EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

31 March 2010

Case document No. 3

European Trade Union Confederation (ETUC)/
Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/
Confédération des Syndicats chrétiens de Belgique (CSC)/
Fédération Générale du Travail de Belgique (FGTB)
v. Belgium
Complaint No. 59/2009

SUBMISSIONS FROM THE GOVERNMENT ON THE MERITS

[TRANSLATION]

registered at the Secretariat on 17 March 2010

Memorial of the Belgian government

on the merits of the complaint

in collective complaint

No. 59/2009

Brussels, 15 March 2010

Contents

Summary

These are the main elements of the Belgian government's case:

- *The right to strike has broad recognition in Belgium, in both legislation and case-law. The European Social Charter is also respected.*
- *Belgium considers that the only real solution to collective disputes is to be found through social dialogue, mediation and conciliation. This is why, more than any other country, since 1945 Belgium has invested continuously in social dialogue and conciliation. As a result, in the vast majority of collective disputes social dialogue has led to compromise.*
- *However, in democratic states governed by the rule of law, it is impossible to prevent persons from turning to the courts when they consider that they are being harmed by actions that are not inherent in the peaceful exercise of the right to strike. This legal procedure is only used in exceptional cases and is hedged about with all imaginable procedural safeguards to protect the rights of the defence.*
- *In 2002, the complainants themselves rejected and blocked a government proposal to improve this legal procedure still further by giving precedence to social conciliation and appointing specialist judges, to further strengthen the rights of the defence.*

Introduction

In June 2009, the three Belgian employee representative organisations (CGSLB, CSC and FGTB), together with the European Trade Union Confederation (hereafter "the complainants"), lodged a collective complaint against the Kingdom of Belgium (hereafter "the defendant"). The complaint was registered under the number 59/2009.

The defendant entered no objections to its admissibility.

The complainants' main contention is as follows[1]:
"[The complainant trade unions] maintain that court intervention in collective disputes since 1987 under the urgent procedure, particularly in the form of restrictions on the activities of strike pickets, is in breach of the right to strike and to collective action, and is therefore incompatible with Article 6§4".

[1] Page 2 of the complaint

In support of this contention, they adduce a number of arguments, in response to which Belgium wishes to make a series of comments.

I. The facts

1. Recognition of the right to strike in Belgium[2]

The complainants maintain that "explicit recognition of the right to strike in Belgium was not granted by a constituent assembly or by parliament", but was the result of a Court of Cassation decision of 21 December 1981[3]. In other words it lacks a coherent legal framework, which the defendant disputes. The following is an overview of the rules applicable to the settlement of collective disputes.

1.1. Background

1.1.1. 1830-1945[4]

When it became independent, Belgium adopted the Napoleonic criminal code. Article 414 of the code made any form of association punishable by imprisonment and a fine. Articles 414 and 415 made it an offence for workers to abandon their work or to intimidate non-strikers, managers and employers. These articles were repealed in 1866 and replaced by article 310 of the criminal code. Workers were then granted the right of association but strike pickets remained illegal.

One of the first so-called "social" laws concerned the establishment of industrial and labour councils[5] in any locality where they might serve a useful purpose[6]. The councils' function was to discuss the joint interests of owners and employees and prevent and settle disputes[7]. Each section of a council was composed of an equal number of heads of industry and employees[8]. The governor, the mayor or the chair of the council could – at the request of either side – convene the section in which a conflict was occurring. The section would then

[2] §§ 9-13 of the complaint
[3] § 11 of the complaint
[4] See *B.S.* Chlepner, *Cent ans d'Histoire Sociale en Belgique*, Brussels, ULB/Institut de sociologie Solvay, 1958, 222 ff. and E. Vogel-Polsky, *La conciliation des conflits collectifs du travail en Belgique*, Gembloux, Duculot, 1966, 215 p.
[5] Act of 16 August 1887 instituting industry and labour councils, *MB* (official journal) 21 October 1887.
[6] Section 1 of the Act of 16 August 1887
[7] Ibid.
[8] Section 4 of the Act of 16 August 1887

seek out means of conciliation. If agreement was impossible, a formal report of the proceedings would be drawn up[9].

The government wished to revise the legislation before the First World War[10], but was thwarted by the global conflict. After 1914, the councils played no further part.

Article 310 of the criminal code was repealed in 1921 and the Freedom of Association Act of 24 May 1921[11] officially decriminalised strikes.

Official conciliation and arbitration committees[12] were set up towards the middle of the 1920s. These committees, appointed by the crown from nominations by employee and employer organisations, comprised a chair, vice-chair, secretary and ordinary members.

The social partners could also set up, by collective agreement, individual conciliation and arbitration committees for specific undertakings or groups of undertakings[13]. When disputes occurred, the parties could submit them to joint industrial committees.

When such a dispute was imminent, the relevant committee would be convened within a specified period. It would receive the explanations of the parties, or their representatives, carry out any inquiries deemed necessary and invite the parties to make proposals, in order to attempt to conciliate. If the parties failed to reach agreement, the committee would suggest that the dispute be settled by arbitration and would propose its good offices.

If an employer boycotted the committee, the strikers could claim unemployment benefit. If, on the other hand, the trade union was at fault, its members might be deprived of benefits for a year.

Unlike mediation, arbitration was unpopular. Between 1926 and 1931, 916 mediations were attempted, of which 353 culminated in an agreement. In the 1930s, these committees fell into disuse.

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[9] Section 10 of the Act of 16 August 1887
[10] B.S. Chlepner, *Cent ans d'Histoire Sociale en Belgique*, Brussels, ULB/Institut de sociologie Solvay, 1958, 223.
[11] *M.B.* 28 May 1921.
[12] Royal decree of 5 May 1926 establishing official conciliation and arbitration committees to help settle collective labour disputes *MB.* 12 May 1926.
[13] Article 6 ff A.R. of 5 May 1926.

1.1.2. After 1945

The liberation was followed by the so-called "civil mobilisation". Strikes were banned to permit the rapid reconstruction of the country. A new joint consultation system emerged after the War, which also included machinery for managing collective disputes. Such machinery has both a preventive and a settlement function.

1.2. The management of collective disputes

1.2.1. Preventive machinery

1.2.1.1. Peace clauses

The parties can agree to include explicit peace obligations in a collective agreement, such as an undertaking not to take strike action until a period of notice has expired. During such cooling-off periods, the parties can negotiate.

This rule was in force for many years. Strikes were only lawful if they were called in accordance with the terms of the relevant collective agreement. If the rules were followed, strike days were treated as working days for the purposes of social security contributions[14].

1.2.1.2. The activities of joint committee conciliation offices[15]

Joint committees are the subject of the legislative decree of 9 June 1945[16]. Their responsibilities are set out in article 10, and include preventing and conciliating in any disputes that might threaten or have arisen between heads of undertakings and employees.

The legal framework for conciliation offices was laid down in the regent's decree of 15 October 1945[17] .

Under section 38 of the act of 5 December 1968, joint committees were given responsibility for preventing and conciliating in any disputes between employers and employees[18].

