European Social Charter | Charte Sociale Européenne

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

Confidential[1]

***Fellesforbundet for Sjøfolk* (FFFS) v. Norway**

Complaint No. 74/2011

REPORT TO THE COMMITTEE OF MINISTERS

Strasbourg, 17 July 2013

[1] It is recalled that pursuant to Article 8§2 of the Protocol, this report will not be made public until after the Committee of Ministers has adopted a resolution, or no later than four months after it has been transmitted to the Committee of Ministers, namely 18 November 2013.

Introduction

1. Pursuant to Article 8§2 of the Protocol providing for a system of collective complaints ("the Protocol"), the European Committee of Social Rights, a committee of independent experts of the European Social Charter ("the Committee") transmits to the Committee of Ministers its report[1] on Complaint No. 74/2011. The report contains the Committee's decision on the merits of the complaint (adopted on 2 July 2013). The decision on admissibility (adopted on 23 May 2012) is appended.

2. The Protocol came into force on 1 July 1998. It has been ratified by Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal and Sweden. Furthermore, Bulgaria and Slovenia are also bound by this procedure pursuant to Article D of the Revised Social Charter of 1996.

3. The Committee's procedure was based on the provisions of the Rules of 29 March 2004 which it adopted at its 201st session and revised on 12 May 2005 at its 207th session, on 20 February 2009 at its 234th session and on 10 May 2011 at its 250th session.

4. The report has been transmitted to the Committee of Minister on 17 July 2013.It is recalled that pursuant to Article 8§2 of the Protocol, this report will not be made public until after the Committee of Ministers has adopted a resolution, or no later than four months after it has been transmitted to the Committee of Ministers, namely 18 November 2013.

[1] This report may be subject to editorial revision.

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

2 July 2013

Fellesforbundet for Sjøfolk (FFFS) v. Norway

Complaint No. 74/2011

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 265th session attended by:

Luis JIMENA QUESADA, President
Monika SCHLACHTER, Vice-President
Petros STANGOS, Vice-President
Lauri LEPPIK
Birgitta NYSTRÖM
Rüçhan IŞIK
Alexandru ATHANASIU
Jarna PETMAN
Giuseppe PALMISANO
Karin LUKAS
Eliane CHEMLA
Jozsef HAJDU
Marcin WUJCZYK

Assisted by Régis BRILLAT, Executive Secretary,

Having deliberated on 18 March, 19 March and on 2 July 2013,

On the basis of the report presented by Jarna PETMAN,

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint submitted by the Fellesforbundet for Sjøfolk ("the FFFS") was registered on 27 September 2011.

2. The complainant trade union alleges that the Norwegian Seamen's Act (*den norske sjømannslov* of 30 May 1975 (No. 18); "the Seamen's Act"), which stipulates retirement for seamen upon reaching the age of 62 years, is to be construed as an unjustified prohibition of employment and a discriminatory denial of seamen's right to work as such, in breach of Article 1§2 (right to work) and 24 (right to protection in case of termination of employment) read alone or in conjunction with Article E (non-discrimination) of the European Social Charter ("the Charter").

3. The Committee declared the complaint admissible on 23 May 2012.

4. In accordance with Article 7 paragraphs 1 and 2 of the Protocol providing for a system of collective complaints ("the Protocol") and with the Committee's decision on the admissibility of the complaint, on 31 May 2012 the Executive Secretary communicated the text of the admissibility decision to the Government of Norway ("the Government") and to the FFFS. On the same day, the decision was sent to the states parties to the Protocol and the states having made a declaration in accordance with Article D§2, and to the organisations referred to in Article 27§2 of the Charter.

5. In accordance with Rule 26 of the Rules of the Committee, the Committee set 12 July 2012 as the deadline for the Government to make its submissions on the merits. At the Government's request, this deadline was extended until 8 September 2012. The Government's submissions on the merits were registered on 7 September 2012.

6. The deadline set for the FFFS's response on the merits of the complaint was 29 November 2012. The FFFS's response was registered on 28 November 2012.

7. On 23 January 2013, the Government submitted its additional observations on the merits of the complaint. On 12 February 2013, these submissions were supplemented with additional information. On 18 February 2013, the complainant trade union submitted its comments on this additional information.

SUBMISSIONS OF THE PARTIES

A – The complainant trade union

8. The complainant trade union asks the Committee to find that the situation in Norway is not in conformity with Article 1§2 and 24 of the Charter read alone or in conjunction with Article E due to Section 19§1, subsection 7 of the Seamen's Act, stipulating that seamen may be given notice of termination of employment solely on the basis of them having reached the age of 62 years.

9. The FFFS claims that this age-limit set out in domestic legislation amounts to an unjustified prohibition of the seamen's right to work and disproportionately restricts their protection in case of termination of employment.

B – The respondent Government

10. The Government asks the Committee to declare the complaint unfounded in all respects.

11. The Government submits that the contested provision of the Seamen's Act is in compliance with the relevant international legal instruments, the Charter included, and therefore asks the Committee to rule that there is no violation of the said Articles.

RELEVANT DOMESTIC LAW AND PRACTICE

12. Section 19§1 of the Seamen's Act, subsections 1 and 7, provide as follows:

> **"Protection against undue notice**
>
> 1. A seaman cannot be given notice unless the notice of termination is duly grounded in factors relating to the shipping company or to the seaman himself.
>
> [...]
>
> 7. A notice which terminates employment before the seaman turns 62 and which is justified solely on the grounds that he is entitled to old age pension pursuant to the Act of 3 December 1948 subsection 7 regarding pension insurance for seamen, shall not be regarded as duly grounded. Departure from service before the age of 62 may, however, be stipulated in advance in the collective wage agreement".

13. Section 15§7, subsection 4 of the Act of 17 June 2005 (No. 62) relating to working environment, working hours and employment protection, etc. ("*the Working Environment Act*"; "the WEA") includes the following provision of a general applicability:

"**Protection against unfair dismissal**

4) Dismissal before an employee reaches 70 years of age due solely to the fact that the employee has reached retirement age pursuant to the National Insurance Act shall not be deemed to be objectively justified [...]."

14. In its decision of 18 February 2010, the Supreme Court of Norway confirmed that pursuant to Section 19§1, subsection 7 of the Seamen's Act, seamen in Norway may be given notice of termination without any other objective justification than them having reached the age of 62 years ("*the Kystlink case*"; Rt (Norwegian Law Reports) -2010-202; § 70).

15. In the above decision, the Supreme Court took note of, inter alia, the fact that the Directive of the European Union (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJEC L 303/16, 2.12.2000) had been integrated into Norwegian legislation by means of the Seamen's Act. It was held by the Supreme Court that having turned 62 years old, a seaman ceased to enjoy the general protection against termination of employment. Basing its assessment on the preparatory works of the Seamen's Act together with its analysis on Norway's international obligations, it further held that this was not against the ban of discrimination on grounds of age, introduced into the Seamen's Act when implementing the above Directive. According to the Supreme Court, it was to be assumed in particular that the national legislator had made a specific choice to maintain the age-limit of 62 years in the national legislation. This was well in keeping with the wide margin of appreciation granted to states when implementing the Directive.

16. With regard to the compatibility of the age-limit with the requirements of the European Convention on Human Rights ("the Convention"), the Supreme Court noted that the contested provision of the Seamen's Act was in conformity with the Convention, as the right to work could not be derived from Article 11 of the Convention or from Article 1 of the Optional Protocol thereto. The Supreme Court also considered the age-limit to be in line with the reasoning of the Human Rights Commission of the United Nations in the case of *Love v. Australia* (see paragraphs 34 - 36), as it could be construed to be based on a "reasonable and objective criteria" within the meaning of that decision.

