EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

29 April 2022

Case Document No. 3

European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) v. the Netherlands
Complaint No. 201/2021

SUBMISSIONS BY THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 12 April 2022

Observations
of the Government of the Kingdom of the Netherlands
on the merits
of complaint no. 201/2021

European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV)

v.

the Netherlands

Introduction

1. By decision of 7 December 2021, the European Committee of Social Rights ('the Committee') declared admissible the complaint lodged by the European Trade Union Confederation ('ETUC'), the Netherlands Trade Union Confederation ('FNV'), and the National Federation of Christian Trade Unions ('CNV') on the basis of the 1995 Additional Protocol to the European Social Charter ('the Additional Protocol'), alleging a violation of the Revised European Social Charter ('the Charter') by the Netherlands.

2. By letter of 15 December 2021, the Executive Secretary of the Committee forwarded that decision to the Government of the Kingdom of the Netherlands ('the Government'), expressing the Committee's wish to receive the Government's observations on the merits of the complaint.

3. The ETUC, FNV and CNV allege that the Dutch Supreme Court's assessment of the restrictions on collective action is not in conformity with Article 6, paragraph 4 and Article G of the Charter since it is made with reference to an excessively broad framework of criteria and not strictly on the basis of Article 6, paragraph 4 and Article G of the Charter. The complainants also allege that the way in which the assessment framework defined by the Supreme Court is applied in the lower courts goes beyond the standard laid down in Article G of the Charter, lacks the character of being stable and foreseeable and thus does not afford sufficient protection in procedures before the courts.

4. In these observations the Government will explain why it considers that the situation in the Netherlands with respect to collective action is in conformity with Article 6, paragraph 4 and Article G of the Charter. First, it will explain how the right to strike evolved in the Netherlands in the period prior to the judgments of the Supreme Court in 2014 and 2015. Second, it will examine how the framework defined by the Supreme Court is applied by the lower courts.

Merits

Evolution of the right to strike in the Netherlands

5. The right to strike is regulated in the Netherlands not by statute but by case law. Parties can institute interim injunction proceedings in relation to collective action. Where time is of the essence, such proceedings are used to obtain a ruling from the courts in the short or very short term. Both parties have the opportunity to express their views and such proceedings must also be conducted in accordance with the general principles of due process. The court must strike a balance between, on the one hand, the interests of the claimant in obtaining a decision without delay and, on the other, the interests of the defendant in enforcing procedural safeguards. Interim injunction proceedings in the Netherlands therefore satisfy the requirements of a fair trial within the meaning of Article 6 of the European Convention

on Human Rights (ECHR). Appeal from a district court's judgment lies to the court of appeal. Appeal in cassation against the judgment of a court of appeal can then be lodged with the Supreme Court.

6. The Government would also point out that the Supreme Court can be requested to give a preliminary ruling on an essential legal issue arising during proceedings on which the Supreme Court has not previously ruled and the answer to which has an important bearing on a number of similar cases. Questions for preliminary ruling can be referred by both district courts and courts of appeal, and in both proceedings on the merits and interim injunction proceedings. The court in the relevant case can decide *ex proprio motu* to refer questions to the Supreme Court for a preliminary ruling, but a party to the proceedings can also request it to do so.

7. In its *Netherlands Railways (NS)* judgment in 1986, the Supreme Court held that Article 6, paragraph 4[1] of the Charter had direct effect because it can be binding on all persons pursuant to article 93 of the Constitution and takes precedence over Dutch legislation pursuant to article 94 of the Constitution. As it has direct effect, private parties can invoke this international provision directly in civil proceedings, irrespective of the national rules. Whether or not the actions of the trade unions are unlawful is directly assessed with reference to Article 6, paragraph 4 of the Charter and the exceptions listed in Article G of the Charter.

