EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

1 July 2010

Case document No 6

European Trade Union Confederation (ETUC)/
Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/
Confédération des Syndicats chrétiens de Belgique (CSC)/
Fédération Générale du Travail de Belgique (FGTB)
v. Belgium
Complaint No. 59/2009

RESPONSE TO THE GOVERNMENT'S WRITTEN SUBMISSIONS ON THE MERITS

[TRANSLATION]

registered at the Secretariat on 11 June 2010

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Memorial in reply

BY:

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- the complainant trade unions

against

The Kingdom of Belgium

The complainants have noted the Belgian government's memorial and observations and wish to:

(1) restate the main elements of their case and the purpose of the complaint;

(2) reply to the government's memorial and, briefly, to the observations of the IOE.

1 Main aspects and purpose of the complaint

- The complainant parties' aim is, and always has been, to prevent and settle collective disputes by negotiation or voluntary conciliation.

  - they maintain that, notwithstanding the non-conformity conclusions of the European Committee of Social Rights (hereafter the Committee) in supervision cycles XVI, XVII and XVIII, the situation in Belgium is still not compatible with Article 6 § 4 of the revised Charter. They therefore call on the Committee to find that judicial intervention in collective disputes in Belgium, particularly restrictions on picketing, which negate the right to collective action, are incompatible with the Charter;

  - it should be noted that the Belgian government itself acknowledges this in several sections of its memorial. In particular it states that "certain employers occasionally abuse this option and are encouraged to do so by a small number of specialist legal practices" (section 2.1.1), and that "certain employers turn to the courts ill-advisedly or too soon" (section 6).

- Contrary to what the government implies, the complainants are not calling for legislation on collective disputes but for each of the three powers that make up the Belgian state to comply with the revised Social Charter. The Belgian government should ensure that each of these components abides by the provisions of the Charter because it is responsible internationally for the actions of the different powers of which it is composed.

- Finally, with reference to paragraph 16 of their complaint, the parties wish to draw attention to the lack of transparency and exhaustiveness of the relevant decisions handed down by the courts. They would like all the decisions relating to collective disputes handed down under the unilateral applications procedure to be made available to the Committee and the Belgian national labour council, which would highlight some more "dubious" decisions and permit an up-to-date analysis of the situation.

2 Reply to the government memorial

2.1 Initial observations

1 The Belgian government does not agree with the arguments presented in the collective complaint.

However, in Part 1 of its memorial the government does attempt to rebut the "facts" presented by the complainants in support of their complaint. The government tries – just – to answer the complainants' criticisms and confines itself to suggesting that they are just a body of insinuations.

It should be stressed from the outset that this type of response cannot have any impact on the merits of the complaint since it is not concerned with either its purpose or the arguments it presents, which are based on the revised Charter and the Committee's case-law.

Part 1 of the government's memorial therefore poses no challenge to the merits of the complaint.

2 The government's failure to discuss the Committee's case-law on the purpose of the complaint.

Strangely, the government makes no attempt to refute the complainants' arguments and takes no account of the Committee's previous case-law (see paragraphs 33 ff of the complaint) on the judicial procedures in question. Nor is this case-law ever challenged.

3 On a number of occasions, the government defends itself by stating that certain judges (members of the judicial power, and thus an integral part of the Belgian state) should have reached a different decision and that judgments and orders would have been reversed in the event of a third party application, an appeal or even an appeal on points of law. This actually reinforces the complainants' argument that the available remedies are ineffective (see paragraph 2.2.6 below) and are not sufficient to bring Belgium into line with the Charter.

4 Where the government memorial does attempt to answer the complainants' arguments, the latter will refute them as follows.

2.2 Analysis

2.2.1 The government maintains that every effort is made in Belgium to ensure that collective disputes are resolved by negotiation

1. In section 1 of its memorial, the government considers the theory behind Belgian industrial relations law. The intention is highly praiseworthy. However, the complainants wish to emphasise that their concern is not with the theory but with the practical situation regarding the right to collective action in Belgian law.

