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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

RESPONSE BY ETUC, FNV AND CNV TO THE SUBMISSIONS BY THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 15 July 2022

Collective Complaint

by the

European Trade Union Confederation (ETUC),

Netherlands Trade Union Confederation (FNV) and

National Federation of Christian Trade Unions in the Netherlands (CNV)

v.

the Kingdom of the Netherlands

15 July 2022

RESPONSE FROM ETUC, FNV AND CNV TO THE GOVERNMENTS OBSERVATIONS D.D. 12 APRIL 2022 IN COMPLAINT NO. 201/2021

Introduction

1. The essence of the twofold complaint of the trade unions is that in its 2014 and 2015 Decisions, in an attempt to overcome previous criticism about the way in which Article 6(4)ESC was implemented in the Netherlands, the Supreme Court created an overly broad framework for the Article G test
   (1) by continuing the so called rules of the game to be relevant as one the perspectives for answering the question whether the action should be restricted or prohibited and
   (2) by maintaining the standard of social urgency for restricting or prohibiting the exercise of the right to collective action,
   (3) which goes beyond the standard that is laid down in Article G since all the circumstances of the case, including economic considerations, can be taken into consideration, separatey or cumulatively, in order to conclude that restrictions can be imposed (see section 3.3.6, para 75, 79 and section 4 of the complaint).

   Lower courts, when applying the framework of the Supreme Court, perform a weighing up of interests based on all circumstances of the case, which is not in conformity with but goes beyond Article G (see section 3.5, para 111 and section 4 of the complaint).

2. The complainants point out that this is clearly in contradiction with the ESC and its appendix which states:
   It is understood that each Party, insofar as it it concerned, regulate the exercise of the right to strike by law, provided that <u>any further restriction that this might place on the right can be justified under the terms of Article G'</u> – (emphasis added).
   This article and its appendix do not allow restrictions to the right to strike that go beyond the (limited) list of aims mentioned in Article G. The Government's observations fail to address the crux of this objection.

3. A comparison of five years of case law, before and after the 2014 and 2015 judgments makes it clear that legal interventions have been extended. It has resulted in a increasingly number of court cases resulting in the restriction or prohibition of collective actions, interfering with the right to strike (see section 3.4.2., para. 84 of the complaint). The Government's observations also fail to address the crux of this objection as explained in more detail below.

   In response to the Government's observations, the complainants would like to comment on the following points.

The impact of interim relief proceedings and procedural law on the right to strike in the Netherlands

4. The complainants pointed out in their complaint that the scope of the Dutch right to strike is impacted by the fact that in the Netherlands, in interim relief proceedings, the court must decide within a very limited space of time whether or not to allow a strike whilst limited appeal options are open against decisions on the plausibility of the submissions (section 3.1.3 of the complaint).

5. In para. 6, the Government draws attention to the fact that during the proceedings parties or the judge can request the Supreme Court for a preliminary ruling if essential

legal questions arise. The complainants point out that this is only the case if the Supreme Court finds that the preliminary ruling relates to a question of law on which the Supreme Court has not previously ruled.

6. This hypothetical possibility does not provide any remedy against the first part of the complaint, i.e. that the 'rules of the game' continue to be relevant as one of the perspectives for answering whether a collective action should be restricted or prohibited and may even be decisive. Furthermore it does not change the fact that the Supreme Court maintained the standard of social urgency for restricting or prohibiting the exercise the right to collective action as laid down in Article 6:162 Dutch Civil Code, which goes beyond the standard that is laid down in Article G, given the circumstances that may be assessed (see section 3.3.6., para. 75 of the complaint as well as section 2.1., para 12 and section 3.1.1., para 50). The Supreme Court outlined the wide legal framework for the courts of first instance and the courts of appeal in its judgments of 2014 and 2015. The Supreme Court has therefore left it to these lower courts to rule on the merits of the case. It has to be recalled that the Supreme Court does not assess the factual circumstances, because the Supreme Court only reviews how law is or should be applied, while precisely these factual circumstances of the case play a crucial or decisive role in interim relief procedures.

7. In addition, this preliminary procedure does not provide a solution to the second part of the complaint, i.e. that the lower courts do not base their assessment of the case on Article G but weigh all the circumstances of the case, including economic interests of the employer, in order to conclude that restrictions can be imposed. Finally complainants would like to point out that the Supreme Court has rejected appeals of complainants as being full of factual findings, that cannot be reviewed by the Supreme Court (see section 3.1.3, para. 62 of the complaint). Therefore the scope for the Supreme Court to judge on legal questions as regards to the right to strike is limited, after the judgments given in 2014 and 2015.

