EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DECISION ON THE MERITS

Adoption: 16 October 2007

Notification: 26 October 2007

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Federation of Finnish Enterprises v. Finland

Complaint No. 35/2006

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 225 the session attended by:

Mrs Polonca KONČAR, President
Mssrs Andrzej SWIATKOWSKI, First Vice president
Tekin AKILLIOĞLU, Second Vice president
Jean-Michel BELORGEY,General Rapporteur
Nikitas ALIPRANTIS
Stein EVJU
Mrs Csilla KOLLONAY LEHOCZKY
Mssrs Lucien FRANÇOIS
Lauri LEPPIK
Mr Colm O'CINNEIDE
Mrs Monika SCHLACHTER
Birgitta NYSTRÖM

Assisted by Mr Régis BRILLAT, Executive Secretary

Having deliberated on 16 October

On the basis of the report presented by Mr. Andrzej SWIATKOWSKI

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint lodged by the Federation of Finnish Enterprises was registered on 19 June 2006. It alleges that Finland is in breach of Article 5 of the Revised Charter on the grounds that Finnish legislation provides that national employers' organisations may conclude collective agreements which provide for the opportunity to derogate from certain provisions of the labour legislation through local collective agreements. This applies to employers belonging to national employer organisations only. Employers not members do not have this possibility.

The Committee declared the complaint admissible on 5 December 2006.

2. Pursuant to Article 7§§1 and 2 of the Protocol providing for a system of collective complaints ("the Protocol") and the Committee's decision on the admissibility of the complaint, the Executive Secretary communicated the text of the admissibility decision on 11 December 2006 to the Finnish Government ("the Government"), the complainant organisation, the states party to the Protocol, the states having ratified the Revised Charter and having made a declaration under its Article D§2, the Union of the Confederations of Industry and Employers of Europe (UNICE), the European Trade Union Confederation (ETUC) and the International Organisation of Employers (IOE).

3. In accordance with Article 31§1 of the Committee's Rules, the Committee fixed a deadline of 16 February 2007 for the presentation of the Government's written submissions on the merits. The submission was registered on 16 February 2007.

4. Pursuant to Rule 31§2, the President set 20 April 2007 as the deadline for the complainant organisation to present its response to the Government's submissions. The response was registered on 20 April 2007.

5. The Committee set 16 February 2007 as the deadline for any observations from the states party to the Protocol as well as from UNICE, the ECTU and the IOE. On 16 February 2007, the European Trade Union Confederation (ETUC) presented its observations on the merits of the complaint.

SUBMISSIONS OF THE PARTIES

A - The complainant organisation

6. The Federation of Finnish Enterprises alleges that Finland violates Article 5 of the Revised Charter on the grounds that Finnish legislation allows employers who are members of national employer organisations to derogate from certain provisions of labour legislation in local collective agreements, thus disadvantaging employers who are not members of national employer organisations.

B - The Government

7. The Government asks the Committee to find the complaint unfounded.

C –Third Party Intervention)

8. The ETUC considers that the negative aspect of the right to organise should be interpreted restrictively so as not to weaken the material content of the positive right to organise. Further or in the alternative the ETUC holds that the situation does not infringe Article 5, as it does not affect the right not to organise which is protected in Finland rather the subject matter of the complaint relates to the collective bargaining system in Finland. The ETUC is of the opinion that Finland complies with Article 5.

RELEVANT DOMESTIC LAW

In their submissions the parties refer to the following provisions of domestic law.

Freedom of Association

9. Section 13 of the Constitution of Finland (*perustuslaki, grundlagen* 731/1999)

"Everyone has the right to arrange meetings and demonstrations without a permit, as well as the right to participate in them.
Everyone has the freedom of association. Freedom of association entails the right to form an association without a permit, to be a member or not to be a member of an association and to participate in the activities of an association.
The freedom to form trade unions and to organise in order to look after other interests is likewise guaranteed.
More detailed provisions on the exercise of the freedom of assembly and the freedom of association are laid down by an Act."

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10. The Employment Contracts Act (*työsopimuslaki arbetsavtalslage 55/2001):*

*"*Employers and employees have the right to belong to associations and to be active in them. They also have the right to establish lawful associations. Employers and employees are likewise free not to belong to any of the associations referred to above. Prevention or restriction of this right or freedom is prohibited.

