EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

23 November 2021

Case Document No. 3

SMB Norge v. Norway
Complaint No. 198/2021

OBSERVATIONS BY THE EUROPEAN CONFEDERATION OF TRADE UNIONS (ETUC)

Registered at the Secretariat on 29 October 2021

Collective Complaint

Norwegian Association of Small & Medium Enterprises (SMB Norge) v. Norway

Complaint No. 198/2021

29/10/2021

Observations by the European Trade Union Confederation (ETUC)

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1 In availing itself of the opportunity provided in the Collective Complaints Procedure Protocol (CCPP - Article 7§2) the European Trade Union Confederation (ETUC) would like to submit the following observations.

2 The ETUC welcomes the fact that the respondent State has ratified not only the Revised European Social Charter (RESC) but also the Collective Complaints Procedure Protocol (CCPP).

3 These observations focus on the core allegation of the complaint, i.e. that the current system of selecting lay judges to sit in Norwegian courts in employment and dismissal cases, and whereby the parties in the respective dispute themselves would nominate and decide on the lay judges who are to sit in these cases, allegedly would weaken the independence of the courts, especially with regard to the requirement of being an 'impartial body'. In contrast, by referring i.a. to the international and European legal framework applicable to the issue at stake in relation to the impartiality of lay judges, these observations aim to demonstrate that

- the complaint is manifestly ill-founded and (alternatively) that
- there are manifest grounds to declare the system of lay judges compatible with the requirements of Article 24 RESC.

These observations have been drafted in consultation with the LO Norway, a trade union organisation referred to in the complaint as being one of the organisations able to recommend such lay judges; LO-Norway is an affiliated organisation of ETUC.

I. General observations

4 The main content of the complaint is described in the Decision on admissibility of 8 September 2021 as follows:

> SMB Norge alleges that the current system of selecting lay judges to sit in Norwegian courts in employment and dismissal cases violates Article 24 (the right to protection in cases of termination of employment) of the Charter in that the parties themselves nominate and decide on the lay judges who are to sit in these cases. SMB Norge alleges that this system thus weakens the independence of the courts, especially with regard to the requirement of being an "impartial body.[1]

5 In substantive terms, this consists of a further collective complaint invoking Article 24 RESC on the "right to protection in cases of termination of employment", however it is for the first time that the right of workers to appeal to an impartial body, as referred to in the second sentence of Article 24 RESC is invoked.[2]

6 At an editorial level, it is indicated that all quotations will be governed by the following principles: they focus on the issues at stake (while still showing the relevant context) and will

[1] ECSR Decision on admissibility, Collective Complaint No. 198/2021, §1.
[2] Today Article 24 RESC has been invoked -separately or in conjunction with other RESC Articles in 25 collective complaints (including this complaint), for an overview of these cases see HUDOC.

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be ordered chronologically (beginning with the newest text). Emphases in **bold** are added by the ETUC;[3] eventual footnotes are, in principle, omitted.

II. International and European law and material

7 The ETUC would like to start by referring to pertinent international and European law and material.[4] From the outset, it should be noted that Norway has ratified all instruments (as far as they are open for ratification) mentioned below, unless otherwise mentioned.

- International law and material[5] -

A. Universal Declaration of Human Rights (UDHR)

8 The United Nations Universal Declaration of Human Rights provides in Article 10 that:

> Everyone is entitled in full equality to a **fair and public hearing by an independent and impartial tribunal**, in the determination of his rights and obligations and of any criminal charge against him.[6]

9 The UDHR is, as its title suggests, universal – meaning it applies to all people, in all countries around the world. Although it is not legally binding, the protection of the rights and freedoms set out in the Declaration serve as a foundation for national and international laws and standards and have been incorporated into many international instruments, national constitutions and domestic legal frameworks.

B. International Covenant on Civil and Political Rights (ICCPR)

10 The United Nations International Covenant on Civil and Political Rights (ICCPR) provides in its Article 14 the following:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a **fair and public hearing by a competent, independent and impartial tribunal** established by law. (…)

11 The Human Rights Committee (CCPR), the main monitoring body to the ICCPR, provided some further guidance on the content of Article 14§1 in its General Comment No. 13 on 'Article 14 (Administration of justice)' of 1984[7] and its General Comment No. 32 on "Article

[3] Where the original text contains emphases they are highlighted in italics.
[4] As to legal impact of the 'Interpretation in harmony with other rules of international law' see the ETUC Observations in No. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden* - Case Document no. 4, Observations by the European Trade Union Confederation (ETUC), paras. 32 and 33.
[5] For a comprehensive overview of the relevant binding and declaratory international and regional instruments on the independence and accountability of judges, see: International Commission of Jurists (ICJ) (2007), International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1, p. 244.
[6] Proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A)
[7] Adopted at the Human Rights Committee Twenty first session (1984)

14: Right to equality before courts and tribunals and to a fair trial" of 2007[8]; however both comments do not provide further guidance on the use of lay judge systems.

12 To note is that in its Concluding Observations towards Norway, the CCPR did not raise nor address the eventual problematic use of system of using lay judges so far[9].