8. In addition, interim relief proceedings relating to the exercise of the right to collective action initiated by the trade unions, provide no scope for asking preliminary questions to the Supreme Court as the case is submitted to the interim relief judge on the basis of a short summons and the hearing is usually held within a day or sometimes within a few hours. The court hearing on the application for interim measures must then decide whether a requested provision should be imposed, i.e. to prohibit the strike. In a legal dispute which has to be decided under great time pressure, a referral of a legal question to the Supreme Court for a preliminary ruling is merely a theoretical option. The court of first instance cannot for urgency reasons suspend its judgment pending a preliminary ruling of the Supreme Court, because this would mean that the collective action would occur before a court ruling can be made. Therefore in practice a preliminary ruling has never taken place in strike cases. The Governments suggestion refers to a theoretical option that does not offer a solution in practice.

9. An appeal may however be lodged against the points of law, but it is to be noted that it is Dutch legal practice to assess the appeal amply after the strike has been prohibited or restricted (see section 3.1.3., para. 58 of the complaint). The correctness of that decision is then reviewed retrospectively. However a court of appeal can dismiss such an appeal by ruling that there is no interest in pursuing the appeal. Furthermore as pointed out in the complaint, employers can avoid the appeal by renunciating the cost order initially imposed on the unions, after which the Court of Appeal declares the trade unions' appeal against the judgment inadmissible for lack of interest. In section 3.1.3. para 58 -60 of the complaint referral is made to two cases in which the trade unions were dismissed when lodging appeal, because the momentum to strike was lost and the employers declared themselves willing to reimburse the legal costs, paid by the

trade unions. This limits the ability of trade unions to challenge incorrect judgments. In both cases (**Actions at Jumbo case** and **Actions at VDL/Nedcar**[1]) the strikes had been prohibited taking into consideration the economic interests of the employer (see section 3.4.5. para 105 and 106). As a consequence the decisions of the courts of first instance could not be challenged.

10. Finally it should be added that in the *Amsta* judgment the Supreme Court ruled that the assessment of whether or not to prohibit a strike should be based on the criteria of the unlawful act (according to Article 6:162 Dutch Civil Code), which means that all the circumstances of the case can and should be taken into consideration when imposing restrictions on the basis of social urgency (complaint section 3.3.1. para. 50 and section 3.2.1.).This framework of the unlawful act is in itself so broad that it gives no possibilities to limit its scope by means of a preliminary question.

The Government's observations on the framework created by the *Enerco* and *Amsta* judgments

11. In paras. 22 and 23, the Government makes its submissions in response to the Supreme Court decisions of 2014 and 2015. These observations insufficiently acknowledge that the standard has changed: previously, the rules of the game (which include the establishment whether a strike is premature, necessary in view of the trade unions objectives ánd has been announced properly) were tested against the direct effect of Article 6(4) ESC in the Dutch legal order, whilst they are now tested against Article G within the context of the unlawful act. This means that the rules of the game have been transposed to the assessment under article G and can therefore still lead to a prohibition or restriction of collective action, as was previously the case.

12. Furthermore, the observations include a number of factually incorrect submissions. The Government wrongly states that case law of the courts shows the element of surprise may be used in actions without prior notice. It is also stated that in addition to surprise actions, unions can use collective action as a warning. However, this cannot be taken as a general rule, because the judgments of the Supreme Court and the cases referred to in the complaint precisely show that collective actions can still be prohibited or restricted if the 'rules of the game' are breached (section 3.3.3., para. 71 of the complaint).

13. In the *Amsta* case, the Supreme Court ruled as follows:

this does not alter the fact that the rules of the game (and not only those mentioned by the Court of Appeal in this case) are still important in deciding whether to restrict or prohibit the exercise of the right to collective action in a specific case on the basis of Article G ESC. Although they are no longer prerequisites for the admissibility of the action, they are still relevant in assessing whether to restrict or prohibit the action. However, the importance of the rules of the game as points of view is not always the same. They may count heavily in a general strike, but far less so in instances of 'work-to rule' of limited duration in which the risk of major damage is nil.

