EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

6 December 2024

Case Document No. 3

Norwegian Association of Small & Medium Enterprises (SMB Norge) v. Norway
Complaint No. 238/2024

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 20 November 2024

ATTORNEY GENERAL FOR CIVIL AFFAIRS

The European Committee of Social Rights

OSLO, 20. November 2024

Written observations by the Kingdom of Norway

represented by Ida Thue, advocate, and as agent, Kaija Bjelland, advocate, in

Complaint No. 238/2024 SMB Norwegian Association of Small & Medium Enterprises (SMB Norge) v. Norway

• • •

1 INTRODUCTION

(1) Reference is made to the complaint submitted by SMB Norge ("SMB)", the Committee's decision on admissibility of 11 September 2024 and the Deputy Executive Secretary's letter of 24 September 2024, whereby the time limit for the Government to make submissions on the merits was set to 20 November 2024.

(2) In its complaint, SMB argues that Norway is in breach of the right to organise under Article 5 of the Revised European Social Charter since an undertaking must be bound by a collective agreement with a trade union of at least 10.000 members to enter into a local agreement on the hiring of personnel from temporary work agencies, cf. Section 14-12, second paragraph of the Norwegian Working Environment Act (WEA).

(3) The Government submits that Section 14-12, second paragraph of the WEA is in conformity with the right organise under Article 5 of the Charter. The Government will therefore ask the European Committee of Social rights to find that no violation has occurred.

Universitetsgata 8, 0164 Oslo
P.O. Box 8012 Dep. NO-0030 Oslo
postmottak@regjeringsadvokaten.no
ith@regjeringsadvokaten.no
+47 22 99 02 00
+47 22 99 02 61

2 RELEVANT DOMESTIC LAW

2.1 Temporary agency work

2.1.1 Introduction

(4) The main rule in Norwegian law is that employees shall be employed on a permanent, time-unlimited basis, directly with the employer, cf. WEA Section 14-9, first paragraph. Fixed-term work may be used in the situations listed in Section 14-9 second paragraph (a) to (e).

Annex 1: The Working Environment Act (English translation)

(5) Section 14-12 first paragraph states that hiring in of workers from temporary work agencies is permitted in the situations listed in Section 14-9 second paragraph (b) to (e):

> *«b) for work as a temporary replacement for another person or persons*
>
> *c) for work as a trainee*
>
> *d) for participants in labour market schemes under the auspices of or in cooperation with the Norwegian Labour and Welfare Administration, and*
>
> *(e) with athletes, trainers, referees and other leaders within organised sports.»*

(6) SMB claims that the amendment to Section 14-12, first paragraph, which entered into force on 1 April 2023, has in practice "resulted in a prohibition against hiring temporary workers from temporary-work agencies." SMB contends that "the remaining temporary employment forms in Section 14-9 (b) to (e) … are not practical." This is not correct. Norwegian law still provides several possibilities to hire in workers, with widespread use of the option to hire in workers "as a temporary replacement for another person or persons" (substitutes).

(7) It is also possible to hire in from production companies, cf. Section 14-13.

(8) There are special regulations on the hiring-in of health personnel and of consultants, cf. FOR-2013-01-11-33 Section 3, and on the hiring of replacement in agricultural enterprises and for short-term arrangements, cf. FOR-2022-12-20-2301.

Annex 2: FOR-2013-01-11-33 (in Norwegian)

Annex 3: FOR-2022-12-20-2301 (in Norwegian)

2.1.2 WEA Section 14-2, second paragraph: local agreement with employee representatives

(9) WEA Section 14-12, second paragraph allows undertakings that are bound by a collective pay agreement concluded with trade unions with the right to nomination pursuant to the Labour Disputes Act, to enter into a written agreement for temporary hiring.

(10) Under Section 39 (1) of The Labour Disputes Act, trade unions with the right to nomination are any trade unions with more than 10.000 members, cf. Annex 3 of the complaint.

(11) SMB seems to consider that Section 14-2, second paragraph gives employers in temporary-work agencies the right to enter into an agreement on hiring under the WEA Section 14-12, second paragraph. This is not correct. The provision is not directed at undertakings that hire out labour (i.e., temporary-work agencies), but at their customers (undertakings that want to hire labour *from* temporary-work agencies).

