EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

27 September 2022

Case Document No. 5

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

REPLY FROM THE GOVERNMENT TO THE RESPONSE BY ETUC, FNV AND CNV

Registered at the Secretariat on 13 September 2022

Further 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 letter of 27 July 2022, the Executive Secretary of the European Committee of Social Rights ('the Committee') forwarded to the Government of the Kingdom of the Netherlands ('the Government') the response dated 15 July 2022 of the European Trade Union Confederation ('ETUC'), the Netherlands Trade Union Confederation ('FNV'), and the National Federation of Christian Trade Unions ('CNV') (together: 'the complainant organisations') to the Government's observations of 12 April 2022. The Government was invited to submit a reply to the complainant organisations' response.

2. First, the Government wishes to state that it maintains its position as set out in its observations of 12 April 2022, to which it would refer the Committee. In addition, the Government wishes to make a number of further observations in reply to the complainant organisations' response. If the Government does not address certain points made by the complainant organisations, this does not mean that it agrees with them.

3. Below, the Government will make further observations on the following points: the impact of relief proceedings and procedural law on the right to strike in the Netherlands (paragraphs 4-7), the framework created by the *Enerco* and *Amsta* judgments (paragraphs 8-12), case law by lower courts (paragraphs 14-15) and the strike figures in the Netherlands (paragraphs 16).

Merits

Impact of relief proceedings and procedural law on the right to strike in the Netherlands

4. Regarding paragraphs 4 to 10 of the observations of the complainants, the Government reiterates that the legal protection in the Netherlands regarding the right to strike meets the requirements of article 6 European Convention on Human Rights ('ECHR') and that the legal remedies available to the trade unions are not purely theoretical in nature but are both practical and effective.

5. In the Netherlands, the legal basis which art. G of the Revised European Social Charter ('the Charter') requires for restrictions is always derived from the general provision on torts – Article 6:162 of the Dutch Civil Code – as interpreted in Dutch case law. According to the Government, this provision constitutes a sufficient legal basis for the standard of social urgency for restricting or prohibiting the exercise of the right to collective action. The legal basis thus meets the requirements as set out in the Charter and the ECHR.

6. The Government would like to point out that there are several effective legal remedies available in the Netherlands regarding the protection of the right to strike, as set out in

paragraphs 5 and 6 of the Government's observations of 12 April 2022. The effective legal remedies are the possibility of an interim injunction procedure at a court of first instance, and the appeal procedure at the court of appeal. Appeal in cassation against the judgment of a court of appeal can then be lodged with the Dutch Supreme Court. In addition, throughout the proceedings, 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.

7. The Government would like to stress that this set of options for conducting legal proceedings is sufficient to adequately guarantee the rights of the trade unions. These legal remedies are effective and not purely theoretical.

Framework created by the *Enerco* and *Amsta* judgments

8. The Government would also like to respond to the complainant organisations' observations in paragraphs 11 to 19, on the framework of the Supreme Court created by the *Enerco* and *Amsta* judgments. In 2014 and 2015, the Supreme Court rendered two judgments that amended 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 more broadly.

9. In its judgment in the *Amsta* case, the Supreme Court abolished the 'ground rules test' as an independent condition when assessing the lawfulness of collective actions. As set out by the Government in its initial observations, 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. As stated above, the exercise of the right to collective action can be limited only under Article G of the Charter. The courts can still assess the last resort principle (the need to first exhaust all other possibilities) and the requirement of timely notice of collective action as relevant factors when assessing whether the action is unlawful under Article G of the Charter.

10. When reviewing whether restrictions to the right to collective action are urgently necessary from a societal point of view, the domestic courts must take all circumstances into account. According to the *Amsta* judgment, the following may be important in this regard: the nature and duration of the action; the relationship between the action and the aim pursued; the damage caused thereby; and by the interests of the employer or third parties, and the nature of those interests and the damage.

11. Under certain circumstances, it can be of significance whether 'the rules of the game' or ground rules have been observed. These 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 assessed in isolation from the other aspects of the case. It can be deduced from the case law of the Supreme Court that when reviewing a collective action, the question of whether weighty procedural rules have been observed must also be considered. In its assessment, the court will have to take into account all the circumstances of the case. For instance, the Limburg District Court ruled a strike in the case of *Nedcar* in violation of art. G of the Charter in view of the real risk of that particular strike action causing major damage to employment in South Limburg.[1]

12. The conclusions drawn by the Government in its observations of 12 April 2022 in paragraphs 22 and 23 are in line with the actual course of events.

Case law by lower courts

13. Regarding the observations of the complainant organisations' response made in paragraphs 25 to 27 of their observations, the Government has already pointed out that the right to collective action as interpreted by the lower 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. This framework of the Supreme Court which is laid down in the judgments of 2014 and 2015 as set out above is applied by the lower courts in strike cases as of 2015. The possibilities for making use of the collective action right have therefore been expanded. Lower courts in the Netherlands have subsequently reviewed the cases submitted to them within this framework, taking into account the specific circumstances of each case under review. It is up to the national courts and not to the Government to weigh interests in every case based on the criteria laid down in the Charter. A party that does not agree with a judgment of the lower court, has the possibility of lodging an appeal at the appeal court and after that, to file an appeal in cassation at the Supreme Court.

14. The Netherlands reported on its case law to the Committee. Subsequently, the Committee concluded that the situation in the Netherlands is in line with Article 6, paragraph 4 and Article G of the Charter in its 2018 Conclusions on the 12th National Report by the Netherlands on the implementation of the European Social Charter.[2]

[1] Limburg District Court, 9 January 2019 (ECLI:NL:RBLIM:2019:382).
[2] In respect of article 6 paragraph 4 of the Charter the Committee held: "The Committee concludes that the situation in the Netherlands is in conformity with Article 6§4 of the Charter." 2018/def/NLD/6/4/EN.

Strike figures in the Netherlands

15. The complainant organisations have submitted data on the basis of which they argue that strikes in the Netherlands can only take place to a limited extent and that the duration of the strikes is also limited.

16. The Government would first like to state that the accuracy of this data is uncertain as it cannot be fully traced how the complainants established the figures mentioned. The Government can therefore not confirm that the figures mentioned are correct. Furthermore, the Government would like to emphasize that the frequency and duration of strikes depend on a number of factors which are not necessarily related to the legal framework.

17. In any event, the available data clearly shows that the possibility to strike exists in the Netherlands and that this option is actually being used. The number of strike days, which the complainant organisations consider to be limited, does not in itself mean that the Government does not properly guarantee the right to strike as such.

Conclusions of the Committee

18. Concerning the observations of the complainant organisations' response in paragraphs 20 to 24 on the conclusions of the Committee in its report in 2018, the Government notes that it must be assumed that the Committee has taken into account all aspects of Dutch case law as presented by the Government in its report in 2018. This seems especially logical in light of the history of the concerns of the Committee about the Dutch situation. It must also be assumed that the Committee took note of the input of the FNV on the report that was submitted by the Government. The Government maintains its position that the 2018 conclusions of the Committee which stated that the situation in the Netherlands was in accordance with Article 6, paragraph 4 of the Charter still stand.

The Hague, 13 September 2022

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