EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

22 December 2021

Case Document No. 4

Norwegian Association of Small & Medium Enterprises (SMB Norge) v. Norway
Complaint No. 198/2021

SUBMISSIONS BY THE GOVERNEMENT ON THE MERITS

Registered at the Secretariat on 10 December 2021

ATTORNEY GENERAL FOR CIVIL AFFAIRS

The European Committee
of Social Rights

OSLO, 10 December 2021

Written Observations by the Kingdom of Norway

represented by Marius Emberland, advocate at the Office of the Attorney General for Civil Affairs, as agent, and by Sverre Runde, associate at the same office, in

Case SMB Norge v. Norway (Complaint No. 198/2021)

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1 INTRODUCTION

(1) Reference is made to the collective complaint submitted by SMB Norge (hereinafter "SMB" or "the complainant organisation") in the above-mentioned case, to the Committee's decision on admissibility of 8 September 2021, and to the Deputy Executive Secretary's letter of 14 October 2021, whereby the Government's request for extension of the time limit for the submission on the merits to 10 December 2021 was accepted.

(2) The complainant organisation argues that Norway – through its system of selecting lay judges to cases of termination and dismissal of employees – violates its duty to ensure that workers who consider that their employment has been terminated without a valid reason have the right to appeal to an impartial body, which is set out in the second paragraph of Article 24 of the revised European Social Charter (hereinafter "the revised Charter"). The essence of the complaint appears to transpire at p. 1 of the complaint in the following terms:

> *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.*

(3) The Government does not agree with SMB's claim that the system violates Article 24 of the revised Charter. The Government therefore asks the European Committee of Social Rights (hereinafter the "Committee") to find that no violation has occurred.

(4) The Government's written observations are organised as follows:

- Section 3 provides an introduction to the domestic legal framework pertinent for the nomination and appointment of lay judges in employment matters.

- Section 4 sets out the Government's view on the obligation that flows from Article 24 second paragraph of the revised Charter and why the system in operation does not violate that provision.

- Section 5 concludes.

(5) Please be advised that not all sources of law referred to in these written observations have been translated into English. The Government assumes that the complainant organisation does not dispute the content of these sources as such. The Government will, however, provide English translations of such sources if the Committee deems it of significance or if the complainant organisation disputes them.

2 COMMENTS ON THE COMPLAINANT ORGANISATION'S RENDITION

(6) The Government observes that the complaint only briefly addresses what the complainant organisation perceives to be a violation of Article 24 second paragraph of the revised Charter.

(7) In addition to the essence of the complaint referred to above, the complaint provides what appears to be anecdotal evidence of a practice that allegedly does not comport with impartiality as guaranteed by the provision in question. On p. 1 the complaint states that "[t]here are several examples of attorneys nominating their own clients as lay judges to a case, which is accepted in the current Norwegian legal system", and section 4.5 of the complaint provides such anecdotal evidence.

(8) The Government is unable to attest to the veracity of the two surveys mentioned in section 4.5 and appended as attachments 5 and 6. The methodology of the two surveys is not transparent, and they are not conducted in a manner that ensures that all relevant factors as regards the reasoning of the different judges are being taken into account. The apparent empirical basis is narrow, making it questionable whether the surveys include a representative selection of court cases, especially as regards the survey presented in annex 6. Also, the Government cannot but note that both surveys have been conducted by representatives of the same law firm that represent the complainant organisation in the present case. Consequently, the surveys should in no account be considered to show the full picture of cases concerning employment matters in Norwegian courts.

(9) Given that Article 24 of the revised Charter only protects workers, and not employers, the Government also fail to recognize the impact of the informal surveys presented in annexes 5 and 6 to the application as the surveys concerns cases where the employee was organised in a trade union (LO).

(10) Further, it should be noted that the complainant organisation omits several legal provisions and mechanisms in the domestic system that would be amenable to provide a more nuanced picture than that presented in the complaint.

(11) In the view of the Government, the Committee cannot build its assessment of compliance of the Norwegian system under scrutiny with Article 24 second paragraph of the revised Charter based on the insufficient factual and legal basis found in the complaint.

(12) The Government invites the Committee rather to consider Norway's compatibility with the revised Charter having regard to the system *beyond* circumstantial examples and to assess the system in the form that transpires from all relevant domestic legal provisions and how they are practiced by Norwegian courts.

3 RELEVANT DOMESTIC LEGAL FRAMEWORK

3.1 The Norwegian judiciary system in general

(13) The independence and impartiality of all courts is a cornerstone of the Norwegian legal system and has been so for more than 200 years. Section 95 of the current version of the Norwegian Constitution reads (English translation provided by the Norwegian Parliament (the *Storting*)):

> *Everyone has the right to have their case tried by an independent and impartial court within reasonable time. Legal proceedings shall be fair and public. The court may however conduct proceedings in camera if considerations of the privacy of the parties concerned or if weighty and significant public interests necessitate this. The authorities of the state shall ensure the independence and impartiality of the courts and the members of the judiciary.*

(14) That courts should be impartial is also provided for by statutory law:

(15) First of all, several provisions of the 1915 Courts of Justice Act specifically address and provide mechanisms to ensure impartiality in all courts, including courts that consider employment disputes. They are considered in detail in section 3.5 below.

(16) Moreover, the right to a fair hearing in Article 6 of the European Convention on Human Rights (hereinafter "the ECHR"), which inter alia requires courts in cases concerning employment disputes to be impartial, is given the status of domestic Norwegian law through Section 2 of the 1999 Human Rights Act and has precedence over national legislation in case of conflict (Section 3 of the Act). As will be explained below, Norwegian courts carefully

interpret their procedural laws in the light of the ECHR as interpreted by the European Court of Human Rights (hereinafter "the ECtHR") so that they are in conformity with the requirements of an impartial body. The impartiality requirement, and its consequent test, applies to both professional judges and lay judges.

