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EUROPEAN SOCIAL CHARTER

Comments by FNV

on the 11th national report

on the implementation of the European Social Charter

submitted by

THE GOVERNMENT OF THE NETHERLANDS

(Articles 2, 4§3, 4§5, 5, 6, 22 and 26 for the period
01/01/2013 – 31/12/2016)

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CYCLE 2018

Comments of Netherlands Trade Union Confederation (FNV) on the 30th ESC report of the government of the Netherlands

Article 2 – All workers have the right to just conditions of work

With regard to the above, the FNV wishes to point out that it is not so much the regulations that cause problems, but the compliance with these regulations by the Inspectorate SZW is a completely different story.

In this perspective, the FNV would like to mention that it has already been indicated several times to the Inspectorate SZW that a considerable number of employers do not comply with the various (above-mentioned) rules and that the Inspectorate SZW should take more adequate action against this by carrying out more checks and possibly fining the employer in the event of an infringement.

In this light, the FNV wishes to emphasise that there are primarily many (severe) malpractices in sectors where many migrants (from mainly Eastern Europe) are being employed. Here, especially the foreign employees work long hours and the working conditions are far below the level of the various laws and regulations, while Article 2 ESH covers "all employees" and hence also foreign employees who are working in the Netherlands.

In view of the above, the FNV would therefore like to draw attention to the capacity of the Inspectorate SZW, which is currently insufficient to adequately enforce the regulations in this field. The FNV is well aware of the fact that things are getting bigger and more complex, but more capacity is required to be able to comply with the various requirements of Article 2 ESH in practice.

Article 4 – The right to a fair remuneration

Article 4§3

Within the context of equal pay for men and women, first of all the FNV would like to refer to the "Global Gender Gap Report 2017". In this report, the Netherlands again fell compared to last year (from place 16 to place 32). As shown in the aforementioned chart, women are still paid 5 to 7% less than men for the same work. Although the difference is decreasing, the FNV is still of the opinion that everyone who does the same work, should receive the same wage.

The FNV also wishes to emphasise that in 2012 the gender pay gap in the public sector was approximately 4.5% is and has now increased again to 5%. This is a development that the FNV is deeply concerned about. Whereas the pay gap in the private sector is narrowing further, it is increasing in the public sector. Against this background, the FNV wishes to point out that the should take the lead.

In addition, some countries have shown that government control on this subject can have positive effects. Within the context, the FNV wishes to refer to Iceland, where businesses must prove every 3 years that men and women receive the same pay for the same work. The FNV would also like to point out that Iceland is at the top of the Global Gender Gap Report 2017. The SZW Inspectorate must actively monitor this. Therefore, extra SZW inspectors are essential.

Finally, (according to the table above) the difference appears to be the biggest among women with higher education. Men are apparently more successful than women. Therefore, the FNV hopes that this will change, on the one hand, by improving the negotiation skills of women (courses), on the other hand, by offering women the same services that men have been offered.

Response of the NL government:
The Dutch Federation of Trade Unions (FNV) has four remarks; on the Dutch position in the Global Gender Gap Report 2017, the increase of the pay difference between men and women in the public sector, the Labour Inspectorate and the difference in pay with regard to higher educated women.
To start, it is vital to state the difference between the overall gender pay gap and pay discrimination. The Government defines the overall gender pay gap as the difference between the average earnings of men and women as a percentage of the average earnings of men per working hour.
The pay gap is calculated by comparing the combined earnings of all male employees with the combined earnings of all female employees. The term 'gender pay gap' must be distinguished from the term 'pay discrimination'. Pay discrimination refers to women receiving less pay than men for work of equal value.

With regard to the Dutch position in the Global Gender Gap Report and the pay difference between higher educated men and women, the government highlights that the pay gap is diminishing and that the government has taken several actions to further diminish the pay gap between men and women, be they lower or higher educated.[1]

Secondly, the Central Bureau of Statistics (CBS) concludes that there is a steady decrease in the corrected pay gap for government employees in the period under review (2008-2014). In order to determine the trend, CBS has estimated a line based on the four adjusted pay differentials for the years 2008, 2010, 2012 and 2014. There is a slight increase between 2012 and 2014. As an explanation for this, it is important to realize that when determining the difference in remuneration, use is made of survey data. This means that uncertainty margins around the outcomes must be taken into account . Therefore, the government cannot conclude that there is a trend break.