C. International Covenant on Economic, Social and Cultural Rights (ICESCR)

13 The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a specific provision on the protection against unfair dismissal nor does it contain anything in relation to (labour) cases to be heard by independent and impartial courts/tribunals. However, via its case law, its main monitoring body, the Committee on Economic, Social and Cultural Rights (CECSR), established a clear link between protection of workers in case of (unjustified) dismissal and respectively Article 6 ICESCR on the right to work and Article 7 ICESCR on the right to just and favourable conditions of work. Whereas also Article 6 nor Article 7 as mentioned do not explicitly mention the issue of (unfair) dismissal, the CECSR only highlights in its respective General Comments that persons who are victim of a violation of the rights under Articles 6 and 7 should have access to effective judicial remedies.[10]

14 To note is that in its different Concluding Observations towards Norway, the CECSR did not raise nor address the eventual problematic use of system of using lay judges so far, nor did it express any particular concerns on the effective judicial remedies available to victims of violations of the rights embedded in the ICESCR.[11]

D. International Labour Organisation (ILO)

15 Whereas already in a Resolution adopted in 1950, the ILO noted the absence of international standards on the termination of contracts of employment, it adopted in 1963 the 'Termination of Employment Recommendation (No 119). This was later than followed by the ILO Convention No. 158 on Termination of Employment Convention, 1982 (No. 158)[12] and

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[8] Human Rights Committee, General Comment No. 32 "Article 14: Right to equality before courts and tribunals and to a fair trial", Ninetieth session Geneva, 9 to 27 July 2007, CCPR/C/GC/32, 23 August 2007.

[9] For the CCPR Concluding Observations on Norway of 2018, 2006, 1999 and 1993, see the UN Treaty Body Database,

[10] CESCR, The Right to Work - General comment No. 18, Adopted on 24 November 2005; CECSR, General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), adopted on 27 April 2016.

[11] For the CECSR Concluding Observations on Norway of 2020, 2013, 2005 and 1995, see the UN Treaty Bodies Database,

[12] Convention concerning Termination of Employment at the Initiative of the Employer (Entry into force: 23 Nov 1985). http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312303:NO.

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accompanied by another Recommendation on Termination of Employment Recommendation, 1982 (No. 166)[13] which replaced the Recommendation No 119.

16 ILO Convention No. 158 contains the core of international regulation of the protection against unfair dismissal. This is all the more important since it has served as basis for Article 24 RESC.[14] Therefore, and although Norway did (unfortunately) not ratify this important Convention, in the ETUC's understanding the protection offered by this Convention should be considered as guaranteeing a minimum level of protection when defining the content of Article 24 RESC.[15]

1. ILO Convention No. 158

17 In its "Part II. Standards of General Application" the Convention defines the substance of the requirements as far as this complaint is concerned.

18 As regards the consequences of a dismissal the Convention stipulates under the heading of "Division C. Procedure of Appeal Against Termination" the following:

> Article 8
>
> 1. A worker who considers that his employment has been unjustifiably terminated shall be **entitled to appeal against that termination to an impartial body**, such as a court, labour tribunal, arbitration committee or arbitrator. (…)

19 ILO Convention No. 158 has - as mentioned above - been accompanied by the Termination of Employment Recommendation, 1982 (No. 166). However, the Recommendation does not provide any further guidance on how to interpret and/or apply Article 8§1 of the Convention in law and practice.

20 Similarly the Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment also does not provide any additional elements regarding the interpretation/application of Article 8§1.

21 Some guidance can however be found in the Final Report of the Tripartite Meeting of Experts to Examine the Termination of Employment Convention (No. 158) and the Termination of Employment Recommendation, 1982 (No. 166)[16]

> 87. **The Secretary-General indicated that Article 8 was not a one-size-fits-all provision**, but that it illustrated mechanisms to settle disputes, such as arbitration committees, a conciliator, or any other impartial body determined by the national legal system. **While emphasis was laid on the impartiality of the body, its composition might differ, and in some countries tripartite bodies existed. Article 8 therefore left it to the country to find the appropriate system adapted to its national circumstances**.

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[13] Recommendation concerning Termination of Employment at the Initiative of the Employer http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312504:NO

[14] "86. The provision has been inspired by ILO Convention No. 158 (Termination of Employment) of 1982." http://conventions.coe.int/Treaty/en/Reports/Html/163.htm.

[15] For the (non-)relevance of non-ratified instruments for interpretation purposes, reference should be made to the ECtHR judgment *Demir and Baykara v. Turkey* (Application no. 34503/97), 12 November 2008, para. 86.

[16] Meeting held at the ILO in Geneva from 18 to 21 April 2011.

2. ILO supervisory bodies' case-law

22 The relevant case-law of the Committee of Experts on the Application of Conventions and Recommendation (CEACR) is contained in its General Survey 1995.[17]

23 In relation to Article 8§1 of Convention No. 158, the following is mentioned:

> II. Procedures of appeal against termination of employment
>
> The principle of the right of appeal — Impartial body — time-limit
>
> 178. Furthermore, the Convention embodies the principle whereby the body to which the appeal is made must be impartial. (…) The Convention mentions the following as constituting such a body: a court, labour tribunal, arbitration committee or arbitrator. **The choice of competent body or bodies is therefore left to each country, provided that such bodies are impartial**.
>
> 181. Article 8, paragraph 1, reflects the variety of appeals procedures available in different countries and also within each country. (…)
>
> 182. The development of labour law has been accompanied by the establishment of procedures for the settlement of specific disputes which are entrusted to specific bodies. The establishment of such bodies reflects, in particular, a desire to provide a less formal and quicker procedure which is sometimes available free of charge for the settlement of labour disputes in general and those relating to termination of employment in particular. Thus, in many countries a worker may appeal to an impartial body which is specialized in appeals concerning labour law, such as a labour tribunal or an industrial relations tribunal or an arbitration committee or arbitrator. These **bodies are made up of either a judge and representatives of employers and workers** or only representatives of employers or workers. In other countries, it is generally the ordinary courts which are competent to hear appeals against unjustified termination of employment.

