EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

8 April 2021

Case Document No. 1

SMB Norge v. Norway
Complaint No. 198/2021

COMPLAINT

Registered at the Secretariat on 6 and April 2021

KVALE

Council of Europe, The Secretary-General
Directorate General, Human Rights and Rule of Law
Avenue de l'Europe
F-67075 Strasbourg Cedex
France

Kvale Advokatfirma DA
Haakon VIIs gate 10
Postboks 1752 Vika
N-0122 Oslo

Tel +47 22 47 97 00
post@kvale.no
www.kvale.no

NO 947 996 053 MVA

Oslo, 25 March 2021
Our ref.: NS/EJO/36726-501

In charge:
Nicolay Skarning

COLLECTIVE COMPLAINT TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS – THE EUROPEAN SOCIAL CHARTER ARTICLE 24 – BREACH OF THE RIGHT TO INDEPENDENT COURTS IN EMPLOYMENT MATTERS IN NORWAY

1 INTRODUCTION

The present collective complaint to the Committee of Social Rights is submitted on behalf of **SMB Norge** (The Norwegian Business Association), a business and employers' organization for small and medium sized businesses in Norway with approximately 5500 members.

The topic of this complaint is the fact that employment matters (termination & dismissal) in courts in Norway has an exceptionally system of the parties themselves nominating and deciding on 2/3 rds. of the judges of court, one lay judge from each side, which opens up for undue influence on the lay judges, thereby weakening the independence of the court. There are several examples of attorneys nominating their owns clients as lay judges to a case, which is accepted in the current Norwegian legal system. Below we will give a lot of concrete examples of this practice.

SMB Norge alleges that the current system in Norway where the parties nominate and decide on which lay judges to sit on the matter is a breach of the European Social Charter Article 24 i.f, the requirement of "impartial body," i.e. impartial courts, to deal with employment matters. The fact that the largest employee organization in Norway, LO, and the largest employers organization, NHO, endorse the current system, and find it beneficiary to their attorneys and their members, is irrelevant in connection with the interpretation of the European Social Charter, which must apply to everybody, also to other citizens, the majority, outside these two organizations.

2 THE COMPLAINING PARTY – SMB NORGE & ADMISSIBILITY

The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints requires in article 1 c) that the right to collective complaints is given to:

> *"representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint."*

SMB Norge is such an organization.

SMB Norge represents approximately 5273 small and medium sized businesses. It is an independent employers' organization and has a democratically elected board. SMB Norge is recognized by the authorities as an independent organization, and it is on a regular basis the addressee for governmental hearings, green papers, white papers, new legislation and other matters of concern to small and medium sized businesses. SMB Norge is not itself party to any collective agreements. The authorization to file this complaint from the chairman of the board is enclosed (**Attachment 1**).

The European Committee of Social Rights (ECSR) found 14 May 2014 that SMB Norge, formerly named Bedriftsforbundet, to have the right to lodge collective complaints (**Attachment 2**). The organization changed its name from Bedriftsforbundet to SMB Norge on 11 July 2019. In English the name is Norwegian Association of Small & Medium Enterprises.

SMB Norge is a competitor to i.e. NHO, but has not been given the possibility to nominate lay judges to the lists of lay judges for employment matters.

3 THE DEFENDANT, NORWAY

Norway has ratified the European Social Charter (revised) (No 163), ratified by Norway 7 May 2001. In addition Norway has also ratified Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (No 158) on 20 March 1997. Subsequently Norway has allowed collective complaints to be lodged. The responsible ministry in Norway is the ministry of Employment, and the minister of Employment, Mr. Torbjørn Røe Isaksen declared to the Norwegian parliament on 1 March 2021 that he was not willing to change the way the lay judges are selected (**Attachment 3**), hence this complaint.

4 THE GROUNDS FOR THE COMPLAINT

4.1 European Social Charter Article 24

European Social Charter Article 24 second paragraph reads:

> *"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."* (our underlining).

Firstly SMB Norge alleges that this phrase also implements the right of the employer to have a case against him or her before a completely impartial court. This right is not only given to an employee but to both parties of an employment contract. There are two parties to an employment relationship and the European Social Charter Article 24 must be interpreted in a way that protects both parties, to give a fair balance of rights.

However, if the Committee finds that Article 24 only protects the employee, this complaint is in any event valid and relevant. An unorganized employee may today file a lawsuit against the employer and find himself or herself in a situation where the employer nominates and decides on a lay judge on the employers side who he knows through the employers' organization or knows about to be a lay judge who is likely to vote against the employee. The current system of selection lay judges in Norway is today a risk also to many employees, and particularly the

unorganized employees, who may not be in a position to find a "friendly" lay judge himself or herself.

The European Social Charter Article 24 establishes also a protection for the unorganized employees, not only the organized ones. And the unorganized employees are best protected if the District Court is completely independent of both parties, and where the lay judges are selected randomly from the court itself.