Thirdly, the Labour Inspectorate (Inspectie SZW) focuses on (non)discriminatory policies on the work floor, in accordance with the Working Conditions Act (Arbeidsomstandighedenwet). In order to ensure a low threshold for employees to report (assumed) pay inequality, employees can report to a municipal antidiscrimination bureau, a civil court or civil service tribunal and/or the Netherlands Institute for Human Rights (College voor de Rechten van de Mens, CRM). The government has decided upon this policy according to the belief that civil law is the most efficient way of dealing with complaints of individuals, rather than criminal law.

Lastly, the government would like to point out that both social partners (employers and employees) and works councils in the private sector can exert influence regarding equal pay. Social partners watch over the application of so-called wage scales ((that is: general remuneration arrangements for defined jobs) as they are laid down in collective agreements. The works councils work under the Works Councils Act (Wet op de

[1] Kamerstukken II, 2017/18, 26150, nr. 165.

ondernemingsraden), which gives these councils a statutory tool for promoting equal pay at their company.

Article 4§5
Within the context of § 5 the FNV would first of all like to draw attention to the fact that currently there is too little capacity at the Inspection SZW to effectively monitor this. In addition, the FNV has detected that employers devise other arrangements in order to not comply with these provisions. Employers pay wages in the right way, but then overcharge employees for housing, etc. As a result, employees do not actually have free access to the statutory minimum wage.

Response of the NL government on capacity of Inspection SZW:
The Inspectorate SZW is selective in its supervision. It determines its priorities on the basis of risk analysis that cover the entire policy field of the Ministry of Social Affairs and Employment. In this way the Inspectorate SZW can use its capacity efficiently and successfully where it is really needed

To intensify enforcement and combating fraud the new Dutch government has decided to spend an additional 50 million each year on strengthening the enforcement chain in which the Inspectorate SZW operates.

These resources will enable the Inspectorate SZW to improve and intensify the supervision on, among other things, the Minimum Wage and Minimum Holiday Allowance Act, Bogus Constructions, unsafe and unhealthy labour circumstances and
prevent labour exploitation (decent work).

Response of the NL government on statutory minimum wage:
The government keeps monitoring the recently adopted regulation to prohibit deductions from and set-offs against the statutory minimum wage which entered into force on January 1 2017.

Negative conclusion A
Within this context the FNV wishes to indicate that lowering the minimum wage age from 23 to 22 years is a step in the right direction. In this light, age discrimination is a major problem. However, the FNV does take the view that even lowering to 21 years is still not the desired end result. In the Netherlands, everyone is considered to be an adult from the age of 18. It is therefore only logical that young people aged 18 and over should also receive adult wages. In addition, this measure has led to a slight increase in youth wages, but the current percentages of the minimum wage are not yet sufficient to be considered decent wages. The FNV sees sufficient scope for improvement in this field.

Response of the NL government
In reaction to the comment of FNV, the government wishes to highlight that the relevant Bill entered into force on July 1 2017 and that the age at which workers become entitled to the adult minimum wage will be reduced still further to 21 as of 1 July 2019. The government will monitor the impact this Bill has on young workers, mainly with regards to their employment.

Negative conclusion C:
The FNV would like to point out that the current government has plans to amend the probationary period clause. When an employer offers an employment contract for an indefinite period of time directly to the employee, it is possible to agree a trial period of up to 5 months (currently 2 months). For a fixed-term employment contract, but longer than 2 years, the government wants to adapt the current scheme to 3 months (now 2 months).
The FNV considers this to be a very bad change, because in the near future employees will receive an employment contract for an indefinite period of time, but will be deprived of their rights for up to 5 months. Although fixed-term employment contracts do not offer many certainties either, in this context a fixed-term contract of 5 months offers more certainty than the current plans of the government.

Response of the NL government
The FNV remarks on the recently presented coalition agreement. The legislation needed to implement these plans has yet to be drafted. The government can at this stage not yet anticipate the actual implementation.

