HUMAN RIGHTS COMMITTEE

Strik v. The Netherlands

Communication No. 1001/2001*

1 November 2002

CCPR/C/76/D/1001/2001

ADMISSIBILITY

Submitted by: Mr. Jacobus Gerardus Strik

Alleged victim: The author

State party: The Netherlands

Date of communication: 29 June 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2002,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Jacobus Gerardus Strik, a Dutch national, born on 6 October 1938. He alleges that he is a victim of a violation by the Netherlands 1/ of articles 5, paragraph 2, 7, 14, paragraphs 6 and 7, 15, paragraph 1, 19, paragraph 2, and 26 of the Covenant. He is not represented by counsel.

The facts as submitted

2.1 The author was employed with the municipality of Eindhoven for 30 years. On 8 April 1990, he addressed a memorandum to his employer's management and the Municipal Council of Eindhoven,

complaining about the treatment he had allegedly endured under the management. Apparently he used defamatory language. The municipality of Eindhoven regarded the report as evidence of the author's neglect of duty and as defamation. Consequently, in its decision of 25 September 1990, it decided to reduce the author's two last salary increases during two years, that the author would be temporarily demoted by one rank, and that he would be transferred to a different department.

2.2 The author appealed the municipality's decision to the Ambtenarengerechts-Hertogenbosch,2/ which on 6 June 1991 decided that the municipality was entitled to impose disciplinary measures, but that the disciplinary measures imposed were disproportionate to the nature of the breach of duty and its circumstances, the author being overworked at the time of the incident. It therefore quashed the disciplinary measures imposed by the municipality of Eindhoven, and left it open whether the municipality were to impose other disciplinary measures, taking into account the court's decision.

2.3 On 15 December 1992, on appeal by the municipality, the Central Board of Appeal confirmed the decision of the lower court. Subsequently, on 5 January 1993, the municipality of Eindhoven took a new decision and imposed new disciplinary measures, consisting of a reduction of salary identical to its first decision.

2.4 In the meantime, the author had gone on sick leave from 11 April 1990. The medical doctor of the municipality considered that he could go back to work under certain conditions. He worked from 1 January 1991 to 1 January 1992 at the municipality's department of cultural affairs. After that, the municipality was not able to find him a post that would fit the conditions and for this reason the author was given what the municipality termed an honourable dismissal as of 1 August 1993, accompanied by an allowance of 80 per cent of his salary.

2.5 After the municipality offered the author suitable work for two months and the author refused in February 1994, the municipality decided to reduce the author's allowance for 8 months. The author contested this measure in the District Court, which in its decision of 2 July 1994, rejected the author's request for interim measures in order to halt his allowance reduction. According to the law, while one receives an allowance, one can be told to accept suitable work elsewhere in order to reduce the costs for the employer. At that time, the author had already reached the age of 55, and claims that he should be protected from such measures because of his age.

2.6 On 4 July 1996, the District Court gave its decision to the author's challenges against the municipality's decisions (a) of 5 January 1993 to reduce his salary as a disciplinary measure; (b) of 8 June 1993 to dismiss him; (c) of 23 June 1993 fixing the height of the allowance as a consequence of the reduced salary; and (d) the temporary reduction in allowance following his refusal to accept suitable work. The Court decided on 4 July 1996 in respect of the author's claims under (a) that the municipality was competent to impose new disciplinary measures and that the author's argument of *ne bis in idem* was rejected because the first disciplinary measures had been quashed and the second decision replaces the first. However, the Court was of the opinion that the punishment amounting to a reduction of a total of FL 10,000 was still disproportionate to the nature of the breach; (b) that in the specific circumstances of the case, it cannot be said that the decision to dismiss the author for lack of suitable work is unreasonable; (c) that although the

Court approved the basis for the decision, it nevertheless quashed it as a result of its decision under (a) that the measure was disproportionate; (d) that it rejected the author's appeal and considered that the author did not have the right to refuse the work and that the law provides for the reduction as applied.

2.7 Following the appeal, the Central Board of Appeal decided finally on 22 January 1998 to confirm the District Court decision of 4 July 1996.

The complaint

3.1 The author claims that his right to be compensated according to law for the unlawful punishment he was submitted to, not to be punished again for an offence for which he has already been finally punished, his right not to be punished for an act which did not constitute a criminal offence at the time when it was committed, his right not to be discriminated against on the basis of his age, his right to hold opinions without interference, and his right not to be subjected to inhuman treatment, have been violated.