After this Supreme Court decision this criterion has been consistently affirmed by courts of first instance and of appeal and it is used in the assessment made by these courts (see section 3.4.6., para. 109 of the complaint). For example in the ***Actions in mail delivery* in the Christmas period** (referred to in section 3.4.2., para. 103 and section 3.4.6, para. 109 of the complaint and enlisted in Annex 5 containing the abridged summary of judgments involved in the research), the court found as follows:

[1] see Annex 5 containig the abridged summary of judgments involved in the reasearch

the exercise of the right to collective action may only be restricted by Article G ESC in line with the teachings of the Supreme Court on that point. Whether an employer was given sufficiently advance notice of a collective action by employees and whether the parties had been involved in negotiations (ultimum remedium) (the 'rules of the game review'), no longer constitute independent criteria in assessing whether a collective action is lawful. It is for the employer (in this case PostNL) or a third party (in this case Sorgente) who demand a restriction or prohibition of the exercise of the right to collective action in a specific case, to establish and make plausible facts and circumstances that justify a restriction or prohibition according to the standard of Article G ESC. This is only the case if restrictions on the right to collective action are urgently required for reasons of social urgency. In assessing that urgency, the court must take all circumstances into account. This may include the nature and duration of the action, the relationship between the action and the objective pursued by it, the damage caused to the interests of the employer or third parties and the nature of the interests and damage. In this context, compliance with the aforementioned rules of the game may also be relevant (or even decisive under certain circumstances).

(…)
According to the foregoing, the collective actions announced by FNV during the SKNJ period will have such far-reaching (social and financial) consequences that a restriction of the fundamental social right to collective action is justified. A restriction is all the more appropriate, since PostNL has rightly pointed out that the collective labour agreement negotiations between it and the trade unions only started in mid-November 2018 and the material points of the collective labour agreement proposals that have been tabled have not yet been sufficiently discussed. It is therefore premature to conclude that the collective bargaining negotiations cannot lead to a favourable negotiation result for FNV. Collective action at this point would therefore not be regarded as an ultimum remedium. The preliminary relief judge finds support for this judgment in the fact that the other trade unions consider collective action premature at this point and wish to continue the collective labour agreement talks with PostNL. For now, they believe that there is sufficient scope to conclude a decent collective labour agreement with PostNL. As requested by PostNL, the right to collective action will be suspended until 6 January 2019 (emphasis by complainants).

These cases show that the 'rules of the game', which determine whether a strike is premature or appropriate and lawful, continue to be relevant in deciding whether a collective action should be restricted or prohibited.

14. In the ***Jumbo*** **case** (also referred to in section 3.4.5., para. 105 of the complaint and enlisted in Annex 5 containing the abridged summary of judgments involved in the reasearch) the court of first instance ruled that a one-day strike to take a petition to the head office by bus to prevent the possible closure or transfer of a butcher's shop that had been announced, was unlawful. It found as follows:

it is understandable that the expressed intention to sell the Central Butchery has led to unrest among the employees and concerns about their jobs. However, at this point there is no concrete threat of job losses at the Central Butchery. At the hearing, Jumbo explained that it was considering a sale and there was even talk of an information memorandum having been drawn up for prospective buyers. Jumbo's internal memo of 29 December 2015 shows that the process for outsourcing / sales consisted of research and analysis of the proposition, after which information memos would be drawn up. It therefore seems as if the process is still at the stage of research and analysis of the proposition. Furthermore, Jumbo has always emphasised that it would consider the interests of the employees in its decision-making and that it was prepared to enter into talks with the FNV about the impact of the sale on employees before it actually had to do so under the SER Merger Code. It is therefore not true that Jumbo would only want to negotiate with the FNV after an agreement in principle had been concluded with a prospective buyer. Jumbo also offered, once again, to discuss with the FNV the possibility of moving forward the consultations with the trade unions as prescribed by the SER Merger Code. But the FNV has always declined this offer, including at the meeting. This court finds that given this state of events, the announced action is disproportionate to the objective pursued and a restriction of the fundamental social right to collective action is therefore necessary. (emphasis by complainants).

15. Contrary to the Government's assertion, this judgment thus shows clearly that no general rule can be inferred from the Supreme Court's ruling, i.e. that warning strikes are simply considered permissible. For the sake of completeness it can be noted that this case also makes clear that courts do asses whether a strike is premature and necessary in view of the trade unions objectives. This assessment infringes directly on the trade uinions prerogatives.