- European law and material -

E. Council of Europe

24 The Council of Europe (CoE) is characterised by two main human rights instruments, the European Convention on Human Rights (ECHR, see below 1)) and the European Social Charter (ESC, see below 2)) which is at the very core of this complaint.

1. European Convention on Human Rights (ECHR)

25 In recent times, the European Court of Human Rights (ECtHR) has developed its jurisprudence on in particular Article 8 ECHR (right to respect of private life) as containing more and more the protection against unfair dismissals. In part, it refers to Article 24 RESC (as well as to ILO-Convention No. 158).[18]

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[17] *ILO*, Protection against unjustified dismissal, General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), International Labour Conference, 82nd Session 1995, Report III (Part 4B), Geneva 1995.

[18] However, from a substantive point of view, the ECtHR has also assessed termination of employment from the perspective of Article 9 (freedom to hold religious beliefs), Article 10 (freedom of expression) and Article 11 (freedom of association). From a procedural point of view, but which forms not the primary focus of the complaint (and these ETUC observations), there is of course also the link

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26 However, in the framework of the collective complaint at stake, the most relevant article of the ECHR concerns Article 6§1 on the right to a fair trial which states:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an **independent and impartial tribunal** established by law. (…)[19]

27 The European Court of Human Rights has also a long line of jurisprudence in which it defines both the two requirements/elements of impartiality, i.e. the actual (objective) impartiality and the apparent (subjective) impartiality. According to the Court, a judge or tribunal will only be impartial if it passes the subjective and objective tests.[20] The subjective test "consists in seeking to determine the personal conviction of a particular judge in a given case".[21] This entails that "no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary".[22] The objective requirement of impartiality "consists in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt" as to his or her impartiality.[23] Under the Court's jurisprudence, if either test fails, a trial will be deemed unfair.

28 In several judgements, the European Court of Human Rights (ECtHR) expressed itself on the use of lay judges and the conformity with Article 6§1 ECHR. It has been summarised in the following terms:

> The participation of lay judges in a case is not, as such, contrary to Article 6 § 1. The existence of a panel with mixed membership comprising, under the presidency of a judge, civil servants and representatives of interested bodies does not in itself constitute evidence of bias (*Le Compte, Van Leuven and De Meyere v. Belgium*, 1981, §§ 57-58), nor is there any objection *per se* to expert lay members participating in the decision-making in a court (*Pabla Ky v. Finland*, 2004, § 32).[24]

29 Most relevant in the context of this collective complaint appears to be the *Kellermann v. Sweden* judgment[25] which is quoted here extensively:

> 60. The Court first observes that the lay assessors sitting on the Labour Court, who take the judicial oath, have special knowledge and experience of the labour market. They therefore contribute to the court's understanding of issues relating to the labour market and appear in

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with Article 6§1 ECHR (right to a fair trial). On the applicability of Article 6§1 to cases of (unjustified) termination of employment, see European Court of Human Rights (2017), Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb), Strasbourg, updated to 31 December 2017, in particular paras. 21, 29, 34 and 35.. (available at: https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf)

[19] For a guidance on the interpretation on Article 6, see European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb), Updated by the Registry 30 April 2021.

[20] For more examples, next to the ones mentioned in the following footnotes, also see European Court of Human Rights, Factsheet – Independence of the justice system, July 2021 as well as European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb), Updated by the Registry 30 April 2021.

[21] Tierce and Others v. San Marino, ECtHR judgment of 25 July 2000, para. 75.

[22] Daktaras v. Lithuania, ECtHR judgment of 10 October 2000, Series 2000-X, para. 30.

[23] Padovani v. Italy, ECtHR judgment of 26 February 1993, Series A257-B, para. 25.

[24] ECtHR (Registry), Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb), Updated to 30 April 2021, para. 238.

[25] ECtHR 24.10.2004, no. 41579/98, *AB KURT KELLERMANN v. SWEDEN*

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principle to be highly qualified to participate in the adjudication of labour disputes. It should also be noted that the inclusion of lay assessors as members of various specialised courts is a common feature in many countries. However, their independence and impartiality may still be open to doubt in a particular case.

61. The Court reiterates that the applicant company has not called into question the independence of the Labour Court nor the impartiality of its professional judges. Furthermore, at the hearing before the Court, the company stated that it did not challenge the subjective impartiality of any of the lay assessors. As it has not found any evidence to suggest any irregularities in these respects, the Court will limit its further examination to the question of the objective impartiality of the lay assessors who sat in the Labour Court.

This examination aims at ascertaining whether the lay assessors offered guarantees sufficient to exclude any legitimate doubt as to their objective impartiality (see, among other authorities, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, pp. 13-14, § 24; and *Langborger v. Sweden*, judgment cited above, p. 16, § 32).