Any agreement contrary to the freedom of association is null and void"

Collective agreements

11. The Employment Contracts Act

Chapter 13

Section 6

Mandatory nature of the provisions

Any agreement reducing the rights of and benefits due to employees under this Act shall be null and void unless otherwise provided in this Act.

Section 7

Derogation under a collective agreement

In derogation from what is laid down in section 6, national employers and employee associations are entitled to agree on what is laid down in chapter 1 section 5 (benefits depending on duration of the

employee relationship); chapter 2 section 5 (the employer's primary obligation to offer work to a part-time employee), section11 (pay during illness), and section 13 (pay day and pay period),; chapter 5 section 3 (advance explanation and hearing the employee), section 4 (lay off notice), and section 7 paragraph 2 (the employer's right to deduct the pay due for the lay off notice period from the pay due for the period of notice in case of termination),chapter 6 section 6 (re-employment of an employee) and chapter 9 (procedure for termination of an employment contract). Collective agreements concluded between said associations may also be used to agree on the grounds of lay offs referred to in chapter 5 section 2 paragraph 1 subparagraph 2 and paragraph 2 but not to extend the maximum duration of the lay –off referred to in paragraph 1 subparagraph 2 or to restrict the area covered by the obligation to offer work as laid down in chapter7 section 4.

The employer may also apply the provisions laid down in collective agreements and referred to in paragraph 1 above to the employment relationships of employees who are not bound by the collective agreement but in whose employment relationships the employer is required to observe the provisions of a collective agreement in accordance with the Collective Agreements Act [……]

[…]

Section 8

Provisions in a generally applicable collective agreement in derogation from the Act

Employers who are required to observe a generally applicable collective agreement as referred to in chapter 2 section 7 may observe the provisions referred to in section 7 of this chapter within the scope of application of this collective agreement if such application does not call for a local agreement. What is provided in section 7 paragraph 2 sentence 2 then applies.

THE LAW

12. Article 5 of the Revised Charter, reads as follows:

Article 5 – The right to organise

Part I:" All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests."

Part II: **"**With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations."

A. Submissions of the parties

13. The complainant organisation argues that the Employment Contracts Acts, Working Hours Act and Annual Holidays Act, by allowing employers members of national employer organisations the right to derogate from mandatory provisions of the legislation through local collective agreements and not allowing the same possibility to employers not members of employer organisations leads to unequal

treatment and favours employers members of employer organisations. Such employers enjoy a wider contractual freedom.

14. The complainant organisation states that in this respect employers members of employer organisations may negotiate terms of employment concerning for example overtime pay working time more favourable to them than the legislation provides. Therefore employers not members of employer organisations have a weaker position under the law and suffer a detriment by virtue of not being organised.

15. The Government first highlights that the negative right to associate is expressly guaranteed in Finland, both by the Constitution and the Employment Contracts Act.

16. In Finland the minimum terms and conditions of employment are ensured by legislation and by the system of general applicability of collective agreements.

17. The Government maintains that the rules allowing derogation from the mandatory provisions of the legislation may have the effect of weakening employee's rights and protection, the restrictions on local agreements must be seen in this context. Any collective bargaining system allowing for a derogation from mandatory provisions of legislation must ensure a balance of power and adequate safeguards. For this reason, the possibility to derogate from mandatory provisions of labour legislation has been granted to nation wide employee and employer organisations.

18 By permitting only employers members of employer organisations parties to the nation wide collective agreements to conclude local agreements derogating from the mandatory provision of the labour legislation, the system ensures a certain number of safeguards. Firstly collective agreements binding organised employers usually provide for a system of worker's representatives, which does not normally exist in non organised employers; it is often these representatives who are entitled to conclude the local agreement. Further the system of shop stewards helps ensure compliance with collective agreements.

19. A national employer oganisation party to a national collective agreement has an obligation to ensure that organised employers, even through negligence, do not breach the terms of collective agreements. If employer organisations fail to supervise or employers breach the terms of a collective agreement they may be fined. On the other hand the supervision of generally applicable collective agreements is left to the labour inspectorate.

20. According to the Government disputes over collective agreements with organised employers may be settled by negotiation and then before the Labour Courts as opposed to the district courts, providing speedier and cheaper remedies.

21. The Government admits that the law does treat employers depending upon whether they are members of an organisation differently but further states that this does not amount to a violation of the right not to organise. The situation complained of by the complainant organisation is in fact a matter of collective bargaining: the parties to collective agreements may decide to transfer some of their powers to the local level.