16. What is more, in the ***Actions at Ryanair*** case, the court of first instance imposed a 72-hour notice period as a requirement, in order to mitigate consequences for travellers (see section 3.4.4., para. 100 of the complaint and enlisted in Annex 5 containing the abridged summary of judgments involved in the reasearch). Furthermore in the ***Easyjet*** case (see section 3.4.4., para. 99 of the complaint and enlisted in Annex 5 containing the abridged summary of judgments involved in the research) a notice period of six hours was imposed, because every effort should be made to minimise the damage to the travelling public, according to the court.

17. These cases show that it is incorrect to state that unions no longer need to give notive of collective action and can use the element of surprise (see para. 23 Governments observations) The element of surprise is significantly restricted by the injunctions imposed by courts, in order to prevent damage caused by a strike to employers and third parties. This severly limits the force and effectiveness of strikes.

18. These restrictions are also a direct consequence of the possibility, permitted by the Supreme Court, to impose restrictions on the exercise of the right to strike, if restrictions are required for reasons of social urgency, as used and defined by the Court. In assessing that urgency, the court must take all circumstances into account. This may include the nature and duration of the action, the relationship between the action and the objective pursued by it, the damage caused to the interests of the employer or third parties and the nature of the interests and damage, depending upon the circumstances being put forward and the assessment of the court and considered to be of importance. In this context, compliance with the aforementioned rules of the game may also be relevant (or even decisive under certain circumstances). The Government doesn't address this specific issue in its observations either.

19. This means that the conclusions of the Government drawn in paras 22 and 23 of its observations, are not in line with the actual course of events.

The Government's observations on the ECSR's conclusions.

20. The complainants maintain that the assessment framework applied by the Supreme Court, i.e. taking account of all the circumstances of the case, is so broad so that courts can apply it differently, even in ways that are not in conformity with article G. In para. 26, the Government discusses the ECSR's Conclusions (2018). It states that it can be inferred from this report that the ECSR decided that "the situation in the Netherlands following the Supreme Court's new case law (*Enerco* and *Amsta* judgments) was in conformity with Article 6(4) of the Charter."

21. The complainants take the view that the content of the Conclusions ECSR 2018 should be read against the background of the long-running criticism of the ECSR of Dutch case law. From 1984 onwards the ECSR has expressed its concerns about the conformity of Dutch court decisions on the right to strike with Article 6(4) of the Charter and it was keen to remain informed of how the courts protected the right to strike (see section 2.4.2., para. 35 of the complaint).This was concluded, after it had already been expressed explicitly by the ECSR several times (see section 2.4.2. paras. 35-36 of the complaint), that these judicial practices by their very nature restrict the right to strike as referred to in Article 6(4) and that these practices go beyond the restrictions permitted under Article 31. According to Article 31/G, the effective exercise of the right to strike - when effectively realised- shall not be subject to any restrictions or limitations except such as prescribed by law and are necessary in a democratic society for the protection

of the rights and freedoms of others or for the protection of public interest, national security, public health or morals. It was concluded by the ECSR that since courts have recourse to the principle of proportionality and as the courts further have the power to determine whether a strike is premature, the judicial practices by their nature restrict the right to strike and that they go beyond the restrictions aloows under article 31 (ECSR, Conclusions XVI-1). In 2014 and 2015, the Supreme Court took this criticism to heart and arrived at a different conclusion as to how to assess whether an action is lawful on the basis of Article 6(4) ESC. On the basis of the country report submitted by the Netherlands, the ECSR consequently concluded in 2018 that the situation in the Netherlands was now in accordance with Article 6(4). The ECSR added, with reference to the Dutch country report:

"According to the report collective action may be restricted only by Article G of the Charter and not by rules laid down in previous cases. (…)."

22. The complainants have the impression that in its Conclusions 2018, the ECSR did not consider how the assessment on the basis of Article G is made in Dutch case law. The ECSR only referred to the Dutch Government's remark in the country report 'that restrictions can only take place on the basis of Article G' (see section 3.3.5, para 74).

23. The ECSR had not the opportunity to assess whether the case law in general, that means including the case law of the courts (first instance as well as appeal), is in conformity with Article G since this was not at stake in the national report on 2018. It was therefore not clear that the Supreme Court had created a much broader assessment framework with its interpretation of Article G in the *Amsta* Judgment, which means that all the circumstances of the case, including whether a strike is premature, appropriate and should be restricted for reasons of social urgency are taken into account on the basis of an unlawful act.