It is the practical situation that the Committee rules on. Most of the government's observations are therefore superfluous and as such cannot be advanced to refute the merits of the complaint.

2. The complainants have not hitherto expressed any criticisms of the standard of the industrial mediation and conciliation services provided by the government.

However, they would make the following points:

Belgium does indeed have well developed arrangements for social dialogue, of which the trade unions are the initiators and fervent supporters, and in which they invest a highly motivated staff and considerable financial resources.

They continue to promote and defend the role of industrial conciliators in collective disputes, in both their preventive and their conciliation activities. They believe that this body of officials plays, and must

continue to play, a key and exclusive part in settling these conflicts, rather than having the courts intervene.

The complainants see the use of the courts as a means of dispossessing industrial conciliators, who are legitimately responsible for dealing with such disputes, of their prerogatives.

Thus, the existence of these mediation and conciliation services can in no way justify the flagrant violation of the Charter by the civil courts under the urgent applications procedure.

The complainants consider that the effect of the courts' intervention that they are criticising is to interfere - in total breach of the principle of separation of powers - with the existence, authority and smooth running of the mediation and conciliation services, which were initiated by the social partners and are offered by the Belgian government. Yet these services are the legal alternative to the "judiciarisation" of industrial disputes.

2.2.2 The Belgian government considers that the law makes adequate provision for the right to collective action

The laws, regulations and collective agreements cited by the government (section 1.2.3.2) do not establish an unambiguous subjective right to strike as part of collective action.

In practice, the right was established when Belgium ratified the Charter.

It should be noted though that the government frequently refers to the right to strike rather than the right to collective action.

This is evidence of the limited acknowledgement of the Charter terminology in Belgian law.

Besides the complainants' criticisms are focussed on the private sector. The overview they have provided of the case-law of the civil courts offers a good illustration of this. The complainants are not therefore "forgetting" the public sector, as the government claim (1.2.3.2). Besides, the state of the right to strike in the public sector can in no way justify violations of the Social Charter in the private sector.

With regard to the government's description of the situation concerning the right to strike in Belgium, the complainants have taken note of its comments (1.2.4 of the memorial) about certain "liberal" aspects of the Belgian system.

The complainants' case is that the right to collective action becomes largely theoretical and illusory as a result of overzealous intervention by the courts, which form part of the Belgian state.

Simply listing features deemed to be "liberal" can in no way justify flagrant violations of the Charter.

Nor is the Belgian government's case devoid of errors and contradictions.

a. Firstly, the government claims (1.2.2.1) that "the ban on strikes ended in 1948" with the passing of the Act of 19 August 1948 on services of public interest in peacetime. The government therefore argues that "strikes have been recognised in Belgian law since 1948, via the Act on services of public interest in peacetime" (= restrictive interpretation of the Court of Cassation in its judgment of 21.12.1981 SIBP v. De Bruyne). The government also refers to the impact of the Court of Cassation's 1981 De Bruyne judgment on recognition of the right to strike in Belgium (1.2.3).

b. Prior to the De Bruyne judgment, Belgian legal theorists never viewed the 1948 Act as a legal basis of the right to strike. The fact that the Court of Cassation found it to be so was actually a matter of some surprise. For example, in a doctoral thesis on "the search for a legal basis" (M RIGAUX, *Staking en bezetting naar Belgisch recht*, Antwerp, 1979, p 131 ff.), the author treated this act as a law that restricted the freedom to strike**.** In a celebrated treatise a distinguished former member of the Committee concluded that it was impossible to find a legal basis for the right to

strike in this act (L. François, *Théorie des relations collectives en droit du travail belge,* Brussels, Bruylant 1980, nos 66-67).

c. To summarise, the right to strike in Belgian law is firmly rooted in the Court of Cassation's 1981 judgment and is currently recognised as such by the academic world[1]. Meanwhile the right to collective action derives directly from Article 6§4 of the Charter.