22. The Government points out that the issue raised by the complainant organisation were discussed in Parliament and the Constitutional Law Committee when examining the draft amended Employment Contracts Act. It found that the restriction on the freedom of association was not excessive taking into account that the aim of the legislation was to protect employees (Opinion of the Constitutional Law Committee Pe VL 41/2000).

23. In response to the Government the complainant organisation argues that not all organised employers have employee representatives, and many unorganised employers do. Further it states that the labour inspectorate are responsible for supervising compliance with labour law and collective agreements irrespective of whether or not the employer is a member of an employer organisation. The Finnish government should not justify the situation on the grounds that the means and resources of the Labour inspectorate are limited, nor on the grounds that disputes can in cases involving employers members of employer organisations be dealt with by the Labour Courts

B. Assessment of the Committee

24. The complainant organisation claims that the difference in treatment provided for by the Finnish legislation amounts to a violation of Article 5 as in order to benefit from the right to derogate from national legislation through collective agreements at the local level they have no other choice than to become a member of an employer organisation.

25. The situation is the result of the combination of several acts: the Collective Agreements Act (*työehtosopimuslaki, lagen om kolllektivavtal 436/1946)* provides that an employer bound by a collective agreement, either by virtue of being a member of an employer organisation or being independently party to a collective agreement is obliged to observe the terms of the agreement in so far as minimum terms and conditions of employment are concerned.

26. The Employment Contracts Act 55/2001 provides that collective agreements may be declared generally binding (Erga Omnes) and are therefore applicable to all working in the sector concerned irrespective of whether an employer is a member of the employer organisation which has concluded the agreement.

27. The Employment Contracts Act, the Working Hours Act (*työaikalaki, arbestidslagen 605/1996*) and the Annual Holidays Act (*vuosilomalaki semesterlagen 162/1995)* permit the national employee and employer associations to derogate from the mandatory provisions of the legislation by collective agreement.

28. In order to determine whether the rules relating to the effects of collective agreements are compatible with Article 5 of the Charter it is essential to interpret the provisions of Article 5 taking into account Article 6 of the Charter. It follows from this that it is legitimate in principle that the legal rules applicable to working conditions be the result of collective bargaining. Such a system implies that employers may be treated differently depending on whether or not they are members of an organisation.

29. Such a conclusion may of course lead to an incompatibility with Article 5 but only if it were to affect the very substance of the freedom of association (see judgment of the European Court of Human Rights in Gustafsson v Sweden of 25 April 1998)

30. The complainant organisation has not however demonstrated nor does the Committee find that the impugned provisions are in conflict with the substance of the freedom of association not has it been demonstrated that this freedom is affected in a manner that is more serious than what is necessary for the effectiveness and coherence of a system of collective bargaining

CONCLUSION

For these reasons, the Committee concludes

by 11 votes to 1 that there has been no violation of Article 5 of the Revised Charter

Andrzej SWIATKOWSKI Rapporteur	Polonca KONČAR President	Régis BRILLAT Executive Secretary

In accordance with Rule 30 of the Committee's rules of Procedure a dissenting opinion by Mr. Tekin AKILLIOGLU is appended to this decision.

APPENDICES

Dissenting opinion of Mr. Tekin AKILLIOGLU

I cannot support the majority opinion for the following reasons:

In this case, Finnish legislation treats employers differently according to whether or not they belong to an employers' organisation. I agree with the majority that the complainant organisation is on weak ground when it argues that the difference in treatment constitutes unfair pressure on employers, who are forced to join an employers' organisation in order to avoid it, and is therefore in breach of Article 5.

However, although the complaint is unfounded under Article 5, it should be considered closely from the standpoint of Article 6. The majority acknowledge in paragraph 28 that to determine whether the rules relating to the effects of collective agreements are compatible with the Charter account must be taken of Article 6. Yet, instead of developing this line of reasoning they conclude that the differentiation made by the legislation between affiliated and non-affiliated employers is a logical consequence of the system.

Although it is not made explicit, this argument gives priority to the notion of representativeness. However, consideration needs to be given to the meaning and scope of representativeness, which in this case embodies significant powers to claim exemption from the law.

Such a privilege based on the notion of representativeness may not be consistent with the promotion of collective bargaining, as specified in Article 6 paragraph 2, and the same may apply to paragraph 3. In dismissing this aspect of the complaint, the majority appear not to have responded to the complainant organisation's allegations in their entirety.

I find that in this case, Finnish legislation and practice are incompatible with the spirit of Article 6 paragraphs 2 and 3.