Originating Body	EUROPEAN COMMITTEE OF SOCIAL RIGHTS
Decision	
Type	Decision on the admissibility and on the merits
Date	03/07/2013
Importance level	1*
Treaty	European Social Charter (revised) of 1996
Conclusion	**Admissible** (unanimity) **Merits:** Violation of Article 6§2 (13 against 1) Violation of Article 6§4 (13 against 1) Violation of Article 19§4 *a* (unanimity) Violation of Article 19§4 *b* (unanimity)
Separate Opinion	No
Complaint	
Number /Title	**85/2012 - Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden**
Respondent State	**Sweden**
Date of registration	27/06/2012
Articles	6§§2 and 4; 19§4 *a* and *b*
Other information	
ECHR Case-law	Demir and Baykara v. Turkey, judgment of 12 November 2008; Wilson, and the National Union of Journalists, Palmer, Wyeth and the National Union of Rail Maritime and Transport Workers and Doolan and Others v. the United Kingdom, judgment of 02 July 2002; Gustafsson v. Sweden, judgment of 25 April 1996; Swedish Engine Drivers' Union v. Sweden, judgment of 6 February 1976; Schmidt and Dahlström v. Sweden, judgment of 6 February 1976; National Union of Belgian Police v. Belgium, judgment of 27 October 1975.
ECSR Case-law	International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, Decision on the merits of 8 September 2004, §26; *Confédération générale du travail* (CGT) v. France, Complaint No. 55/2009, Decision on the merits of 23 June 2010, §§32 and 33; Conclusions 2011, Statement of interpretation on Article 19§6; *CFE-CGC* v. France, Complaint No. 16/2003, decision on the merits of 12 October 2004, §30; Conclusions I - 1969, Statement of Interpretation on Article 6§2; Conclusions I - 1969, Statement of Interpretation on Article 6§4.
Other sources	**CJEU – case law**: *Laval un Partneri* Ltd. v. *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets*

avdelning 1, *Byggettan and Svenska Elektrikerförbundet* - Case C-341/05, judgment of 18 December 2007;
International Transport Workers' Federation and Finnish Seamen's Union v *Viking Line ABP* and *OÜ Viking Line Eesti* - Case C-438/05, judgment of 11 December 2007;
Dirk Rüffert, in his capacity as liquidator of the assets of *Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* - Case C-346/06, judgment of 3 April 2008;
European Commission v Luxembourg - Case C-319/06, judgement of 19 June 2008;
European Commission v Federal Republic of Germany - Case C-271/08, judgment of 15 July 2010;
Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn - Case C-36/02, judgment of 14 October 2004;
Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria - Case C-112/00, judgment of 12 June 2003.

International Labour Conference, 102nd Session, 2013 - Report of the Committee of Experts on the Application of Conventions and Recommendations, Part II - pp. 176-180;
International Labour Conference, 99th Session, 2010 - Report of the Committee of Experts on the Application of Conventions and Recommendations, Part II - pp. 208-209.

Communication COM(2003) 458 of the European Commission on the implementation of EU Directive 96/71/EC;
Resolution of 22 October 2008 of the European Parliament on challenges to collective agreements in the EU (2008/2085(INI)).

Keywords

Human rights
Labour rights
Economic freedoms
Free movement of services
Foreign workers
Posted workers
Foreign employers
Trade unions
Collective bargaining
Collective agreements
Collective action
Strike
Working conditions
Minimum wages
Laval case
Proportionality
Equal treatment
Discrimination

NOTICE

Non-promotion, concerning posted workers, of suitable machinery for voluntary negotiations between employers and workers' organisations with a view to the regulation of conditions of employment by means of collective agreements.

Disproportionate restrictions on the right of trade unions to take collective action in order to regulate employment terms of posted workers. Inadequate recognition of the fundamental right to collective action.

As regards remuneration and other working conditions, treatment of posted workers not less favourable than that of Swedish workers with permanent employment contracts is not secured.

As regards the enjoyment of the benefits of collective bargaining, treatment of foreign posted workers lawfully within the territory not less favourable than that of Swedish workers is not secured.

ADMISSIBILITY

The conditions of admissibility laid down in the Protocol and in the Committee's rules are fulfilled.

a) The complaint is:
- lodged in writing;
- indicates in what respect the complainant trade unions consider that the Charter is not respected;
- concerns provisions of the Charter accepted by the respondent state;

b) The complaint:
- emanates from national representative trade unions;
- is signed by persons entitled to represent the above-mentioned trade unions.

