EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

8 October 2012

Case No. 6

***Fellesforbundet for Sjøfolk* (FFFS) v. Norway**
Complaint No. 74/2011

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

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ATTORNEY GENERAL - CIVIL AFFAIRS

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WRITTEN OBSERVATIONS ON THE MERITS

BY

THE KINGDOM OF NORWAY

COMPLAINT NO. 74/2011

FELLESFORBUNDET FOR SJØFOLK (FFFS) v. NORWAY

1 INTRODUCTION

Reference is made to the Committee's decision on admissibility of 23 May 2012 and the Executive Secretary's letter of 8 June 2012, whereby the Government's request for extension of the deadline for the submission on the merits to 8 September 2012 was accepted.

2 THE COMPLAINT AND THE GOVERNMENT'S POSITION ON THE MERITS

FFFS submits that the Norwegian Seamen's Act of 1975, which in section 19 stipulates a retirement age of 62 for seamen, is to be construed as an unjustified prohibition on employment and a

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discriminatory denial of seamen's right to work as such, in breach of Articles 1§2 and 24 read alone or in conjunction with Article E of the Charter.

In its admissibility decision of 23 May 2012, the Committee observes (at paragraph 4) that, in the matter of discrimination in employment, it is not necessary to combine Article E with Article 1§2 since the latter already prohibits discrimination which workers may suffer in employment.

FFFS argues that the retirement rule in question constitutes direct discrimination and cannot be reasonably justified by health or security considerations or other legitimate aims. FFS points, *inter alia*, to the fact that all seamen over the age of 50 must undergo an annual extensive health check, that there is no reason to assume that seamen's health situation in general deteriorates at the age of 62, and to the fact that modern working and security conditions at sea have been significantly simplified and improved.

The Government refers to the Norwegian Supreme Court's judgment of 18 February 2012 (Rt-2010-202 "Kystlink"), containing a thorough examination of the retirement rule for seamen in the context of prohibition of discrimination on the grounds of age contained in the directives of the European Union, the European Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as the relevant jurisprudence of the European Court of Justice, the European Court of Human Rights and the UN Human Rights Committee. The Supreme Court found that the retirement rule in question was in compliance with these international legal instruments, and the Government submits that Articles 1§2 and 24 of the Revised Social Charter, as interpreted by the European Committee of Social Rights, does not warrant a different conclusion.

It seems worth recalling, at this point, that the Norwegian Seamen's Act of 1975, including the retirement rule in question, is currently under revision. Reference is made to the Government's written observations to the Committee of 12 January 2012. The legislative committee appointed by the Government will submit its proposal for a revised seamen's act on 30 October 2012. The Government intends to submit a revised act to Parliament for approval during the spring of 2013. The outcome of this process as regards the retirement rule cannot be predicted. The Government contends, in any event, that the retirement rule presently in force does not contravene the Social Charter.

3 OBSERVATIONS

3.1. Retirement regulation in Norway

There is not any general statutory provision regarding retirement age in Norway.

The Retirement Act for Public Civil Servants of 1956 (*"Aldersgrenseloven"*) provides for automatic termination of the employment contract at 70, and also allows for automatic termination to take place at 68, 65, 63 or 60 years when health, security or operational requirements so require. In addition, several provisions regarding special retirement age are stipulated in the provisions of Norwegian legislation, and in collective and individual agreements. Pursuant to the Working Environment Act (WEA) of 2005, the employer may terminate the employment contract without any reason other than age from the year the employee reaches the age of 70. Reference is made to

the 2008 Conclusions of the Committee with regard to Norway's report, where it found that the situation in Norway was in conformity with Article 24 of the Charter.[1]

Alternative retirement ages are widely applicable in Norway, particularly in the health sector, police, armed forces and certain performing arts, but also e.g. in the prison service and the railroad and aviation services.

As rules on retirement age, regardless of their legal basis, imply either automatic termination or – as in the present case – a substantial reduction in employment protection, all Norwegian regulation of retirement age is coupled with a right to retire with pension from applicable insurance schemes. Such pension rights become effective no later than as of the retirement age and frequently – as is the case e.g. for seamen – at an earlier age.

