UDSKRIFT
AF
HØJESTERETS DOMBOG

# HØJESTERETS DOM
## afsagt tirsdag den 12. maj 2009

**Sag 517/2007**
(2. afdeling)

Sammenslutningen af Frie Funktionærer som mandatar for
Funktionærforeningen SAFT på Risø
(advokat Kåre Mønsted)
mod
Finansministeriet, Personalestyrelsen
(kammeradvokaten ved advokat Niels Banke)

Biintervenient: Dansk Metal
(advokat Kirstine Emborg Bünemann)

I tidligere instans er afsagt dom af Østre Landsrets 6. afdeling den 23. november 2007.

I pådømmelsen har deltaget fem dommere: Poul Sørensen, Poul Søgaard, Jytte Scharling, Poul Dahl Jensen og Vibeke Rønne.

**Påstande**

Appellanten, Sammenslutningen af Frie Funktionærer som mandatar for Funktionærforeningen SAFT på Risø, har gentaget sine påstande, dog således at de angår krav om forhandling med henblik på indgåelse af organisationsaftale pr. 1. april 2011.

Indstævnte, Finansministeriet, Personalestyrelsen, har påstået stadfæstelse.

Dansk Metal er også for Højesteret indtrådt som biintervenient til støtte for Finansministeriet.

**Anbringender**

Appellanten har særlig anført, at artikel 11 i Den Europæiske Menneskerettighedskonvention medfører en forpligtelse for staten til at give fagforeningerne en reel mulighed for at varetage medlemmernes interesser. En fagforenings medlemmer har – med henblik på at blive i stand til at beskytte deres interesser – krav på at blive hørt af staten som arbejdsgiver. Ved på forhånd at nægte at indlede forhandling med appellanten har Finansministeriet tilsidesat sine forpligtelser efter artikel 11, til dels set i sammenhæng med diskriminationsforbuddet i konventionens artikel 14.

**Supplerende sagsfremstilling**

Finansministeriet og Offentligt Ansattes Organisationer – Det Statslige Område (OAO-S), tidligere Statsansattes Kartel (StK), har med virkning fra den 1. april 2008 indgået ny fællesoverenskomst. Endvidere er der med virkning fra den 1. april 2009 mellem Finansministeriet og en række fagforbund, herunder Dansk Metal og Teknisk Landsforbund, indgået ny organisationsaftale for ingeniørassistenter og forskningsteknikere ved forskningsinstitutioner mv., forskningsteknikere ved Risø og Dansk Dekommissionering samt konsulenter i Arbejdstilsynet. Denne organisationsaftale indebærer en sammenlægning af de hidtidige to organisationsaftaler, hvis gyldighedsperiode blev forlænget til den 1. april 2009. Det fremgår af den nye organisationsaftale, at der ikke er sket ændringer i forhandlings- og aftaleretten, som for så vidt angår forskningsteknikerne ved Risø fortsat tilkommer Dansk Metal. Fællesoverenskomsten og organisationsaftalen kan tidligst opsiges pr. 31. marts 2011.

Den Europæiske Menneskerettighedsdomstol (storkammer) afsagde den 12. november 2008 dom i sagen Demir og Baykara mod Tyrkiet (sag nr. 34503/97). To tyrkiske statsborgere havde i sagen klaget til Domstolen over, at de nationale domstole havde nægtet dem retten til som offentligt ansatte at oprette fagforeninger og dernæst retten til at forhandle kollektivt og indgå kollektive aftaler. I dommen hedder det bl.a.:

> "*3. Whether there was interference*
>
> *(a) General principles concerning the substance of the right of association*
>
> *(i) Evolution of case-law*
>
> 140. The development of the Court's case-law concerning the constituent elements of the right of association can be summarised as follows: the Court has always

considered that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade-union members by the union's collective action, the conduct and development of which the Contracting States must both permit and make possible (see *National Union of Belgian Police*, cited above, § 39; *Swedish Engine Drivers' Union*, cited above, § 40; and *Schmidt and Dahlström v. Sweden*, 6 February 1976, § 36, Series A no. 21).

141. As to the substance of the right of association enshrined in Article 11 of the Convention, the Court has taken the view that paragraph 1 of that Article affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. What the Convention requires, in the Court's view, is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (see *National Union of Belgian Police*, cited above, § 39; *Swedish Engine Drivers' Union*, cited above, § 40; and *Schmidt and Dahlström*, cited above, § 36).

142. As regards the right to enter into collective agreements, the Court initially considered that Article 11 did not secure any particular treatment of trade unions, such as a right for them to enter into collective agreements (see *Swedish Engine Drivers' Union*, cited above, § 39). It further stated that this right in no way constituted an element necessarily inherent in a right guaranteed by the Convention (see *Schmidt and Dahlström*, cited above, § 34).

143. Subsequently, in the case of *Wilson, National Union of Journalists and Others*, the Court considered that even if collective bargaining was not indispensable for the effective enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members' interests. The union had to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, § 44).

144. As a result of the foregoing, the evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, whilst in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law.

145. From the Court's case-law as it stands, the following essential elements of the right of association can be established: the right to form and join a trade union (see, as a recent authority, *Tüm Haber Sen and Çınar*, cited above), the prohibition of closed-shop agreements (see, for example, *Sørensen and Rasmussen*, cited above) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, § 44).

146. This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of

the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights (see, *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 100, ECHR 2003-II; and *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V).

*(ii) The right to bargain collectively*

...

153. In the light of these developments, the Court considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (*Swedish Engine Drivers' Union*, cited above, § 39, and *Schmidt and Dahlström*, cited above, § 34) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Vilho Eskelinen and Others*, cited above, § 56).

154. Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions..."

**Højesterets begrundelse og resultat**

Af de grunde, som landsretten har anført, tiltræder Højesteret, at Finansministeriet ved sin beslutning om ikke at forhandle om eller indgå en organisationsaftale med Funktionærforeningen SAFT på Risø ikke har tilsidesat almindelige forvaltningsretlige principper, herunder princippet om ligebehandling.

Den faggruppe, som appellantens påstande angår, er allerede omfattet af en kollektiv overenskomst, som regulerer løn- og arbejdsvilkår for ca. 300 ansatte. Allerede fordi Funktionærforeningen SAFT på Risø med sine 34 medlemmer ikke kan anses for at være repræsentativ på overenskomstområdet, finder Højesteret, at Finansministeriet ved sin beslutning om ikke at forhandle om eller indgå en organisationsaftale med foreningen heller ikke har tilsidesat forpligtelser, der følger af artikel 11 i Den Europæiske Menneskerettighedskonvention, hverken alene eller sammenholdt med konventionens artikel 14.

Højesteret stadfæster herefter dommen.

**Thi kendes for ret:**

Landsrettens dom stadfæstes.

I sagsomkostninger for Højesteret skal Sammenslutningen af Frie Funktionærer som mandatar for Funktionærforeningen SAFT på Risø betale 50.000 kr. til Finansministeriet, Personalestyrelsen.

De idømte sagsomkostningsbeløb skal betales inden 14 dage efter denne højesteretsdoms afsigelse og forrentes efter rentelovens § 8 a.

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**Udskriftens rigtighed bekræftes.**

**Højesteret, den 12. maj 2009.**

**Mitzi Lou Pranger-Rasmussen**

**kontorfuldmægtig**