8. As regards the exceptions to the right to strike, the Supreme Court stated in its *FNV v. Streekvervoer*[2] judgment that a strike that falls under Article 6, paragraph 4 of the Charter must, in principle, be tolerated, even by the employer, as a legitimate exercise of the fundamental right recognised in this provision of the Charter, notwithstanding the harmful consequences which it is intended and accepted that the strike will have for the employer and third parties. The Supreme Court went on to hold that, in view of the duty of care that must be observed with regard to the person and property of others pursuant to article 6:162 of the Dutch Civil Code, the only circumstance in which the courts may impose restrictions on a strike of this kind is where the strike would infringe the rights of third parties or the public interest to such an extent that restrictions are urgently needed to protect the interests of society. According to the Supreme Court, whether that is so is a question of proportionality which can be decided only by assessing the various interests involved in the exercise of the fundamental right in the light of the interests which are being infringed, taking into account all the different factors that characterise the dispute between the parties, both in relation to one another and in their overall context.

[1] Supreme Court, 30 May 1986, *NJ* 1986, 688.
[2] Supreme Court, 21 March 1997, ECLI:NL:HR:1997:ZC2309, NJ 1997, 437.

9. Moreover, the Supreme Court held in its judgment in the above-mentioned *Netherlands Railways* case that collective action that came within the scope of Article 6, paragraph 4 of the Charter was unlawful if it did not comply with what it termed 'ground rules' (*spelregels*). The test it applied was that the collective action was lawful only if timely notice had been given. Moreover, a strike should be called only where all other possibilities had first been exhausted (in other words, as a last resort).

10. Assessing whether these ground rules had been fulfilled amounted to a procedural test that preceded the necessity test of Article G of the Charter and was intended to determine whether the trade unions were entitled to resort to strike action. In fact, this test of compliance with the ground rules constituted an extra restriction on the right to take collective action, over and above the restrictions permitted by Article G of the Charter.

11. The framework for assessing the lawfulness of a strike was subsequently amended by the Supreme Court in its judgments in the *Enerco* case in 2014 and the *Amsta* case in 2015. These judgments, which are discussed in more detail below, broadened the scope of the concept of 'collective action' contained in Article 6, paragraph 4 of the Charter and moved on from the ground-rules test.

Supreme Court judgment in the Enerco case (2014)

12. The Supreme Court judgment in the *Enerco* case concerned instances of collective action in the port of Amsterdam. These had been organised by the trade unions against the stevedoring company Rietlanden because it had refused to conclude a collective agreement. The dispute resulted in an unannounced strike in mid-October 2012. At the time in question, Enerco had hired Rietlanden to unload the *Evgenia*, a seagoing vessel laden with 120,000 tonnes of coal. As a result of the strike affecting Rietlanden, the *Evgenia's* cargo was not fully unloaded. Enerco then started searching for another firm to finish the job. However, the unions called on trade union officials at similar firms to declare their solidarity with the strike action at Rietlanden and not to unload the ships. The work was declared to be blacked. The success of the sympathy strike meant that the vessel was not unloaded either by Rietlanden or by its competitors. Enerco applied for an interim injunction barring the unions from blacking the work as they had refused to lift the declaration. The application did not therefore relate to the strike at the firm targeted by the strike, but instead concerned the strike at its competitors in support of that strike.

13. The Supreme Court first held that in the light of Article 6, paragraph 4 of the Charter there was no reason to adopt a limited interpretation of the term 'collective action'. In principle, unions are free to choose what form of action they take. To determine whether the form of action is covered by the Charter, it is necessary to consider whether the action can reasonably contribute to the effective exercise of the right to bargain collectively. If that question is answered in the affirmative, the collective action falls within the scope of Article

6, paragraph 4 of the Charter. The exercise of the right to collective action can then be limited only in accordance with Article G of the Charter. In the Supreme Court's opinion, the court of appeal was incorrect in holding that the blacking of the work did not fall within the scope of Article 6, paragraph 4 of the Charter because the action was carried out at a firm other than that of the employer targeted by it. The determining factor is whether the blacking could reasonably contribute to achieving the aim of the action (e.g. because Enerco was encouraged to exert pressure on Rietlanden).

