EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

16 February 2007

Case document No. 4

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

OBSERVATIONS FROM THE EUROPEAN TRADE UNION CONFEDERATION (ETUC)

Registered at the Secretariat on 16 February 2006

European Social Charter

Collective Complaint No. 35/2006
by the
Federation of Finnish Enterprises
against
Finland
Observations
by the
European Trade Union Confederation
(ETUC)

16 February 2007

The complaint, relating to Article 5 (the right to organise) of the Revised European Social Charter (hereinafter: RESC), alleges that the Finnish legislation stipulates that national employers' organizations may conclude collective agreements which provide for the opportunity to derogate from certain provisions of the labour legislation through local agreements process whereby legislation, but that this only applies to employers belonging to national employer organizations and that employers not member of these national employer organizations do not have this possibility

The European Committee of Social Rights (hereinafter: ECSR) declared the complaint admissible on 5 December 2006. The European Trade Union Confederation (hereinafter: ETUC) is asked to submit observations in accordance with article 7 para. 2 of the Additional Protocol by 16 February 2007.

Before submitting its observations, the ETUC would like to express its appreciation to the government of Finland, for not only ratifying the RESC but also the Additional Protocol providing for a system of collective complaints (hereinafter: Additional Protocol). In this way, the Government contributes to re-enforce the Charter and the fundamental social rights in general as well as their specific effectiveness by taking active part in the system of supervision provided for in the Additional Protocol in particular.

In accordance with Article 7(2) of the Additional Protocol (ETS No. 158) to the European Social Charter, the ETUC, in close cooperation/consultation with and building upon the detailed information received from its Finnish affiliated organisations SAK, STTK and AKAVA, would like to submit the following observations.

I. Complaint's Conclusion

The complaint seeks to get established that

> "…the fact that the State of Finland has through legislation given companies that are members of employer organisations the right to apply more advantageous legal provisions than companies that are not members, violates the right to organise. As a consequence, the State of Finland applies stricter legal provisions on those who have used their right to organise in accordance with Article 5 of the Charter by not joining an employer organisation."

and therefore requests that

> "…the State of Finland should be given a recommendation, referred to in the Additional Protocol, to amend such legislation that violates the right to organise."

II. ETUC's Observations

A. National law and labour market practice

Finnish labour legislation on employment contracts, working time and paid holidays is widely, in line with the EU law concerned, mandatory. However, since

the Paid Annual Holidays Act 1960 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 social partners on a given industrial sector (such as technology industry, construction industry etc.). In general terms, as in other contracting States, this legislation reflects acceptance of the social partners, but even recognition that the balance of power between them and their sense of responsibility is of such a standard that there is no risk that they might undermine legislation that has been considered so important for protective or other reasons that it has been made mandatory. However, to illustrate the exact legal status and effect of this semi-mandatory legislation first a brief recap of the main draws in the industrial relations system is necessary.

Collective agreements concluded between a trade union organisation and an employer organisation or a single employer are in Finland – by virtue of Collective Agreements Act ('CAA') - binding *ipso jure* in individual employment relationships and thus supersede any less advantageous terms in employment contracts. The most important among collective agreements are those concluded between a national employer organisation and a nation-wide trade union organisation on a given industrial sector. Such agreements generally include provisions on proper terms and conditions of employment, such as pay, working time, holidays and other paid leaves, lay-offs and other job security, period of notice, sickness pay etc. These agreements include also a supervision structure (shop stewards and other employee representatives, and a negotiation and surveillance procedure between the parties) and a mandatory industrial peace clause, both aspects sanctioned by a compensatory fine. Such agreements cover blue collars and salaried employees in virtually all private sectors and senior salaried employees in certain private sectors such as technology industries.

Employers that are not members in the employers' associations concluding the sector-wide collective agreement are nevertheless by virtue of chapter 2:7 of the Employment Contracts Act ('ECA') obliged by the national sector-wide agreement - if it has been declared generally binding (*erga omnes*) - to apply the proper terms and conditions of employment setting up individual entitlements for single workers and employees but not obligations taking their effect between the organisations, such those on negotiations and employee representation (shop stewards etc.). The vast majority of the sector-wide agreements is declared binding *erga omnes*. An essential draw in this *erga omnes* system is the principle that it creates by virtue of the ECA only obligations for the non-organised employers.

