

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

8 April 2022

Case Document No. 6

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

**REPLY FROM THE GOVERNEMENT
TO SMB NORGE'S RESPONSE**

Registered at the Secretariat on 31 March 2022



ATTORNEY GENERAL FOR CIVIL AFFAIRS

The European Committee
of Social Rights

OSLO, 31 March 2022

Additional observation by the Kingdom of Norway

represented by Ms Henriette Busch, 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. The Kingdom of Norway (complaint No. 198/2021)

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1 INTRODUCTION

- (1) Reference is made to SMB Norge`s (hereinafter "the complainant organisation") second submission 7 February 2022, and the Deputy Head of Department`s Deputy Executive Secretary`s letter 21 February 2022 where the Government is invited to submit a response to the complainant organisation`s letter by 31 March 2022.
- (2) As noted in the Government`s written observations 10 December 2021, the complaint only briefly addresses what the complainant organisation perceives to be a violation of Article 24 second paragraph of the revised Charter. With reference to the complainant organisation organisations second submission, the Government still finds it somewhat difficult to identify exactly which features of the Norwegian system on appointment of lay judges that the complaint concerns, and which of the objections made in the complaint concerns what features of the system. On this point, the Government notes that the European Trade Union Confederation (ETUC) in its observations 29 October 2021 holds that the arguments in the complaint lacks substance and coherence and therefore is ill-founded.
- (3) In the Government`s view, the complainant organisation`s letter 7 February 2022 deals with matters that has been sufficiently commented on in the Government`s written observations 10 December 2021. The Government maintains its position and views presented in the

written observations and refers to that for a complete account of the Government's submissions. In addition to this, the Government would like to state the following:

- (4) The Government reiterates that the wording of Article 24 only protects the rights of workers, not employers, cf. the Government's previous submissions para 65–69. In its second submission, the complainant organisation suggests that the revised Charter should be interpreted as a "living instrument", submitting that "workers" may be understood as both "workers and employers".
- (5) Although the Government agrees that the revised Charter could be seen as a "living instrument", there is no precedence in the Committees' previous decisions for interpreting a provision in direct contrast with the wording of the provision itself. When interpreting the revised Charter as a "living instrument", the Committee rather aims to interpret the rights and freedoms set out in the charter "in the light of current conditions ... as well as in the light of new emerging issues and situations", see e.g. *Transgender Europe v. Czech Republic* (Complaint No. 117/2015) para. 75 and *EUROCEF v. France* (Complaint No. 114/2015) para. 53. Reference is also made to the Vienna Convention on the Law of Treaties Article 31, whereby a treaty shall be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty" in their context and in the light of its object and purpose.
- (6) None of the material provisions in Article 24 concerns employers' rights, and neither of the Committee's previous decisions on Article 24 contemplates the rights of employers. The purpose and intent of Article 24 is solely to protect the rights of workers, and the impartiality of lay judges does not raise any new issues or situations that deems it pertinent to expand the scope of intended beneficiaries of the provision to include employers. There is no basis for interpreting "workers" as both "workers and employers". The rights of employers are protected by other provisions and conventions.
- (7) Further, the complainant organisation generally addresses Article 24 as the right to an "independent court". On page 3 of the second submission, the complainant organisation even claims that "[t]his Complaint is essentially about independence". The Government emphasize that the relevant wording of Article 24 is "impartial", not "independent", and that the delimitation to impartiality means that independence, at least not explicitly, is required after the provision. The Government also remarks that Article 24 only requires an impartial "body", not specifically a "court". In any event, it is obvious that Norwegian courts as such are "independent".
- (8) The assessment of whether workers in Norway have the right to appeal a question of the lawfulness of the termination of their employment to an "impartial body" in accordance with Article 24 of the Charter, depends on whether Sections 106 and 108 of the Court of Justice Act is considered sufficient to ensure that the courts are not sat with impartial judges in each separate case. The Government maintains that it does.
- (9) The Court of Justice Act contains provisions that apply to all ordinary courts, which include both The Supreme Court, the courts of appeal, and all district courts, cf. Section 1 of the Act.

All cases concerning the lawfulness of termination of employments are handled by the ordinary courts, and the provisions in Sections 106 and 108 apply equally in such cases.

- (10) The provisions set forth in the Act relating to working environment, working hours and employment protection chapter 17 are *lex specialis* as far as they concern the same matters as the Court of Justice Act, cf. Section 17-1 of the Act relating to working environment, working hours and employment protection. There are, however, no provisions in chapter 17 that concerns the court's (im)partiality. Quite the contrary, it follows directly from Section 17-1 subsection 1 that in legal proceedings concerning rights or obligation 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". The complainant organisation has not given any reasoning for its statement that chapter 17 entails that "the parties have to accept certain relations between the parties, the attorneys and the lay judges".
- (11) Nor has the complainant organisation in any way shown that Sections 106 and 108 of the Court of Justice Act are interpreted differently in cases that are regulated by Chapter 17 of Act relating to working environment, working hours and employment protection. On the contrary, the judgment presented as attachment 9 to the letter 7 February 2022 illustrates how the courts apply the Court of Justice Act Sections 106 and 108, also in cases regarding termination of employment.
- (12) The Government fails to see the relevance of different bodies and organisations view on the suitability of the present system for suggesting and appointing lay judges presented in the complainant organisation's letter 7 February 2022 section 3. None of the institutions mentioned argues that the system constitutes a violation of worker's rights under Article 24 of the revised Charter. It is natural that different parties have different views on what solution that would be the best to ensure that the courts appoint lay judges that are sufficiently skilled in working life to rule in each separate case, but such different views do not entail that the system does not fulfil the requirement in Article 24.
- (13) The Government would, however, like to point out that it is not correct, as the complainant organisation argues, that both Borgarting and Gulating Court of Appeal "support the allegation of SMB Norge". On the contrary, the quoted section from Borgarting Court of Appeal's letter 14 October 2021¹ in the complainant organisation's letter 7 February section 3 (e) is not representative of the court's views on the system for appointing lay judges in cases concerning termination of employments.
- (14) It follows from the court's letter that only a few of the judges in the court gave response of their experience with lay judges in cases concerning employment. Furthermore, most of the judges that did respond, did not have any negative experience with the present system and

¹ Attachment 3 to the complainant organisation's letter 7 February 2022.