14. The court of appeal had wrongly held that the action did not fall under Article 6, paragraph 4 of the Charter. Having established that the collective action fell within the scope of Article 6, paragraph 4 of the Charter, the Supreme Court considered that the action was, in principle, lawful and that it was therefore up to Enerco to demonstrate its disproportionality.

Supreme Court judgment in the Amsta case (2015)

15. The Supreme Court judgment in the *Amsta* case concerned collective action by the AbvaKabo FNV trade union ('FNV') at the premises of Amsta, a care provider. At the FNV's request, consultations had taken place about the terms and conditions of employment of Amsta's employees. The consultations failed to produce the result desired by the FNV. The FNV subsequently organised collective action on three occasions. This took the form of work stoppages of two hours each at two of Amsta's institutions. On 2 February 2013, Amsta employees again took collective action. This involved denying access to the building to senior executives and to managers not involved in the action.

16. Amsta had applied for an interim injunction barring the FNV from organising occupations of the premises. In support of its application, Amsta argued that the FNV was involved in the 'unannounced occupation' of the premises on 2 February 2013 and that it feared that the further action that had been announced for 8 February 2013 would again lead to an occupation of the premises. The Supreme Court's judgment concerned the issue of whether the unannounced occupation of the premises of 2 February 2013 fell within the scope of Article 6, paragraph 4 of the Charter.

17. The Supreme Court considered that it followed from the *Enerco* judgment of 2014 that the ground rules were no longer an independent criterion for assessing whether collective action is lawful. According to the Supreme Court, however, the ground rules are still important as one of the factors in assessing whether the right to collective action should be limited or prohibited in a specific case on the basis of Article G of the Charter. Although the ground rules are therefore no longer conditions that must be assessed independently when determining whether collective action is admissible, they do play a role in relation to Article G of the Charter as one of the factors to be taken into account.

18. The Supreme Court also noted that if the collective action affects the specially vulnerable – for example young people, the disabled and the elderly – it is more likely to be treated as unlawful if their care is jeopardized as a result. This was not the case here.

Conclusion concerning Supreme Court case law (2014 and 2015)

19. In 2014 and 2015, the Supreme Court gave two judgments that changed the framework for assessing the lawfulness of a strike. In its judgment in the *Enerco* case, the Supreme Court ruled that the term 'collective action' should be interpreted broadly. This means that, in principle, it is up to the trade unions to decide what form of action they wish to take to achieve their goal. The test for determining whether the collective action falls within the scope of Article 6, paragraph 4 of the Charter is whether it can reasonably contribute to the effective exercise of the right to collective bargaining.

20. Subsequently, in its judgment in the *Amsta* case, the Supreme Court abolished the ground rules test as an independent condition. This means that the courts cannot hold that collective action is unlawful solely on the basis that it does not comply with the ground rules. The exercise of the right to collective action can be limited only under Article G of the Charter. The courts can still treat the last resort principle and the requirement of timely notice as relevant factors when assessing whether the action is unlawful under Article G of the Charter. Other factors that may be taken into account are the nature and duration of the collective action, the relationship between the action and its aim, the damage caused by the action to the interests of the employer or third parties and the nature of those interests and damage, and the interests of the specially vulnerable, such as young people, the disabled and the elderly.

21. According to the Government, it is apparent that the right to collective action as interpreted by the courts has been broadened by the two Supreme Court judgments of 2014 and 2015. Not only are the trade unions free, in principle, to choose whatever form of strike or other collective action they consider effective in exercising their right to collective bargaining, but their failure to comply with the ground rules no longer automatically means that the action is unlawful. The decisions of the Supreme Court in the *Enerco* and *Amsta* judgments have thus created more scope for the unions to take collective action when disputes occur. Nonetheless, the courts can still test whether the collective action would lead to disproportionately large (or permanent) damage and in such cases can limit the right to collective action if it is urgently necessary to do so in order to protect the rights and freedoms of others.