Especially during 1990s the nation-wide social partners in various sectors have agreed in the national collective agreement on the possibility to agree – often within the limits established by the nation-wide agreement itself or by legislation – upon modifications/specifications on the company or even establishment level, given the various needs of flexibility and adjustments according to customers' needs, productivity, seasonal factors etc. This type of agreements fulfils the requirements of the doctrine on the semi-mandatory legislation as far as derogations or modifications by nation-wide collective agreements are meant if the local agreements are also legally a part of the nation-wide collective agreement as generally happens. The key in assessing the complaint is that especially the three laws discussed by the complaint, i.e. the Employment

Contracts Act, the Working Hours Act ('WHA') and the Annual Holidays Act ('AHA') allow an employer bound by the sector-wide collective agreement by virtue of chapter 2:7 ECA to apply the derogations stipulated by the sector-wide agreement unless they presuppose - to be valid – further agreement at the local (company or establishment) level. The possibility to apply the 'direct' derogations (i.e. those not presupposing a further local agreement) in the nation-wide agreements is de facto an exception to the principle that the *erga omnes* system means only obligations for the non-organised employer. It means a partial equalisation in the legal positions of the organised and non-organised employers. [1]

How to assess the very complaint?

A structural misunderstanding created by the complaint is that (like maintained at least on p. 5 of the complaint) the very transfer of a certain regulatory power to the local (company or establishment) level would be directly based on the law itself. In reality it takes place – after careful considerations - by the national sector-wide collective agreements. The three laws concerned accept this with the latent presumption that on this national level between social partners a sufficient balance of power exists, and that the transfer of the regulatory power does not endanger the leading principle of mandatory labour legislation, i.e. protection of workers.

Another misconception is concealed in the conclusion of the complaint, i.e. in that the laws concerned would give 'companies that are members of employer organisations the right to apply more advantageous legal provisions than companies that are not members, violates the right to organise.' In reality the complaint concerns provisions that presuppose a further agreement with the trade union side at the local level. Therefore, the employer in such cases only has the right to propose negotiations on such an agreement and the alleged 'right' is in reality only a possibility.

The very issue, i.e. why the organised employers and representatives of employees – but not the employers bound by virtue of chapter 2:7 ECA - are entitled to conclude, if empowered by the national sector-wide collective agreement, agreements on issues governed by semi-mandatory provisions in law, has been discussed in the preparatory works for the ECA, WHA and AHA. For the two first mentioned laws a tripartite state committee [2] defined the reasons for

[1] A further step of partial equalization concerns regular working time, the issue being, however, outside the scope of the complaint. Namely, sections 10 and 11 WHA (law 64/2001) make it possible to conclude a local agreement on regular working time also in non-organised companies, although only within the limits set up by the nation-wide agreement concerned. Many nation-wide agreements do not allow such agreements in non-organised companies at all and some of them allow these agreements if concluded by a shop steward. The background for denying (or, limiting) these agreements by many nation-wide agreements in non-organised companies is the lack – assessed by the nation-wide social partners within their regulatory powers - of a balanced negotiation position at the local level. See further the reasons for this as given below in discussing the merits of the complaint.

[2] State Committee Report 2000:1, pp. 143-144 the relevant contents of which were repeated by the governmental bill 157/2000 that included the present ECA, section 40a WHA and section 16a AHA (in law 65/2001). In the preparatory works for the present AHA (law 162/2005) the tripartite state committee (Vuosilomakomitea 2001:n mietintö s. 109-110) and the governmental bill referred to the grounds in the bill 157/2000.

the division concerned which we reproduce in a slightly amplified way so as to make them more understandable for a European audience.