Article 5 – The right to organise

Question a:
As we pointed out in our previous comments, the situation has changed since the economic crisis. The trend is still that employers want to work as cheaply as possible. In this light, the FNV still notices a trend that more so-called "yellow unions" are emerging. Trade unions that are either not independent, or only conclude collective agreements for financial reasons.

In addition, the FNV has noticed that various laws contain different definitions of the term "trade union/employee organisation". This makes it difficult for the "real" trade unions to take legal action against the yellow unions. Therefore, the FNV is of the opinion that an unequivocal legal description of the term 'trade union/employee organisation" can contribute to a solution against trade unions whose primary objective is not to mainly defend employee interests.

Finally, the FNV wishes to raise once again the position of the ACM (the successor of the NMa). After all, this still has not changed.

Article 6 – The right of workers to bargain collectively

First of all, the FNV wishes to comment on the case law since abovementioned judgements of the Supreme Court (Enerco and Amsta). For these judgements of the Supreme Court, compliance with the so-called ground rules was an independent condition for the lawfulness of a strike. At present, the ground rules are no longer a condition for the admissibility of the strike, but they are points of view when assessing whether a suspension of the strike should be restricted or prohibited. The Supreme Court has responded to the ESCR's criticism in the aforementioned judgements to a large extent, which has repeatedly stressed that the question of whether a strike is lawful can only be answered in accordance with the strict standard of Article G ESC (previously Article 31 ESH). Despite the fact that the Dutch case law should therefore be more in line with Article 6 Paragraph 4 and Article G, the FNV concludes that the embedding of the old independent ground rules as points of view within the context of Article G ESC seems to lead lower judges to apply the Article G test very broadly and in any case more widely than before. The FNV has noticed that the threshold is quickly taken by

lower judges to mean that there is a dispute of interests in the context of Article 6 of the ESC, which has given rise to the right of collective action as such. Subsequently, a great deal of attention is paid in the judgements to the question of whether there is a restriction on the basis of Article G ESC. The FNV is of the opinion that with the creation of the right to collective action there are still very limited possibilities for limiting this fundamental right of trade unions, because of the restrictions as referred to in Article G of the ESC. This is a limited test and not a broad test, as is currently applied in the lower courts.

In addition, the FNV has noticed that in the Amsta ruling, the interest of the employer is now also covered by "the rights and freedoms of others" pursuant to Article G ESC. This is remarkable and incorrect, since it was assumed until then that the employer's own damage in the event of a regular strike does not justify a restriction pursuant to Article G simply because the employer is not a third party within the meaning of Article G ESC. For the sake of completeness, the FNV refers to the relevant legal considerations of the Supreme Court (Amsta):

> *3.3.3*
> *In the considerations of this judgement about the system of the Article 6 and G ESC and the relationship between these provisions mean that the "ground rules" are no longer an independent criterion to assess whether a collective action is lawful. The compliance is therefore no longer an independent prerequisite for this lawfulness. This does not alter the fact that these ground rules (not only those mentioned by the Court of Justice in this case) are still relevant in answering the question of whether the exercise of the right to collective action in a specific case should be restricted or prohibited pursuant to Article G ESC. Although they are no longer a condition for the admissibility of the strike as such, they do still have a point of view as to whether the strike should be restricted or prohibited. However, the importance of the rules as perspectives is not always the same. In the case of for instance, a general strike they have a great deal of weight, but this is to a lesser extent the case when there is a 'lightning strike action' of limited duration which means that no major damage is caused.*
> *It is consistent with the foregoing that it is no longer generally accepted as a condition for the admissibility of collective action to be used as a last resort, as was still envisaged in the judgment of 28 January 2000 mentioned above.*
>
> *3.3.4*
> *The above means that, if the organisers of a collective action show that the action can reasonably contribute to the effective exercise of the right to collective bargaining, the action falls within the scope of Article 6, exordium and under 4, ESH and must therefore, in principle, be regarded as a lawful exercise of the fundamental social right to collective action. It is then to the employer or the third party to demand that the exercise of the right of collective action be limited or excluded in the specific case, in order to make it plausible that this restriction or exclusion is justified by the criteria laid down in Article G ESH.*
> *The latter is only the case if restrictions to the right to collective action are urgently needed from a social point of view (for the latter see) Regional Road Safety Body 4.3 of HR 21 March 1997, ECLI:NL:HR:1997:ZC2309, NJ 1997/437 (Regional transport)).*
>
> *3.3.5*