62. In the above-mentioned case of Langborger v. Sweden, the Court was confronted with an issue of a similar nature regarding the Swedish Housing and Tenancy Court (Bostadsdomstolen) where the two lay assessors had been nominated by the dominant organisations on the housing and rent market – the Swedish Federation of Property Owners (Sveriges fastighetsägareförbund) and the National Tenants' Union (Hyresgästernas riskförbund) – and where the dispute before that court concerned the question whether a negotiation clause in the applicant's lease should be retained. The clause in question prescribed that the parties to the lease – the landlord and the applicant tenant – accept the rent and other conditions agreed upon on the basis of the negotiation agreement in force between, on the one hand, a landlords' union affiliated to the first-mentioned organisation and a landlord and, on the other hand, a tenants' union affiliated to the second organisation. For conducting the negotiations on the rent and other conditions the tenants' union received a commission of 0.3% of the rent. The Court, which considered it difficult to dissociate the question of impartiality from that of independence, reached, inter alia, the following conclusions (judgment cited above, p. 16, §§ 34-35):

> "34. Because of their specialised experience, the lay assessors, who sit on the Housing and Tenancy Court with professional judges, appear in principle to be extremely well qualified to participate in the adjudication of disputes between landlords and tenants and the specific questions which may arise in such disputes. This does not, however, exclude the possibility that their independence and impartiality may be open to doubt in a particular case.
>
> 35. In the present case there is no reason to doubt the personal impartiality of the lay assessors in the absence of any proof.

As regards their objective impartiality and the question whether they presented an appearance of independence, however, the Court notes that they had been nominated by, and had close links with, two associations which both had an interest in the continued existence of the negotiation clause. As the applicant sought the deletion from the lease of this clause, he could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim.

The fact that the Housing and Tenancy Court also included two professional judges, whose independence and impartiality are not in question, makes no difference in this respect."

63. With respect to the objective impartiality of the lay assessors in the present case, the Court considers that, in accordance with the principles developed in the Langborger case, the decisive issue is whether the balance of interests in the composition of the Labour Court was upset and, if so, whether any such lack of balance would result in the court failing to satisfy the requirement of impartiality in the determination of the particular dispute before it. This could be so either if the lay assessors had a common interest contrary to those of the applicant or if their interests, although not common, were such that they were nevertheless opposed to those of the applicant (see *Stallarholmens Plåtslageri o Ventilation Handelsbolag and Others v. Sweden*, no. 12733/87, Commission decision of 7 September 1990, Decisions and Reports 66, p. 111, at p. 118).

64. The Court first notes that, with regard to both the Labour Court's judgment of 11 February 1998 and its decision of 13 March 1998, one of the four lay assessors – the relevant SAF director – disagreed with the majority's findings and thus found in favour of the applicant company (see §§ 27 and 34 above). It could not be said therefore that there was an interest common to all four lay assessors which could be said to be opposed to those of the applicant company. Nevertheless, the question remains whether the three lay assessors in the majority – in both proceedings an employee of the Ministry of Finance representing the State employers, a person nominated by the LO and a person nominated by the TCO/SACO – represented interests which were contrary to those of the applicant company.

65. The applicant company's main contention in the domestic proceedings was that its right to remain outside the labour market organisations had been infringed by the allegedly unlawful industrial action taken against it by the Industrial Union. The measures taken by that union – the cessation of all work at the applicant company and the imposition of a “blockade” – lasted for a total of three days.

66. The Court reiterates that, as the applicant company and the Industrial Union had agreed that the industrial action in question was not unlawful under the 1976 Act, the Labour Court's examination in the two cases centred on the question whether that action had violated the applicant company's right to negative freedom of association under Article 11 of the Convention. The main point in that examination was whether the terms of employment of the collective agreement proposed by the union were more favourable than those provided by the applicant company.

67. The Court considers that the nature of the dispute between the applicant company and the Industrial Union was such that the lay assessors who sat in the Labour Court and the organisations that had nominated them could not objectively have had any other interest than to ensure that the above terms of employment were correctly examined and interpreted and that the principles of Article 11 of the Convention, which form part of Swedish law, were correctly interpreted and applied. These interests could not be contrary to those of the applicant company. It would be wrong to assume that their views on these objective issues would be affected by their belonging to one or other of the nominating bodies. Distinguishing the present case from that of Langborger v. Sweden, the Court notes that, in the latter case, the organisations which had nominated the lay assessors to the Housing and Tenancy Court had an interest in their affiliated unions' continued participation in rent negotiations, a participation which Mr Langborger wished to end by having the relevant negotiation clause deleted from his lease. Furthermore, the affiliated tenants' union had an economic interest in the retention of that clause, as it received a commission of 0.3% of the negotiated rent. No such links between the dispute in the present case and the labour market organisations that had nominated the lay assessors are to be found.

68. The Court also has regard to the fact that the applicant company was not affiliated to any employers' association and so could not be said to have had any representation on the Labour Court, whereas the opposing party, the Industrial Union, was affiliated to the LO which had nominated one of the members of the court. However, to accept that this gives rise to doubts as to the Labour Court's impartiality would, in the Court's opinion, be tantamount to considering that, in cases where lay assessors have been nominated by any labour market organisation, the Labour Court would fail to meet the requirement of being an “impartial tribunal” in all disputes where one of the parties is not affiliated to such an organisation. The Court considers that it would be contrary to the considerations underlying the statement in § 34 of the Langborger judgment (see above) to accept such a proposition (see *Stallarholmens Plåtslageri o Ventilation Handelsbolag and Others v. Sweden*, Commission decision cited above, at p. 119).

69. Having regard to the foregoing, the Court considers that the applicant company could not legitimately fear that the lay assessors who sat in the Labour Court had interests contrary to those of the applicant company or that the balance of interests was upset to such an extent that the Labour Court failed to meet the requirement of impartiality in the determination of the dispute before it.