2.2.3 The case-law of the Court of Cassation

In section 1.2.3.3 the government tries, very surprisingly, to minimise the impact of the Court of Cassation's case-law in the Belgian legal system, while continuing to confirm that the right to strike derives not from legislation but from a judicial decision of that same Court - which, it should be remembered, has only recognised the right to collectively withdraw labour.

What makes the government's attitude in section 2.2 all the more surprising is the fact that it seems to regret that the Court has not had to consider the matter more frequently and appears to encourage trade unions to appeal against decisions of the courts in such cases, up to and including appeals to the Court of Cassation.

The complainants would not deny for one moment that the Court of Cassation is at the pinnacle of the Belgian judicial system. As the government notes, the Court decides whether the law has been violated. It is not concerned with the finding of facts. It also scrutinises the reasoning behind court decisions and quashes judgments for which insufficient reasons are given.

Yet the Court of Cassation refuses to exercise this role in connection with the special procedures that the complainants are challenging (Cass. 4 February 2000), which are employers' normal form of legal proceedings.

In addition, the effect of third party appeals is that the case is transferred to the court of appeal which, if it finds that it is no longer a matter of urgency, no longer has to rule on whether there is an apparently legal state of affairs. The fact that an appellant only executed the original court judgment because a coercive fine was imposed is irrelevant (Cass. (1st), 17.4.2009).

The Court of Cassation's judgments therefore carry considerable weight. This is illustrated by the inability of the civil courts acting under the urgent procedure to recognise other forms of collective action than strikes. This is the consequence of the Court's grudging and minimalist acknowledgement of the right to collective action.

Finally, and contrary to what the government claims in section 1.2.3.4, the complainants have not criticised the Court of Cassation's failure to refer to the Charter in 1981 when recognising the right to strike since it had not then been ratified by Belgium.

2.2.4 The Belgian government maintains that resort to the courts is exceptional

The government tries to show in section 2.3 that resort to the courts is the exception, by comparing its incidence with the number of days of strikes.

The complainants question the relevance of such a comparison. It is of little importance how many disputes have led to judicial proceedings when these proceedings have resulted in an almost uniform body of decisions that are incompatible with the Charter. This body of case-law has a chilling effect on the use of strikes.

In certain periods identified in the complaint resort to the courts can readily be described as intensive.

[1] Which is why, to celebrate its 25th anniversary on 21 December 2006, the University of Ghent organised a study day on the right to strike, the proceedings of which were published with the assistance of Professor Patrick Humblet of that university. (P. Humblet and C. De Vos, Arbeid en Kapitaal, een kwarteeuw stakingsrecht, Ghent, Academia Press, 2007).

The complainants refer in this context to the study and the court orders described in the collective complaint and to the table in appendix 1.

This summary does not of course include any positive or negative orders of which it is unaware because they have remained secret.

What is particularly striking is the fact that the only analysis/listing that exists on the subject (see appendix 12 of the complaint) comes from the legal practices that act as advisers to employers and specialise in such proceedings (cited by the Belgian government in sections 2.1.1 and 6).

It should also be noted that although the minister of employment, labour and social dialogue (section 5 of the government memorial) has asked the national labour council to undertake an evaluation of the 2002 gentlemen's agreement, the council is having difficulty obtaining information from the justice minister on the judicial decisions that might form the basis for such an evaluation.

It is striking that the government, and the IOE, confirm this absolute lack of exhaustive information and transparency in the body of case-law.

The October 2005 strikes, which the government describes as political strikes, in fact followed the breakdown of the social dialogue on employees' "end of careers" and the government's determination to act alone. In Belgium, this is an area that falls largely within the autonomous domain of the social partners. These strikes therefore had a social and economic rather than a political objective.

In connection with political strikes (sections 2.3.1 and 1.2.4), see the relevant section in B. Gernigon, A. Odero and H. Guido, "ILO principles concerning the right to strike", *International Labour Review,* Vol. 137 (1998), No. 4; and for the 2000 edition of this study, pp. 14ff (www.ilo.org). This makes it clear that strikes relating to economic and social issues are perfectly legitimate as far as the ILO's supervisory bodies are concerned.