17. In its later decision in "*the Helicopter case*" (Rt-2010-127) of 14 February 2012, however, the Supreme Court held that a retirement age of 60 years imposed upon helicopter pilots by means of a collective agreement was in violation of the ban on discrimination on grounds of age. In its evaluation, the Supreme Court paid attention to, inter alia, the fact that the age-limit could not be founded on health considerations, as pilots underwent mandatory health checks and it therefore could not be proven that the age-limit had been founded on reasons relating to health. It was moreover observed by the Supreme Court that the assumption that national rules providing for exceptions to the prohibition against discrimination on grounds of age might no longer be in keeping with in particular the latest developments of EU law. Here the Supreme in particular referred to the decision of the European Court of

Justice in the case of *Prigge* (see paragraph 33). When national and international legislation allowed pilots to continue working until the age of 65 years, provided that they fulfilled the necessary health requirements, no valid exception to the ban against discrimination on grounds of age could be made by means of a collective agreement. The Supreme Court took note of the fact that no such conscious choice as in the *Kystlink* case had been made with regard to the retirement age of helicopter pilots and found the age-limit of 60 years to be in violation of the discrimination ban.

18. On 1 November 2012, a Norwegian Committee appointed by a Royal Decree of 18 November 2011 submitted its report to the Ministry of Industry and Trade with its suggestions for a new Ship Employment Act (*Norges offentlige utredninger NOU2012:18. Rett om bord – ny skipsarbeidslov*, available at www.publikasjoner.dep.no). The Committee was mandated to assess, among other things, whether the age-limit provision in Section 19§1, subsection 7 of the Seamen's Act should be amended with a specific view to the overall objective of keeping more people in working life longer (§ 12.3.7; pp. 152, 161).

19. With regard to this possibility in particular, the following is noted by the national Committee (unofficial translation to follow):

> "The Seamen's Act 19§1, last paragraph explicitly states that the termination of an employment relationship before the age of 62 only because a seaman is entitled to a pension under the Seamen Pension Insurance Act shall not be considered as a valid reason for the termination of employment. To the contrary, the provision is considered to result in a situation where the right to pension constitutes a sufficiently valid reason for the termination of employment after the age of 62 years has been reached (§ 12.3.7; p. 161)."

> "The Working Environment Act §§ 15-13a is somewhat differently designed than Section 19§1, seventh paragraph of the Seamen's Act. The first paragraph [of the WEA] states explicitly that employment can be terminated when the employee turns 70. Furthermore, it is clear that a lower age-limit than 70 years may result from other grounds. Such age-limits must however be based on facts and not be disproportionately intrusive (§ 12.3.7; p. 161)."

> "Most workers on ships are entitled to a pension from the age of 60 years onwards, according to Section 4 of the Seamen Pension Insurance Act. This pension law, combined with Section 19§1 of the Seamen's Act has led many businesses [...] to adopt internal systems with the automatic retirement of sailors at the age of 62 (§ 12.3.7; p. 161)."

20. The Norwegian Committee takes note of the preparatory works for the Seamen's Pension Insurance Act, where reference had been made to the requirements of the seafarer profession. Due to these requirements, it was considered "appropriate" to have an age-limit of 62 years in the Seamen's Act. With regard to the current legal situation, the Committee nevertheless notes that "such age-limits as in Section 19§1 of the Seamen's Act are considered direct discrimination, which is, as a starting point, prohibited by the Directive and [the discrimination ban in] Section 33 of the Seamen's Act" (§ 12.3.7; p. 161)."

21. It likewise notes that "although the Framework Directive is not covered by the EEA Agreement, Norway has committed itself politically to implement legislation that ensures a level of protection equal to that of the Directive. It is clear from the case-law that Norwegian courts are to consider the issue of whether an age-limit factually constitutes differential treatment or unlawful discrimination independently and by

applying the same sources of law that would apply if the matter had been submitted to the EU Court (§ 12.3.7; p. 161)."

22. It is likewise observed by the Committee that although the result of the *Kystlink* judgment was to allow the age-limit of 62 years, "the judgment demonstrates that it is doubtful whether today in shipping there are such special circumstances, which justify a lower overall age-limit in shipping". It moreover considers possible that "the age-limit will still be found to be in violation of international rules" and holds that "it is clear for the Committee that judicial practice - both in Norway and in the EU - has evolved further since the *Kystlink* verdict [...]"(§ 12.3.7; p. 162). The Committee also considers that:

> "In shipping, there is a variety of job types where there are no set statutory age requirements for reasons of health and safety. For those positions where a medical certificate is required, it will be a regular part of the profession to have to retire when the requirements are not met. In the Committee's view, the judgment shows that a general limit of 62 years in shipping today is not necessarily anchored in the Directive. Although assessment under Article 6§1 of the Directive may be somewhat different if a conscious choice is made by the legislature, the Committee believes that it is currently difficult to justify a lower overall age-limit in shipping than elsewhere in working life."

23. On these grounds, the national Committee:

> "[...] therefore recommends the raising of the general statutory age-limit to 70 years. Simultaneously the Committee proposes an explicit opening for lower age-limits on different grounds, within the framework of the ban of discrimination. Lower age-limits may be stipulated in the collective agreement or in a company's internal systems. The legality of such limits also depends today on whether the limitation is objectively justified and not disproportionately intervening [...] (§ 12.3.7; p. 162)."

> "The Committee further suggests that this provision would be designed in line with §§15-13a of the Working Environment Act. The text will then, in connection with the protection against discrimination on grounds of age, clearly indicate that circumstantial lower age-limits may be allowed (§ 12.3.7; p. 163)."

RELEVANT INTERNATIONAL MATERIALS

I. The Council of Europe

24. In its Resolution 1793(2011) entitled "*Promoting active ageing: capitalising on older people's working potential*", the Parliamentary Assembly of the Council of Europe held as follows:

> "The Assembly notes that many working-age individuals, who could work and actively contribute to society, are either unemployed or "inactive", in particular in the 50 plus age group. Globalisation and increased competition are having an impact on the work environment and on the quality of work available to older workers, who also face a number of obstacles to remaining in [...] the employment market [...]" (§3).

25. With regard to age discrimination, the Parliamentary Assembly encouraged the member States of the Council of Europe "to give consideration, as appropriate, to [...] adopting legislation to prohibit age discrimination and removing labour market barriers, and empowering older persons to enter, remain in or return to the labour market, in accordance with their capabilities and willingness to work; [...]" (§6.1.1).

26. In the Recommendation 1796(2007) on "*The situation of elderly persons in Europe*", the following was stated by the Parliamentary Assembly:

> "A person's age is no longer an indicator of health, wealth or social status, and there is a pressing need to change approaches and stereotypes related to ageing and to adjust policies accordingly, notably with regard to the compulsory retirement age. Increased life expectancy also has significant implications for social protection systems in the Council of Europe member States" (§4).
>
> "In this connection, the Assembly refers to one of the conclusions of the United Nations 2nd World Assembly on Ageing held in Madrid in 2002, according to which "Older persons should have the opportunity to work for as long as they wish and are able to, in satisfying and productive work" [...] " (§5).
>
> "Unfortunately, elderly persons still too often encounter discrimination, whether in their daily lives or in a professional context. This discrimination concerns their employment [...]" (§6).

27. The Parliamentary Assembly likewise urged the Council of Europe member States, in its Resolution 1502(2006) on "*Demographic challenges for social cohesion*", to "promote active ageing by giving those who are still in good health, and who express a willingness to do so, the chance to work longer [...]" (§8.3.3).

II. The European Union

28. Discrimination on grounds of age is prohibited by the abovementioned Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJEC L 303/16, 2.12.2000; "the Directive"). Recital No. 14 of the Directive provides as follows:

> "This Directive shall be without prejudice to national provisions laying down retirement ages."

29. Article 2 of the Directive includes the following definition of direct discrimination:

> "1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
>
> 2. For the purposes of paragraph 1:

a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1."

30. Under Article 6 of the Directive, the following is provided on "justification of differences of treatment on grounds of age":

"1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; [...]"

31. The Court of Justice of the European Union ("the Court of Justice") has repeatedly addressed the issue of discrimination based on age in connection with retirement. In most cases, the contested retirement age had been set higher than at 62 years (i.e. *Palacios de la Villa v. Cortefiel Servicios SA*, European Court reports 2007, page I-08531; *Torsten Hörnfeldt v. Posten Meddelande AB*, OJ C 287, 22.9.2012, p. 11–12; *Gisela Rosenbladt v. Oellerking Gebäudereinigungsges. mbH*, OJ C 346, 18.12.2010).