According to the case law of the European Court of Justice, recently confirmed in a judgment 5 July 2012 in case C-141/11 *Torsten Hörnfeldt v. Posten Meddelande AB*,

> *"the automatic termination of the employment contracts of employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement (Rosenbladt, paragraph 44)".* [2]

3.2. The retirement age for seamen

Initially, the Government would like to point out that in the context of the present case, the term "compulsory retirement", as used by the Committee e.g. in the presentation of the case in paragraph 1 of its admissibility decision of 23 May 2012, is misleading . The retirement rule of the Seamen's Act does not imply that seamen's employment contracts are *automatically* terminated at 62, or that seamen are under a legal obligation to retire at this age, but rather that the employer at this point is entitled to terminate the work contract for no other reason than age.

Thus, this retirement rule is less harsh on elder persons who wish to stay employed, compared to automatic retirement rules (such as in the *Hörnfeld* case just mentioned), in that the Seamen's Act merely gives the employer an option to terminate a seaman's employment contract at 62 years.

The rationale and justification of the retirement age of 62 for seamen, must be seen in connection with other special regulations for this profession in Norway, including in particular favourable pensions rights, but also other privileges such as favourable taxation[3] and social rights[4].

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[1] At page 20-21, http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Norway2008_en.pdf Regarding the Committee's request in for further information, it should be mentioned that the relevant section 15-7, subsection 4 of the WEA, has since been amended, effective as of 1 January 2010, in order to comply with Council Directive 2000/78/EC.

[2] Case C-141/11 at paragraph 28.

[3] The Nowegian Taxation Act no. 14 of 1999 section 6-61 provides for a special 30% deduction on income.

[4] See *inter alia* sections 25, 28 and 31 of the Seamen's Act.

When the Norwegian Parliament established a special pension scheme for seamen in 1948, with a lower pensionable age than for other employees, it was pointed out that the seamen's profession was subject to special and changeable working conditions. Furthermore, seamen were not in a position to enjoy various social measures in society that other citizens enjoyed. It was also emphasized that the shipping industry was of vital economic importance to the Norwegian society, and that beneficial social conditions were likely to contribute positively to stability of and necessary recruitment to the seaman profession.[5]

In the preparatory works to the Seamen's Pension Act of 1948, it was explained that experience has shown that the seaman profession involves rather heavy strain and risk, and therefore requires particularly strong physical and mental capabilities. Consequently, young employees will often oust older employees. Such considerations may justify a lower pensionable age than for other professions.[6]

For several years, the compulsory retirement age for seamen was identical to pensionable age, 60 years. In the 1980's, there was a legislative initiative to harmonize the shipping legislation with the (previous) Working Environment Act of 1977. In this context, the retirement age for seamen was raised to 62. The legislator's rationale for maintaining a special retirement age for seamen is cited by the Supreme Court in Rt-2010-202 at paragraph 42:

> *"The circumstances at sea and on land are not fully comparable on this issue. The 24-hour community at sea, with presumably greater mental and physical work pressure than on land, is the cause of the particularly strict health regulations [for seamen]. Furthermore, pursuant to the Seamen's Act and the National Insurance Act, a person may be deemed disabled for employment as seaman, but fit for employment on land. On this background, the Seamen Pension Act [of 3 December 1948 no. 7] stipulates a regular pensionable age of 60, but with the possibility to accumulate pension rights in employment up to the age of 62. The Ministry agrees with the Directorate for Seamen that a regular retirement age of 62 would thus be appropriate and in accordance with the principle in the Working Environment Act of 67 and 70 years."*[7]

The legislator has found that when employees reach a certain age, it is in their interest and in the interest of society that they retire. For certain categories of employees, such as seamen, this is the case at an earlier age than in most professions. In other words, equal treatment – and not the opposite – is the underlying reason for lower retirement age.