In assessing whether there is an urgent need to limit or exclude the exercise of the right of collective action in the particular case, from a social point of view, the court must take all circumstances into account (see HR 30 May 1986, ECLI:NL:HR:1986:AC9402, NJ 1986/688 and HR 21 March 1997, ECLI:NL:HR:1997:ZC2309, NJ 1997/437). This may include, inter alia, the nature and duration of the strike, the relationship between the strike and the objective pursued, the damage caused to the interests of the employer or third parties by the strike, and the nature of those interests and damage. In this respect, it follows from what has been considered in point 3.3.3 above that the answer can have (in certain circumstances even decisive) significance to the question of whether the ground rules have been complied with."

As mentioned above, several judgements of lower courts have since followed within the framework of 6 Paragraph 4 ESC, in which, in the opinion of the FNV, constraints to collective actions have been imposed that are not in line with the restrictive grounds for limitation set out in Article G. The FNV therefore takes the view that in that light the Netherlands do not comply with Article 6 Paragraph 4 ESC, as the right to strike is more limited than permitted by the courts.

With regard to the interpretation of the case law on the "socially compelling reason", the FNV takes the view that it violates Article G ESH and refers to the following rulings in which this has not been applied correctly:

- Ktr. Amsterdam, 22 June 2016, ECLI:NL:RBAMS:2016:3995 (Municipality of Schagen/FNV)
- Ktr. Haarlem, 8 July 2016, ECLI:NL:RBNHO:2016:5638 (Easyjet/VNV)
- Ktr. Haarlem, 11 August 2016, ECLI:NL:RBNHO:2016:6696 (KLM/FNV)
- Hof Amsterdam, 26 August 2016, ECLI:NL:GHAMS:2016:3472 (FNV/KLM)
- Ktr. Breda, 22 December 2016, ECLI:NL:RBZWB:2016:8222 (NS/VVMC)

The Supreme Court was right in itself to consider that it is up to the employer or the third party – who demands that the exercise of the right to collective action in the specific case must be limited or excluded - to make it plausible that this restriction or exclusion is justified in accordance with Article G ESC.

In the aforementioned case law of lower courts, the FNV has noticed that courts too easily assume that there is an urgent social interest, in which the test of Article G has not been applied correctly and without the employer having properly proved this in any way, whereas, according to the Supreme Court, in this respect the burden of proof lies with the employer. In addition, lower courts repeatedly assume an urgent social interest without any further justification or with very limited substantiation, while the court also has an aggravated duty to state reasons. As a result, the courts too easily adopt a restriction pursuant to Article G ESC.

In view of this, the FNV wishes to briefly discuss the above case law and explain why the outcomes of these lawsuits are in breach of Article 6 Paragraph 4 ESC juncto. Article G ESC.

Ktr. Amsterdam, 22 June 2016, ECLI:NL:RBAMS:2016:3995 (Municipality of Schagen/FNV)

The issue at stake here was whether the FNV was allowed to strike in particular students' transport (transports of students with structural limitations/disability). According to the court,

this strike was covered by Article 6 Paragraph 4 ESC, but had to be limited because students were highly dependent on the students' transport:

> *"Balancing the mutual interests, it is considered that the social interest in ensuring that students who are dependent on the provision of students' transport for their schooling can actually go to school outweighs the FNV's interest in the strikes, and that a limitation of this is urgently needed […]* (judgment 4.5).

In this judgment, it clearly emerges that the Dutch court on the one hand believes that it concerns collective action within the meaning of Article 6 Paragraph 4 ESC and, on the other hand, stretches the constraints of Article G ESC in a completely erroneous manner. The fact is that a number of children, even if they belong to a vulnerable group, who cannot attend school on a single day (on time), is not a question of public order, national security and/or the public health nor did this strike involve exposure to danger, which could harm their mental or physical health. After all, the strike was supported by the parents of these children. Hence there was no disproportionate violation of the rights or freedoms of others.