32. It has been confirmed by the Court of Justice that even though the member States and, where appropriate, national social partners enjoy a broad margin of appreciation in their choice of a particular aim in the field of social and employment policy, as well as in the definition of measures capable of achieving this aim, the margin of appreciation cannot "have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age" (C-144/2004, *Werner Mangold v Rüdiger Helm*, European Court reports 2005, page I-09981, §63; case C-341/2008, *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, OJ C 179, 3.7.2010, p. 4–4, §§68,73,74; C-45/2009, *Gisela Rosenbladt*, cited above, §§41,44; C-499/08, *Ingeniørforeningen I Danmark v. Region Syddanmark*, OJ C 346, 18.12.2010, p. 7–7, § 33; *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, OJ C 102, 1.5.2009, p. 6–7, §51; *Palacios de la Villa*, cited above, §71).

33. Moreover, in *Prigge* (*Reinhard Prigge, Michael Fromm, Volker Lambach v. Deutsche Lufthansa AG*, OJ C 319, 29.10.2011, p. 4–4), the Court of Justice held that where national and international norms enabled pilots to continue working until the age of 65 years, the prohibition of piloting by means of a collective agreement after the age of 60 was not necessary for the attainment of the objective of maintaining air safety (§63), nor was it proportionate in the circumstances of the case

(§73). It was furthermore noted by the Court of Justice that no apparent reasons as to why pilots were considered to no longer possess the physical capabilities to act in their profession from the age of 60 years onwards had been induced (§74).

III. The United Nations

a. The Human Rights Committee

34. In its decision in the case of *Love v. Australia* (CCPR/C/77/D/983/2001; Communication No. 983/2001, views of 28 April 2003), interpreting the International Covenant on Civil and Political Rights (New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407; "the ICCPR"), the Human Rights Committee discussed a situation where the employment contract of the complainant, who had been employed as an airline pilot, had been terminated upon him reaching the age of 60 years. Despite having reached the statutory retirement age, he continued to hold a valid pilot license together with a medical certificate.

35. It was noted by the Human Rights Committee that systems of retirement age could include a dimension of workers' protection by limiting their lifelong working time, in particular when comprehensive social security schemes were available to secure the subsistence of people who had reached the retirement age. Reasons related to employment policy could be behind legislation or policy on retirement age (§8.2).

36. The Human Rights Committee likewise made reference to international safety standards set by the International Civil Aviation Organisation ("the ICAO"), which it considered widely accepted both nationally and internationally and which at the time provided for a standard age of 60 years for pilots' retirement. Considering that the aim of the retirement age had been to maximise the safety to persons affected by flight travel, the Human Rights Committee was unable to hold that the distinction on grounds of age would not have been based on objective and reasonable considerations in violation of Article 26 of the ICCPR (§§ 4.12, 8.2, 8.3).

37. In its decision of *Albareda and others v. Uruguay* (CCPR/C/103/D/1637/2007; Communications Nos. 1757, 1765/2008, views of 24 October 2011), however, the Human Rights Committee dealt with the issue of discrimination on grounds of age between different categories of civil servants. According to the government, the aim of the disputed legislation had been to maintain the effectiveness of diplomatic secretaries by introducing a retirement age of 60 years in order to avoid the consequences of loss of reflexes and memory. In its decision the Human Rights Committee held that the imposition of a compulsory retirement age for a particular occupational group did not as such amount to discrimination on grounds of age. Nevertheless, the government had failed to sufficiently explain why age could affect

the performance of one administrative category of civil servants but not of another. On these grounds, a violation of Article 26 taken in conjunction with Article 2 of the ICCPR was found by the Human Rights Committee.

b. The International Labour Organization

38. Article 4, paragraphs 1 and 2 of the Convention concerning the Medical Examination of Seafarers (adoption: 29 June 1946, entry into force: 17 August 1955; ratified by Norway on 17 February 1955) includes the following provision on the medical examination of seamen:

> "1. The competent authority shall, after consultation with the shipowners' and seafarers' organisations concerned, prescribe the nature of the medical examination to be made and the particulars to be included in the medical certificate.
>
> 2. When prescribing the nature of the examination, due regard shall be had to the age of the person to be examined and the nature of the duties to be performed."

39. Article 2 paragraph 1 of the Convention concerning Continuity of Employment of Seafarers (adoption: 28 October 1976, entry into force: 03 May 1979; ratified by Norway on 24 January 1979) reads:

> "1. In each member State which has a maritime industry it shall be national policy to encourage all concerned to provide continuous or regular employment for qualified seafarers in so far as this is practicable and, in so doing, to provide shipowners with a stable and competent workforce."

40. The provisions of the International Labour Organization ("the ILO") on medical examinations of seafarers have been revised and consolidated into the Maritime Labour Convention of 2006 (adoption: 23 February 2006).The Convention has been ratified by Norway on 10 February 2009 and will enter into force on 20 August 2013.

c. International Maritime Organization

41. Within the International Maritime Organization ("the IMO"), rules on the medical examinations of seamen have been set out in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adoption: 7 July 1978; entry into force: 28 April 1984; ratified by Norway on 18 January 1982; "the STCW"), as amended.

42. The norms have recently been compiled into Guidelines on the medical examinations of seafarers (International Labour Organization, International Maritime Organization, ILO/IMO/JMS/2011/12, Geneva, 2011; "the Guidelines"), the Appendixes of which contain the relevant provisions of the IMO, the ILO and the World Health Organization.

43. According to the Guidelines, the norms contained therein "ensure that the medical certificates which are issued to seafarers are a valid indicator of their medical fitness for the duties they will perform" (Part 1, § 6).

44. As concerns the required personal qualities, paragraph 51 includes the following statements:

> "(vi) Seafarers need to be able to adjust to living and working conditions on board ships, including the requirement to keep watches at varying times of the day and night, the motion of the vessel in bad weather, the need to live and work within the limited spaces of a ship, to climb and lift weights and to work under a wide variety of weather conditions (see Appendix C, table B-I/9, for examples of relevant physical abilities).
>
> (vii) Seafarers should be able to live and work closely with the same people for long periods of time and under occasionally stressful conditions. They should be capable of dealing effectively with isolation from family and friends and, in some cases, from persons of their own cultural background."

45. According to paragraph 57, subparagraph xii of the Guidelines, the age and experience of the seaman to be examined should be taken into account when conducting the medical examination, together with the nature of duties to be performed and the type of shipping operation and cargo.

46. Finally, outside the IMO, Article 94 of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, United Nations Treaty Series, vol. 1833, p. 3; ratified by Norway on 24 June 1996) sets out the following rule on the responsibility of the flag state in issues of social policy and labour:

> "**Duties of the flag State**
>
> 1. Every State shall effectively exercise its jurisdiction and control in [...] social matters over ships flying its flag.
>
> 2. In particular every State shall:
>
> [...]
>
> (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of [...] social matters concerning the ship.
>
> 3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
>
> [...]
>
> (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
>
> [...]."

THE LAW

Preliminary considerations

47. The Committee recalls that according to the complainant organisation, the situation in Norway is not in conformity with Article 1§2 and 24 of the Charter read alone or in conjunction with Article E due to Section 19§1, subsection 7 of the

Seamen's Act, pursuant to which a seaman may be given notice of termination at the age of 62 years.

48. It moreover observes that the complaint concerns in particular the ability of aged workers to continue in their employment. In this connection, the Committee recalls that the focus of Article 23 of the Charter, providing for the right of elderly persons to social protection, does not cover the field of employment. Accordingly, questions of age discrimination in employment are primarily examined under Articles 1§2 and 24 (Conclusions 2009, Ireland).

49. It notes that the grievances pertain in substance to the right to protection in cases of termination of employment as guaranteed in Article 24 of the Charter, as well as to the right to non-discrimination in employment as guaranteed in Article 1§2.

50. The Committee takes note of the substance of the allegations put forth by the FFFS and considers that in the light of the arguments made by the parties, the complaint raises an issue of whether a lower age-limit set out in national legislation for a certain category of workers in respect of abolishing the guarantees against dismissal amounts to discriminatory treatment on grounds of age contrary to either Article 24 or 1§2 of the Charter or to both.

51. With regard to Article 1§2, the Committee recalls that in matters relating to discrimination in employment, it is not necessary to combine the said Article with Article E, as Article 1§2 alone prohibits such discrimination (see paragraph 82). In respect of Article 24 on the other hand, the Committee considers that the arguments of the parties do not disclose an issue under Article E of the Charter. It therefore suffices to examine the said Article alone.