There has accordingly been no breach of Article 6 § 1 of the Convention.

2. European Social Charter (ESC)

a) Text

30 The European Social Charter provides in Article 24 the following:

> "**Article 24 – The right to protection in cases of termination of employment**
>
> 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: (…)
>
> 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**."

31 The Appendix (Part II) to Article 24 does not provide further guidance in relation to right of appeal to an impartial body as enshrined in the second sentence of Article 24.

32 To note is that Article 24 was explicitly inspired by the ILO Convention No 158 (see above section II.D), some provisions of which are reproduced verbatim.[26] As a consequence, when interpreting Article 24 due regard must be taken of this Convention and the related ILO Recommendation No 166 as well as the case law of the CEACR.[27]

b) Compilation of case law (Digest 2018)

33 Concerning the protection offered by Article 24 ESC, the Digest of the Case Law of the European Committee of Social Rights (ECSR) (Digest 2018), which compiles the main principles deriving from the ECSR's case law based on Statements of Interpretation, Conclusions or Decisions[28], does not provide further guidance on the right for workers to appeal to an impartial body. Similarly, the ECSR Statements on Article 24 of 2007, 2008 and 2012 do also not address this particular point[29].

34 As for the ECSR Conclusions towards individual countries (including Norway), it seems that the issue of impartial bodies, let alone the use of lay judges, is not (yet) raised. Most cases of non-conformity with Article 24 deal with (the absence of) remedies (incl. shifting the burden of proof) and sanctions (reinstatement, financial compensation).

F. European Union

35 The **Charter of Fundamental Rights of the European Union (CFREU)** provides in its Article 30 on "Protection in the event of unjustified dismissal" that:

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[26] Council of Europe (1996) Explanatory Report to the European Social Charter (Revised), Strasbourg, 03.05.1996, § 86.
[27] For a recent academic analysis of Article 24 ESC, see Schmitt, M. (2016) Article 24 – The Right to Protection in Cases of Termination of Employment, in Bruun, N., Lörcher, K., Schömann, I. and Clauwaert, S. (2016) The European Social Charter and the Employment Relation, London: Hart Publishing, pp. 412-438.
[28] Available at: https://www.coe.int/en/web/turin-european-social-charter/case-law
[29] For these Statements of Interpretations, see HUDOC.

> Article 30 Protection in the event of unjustified dismissal
>
> Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

36 The 'Explanations' on Article 30 CFREU show that this article is clearly based on and inspired by Article 24 ESC (and its case law) and should thus be interpreted in light of the ECSR requirements and case law.[30]

37 Secondly, the **CFREU** provides in its Article 47 on the "right to an effective remedy and to a fair trial" that states[31]:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. (…)

38 The Explanations to Article 47 CFREU show clearly that it is based on in particular Article 6§1 ECHR (see above section E.1) and should thus be interpreted in light of the ECHR requirements and case law. [32]

III. National material and information

A. Historical developments

39 In the period from 1977 to 1981, Norway had a system where the Labour Court decided in cases about dismissals, in addition to the Court's traditional cases about interpretation of collective agreements. In 1981, the legislator decided to alter the system which had failed in some ways as amongst others the Labour Court did not have sufficient resources to solve all the cases. When changing the system, the legislator decided that the District Courts and the Appeal Courts should also be composed of lay judges in cases concerning employment protection legislation. The main purpose of altering lay judge legislation was to ensure that the courts that decide labour law cases continued to have the necessary knowledge and insight about the labour market.

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[30] EXPLANATIONS RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS, OJ C(303), 14.12.2007. (Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF)

[31] See Lörcher, K. ((2018) Chapter 27 Article 47 – Right to an Effective Remedy and to a Fair Trial in Lörcher, Dorssemont, Schmitt and Clauwaert (2018) The Charter of Fundamental Rights of the European Union and the Employment Relation, Hart Publishing: London, p. 712 and in particular the section on 'Right for Lay Judges to Sit in Labour Courts'.

[32] EXPLANATIONS RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS, OJ C(303), 14.12.2007. (Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF)

B. The current situation

1. In relation to the system of lay judges

40 The key purpose of the use of lay judges is their knowledge about the relevant industry/part of the labour market. This knowledge includes insights in traditions, collective agreements, relevant education/training, the work tasks, knowledge about terms and conditions in the employment relationships, etc. Therefore, the lay judges may often pose relevant questions to the parties during the hearings, give the judgements more depths, and by dissenting even challenge the majority based on their specific knowledge and experience. They are even specifically capable to contribute to finding friendly settlements.

41 In legal terms, 'Chapter 17' on 'Disputes concerning working conditions of the Working Environment Act' (WEA)[33] contains two provisions to which the complainant refer:

- Section 17-6. Panels of lay judges
- Section 17-7. Appointment of lay judges.

Both provisions are mainly based on Article 61-C which introduced a new procedural system for the resolution of individual employment disputes (see above para. 39).[34] By transferring those disputes from the Labour courts to Civil courts the legislation safeguarded the advantages of the lay judges' system by integrating it into the latter's procedure.