In 2005-2006, there was a new legislative initiative to, *inter alia*, ensure that the provisions of the Seamen's Act were in accordance with Norway's international obligations regarding prohibition of discrimination, in particular with regard to Council Directive 2000/78/EC. In this context, the Ministry of Trade and Industry noted the following :

> *"The Seamen's Act section 19 no.1 sixth paragraph states that a seaman is protected against dismissal on the grounds of age until reaching 62 years. The right to seamen's pension is obtained already upon reaching 60 years. However, there is no duty on the employee under*

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[5] "Historical development" in NOU 1999:6 *Sjømannspensjon* [Seamen's pension], page 38

[6] *Innstilling til pensjonsordning for sjømenn fra det av Sosialdepartementet den 9. november 1945 oppnevnte utvalg* [Recommendations to the Ministry on a pension scheme for seamen], page18, and the Supreme Court's judgment in Rt-2010-202 at paragraph 41.

[7] Ot.prp.nr.26 (1984-1985), page 11.

> *the Seaman's Act to resign at 62. In comparison, it may be noted that the Ministry of Labour and Social Affairs has concluded that the general retirement age of 70 in the Working Environment Act complies with the ban on discrimination and may be maintained. There are considerations in support of the view that this also holds true regarding the retirement age of 62 in the Seaman's Act. Given the nature of this profession and the strains it involves, it seems natural to have a lower retirement age. The fact that the seaman obtains the right to pension at 60 years and thus is economically independent, indicates that the limit of 62 years is not in breach of the Directive. Differential treatment based on age before reaching 62 years will, however, constitute a breach of the ban on discrimination in the Directive."*[8]

The Parliament endorsed the views expressed by the Ministry, *inter alia* in reference to the fact that there had been a solid endorsement of the 62 year retirement age among the stakeholders in the public consultations on the proposal.[9]

In the opinion of the Government, the Committee should take note of the fact that the Norwegian legislature has reconsidered and reconfirmed the special retirement age for seamen as recently as in 2006. Furthermore, it should be emphasized that this review was expressly performed in light of Norway's international obligations regarding non-discrimination; international legal instruments that in purpose and wording are similar – albeit not identical – to the relevant non-discrimination regulations of the Social Charter.

Before the Norwegian Supreme Court, it was argued – as FFFS does in the present complaint – that the working conditions of seamen have changed substantially, and that health and security conditions for seamen no longer deviate from the normal situation on land. Furthermore, it was claimed that other countries did not have such a low retirement age, that the transition from employment to retirement led to a significant reduction of income, and that such a low retirement age was particularly unfair with regard to seamen on vessels in coastal waters, as was the situation in that case.[10]

The Supreme Court did not dismiss these arguments as irrelevant, but pointed to the fact that given the wide margin of appreciation afforded by the Directive in this area, as confirmed by the European Court of Justice in several cases,[11] the balancing of relevant considerations was mainly in the hands of the national legislator. The Supreme Court pointed out that the national rule is the result of a deliberate choice made by the legislator, and that it applies as a general rule for the whole shipping sector, including both domestic and foreign trade. [12]

The Government maintains that there are still, in modern times, important differences in working conditions at sea and on land. These differences are reflected in differences in working regulations for seamen compared to employees on land, such as the strict health regulations for seamen mentioned in FFFS' complaint, more lenient disability conditions, the lower pensionable age as well as the 62 years retirement age, which are all examples of a comprehensive set of regulations that shall ensure health and security at sea and the operational requirements in the shipping service.

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[8] Ot.prp.nr.85 (2005-2006) page 13. Also cited by the Supreme Court in Rt-2012-202, at paragraph 47.
[9] The Supreme Court in Rt-2010-202, at paragraph 49.
[10] *Ibid*, at paragraph 69.
[11] As further specified *ibid*, at paragraph 63.
[12] *Ibid*, at paragraph 70.

As noted above, the Supreme Court did not limit its review to the EU Directive, but also explicitly reviewed the allegations of age discrimination in light of the European Convention of Human Rights Article 14 in conjunction with Article 11 and/or Article 1 of Protocol 1, as well as the International Covenant on Civil and Political Rights Article 26. The Supreme Court concluded that there was no breach of either of those sets of rules.[13]

With regard to the International Covenant on Civil and Political Rights Article 26, the Supreme Court referred to the Human Rights Committee's views in *Love et al v. Australia*[14]. In that case, the Human Rights Committee found that a mandatory retirement age of 60 for pilots was compatible with the prohibition on discrimination in Article 26 of the Covenant. The Government wishes to draw the attention of the European Committee of Social Rights to the following passage in the Human Rights Committee's views in the *Love* case:

> *"However, it is by no means clear that mandatory retirement age would generally constitute age discrimination. The Committee takes note of the fact that systems of mandatory retirement age may include a dimension of workers' protection by limiting the life-long working time, in particular when there are comprehensive social security schemes that secure the subsistence of persons who have reached such an age. Furthermore, reasons related to employment policy may be behind legislation or policy on mandatory retirement age. The Committee notes that while the International Labour Organisation has built up an elaborate regime of protection against discrimination in employment, mandatory retirement age does not appear to be prohibited in any of the ILO Conventions."*

The Human Rights Committee reaffirmed this position in 2011 in *Albareda et al v. Uruguay*.[15]

The Government would also like to draw the Committee's attention to the following passages in the European Court of Justice's Grand Chamber judgment of 12 October 2010 in case C-45/09 *Rosenbladt*, which succeeded the Supreme Court's judgment mentioned above:

> *"The authorization of clauses on automatic termination of employment contracts on the ground that an employee has reached retirement age cannot, generally, be regarded as unduly prejudicing the legitimate interests of the worker concerned.*
>
> *Legislation such as that at issue ... is not based on only a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by means of replacement of income in the form of a retirement pension at the end of their working life (see, to that effect, Palacios de la Villa, paragraph 73)."*[16]

Furthermore, in its judgment in the *Hörnfeldt* case, referred to under point 3.1 above, the European Court of Justice confirmed that

> *"[Article 6(1) of Directive 2000/78/EC grants] broad discretion ... to the Member States and, as necessary, to the social partners at national level in choosing not only to pursue a particular*

[13] *Ibid*, at paragraph s 73-76.
[14] Communication no. 983/2001, at paragraph 8.2
[15] Communications nos. 1637, 1757 and 1765/2008, at paragraph 9.4.
[16] Case C-45/09 paragraph 46-47.

> *aim in the field of social and employment policy, but also in defining measures to implement it".*[17]

The European Court of Justice concluded that

> *"the second subparagraph of Article 6(1) of Directive 2000/78 must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which allows an employer to terminate an employee's employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, as that measure is objectively and reasonably justified by a legitimate aim relating to employment policy and labour-market policy and constitutes an appropriate and necessary means by which to achieve that aim."*[18]

3.3. The legal test of the Revised Social Charter regarding discrimination on the basis of age

According to Article 2§1 of the Revised Social Charter, the Parties undertake *"to protect effectively the right of the worker to earn his living in an occupation freely entered upon"*.

The Government would like to point out that the seamen affected by the Seamen's Act section 19 no.1 sixth paragraph, have obtained the right to pension at 60 years and thus "earn their living" even if their employment contracts are terminated. Furthermore, the provision does not imply a "prohibition on employment or a discriminatory denial of seamen's right to work as such", as submitted by the FFFS in its complaint. As explained under point 3.2 above, the provision does not mean that seamen are under a duty to retire at 62, but rather that the employer is entitled to terminate the work contract on the sole ground that the seaman has reached the age of 62. If a seaman's work contract is terminated by his or her employer, there is no rule preventing him or her from entering into a new employment contract as a seaman. The Government thus submits that the Seaman's Act section 19 no.1 sixth paragraph does not violate Article 2§1 of the Convention.

As far as Article 24 is concerned, the Government would like to refer to the Appendix to the Revised Social Charter which specifies a number of reasons which do not justify dismissal under Article 24, and to the fact that the list includes neither age nor obtaining pension rights. The wording thus confirms that both of those reasons may constitute valid reasons for dismissal under Article 24 if connected to the workers' *"capacity or conduct or based on the operational requirements of the undertaking, establishment or service"*.

To the knowledge of the Government, there are presently no decisions from the Committee emanating from the collective complaints procedure on the issue of discrimination in employment on the basis of age under Articles 2§ 1 or 24 of the Charter.

However, the issue has been addressed in the context of the reporting procedure, *inter alia* in the Committee's Conclusions with regard to Norway's 2008 report,[19] where the Committee noted:

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[17] Case C-141/11 paragraph 32.
[18] *Ibid*, paragraph 47.
[19] Reference and link in footnote 1 above.