MERITS

Preliminary remarks

On the relationship between the Charter and European Union's law

1. With respect to the relevance, from the point of view of the Charter, of any legally binding measures adopted by the institutions of the European Union (EU) within the framework of EU law, the fact that national provisions are based on a EU *directive* does not remove them from the ambit of the Charter.

2. When member States of the European Union agree on binding measures in the form of directives which relate to matters within the remit of the Charter, they should – both when preparing the text in question and when transposing it into national law – take full account of the commitments they have taken upon ratifying the Charter. The same principle is applicable – *mutatis mutandis* – to national provisions based on *preliminary rulings* given by the Court of Justice of the EU on the basis of Article 267 of the Treaty on the functioning of the European Union.

3. The law of the Charter and EU law are two different legal systems, and the principles, rules and obligations constituting EU law do not necessarily coincide with the system of values, principles and rights embodied in the Charter. Neither the current status of social rights in the EU legal order, nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the Charter.

On the provisions of the Charter which have allegedly been violated

4. The substance of the arguments contained in the complaint and the response to the Government's submissions do not concern Article 4 of the Charter. Therefore, the decision only refers to the alleged violation of Article 6§§2 and 4, and Article 19§4 a and b.

I. Article 6§§2 and 4

5. The exercise of the right to bargain collectively and the right to collective action, guaranteed by Article 6§§2 and 4 of the Charter, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter.

6. The right to collective bargaining and action receives constitutional recognition at national level in the vast majority of the Council of Europe's member States, as well as in a significant number of binding legal instruments at the United Nations and European Union (EU) level.

7. On the basis of Article 6§2, States Party undertake not only to recognise, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreement if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other.

8. States should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned.

9. In Sweden, on the basis of Section 5a and Section 5b of the Foreign Posting of Employees Act (1999:678 / Amendments: up to and including SFS 2012:857, SFS 2013:351), as regards foreign posted workers, collective agreements requested by trade unions may only regulate, with the backing and by means of a collective action, the minimum rate of pay or other minimum conditions - or, as regards the particular case of posted agency workers, the pay or other conditions - within the matters referred to in Section 5 of the above-mentioned Act.

10. Such provisions impose substantial limitations on the ability of Swedish trade unions to make use of collective action in establishing binding collective agreements on other matters and/or to reach agreements at a higher level.

11. Moreover, following the changes in Section 2 of the Foreign Branch Offices Act (1992:160, Modified 2009-11-24 by SFS 2009:1083), foreign companies which conduct their economic activities in Sweden are not obliged to create a branch office with independent management in Sweden if the economic activity is made subject to the provisions on free movement of goods and services in the Treaty on the Functioning of the European Union or the corresponding provisions of the Agreement on the European Economic Area (EEA). Swedish trade unions willing to conclude agreements with the above-mentioned foreign companies are therefore forced to negotiate and conclude such agreements with the responsible employers abroad.

12.As regards posted workers, this statutory framework does not promote the development of suitable machinery for voluntary negotiations between employers and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements.

There is a violation of Article 6§2 of the Charter.

13. A restriction to the right to collective action can be considered in conformity with Article 6§4 of the Charter only if, as set forth by Article G, the restriction: a) is prescribed by law; b) pursues a legitimate purpose - i.e. the protection of rights and freedoms of others, of public interest, national security, public health or morals – and, c) is necessary in a democratic society for the pursuance of these purposes, i.e. the restriction has to be proportionate to the legitimate aim pursued.

14. A national legislation which prevents *a priori* the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards would infringe the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers.

15. Within the system of values, principles and fundamental rights embodied in the Charter, the right to collective action is essential in ensuring the autonomy of trade unions and protecting the employment conditions of workers: so that the substance of this right is respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions.

16. Legal rules relating to the exercise of economic freedoms established by State Parties either directly through national law or indirectly through EU law should be interpreted in such a way as to not

impose disproportionate restrictions upon the exercise of labour rights as set forth by, further to the Charter, national laws, EU law, and other international binding standards.

17. National and EU rules regulating the enjoyment of such freedoms should be interpreted and applied in a manner that recognises the fundamental importance of the right of trade unions and their members to strive both for the protection and the improvement of the living and working conditions of workers, and also to seek equal treatment of workers regardless of nationality or any other ground.

18. The facilitation of free cross-border movement of services and the promotion of the freedom of an employer to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights, including the right to collective action to demand further and better protection of the economic and social rights and interests of workers.

19. Any restriction imposed on the enjoyment of the right to collective action should not prevent trade unions from engaging in collective action to improve the employment conditions, including wage levels, of workers irrespective of their nationality.

