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COMITÉ EUROPÉEN DES DROITS SOCIAUX

16 February 2022

Case Document No. 5

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

RESPONSE FROM SMB NORGE TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

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In charge:
Nicolay Skarning

To The European Committee of Social Rights

CASE 198/2021: SMB NORGE – NORWAY – SECOND SUBMISSION

Dear Sir/Madam

1 INTRODUCTION

Reference is made to the written observations by the Kingdom of Norway ("Norway") on 10 December 2021 and written observations from The European Confederation of Trade Unions ("ETUC") on 23 November 2021. Both will be commented after firstly reiterate some legal principles and submitting further evidence to the fact that LO and NHO are allowed by Norwegian Courts to appoint employees of their clients as lay judges to every individual case and the lay judge therefore risk not being appointed again to the next case if voting "wrongly." With two lay judges, appointed by the parties for the one case, and one professional judge drawn randomly, the Norwegian courts may not be considered independent of the parties in employment matters, in contradiction to the European Social Charter ("ESC") article 24 and The European Convention on Human Rights ("ECHR") article 6 no 1, and the jurisprudence of the European Court of Human Rights (the "Court").

Non-unionized employees do not have the right to use non-unionized lay judges, but are obliged to choose lay judges among unionized lay judges from the Norwegian unions, in contradiction to ESC article 24 i.f., ECHR article 6 no 1, article 5 (interpreted as the right not to organise), and ECHR article 11.

There are no limits to what parts of the ESC the SMB Norge is entitled to point out as unsatisfactorily implemented in Norway, ref Protocol 158 article 1 c), in combination with article 3. SMB Norge may therefore point to problems for unorganised labour unions/interest groups in Norway. The rights of the non-unionized labour unions/interest groups are in any event relevant to the members of SMB Norge because independent courts is essential to both, and therefore within the scope of this Complaint.

2 SMB NORGE WILL REITERATE

- The ESP is built on top of the ECHR and has to be interpreted in harmony with the ECHR. The right to an independent and impartial trial is a fundamental right of everybody, ref ECHR article 6 no 1 thus interpreted and complemented into SP article 24, even though the article only talks about workers right to appeal to an "impartial body." The ECHR is a living instrument, a principle that also must be applied to the ESP, hence also employers have the right to appeal to an impartial body under ESP article 24.
- Alternatively, ESP article 24 i.f., protects unorganised workers, and SMB Norge respectfully asks the Committee to accept that the Complaint also includes this matter, because the right of independent courts is relevant to both unorganised workers and members of SMB Norge.
- Norway's Act of Courts sections 106 to 108 do not protect the courts independence well enough because the Working Employment Act, as lex specialis, demands that the parties and the courts accept the lay judge suggestions of the parties to the case even when there are connections between the parties and the lay judges. For example, the Norwegian courts routinely accept that attorneys of LO law firm appoints employees of LO unions, even though these unions are clients of LO law firm.
- Everybody on today's lay judges lists are selected by unions and employer's associations because they are very skilled in employment law matters. The argument from LO and NHO that they need to pick one particular lay judge to every individual case is in reality only hiding the real motivation: to pick the lay judge that possibly will help the attorney to win the case.
- Norway maintains that every organisation is satisfied with today's system for lay judges. That is not correct, even though historically nobody has protested until the last couple of years, because they were not aware of the effects before the Court Survey made by Kvale Law Firm in 2018. This showed a certain systematic bias against employers among the LO lay judges in cases from Oslo City Court 2016-2018. No other survey has shown other results even though LO, NHO and the Norwegian Government have had plenty of time to make their own surveys. Now the two most important Appeal Courts in Norway, Borgarting (Oslo) and Gulating (Bergen) support the allegations of SMB Norge.
- Finally the next largest employer's organisation in Norway, and main competitor to NHO, Virke, finds the Norwegian courts not independent and that they are biased in employment matters. Virke has demanded that the Government change the system. Equally Norsk Lastebileierforbund (Norwegian Truck Owners Association) protests against the current system and does not trust its impartiality. And on the employee's side, The Seamen's Common Union protests against the current system.

All translations in this letter are office translation with the original text attached to this written pleadings.