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[14] See also No. 16 below
[15] See S. Du Bled, “La conciliation sociale en cas de conflit de menace de conflit collectif de travail : aspects théoriques et pratiques", in *La grève : recours aux tribunaux ou retour à la conciliation sociale?*, Brussels, Ed. du Jeune Barreau de Bruxelles, 2002,43 ff. (Appendix 1).
[16] *M.B.* 5 July 1945.
[17] *M.B.* 21 October 1945.
[18] Implemented by articles 19 ff of the royal decree of 6 November 1969 on the general arrangements governing the functioning of joint committees and sub-committees, *MB.* 18 November 1969.

The committees may establish their own conciliation office to prevent or conciliate in any disputes between employers and employees.

Conciliation offices comprise a chair[19], a secretary and members appointed in equal numbers to represent employers' and employees' organisations. The arrangements for appointing members are laid down in committees' internal rules of procedure.

In the event of a dispute or the threat of a dispute, either party may refer the matter to the chair.

Conciliation offices may meet on the orders of the chair or at the request of an organisation represented on the joint committee concerned. Unless the rules of procedure state otherwise, the chair must convene the conciliation office within seven days of the request being made.

A written report is draw up of every conciliation meeting. Decisions arising from the conciliation process are the subject of separate documents that are appended to the report.

The procedure is always the same. First, the parties present their case. Although third parties – normally lawyers – are not banned, advisers are normally only allowed to offer their clients backing. They must not take an active part in the discussions, to ensure that meetings do not degenerate into legal quarrels.

Once the hearing is finished, the members of the office withdraw. The parties then wait in separate rooms, which gives the members the opportunity to ask for additional information.

Even if the office's opinion is unanimous, this is not binding on the parties. However a survey of industrial conciliators shows that the office's opinion is accepted in about 80% of cases.

The proceedings are optional, which means that no one is obliged to accept an invitation from a conciliation office.

[19] Normally the industrial conciliator (see below, 12).

1.2.2. Settlement machinery

When collective disputes occur, machinery comes into operation to monitor them, while efforts are made to end the strike as soon as possible.

1.2.2.1. The Act of 19 August 1948 on services of public interest in peacetime[20]

The ban on strikes ended in 1948 with a political compromise. Strikes were once more authorised on condition that a system of self-regulation was established.
This was the subject of the Act of 19 August 1948, which gave a major role to the social partners.

Joint committees are required to identify and define, for the undertakings for which they are responsible, which activities and services have to be maintained in the event of deliberate and collective withdrawals of labour or lockouts, to ensure that certain vital needs are met, to carry out urgent maintenance on material and equipment and to perform certain tasks necessitated by *force majeure* or an unexpected emergency. They are also required to identify these vital needs. Their decisions can made enforceable by the crown.

If a joint committee fails to take the required decisions, the employment minister may, should the need arise, invite it to identify what vital needs must be met and what activities and services should continue to function. If it has failed to carry out this task within six months, the crown shall itself decide what activities and services must be maintained.

1.2.2.2. The industrial conciliators

Two officials, one for each language region, were appointed in 1946 to deal with conciliation and mediation. In the late sixties, a mediation service was established in the labour ministry, the so-called corps of industrial conciliators.

Industrial conciliators are responsible for:

- preventing industrial disputes and monitoring the triggering, conduct and conclusion of such disputes;
- conciliating in such disputes;
- maintaining permanent contact with employers' and employees' organisations and with members of the labour inspectorate of the ministry of employment and labour;

[20] *M.B.* 21 August 1948.

– drawing up reports on industrial relations in specific industries, sectors or individual undertakings.

The corps has now grown to 20 officials who chair the joint committees and act as conciliators in industrial disputes. They are recruited on the basis of their specialist experience and expertise, often based on their previous trade union or employers organisation experience.

1.2.3. The SIBP v. Debruyne judgment

Section 4.2 of the Act of 5 December 1968 on collective labour agreements and joint committees authorises the social partners to provide for damages if a peace obligation is not respected, in other words if the requirement to give notice of strike is ignored. This has never happened in practice. Until 1981, employers faced with unoffical/wildcat strikes (which as such would be against the orders of the representative organisation) resorted to dismissal for serious misconduct.

1.2.3.1. The major change

In its *SIBP v. De Bruyne* judgment of 21 December 1981[21], the Court of Cassation moved away from the principle that a distinction could be drawn between legal strikes, that is ones that were compatible with peace clauses, and illegal/wildcat ones. Taking part in a strike was not, as such, an illicit act. Employment contracts were suspended during the strike action, so the alleged breach of a peace clause was no longer relevant.

1.2.3.2. The right to strike is not a simple construction of the Court of Cassation

According to the complainants, the right to strike is only based on a judgment of the Court of Cassation. As we shall see later, this is not the case, but even if it were, we do not see how this might be a problem. There are several other European countries where the right to strike is not enshrined in the constitution or legislation. In a recent publication[22], the European Trade Union Institute of the ETUC made no negative comments on this subject. We therefore fail to understand why the complainants wish to draw attention to it from a negative standpoint.

- Protection of strikes and strikers

[21] Pasicrisie 1982, I, 531 (appendix 2).
[22] W. Warneck, Strike rules in the EU27 and beyond (A comparative overview), Brussels, ISE, 2008, 71 p. (appendix 3)

There may not be strike legislation in Belgium but there is certainly a right to strike. As noted above, strikes have been recognised in Belgian law since 1948, via the Act on services of public interest in peacetime, which also lays down the rules governing their consequences. Professor Van Eeckhoutte of the University of Ghent and lawyer at the Court of Cassation even considers that strikes are "protected" (sic). In a series of cases, this protection has taken the form of a ban on strike breaking, but it should also be noted that periods spent on strike are deemed to be periods of normal work for the purposes of various employment and social security rights[23].

a. *Ban on replacement contracts (section 11ter of the Employment Contracts Act of 3 July 1978)*

Persons who replace employees whose contracts have been suspended for reasons *other than lack of work resulting from a strike* may be recruited in conditions that depart from the rules in this Act relating to the duration of contracts and periods of notice.

b. *Ban on temporary work during a strike (Article 8 of Collective Agreement No. 58)*

Temporary employment agencies may not place or maintain temporary employees in work with a client where a strike is taking place.

The trade unions had previously secured such a ban using a unilateral application to a court, which is the same procedure as the one under discussion in this complaint[24].

c. *Public holidays (article 12.4 of the royal decree of 18 April 1974)*

Employees retain their entitlement to remuneration for public holidays occurring, *inter alia*, during the thirty-day period following the start of the suspension of the execution of an employment contract resulting from a strike.

d. *Holiday bonus (article 16 of the royal decree of 30 March 1967)*

For the purposes of calculating the holiday bonus, days of interruption of work resulting from, *inter alia*, participation in a strike by the employees of an undertaking, shall be treated as normal working days, on condition that the strike has the agreement or support of one of the trade union federations represented on the national labour council.

e. *Strikes and social security entitlements*

[23] W. Van Eeckhoutte, "Staking en uitsluiting en de individuele rechtsverhoudingen", *Revue de Droit Social* 1987, 438 ff. (appendix 4)
[24] President of the Brussels Labour Court, 7 October 2005, *Chroniques de droit social* 2006, 385 (appendix 5).