2.2.5 The Belgian government gives a misleading account of the complainants' arguments claiming that the complaint implies that Belgium lacks a coherent legal framework and therefore calls for legislation on collective action

The complainants wish to restate that the purpose of the complaint is to secure confirmation from the Committee that judicial intervention in collective disputes in Belgium, particularly with regard to restrictions imposed on strike pickets, is incompatible with the Charter.

Contrary to what the government implies, the complainants are not calling for legislation on collective disputes but for each of the three powers that make up the Belgian state to comply with the revised Social Charter. Article 6§4 of the Charter is an integral part of the Belgian legal system, which adopts a monistic approach to treaties that are sufficiently clear and detailed, thus giving them direct effect.

2.2.6 The Belgian government maintains that there are effective remedies for judicial decisions that overstep the powers of the courts

Contrary to what is suggested in the government memorial, what the trade unions are criticising is the substance or the outcome of the civil courts' decisions on urgent applications, that is their impact on the right to collective action.

It has to be said that the Committee is not the ideal body to deal with violations of the right of access to justice (Article 6 of the European Convention on Human Rights).

However, the government's defence seems to based on the procedural aspects of the intervention of the courts, under the urgent and third party applications procedures.

The collective complaint is intended to put an end to this important but over-simplified approach by going to the heart of the matter. The existing case-law needs to be examined in the light of the fundamental rights embodied in the European Social Charter, which is the basis of the right to collective action in Belgian law.

The complainants maintain that the government is abusing its status as the defending party by describing the extremely complex rules of Belgian law on procedures that are meant to be exceptional, while ignoring the substantive and non-procedural merits of the complaint.

According to the government (section 2.2), one of the available remedies, third party applications, justifies temporary violations of Article 6 of the Charter. One eminent commentator quite rightly describes it as a pure illusion ("Kort geding en collectief conflict. Diabolische procedure of laatste redmiddel tegen syndicaal hooliganisme?", in De norm achter de regel. *Hommage aan Marcel Storme 1995, Antwerp, Kluwer rechtswetenschappen, 1995, 137-160).* Third party applications are often dealt with too late, after the collective action has ended (generally following a court order, accompanied by a coercive fine). Moreover, the end of the dispute, or the expiry of the period of validity of the court order, is often relied on as grounds for declaring such applications inadmissible! The remedy therefore fails to achieve its real objective, which is to end the breach of the right to collective action. In this connection please see the table in appendix 1 and the edifying example of the "Carrefour" case, in which various appeals were lodged (see 2.2.8 below).

2.2.7 Insinuations (section 2.1.1 of the government memorial)

The complainants are totally opposed to and do not encourage the use of physical violence or threats.

They also wonder why the government quotes the Parti du Travail de Belgique (PTP) in its defence. This party has no organisational links with the complainants.

The complaint concerns Belgian judicial decisions that prohibit peaceful picketing, including the peaceful blocking of access to business premises.

In this respect, the Brussels labour court decision of 5 November 2009, which the government cites (section 4.1), is quite exceptional in that it refuses to acknowledge the peaceful blocking of access as a serious ground for intervention, thus helping to clarify the notion of collective action.

It needs to be stressed that this decision was not handed down by the civil courts under the unilateral applications procedure, which is the subject of this complaint, but by a labour court. It followed the dismissal of union representatives involved in collective action in connection with the restructuring of a firm. The government suggests that this decision is consistent with ILO principles, whereby the peaceful occupation of premises is one element of the right to collective action.

However, in the great majority of cases concerning the urgent procedure, the civil courts' decisions are certainly not compatible with these principles.

2.2.8 Orders made in response to unilateral applications

Decisions under the urgent procedure prohibit the mere blocking – even peaceful – of access to premises as part of strike picketing. They therefore go much further than banning the use of violence.