(12) The requirement that the employer must be bound by a collective agreement concluded with a trade union with more than 10.000 members was adopted in 2019. Prior to this, it was sufficient for the undertaking to be bound by any collective agreement in order to enter into a local agreement on hiring temporary workers. Section 14-12, second paragraph at the time read as follows:

> *«In undertakings bound by a collective agreement, the employer and employee representatives who together represent a majority of the category of workers affected by the hiring arrangement may enter into a written agreement for temporary hiring, notwithstanding the provisions of the first paragraph.»*

(13) Since the definitions of "collective agreement" and "trade union" in The Labour Disputes Act Section 1 (c) and (e) are broad, agreements could then be made between the employer and employee associations at the individual workplace ("house unions").

Annex 4: Labour Dispute Act Section 1 (in Norwegian)

(14) According to the preparatory works, the purpose of raising the level to "trade unions with right of nomination" was partly to reduce the use of temporary agency workers, and partly to prevent union representatives from being pressured to sign agreements, cf. Prop. 73 L (2017-2018) section 8.3.3 (Annex 4 to the complaint):

> *"The Ministry has the impression that the option to enter into agreements is being used more frequently than before to hire a larger number of workers, for example, to staff a construction project. This may come at the expense of direct employment within the company. The Ministry also takes seriously reports that union representatives are experiencing pressure to enter into agreements. The Ministry believes that amending Section 14-12, second paragraph, would be a measure that could reduce the use of temporary staffing in areas where it is currently most prevalent, and thereby address the challenges arising from extensive use of temporary staffing.*
>
> *(...)*
>
> *The Ministry proposes that "higher" requirements be set for the collective agreement to which the company must be bound (in principle) in order to enter into an agreement on local hiring. It is proposed that companies bound by a nationwide collective agreement (with a trade union that has the right to nominate representatives) may*

> *enter into local agreements on such hiring. In the Ministry's assessment, there is reason to believe that companies bound by nationwide collective agreements are generally serious and professional, both in terms of complying with current regulations and in negotiating and consulting with their employee representatives. The employee representatives, in turn, can receive support and advice from their trade union. The Ministry believes that such a regulatory change could be a valuable contribution to ensuring orderly and legal agreements in the industry, and that such agreements are reserved for cases where there is a legitimate need for hiring."* (office translation)

(15) It should be added that when purely local trade unions such as "house unions" are excluded, almost all organised workers in Norway (98.9 per cent) are affiliated with a trade union with the right to nomination. Among the established trade unions in Norway, only three unions that are not affiliated with a main confederation, have less than 10.000 members.

Annex 5: List of established trade unions in Norway

(16) SMB states that WEA Section 14-12, second paragraph requires "that the written agreement on hiring must be entered into with trade unions with the right to nomination pursuant to the Labour Disputes Act" (p. 6). This is incorrect. The provision requires the employer to be bound by a collective pay agreement with a trade union with the right of nomination. It does not require the agreement to be entered into with a representative of the trade union with the right of nomination. An agreement may be concluded with any "elected representatives who collectively represents a majority of the employees in the category of workers to be hired".

(17) Section 14-12, second paragraph does not require that the employer be a member of an employer organisation. Collective agreements between a trade union and individual employers who are not members of an employers' organisation ("substitute agreements") are sufficient to enter into local agreements on hiring from temporary-work agencies. The fact that SMB Norge is not a party to a collective agreement is therefore not an obstacle for businesses affiliated with SMB Norge to enter into agreements on hiring temporary workers under Section 14-12, second paragraph.

2.2 Derogations from statutory provisions by collective agreement

(18) WEA Section 14-12, second paragraph is part of a long-standing tradition and policy to give the social partners the option of entering into agreements on employment-related issues.

(19) Norwegian employment law is to a wide extent subject to statutory regulations in order to ensure strong employee protection. A hallmark of the Norwegian labour market model is the strong position of employers' organisations and trade unions and the combination of centrally regulated peace duties and procedures between the social partners, and rules on codetermination, employee participation and negotiations at the workplace.