Days spent on strike are treated as days worked for the purposes of social security entitlements, as follows:

- retirement pensions: article 34.1.H of the royal decree of 21 December 1967 on the general employees' retirement and survivors' pension scheme treats periods spent on strike as working periods.
- family allowances: under section 53 of the consolidated salaried employees' family allowances legislation, where appropriate and for the purposes of this legislation, employees are deemed to be at work, *inter alia*, during periods where no work is performed on account of a strike.
- unemployment benefits: article 38.1.6.25 of the royal decree of 25 November 1991 on the unemployment regulations treats days spent on strike as working days.
- health care insurance: article 203.6 of the royal decree 3 July 1996 implementing the legislation on compulsory health care insurance and allowances, consolidated on 14 July 1994, treats days spent on strike as working days.

f. Tax exemption of strike allowances

Allowances, or strike pay, paid by trade unions to their striking members are not treated as remuneration[25].

- *Protection of strikes and strikers in the public sector*

The complainants are forgetting the public sector. Strikes have been permitted in the public sector since the 1970s and there are regulations on the consequences. There are various laws stipulating that strikers should not lose their remuneration. Since 1990, when the European Social Charter was ratified, the *Conseil d'Etat* has on a number of occasions dismissed disciplinary sanctions pertaining to collective disputes, with reference to Article 6.4 of the Charter and revised Charter.

For an overview of the situation, we refer to the article "La grève des fonctionnaires ou la lente émergence d'un droit fondamental" (strikes of public officials or the slow emergence of a fundamental right) by Bruno Lombaert, lawyer at the *Conseil d'Etat*, in the *liber amicorum*

[25] Comments concerning the income tax code 1992, no. 31/7.

of Pierre Lambert[26]. The author refers explicitly to Article 6.4 of the European Social Charter as a basis for public officials' right to strike.

1.2.3.3. Response to the criticism in paragraph 13 of the complaint that the Court of Cassation has "defined strikes in a very restrictive fashion" (sic)

The complainants attach great importance to the De Bruyne judgment, which they consider to be the pivot of the right to strike.

It is true that, as the complainants state, the De Bruyne judgment refers to the definition of strikes in the Act of 19 August 1948[27]. Strikes were thus treated as the cessation of work[28]. It should be pointed out here that the judgment was in 1981 and the Social Charter was only ratified ten years later, so it is difficult to criticise the Court for failing to take account of the Charter when the latter was not in force at the time of the judgment.

However, judgments of the Court of Cassation are merely concerned with determining whether a court of appeal or a labour court have complied with the law. In other words, the Court of Cassation does not establish any laws or rights *erga omnes*. Once a decision has been handed down on points of law, the case is referred back to a court other than the one that took the incorrect decision, which means that the case starts again. It is therefore wrong to attribute too much weight to the language used by the Court of Cassation, and certainly to infer that Belgian courts limit strikes to the cessation of work.

The Court of Cassation's case-law is only one part of the right to strike and to take collective action. Other aspects, such as picketing, distributing leaflets, demonstrating and so on also form part of freedom of assembly and association, which is embodied in Article 27 of the Constitution.

One example will help to clarify matters.

In the mid-1990s, an employer claimed damages from employee representatives who had distributed tracts. The Antwerp court of appeal dismissed the claim, with reference to the

[26] B. Lombaert, “La grève des fonctionnaires ou la lente émergence d’un droit fondamental”, in *Les droits de l’homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert*, Brussels, Bruylant, 2000, 517-540 (appendix 6).
[27] See supra (note 13).
[28] It should be pointed out here that the judgment was in 1981 and the Social Charter was only ratified ten years later, so it is difficult to criticise the Court for failing to take account of the Charter when the latter was not in force at the time of the judgment.

Constitution, Article 10 of the ECHR and Article 19 of the International Covenant on Civil and Political Rights[29]. The Court ruled that a trade union could have a different opinion of and criticise policies applied within an undertaking, even if those criticisms were likely to cause offence, shock or create confusion.

So contrary to what the complainants maintain, Belgium does not adopt a simplified approach to settling collective disputes but rather one that is comprehensive and that can be summarised as follows:

Settlement of collective disputes = cessation of work + right of assembly and demonstration + etc.

1.2.3.4. Response to the criticism in paragraph 13 of the complaint: "The Court of Cassation has never referred to the European Social Charter to establish a 'right to collective action'" (sic)

The complainants wish to suggest that Belgium does not comply scrupulously with Article 6.4 of the European Social Charter and argues in support that the Court of Cassation rarely refers to it.

The main reason why the Court makes little reference to Article 6.4 of the Charter or revised Charter is simply that cases concerning collective disputes rarely come before it, which is quite different from saying that it fails to apply this article.

Indeed, in paragraph 31 of the complaint, the complainants themselves state that the Solicitor General, Mr De Riemaecker, acknowledged the direct effect of this article in his conclusions preceding the decision of 31 January 1997. Clearly the Court, which agreed with the Solicitor General's conclusions, was of the same opinion.

Moreover, in his reference work *Inleiding tot het Sociaal Recht*[30], the crown prosecutor at the Court of Cassation, Mr Lenaerts, states that the history of social and labour law shows clearly that strikes are an essential means of constraint for employees if they are to secure satisfactory protection of their right to work and security of existence. By ratifying the

[29] Antwerp court of appeal 7 February 1996, *Auteur & Media* 1996, 357 (appendix 7).
[30] H. Lenaerts, *Inleiding tot het Sociaal Recht*, Kluwer rechtswetenschappen, 2005, 505-506 (appendix 8).

European Social Charter, he continued, the Belgian parliament has also recognised the right to strike.

There are therefore no grounds whatever for alleging any form of animosity on the part of the Court.

1.2.4. The Belgian legislation on strikes is much more liberal than in most European countries

The complainants give the impression that there is no right to strike.

The Belgian government considers that in fact it is quite the opposite. The previously quoted study by the European Trade Union Institute shows just how liberal Belgian legislation is in this regard[31].

Unlike most European countries:

- political strikes are legal, so long as they are aimed at the public authorities rather than at overthrowing democracy;
- there are no restrictions on sympathy strikes;
- unofficial/wildcat strikes are not unlawful;
- strikes may be called by individuals, so trade unions do not have a monopoly on calling strikes;
- peace clauses do not have to be complied with *de facto*. Employees who breach such agreements and their organisations cannot be sanctioned;
- strikes need not be a last resort - the so-called *ultima ratio* theory does not apply;
- strikes may be called against collective agreements that are still in force;
- subject to a few exceptions, such the armed forces and the police, who must follow a special procedure, public officials have an unrestricted right to strike.

There is almost no restriction on collective action, so long as it remains peaceful.

Despite the complainants' allegations, so long as it remains peaceful taking part in a strike is not a ground for dismissal for serious misconduct[32]. The Court of Cassation's judgment of 27 January 2003[33] has been misconstrued.

[31] W. Warneck, Strike rules in the EU27 and beyond. (A comparative overview), Brussels, ISE, 2008, 71 p. (appendix 3)
[32] Footnote 2 of the complaint (page 3)

In its decision, the Court said that in cases involving the dismissal of an employee representative, the lower courts could only use the notion of serious misconduct as it appeared in section 35 of the contracts of employment legislation. This wording implied that such a representative, who naturally would be a trade union member, could not be considered to be other than an ordinary employee. The fact of someone representing employees could not therefore be used against that person[34].