(17) With these fundamentals of Norwegian law in mind, the Government also recalls that the Committee has considered "*that the situation in Norway is in conformity with Article 24 as regards the right to appeal to an impartial body*", see 2005/def/NOR/24EN. Albeit not concluding on the specific matter of this complaint, it cannot be denied that the system in place in Norwegian law, both constitutional and statutory, is generally considered to be in conformity with the revised Charter.

(18) The Government perceives the present complaint to concern the specific procedure of appointing lay judges in disputes concerning termination and dismissal. Accordingly, a detailed presentation of those procedures will be given below. It includes the historic object and purpose of the arrangement and the instruments in place to secure the impartiality of the lay judges being appointed.

3.2 Overview of the legal proceedings in disputes concerning termination and dismissal

(19) Courts' consideration of disputes concerning termination and dismissal are in principle regulated by the 2005 Act relating to mediation and procedure in civil disputes (hereinafter "the Disputes Act") and the 1915 Act relating to the Courts of Justice (hereinafter "the Courts of Justice Act") – legal codes that apply to and govern all civil court proceedings.

(20) The specific legal proceedings at issue in the present complaint are in addition regulated by special rules in the 2005 Act relating to working environment, working hours and employment protection, etc. (hereinafter "the WEA") chapter 17. An English translation of the WEA chapter 17, provided by The Norwegian Labour Inspection Authority (Arbeidstilsynet), is attached.

Annex 1: English translation of the WEA chapter 17

(21) In the preparatory works of the WEA, it is explicitly emphasized that (office translation):

> *The Norwegian authorities are concerned with fulfilling the country's obligations under international law. Significant emphasis is placed on the statements and criticisms that have come, for example from the bodies that monitor compliance with the European Social Charter. The interpretation and case law of the monitoring bodies is also of great importance for the interpretation of national regulations within the areas of the various conventions.*

Annex 2: Preparatory works to the WEA, Ot.prp. nr. 49 (2004-2005) chapter 3.2.1.

(22) The compliance, under the revised Charter, of legal proceedings in employment matters must be evaluated in the light of all three aforementioned acts, and especially their provisions restricting the appointment of lay judges that can be seen as partial or incompetent to the dispute in question, see Section 17-1 para. 1 of the WEA:

> *Section 17-1*
>
> *(1) In legal proceedings concerning rights or obligations pursuant to this Act, the Courts of Justice Act and the Dispute Act shall apply in addition to the special provisions laid down in this chapter.*

(23) These provisions will be explained in detail below and illustrated with relevant case law.

(24) Generally, in disputes concerning termination and dismissal, the courts are set with a professional judge and reinforced with two lay judges holding special expertise and experience from working life/general business conditions, preferably from the relevant sector. The lay judges are appointed from a panel of lay judges. Detailed rules are given in Sections 17-6 and 17-7 of the WEA, 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' organisation and at least two-fifths shall be appointed on the recommendation of the employees' organisation.*
>
> *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.

(25) Lay judges are not used in cases pursuant to the small claims procedure, e.g. cases where the amount in dispute is less than NOK 125.000, see the Dispute Act Section 10-1 and Supreme Court case HR-2018-679-U para. 21. It may also be deviated from if the parties to the case, and the court, agree that lay judges are not necessary, see para. 4 of the WEA Section 17-7.

Annex 3: Supreme Court case HR-2018-679-U

(26) If an appeal is admitted, the appellate court is set with three professional judges, in addition to the two lay judges that are appointed according to the same procedures as for the district court. The appellate court can review all sides of the decision from the district court.

3.3 How lay judges are appointed

(27) The lay judges are appointed from a panel of lay judges that is established for each county, see the WEA Section 17-6 referenced in para. 12 above. The panels are composed based on proposals from the employer and employee organisations, and it is required by law that at least two-fifths of the panel members are nominated by each of the employee organisations and the employers' organisations, respectively. It is stated in the preparatory work regarding Section 17-6 that all organisations may submit proposals for members of the lay judge panels, but that the appointment for all practical purposes will have to take place on the basis of proposals from the large organisations or those usually referred to as main organisations, i.e. the four largest employee organisations (LO, Unio, YS and Akademikerne) and the four largest employer organisations (NHO, KS, Spekter and Virke).[1]

Annex 4: Preparatory works to the WEA, Ot.prp. nr. 49 (2004-2005), commentary to Sections 17-6 and 17-7

(28) Hence, the panels aim to represent a balanced and representative composition of the various interests and experience of Norwegian employers and employees. It is not allowed to appoint judges not part of these panels, see Supreme Court case Rt. 2002 p. 981.

Annex 5: Supreme Court case Rt. 2002 p. 981

[1] Preparatory works to the WEA, Ot.prp. nr. 49 (2004-2005), commentary to Sections 17-6 and 17-7.

(29) The administrative and practical tasks regarding the composition of the panels are handled by the Norwegian Courts Administration, which is an independent body with responsibility for the central administration of the ordinary courts and land consolidation courts in Norway. It was established in 2002 to ensure that the courts have sufficient distance and independence from the executive authorities, and that the courts perform their judicial functions. The organisational rules of The Courts Administration are provided in the Courts of Justice Act, chapter 1 A.[2]

Annex 6: English translation of the Courts of Justice Act, chapter 1 A

(30) The Courts Administration performs the dialogue with the courts in order to estimate the number of lay judges needed in each court, and they also administer the dialogue with the social partners in order to obtain their proposals to members of the lay judge panels. The number of judges in each county's panel is decided on the basis of the number of cases handled by the appurtenant court.[3]

Annex 7: Preparatory works to the WEA, Ot.prp. nr. 49 (2004-2005), chapter 22.4.6

(31) After receiving the social partners' proposals, The Courts Administration ensures that the police carry out a background check of the proposed judges with regard to criminal record. When the panels are finally composed, The Courts Administration communicates the result to each court, and the panels are appointed for four years at a time. During the functioning period, The Courts Administration handles any applications to be relieved of the duties as a lay judge. The Courts Administration also provides written information to each individual member of the panels on practical matters related to the task as a lay judge.