52. As concerns the on-going modifications to the contested legislation, the Committee recalls having taken into consideration alterations to the legislation only where the new legislation has entered into force at the time of the Committee's decision (see *European Council of Police Trade Unions v. Portugal*, Complaint No. 11/2000, decision on the merits of 21 May 2002 §52). The Committee observes that it has been informed of no legislative proposal having been transmitted to the parliament for approval; neither have the legislative changes entered into force. The Committee will therefore base its decision on the Seamen's Act as in force at the moment of its decision.

53. Finally, the Committee refers to the comments on the necessity of raising retirement ages in particular in situations where employees themselves wish to continue working, which have been described above (see paragraphs 24-27). It notes that the subject-matter of the current complaint firstly and foremostly affects seamen wishing to continue working after 62 years of age.

ALLEGED VIOLATION OF ARTICLE 24 OF THE CHARTER

54. Article 24 of the Charter reads as follows:

"Part I

24. All workers have the right to protection in cases of termination of employment."

"Part II

Article 24 – The right to protection in cases of termination of employment

With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

[...]".

55. The Appendix to the Charter includes the following provision:

"Article 24

1. It is understood that for the purposes of this article the terms "termination of employment" and "terminated" mean termination of employment at the initiative of the employer.

[...]

3. For the purpose of this article the following, in particular, shall not constitute valid reasons for termination of employment:

[...]

d. race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

[...]"

A – Arguments of the parties

1. The complainant trade union

56. The FFFS argues that pursuant to Section 19§1, subsection 7 of the Seamen's Act, a seaman having reached the age of 62 years and the statutory entitlement to a seaman's pension is no longer protected against notice of termination.

57. The FFFS therefore considers the above provision to be discriminatory on grounds of age. According to the FFFS, the provision is discriminatory both in comparison to seamen employed in ships of another nationality and to individuals in other professions in Norway. The FFFS claims that a seaman of a Norwegian nationality is protected against the termination of employment until the age of 70 years, if employed on a ship registered to i.e. Denmark. In Norway, seamen are discriminated on grounds of their age against employees of other vocational groups, as the age-limit for retirement is set at 65 years for more demanding jobs, such as for pilots or oil workers.

58. Because the age-limit is strictly applied by the ship-owners with the exception of only a few smaller companies, the FFFS holds that the age-limit factually amounts to compulsory retirement. The FFFS further holds that an ensuing right to receive one's pension should not be equalised with the right of the worker to earn his living in an occupation freely entered upon, as being retired is not comparable to being in an occupation.

59. The FFFS argues that no objective justification has been provided by the Government in support of the age-limit. In particular, it has not been demonstrated that the health situation of seamen would significantly deteriorate at the age of 62 years. In this connection, the FFFS observes that all seamen over 50 years of age are obliged to undergo an extended annual health check-up in order to be able to continue their work at sea. To dismiss them at the age of 62 years regardless of the outcome of the medical examination is not in keeping with the objective of the extended examinations.

60. The FFFS further argues that Section 19§1, subsection 7 of the Seamen's Act is an archaic scheme introduced in connection with the introduction of a separate seamen's pension system in Norway. The FFFS notes that the life expectancy in Norway has increased approximately by ten years since the original enactment of the relevant provision and the health situation of older workers likewise improved considerably. Similarly, the demand for seamen remains high, while working on ships has become safer and simpler.

61. With regard to domestic practice, the FFFS submits that the opinion of the Supreme Court on the retirement age of seamen in its *Helicopter case* (see paragraph 17) illustrates that in matters of pension rights, economic arguments are getting less attention in relation to the right to work as such. The complainant trade union moreover considers the abovementioned practice of the Court of Justice (see paragraphs 31-33; in particular the cases of *Gisela Rosenbladt* and *Torsten Hörnfeldt*) as not directly relevant for the present complaint, as none of the judgments concern the refusal to perform one's profession at sea. In comparison to land-based professions, the FFFS holds that such a refusal constitutes a much more dramatic interference as it limits a seaman's ability to work at sea. In addition, the FFFS underlines that the age-limits investigated in the two cases have been 65 and 67 years and thus higher than in the current case.

62. As concerns the work of the national Committee, the FFFS holds that the Committee's suggestion to raise the retirement age to 70 years underlines the alleged violation of the Charter by Norway.

63. In view of the foregoing, the FFFS submits that the lower age-limit laid down in Section 19§1, subsection 7 of the Seamen's Act is not objectively justified, but constitutes an unnecessary and disproportionate limitation to seamen's right to work and their right to protection in cases of termination of employment and is therefore in violation of Article 1§2 and 24 read alone or in conjunction with Article E of the Charter.

2. The respondent Government

64. The Government argues that the lower age-limit of Section 19§1, subsection 7 of the Seamen's Act, as presently in force, is in conformity with the Charter.

65. With regard to the background of the legislation, the Government indicates that in the parliament in 1948, the lower retirement age of seamen was founded on factors relating to the special and changeable working conditions, the fact that seamen were not in a position to enjoy various social measures in a manner comparable to that of other citizens and the vital economic role of the shipping industry to Norway. In addition, beneficial social conditions were also considered likely to contribute to the stability of the profession of seamen and the necessary recruitment thereto.

66. In the preparatory works of the Seamen's Act from 1948, the age-limit was justified by referral to the heavy strain and risk required by the profession, as well as the necessity of particularly strong physical and mental capabilities. Older employees would therefore often be ousted by young ones.

67. When raising the retirement age to 62 years in the 1980s, moreover, reference was made in the preparatory works to the incomparable working conditions on sea and land, the 24-hour working community at sea and the fact that a person deemed disable to work at sea on grounds of age could be fit to continue working on land.

68. The justification of the age-limit was last looked at in connection of the enactment into national legislation by Norway of the Directive 2000/78/EC in 2006. There, it was again justified by the nature and strain involved in the profession, as well as the fact that seamen remain economically independent upon retirement at 62, as they become entitled to pension at 60 years of age. The Government further observes that the lower retirement age was endorsed by all stakeholders involved in the public consultations on the legislative process.

69. The Government further recalls that the contested age-limit results from a deliberate choice made by the legislator. The situation of seamen therefore differs from that of the domestic *Helicopter* case, as decided by the Supreme Court of Norway, as well as of *Prigge*, as decided by the Court of Justice (see paragraphs 17 and 33), where lower age-limits had been set in collective agreements in deviation from the higher limits set out in national legislation.

70. With regard to the medical examinations of seamen in particular, the Government refers to the report of the national Committee (see paragraph 18), but holds that the assessment of the suitability of an aged seaman for continued service at sea does not depend only on the existence of a valid health certificate. To the contrary, "the work on board several vessels, for instance speedboats, requires a degree of vigilance and powers of reaction that for many individuals will be impaired with age".

71. On these grounds, the Government holds that the lower retirement age of seamen is part of a special set of regulations concerning the seaman profession, consisting of strict health regulations, more lenient disability conditions and a lower pensionable age. These regulations are all aimed at ensuring the health and security at sea, as well as the operational requirements of shipping.

72. The Government therefore considers that the age-limit of 62 years continues to be based on considerations of legitimate employment and social policy. They are legitimate aims pursuing a public interest and as such distinguishable from individual reasons pertaining to any employer's situation.

73. In the light of the great variation of retirement ages in force in the various member States, the Government argues that the states parties to the Charter enjoy a considerable margin of appreciation with regard to retirement ages as long as the age-limits continue to be objectively and reasonably justified by a legitimate aim, as in the circumstances of the current complaint.

74. The Government admits that once the retirement age has been reached, an employer may terminate the employment of a seaman solely on grounds of age, which is why the age-limit does amount to a substantial reduction in employment protection. If a seaman's contract of employment is terminated at the age of 62 years, they are however not prevented from entering into a new employment contract as a seaman. The "retirement rule" does therefore not entail a statutory obligation to retire.

75. The Government finally holds that Section 19§1, subsection 7 of the Seamen's Act does in any case not amount to an automatic termination of employment for the seamen, as according to data obtained from the registers of the Norwegian Labour and Welfare Administration, there were 430 seamen older than 62 years working on Norwegian vessels on 1 January 2013. On 1 January 2011, the comparable figure was 319.