The following are certain extracts from relevant orders, including the accompanying coercive fines:

- **Carrefour:** extracts from the order of 23.10.2008, handed down by the Tournai court of first instance – valid for 15 days, coercive fine of 1000 euros for each person who hinders the application of the measures ordered up to a maximum of 100 000 euros.

  It is forbidden to physically hinder or directly or indirectly prevent, in whatever way, the operations of the applicant or of the applicant's stores in the Tournai judicial district. This includes the firm's owners, managers, suppliers, personnel and customers. It is forbidden for anyone to interfere with peaceful access to the firm's sites, premises, offices or parking areas, either on the public highway or on private land.

- **DHL:** Extracts from the order of 01.03.2010 handed down by the Brussels court of first instance – valid for 2 months, coercive fine of 1000 euros per person, per hour and per offence.

  This order concerns anyone who, either on the public highway or on private land, prevents or hinders movement into or out of the applicants' buildings or land.

  DELI XL - Extracts from the order of 3.10.2008 handed down by the Charleroi court of 1st instance – no limit on the duration of the order, coercive fine of 500 euros per person and per hour. This orders the eviction of anyone who seeks to prevent the applicant, its employees, its suppliers and its customers from going about their normal business.

Orders which prohibit the mere fact of interfering, directly or indirectly, with access may be interpreted as prohibiting the very presence of pickets. Orders designed to protect the "normal business" of an undertaking are in flagrant breach of the right to collective action.

So despite the government's claims, this is not a purely semantic discussion but a semantic discussion with legal, and therefore very practical, consequences, since they are referred to in court decisions that are likely to be executed and some of which have led to proceedings before the seizures judge, as in the IAC case. In other words this is a semantic discussion that affects the exercise of fundamental rights.

The complainants' criticism of the judicial proceedings in question is that they act as disincentives to initiating or continuing a collective action.

The complainants have always opposed judicial intervention in collective disputes, particularly when the decisions have been handed down for preventive purposes, following urgent applications, and are accompanied by coercive fines. They have challenged the powers of the judiciary to hand down such orders, particularly as they are based on exceptional procedures, from the time the first ones appeared. The courts have ignored them for many years, and during this time the only support they have received has been from the Committee's conclusions. Unfortunately the Belgian courts have remained immune to the principles enshrined in the Charter and the case-law of its supervisory body. The specialist legal practices that the government says encourage employers to take legal action have no hesitation in exposing the Committee to ridicule (see extract from "Le Soir).

Following the wave of decisions in 2008, the unions tried once more, almost in desperation, to force the courts to change their practice, by relying simultaneously on the Charter and the Committee's case-law. At the same time they also planned to lodge this complaint. It is true that, for the first time, at the very moment that the complaint was lodged, certain civil courts of first instance did change their practice – often in response to third party applications – by refusing to impose restrictions on the right to strike that were incompatible with the Charter, sometimes adding clarifications concerning the notion of collective action.

However this breath of fresh air did not last long, since with only rare exceptions the appeal courts accepted the employers' arguments (see appendix 1).

The arguments most frequently accepted by appeal and lower courts to justify the rejection of trade union applications are that the latter are no longer relevant, since the period of validity of any orders handed down has expired or the dispute has been settled.

Moreover, the table in appendix 1 shows the extent to which the would-be effectiveness of the available remedies is purely theoretical.

To take the example of the Carrefour dispute in 2008, the chronology of one of the cases brought by the employer before the Mons court of appeal was as follows:

- order handed down following a unilateral application on 24 October 2008,
- third party application lodged on 7 November 2008,
- decision to accept the trade union third party application on 22 April 2009,
- decision of the Mons court of appeal of 5 May 2010 in favour of the employers and declaring the third party application inadmissible because it served no purpose.

If the available remedies are purely theoretical there is nothing theoretical about the chilling effect of preventive orders accompanied by coercive fines.

