EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

28 November 2012

Case No. 7

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

RESPONSE OF FFFS TO THE SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 28 November 2012

The European Committee of Social Rights
Directorate general of Human Rights and Legal Affairs
Council of Europe
F-67075 Strasbourg Cedex
FRANCE

Attn.: Mr. Régis Brillat

Our ref: 633970/102513 Your ref: Oslo, 28. November 2012

Responsible partner: Erik Råd Herlofsen

Dear Mr. Régis Brillat,

COMPLAINT NO. 74/2011 – FELLESFORBUNDET FOR SJØFOLK (FFFS) (UNION OF SAILORS) VS. NORWAY

1 INTRODUCTION

Reference is made to the complaint dated 27 September 2011 and to the written observations on the merits by the Kingdom of Norway dated 7 September 2012.

2 OBSERVATIONS

2.1 Introduction

FFFS is still of the opinion that the distinctively Norwegian arrangement in which seamen lose their general employment protection when turning 62 years of age is in violation of Articles 1§2 and 24 of the Revised Social Charter and refer to the following moments.

2.2 About the Norwegian Supreme Court's judgments

The Government argues that the Norwegian Supreme Court's judgement of 18 February 2010 (Rt-2010-202 "Kystlink" – attached to the complaint) justifies that the loss of employment protection for seamen over the age of 62 is legal in accordance to Norwegian law and in agreement with international conventions.

ADVOKATFIRMA RÆDER DA
HENRIK IBSENS GATE 100 | P.O. BOX 2944 SOLLI | N-0230 OSLO
TEL: +47 23 27 27 00 | FAX: +47 23 27 27 01 | ORG NO: 882 470 032 MVA
E-POST: POST@RAEDER.NO | INTERNETT: WWW.RAEDER.NO

The Government, however, neglects to draw the Committee's attention to the fact that the Supreme Court was strongly in doubt, and that the minority emphasized that the court must make sure there is a sufficiently updated and current basis for the discrimination. «Discrimination which is no longer necessary or proportional, should not be legally upheld with reference to past needs.»

The Supreme Court's minority concluded in paragraph 91 that there is no longer any «satisfactory basis on which to conclude that the age limit even today serves legitimate needs and is suitable, necessary and proportional.»

The Government further neglects to draw the Committee's attention to fact that the EU Court in the matter of C-447/09 – Prigge etc. vs. Lufthansa, came to the conclusion that an age limit of 60 years for pilots in Lufthansa is in violation of Directive 2000/78/EC, all the while the certificate limit for commercial pilots is 65 years of age.

The Government also neglects to draw the Committee's attention to the fact that the Norwegian Supreme Court on 14 February 2012, in an equivalent judgment about helicopter pilots in the North Sea (Supreme Court Report (Rt)-2012-219), concluded, with support in the Prigge judgment, that even a Norwegian age limit for helicopter pilots of 60 years, is in violation of Directive 2000/78/EC and therefore also in violation of Norwegian law. It is, incidentally, illustrative that the Supreme Court in the same decision, paragraph 69, questions whether the majority in the «Kystlink judgment» came to a correct result.

FFFS refers in specific to paragraph 70, in which the Supreme Court states the following:

> *Further, I mention that the pilots will receive a very good pension, when they retire after reaching the age of 60, and that they are entitled to take work, without any effect to the pension. But it should also be mentioned that participation in the working life – and presumably in a position one has had for many years, covers more needs than the income itself, among other social needs, needs to use ones skills, and the need to make oneself useful.*

The Supreme Court's judgment illustrates a development where economic arguments, such as a right to pension, is constantly getting less importance in relation to the right to work.

FFFS is therefore of the opinion that the Supreme Court's majority in 2010 (the «Kystlink judgment»), came to a incorrect result and can therefore not be taken into account for the fact that Norway has violated the Social Charter.

2.3 Revision of the Seamen's Act

The Government refers to the fact that the Seamen's Act is under revision, but neglects to mention that the law panel in NOU 2012:18[1], suggests to increase the age limit for repeal of employment protection for seamen to 70 years, in order for it to correspond with the age limit for land based employees. From the report's page 162 the following is quoted:

> *Even though the result* (in the «Kystlink judgment» - my specification) *was that the age limit remained, the judgment shows that it is doubtful whether there today are particular circumstances in shipping calling for a lower age limit.*
>
> *The judgment is, moreover, appealed before the Committee enforcing the Social Charter. It is therefore a possibility that the age limit may still be deemed in violation of international rules.*
>
> *It is further clear to the panel that case law – both in Norway and the EU – has developed further since the Kystlink judgment, see further point 4.8.4.1. The panel will specifically refer to Supreme Court Report (Rt.) 2012 p. 219 (the Helicopter pilot judgment). Here the Supreme Court decided that a tariff regulated age limit of 60 years for helicopter pilots was in breach of the prohibition of age discrimination. The court referred in their argument to the EU court's decision in the Prigge matter (C-447/09).*
>
> *In shipping there are a number of job types where there is no mandatory age requirements justified by health and security. For the positions where a health certificate is required, it will be a regular part of the job that one has to withdraw when the demands are not met. In the panel's opinion, the judgment shows that a general limit of 62 years in shipping today cannot automatically be deeply rooted in the directive.*