Ktr. Haarlem, 11 August 2016, ECLI:NL:RBNHO:2016:6696 (KLM/FNV)
In this case, led by the FNV, KLM's ground staff want to strike during the 2016 Summer Holiday. Also in this case, the court ruled that it was a strike covered by Article 6 Paragraph 4 ESH as a result of which the strike can only be limited under the provisions of Article G ESH. The court then prohibits collective actions from 11 August 2016 to 4 September 2016. KLM and Schiphol took the following positions:

> *"Furthermore, the damage KLM suffers is disproportionate and in relation to the targets set by the strikers." (*judgment 4.10)

> *"[…]In this connection, Schiphol Airport points in particular to the summer peak in July and August, the recent breakdown of the baggage handling system, to which the accumulated arrears still have to be cleared, and the extra security measures that have been in force at Schiphol Airport for a few days now in connection with the terrorist threat, which not only create additional pressure on the Schiphol organisation, but also contribute to feelings of unease and tension among passengers and Schiphol Airport employees" (*judgment 4.11)

However, neither KLM nor Schiphol substantiates this problem with concrete data and evidence. Nor had the Dutch authorities, which are pre-eminently concerned with national security, applied to the courts for a ban on strikes. Nevertheless, the court is in agreement with KLM and Schiphol Airport:

> *"The Court in preliminary relief proceedings therefore considers in view of the immense pressure of holidays it was at this point in time plausible that the damage caused by strikes, although perhaps to some extent exaggerated by KLM but on the other hand erroneously downplayed by the FNV would be likely to be high. This consequence and the associated damage, combined with the aftereffect that this will have had and the existing problems with baggage handling at Schiphol Airport in the past week, prompted the Court in preliminary relief proceedings, particularly in view of the current terrorist threat, in connection with which extra security measures are currently in force at Schiphol Airport, to limit the collective actions announced and to provisionally prohibit more concrete work interruptions. The court in preliminary*

relief proceedings considered that, with the attack at Zaventem airport still fresh in mind, that it is common knowledge that airports can be the prime target of terrorists.

[…]

The Court also considers it important that the operator (Schiphol Airport) and the airlines (including KLM) are (jointly) responsible for the implementation of various security measures. The fact that agreements can be made within this context which result in parts of the airport (for example the departure hall) not being more crowded does not affect the foregoing in the opinion of the Court of Appeal." (judgment 4.13)

The FNV takes the view that a terrorist threat could be a reason for restricting or banning of strikes, but it must be proven by the employer and of course be well substantiated by the Court. Adopting terrorism as a fact of general awareness is in this case not the right way to substantiate. In addition, the FNV is prepared to take measures to prevent chaos, but this is completely set aside by the Court, even without any further substantiation.

Court of Amsterdam, 26 August 2016, ECLI:NL:GHAMS:2016:3472 (FNV/KLM)
This is the appeal of ECLI:NL:RBNHO:2016:6696 (KLM/FNV). The FNV appealed against the verdict of the Subdistrict Court in Haarlem and again took the position that the strike should not have been prohibited. Nevertheless, the court also states that the strike should be temporarily prohibited pursuant to Article G ESH:

"The consequences that a strike in the manner advocated by the FNV during the period up to and including 4 September 2016 will have for the period up to and including 4 September 2016, in view of the considerations set out above, will be so far-reaching that they justify a restriction of the right of collective action under Article G of the ESH, also in view of the way this Article by the HR is applied, a constraint of the collective action right justify. The prohibition of the strikes advocated by the FNV until 4 September 2016 is proportionate in this respect. In addition, the court of Appeal takes into account that from 5 September 2016 onwards, the FNV will provide sufficient resources to try to pursue its objectives." (judgment 4.9)

Here, too, the test of Article G is incorrectly applied, partly by reference to the manner in which Article G is applied by the Supreme Court. Furthermore, the court did not sufficiently comply with its duty to state reasons. In addition, within this context, the FNV would like to draw attention to the fact that the court stepped into the shoes of the trade unions by concluding that strikes can also be held after 5 September 2016 and the objective of the FNV can be achieved, which, according to the FNV, is contrary to Article G ESH.