4.2 Legal remarks on the importance of independent courts

We saw on a high political level in the USA in the autumn of 2020 the importance of independent courts during a peaceful transition of political power in a democracy, and where the presidential election was disputed, and thereafter handled by the courts. Employment matters are less political but important enough to both parties to the case, their families and the workplace. Subsequently independence of the court is also important in employment matters.

It is vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law. When carrying out their judicial function they must be free of any improper influence. Such influence could come from any number of sources. And with the current selection system in Norway today, the system opens up for undue influence. Justice must not only be done – it must be seen to be done. It is of vital importance that judges, including the lay judges are seen to be both independent and impartial. That is not really possible when they are selected by the parties themselves to the current case, instead of randomly by the court.

For a small business losing an employment case, is often very costly, about 1 million NOK, or 100 000 Euros. A loss might entail the closure of the business and lost capital to its owners. Therefore it is important to both parties that they can count on the court and that all three judges are voting on a completely independent basis. SMB Norge does not find that to be the case today.

4.3 Norwegian legal background and text

Today's system is found in Norwegian Working Environment Act 2005, which reads:

> *"Section 17-6. Panels of lay judges*
>
> *For each county, the Norwegian Courts Administration shall appoint one or more special panels of lay judges with a broad knowledge of industrial life. At least two- fifths of the lay judges in each panel shall be appointed on the recommendation of the employers' organization and at least two-fifths shall be appointed on the recommendation of the employees' organization.*
>
> *Section 17-7. Appointment of lay judges*
>
> *(1) For the main hearing and for hearing in the Court of Appeal the court shall sit with two lay judges.*
>
> *(2) Lay judges shall be appointed on the recommendation of the parties from the panel of lay judges appointed pursuant to section 17-6. In cases before the Court of Appeal the lay judges are taken from the panels appointed within the district of the court.*
>
> *(3) Each party proposes one-half of the number of lay judges included in an individual case. If the proposals from the parties are not available within the time limit stipulated by the judge, the judge may appoint lay judges pursuant to section 94 of the Courts of Justice Act. The same applies if several plaintiffs or defendants fail to agree on a joint proposal.*

(4) Nevertheless, the court may sit without lay judges if the parties and the court are agreed that lay judges are unnecessary."

The text of the act is a bit misleading. It seems that the parties to a case only is recommending lay judges. The fact and the practice is that the lay judges are decided by the parties to the case. The court's appointment is only a formality: the court appoints the ones who are proposed by the parties.

4.4 History & Problem with today's nomination to an employment matter in the district court

Today's system, where the parties select themselves the lay judges to an employment case, goes back to 1977 when the Central Labour Court was the court of appeal for these cases. This changed in 1981, when these cases went into the regular court system again, with the Supreme court as the final appeal court. However the problem started at this time: When mirroring the system of lay judged in the Central Labour Court, Norway got at system accepting clients of the organization's law firms, like LO's Law Firm, to become lay judges also in the District Courts.

At the time in 1977, and now, The Central Labour Court was composed of a majority of representatives of unions and employers organizations, deciding on collective agreement, owned by the parties themselves. It looks a bit like an arbitration court, because it decides on interpretation on private collective agreements, and it is therefore fully accepted that the parties to the collective agreement also have direct members of the Labour court. However this system should not have been copied over to the District Court.

The District Courts however decide on what is lawful and unlawful according to Norwegian law, i.e. acts by the Norwegian parliament (the Storting). In our opinion it was, as stated above, therefore wrong already in 1977 to set up the District Court in a similar way, even on a smaller scale (2 lay judges in the District Court instead of 4 lay judges in the Central Labour Court).

In the District Court the three judges have the same voting power. The chairman is randomly selected by the court itself, lawyer and he or she is a professional judge and lawyer, and independent of the parties.

4.5 The Norwegian System accepts for attorneys to use their own clients as lay judges

LO and its law firm (The LO Law Firm) uses regularly their own clients as judges (**Attachment 4**), as the Norwegian system today invites to do.

When a member of one of the LO unions file a lawsuit against the employer they normally use the LO law firm. Then the LO lawyer normally selects a lay judge from one of the LO unions. This is accepted from NHO and from the Norwegian court.

A short survey in Kvale law firm from Oslo District Court 2016-17 shows that LO Law firm appointed 12 lay judges in this period, of which 9 must be considered as clients of LO Law firm (employed by a LO subsidiary union or elected representative in a LO subsidiary union, in both cases using LO Law Firm as their legal representative and legal adviser). **(Attachment 5)** Even though NHO has confidence in this system, and supports it, SMB Norge does not find it to be independent enough.