(32) In advance of the main hearing in a dispute, the parties are asked to submit a ranked recommendation of judges from the panel. Often, they will choose candidates from the same 'side' as the party. The parties are, however, not obligated to do this. Considering what is best for the enlightenment of the case, an employee may, however, choose to recommend a lay judge with experience as an employer, or vice versa, see decision 18 July 2007 from Gulating Court of Appeal (reference: LG-2007-99081). The Court of Appeal stated as follows

[2] See https://www.domstol.no/domstoladministrasjonen/ for more information on The Courts Administration.
[3] Preparatory works to the WEA, Ot.prp. nr. 49 (2004-2005) chapter 22.4.6.

(office translation):

> *As the Court of Appeal sees it, it is important to maintain that the main object of the arrangement with special lay judge panels is to bring the necessary professional knowledge to the court, and on the basis of this, to contribute to the parties' trust in the courts as a competent body to resolve these types of disputes. These considerations do not imply that a party should be "forced" to choose lay judges from "its" side if the party wishes to choose differently in the individual case.*

Annex 8: LG-2007-99081

(33) The court to consider the dispute subsequently performs the actual appointment, but only after considering whether the recommended person is sufficiently competent and impartial to participate as a judge in the specific case. If one of the recommended lay judges is found to be incompetent, e.g. due to his or her connection with the recommending party or the counsel, the court appoints the next candidate on the ranked list. If there are no impartial candidates on the list, the court appoints from the panel of lay judges. The rules of competence, including impartiality, are set out in the Courts of Justice Act Sections 106 to 108 (referred to below), which implements and are in accordance with the requirements of impartiality in ECHR Article 6 para. 1.

3.4 Historical backdrop and the purpose of using lay judges

(34) The procedural rules of recommending and appointing lay judges in the field of employment matters are closely related to the development of the substantive rules regarding termination of employment. The legislator has placed great emphasis on ensuring that these disputes are handled in an efficient manner, including that the courts have the necessary expertise.

(35) From 1977 and until 1981, disputes concerning dismissal were dealt with by selected district courts, set with both a professional judge and lay judges with special competence. Appeals were dealt with by The Labour Court, a specialist court with limited jurisdiction, which is characterized by the fact that it is composed of both professional judges and lay judges with expertise on industrial matters appointed for three years at a time based on nominations from the organisations of both sides. The Labour Court still operates, but it does not anymore deal with the disputes at issue in the present complaint.

(36) In 1981, disputes concerning dismissal were transferred to the ordinary court system, where it was decided that the composition of the district and appellate courts should be enforced with lay judges in addition to their professional judges. Initially, the cases were dealt with by a limited selection of courts throughout Norway, enabling them to gain special expertise on the matter.

(37) The 1981 scheme was repealed in 2005 in connection with the revision of the Working Environment Act. It was instead decided that all district courts should be competent to handle disputes concerning termination of employment, not just the selected specialist courts of the 1981 scheme. At the same time, it was decided that the special procedural rules in the WEA, including the rules on lay judges, should be applied not only to disputes concerning termination of employment, but to all disputes that related to rights and obligations under the WEA. In connection with these amendments, it was emphasized in the preparatory works that when the scheme with specialized district courts was repealed, it was still a clear intention to maintain the use of industrial life-skilled lay judges to ensure necessary competence in the courts (office translation):[4]

> *In the Ministry's opinion, the need for expertise will be taken care of by the participation of industrial life-skilled lay judges. By retaining the scheme of lay judges who have such experience, the courts will continue to be provided with special knowledge and experience of the conditions, considerations and interests that apply in working life.*
>
> **Annex 9:** Preparatory works to the WEA, Ot. prp. nr. 49 (2004-2005) chapter 22.4.2

(38) Under the current arrangement, in place since 2005, the panel of lay judges to sit at the district and appellate court level offers candidates with diverse work- and life experience, e.g. as business leaders, from human resources departments or trade unions. Presumably, the parties have more insight than the court into which judge that has the relevant experience for a given case. Thus, the parties are best suited to offer recommendations on which judges that should be appointed. Additionally, knowledge of organisations and organisational patterns are precisely part of the expertise that the lay judges are meant to bring in. A principle of randomness will therefore, in the Governments opinion, violate the very basic idea of special expertise in disputes concerning working conditions.

[4] Preparatory works to the WEA, Ot. prp. nr. 49 (2004-2005) chapter 22.4.2.

(39) Moreover, it is reasonable to believe that giving the parties the opportunity to recommend judges contributes to the public trust in the courts.

(40) To summarize, the objective of the arrangement to which the present complaint relates is to ensure that the court is equipped with judges who have the necessary competence and expertise in the motley issues that may arise in disputes regarding working conditions. As the Government understands it, this objective is widely recognized and welcomed, and it is also not an issue as such in the complaint. In the view of the Government, the current system of appointing lay judges is the most efficient and compliant method to achieve this objective.