In the past, certain lower court judges thought that staff representatives should set an example, and that in the event of collective action they could not be allowed as much leeway as other employees. The Court of Cassation's judgment of 27 January 2003 rejected this line of reasoning based on a wording that was intended to protect employee representatives. But nor, on the other hand, does it allow such representatives more scope than other employees. During strikes, they may not – obviously – resort to vandalism.

The defendant therefore denies firmly that dismissal for serious misconduct is used systematically to punish strikers.

2. Judicial intervention in collective disputes following recognition of the right to strike (1987-2009)

Sometimes, though this is not the rule, employers apply to the courts to intervene in collective disputes. To do so they use unilateral applications, which the complainants consider to be a restriction on the right to strike.

2.1. Orders made on unilateral applications are not an arbitrary use of power[35]

Under Article 584 of the Labour Code the president of the court of first instance makes interlocutory rulings in cases that he recognises as urgent, on all subjects, other than ones that the law removes from the judicial authorities' jurisdiction. The presidents of the labour and commercial courts may make interlocutory rulings in cases that they recognise as urgent, on all subjects that fall within their respective jurisdictions.

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[33] Cass. 27 January 2003, *Journal des Tribunaux de Travail* 2003, 121 (Appendix 9).
[34] See section 4.3 of the legislation on special arrangements governing the dismissal of staff representatives on works councils and occupational health, safety and improvements to workplaces committees, and of candidates to be staff representatives: In any letter provided for in paragraph 1, the employer must refer to all the facts that he considers make any professional collaboration impossible once they have been recognised to be accurate and sufficiently serious by the labour courts. This may not in any circumstance concern facts relating to the function of staff representative.
[35] Response to the criticism in paragraph 15 of the complaint.

Applications are made under an urgent procedure. Unilateral applications are based on article 54 of an imperial decree of 1808 and have thus applied for 200 years.

According to Monad and Degreef, who have written a major reference work on the subject[36], as well as labour law – the subject of this complaint – unilateral applications are used in the following areas:

- company law;
- media law;
- administrative law;
- the termination of agreements;
- attachment and seizure;
- criminal law and prison law;
- family difficulties;
- inheritance, liquidation and partition;
- patently illegal action in the broadest sense.

Clearly the unilateral applications procedure is the exception and is only applicable if certain strict conditions are met:

- Urgency

According to the preparatory parliamentary work, the urgency must be such that any delay would severely infringe the party's rights, to the extent that even a much shorter timetable and an emergency injunction would be insufficient to deal with an imminent risk[37].

- Absolute necessity

An urgent application normally requires both parties to be heard. To qualify for the unilateral procedure, that is with no adverse party, there has to be absolute necessity: absolute necessity therefore means that the immediate and sudden application of the measure sought is the sole means of ensuring that it will be fully effective[38].

- A strict procedure

[36] E. Monard et d. Degreef, *Het eenzijdig verzoekschrift*, Antwerpen, Kluwer Rechtswetenschappen, 1998, 383 p.
[37] Bill to establish the Judicial Code, Senate 1963-64, n° 60, 141 (appendix 10).
[38] Ibid

Applications will only be valid if they include:

1. the day, month and year;
2. the applicant's name, first name, profession and address and, where appropriate, the name, first name, address and capacity of his legal representatives;
3. the purpose and a summary of the grounds for the application;
4. the name of the judge who would hear the application;
5. Unless the law prescribes otherwise, the signature of the party's legal representative.

The unilateral applications procedure can therefore only be used in very exceptional circumstances and before an independent judge. Moreover, the resulting order can only prescribe interim measures. Such a practice is very common and exists in other countries. For example, in terms very similar to that used in the Belgian legislation, Article 812 of the new French code of criminal procedure provides that applications may be made to the president of the court in circumstances specified in law.

He may also order, in response to an application, any urgent measures if circumstances demand that they be taken without the presence of both parties.

Applications relating to a case before the courts shall be presented to the president of the chamber to which the case has already been allocated or to the judge to whom it has already been referred.

The complainants' reference to "orders handed down from on high" (in French "*lettre de cachet*", namely a sanction handed down unilaterally by the crown for which no justification is required) is quite incorrect. Indeed, the urgent applications procedure is an essential element of a democratic legal system. According to Jacques Normand, the very existence of the urgent procedure should, in many cases, act as a disincentive. Where dissuasion is not enough, the extreme rapidity with which it operates should lead to the successful re-establishment of the rule of law. It therefore deserves, in every respect, the compliment paid to it some thirty years ago that it has "saved the honour of the judicial system"[39].

2.2. The rights of the defence are not violated[40]

The complainants consider that the rights of the defence are violated. This is not so since there is the possibility of an application by a third party. To take the example of a dispute

[39] J. Normand, "Les fonctions des référés", in J. Van Compernolle et g. Tarzia (eds.), *Les mesures provisoires en droit belge, français et italien. Etude de droit comparé*, Brussels, Bruylant, 1998, 87 (appendix 11).
[40] Response to the criticism in paragraph 16 of the complaint.

breaking out for which the unilateral applications procedure is used, if the president accepts the application, which is fairly rare, and issues an order, this is transmitted to the bailiff, who prepares an injunction.

The bailiff takes the injunction to the undertaking, delivers it to the members of the strike picket and records their identity.

If, for example, the application stipulates that an entrance must no longer be obstructed, the pickets must comply with this.

If the pickets consider that the order has been handed down incorrectly, the recipients of the injunction may make a third party application to set it aside. Under Article 1122 of the Judicial Code:

> Any person who has not been duly summoned or has not intervened in the case in the same capacity may make a third party application to set aside a decision, even an interim one, that violates his rights and that has been handed by a civil court, or by a criminal court ruling on civil interests.

Such third party applications may be dealt with very rapidly. Emeritus Professor Marcel Storme of the universities of Ghent and Antwerp, who between 1995 and 2007 was President of the International Association of Procedural Law, believes that urgent and subsequent third party applications can be dealt with in less than 24 hours[41].

Unlike the ECHR, the complainants make the mistake of not considering the procedure in its entirety.

In § 51 of the *Nemeth* judgment of 20 September 2005 (French only), the ECHR stated that the fairness of proceedings must be assessed with regard to the proceedings as a whole and not as an isolated element (see, for example, the *Miailhe v. France* (no. 2) judgment of 2 September 1996, Reports 1996-IV, p. 1338, § 43 and the *Dallos v. Hungary* judgment of 1 March 2001, Reports 2001-II, p. 219, § 47).

The situation is therefore as follows:

[41] M. Storme, Artikel 6 E.V.R.M. en het eenzijdig verzoekschrift", *Rechtskundig Weekblad* 2005-2006, 305 (appendix 12).

- Third party applications enable strike pickets to present their arguments to the same court. Both sides therefore become parties to the proceedings;
- Remedies are available against the decision following the third party application;
- Appeals are possible on points of law.

