

**DECISION ON ADMISSIBILITY
AND THE MERITS**

Adoption: 6 September 2016

Notification: 30 September 2016

Publication: 31 January 2017

Finnish Society of Social Rights v. Finland

Complaint No. 107/2014

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 287th session attended by:

Giuseppe PALMISANO, President
Monika SCHLACHTER, Vice-President
Petros STANGOS, Vice-President
Lauri LEPPIK, General Rapporteur
Karin LUKAS
Eliane CHEMLA
József HAJDU
Marcin WUJCZYK
Krassimira SREDKOVA
Raul CANOSA USERA
Marit FROGNER
François VANDAMME

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary,

Having deliberated on 5 July and 6 September 2016,
On the basis of the report presented by József HAJDU,
Delivers the following decision adopted on this last date

PROCEDURE

1. The complaint lodged by the Finnish Society of Social Rights was registered on 29 April 2014.
2. The Finnish Society of Social Rights alleges that Finland is in violation of Article 24 of the Revised Charter ("the Charter") on the grounds that dismissals are permitted for financial and production grounds even where there is no economic necessity.
3. In accordance with Rule 29§2 of the Rules of the Committee ("the Rules"), the Committee asked the Government of Finland ("the Government") to make written submissions on the merits in the event that the complaint is declared admissible, by 13 November 2014, at the same time as its observations on the admissibility of the complaint. The Government sought and was granted an extension of this deadline until 5 January 2015. The Government's submissions were registered on 5 January 2015.
4. The Finnish Society for Social Rights was invited to submit a response to the Government's submissions by 15 April 2015. It sought and was granted an extension of the deadline until 15 May 2015. The response was registered on 15 May 2015.
5. Pursuant to Article 7§2 of the Protocol, the Committee invited the international employers' and workers' organisations mentioned in Article 27§2 of the Charter of 1961 to submit observations before 15 January 2015.
6. Observations from the European Trade Union Confederation ("the ETUC") were registered on 15 January 2015.
7. The International Organisation of Employers ("the IOE") sought and was granted an extension of this deadline until 30 January 2015. Observations from the IOE were registered on 30 January 2015.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

8. The Finnish Society for Social Rights invites the Committee to find that Finland is in breach of Article 24 of the Charter on the ground that employees may be dismissed in circumstances which go beyond those permitted by Article 24 of the Charter.

B – The respondent Government

9. The Government considers that the complaint fulfils the requirements in relation to the representativity of the association as well as the formal requirements laid down by Article 4 of the Additional Protocol (“the Protocol”). However, it has serious doubts whether the Finnish Society of Social Rights has particular competence in relation to the protection in cases of termination of employment as required by Article 2 of the Protocol. It further asks the Committee to declare the complaint unfounded in all respects.

THIRD PARTY OBSERVATIONS

A – Observations by the European Trade Union Confederation

10. The ETUC firstly refers to international instruments concerning unlawful dismissals, in particular those of the ILO.

11. It states that protection from dismissal is a cornerstone of worker’s protection and there should be a high threshold for allowing termination of an indefinite employment relationship.

12. It highlights that the Finnish Constitution protects the right not to be unlawfully dismissed.

13. The ETUC maintains that Finnish law permits dismissals for financial reasons only – i.e. to increase profit. It argues that neither Article 24 of the Charter nor ILO Convention No. 158 permit dismissal for purely financial reasons. Allowing termination for such reasons would deprive the concept of valid reasons of all content.

14. Finnish law does not include the principle of *ultima ratio* as a precondition for dismissals.

15. As regards outsourcing the ETUC states that outsourcing should not be used to circumvent protection against dismissal. Finnish law does not provide adequate protection against dismissals due to outsourcing of tasks. In this respect, the ETUC points out that several collective agreements in Finland provide better protection than the legislation by stipulating that dismissals due to out sourcing can only be exceptional. However, collective agreements do not cover all workers.

16. Likewise, the ETUC maintains that having recourse to agency workers (“*hiring in manpower*”) following dismissals is contrary to the Charter requirement that there must be a valid reason for the termination of employment. Collective agreements in Finland have laid down strict rules on the use of agency workers. Previously in Finland it was not permitted to dismiss permanent employees and replace them with agency workers. However today it is.

