COMMITTEE OF MINISTERS
COMITÉ DES MINISTRES

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution CM/ResChS(2014)1
Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012

(Adopted by the Committee of Ministers on 5 February 2014
at the 1190th meeting of the Ministers' Deputies)

The Committee of Ministers,[1]

Having regard to Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints;

Taking into consideration the complaint lodged on 27 June 2012 by Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) against Sweden;

Having regard to the report transmitted by the European Committee of Social Rights containing its decision on admissibility and the merits, in which it concluded:

- by 13 votes to 1, that there is a violation of Article* 6§2 *of the Charter

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.

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 EU level.

On the basis of Article 6§2, States Parties 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.

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.

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.

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.

[1] In accordance with Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints the following Contracting Parties to the European Social Charter or the revised European Social Charter have participated in the vote: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and United Kingdom.

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.

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.

- by 13 votes to 1, that there is a violation of Article 6§4 of the Charter

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.

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.

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.

Legal rules relating to the exercise of economic freedoms established by States 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.

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.

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.

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.

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.

Section 5b of the above-mentioned 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.

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).

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.

- unanimously, that there is a violation of Article 19§4 a of the Charter

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*, remuneration and other employment and working conditions.

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.

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).

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.

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.

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.

- unanimously, that there is a violation of Article 19§4 b of the Charter

According to Article 19§4 *b*, 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 also with respect trade union membership and the enjoyment of benefits of collective bargaining.

Bearing in mind the considerations made in paragraph 29 above, posted workers have the right, for the period of stay and work in the territory of the host State, to receive treatment not less favourable than that of the national workers of the host State also in respect of the enjoyment of the benefits of collective bargaining.

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 States 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.

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.

On the contrary, the Committee underlines that 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.

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.

Having regard to the document distributed at the request of the Representative of Sweden at the meeting of the Rapporteur Group on Social and Health Questions (GR-SOC) of 26 November 2013,

1. takes note of the report of the European Committee of Social Rights and of the information communicated by the Swedish delegation on the follow-up to the decision of the European Committee of Social Rights (see Appendix to the resolution);

2. notes Sweden's concerns, as they appear in the Appendix to the present resolution, and recognises that the decision of the European Committee of Social Rights in this case raises complex issues in relation to the obligation of EU member States to respect EU law and the obligation to respect the Charter;

3. looks forward to Sweden reporting of any possible evolution in the issue.

Appendix to Resolution CM/ResChS(2014)1

Observations of the Government of Sweden in reply to the report of the European Committee of Social Rights on Complaint No. 85/2012, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden

INTRODUCTION

The Swedish Government welcomes this opportunity to provide further information, clarification and comments in respect of this important case. Needless to say, the government appreciates the work of the European Committee of Social Rights (the Committee) and considers the European Social Charter (the Charter) to be of fundamental importance for the protection of social rights. It should be emphasised that the government takes all its international obligations, including those towards the Council of Europe, most seriously.

However, Sweden is, together with many other states, not only a member of the Council of Europe, but also a member of the EU. The EU membership implies that Sweden also has to comply with the sui generis legal framework of the EU. Even though the competence to regulate industrial action remains with the individual member states of the EU, the legislative changes at issue have been deemed necessary in order for Swedish legislation to comply with EU law.

As will be elaborated on in this memorandum, the government does not consider that the Swedish implementation of EU law runs counter to the Charter, and hence does not agree with the Committee's conclusions.

* * *

Information from the Swedish Government

The Swedish labour market model, EU law and the Charter

An important characteristic for the Swedish labour market model is that it is to a large extent self-regulated by its social partners – the organisations of the employees and of the employers. There is a broad consensus among the Swedish political parties in the parliament, as well as the parties on the labour market, that our labour market model functions well and is important to safeguard. Therefore, where it has been necessary to adapt Swedish law to EU law, the legislative changes have been designed in order to preserve the Swedish labour market model.

The government can conclude that the report of the Committee to a large extent concerns the implementation of EU law. According to the Treaty of Lisbon, which entered into force in 2009, the Union shall recognise the rights, freedoms and principles set out in the EU Charter of Fundamental Rights. Under the EU Charter of Fundamental Rights, which is still relatively new, certain articles derive from articles in the Charter.

Lex Laval and its relationship with EU law

In the Laval case (C-341/05), the European Court of Justice (ECJ), *inter alia,* provided further clarification as regards the contents of the EU Posting of Workers Directive (96/71/EC), and concluded that the industrial action at hand was contrary to the freedom to provide services in the Treaty on the Functioning of the European Union. After the Laval case, it was deemed necessary to amend the Swedish legislation on industrial action with regard to posted workers in order to comply with EU law. The core of the legislative changes, commonly referred to as lex Laval, is a new section in the Swedish Foreign Posting of Employees Act (1999:678). The changes restrict the Swedish trade unions' possibilities to take industrial action against a foreign employer who posts workers to Sweden, if the industrial action aims at regulating employment conditions which go beyond the minimum requirements of the so-called hard core of the EU Posting of Workers Directive. Nevertheless, the regulations ensure that posted workers are guaranteed a certain level of protection in terms of pay and other employment conditions, in accordance with the EU Posting of Workers Directive. With regard to posted temporary agency workers, the regulation was modified when the EU Directive on Temporary Agency Work (2008/104/EC) was implemented in Sweden, with increased possibilities to take industrial action with respect to posted temporary agency workers.