3 MORE COMMENTS ON ESC, ECHR, LEGAL PRINCIPLES & JURISPRUDENCE

(A) Completing the ESP with the ECHR

SMB Norge alleges that the connection to the ECHR entails that independent courts are for everybody, not only the workers, and that the ESP must be completed at this point.

The ESP states in the preamble, second paragraph:

> *"Considering that in the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, and the Protocols thereto, the member States of the Council of Europe agreed to secure to their populations the civil and political rights and freedoms therein specified;..."*

The reference to the ECHR opens up for the ESP to be complemented by the ECHR, at least the right to independent and impartial courts, ref ECHR article 6 no. 1.

The Court has stated that the ECHR is a living instrument, which also must be a guideline for ESP, ref Tyrer v. UK (1978), where stated:

> *"The Court must also recall that the Convention is a living instrument which, [...] must be interpreted in the light of present-day conditions."*

According to this principle the wording of "workers" in the ESP article 24 may be complemented as "workers and employers," giving right to both sides in the employment marked to independent courts, also protected by the ESP.

In order to achieve the goals of the ESP, employees and employers have to cooperate. This cooperation works better when the parties are treated equally before the courts.

Finally, an employment contract has two parties. In due respect for this fact, both parties must have an equal right to an independent and impartial court because the cooperation between them is essential in obtaining the goals of the charter, for example part I section 5, which states:

> *"All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests."*

Both parties to the employment contract need an independent and impartial court in order to obtain freedom of association for the protection of their economic and social interests.

(B) The meaning of the expression "impartial" and independent

Impartiality means lack of prejudice or bias, closely connected to the criteria independence, ref ECHR article 6 no. 1. This Complaint is essentially about independence, focusing on the flaws in the way the lay judges are appointed by the parties to each and every individual case, and therefore not independent enough of the parties and their attorneys.

SMB Norge would like to point to some jurisprudence in this respect;

The Court has stated that in order for at court to be independent it must be independent both of the executive as well as of the parties to the case, ref. Ringeisen v. Austria (1971) para 95.

In Maktouf and Damjanovic v Bosnia and Herzegovina (2013) para 49, the Court stated:

> *"In determining in previous cases whether a body could be considered to be "independent"-notably of the executive and of the parties to the case- it has had regard to such factors as the manner of appointment of its members, the duration of the term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."*

The Norwegian system is *"as a whole ...unsatisfactorily"*, ref Zand v Austria (1978). Both the NHO and the LO have large law firms and selects the "best" lay judge for their case. The LO law firm

consists of about 30 specialized employment lawyers and the NHO law firm is somewhat smaller but is connected to attorneys within other NHO departments and suborganisations.

A lay judge who votes "wrongly" runs the risk of ending on a "black list" in the respective organisational law firm whether this is imaginary or not: he or she is expected to vote in favour of the party (the attorney) who appointed him/her. Not everybody will agree to this allegation, but the Kvale Court Survey 2018 indicates such an expectation and that the expectation is met.

Duration of the time for the appointment is of relevance, ref Campbell and Fell v UK (1984). In that case appointment for three years was sufficient. In Norway the lay judges are only appointed for one singular case, and is therefore more susceptible for direct influence and fear of not being appointed to more cases by for instance the LO og NHO law firms.

According to practice from ECHR a court has to be independent both from the executive but also from the parties to a case, ref Langborger v. Sweden (1989), Micallef v. Malta (2009) and Salaman v UK (2000).

(C) Norwegian Parliament's decision on 8 June 2021

There was a growing concern in the Norwegian Parliament through 2021 about the independence of the Norwegian courts in employment matters. By consequence the Parliament decided on 8 June 2021, **ATTACHMENT 1:**

> *"The Parliament demands of the Government to explore possible changes in the Working Environment Act where the current arrangement with the appointment of particularly skilled employment lay judges in each individual case is to be replaced with a random draw of lay judges from each side of the employment lay judges lists."*

After this, the Ministry of Employment made a request to the labor market parties and the court administration in order to get their views.

The fact that the Parliament decided to intervene, shows in itself a broad concern about whether the courts are independent enough of the parties to the case.