76. The Government submits also that an automatic termination of employment is allowed in certain cases at 68, 65, 63 or 60 years on grounds relating to health, security or operational requirements. Moreover, various pieces of special legislation include provisions on special retirement ages, as do collective and individual agreements. Special retirement ages apply within areas such as the health sector, police, armed forces, the prison service and the railroad and aviation services.

77. According to the WEA however, an employment contract may be terminated by an employer solely on grounds of age once the age of 70 years has been reached by the employee. In this regard, the Government refers to the Conclusions by the Committee in 2008 concerning Norway, where the Committee considered this to be in conformity with Article 24 of the Charter (Conclusions 2008, Norway).

78. The Government observes that the original retirement age for seamen was 60 years and as such identical with their pensionable age. Following a harmonisation of shipping legislation with the previous Working Environment Act in the 1980s, the retirement age of seamen was raised to 62 years.

79. The Government highlights that an eventual dismissal at the age of 62 should not be considered as disproportionate solely because it may entail a reduction in income as a seaman begins receiving pension instead of pay. The Government submits that the affected seamen are entitled to pension and therefore continue to "earn their living" within the meaning of Article 1§2. In this connection, the Government submits that age or the obtaining of pension rights are not enlisted in the Appendix to

the Charter as reasons not justifying dismissal under Article 24. They therefore constitute valid reasons for termination of employment.

80. Finally, the Seamen's Act is under revision and proposal for a revised act should be submitted to the parliament during spring 2013. The Government notes, nevertheless, that "the outcome of this process as regards the retirement rule cannot be predicted".

81. The Government concludes that the contested provision of the Seamen's Act is compatible with Article 24 of the Charter, as well as with Article 1§2 thereof.

B – Assessment of the Committee

82. With regard to Article 24 of the Charter, the Committee recalls that, in general, the conditions of the right of everyone to earn his living in an occupation freely entered upon, as well as any discrimination in that connection, are assessed under Article 1§2 of the Charter. However, in circumstances where the termination of employment may take place solely on grounds of age, the Committee considers that the circumstances of the complaint may amount to a restriction of the right to protection in cases of termination of employment and therefore fall under Article 24 of the Charter.

83. A series of provisions in the Charter require more rigorous safeguards against dismissal on certain grounds. Among these is Article 1§2 with regard to the safeguards against discrimination in relation to the right to work. Most of these grounds are listed in the Appendix under Article 24 as reasons not justifying dismissal (Conclusions 2008, Malta).

84. The Committee recalls having held that dismissal on grounds of age will not constitute a valid reason for termination of employment unless a termination is, within the context of national law, objectively and reasonably justified by a legitimate aim such as a legitimate employment policy, labour market objectives or the operational requirements of the undertaking, establishment or service and provided that the means of achieving that aim are appropriate and necessary (Conclusions 2008, Lithuania).

85. The Committee emphasises having adopted the following statement of interpretation on age and the termination of employment (Conclusions 2012, General Introduction):

> "The Committee recalls that according to the Appendix to the Charter, for the purposes of Article 24 the term 'termination of employment' means termination of employment at the initiative of the employer. Therefore, situations where a mandatory retirement age is set by statute, as a consequence of which the employment relationship automatically ceases by operation of law, do not fall within the scope of this provision.
>
> The Committee further recalls that Article 24 establishes in an exhaustive manner the valid grounds on which an employer can terminate an employment relationship. Two types of grounds are considered valid, namely on the one hand those connected with the capacity or conduct of the employee and on the other hand those based on the operational requirements of the enterprise (economic reasons).

> The Committee holds that under Article 24 dismissal of the employee at the initiative of the employer on the ground that the former has reached the normal pensionable age (age when an individual becomes entitled to a pension) will be contrary to the Charter, unless the termination is properly justified with reference to one of the valid grounds expressly established by this provision of the Charter".

86. Referring to this statement of interpretation, the Committee recalls that situations where a mandatory retirement age is set by a statute so that the employment relationship automatically ceases by operation of law, are excluded from the scope of Article 24. However, situations where an employee may be dismissed at the initiative of the employer solely on the ground of the former having reached the pensionable age, will be contrary to the Charter. The Committee notes that pursuant to this, the general age-limit of 70 years set out in the WEA does not fall within the scope of application of Article 24 as it is the mandatory retirement age, upon which employment relationships cease. The Committee observes that the Seamen's Act does not oblige any employer to terminate contracts of employment, but abolishes the protection of an employee against such a termination.

87. Note is taken of the arguments made in this regards by the parties, namely of the argument by the FFFS that the retirement rule is in fact rigorously applied by the vast majority of shipping companies, as well as of the Government's submission that a seaman within the scope of application of the retirement provision is indeed free to continue his employment. It emanates from the observations of the parties, as well as from the report of the national Committee (see paragraph 19), that this opportunity is in practice made use of by many employers. This is however not the case for the totality of them, as it has been established that 430 of over 62-years-old seamen have continued working. The age-limit of 62 years does therefore not amount to mandatory retirement.

88. The conformity of the age-limit with Article 24 depends on whether the termination of employment must be justified with reference to one of the valid reasons expressly enlisted in the said Article. The Committee observes that the wording of the contested provisions of the Seamen's' Act allows the dismissal of the affected seamen at the age of 62 years regardless of their capacity or conduct, as well as of any operational requirements of the undertaking, establishment or service.

89. The Committee observes that as no other grounds than age are required in national law for the justification of dismissal, the contested provision clearly falls within the scope of application of Article 24.

90. In the light of the arguments of the Government in particular, the age-limit of 62 years for seamen has been founded on considerations of employment policy, operational requirements, as well as the goal of ensuring the health and security of those at sea (see paragraphs 64– 67). The Committee finds no reasons not to accept the legitimacy of these considerations and finds them to fall within the margin of appreciation of the states parties.

91. The Committee nevertheless holds that even when based on a legitimate aim, an age-limit must also be necessary for the attainment of its aims. In this regard the Committee again takes note of the variety of specific aims and purposes of the

legislation mentioned by the Government. With regard to the aim of ensuring the health and security of those working at sea, the Committee takes note of the arguments made by the parties on the circumstances of sea work, which have been raised to justify the possibility of an earlier retirement. In this regard, it observes that an up-to-date description of the necessary physical and mental qualities for seafarer work has been included into the Guidelines (see paragraph 42). Even though the physical demands and the risk of sea work have most likely diminished or changed since 1948, the Committee notes that the Government's description of the requirements of sea work by and large corresponds to what has been stated in the Guidelines.

92. In the Committee's opinion, this is however irrelevant for the resolution of the complaint. The Committee notes that in the light of the international regulations referred to above (see paragraphs 41 to 46) concerning the medical examinations of seamen, it is up to the responsible bodies of the flag state to guarantee that the medical examinations are sufficiently comprehensive in order to ascertain a seaman's capability to meet all the physical and mental requirements of their current post aboard the ship of employment. Regard must be had of, inter alia, the age of the seaman and the nature of the duties to be performed. The Committee notes that no evidence has been produced by the Government on the alleged degeneration of seamen's health at the particular age of 62 years.

93. In this connection, the Committee endorses the complainant organisation's argument as to the inconsistency between the fact that seamen over 50 years of age are subjected to an annual health-check of an extended scope but that regardless of the outcome of the most recent examination, their protection against the termination of employment is significantly lowered at the age of 62 years. The Committee holds that where a certificate of medical fitness for the purpose of certain types of tasks aboard a ship may be issued to a seaman having reached the age of 62 years, and where such a seaman may be re-employed by means of a new employment contract for the tasks of a seaman regardless of age, the age-limit of 62 years may not be considered as necessary for the attainment of the desired goals.

94. Even though the contested legislation is argued by the Government to be aimed at ensuring the operational requirements of shipping, the Committee notes that such requirements have not been elaborated any further. The Committee observes however, that sea personnel must be capable to function in all circumstances at sea in order for the ship to remain operational and safe. In line with what has been stated above on medical examinations, the Committee nevertheless holds that if all seamen are – as regularly established by their appropriate health certificates – capable to fully manage their specific tasks aboard, the ship should remain operational. The difference in treatment may accordingly not be founded on operational requirements.