First, the legislator has found that in national sector-wide collective agreements there is an overall negotiation and agreement balance due to which the leading principle of labour legislation, protection of workers and employees, is not endangered. [3] It is absolutely presumable that the parties to such agreements transfer the regulatory power to the local level in a responsible manner that does not endanger worker and employee protection. This regularly happens by keeping the national agreement as a binding minimum agreement with the contractual arrangement that the provisions of the national agreement apply as such unless otherwise agreed upon locally. Sometimes the national agreements set up conditions or limits for local agreements. [4] All this means that the local level worker and employee representatives are by no means imposed to conclude bad agreements. In addition to this, local agreements normally include compensatory elements if they derogate from the national agreement. For this reason the complaint exaggerates the advantageousness of the local agreements for organised employers. Pure derogations from the national agreements are hardly agreed upon outside economic crisis situations, and then, too, they require the mandate in the national agreement.

Second, collective agreements binding the organised employers regularly include a system of workers' and employees' representatives that are entitled to participate in trade union training for their tasks, having always the opportunity to get also direct support from their national union. This system for its part safeguards the compliance with the provisions in the collective agreement. In the non-organised companies the law does not require fulfilment of the representation system in the national agreement (but only the general provisions in ECA). This is a legal tradition inherent in the Finnish *erga omnes* system since its emergence, i.e. 1970. [5] It is notorious that worker and employee representation by shop stewards does not cover the whole field of non-organised employers.

Third, the local agreements discussed now are, given that they are legally a part of the national collective agreement, subject to a compensatory fine if the employer breaks the agreement intentionally or by grave negligence. The *erga omnes* system does not include any scheme of compensatory fines.

Fourth, the national employer organisation being party to the national agreement is *ipso jure* bound by an obligation, sanctioned by a compensatory fine, to supervise that the organised employers do not even by negligence break the collective agreement.

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[3] See e.g. the report of the state committee preparing the 1960 Annual Holidays Act, pp. 11-12.

[4] See e.g. the exclusion of the Sunday bonus from local agreements on overtime compensation for blue collars in the nation-wide collective agreement Technology Industries that is in the Annex to these observations, at the end of the corpus text. The WHA (section 40) as such allows derogations by a nation-wide collective agreement also regarding the Sunday bonus.

[5] The clauses on systems of worker and employee representation in the national collective agreements are not regarded as valid in the individual employment relationships and therefore do not bind a non-organised employer.

Fifth, possible legal disputes are settled by the specialized Labour Court as the single national instance. The proceedings are essentially quicker and, for a worker or employee, cheaper than proceedings in general courts that are the forum for disputes against a non-organised employer.

Sixth, the surveillance of collective agreements binding under chapter 2:7 ECA well is a matter of labour inspection authorities but their resources are rather limited. Besides, their legal possibilities to act are limited. Accordingly, the organisations of organised employers are not entitled to supervise non-organised employers.

Seventh, a trade union party to a collective agreement naturally seeks 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). Equally, the workers concerned lack the negotiation procedure in the collective agreement, thus the possibility to resort to negotiations between parties to the collective agreement in case of disputes.

In sum: there are many safeguards in the collective agreements binding under the CAA explaining why the legislator has delimited the negotiable derogations from semi-mandatory norms in law to organised local management and labour. We also recall the fact that a collective agreement between a trade union and a non-organised employer is possible under the CAA and this is a well-established practice in numerous sectors. Often such agreements include a simple adherence to the provisions in the nation-wide agreement of the sector concerned. Such agreements involve the legal consequences of a collective agreement – with the natural exception that there is no surveillance obligation of an employer organisation. Thus, they involve also the same possibility to resort to local agreements as organised employers have by virtue of the national agreement. This opportunity is naturally open also for the members of the Federation of Finnish Enterprises and many of them have also used it.

Negative freedom of association in Finnish law still merits a couple of remarks. Thus, it is guaranteed by section 13 of the Constitution [6] and, as elaborated, by chapter 13:1 ECA. [7] This principle has thus been taken into consideration by the

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[6] Section 13 of the Constitution reads:
Freedom of assembly and freedom of association
Everyone has the right to arrange meetings and demonstrations without a permit, as well as the right to participate in them.
Everyone has the freedom of association. Freedom of association entails the right 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 an association.
The freedom to form trade unions and to organise in order to look after other interests is likewise guaranteed.
More detailed provisions on the exercise of the freedom of assembly and the freedom of association are laid down by an Act.