(20) As in the other Nordic countries, the employment legislation grants local social partners the right to derogate from statutory requirements in several areas. This gives increased flexibility

for the undertakings, based on consultations between the management and employee representatives at the local level.

(21) There are for example extensive possibilities to derogate from working time regulations through agreements with trade unions, both at company level or at the central level (for the most far-reaching exceptions), see WEA Section 10-5, second paragraph, Section 10-8, third paragraph, Section 10-1, first paragraph and Section 10-12, fourth paragraph. The hiring in of workers is another field with such derogations, cf. Section 12-14, second paragraph.

(22) Such provisions have several advantages. The social partners are often more knowledgeable as regards industry conditions and local circumstances than the legislator. This allows them to strike a balance between the different considerations and make necessary adjustments to find effective solutions tailored to local conditions.

(23) Such rules also provide incentives to collective bargaining and thus contribute to increasing the collective bargaining coverage in the Norwegian labour market, cf. a paper prepared for discussion at the Nordic Labour Minister meeting, 22 November 2022:[1]

> *"In international literature, it is well established that state support is indispensable for the maintenance of well-functioning CB systems with high coverage (Traxler et al., 2001). Besides legal protection of the freedom to organize and engage in collective bargaining in accordance with the European Convention of Human Rights, ILO-conventions and other international law recognized in the EU treaties, such support often includes arrangements for dispute resolution, making CAs generally applicable, and tripartite cooperation in labour market and social policy issues. Another lever in the Nordic context is so-called semi-dispositive employment regulation allowing actors bound by CAs to negotiate exemptions from the law, typically pertaining to rules regarding working time, use of temp agencies, subcontractors or other non-standard contracts. Providing incentives for engagement in CB, this is in the Nordic context most prominently seen in Sweden, where most employment protection law can be exempted from through CAs, opening for negotiated flexibility."*

(24) It should be added that provisions that allow derogations from statutory employment rules by collective agreement are common in EU law, cf. Directive 2019/1152 on transparent and predictable working conditions (Article 14), Directive 2008/104 on temporary agency work (Article 5), and Directive 2003/88 concerning certain aspects of the organisation of working time (Article 17).

[1] Dølvik, J. E. (2022). "Strengthening the Nordic working life model – a precondition for successful transition to the future of work." Background paper for Nordic Labour Minister meeting.

2.3 Rules on the freedom of association

2.3.1 The Norwegian Constitution

(25) The freedom of association is guaranteed by Section 101, first paragraph of the Constitution. This includes both the positive and the negative aspects of the freedom of association.

> *«Everyone has a right to form, join or withdraw from associations, including trade unions and political parties".*

(26) According to the preparatory works, Section 101 codifies existing law:

> *"Establishment of the freedom of association and association in the Constitution willnot alter the current legal situation in Norway, and it may be assumed that a provision including it in the Constitution will have limited significance in practice.*
>
> *This is due to the fact that freedom of organisation and association is presently protected through practice, international human rights conventions and the criminal code. Codification in the constitution of the freedom of organisation and association will primarily make these rights clearer and more visible in the Norwegian legal order.»* (office translation)
>
> **Annex 6:** Document 16 (2011-2012) (in Norwegian)

2.3.2 The Human Rights Act

(27) The freedom of association is also protected by the Human Rights Act (HRA) of 21 May 1999 which incorporates The European Convention on Human Rights and The UN International Covenant on Civil and Political Rights (ICCPR), with precedence over other legislation in case of conflict, cf. HRA Section 3 and the Supreme Court's case Rt. 2001 s. 248 *Olderdalen Ambulanse* (p. 258):

> *"The freedom of workers to join trade unions is protected under Article 11 of the European Convention on Human Rights (ECHR), Article 8 of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 22 of the UN International Covenant on Civil and Political Rights (ICCPR). Furthermore, I find it relevant to mention ILO Convention No. 98 (1949) (...). The first three conventions mentioned apply as Norwegian law under the Human Rights Act."* (office translation)
>
> **Annex 7:** Rt. 2001 s. 248 (in Norwegian)

2.3.3 The Working Environment Act

(28) The freedom of association is furthermore enshrined in the WEA.