Belgium implicitly acknowledges in sections 2.1 and 2.2 that its courts have been acting in contravention of the Charter and, as we have shown, cannot rely on the remedies available to the complainants as a means of rectifying this, for the clear and simple reason that the complainants are quite unable to obtain from the civil courts (i) the overturning of decisions (ii) in good time (iii) capable of repairing the damage caused, namely the infringements of the right to collective action.

So while the government acknowledges in its memorial that the courts have overstepped their authority, a majority of the latter have not, unfortunately, recognised this in their decisions.

The complainants are naturally pleased that the ministry's site refers to the European Social Charter and that certain judges refer to it when trade unionists rely on it. However, it is still the case that the vast majority of decisions under the urgent procedure are in breach of the Charter. Nor do these decisions generally reply to the unions' arguments concerning the Charter and references to it are often purely for form's sake, with the provisions of these decisions taking no account of the Committee's case-law.

The complainants hope that the outcome of this complaint will help to change this situation in fact and in law.

2.2.9 The Belgian government criticises trade unions for losing control of disputes and for the increasingly violent nature of some of their action

In section 2.3.1, the government tries first to show that the number of legal actions is very small compared to the number of strike days and then to obscure the situation described above by highlighting a few, usually very old, disputes to draw a number of very general conclusions and cast doubt on the unions' ability to control the situation.

In this context, the complainants note that employee discontent and collective action are often the consequence of such specific circumstances as the dismissal of employee representatives, failure to comply with agreed redundancy procedures and sometimes employers' unwillingness to negotiate reasonable social plans to accompany restructuring.

They disagree with how the government has characterised certain disputes, and wish to emphasise yet again that they are opposed to all forms of violence.

2.2.10 The government states that it cannot prevent applications to the courts

The government states in section 2.2 that "the courts can only intervene if illegal acts, such as violence or vandalism, have been committed".

Yet the complainants have shown that the decisions they are challenging go well beyond these principles and that they are unable to overturn them with the remedies at their disposal.

Moreover, the Belgian government should ensure that each of its components abides by the provisions of the Charter because it is responsible internationally for the actions of the different powers of which it is composed.

In a series of recent judgments concerning Turkey and Russia, the European Court of Human Rights has attached to Article 11§1 of the Convention the rights to organise (*Danilenkov and others v Russia*, 30.7.09), to negotiate or bargain collectively (*Demir and Baykara v Turkey,12.11.08*)[2] and to collective action (*Satilmiş* (formerly *Dilek*) *and others v Turkey, 17.7.07, Enerji Yapi-Yol Special educational needs v Turkey, 21.4.2009*[3], *Kaya and Seyhan v Turkey*, 15.9.09). In doing so it strengthened the scope of Article 6 of the Charter, to which it often referred explicitly, with regard to countries such as Belgium that are bound by both instruments.

It is therefore particularly appropriate in the context of this complainant to refer to the case-law of the Strasbourg Court from the following two standpoints:

1. an absence of remedies (Article 13 of the Convention) or the ineffectiveness of existing ones (Article 6) can lead to violations of substantive rights.
2. how the courts exercise their powers is very often recognised to be the cause of such violations.

The complainants therefore note that:

1. in the majority of cases the case-law of the Belgian courts shows that there are no effective remedies against orders that interfere with the right to collective action and this gap reinforces Belgium's breach of its obligations under Article 6.4 of the revised Charter;
2. signatory states undertake to ensure that all their component elements apply the Charter, which means that the federal government, which represents Belgium before the Committee, cannot implicitly hide behind the constitutional separation of powers and argue that it cannot prevent the courts from reaching whatever decisions they choose. Indeed, it is responsible for ensuring that the rights embodied in Article 6.4 are fully respected by the organs of the Belgian judicial system.

2.2.11 The Belgian government criticises the complainants for its rejection in 2001 of an initiative of the then minister of employment

This initiative was intended to establish the basis for (and therefore endorse) court intervention in collective disputes and did not put an end to the use of coercive fines, whose dissuasive and inhibiting effect is obvious.