[7] Chapter 13:1 ECA reads:
Freedom of association
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. 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.
Any agreement contrary to the freedom of association is null and void.

legislator both in enacting the ECA of 2001 and in amending at the same time the WHA (by adding section 40a, law 64/2001) and AHA (by adding section 16a, law 65/2001) for the parts that form the identical material contents of the complaint.

How to assess the only example in the complaint, the agreement of Technology Industries (for blue collars)?

The complaint presents its only practical example, that of overtime compensation provisions in the nation-wide collective agreement for Technology Industries, in a gravely misleading way while it asserts that an organised employer could apply for overtime work only a compensation rate of 20% whereas the non-organised employers shall apply a rate of 50 or 100%. Namely, the background is that the WHA makes in overtime work a distinction (which the nation-wide collective agreements repeat) between daily and weekly overtime. In daily overtime the compensation rate is – since decades - for the first two hours 50% and thereafter 100%. Weekly overtime is that done after 40 hours of work within a week and the compensation rate is 50%.

As related to the certain flexibility in working time arrangement allowed by both law and agreements, the collective agreement in Technology Industries gives the possibility to agree locally on the use of only one overtime concept (i.e. by combining the daily and weekly overtime) and to agree also upon a single compensation rate that may normally situate – when agreed as reflecting the previous relationship between daily and weekly overtime as the agreement recommends – around 70%. Under no circumstances can it be below 50%. This is evident in light of simplification of overtime compensation as a declared principle of the agreement and of the statement in the very national agreement: "In the view of the federations, locally agreed solutions are most effective when they succeed in combining the traditional standard of the overtime compensation scheme at the workplace and the requirements arising from its individual need for working hours." [8]

Thus, when the complaint boldly maintains that the compensation rate could be validly lowered down to 20%, it is a grave misconception of the collective agreement. No worker representative would normally agree on a 20 per cent's compensation rate and if such an agreement would anyway emerge, it would be rectified by the national social partners. Besides, here, too, one has to take into account the fact that according to the collective agreement the distinction between daily and weekly overtime with their respective compensation rates remains in force if no local agreement is concluded.

As to the factual importance of this compensation possibility it is appropriate to note that the Finnish Metalworkers' Union is so far not aware of any such local agreement. However, the assertion of a 20% overtime compensation rate as presented by the Federation of Finnish Enterprises is symptomatic in its way of interpreting the collective agreement concerned and thus a graphic illustration of the reasons why the legislator has delimited the application of the derogations

[8] For clarity's sake we enclose as an annex the whole section 14, clause 7. A further clarification is that it is clause 30 according to which the local agreements referred to in the collective agreement for Technology Industries shall form a part of the current collective agreement.

from semi-mandatory norms only to local agreements between organised management and labour.

In concluding we denote that national law and labour market practice do not support the complaint.

B Observations on the Social Charter

As a background postulate the ETUC and its Finnish affiliates consider that the negative aspect of the right to organise should be interpreted restrictively so as not to weaken the material content of the positive right to organise that must in addition be assessed in conjunction with Article 6(2) of the Charter: promotion of collective bargaining by the contracting States. The use of semi-mandatory clauses in law serves exactly this purpose, as does the delimitation of derogations, discussed above, to organised local management and labour if they presuppose local agreements. Besides, the material protection of the right to collective bargaining comes into play also under Article 5. Namely, "…where a fundamental trade union prerogative such as the right to bargain collectively was restricted, this could amount to an infringement of the very nature of the trade union freedom guaranteed under Article 5." [9] This position, i.e. the interdependence of Articles 5 and 6 has been repeated and elaborated further in various Conclusions; e.g. Conclusions VI (concerning Ireland) state how '…a precondition of satisfactory compliance with the obligations arising out of Article 6, paragraph 2, was full observance of Article 5…". [10]

The complainant has referred – in the context of negative freedom of association – to the collective complaint *Confederation of Swedish Enterprises v Sweden* (No. 12/2002), to case *Sigurjónsson v Iceland* (judgment of 30.6.1993, A No. 264) and to case *Gustafsson v Sweden* (judgment of 25.4.1996, Rep. 1996-II). In material sense the decision on the merits of the Swedish complaint and these judgments well included the negative freedom of association but do not support this complaint.