Ktr. Breda, 22 December 2016, ECLI:NL:RBZWB:2016:8222 (NS/VVMC)
In this case, a train drivers' union wanted to strike on 23 December 2016. Again, the court ruled that this concerns a strike covered by Article 6 Paragraph 4 ESH and that it can only be limited by Article G ESH. The court then prohibited the strike, on the one hand, because of the fact that there is a terrorist threat , and, on the other hand, because according to the court, the parties had not yet finished negotiating:

"The letter offers NSR the opportunity to ask NSR for an explanation of the requirements. NSR did so in time with its letter of 15 December 2016. The Parties are still in negotiations with each other. From the explanatory notes in the hearing, the

court of Appeal concluded that constructive consultations with VVMC, and the other unions, would continue. Currently, it cannot be said that a negotiation result satisfactory to VVMC is not possible. These facts and circumstances make VVMC's importance in a strike on 23 December 2016 less important. Moreover, they claim that a strike on 23 December 2016 is disproportionate.

Once again, the application of Article G ESH is incorrect and ill-motivated. The FNV also notes on this case that the ultimate remedy test, which had just rightly been released by the Supreme court in Enerco and Amsta, is again being applied contrary to Article G ESH.

In addition, there is also a ruling delivered by the court in Amsterdam on 25 February 2016 (Jumbo/FNV). The court ruled that the announced strike was premature since Jumbo had not yet reported under the SER-merger rules of conduct. Within this context, the FNV took the view that this was a complete misinterpretation of Article 6 Paragraph 4 ESH and Article G ESH. In fact, the court still cites the ultimate remedy test while there is no restriction on the grounds of Article G ESH:

"At the moment, there is no concrete threat to the maintenance of employment at the location of Centrale Slagerij.

[…]
For this situation , in the opinion of the court in preliminary relief proceedings, the declared strike is disproportionate to the objective pursued and a restriction of the fundamental social right to collective action is necessary. A general strike as announced will lead to considerable damage, not only for Jumbo itself but also for its franchisees, while a general strike will also create the risk of meat spoilage.

[…]

Under the same circumstances, any other collective action which will force the company to (almost) completely close down for at least one whole day should not be regarded as lawful." (judgement 4.7.)

"If and as soon as FNV accepts Jumbo's offer to enter into consultations about the further course of events in the (proposed) sales process, a new situation will arise, in which the prohibition referred to in 4.7 n no longer applies and in which it will depend on the circumstances of the case and the extent to which collective actions are permissible." (judgment 4.8)

The collective action announced by the FNV was prohibited. When a strike is illegitimately OR unlawfully prohibited, the means of exerting pressure by means of the strike is gone. As this violates the right to collective bargaining and strike this obviously causes great damage to the trade unions having called for the strikes.

Finally, with regard to the case law, the FNV would like to refer to a ruling of the Sub district Court of Haarlem of 26 April 2017 (Holland Casino/FNV). The employer wished to do the following:

"[The fact that the court in preliminary relief proceedings] orders the defendants, each separately, to notify Holland Casino in writing of any collective action against

Holland Casino no later than six hours prior to the commencement of such strikes or another reasonable period to be determined by a proper judicial authority […] (judgment 3.1 under a).”

According to Holland Casino, the reason for such a notification - and therefore the restriction of the strike – is safety. The court then considered that the various points raised by Holland Casino should in principle be discussed in the safety consultations. However:

“There is no doubt that safety will be served by a formal notification” (judgment 4.16)

“On the other hand, the absence of each advance warning cannot be regarded as justified from the point of view of safety” (judgment 4.18).

Therefore, in the end, the court rules as follows:

“The trade unions must announce any collective action against Holland Casino in writing no later than one hour prior to the commencement of such action as is mentioned below in the dictum.
This period shall be extended to two hours if and as soon as Holland Casino commits in writing that it will not use the extra time to deploy personnel from elsewhere, except insofar as this is necessary to maintain the minimum occupancy level of expert HSE and staff.” (judgment 4.19).