42 In a general way, the Court Administration has prepared a document available on the internet describing in detail the obligations of lay judges in particular in relation to impartiality:[35]

> Independence, impartiality and competence
>
> It is a fundamental human right that everyone has the right to have his or her case decided by an independent and impartial tribunal, with competent judges. This applies, of course, to the handling of disputes under the Working Environment Act.
>
> You cannot therefore serve as a co-judge if you are disqualified. You may be disqualified if you:
>
> - are related to or closely associated with any of the persons involved in the case
> - have any interest in or connection with the case
> - have made statements on the matter, for example in the social media
>
> The fact that you are organised or have a position of trust in the same association as one of the parties will not normally mean that you are disqualified, but a specific assessment must be made. If you are unsure whether you can be disqualified in the case, you must contact the court about this immediately. Even if the connection to some of the actors may appear loose and a bit personal in your assessment, it is important that you also address this so that your capacity can be assessed. If

[33] Act relating to working environment, working hours and employment protection, etc. (Working Environment Act), LOV-2005-06-17-62.
[34] Ot.prp.nr.78 (1980-1981) On the Act amending Act 4 February 1977 No. 4 on labour relations and the working environment etc. and certain other Acts.
[35] https://www.domstol.no/straffesak/aktorene-i-retten/meddommer/for-arbeidslivskyndige-meddommere/ (un-official translation).

> disqualification is established after the case is pending or after the judgment has been quashed, the whole case must be retried with new judges. Therefore, think carefully about whether there may be grounds for your disqualification and raise this with the court as early as possible.
>
> The examining magistrate and the co-judges with professional experience are judges on the same line in the case. It is your duty to address the issues raised in the case in an objective and neutral manner. You do not represent the employers' or employees' side in the case, nor the employers' or employees' organisation that proposed you for the board.

43 The procedural steps in the system of appointment are composed of two elements:

- As a first (and general) step, the Court Administration establishes a list ('panel') on 'recommendation' of the employers' and workers' side.
- As a second (and case-specific) step, the professional judge appoints the lay judges on 'recommendation' of the representatives of the two sides in the individual dispute who have to take the persons recommended as lay judges from the established list.

44 For the first step, the English translation in Section 17-6 WEA provides that:

> 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' organisation and at least two-fifths shall be appointed on the recommendation of the employees' organisation.

45 For the second step, the English translation in Section 17-7(2) WEA provides that:

> **Lay judges shall be appointed on the recommendation** of the parties from the panel of lay judges appointed pursuant to section 17-6. (…)

As a preliminary observation, this does not mean , that the professional judge would be obliged to follow the recommendation under all circumstances. The main rule is that the court appoints lay judges on the basis of the recommendation of the parties, but different reasons justify exemptions. The preparatory works refer for instance to cases of partiality as a reason to defer from the recommendation by the parties. Such deferral may occur before, during and after the hearing. If the lay judge is found to be partial after judgement has been made, the judgement will be set aside. Consequently, there is a legal possibility to refuse a lay judge who has been 'recommended'. One reason not to follow the recommendation may just be to avoid problems with (im-)partiality.

46 In practice for the second step, the trade unions suggest lay judges for the lists to be established, and the attorneys in the specific cases suggest lay judges from the lists in the respective case which has to be agreed upon by the professional judge.

47 There is an important number of examples where one of the parties claimed that the lay judge is not impartial, both from the employer side and from the worker side. The results in the decisions about the impartiality differ; sometimes the court's decision is that the lay judge

is not impartial – and in other cases the court finds that the lay judge is impartial.[36] To refer to just one example more explicitly: The judgement from the Court of Appeal in the Agder district.[37] In that case, the lay judge had a central position in the organization where the dismissed employee was organized, and where her legal representative was employed. The appeal court concluded that this fact was suitable to weaken the public trust in the lay judge's impartiality and overturned the city court judgement.[38] In conclusion, if the lay judge is found to be not impartial, this person cannot act as a lay judge in the given case.

48 Moreover, general rules on recusal of a not impartial judge apply additionally to the special provisions laid down in WEA Chapter 17: The Court of Justice Act and the Dispute Act apply in labour cases in addition. The Court of Justice Act Chapter Six contains provisions about judges' impartiality, including the impartiality of lay judges. According to the Court of Justice Act Section 108 a person cannot serve as judge if such circumstances exist that are capable of undermining confidence in his impartiality. This applies in particular when a party demands that he/she withdraws from the case on these grounds.

2. In relation to the complainant's role in the appointment procedure

49 According to the *travaux préparatoires* of the law,[39] all organisations may put forward proposals for members in the special panel of lay judges. Even if in practice the appointment will normally be based on recommendations from the most representative organisations, often referred to as the main organisations (*hovedorganisasjonene*) the possibility for minority organizations to recommend lay judges s not excluded in law. SMB may therefore put forward proposals for members in the panels of lay judges. It is therefore up to the complainant to avail itself of this possibility, but which it has apparently not done so up till now. Indeed, the courts dealing with labour law matters could benefit from competence from the small and medium sized employers, as stated in the complaint.

IV. The Law

50 The complaint refers mainly to Article 24, 2nd sentence RESC which reads as follows:

> 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.

51 The main allegation is that the Norwegian lay judges' system in termination of employment issues is not to be considered as an 'impartial body'. However, it should be noted that the wording does not require (at least not explicitly) independence.

[36] Examples: HR-2011-1988-A, HR-2012-1451-U, (two decisions from the Supreme Court), LB-2016-121483, LG-2015-60348, LG-2019-178825, LH-2010-55611, LH-2019-15141, TBERG-2016-19405-1.
[37] LA-2009-61643
[38] https://lovdata.no/pro/#document/LASIV/avgjorelse/la-2009-61643?searchResultContext=2024&rowNumber=1&totalHits=2
[39] Ot.prp. nr. 49 (2004–2005), p. 343.