(41) However, although the parties are given the opportunity to *recommend* judges, the lay judges shall never act as a representative for any of the parties. This is a given having regard to the rules of impartiality provided for in statutory law (see below), but it has also been specifically addressed in court practice. Reference is in particular made to decision 8 October 2010 from Hålogaland Court of Appeal (reference: LH-2010-55611), where the court stated as follows (office translation):

> *In the Court of Appeal's view, it follows from the arrangement of lay judges that those who are appointed have special knowledge of social life and work life. Consequently, the courts are provided with competence from working life in line with the purpose of the scheme. During their service, however, the lay judges shall not act as representatives of any of the parties.*

Annex 10: LH-2010-55611

(42) To ensure that this objective is secured, the appointment of the lay judges is therefore made by the courts, not by the parties, subject to a test of impartiality that is vital for the independence and impartiality of the court.

3.5 The impartiality test of lay judges

(43) The Courts of Justice Act implements several restrictions on the use of lay judges – both when selecting judges to the panels of lay judges and in the appointment of a judge to a specific case. The restrictions are in principle the same for professional judges and lay judges, and for other matters than disputes concerning termination and dismissal.

(44) Firstly, the selection of judges to the panels of lay judges are regulated by the Court of Justice Act Sections 70-72, providing similar restrictions in disputes concerning working matters as the selection of judges to panels in other matters. The restrictions in Sections 70-72 reads (English translation provided by the Norwegian Courts Administration):

> *Section 70*
>
> *Any person who is elected must possess an adequate command of Norwegian and otherwise be personally suitable for the task.*
>
> *In addition, the person concerned must:*
>
> *1. be aged over 21 and under 70 at the start of the election period,*
>
> *2. not have been deprived of the right to vote on public affairs,*
>
> *3. not be the subject of official debt negotiations or bankruptcy proceedings or be under bankruptcy quarantine,*
>
> *4. be entered in the national population register as resident in the municipality as of the election date, and*
>
> *5. be a citizen of Norway or another Nordic country, or have been entered in the national population register as being resident in the Kingdom for the last three years prior to the election date.*
>
> *Section 71*
>
> *The following are disqualified from election due to their position:*
>
> *1. The Norwegian Parliament's representatives and deputy representatives,*
>
> *2. the Council of State's members, Secretaries of State, the Council of State's personal political advisers and employees of the Prime Minister's office,*
>
> *3. county governors and assistant county governors,*
>
> *4. appointed and constituted judges and staff at the courts,*
>
> *5. employees of the prosecution authority, the police and the correctional services and people who have been assigned limited police authority,*
>
> *6. employees of the Ministry of Justice, the Police Directorate and the Norwegian Courts Administration and its board,*

7. employees and students at the Police University College and the Correctional Service of Norway Staff Academy,

8. practising lawyers and associates,

9. municipal heads of administration (members of the municipal council in municipalities with a parliamentary governance system) and other municipal offices who are directly involved in preparations for or holding of the election.

Section 72

The following are disqualified from election due to their past conduct:

1. any person who has been sentenced to unconditional prison for more than one year,

2. any person who has been taken into custody or had special measures imposed on them pursuant to §§ 39 – 39 c of the Penal Code,

3. any person who has been sentenced to unconditional prison for one year or less where at the start of the election period it is less than 15 years since the verdict had legal force,

4. any person who has been sentenced to conditional prison where at the start of the election period it is less than 10 years since the verdict had legal force,

5. any person who has been issued with or had approved a penalty fine for a circumstance which in accordance with the law could result in imprisonment for more than one year and at the start of the election period it is less than 10 years since the verdict had legal force or the decision was adopted,

6. any person who has been the subject of a decision of conditional non-indictment or deferment of sentence for a circumstance which in accordance with the law could result in imprisonment for more than one year where it is less than 10 years since the decision had legal force.

Sentences involving community service may result in disqualification pursuant to the first paragraph no. 1 or 3, depending on the duration of the subsidiary prison sentence. In the case of partially conditional prison sentences, each part shall be considered separately in accordance with the first paragraph.

(45) Restrictions on the appointment of judges to a specific case are regulated by the Courts of Justice Act chapter 6 (disqualification). Concerns about the impartiality of a judge can be raised by the parties themselves, or ex officio by the district court or the appellate court. The court must inform the lay judges of the requirements of impartiality before the proceedings begin, see the Courts of Justice Act Section 115:

> *Section 115*
>
> *Prior to the commencement of proceedings in the individual case, the presiding judge shall alert the jurors or lay judges to the fact that they will be disqualified from serving if they have such connections to the case as stated in § 106 or § 107, or if such circumstances as addressed in § 108 are present: he/she shall request notification of the abovementioned where relevant.*

(46) Further, Section 116 decides that no judge may contribute to any decision regarding his/her own disqualification:

> *Section 116*
>
> *No judge may contribute to any decision regarding his/her own disqualification, if the court is still quorate. Neither should he/she participate in the decision when another judge from the same court may be summoned in his/her stead without incurring any significant inconvenience or expense.*

(47) The impartiality test in the Courts of Justice Act chapter 6 consists of both absolute reasons for disqualification and disqualification on the grounds of a broader assessment. The *absolute reasons* for disqualification are set in Section 106, which reads:

> *Section 106*
>
> *A person may not serve as a judge or juror if he/she:*
>
> *1. is themselves a party in the case, or co-entitled, co-obliged or liable to recourse in relation to another party, or is, in criminal proceedings, the aggrieved party in relation to the offense;*
>
> *2. is related by blood or marriage in ascending or descending line, or collaterally as close as siblings, to someone who has such a connection to the case as is stated in no. 1;*
>
> *3. is or has been married, is engaged, or is foster father, foster mother or foster child to someone who has such a connection to the case as is stated in no. 1;*

4. is the legal guardian of someone who has such a connection to the case as is stated in no. 1, or became the legal guardian of one of the parties after the commencement of court proceedings;