24. The complainants have the impression that this important change relating to Article G was not included in the review of 2018. No attention seems to have been paid to the input provided by the FNV since there is no mention of the contribution of FNV in the text of the review. In that contribution, which is included as Appendix 3 to the collective complaint, attention was drawn to the changes made to the interpretation of Article G, and that an overly broad framework had been applied since the 2014 and 2015 judgments.

Observations regarding case law by lower courts

25. At the end of the observations, the Government addresses the second part of the complaint on how the right to strike is restricted in lower courts. The complainants emphasize that the State does not actually address the detailed objections that have been raised against the judgments. In para. 32 of its observations, the Government concludes that, although the lower case law is casuistic, the lower courts rule for the most part in accordance with the assessment criteria laid down by the Supreme Court and that it follows from the comments in de complaint that most rulings are in accordance with the Charter.

26. It is acknowledged in the observations of the Government as well as in the annex that the excersise of the right to strike may be limited or prohibited through the application of the proportionality test that involves the weighing of interests of the employer as well as those of third parties and the public interest. The complainants contest that the cases being referred to in the Annexe substantiate that these limitations are merely

imposed when necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals. It is clear from the description that restrictions on the right to strike are already imposed when pupils are restricted from using transport on certain days, when passengers learn shortly before departure that they cannot fly or when delays arise in the transport of their luggage.

27. These observations insufficiently acknowledge that the crucial element of the complaint is that the assessment framework exceeds the restrictions set by Article G, and that this certainly applies to how they are interpreted by courts of first instance and courts of appeal. The Government's conclusion in para. 32, i.e. that the complaint is only critical of some of the rulings by the lower courts since 2014/2015, is incorrect for the following reasons (see section 3.5. para 112 of the complaint):

- 1th, the complaint includes a statistical overview which clearly shows that there has been a substantial increase in restrictions on strike actions since 2014/2015. In fact, a comparison of five years of case law, before and after the 2014-2015 judgments of the Supreme court, makes it clear that legal interventions have been extended, as an increasingly number of court cases result in a restriction or prohibition of collective action on ground that go beyond the requirements of Article G (see section 3.4.2., para. 84 of the complaint).

- 2nd the observations in paras. 29 and 30 the Government wrongly suggests that the right to strike has been extended because the right to strike falls within the scope of Article 6(4). As extensively substantiated in the complaint on first sight this may seem to be the case, but in fact the right to strike is unjustly restricted by way of an incorrect application of art G. The restrictions of article G are not respected when all circumstances of the case, such as the nature and duration of the action, the relationship between the action and the objective pursued by it, the damage caused to the interests of the employer or third parties and the nature of the interests and damage as well as compliance with the aforementioned rules of the game, are decisive.This plurality of factors that a judge may take into consideration in interim proceedings, leads to arbitrairness and to a situation where there is no stable and forseeable case law.

- 3th: These prohibitions and restrictions are increasingly imposed in situations other than those involving safety or public health risks or the risk of serious harm to third parties. From the summaries of the cases given in the Government's observations, it is clear that this includes the accessibility of school transport for students that rely on this facility, the need to make every effort to minimise the damage to the travelling public and the interest of passengers not having their holiday plans disrupted.

- 4th: It is unacceptable that according to the Government in para 32 the case law in the Netherlands is considered to bein accordance with Article G ESC if at least the majority of the judgments complies with it. The applicable case law should be entirely in accordance with Article G.

Strike figures in the Netherlands

28. In para. 34, the Government submits an overview of data showing that the statement "strikes do indeed take place in the Netherlands" can be substantiated. This is not contested by the complainants. The complainants would like to notice that the submitted data show that in the 2015-2020 period an average of 1.16% of workers out of a labour force of 9.4 million participated in strikes and that the duration of the strike

was on average 1.7 days per year. In the preceding period (2010-2015), an average number of 0.85 % of the workers (labour force of 8,4 workers) were involved in strikes whilst the average duration of a strike was 2.1 days per year. While the complainants wish to emphasise that these data cannot be used to provide any evidence for the suggestion that the Dutch right to strike is in line with the ESC, they do note that strikes occur in the Netherlands albeit - to a limited extent and of limited duration.

Conclusion

29. The complainants note that the Government has not adequately contested the content of the complaint and are of the opinion that the complaint should be declared well-founded.

Brussels/Utrecht, 15 july 2022

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