B – Observations by the International Organisation of Employers

17. The IOE submits that the allegations made by the Finnish Society of Social Rights are very general and unsubstantiated by data or empirical evidence.

18. Further it submits that it should not be ignored that Finnish labour legislation is adopted only after extensive tripartite consultation.

19. Chapter 7 of the Employment Contracts Act stipulates the grounds upon which employees may be dismissed. Labour Courts may review whether dismissals were made in accordance with the requirements laid down by law.

20. According to the IOE there is no evidence to support the Finnish Society of Social Right's allegations that collective dismissals without valid reason take place with some frequency in Finland. In cases of collective dismissals employees are involved in the procedure as provided for by the Act on Cooperation within Undertakings No. 334/2007.

21. The IOE also refers to the role of the Cooperation Ombudsman, who is tasked with supervising compliance with the Act on Cooperation within Undertakings and other legislation.

RELEVANT DOMESTIC LAW

22. In their submissions, the parties make reference to the following main domestic legal sources:

23. **Constitution** (1999), in particular Article18, which reads as follows:

Article18 - The right to work and the freedom to engage in commercial activity

Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice. The public authorities shall take responsibility for the protection of the labour force.

The public authorities shall promote employment and work towards guaranteeing for everyone the right to work.

Provisions on the right to receive training that promotes employability are laid down by an Act. No one shall be dismissed from employment without a lawful reason.

24. **Employment Contracts Act** (55/2001, amendments up to 398/2013 included)

Chapter 5

Section 2

Grounds for lay-offs

The employer is entitled to lay off an employee if

- 1) the employer has a financial or production-related reason for terminating the employment contract referred to chapter 7, section 3, or
- 2) the work or the employer's potential for offering work have diminished temporarily and the employer cannot reasonably provide the employee with other suitable work or training corresponding to its needs; the work or the potential for offering work are considered to have diminished temporarily if they can be estimated to last a maximum of 90 days.

Notwithstanding what is provided in subsection 1 and in section 4 of this chapter, the employer and the employee may, during the employment relationship, agree on a lay-off for a fixed period if this is needed in view of the employer's operations or financial standing.

Chapter 7

Grounds for termination of the employment contract by means of notice

Section 1. General provision on the grounds for termination of an employment contract

The employer shall not terminate an indefinitely valid employment contract without proper and weighty reason.

Section 2. Termination grounds related to the employee's person

Serious breach or neglect of obligations arising from the employment contract or the law and having essential impact on the employment relationship as well as such essential changes in the conditions necessary for working related to the employee's person as render the employee no more able to cope with his or her work duties can be considered a proper and weighty reason for termination arising from the employee or related to the employee's person. The employer's and the employee's overall circumstances must be taken into account when assessing the proper and weighty nature of the reason.

At least the following cannot be regarded as proper and weighty reasons:

- 1) illness, disability or accident affecting the employee, unless working capacity is substantially reduced thereby for such a long term as to render it unreasonable to require that the employer continue the contractual relationship;
- 2) participation of the employee in industrial action arranged by an employee organization or in accordance with the Collective Agreements Act;
- 3) the employee's political, religious or other opinions or participation in social activity or associations;
- 4) resort to means of legal protection available to employees.

Employees who have neglected their duties arising from the employment relationship or committed a breach thereof shall not be given notice, however, before they have been warned and given a chance to amend their conduct.

Having heard the employee in the manner referred to in chapter 9, section 2, the employer shall, before giving notice, find out whether it is possible to avoid giving notice by placing the employee in other work.

What is provided in subsections 3 and 4 need not be observed if the reason for giving notice is such a grave breach related to the employment relationship as to render it unreasonable to require that the employer continue the contractual relationship.

Section 3. Financial and production-related grounds for termination

The employer may terminate the employment contract if the work to be offered has diminished substantially and permanently for financial or production-related reasons or for reasons arising from reorganization of the employer's operations. The employment contract shall not be terminated, however, if the employee can be placed in or trained for other duties as provided in section 4.

At least the following shall not constitute grounds for termination:

- 1) either before termination or thereafter the employer has employed a new employee for similar duties even though the employer's operating conditions have not changed during the equivalent period; or
- 2) no actual reduction of work has taken place as a result of work reorganisation.

Section 4. Obligation to offer work and provide training

Employees shall primarily be offered work that is equivalent to that defined in their employment contract. If no such work is available, they shall be offered other work equivalent to their training, professional skill or experience.