5. is the chairperson, a member/deputy member of the board of a company, cooperative, association, savings bank, foundation or government body, or mayor/deputy mayor in a municipality or county municipality, who has such a connection to the case as is stated in no. 1, or is the chairperson or a member/deputy member of the board of an estate which has such a connection to the case as is stated in no. 1, and where the district court is not itself handling administration of the estate;

6. has acted on behalf of one of the parties in the case, or for the prosecuting authority or the aggrieved party;

7. is related by blood or marriage in ascending or descending line, or collaterally as close as siblings, or is married or engaged to someone acting on behalf of one of the parties in the case, or for the prosecuting authority or the aggrieved party;

8. has previously had dealings with the case in the capacity of arbitrator, or in the lower courts, as judge or juror;

9. is related by blood or marriage in ascending or descending line, or collaterally as close as siblings, to someone who sat as a judge in the case in the lower courts.

(48) The *broader assessment* is enshrined in Section 108, which reads:

Section 108

Nor may a person serve as a judge or juror when other special circumstances exist that are capable of undermining confidence in his impartiality. This applies in particular when a party demands that he/she withdraw from the case on these grounds.

(49) The test of impartiality pursuant to Section 108 has two sides, see Supreme Court cases Rt. 2012 p. 1769 para. 12. In part, it is a question of whether the judge, on the basis of the circumstances of the case, will be able to make an impartial decision that is not influenced by irrelevant considerations related to the actors, the judge's own interests or previous positions in the case. This is the subjective side of the test. On the other hand, the court must assess how the relationship is assumed to be perceived by the parties and the general public – this is the objective test. The subjective and objective aspects of impartiality is a well-known legal construct, also in the case-law of the European Court of Human Rights. The Government therefore does not deem it necessary to expound on the details of the Supreme Court cases here.

Annex 11: Supreme Court case Rt. 2012 p. 1769

(50) In recent years, case law has, however, attached rising importance to the objective side of impartiality, see e.g. Supreme Court cases Rt. 2011 p. 1348 para. 46 and Rt. 2013 p. 1570 para. 20. This follows already from the second sentence of the Courts of Justice Act Section 108, which prescribes that a demand of withdrawal raised by a party shall be attached particular weight in the assessment of the judge's impartiality. Hence, the objective test of impartiality makes it easier to disqualify a lay judge recommended by one of the parties than when the judge is selected at random, see Supreme Court case Rt. 2008 p. 129 para. 36 (office translation):

> *In a situation where a lay judge in reality is selected by one of the parties, the central consideration must be that most people must be able to have confidence in the court's impartiality.*

Annex 12: Supreme Court case Rt. 2011 p. 1348

Annex 13: Supreme Court case Rt. 2013 p. 1570

Annex 14: Supreme Court case Rt. 2008 p. 129

(51) Norwegian case law provides several examples of the impartiality test in practice:

(52) In Supreme Court case Rt. 2012 p. 1185, the lay judge had acted as a party representative in another case with an almost parallel issue, already taking a stand on the judicial assessment that was central to the trial. The lay judge was disqualified.

Annex 15: Supreme Court case Rt. 2012 p. 1185

(53) In Supreme Court case Rt. 2011 p. 1348 (annex 12), a lay judge in the appellant court who had been a member of a municipal committee and a company was not disqualified to judge in a case where a municipality and a company was a party. The case had no connection to the committee or the company or to the work with municipal business development. However, the lay judge was considered incompetent due to his affiliation with the lay judge in the district court. They were employed by the same company, and the lay judge in the Court of Appeal was incompetent under the Courts of Justice act Section 108 in that he was to review a judgment handed down by a colleague.

(54) In a decision 16 June 2015 from Gulating Court of Appeal (reference: LG-2015-60348), a lay judge was not disqualified for being a sub-contractor to one of the parties in an unrelated business matter. The Appeals Selection Committee of the Supreme Court decided not to consider the case in decision HR-2015-1570-U.

Annex 16: LG-2015-60348

Annex 17: Supreme Court case HR-2015-1570-U.

(55) In decision 13 September 2001 from Gulating Court of Appeal (reference: LG-2000-1746), two lay judges recommended by the employee was affiliated with the same trade union as the employer. The court performed a concrete assessment of the judges' tie to the trade union, concluding that the judges were impartial. The Appeals Selection Committee of the Supreme Court decided not to consider the case in decision HR-2002-221.

Annex 18: LG-2000-1746

Annex 19: Supreme Court case HR-2002-221

(56) In a similar decision 25 May 2009 from Agder Court of Appeal (reference: LA-2009-61643), the court found a lay judge with a position of trust in the specific trade union to be disqualified, emphasising the increased focus on the objective side of the impartiality test.

Annex 20: LA-2009-61643

(57) Finally, it should be emphasised that Norwegian courts interpret Section 108 in the light of case law from the ECtHR, see Supreme Court case HR-2017-525-U para. 14, implying that the test of impartiality enshrined in the Court of Justice Act Sections 106 and 108 is in accordance with the requirements of ECHR art. 6. This is also in compliance with the 1999 Human Rights Act.

