EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

25 February 2013

Case No. 3

Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden
Complaint No. 85/2012

RESPONSE FROM LO AND TCO TO THE GOVERNMENT'S SUBMISSIONS ON THE ADMISSIBILITY AND THE MERITS

Registered at the Secretariat on 29 January 2013

Stockholm, 29 January 2013

Response by LO and TCO to the Government's submissions in complaint 85/2012, LO and TCO v. Sweden

The legal effect of the new legislation

The Government seems to agree upon our description of the legal situation in Sweden but has a different conclusion if the legislation is in conformity with the European Social Charter.

In our view, Sweden has, by the legislation passed in the aftermath of the ECJ's Judgment in the Laval case, violated its obligations under Article 6.2 and 6.4 in the European Social Charter, in respect of the restrictions on the right to strike and in respect of the breach of the State's duty to promote collective bargaining. Sweden has furthermore violated Article 19.4 by imposing restrictions on the right to take industrial action against foreign companies.

It should especially be noted that under Article 6.2 Sweden has an obligation to promote the use of collective agreements. Moreover, under Article 6.4, Sweden has recognized the right of workers to use collective action. The legislation at hand, however, does not promote the use of collective agreements, rather the opposite. Moreover, the legislation is a severe restriction on the right to industrial action, which cannot be said to be in line with Article G and thus constitutes an infringement of Article 6.4. In addition to this, the uncertainty of the legality of industrial actions combined with strict tort liability makes unions in Sweden more cautious about demanding collective agreements. Statistics presented below also show that the number of collective agreements concluded has decreased significantly after the legislation was passed.

It should be stressed that the new legislation is in effect even in those situations where the union has members among the employees. This means that the legislation prevents the unions from representing these members in the same way as other members, since the legislation only allows collective agreements to be concluded with their foreign employers either voluntarily, on a lower level and only concerning certain things, or not at all.

It is correct that the legislation in the short run only affects the right to take industrial actions in support of posted workers. But in the long run it is obvious that lower wages and working conditions for these workers will affect even the purely internal Swedish labour market. And if it is impossible to force employers to conclude collective agreements on some parts of the labour market, this will in the long run have an impact on the entire Swedish labor market model. The purpose of industrial actions is to put economic pressure on the counterpart. If industrial actions by trade unions can be illegal because of the economic interest of the employer, this will disturb a fair balance on the labour market.

Even if some parts of the legislation depend on the ECJ´s Judgment in the Laval case, in our view some parts are not necessary because of this Judgment. And we want to point out that it is Sweden, not the EU, which is bound by the European Social Charter and that has the sole responsibility for not violating this, or any other conventions.

Assignment of a Parliamentary Committee regarding posting of workers

The Swedish government mentions the assignment, on 27 September 2012, of a Parliamentary Committee with the purpose of evaluating the changes of the Foreign Posting of Employees Act after the Laval case. We would like to point out the fact that despite trade union demands, the Parliamentary committee has not been given the task of evaluating whether Sweden fulfills its obligations under the European Social Charter or other international conventions. The mission of the parliamentary committee only includes a standard phrase urging the committee to consider the relation of their proposals to relevant international regulations. The fact that the standard phrase does not provide any guarantee for a sufficient analysis of relevant conventions and recommendations is evident from the records of the tri-partite Swedish ILO Committee which on numerous occasions in recent years has been forced to conclude that committees preparing new legislation have failed in this respect.

The assignment of the parliamentary committee regarding the posting of workers should therefore not be interpreted as a measure aimed at remedying Sweden's ongoing violation of the European Social Charter.

Some statistics from the Swedish Mediation Office regarding collective agreements concluded with foreign companies

In our view, the most interesting figure is the one regarding the number of collective agreements concluded, as it is closest to measuring the outcome of the legal situation in post-Laval Sweden. In order to make a correct assessment of the effects of the Laval case and the subsequent legislation, one does, however, have to look into the situation before the ECJ decision in Laval, which was the event that effectively changed the legal situation.