The employer shall provide employees with training required by new work duties that can be deemed feasible and reasonable from the point of view of both contracting parties.

If an employer which in fact exercises control in personnel matters in another enterprise or corporate body on the basis of ownership, agreement or some other arrangement cannot offer an employee work as referred to in subsection 1, it must find out if it is possible to meet the employer's obligation to provide work and training by offering the employee work in other enterprises or corporate bodies under its control.

Section 7. Termination in connection with a reorganization procedure

If the employer is subject to a procedure referred to in the Act on Restructuring of Enterprises (47/1993), the employer shall be entitled, unless otherwise provided in section 4, to terminate the employment contract regardless of its duration at a notice of two months, if

- 1) the termination derives from an arrangement or measure to be carried out during the reorganization procedure which is necessary to avoid bankruptcy and which causes the work to cease or decrease in the manner referred to in section 3 or
- 2) the termination derives from a procedure in accordance with a confirmed reorganization plan that causes the work to cease or decrease in the manner referred to in section 3, or if the termination derives from an arrangement in accordance with the plan, which is attributed to financial grounds established in the confirmed reorganization plan, and calls for a reduction in personnel resources.

The employee shall observe a notice period of 14 days in connection with reorganization procedures, unless otherwise provided in chapter 5, section 7, subsection 1.

RELEVANT INTERNATIONAL MATERIALS

The International Labour Organisation

25. ILO Convention No. 158, Termination of Employment Convention, includes the following provision:

“Part II. Standards of General Application

Division A. Justification for Termination

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”

THE LAW

ADMISSIBILITY

26. The Committee observes that, in accordance with Article 4 of the Protocol, which was ratified by Finland on 17 July 1998 and entered into force for this State on 1 September 1998, the complaint has been submitted in writing and concerns Article 24 of the Charter, a provision accepted by Finland when it ratified this treaty on 21 June 2002 and to which it is bound since the entry into force of this treaty in its respect on 1 September 2002.

27. Moreover, the grounds for the complaint are indicated.

28. The Committee also observes that the Finnish Society of Social Rights is a national non-governmental organisation, founded on 16 March 1999 and registered the same year at the Register of Associations in Finland. It notes that, in a declaration dated 21 August 1998 and entered into force on 1 September 1998 for an indefinite period, Finland recognised the right of any representative national non-governmental organisation within its jurisdiction which has particular competence in the matters governed by the Charter to lodge complaints against it.

29. As regards the requirement of “representativity” laid down by Article 2§1 of the Protocol, the Committee recalls that it has previously found the Finnish Society of Social Rights to be representative within the meaning of the Protocol (Finnish Society of Social Rights v. Finland, Complaint No. 88/2012, decision on admissibility of 14 May 2013, §§6-11)

30. As regards the particular competence of the Finnish Society of Social Rights, the Government questions whether it can be regarded as having particular competence in the issue. The Committee notes from the Finnish Society of Social Rights’ rules and from their webpage that its sphere of activity concerns the protection of social rights, including labour law rights. Consequently, the Committee

finds that the Finnish Society of Social Rights has particular competence within the meaning of Article 3 of the Protocol, in respect of the instant complaint. (Finnish Society of Social Rights v. Finland, Complaint No. 88/2012, decision on admissibility of 14 May 2013, §12)

31. The complaint submitted on behalf of the Finnish Society of Social Rights is signed by Mr Yrjö Mattila, Chairperson and Mrs Helena Harju, Secretary of the Association and member of the Board who, according to Article 10 of the Association's rules, are together entitled to represent it. The Committee therefore considers that the condition provided for in Article 23 of its Rules is fulfilled.

32. On these grounds, the Committee declares the complaint admissible.

MERITS

ALLEGED VIOLATION OF ARTICLE 24 OF THE CHARTER

33. Article 24 reads as follows

Article 24 -The right to protection in cases of termination of employment

Part I: "All workers have the right to protection in cases of termination of employment"

Part II: "With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.