Annex 21: Supreme Court case HR-2017-525-U

(58) As a conclusion on the introduction to the domestic legal framework (present section 3), the Government additionally makes reference to a survey conducted by the Courts Administration, with the purpose of collecting views and inputs from Norwegian courts and professional judges of the arrangement at issue. The concluding letter from the Courts Administration of 2 November 2021, informing about the results, is attached as annex 22. Our office translation of the summary is provided here:

> *In line with the Ministry's request, the courts have been asked to share their experiences with the appointment of lay judges. Feedback has been received from a total of nine courts, including almost all courts of appeal. These are briefly summarized below.*
>
> *At certain points, the courts that have given feedback to the Courts Administration are mainly in agreement with each other. The main impression is that the majority of the courts / judges believes the arrangement works well. Most emphasize that the lay judges generally act objectively and unbiased, and contribute valuable industry knowledge and experience from working life. Several emphasize that the participation of working life experts from both the employer and employee side adds legitimacy and balance to the process, and that the parties generally seem to be satisfied with the*

arrangement. In this context, it is pointed out that it is the court that make contact with the nominated judge following proposals from the parties, not the parties directly. In other respects, the rules of impartiality apply to the lay judges in the same way as in other types of cases.

The judges' experience is that the lay judges do not appear to be particularly coloured by general party interests when a decision is to be made. Some judges have nevertheless experienced individual cases where lay judges have appeared biased or have weighted relevant considerations based on which part of the committee they have been appointed from.

The courts have different views on which solution is, in principle, most appropriate when it comes to the appointment of lay judges who are skilled in working life according to aml. § 17-7 [the WEA Section 17-7). Some argue that the parties' right to propose lay judges should continue, in order to provide the court with particularly relevant competence. Correct application of the rules of impartiality shall ensure adequate consideration of the considerations of independence and impartiality, etc. Others advocate that a lay judge from the employee side and one from the employer side should be drawn at random, in order to better safeguard the independence of the courts. Relevant working life experience is still ensured by a principle of randomness, but the risk that the lay judges do not have a sufficient distance to the case is reduced. Among the respondents, not all have taken an explicit position on the question of which solution is most appropriate, as the courts were not explicitly asked to do so either.

The courts have different views on which alternative to appointment will be most time- and resource-saving for the courts. However, several point out the necessity that the panel of lay judges must in any case consist of sufficiently qualified persons in a number that is large enough to cover the needs of the courts.

Annex 22: Assessment from the Courts Administration, dated 2 November 2021

4 THE COMPLAINT DISCLOSES NO VIOLATION OF ARTICLE 24 OF THE REVISED CHARTER

4.1 Introduction

(59) As also intimated above, the complainant organisation submits:

- That "*… the current system in Norway where the parties nominate and decides in which judges to sit on the matter […] opens up for undue influence on the lay judges, thereby weakening the independence of the court*", and that this practice is in breach of the second paragraph of Article 24 of the revised Charter, see the complaint p. 1.

- That Article 24 of the revised Charter gives rights to employers as well as workers.

- That even if only workers are protected by Article 24, the system of selecting lay judges in Norway is "*… 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*", see the complaint p. 2-3.

(60) The Government deems it pertinent to restate to Article 24 of the revised Charter in full, which reads:

> *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."*

(61) In the view of the Government, the complaint does not disclose any violation of this provision, for the following reasons:

(62) First, Article 24 protects the rights of workers. The Government observes that the complainant represents an employer's organisation, and that no representatives of workers have contested the arrangement at issue. Considering that Article 24 only protects the rights of workers, the Government fails to see the relevance of the surveys conducted by the complainant.

(63) Second, noticing the absence of previous decisions and conclusions from the Committee on the requirement of impartiality in Article 24, the Government submits that the provision principally points to the requirement of having the opportunity to appeal to an impartial institution outside of the employer, e.g. a court. The Committee has previously held "*… that the situation in Norway is in conformity with Article 24 as regards the right to appeal to an impartial body*", see 2005/def/NOR/24EN.

(64) Third, if the Committee finds that Article 24 should be interpreted as a requirement of closer scrutiny on the impartiality of an individual judge, the Government submits that the impartiality test in the Courts of Justice Act Section 106 to 108, and its subsequent case law, meets the prevailing requirements. The Government remarks that the threshold of impartiality in the revised Charter Article 24 cannot be stricter than the assessment under ECHR Article 6. Seeing that the assessment done by Norwegian courts in regard of the impartiality test are in accordance with case law from the ECtHR, the requirements of the revised Charter Article 24 must also be fulfilled.

4.2 The intended beneficiaries of Article 24

(65) The Government first observes that the wording of Article 24 only protects "workers", not employers nor national organisations of employers. Consequently, based on Article 31 § 1 of the Vienna Convention on the Law of Treaties, whereby the "ordinary meaning to be given to the terms of the treaty" serves as the starting point for any interpretation, "the Contracting Parties' obligation to ensure the right to appeal to an impartial body under the second paragraph of Article 24 is restricted to those of "workers".

(66) This follows directly not only from the wording of the provision itself, but also from its context, which also is central to the interpretative process, cf. Article 31 § 1 of the Vienna Convention, notably the other terms and phrases of Article 24. Having regard to letters a and b of the first paragraph of Article 24, the Government observes that two general principles are set out: (i) the right not to be dismissed unless there are valid grounds, and (ii) the right to adequate compensation or other remedies in cases of an unfair dismissal. These principles clearly do not protect employers and they are not intended to do so. On the contrary, the very nature of the rights enshrined in Article 24 curtails the rights of employers. The personal scope of the right to appeal to an "impartial body", and the Contracting Parties' corresponding duty to ensure it, must clearly be read in this context.