The court therefore allowed Holland Casino’s claim to the extent that the FNV had to observe a notice period of 2 hours if Holland Casino did not promise to place strike breakers in.

This ruling (just like the Easyjet/VNV ruling) highlights the problem that employers are trying to break a strike having staff from other locations work instead of the strikers. In both cases, employers therefore also ask for a very long period of notice in order to achieve this. However, in the case of Holland Casino/FNV, the court links the issue of the strike breakers to Article G ESH. This is legally incorrect. The court even ruled that a strike may be further limited (from one to two hours’ notice) if the employer promises not to deploy strike breakers. The court therefore imposes a restriction on the FNV in the context of an entirely different ground than Article G ESH. If Holland Casino does <u>not</u> abide by the ban on the strike breakers, it is not a problem for the FNV to make a notification one hour in advance on the grounds of “safety”. The FNV can therefore only conclude that the court was completely off-limits on the imposition of restrictions under Article G ESH.

Within the context of the ban on strike breakers, the FNV would like to point out that strikes are increasingly more often broken by the employers by way of strike breakers. These are (predominantly) seconded employees (e.g. temporary employees) who take over the work of the strikers. As a result, the employer suffers relatively little damage as a result of the strike and the strike can last very long. Article 10 Waadi provides for a legal ban on making labour available to companies, where there is a strike. If If there is a suspicion that a strike will be broken via strike breakers and Article 10 Waadi is breached, this may be reported to the Inspection SZW. In the short term, the Inspectorate SZW will then check this and take action against it. Only the lender can be considered an offender and there is no legal sanction for a breach of Article 10 Waadi. There is only the option of starting a civil procedure.

However, case law has shown employers have to pay such low damages in the event of a detected infringement that it will be financially worthwhile to break strikes. In this respect, also see: Hof 's-Hertogenbosch, 8 March 2016, ECLI:NL:GHSHE:2016:864 (Vlissingse Bootlieden), in which the employer was ordered to pay a compensation of only € 15,000.00 to the FNV, while the advantage gained by the employer is many times greater. This directly undermines the right of workers to strike as provided for in Article 6 Paragraph 4 ESH. In this light, FNV would also like to mention that there is a hefty penalty clause in Article 10 WAADI that can offer a solution to solve this problem.

Regarding the ruling between Holland Casino and the FNV, the FNV would also like to mention that, in the context of Article G ESH it is first of all necessary to consider whether the company under strike is covered by an Article G ESH sector. This is a sector in which public order, the national security and/or public health are in principle always threatened by the strike. This includes the police, ambulance services and the fire brigade.
If the answer to this question is therefore positive, the trade unions will have to make arrangements during the strike and a strike may be limited if the employer makes it plausible that it causes problems and must therefore be properly motivated by the court if he agrees with the employer's position. It is not enough to take the view that this is a well-known fact without substantiation.
In accordance with Article G ESH, if the question of whether the discontinued operation is covered by Article G ESH sector is to be answered in the negative, it should in principle be possible to terminate without any restrictions/provisions. If by way of Article G ESH there is still an aspect where provisions must be made (e.g. security), the employer must make this plausible on solid grounds and the court must also state explicit and thorough reasons if the court agrees with the position of the employer (obligation to state reasons). To date, the FNV is of the opinion that this does not happen correctly.

The FNV takes the view that any restriction by a court – of any kind – is a restriction on the right to strike and thus on its fundamental right laid down in Article 6 Article 6 Paragraph 4 ESH. A restriction of the right to strike is only possible if it complies with Article G ESH. The FNV can therefore only conclude that in a large number of rulings the right to strike is too much restricted and therefore affects a fundamental right of the Dutch trade unions.