(D) Statement by professor, dr. jur Anna Nylund and associate professor, PHD, Margrethe Jensen, University of Tromsø on the legality of the Norwegian lay judge system in employment cases

The Ministry of Employment did not ask the Universities of their opinion. However two professors wrote to the Ministry of their own:

The two scholars work with constitutional and humanitarian law at the University of Tromsø. They wrote to the Ministry of Labour on 14 October 2021, **ATTACHMENT 2**

> *"The fact that the parties can point out a certain person as labour skilled lay judge is in contradiction to these principles [The Constitution] and therefore problematic, also when there is an agreement as to the different interest of the parties being represented among the lay judges.*
>
> *A system where labour skilled lay judges are randomly drawn… is non problematic considering independence and impartiality, and in accordance with common practice in Norwegian courts."*

The common practice the two professors refers to is for criminal cases, where lay judges are randomly selected, as is the system for all professional judges in Norway: the parties may not select at "favorite" judge but must accept the judge selected by the court. It would be easy to

introduce such a system for employment matters also, but there is a tradition in Norway that the Government is cautious in doing changes where both LO and NHO are opposed to the change, which is the case in the current situation.

(E) Statement of principal by the two largest Norwegian appeal courts

Some courts answered the request from the Ministry after the decision by the parliament on ? June 2021 (Attachment 2), and they had different experiences with the current system.

The largest appeal court from the Oslo area, Borgarting appeal court, stated 14 October 2021, **ATTACHMENT 3.**

> *"There were several of the judges who stated that they had negative experiences with the lay judges in these cases. The negative experiences were due to the fact that some of the lay judges seemed to be biased and were not able to assess the case independently og the own "party interest."*

The second largest appeal court, from the Bergen area is Gulating appeal court, which stated on 25 October 2022:

> *"Principally we are of the opinion that a better solution would be to draw the lay judges randomly from a register of qualified persons."*

The SMB Norge asks the Committee to bear in mind that the parliament, the two above mentioned professors and the two appeal courts have no interest of their own in the functioning of the courts' dealings with employment matters. They are concerned about the courts independence from the outside, how it appears, and they are worried. That, and in itself, is an argument of non-objectivity in contradiction to a well-functioning rule of law.

(F) The Central Labour Court (Arbeidsretten)

The Ministry did not ask the Central Labour Court about its opinion on the matter. This court consist of 7 judges, whereof 3 are professionals, and two are from each side from the parties to the disputes. This court was the appeal court for all employment matters from 1977-1981 and may explain, to some extent, why the district courts were from 1977 set up with a composition of one professional judge and two employment lay judges from each side. However, there is an important difference:

Firstly, The Central Labour Court rules on the collective agreements, agreements owned by the parties to the case, and not primarily on Norwegian acts.

Secondly, the lay judges of the Central Labour Court are appointed for a period of three years and not for each individual case, i.e: if for instance LO and NHO are dissatisfied with their lay judge's voting, they cannot change the judge before the period of three years is expired.

ATTACHMENT 4: The composition of the Central Labour Court

(G) Norwegian employers' organisations

NHO, the biggest employers organisation with 30.000 members is satisfied with today's system and support this actively together with the biggest employees organisation, LO. Both have most of the lay judges on the lists and have traditions back to 1977 in using the system to their advantage. When they meet each other in the courts, both use their "favourite" judges and in that sense "neutralizes" the effect towards each other. However, when their attorneys meet other counterparts, for instance unorganized companies or unorganized employees, the system works

to their advantage: they use a favourite lay judge but the other party do not have this possibility. There is no list of unorganised lay judges for companies or employees.

The next largest employer's organisation in Norway in private sector, Virke (The Federation of Norwegian Enterprises), with 24.000 employers as members, stated on 20 October 2021 (page one, on bottom), **ATTACHMENT 5:**

> *"Our experience is that the lay judges in certain cases do not seem to be objective or neutral. Virke's attorneys have in several cases met lay judges who seem to be prejudiced, especially from the employee's side. This has come forward during the trial and under the questioning."*

On page two of the letter, Virke states that the rules of objectivity in the Norwegian Court Act do not work properly in these matters and concludes on page three:

> *"The current system where the parties suggest their own lay judge has essential weaknesses that threatens the rule of law in employment cases."*

Norsk Lastebileierforbund (Norwegian Truck Owners Association), an employer's organisation with 3.000 members, and their law firm Vectio, has on 20 October 2021 stated, see page one, **ATTACHMENT 6:**