In a very detailed article covering much of the case-law of the ECHR, professors Jean-François van Drooghenbroeck (Catholic University of Louvain) and Sebastien van Drooghenbroeck (Saint-Louis University faculties) conclude that, taken in its entirety, the unilateral applications procedure is compatible with Article 6 of the European Convention on Human Rights[42]. They conclude that in principle, unilateral applications to the president of the court do not violate the principle that both parties shall be heard. Nor according to the rules does this court show partiality when it rules on a third party application[43].

- The complainants' arguments

Although the defendant has shown that that the unilateral applications procedure guarantees a fair hearing, it will nevertheless reply to the complainants' arguments.

a. In paragraph 16 of the complaint, the trade unions complain that they are unable to see certain orders and refer in this context to correspondence between the Secretary General of the FGTB and the President of the Mechelen court of first instance[44].

The correspondence, which is not translated into French, shows that the president dismissed two unilateral applications lodged by employers in connection with collective disputes. The ABVV/FGTB learnt of this through the press and asked to see the orders.

Naturally, the bailiff could not agree to this since the ABVV/FGTB was not a party to the proceedings. If an order is issued, it is addressed to persons who are not necessarily members of an employees' organisation or who possibly belong to one other than the ABVV/FGTB. Besides, in Belgium trade unions have always refused to accept legal personality. This means that the ABVV/FGTB cannot be taken to court, but it has the disadvantage that trade unions cannot make applications, other than on subjects for which they have a "functional" legal personality, which is not the case here.

[42] J.F. Van Drooghenbroeck et S. Van Drooghenbroeck, “Référé et procès équitable”, *Revue critique de jurisprudence belge* 2006, 507-555 (appendix 13).
[43] Ibid. 555.
[44] Appendix 8 of the complaint.

b. Another criticism is that certain court decisions reject third party applications as unfounded when the proceedings have come to an end.

Only one decision is cited in support of this contention, namely a judgment of the Antwerp court of appeal of 6 September 2006[45]. We can therefore only speak about this judgment.

In this case, the president of the Tongeren court of first instance had issued an order forbidding persons from interfering with the right to work of non-strikers, sub-contractors and so on. In other words the court president had only prohibited violent strike picketing. The order was limited to the period from 29 March to 29 May 2005. After this cooling-off period, those concerned were no longer bound by the order.

The appeal was lodged on 21 November 2005 and examined in 2006, when the court simply noted that the order was no longer applicable.

According to the complainants, the court should nevertheless have adopted a position, "for the purpose of the case", on what the president had decided in his interim order. This is a subject of fairly academic concern and in any case it seems fairly unlikely that an order aimed solely at violent picketing (strike picketing as such was not banned) was unlawful.

The defendant wishes to emphasise that third party applications are often successful, as in the case of:

- President of Veurne court 3 December 2008[46];
- President of Mons court 25 March 2009[47];
- President of Charleroi court 22 April 2009[48];
- President of Antwerp court 15 September 2009[49];

The third party application procedure is compatible with Article 6 of the ECHR. In § 16 of the complaint, and elsewhere, criticisms are levelled at coercive fines.

Under Article 1385bis of the Judicial Code, the court may, at the request of one of the parties, order the other party to pay a sum of money, or coercive fine, if it is not satisfied with the main judgment, without prejudice to any damages. However, such a coercive fine may

[45] Appendix 9 of the complaint.
[46] Appendix 14.
[47] Appendix 15.
[48] Appendix 16.
[49] Appendix 17.

not be imposed in the event of a judgment ordering the payment of a sum of money, or in connection with actions to enforce employment contracts.

The defendant will confine itself to a number of observations:

- a judge cannot use a coercive fine to make strikers return to work. Such fines cannot be imposed in connection with actions to enforce employment contracts;
- the sole purpose of such fines is to ensure compliance with an order. For example, when an order forbids the intimidation of non-strikers, no fines may be imposed on peaceful picketers;
- the defendant is unaware of any cases where pickets have had to pay a coercive fine.

The government also objects to the complainants' use of the words "the effect of these orders under the urgent procedure is to prohibit picketing, under the threat of civil financial penalties"[50].

They are insinuating that individuals are empowered to impose fines. This is not so - the court orders the coercive fine and it can only be requested if the judicial injunction, against which an appeal has been lodged, is not complied with.

The defendant also protests about the complainants' reference to Article 310 of the criminal code[51]. The article was repealed in 1921 and no longer appears in the code. Including this in the case documents is merely an attempt to confuse the Committee by having its members believe that a highly punitive item of legislation is still in force in Belgium, which is not the case.

2.3. There is no trend toward increased court intervention in collective disputes[52].

The complainants appear to argue that judicial intervention continues to rise. The government believes that this is not the case.

The reasons for judicial intervention

Judicial intervention is not new. In the 1970s and 80s, there were a number of factory occupations in Belgium. In response, each time the employers applied to the district court for an eviction order. However, from the mid-1980s the unilateral applications procedure started

[50] § 15 of the complaint.
[51] Footnote 4 and appendix 7 of the complaint
[52] Response to the criticism in paragraphs 22 and 23 of the complaint.

to be used. The Court of Cassation decision of 21 December 1981 was probably one of the main reasons for the switch.

Before this judgment, strikes were generally called under the collective agreement procedure. Until 1981, unofficial strikes[53] were often sanctioned by dismissal for serious misconduct. This no longer happened after the judgment of 21 December 1981, and trade unions lost control over industrial disputes. Thereafter, it was often non-unionised employees who took the initiative and in the absence of trade union oversight there were no restraints on industrial action. Strike pickets physically barred access to premises, sometimes on such a scale that questions were asked in parliament[54].

Such actions were often carried out by groups of workers who had almost no links with representative employee organisations or who were not even employed in the undertaking concerned. For example, the "*mouvement du renouveau syndical*", led by Roberto d'Orazio, had to appear before the criminal court on charges of assault, particularly against the administrator of the Forges de Clabecq steelworks[55].

The climate of terror that such persons established made it quite understandable for employers to call on the courts to bring an end to such activities.

Contrary to what the complainants state, there has been no massive resort to the law. As a rule, conciliation with the aid of industrial conciliators is still always the preferred option. As proof of this, each year 300 to 400 conciliation meetings take place in the conciliation offices of the joint committees.

The two examples cited to illustrate the increase in judicial intervention are not very well chosen.

a. The wave of strikes in 2005[56]

In 2005, there was a strike against the famous "solidarity between the generations plan". This was a political strike aimed at the measures taken by the authorities. A total of 669 982

[53] That is ones that did not respect the strike notice specified in the national collective agreement.
[54] Parliamentary question no. 4 of 8 December 2004 (appendix 18): "the announcement of the restructuring decision has resulted in strong and even aggressive reactions from employees such as sequestration of the management, damage to buildings and assaults on journalists."
[55] See Zenner, *La saga de Clabecq. Du naufrage au* sauvetage, Brussels, Luc Pire, 1998,58 – 67 (Appendix 19).
[56] § 22 of the complaint

days of work were lost[57]. As the complainants themselves note[58], and even with a strike on this scale, there were only 59 unilateral applications, of which only 37 were granted. And even this does not signify that these were granted illegitimately.

b. The wave of strikes in 2008[59]

The complainants refer to the 18 orders granted in 2008 as evidence of the increase in judicial activity.