Article 22 – The right to take part in the determination and improvement of the working conditions and working environment

In the light of this, the FNV wishes to express its concerns about the current capacity of the Inspectorate SZW. In various situations, including these, there are not enough inspectors. The FNV understands that matters are more complex than in the past and employers are also more likely to turn to a lawyer for possible fines. However, this does not alter the fact that the current capacity of the Inspectorate for SZW is insufficient to ensure that it can be properly enforced. Within this context, the FNV wishes to refer to for example the 2017 ILO report on C-152. These comments are based on the figures provided of the Inspection SZW itself:

> **"*Part V Results inspections***
> *The government reports about the inspections between 1 May 2012 and 31 December 2016. During that time,* ***105 accidents*** *occurred as a result of dock work that were reported to the Labour Inspectorate;* ***seven of these accidents had a fatal outcome****. The Labour Inspectorate has only* ***investigated 3 accidents*** *over this period, with no significant discoveries being made. Lack of transparency in decisions on what kind of accidents are investigated persists.*

FNV considers that the report on this point is insufficient, and argues first of all that any accident is an accident too much, especially if this leads to the death of a worker. In addition, the FNV ascertains that fatal accidents should be properly investigated by the Labour Inspectorate to deal with possible diseases and to prevent (fatal) accidents in the future. Evaluating the report of the Dutch Government, FNV can only conclude that insufficient inspections are held in the ports and there is insufficient priority by the Labour Inspectorate in the case of accidents at dock work in the ports. As a consequence, an unsafe work situation is created for this group of employees. The FNV wishes to refer to its comments on Convention 81 and 129 for a more extensive comment on this subject."

Response of NL government:
See response under Article 4§5

Article 26 – The right to dignity at work

Conclusion A:

In this light, the FNV takes the view that the Working Conditions Act in principle offers sufficient possibilities to protect employees against psychosocial workload. However, within this context the FNV is also of the opinion that there is insufficient capacity within the Inspectorate SZW as a result of which employees have insufficient protection "in practice" against psychosocial workload.

In addition, the FNV would like to draw attention in general to the various abuses committed against foreign workers (mainly from Eastern Europe). There are instances of a serious psychosocial workload here, but it seems to be a problem that still cannot be adequately addressed so far. Although the FNV does not blame the Inspectorate SZW alone for this, the Inspectorate SZW does have a major role to play in this field.

Question a and b:
With regard to sexual harassment, the FNV would like to point out that there has also been a lot of publicity in the Netherlands recently. Even though the FNV cannot ignore the fact that this may have become a hype, it cannot be denied that sexual harassment is apparently a major problem in the workplace.

This is often resolved internally by means of a termination agreement for either the victim or the perpetrator. By means of this agreement, the employment contract ends with mutual consent. This is usually offset by a fee which, in principle, is based on the current transitional allowance. In the case of the victim, there is often also a confidentiality clause in such a termination contract, which also often includes that the victim is not allowed to disclose the reason for the termination contract. Within this context, the FNV takes the view that such contracts of silence should be prohibited in order to protect the victim. These contracts of silence prevent many victims from coming forward.

Since it is clear that such contracts are frequently used, the FNV proposes that such clauses in contracts - which oblige employees to remain silent on misunderstandings - should be legally prohibited, as is the case, for example, in the UK.

Question h:
For both sexual harassment as well as "ordinary" intimidation/bullying the FNV would like to point out that it is very difficult to obtain compensation on the basis of the Civil Code. For both Section 7:658 of the Dutch Civil Code and 6:162 of the Dutch Civil Code it is first and foremost a requirement that there must be tangible damage. Intangible damage is difficult to prove in this regard. In addition, when it comes to psychological harm, it is also difficult for the victim to prove the causal link of the damage.

At the same time, it is also a high threshold for a victim to enter into such a procedure, especially if the victim in question is still employed by the company concerned (and the alleged perpetrator is a (direct) manager).

The FNV believes that for instance, government control could be a solution to this problem. To this effect, a system could be envisaged where every three years employers must prove to the Inspectorate SZW that that they comply with the Working Conditions Act on this subject. Within this context, the FNV would like to refer to Iceland's system of equal pay for men and women.

Response of NL government concerning sexual intimidation:
The government recently sent a letter to the Parliament (Annex 3: letter dated 24 November 2017) with its view on undesirable sexual behavior, sexual intimidation and sexual violence, especially at the workplace and the position of the government with respect to this issue.