(67) The delimitation to "workers" is further emphasized by Articles 5 and 6 of the revised Charter, which in contrast to Article 24 explicitly protects the rights of both "workers and employers". These provisions also count as "context" within the meaning of Article 31 § 1 of the Vienna Convention. Accordingly, it is evident that the Contracting Parties of the revised Charter had a conscious understanding of the distinction between the rights of workers and employers, and that the obligation found in the second paragraph of Article 24 is restricted to the rights of workers only. Considering also that Article 24 of the revised Charter is inspired by the wording of ILO Convention No. 158 Article 8, reference is also made to that provision, which similarly only mentions the rights of workers. Construing Article 24 second paragraph in the light of ILO Convention No. 158 is fully in compliance with the method laid down in Article 31 § 3 c of the Vienna Convention, and it has been corroborated in scholarly literature.[5]

(68) The Government further refers to the Committee's previous decisions on Article 24, of which none appear to concern the rights of employers. The issue has also not been raised in relation to decisions on admissibility. This is presumably because the rights of Article 24, as described in para. 66 above, only protects the interests of workers, and that employer organisations naturally lack interest in invoking such rights.

(69) In this regard, the Government remarks that the use of lay judges at issue in the present complaint is not contested by any workers, trade unions or employee organisations, and, therefore not contested by any of the beneficiaries of Article 24. In the circumstances, the Government submits that the absence of a link between the complainant organisation's interests, and the interests of persons protected by the second paragraph of Article 24 of the revised Charter must lead to the conclusion that Norway has not violated the Charter for the purposes of the present complaint.

4.3 The requirement of impartiality has been observed

(70) In any event, the Norwegian Government submits that Norway's obligation pursuant to Article 24 second paragraph has not been violated since the system in place is "impartial" within the meaning of the provision.

[5] Lukas, Karin. *The Revised European Social Charter. An Article by Article Commentary* (2021), p. 288.

(71) The wording of Article 24 does not specify what constitutes an "impartial body". On the one hand, impartiality can be seen as a requirement on an institutional level, providing that a worker who considers that his or her employment has been terminated without a valid reason, has a real possibility of appealing to an institution outside of the employer. This interpretation is supported by comparing the ILO Convention No. 158 Article 8, which adds examples of an impartial body: "*…an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator*" – indicating that "impartiality" merely points to an institutional impartiality that Norwegian courts obviously inhibit, in contrast to only having a right to have the dispute heard by the employer.

(72) In so far as Article 24 also determine requirements for the procedures of appointing lay judges, the Government will argue that while the requirement of an "impartial body" can be interpreted as the freedom from biases, it is evident that no judge can be completely rinsed of any preconceptions. Consequently, one must establish a *threshold* of impartiality. In the view of the Government, the threshold of impartiality in the second paragraph of Article 24 under the revised Charter, cannot be stricter than the requirements developed in case law from the ECtHR, which can be summarized with the latter court's judgment in Perus v. Slovenia, app. no. 35016/05, 27 September 2012, paras. 34-37:

> *34. According to the Court's constant case-law, when the impartiality of a tribunal for the purposes of Article 6 § 1 is being determined, regard must be had to the personal conviction and behaviour of a particular judge in a given case – the subjective approach – as well as to whether sufficient guarantees were afforded to exclude any legitimate doubt in this respect – the objective approach (see Kyprianou v. Cyprus [GC], no. 73797/01, § 118, ECHR 2005-..., and Fatullayev v. Azerbaijan, no. 40984/07, § 136, 22 April 2010).*
>
> *35. Firstly, as to the subjective test, the tribunal must be subjectively free of personal prejudice or bias. In this regard, the personal impartiality of a judge must be presumed until there is proof to the contrary (see, among other authorities, Padovani v. Italy, 26 February 1993, § 26, Series A no. 257-B, and Morel v. France, no. 34130/96, § 41, ECHR 2000-VI). In the present case, in the absence of any evidence to the contrary, there is no reason to doubt judge L.F.'s personal impartiality.*
>
> *36. Secondly, under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality (see Micallef v. Malta [GC], no. 17056/06, § 96, ECHR 2009), since "justice must not only be done; it must also be seen to be done". In this regard, even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see De Cubber v. Belgium, 26 October 1984, § 26, Series A no. 86). Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must*

> *withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, among many other authorities, Micallef, cited above, § 96).*
>
> *37. When determining the objective justification for the applicant's fear, such factors as the judge's dual role in the proceedings, the time which elapsed between the two participations, and the extent to which the judge was involved in the proceedings may be taken into consideration (see, Švarc and Kavnik v. Slovenia, no. 75617/01, § 40, 8 February 2007; Fatullayev, cited above, § 139; and Sigma Radio Television Ltd v. Cyprus, nos. 32181/04 and 35122/05, §§ 174 and 175, 21 July 2011).*

(73) Case law from the ECtHR on the requirement of impartiality can generally be divided in three groups, i.e. (i) if the judge has been previously involved in the dispute, (ii) the judge's behaviour and (iii) the judge's connection to any of the parties.[6] Out of these three groups, only the last group is relevant for the issues raised in the complaint. Looking at case law examining the impartiality of judges with a connection to the parties, the examples revolve around being a near family member, colleague or having economic interest in the outcome – grounds that are not relevant for the complaint. In contrast, judges with background from the same union/association as the party, or that previously have been represented by the party's counsel, is generally considered as impartial, unless there are specific reasons to suspect otherwise.[7]

(74) In the case of AB Kurt Kellermann v. Sweden, app. no. 41579/98, 26 October 2004, which specifically concern the appointment of lay judges with ties to social partners, the ECtHR in para. 60 underlined:

> *… 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 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.*

[6] Kjølbro, Jon Fridrik. *Den Europæiske Menneskerettighedskonvention, for praktikere* (2020), p. 605-628.
[7] Kjølbro, Jon Fridrik. *Den Europæiske Menneskerettighedskonvention, for praktikere* (2020), p. 618. See also the case of Falter Zeitschriften GmbH v. Austria (nr. 2), app. no. 3084/07, 18 September 2012.