That year Belgium was affected by a wave of strikes, including unofficial ones, and the use of flying pickets, often operating in an uncontrolled fashion. The orders were a reaction to this phenomenon and what was forbidden is fairly obvious, namely:

- preventing access for non-strikers;
- taking staff hostage – in the Cytec case, for example, three members of the management were held against their will, cameras were disabled, and so on[60].

The undertakings concerned sometimes handled dangerous products. Cytec, for example, is a Seveso establishment.

The defendant points out that over this same period unilateral applications were also rejected, for example:

- *President of the Mechelen civil court, 7 November 2008[61]:* in this case the judge considered that there was no urgency and the opposing party could be called, in other words, both parties should be heard;
- *President of the Antwerp civil court, 24 October 2008[62]:* in this case the judge considered that the presence of strike pickets was one element of the right to strike, even if this did cause embarrassment to the employers.

[57] K. Vandaele, "From the seventies strike wave to the first cyber strike in the twenty-first century. Strike activity and labour unrest in Belgium", in S. Van Der Velden and others, Strikes around the world. 1968-2005", Amsterdam, Aksant, 2007, 221 (Appendix 20). The figures come from an unimpeachable source as the author works for the European Trade Union Institute.
[58] § 22 of the complaint
[59] § 23 of the complaint
[60] "La direction de Cytec est toujours séquestrée" (http://www.7sur7.be) (appendix 21).
[61] Appendix 22.
[62] Appendix 23.

II. The situation in Belgium vis-à-vis the Charter and revised Charter

Iura novit curia

The defendant starts from the principle that the Committee knows its own case-law better than the parties, so this will not be repeated. However, it does wish to express reservations about certain assertions concealed in the descriptive part of the complainants' conclusions[63].

The gentlemen's agreement

The complainants state that the 2002 gentlemen's agreement between the employers' organisations and themselves was "inspired by the unions' concern to ensure that the right to organise enshrined in international and European treaties was protected and that court intervention in industrial disputes matters was brought to a halt"[64]. As the defendant will show later, the only aim of this agreement was to prevent parliament from legislating on industrial disputes.

It is also worth mentioning that the parties, including the trade unions, have violated this agreement several times. They had undertaken to recommend that their members abide by the strike notice procedure. In 2008, when the country was inundated with unofficial strikes they were generally recognised, despite the fact that they were incompatible with the agreement and often made demands that were in breach of existing collective agreements. Michel Capron put it this way in *Vlaams Marxistisch Tijdschrift*, a Flemish Marxist journal[65]: there was a wave of strikes in Flanders in January and February 1980. The shock was felt by Ford-Genk and various steel works, as well as other industrial sectors, and it took the form of spontaneous strikes that were each time recognised, sometimes reluctantly, by the trade unions.

The revised Charter in the Belgian legal system

In paragraphs 31 and 32, the complainants again try to give the impression that Belgium is in breach of Article 6.4 of the revised Charter, something the defendant strenuously denies. For example, the employment ministry web site refers to the revised Charter as an important legal source of the right to strike[66] and it also includes the text of the Charter[67]. Moreover,

[63] §§ 21-46 of the complaint
[64] § 45 of the complaint
[65] M. Capron, "Een spontane stakingsgolf in Limburg", *VMT* 2008, 42/2, 26 (appendix 24)
[66] http://www.emploi.belgique.be/defaultTab.aspx?id=518
[67] http://www.emploi.belgique.be/moduleTab.aspx?id=518&idM=102

the complainants themselves recognise that the Constitutional Court, the *Conseil d'Etat* and the Court of Cassation recognise Article 6.4[68].

The complainants quote the Antwerp court's judgment[69] to support their case. This calls for certain comments.

First, this judgment has nothing to do with the practices under consideration. It concerned not the unilateral applications procedure but a challenge to a dismissal for serious misconduct before a labour court, comprising a professional judge and two non-professional judges, one of whom had been appointed by the crown on the recommendation of an employee representative organisation, namely one of the complainants.

In this case, the labour court found that calling a strike against the advice of the trade union constituted serious misconduct that made any subsequent collaboration between the two sides impossible.

Legal theorists, particularly professors De Vos and Humblet of the University of Ghent, have criticised this judgment as being incompatible with Article 6.4 of the Charter[70]. The judgment has to be seen as an aberration that would certainly not have been confirmed on appeal. However no appeal was ever lodged, for the following complex reasons, which the complainants fail to mention:

- the dismissed worker had called a strike after an agreement had been reached between the union secretary and the employer, in other words, the strike went against union policy;
- the worker was part of a communist group within his union;
- the judgment ordered the worker to pay one euro's provisional damages, something the complainants fail to mention. It was feared that the employer would claim damages, which would have required the union to give its member financial support. Even though the risk of this was small, it was decided not to continue the proceedings.
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The complainants' use of this example lacks credibility. They could very easily have won their case on appeal, but chose not to do so.

The tsunami of orders (sic)

[68] § 31 of the complaint
[69] Appendix 14 of the complaint
[70] M. De Vos and P. Humblet, "Bloemlezing arbeidsrecht juli 2000 – juli 2001 (deel 2)", *Oriëntatie 2002,* 100 (Appendix 25).

Paragraph 46 again refers to a number of cases in autumn 2008, whose importance has already been cast in doubt.

III. The situation in Belgium vis-à-vis other international instruments

The complainants refer to other international organisations that have allegedly criticised Belgium.

It should be pointed out first that the discussion in this case can only be concerned with the would-be failure to comply with Article 6.4 of the revised Charter. However, the complainants draw on a whole variety of sources to try to give the Committee a negative impression of how the right to strike is dealt with in Belgium. We must therefore respond to these comments.

1. International Covenant on Economic, Social and Cultural Rights

In November 2007, the UN Committee on Economic, Social and Cultural Rights expressed concern about the way the judicial authorities dealt with strikes. The Belgian government sent a written reply.

This procedure only concerns Article 8 of the International Covenant on Economic, Social and Cultural Rights and has nothing to do with Article 6.4 of the Charter. Moreover, contrary to what the complainants claim[71], the courts may only impose restrictions on the conduct of strikes in the event of illegal actions that are not an inherent part of the collective action, such as the use of violence or the physical intimidation of non-strikers.

2. ILO Convention 87

The complainants give the impression that the Committee of Experts on the Application of Conventions and Recommendations criticised Belgium, but this is not the case. The Committee recalled the principles that are known to all, namely that the authorities must not interfere with pickets unless they are not acting peacefully (in which case it is generally the courts that are called on).

3. Criticisms of the International Trade Union Confederation ITUC

[71] § 48 of the complaint

The complainants refer "last but not least"[72] (sic) to the comments of the ITUC, of which they are members. This argument therefore has no legitimacy but helps to generate animosity towards the defendant.

[72] § 50 of the complaint

IV. The compatibility of the restrictions on the right to strike with Article 6§4 of the revised Charter

1. The restrictions cannot be isolated from the exercise of the right to strike or the right to collective action[73]

Belgium acknowledges and confirms that the right to strike entitles employees not only to stop work but also to take part in collective action, so long as it is peaceful. Strike picketing, for example, is one aspect of freedom of association and is protected by Article 27 of the Constitution.