Appendix

1. *It is understood that for the purposes of this article the terms "termination of employment" and "terminated" mean termination of employment at the initiative of the employer.*

2. *It is understood that this article covers all workers but that a Party may exclude from some or all of its protection the following categories of employed persons:*

a *workers engaged under a contract of employment for a specified period of time or a specified task;*

b *workers undergoing a period of probation or a qualifying period of employment, provided that this is determined in advance and is of a reasonable duration;*

c *workers engaged on a casual basis for a short period.*

3. *For the purpose of this article the following, in particular, shall not constitute valid reasons for termination of employment:*

a trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours;

b seeking office as, acting or having acted in the capacity of a workers' representative;

c the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

d race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

e maternity or parental leave;

f temporary absence from work due to illness or injury.

4. *It is understood that compensation or other appropriate relief in case of termination of employment without valid reasons shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions."*

A – Arguments of the parties

1. The complainant organisation

34. The Finnish Society of Social Rights alleges that Finland is in violation of Article 24 of the Charter on the grounds that dismissals are permitted in circumstances which go beyond Article 24 of the Charter. It maintains that it is very easy to legally dismiss employees in Finland, the employer must respect the notice period laid down by law or by collective agreement but then may dismiss employees on production or economic grounds without further constraints. The Finnish Society of Social Rights argues that enterprises consider that the wish to increase profits may justify dismissal on economic and production grounds, even where the enterprise is already profitable. Finnish enterprises have no duty to take into account the interests of their employees.

35. The Finnish Society of Social Rights states that the Employment Contracts Act permits termination of employment "if the work to be offered has diminished substantially and permanently for economic or production-related reasons *or for reasons arising from reorganisation of the employer's operations.*" This last ground does not necessarily require any economic reasons to be behind the dismissal. The Finnish Society of Social Rights argues that Article 24 of the Charter only permits dismissal for economic reasons where enterprises are in economic difficulties, not to maximize profit.

36. The small number of cases before the courts challenging the legality of dismissals on financial or production related grounds, is evidence, according to the Finnish Society of Social Rights that cases are difficult for employees to pursue. It cites cases where claims of unlawful dismissal have not been upheld by the courts.

37. The Finnish Society of Social Rights alleges that the provisions of the Employment Contracts Act requiring employers to offer employees alternative work if possible, instead of dismissing them, is difficult to supervise especially in large enterprises.

38. Further the Finnish Society of Social Rights alleges that there are loopholes in the legislation concerning dismissals. Employers are entitled to dismiss employees in order to sub-contract the activities/tasks previously carried out by its own employees, this is considered as a reorganization of the employers' operations as provided for by the Employment Contracts Act.

39. Another loophole, according to the Finnish Society of Social Rights, is that employees maybe dismissed on "economic reasons", however agency workers may be taken on to perform the same tasks as dismissed employees. It argues that if agency workers can replace dismissed employees there cannot be proper and substantial reasons to dismiss. However, it states that the Labour Court has found that an employer had lawfully dismissed employees on economic and productive grounds, even where they were replaced by agency workers (decision of the Labour Court, 2007:103).

40. The Finnish Society of Social Rights emphasises that employees are often dismissed on economic and productive grounds even where the enterprise is profitable and not experiencing any financial difficulties. Employees are dismissed to further increase profits. It provides examples of profitable businesses laying off employees. The Finnish Society of Social Rights maintains that Article 24 of the Charter only permits dismissals on financial or production related grounds where the enterprise is in economic difficulty.

2. The respondent Government

41. The Government firstly highlights the unsubstantiated and abstract nature of the complaint. It recalls that under the provisions of Chapter 7 of the Employment Contracts Act the conditions for a dismissal to be lawful are

- i) the reason for the dismissal must be proper and weighty, and
- ii) the work to be offered has diminished substantially and permanently for economic or production-related reasons or for reasons arising from reorganisation of the employer's operations and
- iii) the employer must offer other work to the employee and provide the employee with any training that the new duties may require if possible.

42. As regards the factors which must be taken onto account when assessing if a dismissal fulfils the above conditions, the Government notes that the reasons may arise from external factors, e.g. decline in demand, obsolete products, increased competition or restructuring of the business. Outsourcing labour or relying on agency

workers may be permitted following dismissal on economic grounds if it is not being used to circumvent the protection of the employer's own employees.

43. Preconditions for the dismissal to be lawful are that the employee's work must have diminished both substantially and permanently, and the employer must seek to offer the employee alternative employment and training.