The complaint of the Confederation of the Swedish Enterprises concerned pre-entry closed shops (and deduction of a wage monitoring fee – manifestly irrelevant here) on the workers' side. The Finnish system of semi-mandatory norms with the possibility to derogations by a nation-wide collective agreement, as complemented by local agreements, obviously encourages the employers to organise but is by no means comparable to any closed shop, besides on the employer side. Finnish law guarantees (as do the agreements) the freedom not to organise.

Judgment *Sigurjónsson* concerned compulsory membership, prescribed by law, in an association of taxi-entrepreneurs that clearly had also public law tasks, on pain of losing or not getting the cab-licence. The case did not involve any labour market aspect (as to paid labour) and is therefore no relevant precedent for this complaint.

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[9] See Lenia Samuel, Fundamental social rights; Case law of the European Social Charter, 2nd edition 2002, p. 121.
[10] See Conclusions VI, p. 36.

Judgment *Gustafsson* involved the question about pressing the employer to become a member in the employers' organisation concerned or to conclude a substitute agreement so as to apply the nation-wide collective agreement concerned. It is thus indirectly akin to this complaint. In this sense notable is that the Court in *Gustafsson*, while it recognised in principle the negative freedom of association, anyway held that Article 11 ECHR does not as such guarantee a right not to conclude a collective agreement (paragraph 52). Given the substantive connection between Article 5 of the Charter and Article 11 ECHR, it is logical to resume that no such right exists under Article 5 of the Charter either. This is of course evident already from the wording and general scheme of Article 5 as such. Also with this ground the consequence is that the Finnish law system of semi-mandatory norms with possible derogations by local agreements, as empowered by nation-wide collective agreements, is no violation of the employers' right to organise.

III. General conclusion

Based on all the abovementioned, The ETUC and its Finnish affiliates SAK, STTK and AKAVA conclude that the complaint should be considered unfounded. The Finnish legislation concerned reflects a well developed although sophisticated feature of regulating local (company or establishment level) solutions (agreements) based on the national sector-wide collective agreements. They also consider that the Finnish legislation does not violate the right to organise of the employers and, therefore, consider that no recommendation should be addressed to the Finnish State.

Annex: Extract from the Collective Agreement for Technology Industries 2005-2007

Section 14 Overtime, Sunday work and work done during weekly time off

Clause 7. A local agreement may be made with a view to simplifying the principles governing overtime compensation. In the view of the federations, locally agreed solutions are most effective when they succeed in combining the traditional standard of the overtime compensation scheme at the workplace and the requirements arising from its individual need for working hours. The procedures involved in adopting a format based on a single overtime concept are specified in greater detail below.

It may be locally agreed that the compensation paid for overtime is determined using a single overtime concept. This means that compensation is no longer paid separately for daily and weekly overtime, but that compensation is paid for all overtime hours accruing over a specified longer period on the basis of one and the same overtime compensation regulation.

The foregoing local agreement must specify the length of the overtime compensation tracking period and the amount of overtime compensation payable, which will either be graded according to the number of overtime hours worked or expressed as a flat percentage rate.

The local agreement will be concluded between the employer and the chief shop steward.

Use of the single overtime concept applies only to the overtime referred to in this section and to collective agreement overtime, and does not affect the Sunday bonus payable under clause 9 or the compensation for weekly time off referred to in clause 10.

Implementation regulation:
The single overtime concept format is as follows:
1. A tracking period is selected for use in overtime compensation, which may, for example, be one or more months or a quarterly period. However, the tracking period will not exceed one year.
2. All overtime hours for the entire tracking period are counted (including collective agreement overtime).

3. The overtime hours are compensated, for example, in accordance with the following
scheme:

The overtime hours from the beginning of the tracking period are compensated up to a
certain limit at overtime compensation rate x and the remaining overtime hours for the
tracking period are compensated at overtime compensation rate y.
Other formats for overtime compensation may also be agreed at the workplace.