a matter locally and the provisions of law can be deviated from in the framework of the local agreement.

37. The Government recalls that the parties to collective agreements also "manage" the collective agreement by, for example, deciding on the contents of the agreement and on how amendments are made.

38. The Government notes that in principle, the legislation only makes it possible for companies belonging to an employer organisation operating in the framework of collective agreements to make local agreements.

39. Indeed, the parties to collective agreements are empowered to make contracts in the framework of the collective agreement, or in other words, to decide whether some parts of the agreement are delegated in order to make local agreements and if, to what extent such delegation is made, i.e., what may be agreed upon at a local level.

40. A local agreement is thus possible only between the parties to the collective agreement and local agreements are in reality made within the system of collective agreements. These terms and conditions may concern, among other things, pay for overtime and arranging of

working hours.

41. The right and duty of a non-organised employer to apply a generally binding agreement is based on the provisions in the Employments Contracts Act. Such an employers possibilities to deviate from mandatory law and make a local agreement requires a separate provision (see, i.e., Working Hours Act, Sections 10 and 11).

42. Collective agreements binding the organised employers usually include a system of workers' and employees' representatives (shop steward). It is often these representatives who are entitled to make a local agreement. In a non-organised company there is not necessarily any such representative for the employees.

43. The system with shop stewards secures the compliance with the collective agreement. Disputes relating to local agreements are solved by negotiating in the similar way as disputes concerning national collective agreements.

44. A national employer organisation being party to the national collective agreement has an obligation according to the Collective Agreements Act, sanctioned by a compensatory fine, to supervise that the organised employers do not, even by negligence, break the collective agreement.

45. If a dispute is not solved by negotiations, legal disputes are settled by the Labour Court. The proceedings before this Court are essentially quicker and, for a worker or employee, cheaper than proceedings in district courts.

46. Disputes against non-organised employers bound by generally applicable collective agreements are handled by the last-mentioned courts in civil proceedings.

47. The surveillance of generally applicable collective agreements binding under Chapter 2, Section 7 of the Employment Contracts Act is a matter of labour inspection authorities but their resources are rather limited. Besides, their legal possibilities to act are limited. The organisations of organised employers are not entitled to supervise non-organised employers.

48. An organisation party to a collective agreement may seek to safeguard also the rights and interests of its members working for a non-organised employer, but it lacks quick and effective legal means (being bound to proceedings in general courts).

49. Furthermore, the employees working for a non-organised employer lack the possibility to resort to negotiations between parties to the collective agreement in case of disputes.

50. The Government recalls that a generally applicable collective agreement sets the binding minimum standard in a given working

sector. These minimum standards have to be complied with also by non-organised employers when their workers perform work defined in a generally applicable collective agreement.

51. The Government further reiterates that a non-organised employer applying a generally binding collective agreement is not a party to that agreement and, therefore, has neither the rights nor the responsibilities according to the Collective Agreements Act. This agreement is applied to the employment contract and any disputes are solved in general courts without the possibility to resort to negotiations.

Whether organised employers may apply more advantageous legal provisions than non-organised

52. According to the complaint, the possibility to make local agreements is not fair. It is also alleged that as a consequence, non-organised employers have to apply to stricter terms and conditions of employment than organised employers.

53. The Government notes that this question has been discussed in Parliament and that the Constitutional Committee of the Parliament has not considered the legislation to violate the right not to organise.

54. The arguments presented in the Government Bill (HE 157/2000 vp., p. 128/I) concerning the new employment contract act approached the question of local bargaining in relation to the aspect of general applicability of collective agreements. It was stated in the argumentation of the proposal that "at least for the time being it is not appropriate, solely on grounds of the principle of general applicability, to broaden the scope of possibilities of employers not members of national employer organisations to apply the bargaining option transferred to the company level by collective agreements". According to the Bill, it is, however, necessary to follow the evolution in the practice of collective bargaining and take legislative measures should they change as compared with the practice we have today.

55. The Constitutional Committee considered in its statement concerning the employment contract act (PeVL 41/2000 vp., p. 5/I) the principle of general applicability of collective agreements from the point of view of the negative freedom of association guaranteed by Section 13, subsection 2 of the Constitution and the provisions for equality guaranteed by Section of the Constitution. A non-organised employer observing a generally applicable collective agreement is not entitled to apply the provisions of the collective agreement that presuppose a local agreement. The restriction means in practice that employers not members of employer organisations cannot benefit from solutions advantageous to employers that have been agreed upon locally by the organised sector. The conclusion was, however, that "the present state of affairs has not, in the view of the Committee, lead to repercussions to the standing of the different employer categories so significant that they should be, considering the objective stated in

Section 18, subsection 1 of the Constitution, i.e., the protection of employees, regarded as having an excessive bearing the realisation of the negative freedom of association in practice as well".

CONCLUSION

56. The Government reiterates that one reason behind the restricted possibilities to make local agreements is due to the fact that the nation-wide organisations are considered to be responsible enough not to undermine the aim of the labour legislation, the protection of the employee.

57. The Government emphasises that, when comparing the situation of organised and non-organised employers, the systems in their entirety, i.e., the rights and obligations, monitoring, the negotiation procedure and litigation mechanism, should be considered. From this point of view, the decisions on the part of the employer to apply either one of these legal systems may be regarded as well-founded and balanced.

58. Against this background and considering the system in its entirety, if being non-organised were clearly more beneficial than being organised, one might argue that this could be in conflict with the right to organise and with the substance and spirit of the ILO Convention no. 154/1981 and the recommendation no. 163/1981.

59. The Government concludes that the situation in Finland is in conformity with Article 5 of the Revised Social Charter.

Accept, Sir, the assurance of my highest consideration.

Arto Kosonen
Director,
Agent of the Government of Finland
before the European Committee of Social Rights