The *Annual Report of the Swedish National Mediation Office2007*, page 212, shows that from December 2004, when the Swedish Labour Court in a preliminary decision declared that the industrial action against Laval was in conformity with Swedish legislation, and until December 2007, when the judgment was issued by the European Court of Justice, the Swedish Building Workers' Union *Byggnadsarbetareförbundet* concluded 356 collective agreements with foreign companies. This means that during these three years the union concluded about 120 collective agreements with foreign companies every year. After 2007 and the judgment in the Laval case from the ECJ the number of collective agreements fell dramatically to about 30 every year (see our complaint point 82). It is obvious that the reason for this is the judgment from ECJ and the new legal situation that the Judgment created on the labour market. This situation was made even worse by the 2010 changes in the Swedish legislation.

Government proposition regarding contact person and obligation to report posting of workers

In its comments the Swedish Government states that it plans to submit a bill to the Swedish Parliament, requiring foreign employers to appoint a contact person in Sweden. The bill is presented in December 2012 and, if passed, it will be an improvement compared to the current situation. But even if this legislation is passed however, there will still not be any guarantee that foreign companies will provide Swedish trade unions with a counterpart, as there is no requirement that the representative of the employer will be mandated to negotiate and conclude collective agreements with the unions during the work in Sweden.

The new legislation regarding posted agency workers

The new legislation on posted agency workers is a step forward. But Swedish unions will still not be allowed to take industrial actions in order to bring about equal treatment with Swedish workers on issues outside the framework of the EU Posting of Workers Directive, Article 3 (1) a-g. And the problem with "collective agreements free zones" will remain. If the employer shows that the workers' conditions, within the framework of the Posting of Workers Directive, are in all essentials at least as favorable as those of a regular Swedish collective agreement, or those at the user company, still no industrial actions at all will be allowed (see our complaint point 71 ff).

Other information

At the end of its submission, the Swedish government makes reference to the ongoing discussions within the EU regarding a directive to improve the application of the EU Posting of Workers Directive. In the present context, this is irrelevant. The proposal being discussed within the EU does not address the issue of the right to take collective action.

Article 19

Workers from other EU/EEA countries that are posted to Sweden are migrant workers lawfully within Swedish territory, with the effect that Sweden has the obligation to ensure them treatment not less favourable than that of their own nationals in respect of, *inter alia*, remuneration and other employment and working conditions and the enjoyment of the benefits of collective bargaining (Article 19.4).

As the current Swedish legislation restricts the content of the collective agreements that Swedish trade unions, with the backing of a possibility to take collective action, can ask the employers of posted workers to sign, to minimum standards and to certain subject matters, Sweden effectively denies posted workers equal treatment in respect of remuneration and other employment conditions. For the same reason, current Swedish legislation denies posted workers the enjoyment of the benefits of collective bargain on the same terms as Swedish nationals. Sweden is thus in violation of Article 19.4 letter a) and b) of the Charter.

The fact that the posted workers' stay in Sweden is of a temporary nature should not affect their status as "migrant workers". Article 19.4 only speaks of "workers lawfully within their territories" while other provisions of Article 19 expressively have a more narrow scope requiring the worker to be "lawfully residing" (Art 19.8) or permitted to "establish himself within their territory" (19.6).

Admissibility

The Swedish government does not present any observations regarding the admissibility of the collective complaint. However, as has been said in the complaint, LO comprises 14 affiliated trade unions with a total number of 1,5 million members, and TCO comprises 15 affiliated trade unions with a total of 1,2 million members. LO and TCO are the two largest trade union confederations in Sweden. Both organizations have a vast influence on negotiations regarding collective agreements. Considering this, LO and TCO are to be seen as representative organizations and the requirements in Article 1 C in the additional protocol to the European Social Charter providing a system for collective complaints regarding admissibility are therefore fulfilled.

Sweden is bound by the European Social Charter and its additional protocol on collective complaints by the ratifications made on May 29, 1998.

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