[1] http://www.regjeringen.no/nb/dep/nhd/dok/nou-er/2012/nou-2012-18.html?id=706392

Even though the assessment after the directive's article 6 nr 1 can be somewhat different if the legislator makes a conscious choice, the panel feels that it is difficult to substantiate a lower general limit in shipping than in working life in general. The panel is therefore voting to change the law's general limit to 70 years of age.

It is worth noticing that the Government in their reply page 5, last paragraph, is out of step with the law panel's perception.

FFFS is therefore of the opinion that the suggestion to raise the age limit to 70 years, compared with the law panel's comments, shows that Norway has violated the Social Charter.

2.4 Repeal of employment protection vs. mandatory age limits

The Government claims that the repeal of employment protection when reaching 62 years of age, does not imply «automatic» repeal of the right to work as a seaman, thus, the employer can chose to continue the employment.

FFFS would like to emphasize that even though the Government's statement are legally «correct», the age limit in reality involves compulsory retirement, as only a few smaller shipowners do not practice the age limit strictly.

This implies that one in this matter is refused the right to perform ones profession, which is far more dramatic than for most land based positions. The Government's reference to C-45/09 Rosenbladt (cleaning personnel) and C-141/11 Hörnfeldt (postal employee) are therefore not directly relevant. Attention is further called to the fact that the age limit in the aforementioned matters were 65 and 67 years respectively; consequently far higher than in the matter in question.

2.5 «Retirement age is coupled with a right to retire with pension»

The Government states that the age limit must be seen in connection with the right to seaman's pension, but neglect to draw to the Committee's attention the fact that the seamen's pension is of a modest size and that the condition for the pension is that the seaman has worked as a seaman for 150 months, cf. Seaman's Pension Act (sjømannspensjonsloven) § 4.

As an example, reference is made to the Court of Appeal's decision in the Kystlink matter; see the complaint's appendix 4-2 term 8, where seaman B won her annulment action for unlawful dismissal. This solely because the person concerned had not been a seaman for 150 months and was therefore not entitled to the seaman's pension.

This illustrates the senselessness of the Seaman's Act's 62 year age limit, in that seamen who have worked at sea for more than 150 months lose their employment protection, while seamen who have not worked as seamen for more than 150 months have their employment protection intact – cf. Seamen's Act § 19.1 sixth paragraph included in the complaint's appendix 3-8.

2.6 Reference to other international conventions

The Government refer in their reply to the Love case from 2001, where an age limit of 60 years for pilots was considered not to violate the Civil and Political Rights article 26.

FFFS is of the opinion that the aforementioned judgment is no longer relevant in light of the Prigge judgment passed by the EU court. FFFS marks, however, that the Government with their reference to Albareda et al vs. Uruguay, neglects to make the Committee aware that the Human Rights Committee in the matter concerned concluded that an upper age limit of 60 years for some secretaries in the foreign service was a violation of article 26.

Moreover, reference is made to the fact that the Norwegian Supreme Court in the Kystlink judgment did not consider whether the age limit might be in violation of international conventions, but only referred to the fact that the court did not find any relevant case law within the European Court of Human Rights – cf. paragraph 74. To be sure, the Supreme Court does refer to the Love case, but this is, as mentioned, no longer relevant.

2.7 «The legal test»

The Government states in their reply item 3.3 that a seaman

> *«have obtained the right to pension at 60 years and thus «earn their living» even if their employment contracts are terminated».*

FFFS is of the opinion that the Government here has misinterpreted article 2§1. It must be obvious that a right to pension cannot be equalised with «*the right of the worker to earn his living in an occupation freely entered upon*».

As stated above in item 2.4, the repeal of employment protection for seamen is in reality bound resignation when turning 62 years of age.

The Government states further in their reply page 8 at the bottom that neither is article 24 being violated:

> *«as long as the chosen retirement age is objectively and reasonable justified by a legitimate aim, and that the means are appropriate and necessary.»*

FFFS agrees to this legal basis, but is, as mentioned, of the opinion that the repeal of employment protection for Norwegian seamen turning 62 years, is not objectively and reasonable justified by a legitimate aim, and that the means are not appropriate and necessary.

3 CONCLUSION

FFFS submits that the retirement age for seamen on reaching the age of 62 years does violate Articles 2§1 and/or 24 of the Revised Social Charter.

FFFS claim to be awarded legal costs.

Yours sincerely,

Erik Råd Herlofsen
Attorney/Partner