(29) Section 55 A of the former Working Environment Act of 4 February 1977 No. 4, contained the following provision:

"The employer shall not in announcement for new employees or in another manner require the applicants to give information on their views on political or religious questions, or on whether they are members of trade unions"

(30) In *Olderdalen Ambulanse*, the Supreme Court held that Section 55 A protects the positive right to freedom of association (p. 259):

"Olderdalen Ambulanse AS has not directly requested information regarding Mos and Dalvik's potential membership in such organizations, but the condition set for employment must, in my opinion, be considered unjust. The condition clearly contradicts the purpose of Section 55A, first paragraph. It is designed to reveal whether an applicant is or is not unionized, and I view the condition as an attempt to circumvent the prohibitions contained in the legal provision." (office translation)

(31) The Supreme Court applied the same reasoning with regard to the negative right to freedom of association in Rt. 2001 s. 1413 *Norsk Folkehjelp* (p. 1427):

"This reasoning [the above quote from Olderdalen Ambulanse] is in my opinion also valid for Norsk Folkehjelp's clause on obligatory organisation. An obligation to be organized in a particular trade union will largely in the same manner as a condition of being non-organized be likely to result in information about whether a job seeker is or is not a member of a trade union ... Based on the foregoing, I conclude that Norsk Folkehjelp's clause on obligatory organisation is unlawful as contradictory to Section 55 A of the Working Environment Act." (office translation)

Annex 8: Rt. 2001 p. 1413 (in Norwegian)

(32) These rights have been further strengthened in WEA Chapter 13, see Section 13-1, first paragraph, Section 13-2, first and second paragraph and Section 13-4, first paragraph:

"Section 13-1. Prohibition against discrimination

Direct and indirect discrimination based on political views, membership of a trade union, or age is prohibited.

Section 13-2. Scope of this chapter

(1) The provisions of this chapter shall apply to all aspects of employment, including:

a)advertising of posts, appointments, relocation and promotion,

b) training and other forms of competence development,

c) pay and working conditions,

d)termination of employment.

> *The provisions of this chapter shall correspondingly to the employer´s selection and treatment of independent contractors and hired employees. …*
>
> *Section 13-4. Obtaining Information on the appointment of employees*
>
> *The employer must not when advertising for new employees in any other manner request applicants to provide information concerning their views on political issues or whether they are members of employee organisations. Nor must the employer implement measures to obtain such information in any other manner"*

(33) Under Section 13-9 WEA violations of these provisions are sanctioned with compensation and redress, regardless of whether the employer is at fault for the discrimination.

(34) Section 13-8 sets out a rule on shared burden of proof, meaning that if the employee establishes a presumption of discrimination the burden of proof and the risk of doubt shift to the employer to prove that no unlawful discrimination has occurred.

3 ARTICLE 5 OF THE EUROPEAN CHARTER OF SOCIAL RIGHTS

(35) Article 5 of the Charter reads as follows:

(36) "With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be applied to impair, this freedom (…)"

(37) In a statement of interpretation on Article 5, the Committee notes that:

> *"This article sets out the principle that employers and workers have the right to form national or international associations, for the protection of their economic and social interest. The Committee noted that two obligations were embodied in this provision, having a negative and positive aspect respectively.*
>
> *The implementation of the first obligation requires the absence, in the municipal law of each Contracting State, of any legislation or regulation or any administrative practice such as to impair the freedom of employers or workers to form or join their respective organisations. By virtue of the second obligation, the Contracting State is obliged to take adequate legislative or other measures to guarantee the exercise of the right to organise and, in particular, to protect workers' organisations from any interference on the part of employers."*

(38) The Committee has held that the freedom guaranteed in Article 5 implies that the exercise of a worker's right to join a trade union is the result of a choice and that, consequently, it is not to be decided by the worker under constraints that rule out the exercise of this freedom, cf. *Confederation of Swedish Enterprise v. Sweden*, para 28.