The government claims in section 5 that the 2002 gentlemen's agreement was intended to avoid legislation to remedy the fact that the parties were not all represented in the relevant court proceedings.

The complainants wish to emphasis that their complaint is concerned not with the lack of representation in the proceedings but the content and outcome of the decisions handed down. This argument does not therefore hold water.

In sections 5 and 6 the government itself refers to the problems associated with these proceedings, but purely from the standpoint of the rights of the defence, and not that of the ineffectiveness of the available remedies.

2.2.12 *The Belgian government states that references to international instruments are not relevant*

The Belgian government states in section 3 that the references in the complaint to various international instruments are not relevant.

To the contrary, the complainants consider that the observations of the supervisory bodies of the UN International Covenant on Economic, Social and Cultural Rights, and particularly of the ILO, are important in a number of respects.

[2] In this judgment, the Court stated that freedom to bargain collectively was a key element of, and thus inherent in, freedom of association.
[3] In the Enerji judgment, the Court described the right to strike as an integral aspect of freedom of association.

Firstly, the Social Charter is based in large part on ILO instruments. The explanatory report to the Additional Protocol providing for a system of collective complaints refers to existing ILO procedures. The close relationship between the two instruments is confirmed by the participation of an ILO representative in the reporting system (Article C of the revised Charter and Article 28 of the Charter).

Secondly, the European Court of Human Rights refers, particularly in the context of collective labour law, to the international instruments and case-law of the UN and the ILO (see judgment of 12 November 2008 – Demir and Baykara – paragraph 85: the Court "can and must take into account elements of international law other than the Convention, [and] the interpretation of such elements by competent organs ...").

Finally, the Committee itself also refers to ILO Conventions (see Digest 2008 concerning articles 1§2, 3§2, 12§2 and 29 of the revised Charter and even Article 6§4 of the Charter, Conclusions XVII-1 Malta).

It is therefore perfectly relevant when interpreting and applying Article 6.4 of the revised Charter to refer to the various international instruments concerned and their related case-law where there has also been a non-compliance finding concerning the situation in Belgium.

3 Reply to the observations of the International Organisation of Employers (IOE)

The complainants consider that they have already answered most of the IOE's observations.

However, they would like to challenge the reference in the observations to the *Viking* and *Laval* judgments of the CJEU.

The proportionality test applied by the Court did not concern the relationship between the means and the end of the collective action.

Nor, in our view, do the Community law-making authorities or the Court have the power to rule on collective disputes that have no impact on cross-border freedom of movement.

The mere fact that the European Union's Charter of Fundamental Rights makes it possible to restrict the fundamental rights that it embodies do not seem relevant to us.

First, this Charter only concerns EU member states regarding the application of Community law. It is of no relevance to totally domestic situations.

Secondly, and in accordance with well-established tradition, under Article 52 of the Charter the exercise of fundamental rights is not subject to the proportionality principle, which only applies to restrictions on those rights.

At all events, the Viking and Laval judgments are not consistent with the European Court of Human Rights' interpretation of the ECHR, which, in accordance with articles 52 and 53 of the Charter of Fundamental Rights, requires the CJEC to take account of "elements of international law other than the Convention, [and] the interpretation of such elements by competent organs" (*Demir and Baykara* judgment, quoted above). In other words, it is not the Committee that needs to take account of the CJEC's restrictive interpretation of the right to strike, but rather the latter that should bear in mind the case-law of the Committee.

Conclusions

All that has been said above shows that the complainants are, and always have been, committed to anticipating and resolving disputes through prevention and social dialogue. The intervention of the courts in such disputes is totally inconsistent with a system in which social dialogue was designed explicitly to avoid judicial involvement. The courts have in any case shown themselves to be incapable of resolving disputes or of offering an appropriate response, in contrast to the contribution of the industrial conciliators. The complainants do not accept that the courts should have the power to hand down discretionary decisions on collective disputes and impose restrictions on the right to collective action that are incompatible with the European Social Charter.

Signatures

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Jan Vercamst
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