A survey made by two students working in Kvale law firm in Oslo in 2018 showed that the lay judges from LO was about 2,5 more active in dissenting against the employer than other judges (**Attachment 6).** SMB Norge submits that this gives an indication of a less independent court, when seen in connection with the fact that they are clients of LO Law Firm.

SMB Norway has on their side no names on the list and, as we understand, has never been invited to submit names to the lists. This deprives the courts of competence from the small and

medium sized employers. At the same time SMB members attend in the courts without "their own" judge, even though they meet judges from LO. It comes as a huge disadvantage to the SMB Norge members, often risking a loss of about 1 million NOK (100.000 Euros) if the case is lost.

For members of EMB Norge it is subsequently a matter of huge importance to have a fully independent court with all three judges on the tribunal completely independent. Hopefully this right is enshrined in the European Social Rights Article 24 when LO, NHO and the Norwegian Government refuse to change the system.

The matter has been publicly discussed for some time, also with LO **(Attachment 7)**.

4.6 Practical remarks

The undersigned attorney can be contacted at any time if there are questions concerning this complaint: Attorney Nicolay Skarning, ns@kvale.no, tel.: + 47 90664191.

Alternatively: Head of Public Affairs, Mr. Jørund Rytman, rytman@smbnorge.no, tel.: +47 909 33 499.

A copy of this complaint is also sent to the Norwegian Ministry of Employment, as responsible ministry, for informational purposes.

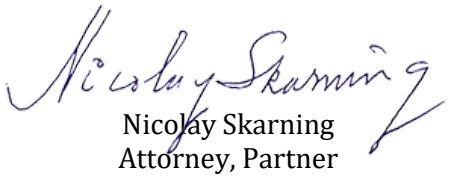
5 CONCLUSION & DEMAND FOR DECISION BY THE COMMITTEE

SMB Norge respectfully requests the Committee to adopt the following

CONCLUSION

The Norwegian system of selecting lay judges to a current employment case is a breach of the European Social Charter article 24.

Oslo, 25 March 2021



Nicolay Skarning
Attorney, Partner
Right of audience to the Norwegian Supreme Court
Member of the Norwegian Bar Association
www.kvale.no
Oslo, Norway

KVALE

Council of Europe
Directorate of Human Rights
Department of the European Social Charter DG I
F-67075 Strasbourg Cedex
FRANCE

Kvale Advokatfirma DA
Haakon VIIs gate 10
Postboks 1752 Vika
N-0122 Oslo

Tel +47 22 47 97 00
post@kvale.no
www.kvale.no

NO 947 996 053 MVA

Oslo, 9 April 2021
Our ref.: NS/EJO/36726-501

In charge:
Nicolay Skarning

REFERENCE 198/2021: SMB NORGE - NORWAY

I refer to the complaint on behalf of SMB Norge dated 26 March 2021, with Ref no 198/2021.

To the question of admissibility please find attached SMB Norge's regulations/laws, (Attachment 1). They verify that SMB Norge is still a national organisation representing Norwegian employers and businesses.

In addition, I also attach more recent evidence from the last few years from Norwegian Courts, also from the Appellate Courts, which prove that the LO Law Firm is accepted to appoint lay judges from the LO Organisations, employees with clients of the LO Law Firm (Attachment 2).

I also enclose a list of the current attorneys in LO Law Firm (Attachment 3), to verify that this department of LO must be considered as a law firm. By consequence, the subordinate unions of the LO are to be considered as clients of all these attorneys.

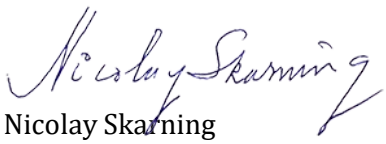
Additionally I enclose two emails from other large employers organisations in Norway; Virke and Spekter. The Head of employment law in Virke, Mr. Per Engeland, verifies that also their impression is that the LO lay judges practically always vote against the defendant company of the case (Attachment 4). In addition, the General External Counsel of the employers' organisation Spekter, verifies the same fact (Attachment 5).

As mentioned in the complaint of 25 March 2021: When the judges may have prejudices against employers in the way lay judges are appointed for a case in Norway, the risk is the same against the unorganised employee: he could find himself in a situation where he doesn't know any of the lay judges on the list but where the employers attorney has picked out a lay judge with prejudices against the employees side of the case.

It is not an argument in favour of the Norwegian system that both parties to a case, the plaintiff and the defendant, have the same right to appoint lay judges, hence there is a balance. The system is an advantage only for the unions and employers' organisations with members on the lay judges lists, and is particularly favourably to LO, who may use employees of their own subordinate unions.

In order to be in harmony with the European Social Charter article 24, it should be the court itself in Norway that pointed out the lay judges by random draw from each side (employers list and employees list).

Yours sincerely
KVALE ADVOKATFIRMA DA



Nicolay Skarning
Attorney at law, partner
Right of Audience to the Norwegian Supreme Court

Attachements: 5