52 Generally speaking, it would appear that 'the facts adduced are not of such a nature as to allow [the Committee] to conclude that there has been a violation of the right'[40] alleged by the complainant. However, as the ECSR has already declared this complaint admissible, it will therefore be important to look again into these elements, as described further below.

A. The subject of the complaint

53 As the system is not well described it would appear that the examination of the complaint has been limited by the complainant in two ways:

1. Limitation to Article 24 RESC and its consequences

54 The complainant alleges a violation of Article 24 RESC. Therefore, it is limited to issues on termination of employment. Accordingly, all other employment or collective matters are not subject of the complaint.

55 Against this background, all information and allegations in relation to lay judges in 'employment' cases in general are irrelevant as long they do not specify in particular the part which relates to 'termination of employment'. It is not the ECSR's obligation to sort out any possible (part of) relevance, instead, it is the complainant's obligation to fully and accurately describe the situation under Article 24 RESC.

2. Limitation to the examination of the practice

56 Quoting the pertinent legal provisions, the complainant describes the alleged problems in practice in the following terms:

> 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.

57 This appears to mean that the complainant is not challenging the legal situation as such (still assuming that it deals with termination of employment) but finally the practice. This is confirmed by challenging its own lack of representation the lay judges' system (see below).

B. The complaint is manifestly ill-founded

58 Even assuming that the ECSR would go into any substance of the case (despite the lack of specific information about termination of employment issues/cases), the information and argumentation is (at least partially) not sufficient, not coherent and lacks pertinent (means of) evidence.

1. The complainant's argumentation lacks substance and coherence

59 According to the Digest 2018, the ECSR has found that:

[40] ECSR, Decision on admissibility, 13.6.2005, No. 28/2004, *Syndicat national des Dermato-Vénérologues v. France*, para. 8.

> [t]he alleged manifest ill-foundedness of the complaint concerns the merits of the complaint and is not considered at the admissibility stage.
>
> Similarly, consideration of any alleged lack of substance in the complaint is a matter for the examination of the merits of the complaint, not its admissibility.
>
> Again, the consideration of an allegation to the effect that the complaint has used and quoted obsolete sources is a matter for the examination of the merits of the complaint.[41]

60 Moreover, for the purpose of examination of the merits, the ECSR requires that:

> Claims must be accompanied by evidence.[42]

61 Accordingly, these issues should be examined at the preliminary stage of the merits of the case.

a) Lack of substance: unclear and insufficient information for assessing the case

62 On the basis of the information provided in the complaint it does not appear possible to make any legal assessment based on a clear factual description of the issue at stake.

63 First, it is very unclear what the core of the complaint is about. Article 24 RESC only refers to the necessity of an 'impartial' body and does not – at least not explicitly – require 'independence'. The complaint, instead, already in its title only addressed the 'Breach of the right to independent courts in employment matters in Norway' (emphasis added) is mentioned.

64 Concerning 'impartiality' the complaint only mentions this term twice[43] in the following terms:

> 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. (Emphases added)

65 Thus, it is obvious that the main line of argumentation lies with the 'independence' requirement which is not explicitly guaranteed by Article 24 RESC.

66 As regards the reference to 'courts', it should again be recalled that Article 24 RESC does not require an impartial 'court' but merely an impartial 'body'. As such the same criteria cannot be applied for 'courts' and 'bodies'. This aspect is completely neglected by the complaint.

67 Second, the complaint does not show any specific case in which the impartiality of a lay judge recommended by the LO law firm and accepted by the professional judge was not secured or would have had any negative consequences due to the alleged 'partiality'.

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[41] Digest of the Case Law of the European Committee of Social Rights, December 2018 (Digest 2018), Part I, A. 8).
[42] Digest 2018, Part I, B. 3).
[43] The other (four) four references (under 1. and 4.1) merely repeat the text of the Article 24 RESC.

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68 Third, the factual information is limited to the situation in Oslo relating to a period of ca. five years ago and therefore not capable to demonstrate the practice in total and in a timely manner.

69 Fourth, it remains at least very unclear (if not contradictory) how and even if so to which extent (the number of) 'dissenting' opinions or votes could be used to show any lack of impartiality or of independence. On the contrary, dissenting opinions show the well-functioning of a court system by providing additional transparency and thus contributing to the confidence of the all those who address a court. In any event, the following elements would have to be taken into account: This 'survey'

- is, again, limited in territorial and temporal terms and therefore as such not representative (see above),
- does not look into
  - the further developments (e.g. if a 'dissenting opinion' has been confirmed in the next instance(s),
  - the reasons for which the lay judge from the labour side opposed the ruling.

70 Finally, even assuming that in practice the professional judge follows the recommendation of the parties /lay judges? the complaint totally neglects its legal possibility to refuse a recommendation in a case in which there would arise any specific problem with the recommended lay judge (e.g. in relation to statements, behaviours or other activities which might show that his or her impartiality is jeopardized).

71 As the ECSR has declared the complaint admissible it should already on this basis at least be rejected as manifestly ill-founded.

b) Lack of coherence: Contradicting argumentation

72 The complainant alleges that

> 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.