22. The new assessment framework refines various aspects of the old system for assessing whether a strike should be restricted or prohibited. The previous procedural rules – the requirement of timely notice of collective action and the need to have first exhausted all other possibilities (the last-resort principle) – are no longer an independent assessment

criterion to be applied prior to the proportionality test, but they can be taken into account as relevant factors in determining whether a restriction is necessary. Moreover, damage is inherent in collective actions and an action can be prohibited only if the expected damage is disproportionate.

23. As unions no longer need to give notice of collective action, they can use the element of surprise. Besides taking surprise action, unions can also use collective action as a warning. Action of this kind enables the unions to exert pressure in the negotiations, even if talks have not yet reached a breaking point. This is because compliance with the last-resort principle is no longer a precondition for the legality of a strike.

The Committee's Conclusions (2018) - Article 6 (4) of the Charter

24. In the past, the Committee found that the situation in the Netherlands was not in conformity with Article 6, paragraph 4 of the Charter as the fact that a Dutch judge may determine whether recourse to a strike is premature constitutes an infringement on the very substance of the right to strike, as this allows the judge to exercise the trade unions' prerogative of deciding whether and when a strike is necessary (Conclusions XVII-1, XVIII-1). However, the Committee had previously observed (Conclusions 2014) that, in view of the examples given, the Dutch courts do take into account the principles enshrined in Article G of the Charter in their decisions. The Committee therefore considered that the situation was now in conformity with the Charter on this point, but requested updated information on any new developments and case law of the courts with regard to this situation.

25. In the report it submitted in 2018, the Netherlands explained that collective action in the Netherlands is regulated by case law. In its *Enerco* judgment (2014), the Supreme Court interpreted the right to strike in broad terms and held that the trade unions are, in principle, free to decide on the nature of collective action, provided that the action they take can reasonably be assumed to be useful in furthering the exercise of their right to collective bargaining. In its *Amsta* judgment (2015), the Supreme Court ruled that although criteria such as 'timely notice' and 'first having exhausted all other possibilities' may still be applied, they are no longer sufficient in themselves to determine whether collective action is lawful. They may therefore be taken into account, but only in the context of a decision on whether or not a restriction under Article G of the Charter (serious social grounds) is justified, and only among other relevant factors. In short, collective action may be restricted only by Article G of the Charter and not by rules laid down in the previous cases.

26. Based on this report, the Committee decided in its Conclusions 2018 that the situation in the Netherlands following the Supreme Court's new case law (*Enerco* and *Amsta* judgments) was in conformity with Article 6, paragraph 4 of the Charter.

Application of Supreme Court case law by the lower courts

27. Since the Supreme Court gave the judgments referred to above in 2014 and 2015, 35 judgments have been given in strike cases, mainly by district courts. These usually concern interim injunction proceedings brought where time is of the essence because of the nature of a strike and the circumstances connected with it.

28. The right to strike has been expanded as a result of the revised assessment framework for determining whether strike action falls within the scope of Article 6, paragraph 4 of the Charter. For example, The Hague Court of Appeal saw no reason to prohibit a strike by the police even though this meant bailiffs would be unable to carry out evictions and seizures in the absence of police back-up.[3] And bus operator Connexxion had to tolerate a strike by drivers in Almere as the court considered it had not produced sufficient evidence of its assertion that the strike would cause traffic chaos.[4]

29. The picture that emerges from the case law of the lower courts is that they are indeed more likely to hold that collective action can help to promote collective bargaining and that such action therefore falls within the scope of the right to strike. According to that case law, collective action that falls within the scope of Article 6, paragraph 4 of the Charter must, in principle, be tolerated as a lawful exercise of the fundamental right recognised in this provision. Nonetheless, the exercise of the right to collective action may be limited or prohibited in a specific case through application of the proportionality test, subject to the grounds for limitation listed in Article G of the Charter. This involves weighing the interests of the employer as well as those of third parties and, more generally, the public interest.