95. As concerns the argument on the vital economic role of the shipping industry to Norway, the Committee notes that the argument has not been expanded upon by the Government. According to the Government, older seamen tend in any case to be ousted from their profession by younger ones. It is moreover stated by the complainant organisation that qualified employees continue to be in demand for the shipping sector, which argument has not been contested by the Government. The

Committee notes that as the argument has not been further elaborated by either of the parties, the Committee lacks appropriate information and will accordingly not address it to a greater detail.

96. With regard to the argument on enhancing the necessary recruitment of younger seamen to the seaman profession, the Government maintains that the combination of the possibility to retire at the age of 62, on the one hand, and the lower pensionable age of 60 years, on the other, are thought to create beneficial social conditions that are considered likely to contribute to the recruitment into the profession. The original reasoning from 1948 has last been readopted in 2006. The Committee notes again that no exact information or statistics on the success of this policy has been issued to it. It is accordingly unable to assess the validity of the argument.

97. Basing its evaluation on the above considerations, the Committee holds that the Government has not advanced sufficiently detailed arguments justifying the difference in treatment. No specific evidence has been submitted to the Committee demonstrating how the age-limit of 62 years corresponds to essential professional requirements imposing the earlier retirement of seamen in the present-day conditions. The Committee holds accordingly that the age-limit is not based on objective grounds. Moreover, it has not been shown that the desired aims could not have been attained by less intrusive means. The Committee therefore holds that the age-limit in question disproportionately affects the rights of the seamen within its scope of application and that no valid reasons within the meaning of Article 24 are required in the Seamen's Act for the termination of employment.

98. Finally, as concerns the Government's argument that dismissal pursuant to the obtaining of pension rights is not forbidden in the Annex to the Charter as a reason not justifying dismissal and therefore not against the Charter, the Committee refers to its Conclusions cited above, according to which not all forbidden grounds of discrimination are listed in the Annex (see paragraph 82).

99. The Committee holds that the contested provision enables dismissal directly on grounds of age and does therefore not effectively guarantee the seamen's right to protection in cases of termination of employment. This is the situation irrespective of whether the seaman in question will be entitled to pension following the termination of his employment relationship.

100. In view of the above, the Committee holds that Article 19§1, subsection 7 of the Seamen's Act constitutes a violation of Article 24 of the Charter.

ALLEGED VIOLATION OF ARTICLE 1§2 OF THE CHARTER

101. Article 1§2 of the Charter reads as follows:

> **"Part I**
>
> 1. Everyone shall have the opportunity to earn his living in an occupation freely entered upon."

"Part II

Article 1 – The right to work

With a view to ensuring the effective exercise of the right to work, the Parties undertake:

[...]

§ 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon; [...]".

A – Arguments of the parties

1. The complainant trade union

102. The FFFS's arguments have been described under Article 24.

2. The respondent Government

103. The Government's arguments have been described under Article 24.

B – Assessment of the Committee

104. The Committee recalls that Article 1§2 requires the states having accepted it to effectively protect the right of workers to earn their living in an occupation freely entered upon. The obligation consists of, firstly, the elimination of all forms of discrimination in employment, whatever the legal nature of the professional relationship (*Syndicat national des Professions du tourisme v. France*, Complaint No. 6/1999, decision on the merits of 10 October 2000, §24; Quaker Council for European Affairs (QCEA) v. Greece, Complaint No. 8/2000, decision on the merits of 25 April 2001, §20). Article 1§2 also covers issues related to the prohibition of forced labour (International Federation of Human Rights Leagues v. Greece; Complaint No. 7/2000, decision on the merits of 5 December 2000, §17), as well as certain other aspects of the right to earn one's living in an occupation freely entered upon (Conclusions XVI-1 volume 1). The Committee holds that the current complaint raises issues mainly relating to the first aspect of the Article.

105. The Committee reiterates also that under Article 1§2, domestic legislation must prohibit discrimination in employment on grounds of, inter alia, age (Conclusions XVIII-1; Conclusions 2006, Norway; Conclusions 2008, Lithuania, Conclusions 2008, Netherlands). It must cover both direct and indirect discrimination (Autism - Europe v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003, §52).

106. The Committee further refers to its previous finding that discriminatory acts and provisions prohibited by Article 1§2 may apply to all aspects of recruitment and employment conditions in general, including also dismissal (Conclusions XVI-1,

Austria; Conclusions 2008, Azerbaijan). Exceptions to the ban of discrimination may be authorised for essential occupational requirements or to permit positive action (Conclusions 2006; Bulgaria; Conclusions 2008, Azerbaijan).

107. With regard to the concept of discrimination, the Committee recalls having held for a difference in treatment between people in comparable situations to constitute discrimination in breach of the Charter if it does not pursue a legitimate aim and is not based on objective and reasonable grounds (*Syndicat national des Professions du tourisme v. France*, cited above, §25).

108. As regards to whether in the circumstances of the current complaint there are professional categories that may be deemed to be in a comparable situation, the Committee recalls that the FFFS considers the contested provision as discriminatory in relation to, firstly, any seamen employed on ships registered to a state where the retirement age of seamen is higher than in Norway. In this connection, the Committee reiterates that the examination of collective complaints does not entail any comparison between the states parties having ratified the Charter (International Commission of Jurists v. Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §24). It notes, moreover, that no such international standards on the advisable retirement age of seamen, as referred to by the Human Rights Committee in Love v. Australia on part of pilots, have been brought to its attention. The Committee will accordingly limit its examination upon the situation of Norway.

109. In Norway, all workers are entitled to work until the general pensionable age of 70 years, with some exceptions such as the age of 65 years set out for pilots and oil workers. For seamen, 62 years has been fixed as the age after which they may be dismissed on grounds of age. The complainant organisation argues that the Seamen's Act is discriminatory in relation to employees of such other professions in Norway, in which the employees may continue working without any changes to their employment protection at the age of 62. According to the FFFS, seamen are in particular discriminated against employees in such fields of work as pilot or oil work. In the opinion of the Committee, in particular senior pilots and senior oil workers may be considered as comparable categories of workers for the purposes of the current complaint. The Committee accepts that these categories of employees work in circumstances that may be sufficiently similar in terms of in particular professional hardship and physical strain.

110. The Committee holds that the application of the contested provision of the Seamen's' Act has the consequence of treating less favourably the seamen within its scope of applicability than anyone who may continue to work in Norway without restrictions to that right after having reached the age of 62 years. The Committee thus holds that the Seamen's Act establishes a difference in treatment on grounds of age between these categories of employees.

111. With regard to the substance of the contested provision, the Committee notes that Section 19 of the Seamen's Act contains rules on protection against undue notice and sets out the age of 62 years, after which notice may be given to seamen with no other justification than age. The contested legislation does according to its wording not prescribe a lower retirement age. According to information provided by

the Government moreover, on 1 January 2013 a total of 430 seamen had been able to continue working at sea despite having reached the contested age-limit.

112. The Committee nevertheless observes that it has no information on the overall number of seamen no longer employed in the seaman profession at the age of 62 years or thereafter and may accordingly not compare them to those who do not remain in employment. According to the national Committee moreover, the contested piece of legislation has in combination with the applicable pension law "led many businesses [...] to adopt internal systems with the automatic retirement of sailors at the age of 62" (see paragraph 19). The Committee holds that sufficient evidence exist providing that a significant number of seamen are in practice dismissed at 62 years pursuant to the contested provision. This has not been contested by the Government.

113. The Committee recalls that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact (International Commission of Jurists v. Portugal, cited above, §32). It therefore holds that even though the provision does not according to its wording amount to a mandatory retirement age of seamen, it is often applied as such.

114. The Committee holds that an age-limit set out in national legislation for a certain category of workers in respect of their guarantees against dismissal amounts to discrimination in a situation where the age-limit has not been sufficiently justified. It therefore next evaluates whether the difference in treatment constitutes discrimination in breach of the Charter, that is, whether it may be justified as pursuing a legitimate aim in view of the specific situation of the category of workers to whom it is applied. In this regard, the Committee recalls that states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law, but it is ultimately for the Committee to decide whether the difference lies within this margin (*Confédération Française Démocratique du Travail (CFDT) v. France*, Complaint No. 50/2008, decision on the merits of 9 September 2009, §39).