These new legislative changes were, to the extent possible, designed to preserve the Swedish labour market model. The trade unions are still responsible for the monitoring and enforcement of safeguarding workers posted abroad and to ensure that providers of services from other countries do not compete unfairly by means of low conditions of pay and service in the fields indicated by the EU Posting of Workers Directive.

New initiatives in Sweden and the EU regarding posted workers

In September 2012, a Commission was assigned by the government with the task to evaluate the enforcement of the changes of the Foreign Posting of Employees Act after the Laval case. Lex Laval entered into force 2010 and the legislation is thus still fairly new. There has, as of yet, not been any unbiased and comprehensive investigation of the consequences of the legislative changes after the Laval case. During its initial phase, the Commission shall examine the situation of posted workers in Sweden. After the initial investigation, the Commission shall evaluate the legislative amendments after the Laval case and propose any necessary amendments. The Commission shall further consider necessary changes to safeguard the Swedish labour market model in an international context. The proposals of the Commission shall further include an analysis of the consequences in relation to relevant international regulations. The Commission is composed of representatives of all parties in the parliament. The Commission shall also during the course of its work pursue a dialogue with representatives of the social partners on the Swedish labour market.

With regard to the conclusions of the Committee regarding the contact person in Sweden with respect to posted workers, the government would like to submit the following information. A change of the Foreign Branch Offices Act (1992:160) was made, whereby the requirement for a representative responsible for the

business operations in Sweden was removed as regards natural persons resident in the EEA. The change was deemed necessary in order for the legislation to comply with the EU Services Directive (2006/123/EC). However, an amendment to the Foreign Posting of Employees Act entered into force in July this year, according to which a foreign employer must report that it posts workers to Sweden. Further, the employer must appoint a contact person in Sweden, which shall be authorised to receive notice on behalf of the employer. The contact person shall be able to provide documentation demonstrating that the requirements of Foreign Posting of Employees Act, as regards employment conditions for posted workers, are met. With regard to the Committee's report and in addition to the government's answer to the complaint, the government would like to clarify that should the contact person receive notice of a request for collective bargaining negotiations, the foreign employer must participate in negotiations in order to prevent being subject to industrial action, according to the Co-Determination Act (1976:580). It is the opinion of the government that this regulation may facilitate negotiations regarding collective bargaining agreements. It shall further be noted that the recent legislative changes has been drafted in order to comply with relevant EU law.

There are furthermore ongoing initiatives with respect to posted workers at EU level, where a directive to improve the application of the EU Posting of Workers Directive is currently being negotiated.[2] The aim of the directive is to reconcile the exercise of the freedom to provide cross-border services with appropriate protection of the rights of workers temporarily posted abroad for that purpose, and to prevent abuse of the regulations.

Posted workers and the scope of the Charter

With regard to the Committee's report and in addition to the government's answer to the complaint, the government would like to draw the attention to that the legislation concerns employees which are posted from and employed in and normally working in another country, and thus in essence are covered by the laws of another country according to international provisions regarding applicable law.

In light of the above, as regards article 6 of the Charter, the government would like to draw attention as to whether posted workers are to be considered as "lawfully resident or working regularly within the territory of the Party concerned", as stated in the appendix of the Charter regarding the scope of its protection.

Further, the government would like to raise concerns regarding the Committee's interpretation of Article 19 of the Charter, whereby posted employees should be considered as migrants and thereby equally treated with other workers under the Charter. It is the opinion of the government that an interpretation of the Charter which creates an obligation to treat posted workers equally with other workers in the host country, despite that another country's law is applicable, may contradict international provisions regarding applicable law. The government would further like to point out that where there is no conflict of law situation, Swedish employment legislation applies in full for migrant workers, in the same way as for any other worker on the Swedish labour market.

With respect to the Committee's report regarding article 19.4 a in particular, the government would further like to recall that as the Swedish labour market is, to a large extent, self-regulated by the social partners and wage levels are not regulated by law or regulations, as prescribed in article 19.4 a.

Information on EU level regarding the Committee's report

Finally, as the report of the Committee to a large extent concerns EU legislation and therefore the relationship between EU law and the Charter, the government would like to inform the Committee of Ministers that it will in due course raise relevant aspects of the conclusions of the Committee in an EU context.

Conclusion

In the government's view, the Committee's interpretation of the Charter is quite far reaching. The government disagrees with the Committee's opinion that the Swedish implementation of EU law in this case runs counter to the wording or the meaning of the relevant provisions of the Charter. The Committee's interpretation of the Charter creates, in the government's opinion, an unnecessary tension between the obligation of EU member States to respect EU law and the obligation to respect the Charter. It goes without saying that when an

[2] COM(2012)131 final – Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

international human rights body such as the Committee, questions the legality of a lawful implementation of EU law in an EU member State under the human rights instrument the body in question has been set to interpret, that State is put in a very delicate position.

Nevertheless, the government has recently taken several new initiatives, and has assigned a Commission with the task to evaluate the situation on the Swedish labour market following the changes of the Foreign Posting of Employees Act after the Laval case.

As the report of the Committee to a large extent concerns EU law, the government will further raise relevant aspects of the conclusions of the Committee in an EU context.

The government will at the time of the submission of reports to the Council of Europe concerning the relevant provisions of the Revised European Social Charter provide further information on the development.

In light of the above, it is the opinion of the government that the Committee's report should not be the basis for criticism against Sweden by the Committee of Ministers. It is proposed that a resolution be formulated in a neutral manner.