30. It appears from the lower case law that the courts do take into account this amended assessment framework in their judgments. The fact that the employer may suffer substantial financial loss is unlikely to be considered disproportionate in itself, but it is apparent from the lower case law that the existence of safety or public health risks or the possibility of serious harm to large numbers of third parties can be reasons to prohibit or limit a strike in terms of scope or duration.

31. The amended assessment framework has led to stricter rules on the obligation to make factual submissions on damage and on the burden of proof. As a result, anyone alleging that a strike is unlawful, whether it be the employer or a third party, must adduce sufficiently concrete evidence of the nature and extent of the damage to be expected. Mention seems to be made of this requirement in most judgments of the lower courts.

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[3] The Hague Court of Appeal 22 September 2015, ECLI:NL:GHDHA:2015:2555.
[4] District Court Central-Netherlands 4 April 2016, ECLI:NL:RBMNE:2016:1899.

32. The Government concludes that, although the lower case law is of a casuistic nature, the judgments of the lower courts are reached for the most part in accordance with the assessment criteria adopted by the Supreme Court. The complaint comments critically on only a few of the 35 judgments. It follows that there is no dispute that the great majority of lower case law is in accordance with the Charter. The judgments mentioned by name in the complaint are discussed – in summary – in Annexe 1 to clarify what circumstances were taken into account by the courts in these cases and how they weighed the different interests.

33. The Government concludes that the judgments of the lower courts since 2015 have been in keeping with the Charter. The Netherlands reported on this to the Committee, which noted in its Conclusions 2018 that the situation in the Netherlands is in conformity with Article 6, paragraph 4 and Article G of the Charter. The decisions of the lower courts since that date are in keeping with the previous judgments.

Strike figures in the Netherlands

34. Below is an overview of the number of strikes in the Netherlands over time.[5] The Government is including this information here to show that strikes do indeed take place in the Netherlands. A total of 147 strikes took place in the period 2015-2020.

	Strikes	Working days lost	Workers involved
1901	122	.	4,500
1910	146	366,300	13,200
1920	481	2,354,900	66,500
1930	212	229,300	11,000
1940	23	43,100	3,300
1950	79	162,500	17,600
1960	40	526,100	84,200
1970	47	293,500	86,200
1980	22	56,800	25,600
1990	29	206,700	25,000
1996	12	7,400	8,100

[5] The figures are taken from an annual survey by Statistics Netherlands (CBS) of the number of strikes in the Netherlands. Source: www.cbs.nl/nl-nl/visualisaties/dashboard-arbeidsmarkt/werkenden/werkstakingen.

◦	Strikes	Working days lost	Workers involved
1997	17	14,600	7,200
1998	22	33,200	30,800
1999	24	75,800	58,900
2000	23	9,400	10,300
2001	16	45,100	37,400
2002	16	245,500	28,600
2003	14	15,000	10,800
2004	12	62,200	104,200
2005	28	41,700	29,000
2006	31	15,800	11,300
2007	20	26,400	20,700
2008	21	120,600	51,900
2009	25	4,600	3,600
2010	21	59,200	14,100
2011	17	22,000	47,100
2012	18	219,400	89,600
2013	24	19,400	4,500
2014	25	40,900	10,200
2015	27	47,600	42,400
2016	25	19,200	11,100
2017	32	306,300	146,900
2018	28	239,100	33,700
2019	26	391,000	318,700
2020	9	211,000	105,300

Conclusion

35. It is apparent from the observations set out above that the manner in which the right to strike/take collective action can be exercised in the Netherlands is in conformity with Article 6, paragraph 4 and Article G of the Charter. The Government therefore requests the Committee to declare the complaints unfounded.

The Hague, 12 April 2022

Babette Koopman
Agent of the Government of the Kingdom of the Netherlands