

European Labour Law

The European Committee of Social Rights and

Complaint n. 85/2012: Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden.

PAR 1: Information about European Committee of Social Rights

- Seat: Strasbourg, France
- Instrument: European Social Charter
- Operating since: 1965

The European Committee of Social Rights is a regional human rights body that oversees the protection of certain economic and social rights in most of Europe.

The Committee monitors the implementation of the 1961 Charter, the 1988 Additional Protocol, and 1996 Revised European Social Charter.

The Committee is composed by 15 independent and impartial members elected by Council of Europe's Committee of Ministers. They are elected for 6 years and the mandate is renewable once. The ESC is unique in that it permits States to select which articles by which they will consider themselves bound by at least six of following articles:

- Article 1 **The right to work**
- Article 5 **The right to organise**
- Article 6 **The right to bargain collectively**
- Article 7 **The right of children and young persons to protection**
- Article 12 **The right to social security**
- Article 13 **The right to social and medical assistance**
- Article 16 **The right of the family to social, legal and economic protection**
- Article 19 **The right of migrant workers and their families to protection and assistance**
- Article 20 **The right to equal opportunities and equal treatment in matters of employment**
- **and occupation without discrimination on the grounds of sex**

Additionally, States parties to the Revised Charter must selected no fewer than 16 articles or 63 sub paragraphs by which to consider themselves bound.

The European Committee of Social Rights operates by two systems:

1. **National Reporting System:** Each year, States Parties to the European Social Charter submit a national report describing how they are implementing provisions of the Charter. The Committee evaluates the reports and publishes conclusions. If a States does not respect the provisions of the Charter and does not act in response to the Committee's decisions, the Committee will also issue a recommendation to the State. Following the conclusion of the national reporting procedure, the Council of Europe's Committee of Ministers adopts resolutions.
2. **Collective Complaints Procedure:** The Committee is also empowered to hear collective complaints against the States that have accepted this procedure. So far, 15 States have accepted the jurisdiction of the Committee. This procedure was inserted in the European Social Charter in the Additional Protocol in 1995, and this agreement entered into force in 1998.

PAR.2: *The Fact*

- Basic Facts: **The Laval Case, and the European Court of Justice judgement.** The European Court of Justice establishes that “**the right to take collective action in order to force an undertaking to conclude a collective agreement with certain terms and conditions constitutes a restriction on the free movement of services.**” (See par.99). This right to collective action *makes it less attractive to provide services.*”
- Legislation following the ECJ judgment restricting trade union rights:
 1. On 10 April 2008 the Swedish government decided to appoint a special Committee with the aim to change Swedish legislation, this committee was called the Laval Committee. The Laval Committee is obliged to make legislation in accordance with EU law. (In particular, The **Posting of Workers Directive** 96/71/EC).
 2. Proposal from the Laval Committee were transformed into a Government Bill. The Bill proposes amendments to the **Swedish Co-determination Act** and the **Act on Posting of Workers**. The proposal entered into force on 15 April 2010.
 3. The most important fact is that the main changes concern **COLLECTIVE ACTION**; in particular there is a restriction to the right to take industrial action against all companies that post workers to Sweden; the trade union’s right to take a collective action for the purpose of regulating the condition of posted workers in a collective agreement is limited in particular in *section 5a and b of the Posting of Workers Act.*
 4. So, for LO and for TCO there is a violation of article 6§§ 2 and 4; article 19§4 a and b

PAR.3: *Articles discussed in the case*

1. Articles of European Social Charter

Article 6 – The right to bargain collectively (In particular par.2 and 4)

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1. to promote joint consultation between workers and employers;
2. **to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;**
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:
4. **the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.**

Article 19 – The right of migrant workers and their families to protection and assistance (In particular par. 4 a and b)

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake:

1. to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;
2. to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;
3. to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries;
4. **to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:**
 - a. **remuneration and other employment and working conditions;**
 - b. **membership of trade unions and enjoyment of the benefits of collective bargaining;**
 - c. accommodation;
5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;
6. to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;
7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;
8. to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;
9. to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;
10. to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply.

2. Article 3 of the EU Posting of Workers Directive

Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or

- **by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:**

- (a) Maximum work periods and minimum rest periods;
- (b) Minimum paid annual holidays;
- (c) **The minimum rates of pay, including overtime rates;** this point does not apply to supplementary occupational retirement pension schemes;
- (d) The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) Health, safety and hygiene at work;
- (f) Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- (g) Equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this Directive, **the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.**

3. Swedish Posting of Workers Act, Section 5a point 2

PAR.4: The decision of the European Committee of Social Rights

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

1. is lodged in writing;
2. indicates in what respect the complaint considers that the Charter is not respected;
3. concerns provision of the Charter accepted by the respondent state;
4. is emanated from national representative trade unions;
5. is signed by persons entitled to represent trade unions.

Merits: The Committee analyzes the [relationship between the Charter and European Union's law](#), and it says that EU law and the law of the Charter are two different legal systems, that not necessarily coincide in values, rules and principles.