> *"We have experienced that lay judges, especially on the employees side, almost have acted as attorneys for the employee, and asked questions which shows that there is no intent in assessing all sides of the case."*

At page two they point to the close connection between LO and their lay judges and concludes on page two (bottom):

> *"There are no good reasons for the system where the parties have the right to choose their lay judge."*

In addition to the organizations mentioned above, we also point to one of the biggest employers in Norway, Oslo University Hospital, with 20.000 employees and their own internal law firm, stated on 7 October 2021, first page (bottom), **ATTACHMENT 7:**

> *"For us dealing with the hospitals employment cases, and other cases, we normally assume that it realistically is not possible to obtain a complete victory in court, independently of what position the hospital takes. Based on experience there is reason to question whether the current system with lay judges is in harmony with the principle of independent courts."*

Oslo University Hospital is member of Spekter, the employer's organization for public owned companies, has asked the Ministry to assess the lay judges system further, **ATTACHMENT 8.** Spekter states on 18 October 2021 (bottom):

> *"There has been information of experiences with lay judges from the employees' side to a larger extent than lay judges from the employers side dissent against the professional judge. It is unfortunate if this fact should undermine the confidence in the independence of the court. Spekter advises that the topic is to be more scrutinized."*

Except for the NHO, we notice that several of the other employers organizations agree with SMB Norge and has distrust in the independence of Norwegian courts in dealing with employment matters.

(H) Summary

From the experiences mentioned above it seems clear that the court survey made by Kvale law firm in 2018, showing signs of biased judgments from lay judges on the employees side, in particular from the lay judges from LO, is correct: There is often a certain relation between the attorney from the employees organisation and the lay judge, they are from the same organisational structure or the lay judge works for the attorneys client. These relations may have an influence on the judgment of the lay judge, in contradiction to an independent and impartial tribunal. The most important flaw is that the lay judge is appointed only for the one case, with the risk of never being appointed again. That might influence his or her judging and is in breach of the jurisprudence of the Court. The current Norwegian lay judges system in employment matters does not appear to be independent, and reference is made to Sramek v Austria (1984) where the Court emphasized the importance of appearance.

4 COMMENTS TO THE OBSERVATIONS BY THE KINGDOM OF NORWAY ("NORWAY")

(A) Rules on impartiality (Norwegian Court Act)

Norway claims that Norwegian rules on impartiality (The Court Act section 106-108) protects the parties well enough. SMB Norge disagrees with this statement because the Working Environment Act is lex specialis and the parties have to accept certain relations between the parties, the attorneys and the lay judges. This is shown in **ATTACHMENT 9**, where the city court accepted the lay judge from an LO organisation, even though the plaintiff was member of another LO organisation and the attorney was an LO-attorney. As mentioned in the Complaint: LO law firm is the law firm of all LO organisations, hence the lay judge in the case worked for the client of LO law firm, but was still accepted by the court as judge in the case because of the special rules in Employment Environment Act as an exception, lex specialis, from the Court Act.

(B) Kvale Court Survey 2018

Norway criticizes the Survey conducted by Kvale Law firm but have no survey of its own to rebut the results of the survey, neither from LO or NHO. This could easily have been done and it is actually Norway who has the burden of proof to the fact that the courts are independent enough. SMB Norge maintains that Norway has not accomplished this.

(C) Protest by representatives of workers – Seamen's Common Union

On the last page Norway maintains that no representative of workers union/interest organizations have protested against the Norwegian lay judges system. That is not entirely correct, ref **ATTACHMENT 10** (taken from: https://fffs.no/category/aktuelt/page/2/) , where the The Seamen's Common Union, a competitor of LO, states on 23 April 2021:

> *"Today's lay judge system in employment matters was a gift from the Government of Nordli (Labour Party) to LO in 1977. It has given LO a possibility of unjust influence on the courts since 1977, with a control over the lay judges. LO appoints systematically employees from their own organisation and clients of LO law firm as lay judges in the cases they conduct before the courts. By this they safeguard one vote for themselves independently of the solidity of the case. Both the courts and NHO accept this. NHO uses the system in an unjust way against employees who file lawsuits against NHO member*

companies, which may lead to the risk of the employee losing the case he should have won, because the NHO company has appointed an NHO lay judge. "