(75) The ECtHR then performed a concrete assessment of the impartiality of the party nominated judges in para. 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.*

(76) Further examining the impact of the judge being affiliated with the same union as the party that nominated the judge, the ECtHR concluded as following in para. 68:

> *… 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.*

(77) To summarize, it is not in itself sufficient for disqualification that a judge is nominated by a party with affiliation with the same union as the judge. Other factors come into play. Consequently, all judges appointed to court are under scrutiny of whether there exists a legitimate fear of lack of impartiality, either subjectively or objectively based on the judge's appearance. In the view of the government, this safeguard – the impartiality test that lies in the Court of Justice Act Section 108 and ECHR Article 6 with its subsequent case law – is sufficient to conclude that the beneficiaries of the revised Charter Article 24 have the right to appeal to an "impartial body" under Norwegian law.

4.4 Remarks on specific issues raised by the complainant organisation

(78) Having regard to the interpretation of Article 24 second paragraph of the revised Charter as set out above, the Government submits that no violation is at issue with regard to the Norwegian system of lay judges in employment disputes. For the sake of good order, the Government will, however, also address issues particularly raised by the complainant organisation in the present case. These comments also strengthen the conclusion already reached above.

(79) The Government firstly remarks that the rules at issue only apply in cases where the parties and the court do not agree that lay judges are unnecessary, cf. Section 17-7 para. 4 of the WEA. Also, considering that the appellate court is set with three professional judges in addition to the two lay judges that are appointed, the complainant organisation's concern that two thirds of the judges are nominated by the parties does in any case not apply for the appellate court.

(80) Further, both parties to an individual case do have a mutual right to nominate one lay judge each. This right has never been contested by any of the trade unions, nor by any of the main employer unions except SMB. In the Government's view, this fact does indicate that the present system is considered to work sufficiently also as regards the impartiality of the courts.

(81) The present arrangement entails that the parties, who must be assumed to have the greatest knowledge of the case and the legal and factual questions that it arises, may nominate judges who possess the knowledge and experience that is most beneficial to the court. If the lay judges were, as suggested by the complainant organisation, "*selected randomly from the court itself*",[8] it is likely that the function of the lay judges would be reduced, as the lay judges may not have the same amount of expertise relevant to the present case.

[8] See p. 3 of the application.

(82) Contrary to the complainant organisation, the Government does not find that there is any reason to assume that the nomination process is a question of "*find(ing) a friendly judge*".[9] Rather, the opportunity to nominate one or more lay judges gives the parties the possibility to help the court in its appointment of lay judges that would actually serve their purpose as judges with expertise relevant to the case that may contribute to the court's actual purpose of reaching a correct decision of the case. In this respect, unorganised workers are not in a different position than organised workers and indeed employers when it comes to considering what lay judges may be suited for nomination.

(83) It must, however, be stressed that the parties only have the right to *nominate* lay judges. The final decision as to what persons that shall be appointed, lies solely with the court. The Government cannot see that there is merit in the complainant organisation's claim that *"[t]he court's appointment is only a formality: the court appoints the ones who are proposed by the parties*".[10] The Government does not possess specific numbers of how often the parties' nominations are being followed or rejected respectively, but it should in general be stressed that the fact that a court appoints lay judges in accordance with the parties nominations does not in itself entail that the court has not conducted an independent assessment of the suitability of the lay judges to be appointed. Furthermore, the fact that the parties' nominations must be assumed to ensure that the expertise needed in the present case is found in the nominees, indicates that the courts should exercise caution in overruling the parties' judgment.

(84) When making the decision of appointing lay judges, the courts must act in accordance not only with the WEA, but also the general rules in The Disputes Act and the Court of Justice Act. In this relation, it should be emphasized that the provisions in the Court of Justice Act and the case-law relating to it are neutral and apply equally to cases regarding employment matters. The requirements set forth in Sections 106 and 108 respectively of said Act applies to both professional and lay judges equally. In the Government`s view, the provisions, interpreted in line with the case-law described, are suitable to ensure that there is a sufficient distance between the judges and the parties to the relevant case, and indeed that no judge in reality acts as a representative of any of the parties.

[9] See p. 3 of the application.
[10] See p. 4 of the application.

(85) It should also be noticed that the (im)partiality of judges is routinely scrutinized by the Courts, see, amongst others, the Supreme Court's judgments in Rt. 1996 p. 1528 (lay judge not partial), Rt. 2011 p. 1348 (lay judge not partial, see annex 12), Rt. 2012 p. 1185 (lay judge partial, see annex 15) and HR-2021-2295-U (procedural error only to appoint lay judges from the list of judges nominated by the workers organisations), and judgments from the Courts of Appeal in LG-2007-99081 (lay judge not partial, see annex 8) and LA-2009-61643 (see annex 20). The rich case-law on the partiality of lay judges illustrates how the provisions in the Courts of Justice Act Sections 106 and 108 regularly do have a function in ensuring that lay judges which do have too strong ties to any of the parties are excluded from serving in the case, and thus that the rules do serve their purpose.

Annex 23: Supreme Court case Rt. 1996 p. 1528

Annex 24: Supreme Court case HR-2021-2295-U

5 CONCLUDING REMARKS

(86) In summary, the Government submits that Article 24 of the revised Charter does not concern employers' access to an impartial tribunal, and thus that only workers are protected under the provision. This entails that the Committee`s scrutiny of the case should be restricted to the part of the application that concerns the rights of unorganised workers.

(87) Furthermore, the Government holds that the procedural rules of appointing lay judges in disputes concerning termination and dismissal sufficiently secures that lay judges are neutral and do not act in capacity as a representative of any of the parties, thereby fulfilling the requirement of an "impartial body" as required by the revised Charter Article 24. Considering this, the Government respectfully asks the Committee to find that no violation of Article 24 has occurred.

• • •

Oslo, 10 December 2021
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