(39) National law must guarantee the right of workers to join a trade union and provide effective sanctions and remedies for failure to respect this right. Trade union members must be protected by law from any detrimental consequences that their trade union membership or activities may have on their employment, cf. C*onclusions 2010, Republic of Moldova*. In cases where discrimination has occurred, national law must provide for adequate compensation proportionate to the damage suffered by the victim, cf. *Conclusions 2004, Bulgaria*.

(40) In its statement of interpretation on Article 5, the Committee has stated that domestic law may restrict participation in various consultations and collective bargaining procedures to representative trade unions as long as the following conditions are met:

- decisions on representativeness does not present a direct or indirect obstacle to the forming of trade unions,
- areas of activity restricted to representative unions does not include key trade union prerogatives,
- and the criteria used to determine representativeness are reasonable, clear, predetermined, objective and prescribed by law.

4 SECTION 14-12, SECOND PARAGRAPH OF THE WEA IS IN FULL CONFORMITY WITH ARTICLE 5 OF THE REVISED EUROPEAN SOCIAL CHARTER

(41) The Government considers that Section 14-12, second paragraph of the WEA complies with Article 5 of the Revised European Social Charter. The provision does not impose any obligation or exert any pressure to organise or join a union.

(42) The WEA Section 14-12, second paragraph does not deprive employees of benefits or rights if they are not organised or members of specific trade unions, nor does it grant advantages to specific unions or their members.

(43) The provision merely allows undertakings that are bound by a collective agreement with a trade union with more than 10.000 members to enter into agreements on the hiring in of temporary agency workers.

(44) The provision is consistent with the long-standing Norwegian tradition of semi-dispositive legislation, allowing undertakings bound by collective agreements to derogate from the WEA. Such semi-dispositive provisions aim to encourage enterprises to enter into collective agreements, thus contributing to an increase in collective agreement coverage. Increased unionisation and collective agreement coverage is a priority objective for the Norwegian government, as well as for the European Union.

(45) It is a fundamental prerequisite for entering into a collective bargaining agreement that the employee side is organised, cf. the Labour Dispute Act Section 1 (e). Any semi-dispositive provision could hence theoretically lead employers to prefer that their employees join a union.

(46) The Government recalls that it is the undertaking that wants to hire in workers, that benefits from a hiring agreement under WEA Section 14-12, second paragraph. The aim of increasing employer flexibility is unlikely to influence *employees*' choices about joining a trade union or which union to join. There is no evidence that Section 14-12, second paragraph has led to employees feeling pressured to join a union.

(47) In any event, Section 13-1 of the WEA prohibits discrimination based on union membership. The prohibition covers discrimination both for being a union member and for not being a member and applies to all aspects of employment.

(48) The distinction between trade unions with and without the right to nomination (more than 10.000 members) in WEA Section 14-12, second paragraph, does not conflict with Article 5. As explained in Chapter 4 above, Article 5 allows certain collective bargaining processes to be restricted to representative unions. Section 14-12, second paragraph complies with the conditions set out in the Committee's statement of interpretation on Article 5.

(49) The provision imposes no barriers to employees' ability to form trade unions, nor does it restrict smaller unions from representing their members' interests through negotiations with employers.

(50) The possibility to enter into an agreement on temporary hiring is not reserved for unions with more than 10.000 members. If the *undertaking* is bound by a collective agreement with such a trade union, any elected representative who collectively represent a majority of the employees in the category of workers to be hired, may enter into such an agreement.

(51) The criteria used to determine representativeness are reasonable, clear, predetermined, objective and prescribed by law. Section 39 of the Labour Disputes Act contains a definition of the trade unions that are considered representative, related to an objective assessment of the number of members in the trade union, thus allowing neither discretion nor abuse.

(52) Based on the above, the Government submits that Section 14-12, second paragraph of the WEA, is in conformity with the right organise under Article 5 of the Charter. The Government therefore asks the Committee to find that no violation has occurred.

• • •

Oslo, 20. November 2024

OFFICE OF THE ATTORNEY GENERAL
FOR CIVIL AFFAIRS

/sign/
Ida Thue
Agent

/sign/
Anne Karine Plahter
Director General
Ministry of Labour and Social Affairs


Kaija Bjelland
Agent