In other words, the courts cannot ban peaceful picketing, on pain of a coercive fine[74]. If however the law is broken the situation can be rectified via the appeals procedure, including appeals on points of law.

To show that the courts interpret the right to strike as more than just a work stoppage, the defendant appends a judgment of the Brussels labour court of 5 November 2009, in which it recognises the right to strike with reference to the revised Charter and also the right to collective action. The court considered that the actions challenged – blocking access to the company's site and moving vehicles inside the site – were part of the exercise of the right to collective action[75].

This reflects the relevant ILO principles, in particular that occupations may be acceptable, so long as they remain peaceful, in other words restrictions on strike pickets and the occupation of premises should be limited to cases where the actions cease to be peaceful in nature[76].

Unless we are mistaken, your Committee has not yet ruled on this matter. However, if the Committee does recommend acceptance of peaceful occupations, the defendant asks it to define what precisely it means by that. This is an extremely complex matter, despite the fact that the complainants refer to "simple occupations of premises"[77].

[73] Criticisms levelled in §§ 51-55 of the complaint
[74] The complainants argue the contrary in §§ 52-53.
[75] Appendix 26 (p. 27).
[76] B. Gernigon, A. Odero, H.Guido, ILO Principles concerning the right to strike, *International Labour Review* 1998, 500 (appendix 27).
[77] § 54 of the complaint

The defendant wishes to draw attention to a significant problem. Employers exercise authority within their undertakings, a principle that was acknowledged by trade unions in article 2 of Convention 5 of 24 May 1971 on the status of union delegations[78]. When occupiers are free to circulate within an undertaking, they remove themselves from the employer's authority. In such cases, strikers often fail to take security measures seriously, certain individuals take advantage of the situation to steal items and so on. Moreover, it is often impossible to continue production because non-strikers are unable to continue working. Such chaos may force an employer to institute a lock-out, a measure that is compatible with Article 6.4 of the Charter but also penalises non-strikers, who are not eligible for any form of compensation.

Another problem is that during occupations employers retain responsibility for security. If they are denied access to their own premises they cannot guarantee such security. The problem is particularly acute in SEVESO undertakings, of which there are 373 in Belgium.

2. The essence of the complaint

In paragraphs 57 ff of the complaint, the complainants make a number of allegations, which have already been partially discussed. The defendant apologises to the Committee for any possible repetitions.

There are three main complaints.

2.1. Recent decisions go beyond bans on peaceful blockages[79] (sic)

2.1.1. Certain militants are far from peaceful

Industrial conflicts in Belgium are usually settled by negotiation. However, in exceptional circumstances, there is a procedure for taking such matters to the courts.

The government does not deny that certain employers occasionally abuse this option and are encouraged to do so by a small number of specialist legal practices. Judges to whom such applications are made must however dismiss them.

[78] The employees recognise the legitimate authority of management and agree on their honour to perform their duties conscientiously.
[79] §§ 57- 60 of the complaint

The complainants wish to give the impression that an unspecified number of recent orders also prohibit the peaceful blocking of entrances, which they attempt to establish by a semantic discussion. However they offer no practical examples of judges' orders banning peaceful picketing.

Belgium also draws attention to the violent nature of certain strike pickets. Even more worrying is the trend since 2003 towards taking certain members of staff hostage. The first time this occurred was at Sigma Coatings in 2003. The attached document shows clearly how normal standards became blurred. On its web site the communist Parti du Travail de Belgique justified this action by arguing that the directors had not been detained against their will, but were being held to give them an opportunity to reflect[80].

In the recent strikes of 2008-2009, an absence of union co-ordination led to various excesses. For example, in the firm Cytec, where according to the complainants the unions were the victims of an incorrectly issued order, members of the management were taken hostage[81]. This technique continued to be used in 2009 and 2010, as show by the examples of Unilin Mouscron[82] and Inbev[83].

The defendant wishes to point out that the authorities have never called in the police and there have been no prosecutions, even though holding a person against his will is a criminal offence. On each occasion, the problem has been resolved through dialogue.

2.1.2. The right to enter premises

The complainants are also reluctant to accept bans on strikers from entering premises[84]. This is linked to the problem of the occupation of premises and it would therefore be appropriate to await the Committee's opinion on the matter.

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[80] Appendix 28 (http://www.archivesolidaire.org/scripts/article.phtml?section=A1AAAABA&obid=21982)
[81] Appendix 21 (http://www.7sur7.be/7s7/fr/1536/Economie/article/detail/836392/2009/04/29/La-direction-de-Cytec-est-toujours-sequestree.dhtml).
[82] Appendix 29 (http://mouscron.nordeclair.be/regions/mouscron/2009-05-06/unilin-mouscron-sequestrent-patrons-700631.shtml).
[83] Appendix 30: http://www.rtlinfo.be/info/belgique/faits_divers/298467/30-ouvriers-ab-inbev-ont-sequestre-leurs-directeurs .
[84] § 59: § 59. "Further criticism can be made of certain orders that ban strikers from entering premises without the employer's prior authorisation."

The complainants also argue, with reference to article 11 of collective agreement no. 5, that "such bans also restrict the ability of union representatives to exercise properly their general responsibilities for industrial relations within those same undertakings"[85]. In fact collective agreement 5 has never been made obligatory and is not therefore binding on the signatory organisations or their members. Not all employers are members of a representative employers' organisation. A sweeping statement that collective agreement 5 has not been complied with is therefore meaningless.

It should also be pointed out that when implementing this collective agreement the social partners must specify all the arrangements governing the duties of union representatives, including therefore their rights during strikes, in specific collective agreements. It is difficult to criticise the defendant when no such agreement has been reached.

2.1.3. The role of bailiffs and coercive fines

The defendant does not agree with the following statement: "this particular ban is therefore liable to be interpreted by court bailiffs, who have sole responsibility for implementing court decisions, quite simply as making a particular strike unlawful, with penalties for non-compliance. This also verges on forced labour[86]."

Bailiffs have to abide by the wording of the order. They can call on police assistance for identification purposes. If, as the complainants state, the police go beyond this role, a complaint can be lodged with the P committee, an external supervisory body for all officials with police powers[87].

Courts may order the total or partial lifting of the blocking of entrances. However they can never order strikers to resume work under threat of a coercive fine, as the complainants maintain. This would also be in breach of Article 4 of the ECHR and could be challenged in the European Court of Human Rights. To date, no such cases have arisen.

[85] § 59.
[86] Criticism levelled in § 60 of the complaint
[87] http://www.comitep.be/Fr/fr.html

2.2. The restrictions concerned cannot be justified by respect for the rights and freedoms of others[88]

The complainants state in §§ 61 - 63 that courts balance the right to strike against employers' financial interests and that the latter carry more weight.

Belgium again wishes to stress that in unilateral applications proceedings, the courts can only intervene if illegal acts, such as violence or vandalism, have been committed. The fact that financial damage has been suffered is irrelevant.

The same point was made by the Belgian government in its written observations (§ 42) to the European Court of Justice in the *Viking* case (C-438/05), where it stated that freedom of enterprise cannot be used as grounds for restrictions that can be deemed to be disproportionate and intolerable and as a result of which fundamental rights, such as the rights to collective action and to strike, are attacked at their very roots and reduced in effectiveness.