73 By accusing not to be 'listed' the complainant implicitly concedes that it would not see problems 'with "their own" judge'. Therefore, it would appear that this factual 'exclusion' of representation in the courts lay judges system is the main problem. But this could not and cannot be addressed under Article 24 RESC. Therefore, it would appear that the complainant is trying to circumvent the procedure by referring to a specific (indeed, the only) article which requires from the Contracting Parties to ensure 'the right to appeal to an impartial body'. Moreover, as pointed out above, the complainant did not try to become listed. Instead it complains that it was 'not invited' to do what is, in fact, not legally required.

74 Therefore, it is hard to see how the complainant's allegations could be considered as pertinent.

c) Lack of evidence

75 The only evidences referred to in the complaint are the following three attachments. Already as such they do not demonstrate the lack of an 'impartial body'. Looking at them individually, they can even less be considered as relevant:

- 'A short survey in Kvale law firm from Oslo District Court 2016-17' (*Attachment 5*); this has been dealt with in para. 68,
- 'A survey made by two students working in Kvale law firm in Oslo in 2018' on 'dissenting against the employer than other judges' (*Attachment 6*); this has been dealt with in para. 69, and
- 'The matter has been publicly discussed for some time, also with LO (*Attachment 7*)', it is hard to imagine how a reference to a public debate could be considered as a means of evidence in the context of this complaint; at its best it might contain a sort of background material.

76 It does not appear conceivable how these references could serve as 'evidence' to call into question the impartiality of lay judges in general or even 'appointed lay judges from the LO law firm'.

d) Interim conclusions

77 Against this background the complaint should be rejected as manifestly ill-founded.

2. Manifest grounds for justifications of the Norwegian lay judges' system

78 Even assuming that the ECSR would not declare the complaint as manifestly ill-founded at this stage, there are manifest grounds for justifications for the Norwegian lay judges' system against the requirements of Article 24 RESC. First, the requirements related to the deciding 'body' are fulfilled. Second, also its 'impartiality' is guaranteed.

79 In a general way, it should be recalled that no international or European supervisory body has criticised Norway for violating international standards. In particular, the ECSR did not address this issue (see para. 34).

a) Impartial 'body' is guaranteed

80 In interpreting Article 8(1) the ILO Convention 158 which formed the basis for Article 24 RESC the CEACR has recognised the specificities of impartial 'bodies' in termination of employment matters by recognising that the 'choice of competent body or bodies is therefore left to each country' and that these bodies can be made up of judge and representatives of employers and workers' (see above para. 23).

81 This means that Contracting Parties have a variety of possibilities in relation to its composition and procedures to be followed. Therefore, in procedural terms, it would not appear contrary to the term 'body' if ideas or even certain elements of arbitration (committees) such as 'nomination' of parts of the arbitrators by the parties are included in court procedures which deal with labour law matters.

82 In this respect, the Norwegian lay judges' system is perfectly in line with these requirements.

b) 'Impartiality' of the body is guaranteed

(1) The principles

83 Looking at the international standards (see Part II) it is clear that lay judges' systems in labour law matters with equal representation of employers (organisations) and workers (trade unions) are recognised as guaranteeing specific knowledge and experience. They are seen as helpful and important for the proper administration of justice. They are considered to be in conformity with impartiality requirements.

84 In a general way, this is confirmed even by the ECtHR attributing a great importance to Article 6 ECHR on the right to a fair trial. In this respective should be recalled that the ECtHR has not only in general recognised the system of lay judges in labour matters (see above para. 28) but accepted a similar system in relation to Sweden (see above para. 29) under the strict conditions of Article 6 ECHR.:

(2) Specific systemic guarantee

77 Besides lay judges in other areas (like e.g. jurors in criminal law) the lay judges' system in labour law has a specificity. By putting employers and workers representation at equal footing (see the legal framework) their dichotomy contributes in a systemic way to guarantee impartiality. Indeed, by coming from the opposite sides of the employment relation they 'neutralise' each other if impartiality would be endangered. Thus, they avoid in systemic way possible impartial attitudes and, thus, also contribute to a balanced approach.

(3) Specific legal protections in the Norwegian court system

78 In order to assess the conformity of the Norwegian situation with the requirements of Article 24 RESC it is indispensable to take all relevant elements, in particular in the legal situation, into account.

79 First and most importantly, there is the legal possibility of not following a recommendation for the appointment of a lay judge. Despite the fact that the complainant totally neglects this possibility, the legal possibility of not following a recommendation for the nomination of a lay judge in case of disputed impartiality is of crucial importance (see above paras. 40 seq.). It functions also in practice (see above 47).

80 Second, for comparative purposes, it might be helpful to look also into the practice of other Contracting Parties. In a ruling by the German Federal Labour Court44, it was on the one side made clear that lay judges who work in the Law firm of the German Trade Union Confederation (*Deutscher Gewerkschaftsbund – DGB-Rechtsschutz GmbH*) are not excluded from holding the office of a lay judge.45 On the other side, it found that the recusal in this very specific case was founded.[46]

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[44] Bundesarbeitsgericht (German Federal Labour Court), https://www.bundesarbeitsgericht.de/entscheidung/7-azr-646-10-a/, only available in German.
[45] Ibid. paras. 6 – 16.
[46] Ibid. paras. 7 – 23.

c) Interim conclusion

81 Even looking into the substance of the case, there are obvious systemic and legal protections to secure impartiality as required by Article 24 RESC.

V. Conclusions

82 For all the reasons stated above, the ETUC suggest to reject the present complaint as manifestly ill-founded.

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