> *"The Committee holds that dismissal on the grounds of age will not constitute a valid reason for termination of employment unless a termination is, within the context of national law, objectively and reasonably justified by a legitimate aim such as legitimate employment policy, labour market objectives or the operational requirement of the undertaking, establishment or service and provided that the means of achieving that aim are appropriate and necessary."*

As is apparent from the judgment of the Norwegian Supreme Court in Rt-2010-202, and particularly the citations quoted in point 3.2 .above, the establishment and maintenance of a general, lower retirement age for seamen is based primarily on legitimate employment and social policy considerations, and in addition on the operational requirements of services at sea. These legitimate aims are of a public interest nature, and distinguishable from individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognize, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.[20]

In several of its conclusions in respect of reports from the Contracting Parties, the Committee has made references to national legislation which links retirement age to pension entitlements, as in Norwegian legislation, without concluding that the situation was not in conformity with Article 24 of the Revised Charter, cf the Committee's Conclusions 2008 in respect of Romania, Armenia and Bulgaria. This indicates that pension rights are relevant to the consideration of the conformity of a specific retirement age with the Social Charter. As mentioned in point 3.1 above, in the Committee's 2008 Conclusions in respect of Norway, it found that the situation in Norway was in conformity with Article 24 of the Charter, notwithstanding the rule in the Working Environment Act (WEA) of 2005, allowing employers to terminate employment contracts without any reason other than age from the year the employee reaches the age of 70.

In this context, it is should be reiterated and emphasized that seamen obtain the right to retirement pension from the age of 60. The fact that retirement may entail a reduction in income, as a pension will normally be lower than the wages earned in employment, does not, in the opinion of the Government, render the right of dismissal of seamen at age 62 disproportionate or unreasonable.[21] Seamen reaching the age of 62 are in a factual and legal situation comparable to that of other employees subject to the 70 year rule in the WEA.

The Government submits that international jurisprudence confirms that a broad discretion should be afforded to the national authorities in choosing not only to pursue a particular aim in the field of social employment policy, but also in defining measures to implement it.[22] The Committee has received reports from Contracting States with a great variation in retirement ages, where the employer may terminate the contract for the sole reason of a specific age being reached, from as early as 60 years upwards (e.g. Italy 2008). However, the Committee has made no specific requirements in this regard. This gives reason for the Contracting Parties to conclude that the Committee has granted them a discretion in these matters as long as the chosen retirement age is objectively and reasonable justified by a legitimate aim, and that the means are appropriate and necessary.

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[20] C-388/07 *Age Concern*, at paragraph 46.

[21] See correspondingly, under EU law, C-141/11 *Hörnfeld*, at paragraphs 35 et seq., where a dramatic reduction in income occured upon automatic termination at age 67 of Mr Hörnfeld's employment contract.

[22] Cf the recent jurisprudence from the European Court of Justice referred to earlier.

As noted above, the 62 year age limit was reviewed and confirmed by the Norwegian Parliament as recently as 2006. It is therefore not correct when FFFS asserts that the maintenance of a special, lower retirement age for seamen is obsolete and has failed to take account of the facts that the health situation of the population in general has improved, and modern working and security conditions at sea have been simplified and improved.[23]

Thus, the Government asserts that the means chosen to achieve the legitimate aims are appropriate and necessary. The specific retirement age is justified by the particularities related to the seamen's profession and the differences in working conditions which exist also in modern times, the shipping industry's position in Norwegian society and its recruitment needs, in addition to the favourable pension scheme and other rules which imply favourable treatment of seamen, cf. explanations in 3.2 above.

The Government concludes that the retirement age of 62 years in the Norwegian Seamen's Act section 19 is appropriate and necessary in order to achieve legitimate aims and therefore does not constitute discrimination in employment of the basis of age under test of the Revised Social Charter.

4 CONCLUSION

- The Norwegian Government submits that the retirement age for seamen on reaching the age of 62 years does not constitute discrimination in breach of Articles 2§1 or 24 of the Revised Social Charter.

Yours sincerely,

Fanny Platou Amble
Attorney General – civil affairs
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[23] The complaint at page 5.