44. If the work has diminished substantially but not permanently the employer is entitled to lay off the employee only on the conditions stipulated in Chapter 5, Section 2 (1) of the Employment Contracts Act.

45. Chapter 7, Section 4 requires that prior the termination of their employment, employees must if possible, be offered work that is the equivalent to that defined in the employment contract, if no such work is available they shall be offered other work equivalent to their training, professional skill or experience.

46. If an employee has been dismissed on the grounds provided for in Chapter 7 Sections 3 or 7 and the employer needs new employees within nine months of the termination of employment, for the same or similar work that the employees had been doing, the employer shall offer work to the former employees if these are still seeking work (Chapter 6, Section 6).

47. There can be no dismissal on economic or production or work organisation grounds if there has been no actual reduction in work (Chapter 7, Sections 3 and 4).

48. The Government further provides information on the procedural rules to be followed in collective dismissals, under the Employment Contracts Act and the Act on Co-operation within undertakings No. 334/2007.

B – Assessment of the Committee

49. The Committee recalls that under Article 24, the following are regarded as valid reasons for termination of an employment contract: reasons connected with the capacity or conduct of the employee and certain economic reasons. Economic reasons for dismissal must be based on the operational requirements of the undertaking, establishment or service. The assessment relies on the domestic courts' interpretation of the law. The courts must have the competence to review a case on the economic facts underlying the reasons of dismissal and not just on issues of law (Conclusions 2012, Turkey).

50. As regards the Finnish Society of Social Right's argument that Finnish law allows dismissal on economic grounds even where the undertaking is not in economic difficulties in breach of the Charter, the Committee notes that the terms "operational requirements" found in Article 24 may cover many different situations. In particular the term "operational requirements" may cover industrial or strategic measures considered necessary by the enterprise to maintain or improve

competitiveness in a globalised market even when the enterprise is not per se in economic difficulty. Article 24 of the Charter requires a balance to be struck between employers' right to manage their enterprise as they see fit and the need to protect the rights of the employees. The Committee finds that Finnish legislation strikes such a balance; it notes that under the Employment Contracts Act employers may dismiss employees for economic or production-related grounds, but in addition there must be a proper and weighty reason and the work must have diminished substantially and permanently. Further it notes the factors which must be taken into account when assessing whether a dismissal fulfils the conditions: decline in demand, obsolete products, increased competition or restructuring of the business.

51. As regards outsourcing of labour or using agency workers following dismissals for economic reasons, the Committee considers such a practice could be contrary to Article 24 of the Charter. However, the Committee notes that in Finland the legislation provides certain guarantees, notably the obligation to re-employ employees dismissed on economic grounds where the employer needs new employees within nine months of the termination of employment, for the same or similar work that the employees had been doing, and in addition it notes the competence of the national courts to review cases of dismissals including in respect of the economic facts underlying the dismissals. It notes that according to a decision of the Labour Court outsourcing labour or relying on agency workers may be permitted following dismissal on economic grounds if it is not being used to circumvent the protection of the employer's own employees (decision of the Labour Court, 2007:103).

52. The Committee recalls that in its most recent conclusion under the reporting system, the Committee noted that in Finland the courts decide whether the necessary conditions for a dismissal to be lawful have been satisfied. Further it previously found the situation as a whole in Finland to be in conformity with Article 24 of the Charter in this respect (Conclusions 2012). The Committee considers that the Finnish Society of Social Rights has not adduced any new elements which would lead the Committee to alter its previous assessment of the situation.

53. The Committee holds that there is no violation of Article 24 of the Charter.

CONCLUSION

For these reasons, the Committee:

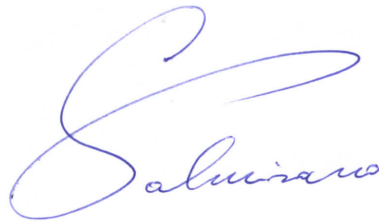
- unanimously declares the complaint admissible ;

and concludes:

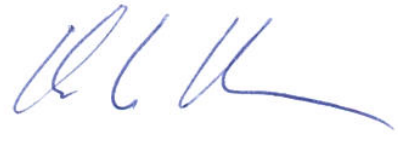
- unanimously that there is no violation of Article 24 of the Charter.



József HAJDU
Rapporteur



Giuseppe PALMISANO
President



Henrik KRISTENSEN
Deputy Executive Secretary