20. Section 5a of the Foreign Posting of Employees Act, taken together with the provisions of Section 41c of the Co-determination Act (1976:580 / Amendments: up to and including SFS 2012:855), provides that no form of collective action can be taken by trade unions if the employer shows that workers enjoy conditions of employment (including wage levels and other essential aspects of work) that are at least as favourable as the minimum conditions established in agreements at central level.

21. Section 5b of the Foreign Posting of Employees Act, taken together with the provisions of Section 41c of the Co-determination Act, provides that no form of collective action can be taken by trade unions if the employer shows that workers enjoy conditions of employment (including wage levels and other essential aspects of work) that are at least as favourable as the conditions established in agreements at central level or in the user undertaking.

22. Furthermore, under Section 41c of the Co-determination Act, collective action taken in violation of Section 5a and 5b is unlawful, and trade unions acting in breach of the Foreign Posting of Employees Act shall pay compensation for any loss incurred (cf. Section 55 of the Co-determination Act).

23. This statutory framework constitutes a disproportionate restriction on the free enjoyment of the right of trade unions to engage in collective action, since it prevents trade unions taking action to improve the employment conditions of posted workers over and beyond the requirements of the above-mentioned conditions.

There is a violation of Article 6§4 of the Charter.

II. Article 19§4 *a* and *b*

24. According to Article 19§4 a, with a view to assisting and improving the legal, social and material position of migrant workers and their families, States parties are required to guarantee certain minimum standards with respect to, *inter alia*, a) remuneration and other employment and working conditions b) trade union membership and the enjoyment of benefits of collective bargaining.

25. For the period of stay and work in the territory of the host State, posted workers are workers coming from another State Party and lawfully within the territory of the host State. In this sense, they fall within the scope of application of Article 19 of the Charter and they have the right, for the period of their stay and work in the host State to receive treatment not less favourable than that of the national workers of the host State in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining.

26. According to Section 5a of the Foreign Posting of Employees Act, as regards wages and other working conditions, it is admissible to grant foreign posted workers, irrespective of their age or level of occupational experience and skills, minimum standards equivalent to those enjoyed by national workers under the correspondent central collective agreements (unless employers voluntarily grant more favourable conditions).

27. However, in practice, collective agreements do not very often provide for rules concerning minimum wages, and the minimum wage can be considerably lower than the normal rate of pay generally applied throughout the country to Swedish workers (working in the same professional sector). In addition, minimum wages rules, when they are provided for by collective agreements, are normally applied only to people without occupational experience, such as young people; the collective agreements often oblige the employer to pay a higher rate to workers with professional experience and skills.

28. According to Section 5b of the above-mentioned Act, posted agency workers can benefit from normal standards but there is still a limited scope of working conditions that applies to them and which could be regulated in a collective agreement.

29. In the light of the above, the Swedish legislation, in respect of remuneration and other working conditions, does not secure for posted workers the same treatment guaranteed to other workers with permanent employment contracts.

There is a violation of Article 19§4 *a* of the Charter

30. Applying the principle of non-discrimination, as set out in Article 19§4 b of the Charter to the context of collective bargaining, requires that State parties have to take action to ensure that migrant workers enjoy equal treatment when it comes to benefiting from collective agreements aimed at implementing the principle of equal pay for equal work for all workers in the workplace, or from legitimate collective action in support of such an agreement, in accordance with national laws or practice.

31. Posted workers, for the period of their stay and work in the territory of the host State, should be treated by the host State as all the other workers who work in that State; and foreign undertakings should be treated equally, by the host State, when they provide services by using posted workers.

32. On the contrary, excluding or limiting the right to collective bargaining or action with respect to foreign undertakings, for the sake of enhancing free cross border movement of services and advantages in terms of competition within a common market zone, constitutes, according to the Charter, discriminatory treatment on the ground of nationality of the workers, on the basis that it determines, in the host State, lower protection and more limited economic and social rights for posted foreign workers, in comparison with the protection and rights guaranteed to all other workers.

33. As indicated, the provisions contained in Sections 5a and 5b of the Foreign Posting of Employees Act, as well as Section 41c of the Co-determination act, constitute a disproportionate restriction of the enjoyment of the right of trade unions to engage in collective action. On the other side of the coin, which is from the standpoint of the rights of posted workers, this does not guarantee for foreign posted workers lawfully within the territory of Sweden treatment not less favourable than that of Swedish workers respect to the enjoyment of the benefits of collective bargaining.

There is a violation of Article 19§4 *b* of the Charter.