115. Under Article 1§2 of the Charter, elderly persons cannot be excluded from the effective protection of the right to earn one's living in an occupation freely entered upon. In particular, beyond the issue of pension rights (an important element of social protection purported to ensure the decent standard of living for the elderly, even though not directly at stake in the current complaint), the Committee holds that the rights of elderly persons at the workplace cannot be dissociated from the protection against discrimination especially on the grounds of age under Article 1§2.

116. This aspect of the right to earn one's living in an occupation freely entered upon is also consistent with one of the primary objectives of Article 23, which is to enable elderly persons to remain full members of society and, consequently, to suffer no ostracism on account of their age. From this point of view, the Committee has considered that the right to take part in society's various fields of activity should be granted to everyone active or retired, including measures to allow or encourage elderly persons to remain in the labour force (Conclusions XIII-5, Finland, p. 305). Such measures include prolonging their retirement age or taking early retirement in order to take up another job or to become self-employed. The related instruments

adopted by the Parliamentary Assembly of the Council of Europe (see paragraphs 24-27 above) are in line with the Charter in this field.

117. The Committee refers to its findings under Article 24, according to which the arguments advanced as grounds for the age-limit did not amount to a sufficient justification in present-day conditions (see paragraph 96) for the difference in treatment, the effect of which is to deprive qualified personnel from continuing in the occupation of their choosing for as long as employees in other occupations. On the same grounds, it considers that the age-limit disproportionally affects the seamen who come within the scope of application of the contested legislation and considers that under Article 1§2, this difference in treatment constitutes discrimination contrary to the right to non-discrimination in employment guaranteed under the said Article.

118. In view of the above, the Committee holds that the established discrimination amounts to a violation of the effective right of a worker to earn one's living in an occupation freely entered upon, as provided for under Article 1§2 of the Charter.

CONCLUSION

For these reasons, the Committee concludes:

- unanimously that there is a violation of Article 24 of the Charter;
- unanimously that there is a violation of Article 1§2 of the Charter.

Jarna PETMAN
Rapporteur

Luis JIMENA QUESADA
President

Régis BRILLAT
Executive Secretary

APPENDIX

Decision on admissibility

European Social Charter | Charte Sociale Européenne

COUNCIL OF EUROPE | CONSEIL DE L'EUROPE

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON ADMISSIBILITY

23 May 2012

***Fellesforbundet for Sjøfolk* (FFFS)**
v. Norway

Complaint No. 74/2011

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 257th session attended by:

Messrs Luis JIMENA QUESADA, President
Colm O'CINNEIDE, Vice-President
Jean-Michel BELORGEY, General Rapporteur
Mrs Csilla KOLLONAY LEHOCZKY
Messrs Andrzej SWIATKOWSKI
Lauri LEPPIK
Mrs Birgitta NYSTRÖM
Messrs Rüçhan IŞIK
Petros STANGOS
Alexandru ATHANASIU
Mrs Jarna PETMAN
Elena MACHULSKAYA
Mr Giuseppe PALMISANO
Mrs Karin LUKAS

Assisted by Mr Régis BRILLAT, Executive Secretary,

Having regard to the complaint dated 27 September 2011, registered on the same date as number 74/2011, lodged by *Fellesforbundet for Sjøfolk* (a seamen's trade union) ("the FFFS") and signed by its President, Mr Leif R. Vervik, requesting the Committee to find that the situation in Norway is not in conformity with Articles 1§2 and 24 of the Revised European Social Charter ("the Charter") read alone or in conjunction with Article E;

Having regard to the notification addressed to the Norwegian Government ("the Government") on 28 October 2011;

Having regard to the documents appended to the complaint;

Having regard to the Charter and, in particular, to Articles 1§2, 24 and E, which read as follows:

> **Article 1 – The right to work**
>
> Part I: "Everyone shall have the opportunity to earn his living in an occupation freely entered upon".
>
> Part II: "With a view to ensuring the effective exercise of the right to work, the Parties undertake: (...)
>
> 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon (...)".
>
> **Article 24 – The right to protection in cases of termination of employment**
>
> Part I: "All workers have the right to protection in cases of termination of employment".
>
> Part II: "With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:
>
> a the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
>
> b the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.
>
> To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body."
>
> **Article E –Non-discrimination**
>
> "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status".

Having regard to the Additional Protocol to the European Social Charter ("the 1961 Charter") providing for a system of collective complaints ("the Protocol");

Having regard to the Rules of the Committee adopted on 29 March 2004 at its 201st session and revised on 12 May 2005 at its 207th session, on 20 February 2009 at its 234th session and on 10th May 2011 at its 250th session ("the Rules");

Having regard to the observations of the Government on the admissibility of the complaint received on 12 January 2012 and registered on the same date;

Having regard to the observations of the FFFS received on 1 February 2012 and registered on the same date, in response to those of the Government;

Having regard to the additional observations of the Government received on 21 February 2012 and registered on the same date, and the documents appended to it;

Having regard to the additional observations of the FFFS received on 30 April 2012 and registered on the same date, in response to those of the Government;

Having deliberated on 23 May 2012;

Delivers the following decision, adopted on the above-mentioned date:

1. The FFFS submits that the Norwegian Seamen's Act (*Den norske sjømannslov*) of 30 May 1975 (No. 18), which stipulates compulsory retirement for seamen on reaching the age of 62 years, is to be construed as an unjustified prohibition of employment and a discriminatory denial of seamen's right to work as such, in breach of Articles 1§2 (right to work) and 24 (right to protection in case of termination of employment) read alone or in conjunction with Article E (non-discrimination) of the Charter.

2. In its observations, the Government raises the following objections concerning the admissibility of the complaint:

- the FFFS does not substantiate that the signatory of the complaint has the proper authority to sign the complaint;

- the FFFS is not a "representative" trade union within the meaning of Article 1§c of the Protocol;

- to declare the complaint admissible would be particularly inappropriate in a such a highly unionised sector when it concerns a subject whose sole proponent is a very small union.

3. In reply, the FFFS stresses that it is representative for the purpose of the collective complaints procedure, that its Articles of Agreement grant power of attorney to Mr Leif R. Vervik and that the fact that the other trade unions do not challenge the age limit for retirement has no effect on its capacity to bring a complaint before the Committee.

THE LAW

As to the admissibility conditions set out in the Protocol and the Committee's Rules of Procedure, and objections 1 and 2 of the Government in that regard

4. The Committee observes that, in accordance with Article 4 of the Protocol, which was ratified by Norway on 20 March 1997 and took effect in respect of that State on 1 July 1998, the complaint was lodged in writing and concerns Articles 1§2, 24 and E of the Charter, provisions accepted by Norway at the ratification of this treaty on 7 May 2001 and binding upon it since the entry into force of the treaty in respect of it on 1 July 2001. The Committee observes that, in the matter of discrimination in employment, it is not necessary to combine Article E (non-discrimination) with Article 1§2 (right to work) since the latter already prohibits discrimination which workers may suffer in employment.

5. Moreover, the grounds for the complaint are stated.

6. The Committee recalls that under Article 1§c of the Protocol, Contracting Parties to the Protocol secure the right to lay complaints alleging unsatisfactory application of the Charter to "representative national (...) trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint".

7. The Committee notes that the FFFS is a trade union which engages in activities within Norwegian jurisdiction, in accordance with Article 1§c of the Protocol, and that the Government does not contest this.

8. In pursuance of Rule 23 of the Committee's Rules of Procedure, "complaints shall be signed by the person(s) with the competence to represent the complainant organisation". The complaint submitted on behalf of the FFFS is signed by Mr Leif R. Vervik, President of the FFFS.

9. The Government raises the two following objections alleging that Mr Leif R. Vervik lacks competence to represent the FFFS:

- According to Article 17 of the FFFS Articles of Agreement, power of attorney is granted to the chairman of the board of management/general manager and to the vice-chairman. Thus it is not clearly apparent from this wording whether the chairman of the board can sign alone;
- According to Article 13 of the FFFS Articles of Agreement, the powers of the chairman of the board are limited. He represents the board and must act in accordance with the decisions taken by the board. Only in exceptional circumstances may he act on his own responsibility, and in that event must seek the agreement of the board afterwards. The complaint does not demonstrate that the decision to confer power to represent the FFFS and to lodge the complaint was taken in accordance with this article.