Secondarily, The Committee analyzes the complaint. For the Committee:

1. THERE IS A VIOLATION OF ARTICLE 6§2 OF THE CHARTER

The Committee notices that the exercise of the right to bargain collectively and the right to collective actions represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter. The right to collective bargaining and the right to collective action receive constitutional recognition at national level, and also in EU law. It is important to notice that on the basis of article 6§2, States party have not only to recognise this right, but also actively to promote the conclusion of collective agreement between employers and workers. But in Sweden, according to section 5a and 5b of the Swedish Posting of Workers Act, collective agreements requested by trade unions **MAY ONLY REGULATE THE MINIMUM RATE**

OF PAY OR OTHER MINIMUM CONDITIONS. (According with art.3 of the EU posting of workers directive).

- There is **SUBSTANTIAL LIMITATIONS** on the ability of Swedish Trade Unions to use collective action in establishing binding collective agreements in **other matters.**

2. 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 If the conditions in article G are satisfied. The conditions are:

- The restriction is prescribed by law
- Pursues a legitimate purpose
- Is necessary in a democratic society to pursue these purposes.

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

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 **cannot be interpreted as a way to limit a priori the right to take collective action for the implementation of worker's rights added in the Charter.** Above, Section A of the Foreign Posting of Employees Act, provides that no form of collective action can be taken by trade unions **if the employer shows that workers enjoy conditions of employment that are at least as favourable as the minimum conditions established in agreements at central level.** Furthermore, under section 41c of the Co-determination Act, collective action taken in violation of section 5 is unlawful, and trade unions that act against the provisions of the Foreign Posting of Employees Act shall pay compensation for any loss incurred. So, this situation **CONSTITUTES A DISPROPORTIONATE RESTRICTION OF THE RIGHT TO TAKE COLLECTIVE ACTION.**

3. THERE IS A VIOLATION OF ARTICLE 19§4 A and B

According to article 19§4 States parties are required to guarantee certain minimum standards in particular in respect of:

- A) remuneration and other employment and working condition;
- B) trade union membership and the enjoyment of benefits of collective bargaining ;

So, under this provision, posted workers for the period they stay and work in another state, they have the right to receive treatment **not less favourable than that of the national workers of the host State in respect of remuneration and other conditions.** According to section a, as regard wages and other working conditions, it is possible to grant foreign posted workers minimum standards equivalent to those enjoyed by national workers under the correspondent central collective agreements. **However, in practice, collective agreement in Sweden do not very often provide for rules concerning minimum wages, and the minimum wages can be considerably lower than the normal pay applied to Swedish workers.** Is important to notice that generally, minimum wage rules, are applied only to people without occupational experiences. In the light of above, the Swedish legislation in respect of remuneration and other conditions **does not secure for posted workers the same treatment guarantee to Swedish workers.**

The Swedish legislation is also not compatible with art 19§4 b because, excluding or limiting the right to collective bargaining or action, with the scope to create a common market zone, constitute according with the Charter **discriminatory treatment on the ground of nationality of workers.**

Par. 5: *Information from the Swedish Government*

Lex Laval and its relationship with EU law: In the Laval Case (341/05) the European Court of Justice concludes that industrial action was contrary to the freedom to provide services insered in the TFEU.

For the Government, after this case, was necessary to amend the Swedish legislation on industrial action, in order to comply with EU law. It is true that, the changes *restrict the Swedish Trade Unions possibility to take industrial action against a foreign employer who posts workers in Sweden, but this regulation is comply with EU posting of workers directive, because the regulation ensures that posted workers are guaranteed a certain, minimum, level of protection.*

In the government's point of view the interpretation of the Charter is quite far reaching. The committee interpretation, in the government's opinion, **creates an unnecessary tension between the obligation of EU member States to respect law and the obligation to respect the Charter.**

Nevertheless the government has recently taken several new initiatives, and has assigned a Commission with the aim to control the situation on the Swedish Labour Market after the Lex Laval.

PAR.6: *Conclusions*

In February, 2013 the ILO Committee of Experts delivered its **General Report on the Application on Conventions and Recommendations.** The Committee reviewed and commented on Lex Laval and the final Laval judgment in relation to Freedom of Association and Protection of the Right to Organise Convention No 87 and the Right to Organise and Collective Bargaining Convention No 98, and expressed deep concern about the Swedish developments. The Committee was inter alia deeply concerned that the trade unions involved in the Laval case had been held liable for a collective action that was lawful under national law and which could not have been reasonably presumed to be found in violation of European law. The Swedish Government has since declared that they will answer the ILO Committee of Experts.

Trade unions LO and TCO have naturally welcomed this decision, **and demanded that changes must be made to the Swedish legislation. The Confederation of Swedish Enterprise has maintained the supremacy of EU law and highlighted the fact that the decision of the Committee is not legally binding.**

So, we can notice that, the decision of the Committee is not binding for the States that accept the collective complaints procedure.

The problem, in my opinion, is that the values promoted by EU Posting of Workers Directive (free movement of services, creation of a common market) seems to be, in the interpretation of the ECJ incompatible with some basic worker's rights, in particular the right to take collective actions.

But, the interpretation of ECJ is binding.

In fact, from 341/05 ECJ:

- "In the case in the main proceedings, it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden,

and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC."

It is desirable that the ECJ changes its interpretation about EU law, *in particular about EU Posting of Workers Directive and its relationship with rights contained in the European Social Charter*. For this reason, the European Committee of Social Right's decisions are important: even if decisions are not legally binding, the decisions *can inspire a change in the European Court of Justice's way to interpret EU law*.