SMB Norge does not know the real political background of the current lay judge system established by the Working Environment Act 1977, proposed by the Oddvar Nordli – Government, from the Labour Party. However, LO had two representatives in the Central Committee of the Labour Party when the Act, and the lay judge system was constructed in 1976-77, LO President Tor Aspengren and LO Iron Workers Union President, Lars Skytøen. It is therefore fair to assume that LO played an important role, maybe a decisive role, when the current lay judge system was constructed in 1976-77. This was long before the ESC of 1996 and the Court's ruling in Maktouf and Damjanovic v Bosnia and Herzegovina (2013). It was probably less emphasize on this kind of independence of the courts in those days. SMB Norge therefore alleges that the current lay judge system is , from a legal point of view, outdated.

5 COMMENTS TO THE OBSERVATIONS BY EUROPEAN CONFEDERATION OF TRADE UNIONS (ETUC)

The observations have been drafted in cooperation with LO in Norway (ref page 3) and can be seen as LO's submissions. As mentioned in the Complaint: The current lay judges system in Norway is particularly advantageous to the LO and the LO law firm, constructed under their strong influence in 1976-77, and there is no wonder that they will do everything to protect it.

On page 8 the ETUC refers to the Kellermann v Sweden case (2004). That is quite interesting because, as SMB Norge understands the situation, the lay judges in that court are appointed for three years (Swedish Labour Dispute Act, section 1 i.f.), like the Norwegian Central Labour Court, and cannot be taken out by the parties in the appointment period, i.e they are independent of the parties when sitting at the bench. That is in complete contradiction to the Norwegian lay judges system in ordinary employment matters, where the lay judges are only appointed for one individual case, and risk not being appointed again (by LO law firm or NHO law firm), if they don't vote "correctly." SMB Norge reiterate that the Central Labour Court in Sweden and Norway primarily work with collective agreements, owned by the organisations, and lay judges from these organisations are important. The normal courts, topic for this Complaint, interpret Norwegian Acts, The Constitution and Human Rights, hence independence is more important than in the central labour courts.

On page 14 the ETUC states that the professional judge is not obliged to follow the recommendation from the parties about which lay judge to appoint. This is just a formality argument: the professional judge have no reason not to follow the recommendation and that is done in practically all cases. The purpose of the requirement is that the professional judge follows the recommendation and the judges are loyal towards this purpose.

On page 15 the ETUC describes how the lists are assembled. SMB Norge cannot see in their files that they have ever been asked to put forward names of lay judges and unorganised unions/interests organisations may not put names forward. Only the largest organisations in Norway have names on the lists and the parties in a case cannot use anyone else. It seems to SMB Norge there is an unjust difference in treatment against the smaller labour organisations in Norway like SMB Norge, Krifa Union (The Christian Union, www.krifa.no), The Seamen's Common Union (www.fffs.no).

The ETUC attacks the Complaint particularly on page 16 and forward for lacking evidence etc. That is not correct. Evidence for lack of independence, appointments of clients of the LO law firm are attached to the Complaint. In addition the Dagbladet- case from 2020 is **ATTACHMENT 11.** LO members files a law suit against the newspaper Dagbladet, and the two LO attorneys and two LO-lay judges appointed, who, even if Dagbladet won the case all the way to the Supreme

Court, dissented against the professional judges in both the city court and the appeal court. Both lay judges worked for two LO-organisations that are clients of the LO law firm.

SMB Norge maintains that Norway has the burden of proof for the independence of the courts, at least when SMB Norge has submitted a lot of evidence to the contrary. Norway is closest to the documentation, has huge resources, both legal, administrative and economical. Despite all these resources, Norway has not been able to show that the court are, in real life, independent of one or both parties in employment cases.

6 ORAL HEARING

If the Committee wants to have an oral hearing in the case, SMB Norge is most willing to be present to give the Committee information, on this side represented by the attorney Nicolay Skarning and the CEO of SMB Norge, Mr Jørund Rytman.

7 CONCLUSION

As in the Complaint, the SMB Norge concludes that Norway is in breach of ESC article 24 i.f. by letting the parties to an employment case appoint their own lay judge, only for the one case, and only among unionized persons or persons from organized employers from a predesigned list, thereby taking the risk of outside and non-relevant considerations to influence the court of law.

Yours sincerely
KVALE ADVOKATFIRMA DA

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