2.3. The restrictions concerned are not "prescribed by law"[89]

The procedure in question is governed by law and subject to strict conditions.
Anyone who considers him or herself the unjust victim of a restriction on the right to strike as a result of the unilateral applications procedure can make a third party application and subsequently lodge an appeal.

According to the complainants, in its decision of 31 January 1997, the Court of Cassation made a mistake[90]: "Be that as it may, the Court of Cassation's approach to these urgent applications cases tends to remove them from the scope of legal review."

The Court of Cassation cannot consider the facts. If the presidents of courts of first instance and/or appeal consider that illegal acts have been committed, there is nothing more that the Court of Cassation can do because, like the highest courts in many other European countries, it can only rule on violations of the law, not on the facts of a case. Belgium is

[88] §§ 61-63 of the complaint
[89] Criticism levelled in §§ 64-68 of the complaint
[90] § 66 of the complaint

convinced that a system with two tiers of justice is sufficient to safeguard the rights of employees and the rights of the defence, as is the case with all citizens.

V. Other solutions

Belgium dislikes the notion of judicial intervention in industrial relations, with employers setting aside social dialogue and turning to the courts to unblock particular situations as rapidly as possible. In a limited number of cases the resulting decisions can even make the situation worse. But what other solutions are there?

Removing collective disputes from the purview of the courts?

Removing the courts' jurisdiction to hear cases involving collective disputes is not an option, for two reasons.

Belgium is convinced that collective disputes must be settled by negotiation and dialogue and not through the courts. However, despite all the investment that has gone into establishing, free of charge, powerful machinery for social dialogue and the efforts to promote it as a means of preventing and settling industrial disputes, it is neither possible nor acceptable to prevent persons who consider that they have suffered disproportionate harm from turning to the courts to put an end to certain actions that are not inherent to the peaceful exercise of the right to strike. Naturally, the procedural options of third party applications, appeals and appeals on points of law already offer safeguards for the two parties' interests.
Persons whose interests have been infringed, such as non-strikers who are denied access to their plant by violent pickets and who cannot apply to a judge, can take their case to the European Court of Human Rights, relying – probably successfully - on a breach of Article 6 of the Convention.

Secondly, the effect of creating a legal vacuum would be to increase the role of the police. The latter would have to intervene much more frequently than is currently the case, making disputes still more confrontational.

Nemo auditur….

On the other hand, making further improvements to legal proceedings relating to collective disputes, by allowing both parties to be represented from the outset, is a justifiable option. All the more surprising therefore that in 2001/2002 the unions opposed draft legislation produced by the then employment minister.

In 2001, the minister of employment, Mrs Onkelinx, submitted proposals[91] that had widespread academic support[92]. The main features were that:

- only the presidents of the labour courts would have jurisdiction to hear such cases: the labour courts had closer links to the social partners. It was easier for them than for their more generalist colleagues on the courts of first instance to assess the gravity of situations.
- both parties would be heard in the proceedings: unilateral application proceedings would only be possible in very specific circumstances. If nevertheless such applications were made, the labour court public prosecutor would try to identify the opposing party. In doing so, he or she would seek the views of the labour inspectorate;
- a strict procedure would be followed;
- coercive fines remained an option but required specific procedures and the president could restrict their use.

These proposals reflected the complainants' wishes. However, they were opposed by both employers' and employees' organisations[93].

As a result, in 2002 the social partners introduced a parallel initiative in the form of the famous "gentlemen's agreement" on the rules of conduct governing collective disputes and the intervention of the courts. In this connection, the complainants state that "the gentlemen's agreement was therefore inspired by the unions' concern to ensure that the right to organise enshrined in international and European treaties was protected and that court intervention in industrial disputes matters was brought to a halt."[94].

The defendant doubts that this was the main reason and refers to an article by Paul Palsterman of the research department of the CSC, one of the complainants, who argues

[91] See Janssens, JP, "Communication de la vice-première ministre et ministre de l'emploi sur les relations collectives de travail et sur la promotion de la concertation sociale", in *La grève: recours aux tribunaux ou retour à la conciliation sociale?*, Brussels, Ed. du Jeune Barreau, 83-89 (Appendix 31).
[92] P. Humblet, "Modestes propositions à tous ceux qui croient encore au dialogue social", in *Actualités du dialogue social et du droit de grève* , Waterloo, kluwer, 2009, 116 ff. (appendix 32)
[93] P. Palsterman, *L'accord sur le droit de grève*, Brussels, Centre de recherche et d'information socio-politiques, Courrier hebdomadaire 2002, no. 1755, 25 – 26 (appendix 33)
[94] § 45 of the complaint.

that the main consideration for the social partners, both employers and employees, was to avoid any further legislation[95].

This agreement has clearly not functioned sufficiently well and the complainants display a certain cynicism when they accuse the authorities of a wait-and-see attitude, even though it was they who urged the authorities to take the initiative. The current employment minister has now asked the national labour council to undertake an evaluation of the gentlemen's agreement.

VI. Conclusions

The Kingdom of Belgium recognises and abides by the right to collective action. As regards the content of this right, it considers that your Committee's opinion is the authoritative source.

Belgium recognises that collective action is more than just the cessation of work and also entails the organisation of peaceful strike pickets and freedom of expression, for example, in pamphlets. The last two aspects of the freedom to organise are even explicitly provided for in, respectively, articles 26 and 19 of the Constitution.

The judicial authorities only become involved in a limited proportion of collective disputes. The law only allows the courts to intervene if strike pickets do not behave peacefully. Judges who forbid peaceful picketing overstep their jurisdiction. The victims of such decisions could very rapidly have them set aside, either by a third party application or on appeal.
Those who implement judges' orders - bailiffs and the police - are required to comply with the democratic rules. Again, if they exceed their powers, action can be taken against them.

The defendant notes that the complainants talk of increasing judicial intervention but fail to mention that for a number of years certain industrial disputes have often taken a less than peaceful turn. So much so that certain specialist legal practices, which are clearly not interested in industrial dialogue, have made this their main line of business.

Belgium doe not deny that certain employers turn to the courts ill-advisedly or too soon. Your Committee has already expressed its concerns on this matter on a number of occasions. To

[95] P. Palsterman, *L'accord sur le droit de grève*, Brussels, Centre de recherche et d'information socio-politiques, Courrier hebdomadaire 2002, no. 1755, 31 (appendix 34)

remedy this, Belgium has invested heavily in consultation and dialogue in the field of industrial relations as a means of settling collective disputes. In practice, and in the great majority of cases, this approach results in agreement and compromise. For the exceptional cases where resort to the courts is inevitable, the defendant has proposed changes to the law. However, these proposals have been blocked by the social partners, working in tandem. On the one hand, the complainants do not want the state to become involved through the imposition of strike legislation. But on the other hand they complain that pickets are often the victims of gaps in the law.

Finally, the Kingdom of Belgium wishes to express strong exception to the impression given by the complainants that the country is a police state where strike pickets are not tolerated, whereas the opposite is the case.

For all these reasons, the Kingdom of Belgium asks your Committee to dismiss this complaint as unfounded.

The agent of the Belgian government

Paul Rietjens

Director General of Legal Affairs