ATTORNEY GENERAL FOR CIVIL AFFAIRS

considered it to be positive that the court was sat with judges with working life experience. An English translation of the relevant parts of the letter are included as appendix 1.²

- (15) All lay judges on the employees list are suggested by the organisations. However, it is not a requirement that the suggested lay judges shall have a working relationship, a position of trust or be actively engaged in the organisation. Information obtained from Norwegian Courts Administration indicates that there is considerable variation in the lay judges' professional background, see the letter attached as appendix 2.³
- (16) As regards what organisations that are invited to suggest lay judges to the courts' list of lay judges with working life experience, the Norwegian Courts Administration ("DA") by their own initiative only approach the four largest organisations representing workers and employers respectively. This does not entail that other organisations are prohibited from giving suggestions by their own accord. The Government notes that the complainant organisation has not done this so far, as confirmed by the DA in appendix 2.
- (17) The Government maintains 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.
- (18) The Government considers the case to be fully presented through the parties' statements and does not see any need for an oral hearing.

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Oslo, 31 March 2022
OFFICE OF THE ATTORNEY GENERAL
FOR CIVIL AFFAIRS

Sverre Runde
associate

Henriette Busch
acting agent

² Office translation.

³ Office translation.

“We have got a short deadline to provide our response. We have invited all our judges to share their personal experience. We have received 12 written, as well as some oral replies.

A minor majority of the respondents have said that it is positive to have lay judges with experience from working life in these cases as it brings relevant competence into the court. This majority had on the whole not experienced that the lay judges had represented the interests of a party to a degree worth mentioning.

There were, however, also 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 of their own "party interest".

DA`ss request was restricted to ask for feedback on our experience with appointment of lay judges in this kind of cases. Thus, we don't enter into a principle discussion on the suitability of the cases concerning employment protection having a system of appointing lay judges that doesn't exist in other cases, and which in many ways constitutes a breach with fundamental principles of ensuring that the lay judges are impartial. We will, however, remark that the proposal in the Dokument 8 that the Ministry referred to did not contain a proposition to eliminate the system of lay judges with working life experience. According to the proposal, the lay judges should be drawn at random from a selection of lay judges with working life experience, rather than being appointed by the parties. In our view, the proposal may be a way to ensure continued access for the courts to relevant experience with working life, whilst at the same time reduce the risk of the judges not having the necessary distance to each case.”

Fra: [Finsland Ingrid](#)
Til: [Finsland Ingrid](#)
Emne: Arbeidslivskyndige meddommere
Dato: onsdag 30. mars 2022 15:31:31

Fra: Moen, Hilde Wahl <Hilde.Wahl.Moen@domstol.no>

Sendt: 28. mars 2022 13:03

Til: Finsland Ingrid <Ingrid.Finsland@aid.dep.no>

Emne: SV: Arbeidslivskyndige meddommere

Hei,

Vi har nå foretatt en manuell gjennomgang i listen over arbeidslivskyndige meddommere. Listen omfatter i alt 800 navn.

Basert på denne gjennomgangen er det grunn til å tro at mellom 10 -15 % av alle arbeidslivskyndige meddommere kan ha et ansettelsesforhold til en arbeidstakerorganisasjon. Vi har tatt utgangspunkt i nåværende stillingstittel kombinert med mailadresse. Stillingstittelen kan være f.eks. distriktssekretær, rådgiver, faglig sekretær, regionkontorleder, forbundssekretær m.m.

I tillegg kommer en rekke tillitsvalgte som i større eller mindre grad er frikjøpt for å kunne utøve sitt verv. Disse har vi ikke gjort noe overslag over.

Utover dette kan vi ut fra samme liste slutte at arbeidslivskyndige meddommere sin yrkesbakgrunn er svært variert. Vi har ikke muligheter for noen skjematisk fremstilling av dette.

Når det gjelder ditt tilleggsspørsmål (mail 25.3.d.å.) kan vi ikke se å ha mottatt noen henvendelse fra SMB knyttet til arbeidslivskyndige meddommere. Dette er basert på en gjennomgang av våre arkiver for de tre siste år.

Vi håper dette kan være til hjelp.

Med hilsen

Hilde Wahl Moen

seniorrådgiver

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We have now manually gone through the list of lay judges with working life experience. In total, the list contains 800 names.

Based on our review, it seems that about 10 to 15 percent of all lay judges with working life experience may have an employment relation with any of the workers' organisations. In this regards, we have looked at the person`s present title combined with their e-mail address. The titles include e.g. district secretary, adviser, trade union official, head of regional office, national secretary.

In addition to this, there are a number of persons who are representatives of their organisations, who, to a certain extent, have been released to be able to perform their duties on behalf of their organisation. We have not made any estimate of how many this concerns.

We may, from the list, conclude that the lay judges come from a wide range of backgrounds. We have no means of producing a schematic representation of this.

As regards your additional question (e-mail 25 March this year), we have not registered any inquiries from SMB Norge concerning lay judges with working life experience. This is based on a review of our archives from the last three years.