10. As to the first objection, the FFFS states that Article 17 of its Articles of Agreement means that both the chairman of the board of management/general manager and the vice-chairman separately hold authority for signature.

11. The Committee observes that in its reply the Government does not return to this point. Nevertheless, it emphasises that Article 17 of the FFFS Articles of Agreement grants authority for signature to Mr Leif R. Vervik as chairman of the board of management.

12. As to the second objection, the FFFS points out that Mr Leif R. Vervik has the board's unanimous support and is empowered to decide to brief a lawyer to lodge the collective complaint. The FFFS transmitted a memorandum from its board of management dated 25 April 2012, giving Mr Leif R. Vervik full power in the present complaint.

13. The Committee recalls that, short of being permanently authorised by the articles of agreement, the signatory may be authorised by a deliberation of the body managing the trade union. This may even be issued after the complaint has been lodged (see *Centrale générale des services publics* (CGSP) v. Belgium, Complaint No. 25/2004, decision on admissibility of 6 September 2004, §8). It accordingly notes that Mr Leif R. Vervik can commit the FFFS to the present procedure.

14. Furthermore, the Government contests that the FFFS is a representative organisation, within the meaning of Article 1§c of the Protocol, because its membership is too limited and because the FFFS does not participate in national negotiations. The Government recalls in that regard the Explanatory Report to the Protocol which specifies: "In the absence of any criteria on a national level, factors such as the number of members and the organisation's actual role in national negotiations should be taken into account" (§23).

15. Regarding the membership of the FFFS, the Government points out that the FFFS is a much smaller trade union than the three main Norwegian trade unions in the sector: *Det Norske Maskinistforbundet* (Norwegian Union of Marine Engineers) with some 6 300 members, the *Norsk Sjømannsforbund* (Norwegian Seafarers' Union) with some 10 100 members, and the *Norsk Sjøoffisersforbund* (Norwegian Maritime Officers' Union) with some 5 100 members to whom 700 petty officers should be added. The aggregate membership of these three trade unions comes to about 22 200. The FFFS would therefore represent, with 1 500 claimed members, at the most 6% of unionised workers in the maritime sector. The Government adds that there are an estimated 19 300 workers on ships in Norway (as of 31 December 2009), about 16 900 of whom belong to one of the three above-mentioned trade unions.

16. In reply, the FFFS indicates that 1 293 workers are fee-paying members to whom a certain number of retired associate members should be added. In terms of size, the FFFS is the 4th Norwegian seamen's union. It adds that the European Committee of Social Rights has already considered the merits of complaints lodged by small trade unions. The FFFS emphasises that the Committee makes an overall assessment of the case file in order to determine a trade union's representativeness, and that the number of members is only one element among others.

17. Concerning the role of the FFFS in national negotiations, the Government emphasises that despite the requests made to that effect by the FFFS to employers' organisations, it was not granted the right of collective bargaining unlike the other three trade unions in the sector. Nor was the FFFS invited to participate at the national level in the legal panel set up by the Government on 18 November 2011 to make a full review of the 1975 Norwegian Seamen's Act (*Den norske sjømannslov*). The Government explains that it was intended to limit the size of the panel for reasons of efficiency and to have a balance between the number of workers' representatives and the number of employers' representatives. According to the Government, this demonstrates that the FFFS is not regarded as a representative trade union.

18. The FFFS acknowledges that the *Norges Rederiforbund* (Norwegian Shipowners' Association) did not grant it the right to bargain collectively. However, the FFFS states that it has concluded numerous agreements and for several years has helped its members to defend themselves against their employers in disputes on various issues, particularly through actions before the courts.

19. The Committee recalls that, for the purposes of the collective complaints procedure, representativeness is an autonomous concept, not necessarily identical to the national notion of representativeness (*Confédération française de l'Encadrement CFE-CGC* v. France, Complaint No. 9/2000, decision on admissibility of 6 November 2000, §6).

20. The Committee stresses that the number of members and the role performed in national negotiations are mentioned in the Explanatory Report to the Additional Protocol to the Charter providing for a system of collective complaints by way of illustration and not as conditions of an exclusive nature. The Committee, accordingly, makes an overall assessment to establish whether or not a trade union is representative within the meaning of Article 1§c of the Protocol.

21. The application of criteria of representativeness should not lead to automatic exclusion of the small trade unions or those not long formed, to the advantage of larger and longer-established trade unions, thereby prejudicing the effectiveness of the right of all trade unions to bring a complaint before the Committee.

22. The Committee examines representativeness in particular with regard to the field covered by the complaint, to the aim of the trade union and the activities which it carries (see *Syndicat de Défense des Fonctionnaires* v. France, Complaint No. 73/2011, decision on admissibility of 7 December 2011, §6). It also considers that in order to qualify as representative, a trade union must be real, active and independent. The Committee finds that the FFFS fulfils these criteria, which the Government moreover does not dispute.

23. The overall assessment of the information in its possession leads the Committee to consider the FFFS as a representative trade union for the purposes of the collective complaints procedure.

24. Consequently, the Committee considers that the complaint complies with Article 1§c of the Protocol.

As to the Government's objection relating to the expediency of the complaint and the difficulties which the FFFS allegedly encounters in conducting its union action

25. In the Government's view, the admissibility of a complaint must be stringently determined in a matter which has potential implications for all persons over a certain age, further considering that the complaint is brought by a very small trade union against the wishes of a very substantial majority of members of trade unions in the maritime sector. To declare a complaint of this kind admissible would be particularly inappropriate in such a highly unionised sector.

26. The FFFS, for its part, stresses that the sector's three other trade unions are close to each other since their premises are located at the same address and they have a joint bank account for their members' fees. Therefore, the FFFS argues, a real need exists for there to be an alternative trade union. The FFFS adds that the three other trade unions and the Government are seeking to prevent the FFFS from conducting its union activities through various measures like making the subscriptions paid to the FFFS non-tax deductible as opposed to those paid to the three other trade unions in the sector. The FFFS adds that the fact that the other trade unions do not challenge the age limit for retirement has no effect on its capacity to refer an alleged violation of the Charter to the Committee. The FFFS further considers that there is no way of knowing the position of these trade unions as to whether or not the age limit of 62 years is discriminatory and whether or not it complies with the Charter.

27. In reply, the Government points out that the non-tax deductibility of membership fees to the FFFS stems from the application of the law which requires trade unions to have a national dimension for tax deductibility to operate. It adds that this question is currently under examination by the Oslo court of first instance (*Oslo tingrett*). In reply, the FFFS stresses its national dimension.

28. The Committee considers the argument raised by the Government invalid because it is not among those which may be properly relied on to establish the inadmissibility or ill-foundedness of a complaint. It would moreover be particularly inadvisable for the Committee to refuse to examine situations potentially violating the Charter on the pretext that the complainant organisation upholds a position not shared by other organisations in the same sector. Any other stance by the Committee would conflict with the freedom to organise.

29. Consequently, the Committee holds that the pleas of inadmissibility entered by the Government are to be rejected.

30. For these reasons, the Committee, by 13 votes to 1, on the basis of the report presented by Mrs Jarna PETMAN and without prejudice to its decision on the merits of the complaint,

DECLARES THE COMPLAINT ADMISSIBLE

In application of Article 7§1 of the Protocol, requests the Executive Secretary to notify the complainant organisation and the Respondent State of the present decision, to transmit it to the parties to the Protocol and the States having submitted a declaration pursuant to Article D§2 of the Charter, and to make it public.

Requests the Executive Secretary to publish the decision on the Internet site of the Council of Europe.

Invites the Government to make written submissions on the merits of the complaint by 12 July 2012.

Invites the FFFS to submit a response to the Government's submissions by a deadline which it shall determine.

Invites parties to the Protocol and the States having submitted a declaration pursuant to Article D§2 of the Charter to make comments by 12 July 2012, should they so wish.

In application of Article 7§2 of the Protocol, invites the international organisations of employers or workers mentioned in Article 27§2 of the 1961 Charter to make observations by 12 July 2012.

Jarna PETMAN
Rapporteur

Luis JIMENA QUESADA
President

Régis BRILLAT
Executive Secretary