3.2 The author claims that he was punished several times for the same act, in decisions of 25 September 1990, 5 January and 8 June 1993 by his employer, and that this was not repaired in spite of the Central Board of Appeal's ruling in his favour, in violation of article 14, paragraphs 6 and 7.

3.3 The author complains that the Central Board of Appeal by combining the penalty of dismissal with other penalties imposed a heavier penalty on him, than the one that was applicable at the time of the offence, in violation of article 15 of the Covenant.

3.4 The author claims to be a victim of a violation of article 26 or 5, paragraph 2 of the Covenant, since the court did not apply the legislation that protected him from the imposition of work when he had reached the age of 55, and it imposed a combination of penalties when it had been decided that the employee should resign from his position although prohibited by law.

3.5 The author claims that he was punished for neglect of duty and defamation for the act of writing a report complaining about how he had been treated by management, although the report was based on facts, and only sent to the municipality for which he was working, in violation of his right to freedom of expression under article 19, paragraph 2, of the Covenant.

3.6 The author claims that he was submitted to inhuman treatment by the Central Board of Appeal, which used his medical conditions to justify his dismissal, and by the court proceedings in general, which took so long that the proceedings themselves were inhuman, in violation of article 7 of the Covenant.

The State party's submission on the admissibility

4.1 By note verbale of 1 October 2001, the State party informed the Committee that it wished to challenge the admissibility of the communication.

4.2 The State party contends that the author has failed to exhaust domestic remedies, by not bringing the

same claims before the domestic courts, which he now brings before the Committee. It claims that the author thereby has failed to comply with the admissibility criterion in article 2 of the Optional Protocol.

4.3 Furthermore, in respect of the author's claims under articles 14 and 15 of the Covenant, these articles do not apply to the author's case, since the author has not been prosecuted for the remarks he made in his report.

4.4 The State party further contends that the author under no circumstances has been exposed to inhuman or degrading treatment within the meaning of article 7 of the Covenant.

4.5 With regard to the author's claims of unequal treatment (article 26 of the Covenant), and freedom of expression (article 19 of the Covenant), the State party contends that the author has not advanced any relevant arguments to substantiate his claims.

4.6 The State party refers to the inadmissibility decision of the European Commission of Human Rights of 29 October 1998 in relation to the same matter, where the Commission after having studied the documents submitted by the author, concluded that "they do not disclose any appearance of a violation of the rights set out in the Convention and its Protocols". It claims that the communication should be declared inadmissible for non-substantiation, and refers in that regard to the Committee's jurisprudence in Cases Nos. 419/1990, 379/1989, 378/1989, 341/1988 and 329/1988.

Comments by the author

5.1 By letters of 20 November 2001 and 20 February 2002, the author commented on the State party's submission.

5.2 With respect to the State party's contention that he has failed to exhaust domestic remedies, the author argues that he brought his claims before the highest domestic court, and thereby exhausted domestic remedies.

5.3 With respect to the State party's objection that articles 14 and 15 of the Covenant do not apply to his case since he was not prosecuted for his remarks in the report, the author contends that he was, nevertheless, punished three times for the same act and imposed with a heavier punishment than what was provided by law, in violation of the said articles.

Issues and proceedings before the Committee

6. By decision of 12 February 2002, the Committee, acting through its Special Rapporteur on New Communications, decided to separate the Committee's consideration of the admissibility and the merits of the case.

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the

Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.3/

7.3 With regard to the author's claims that he was punished several times for the same act, in decisions of 25 September 1990, 5 January and 8 June 1993 by his employer, that this was not repaired in spite of the Central Board of Appeal's ruling in his favour, and that the Central Board of Appeal by combining the penalty of resignation with other penalties, imposed a heavier penalty on him, than the one that was applicable at the time of the criminal offence, in violation of articles 14, paragraphs 6 and 7, and 15 of the Covenant, the Committee notes that these articles of the Covenant relate to criminal offences, whereas in the author's case only disciplinary measures were imposed and the material before the Committee does not show that the imposition of these measures related to a "*criminal charge*" or a "*criminal offence*" in the meaning of article 14 or 15 of the Covenant. This part of the claim is therefore outside the scope of the Covenant, and inadmissible, *ratione materiae,* under article 3 of the Optional Protocol.

7.4 In respect of the fact that according to the decision of the Central Board of Appeal, the domestic law of the State party did not give the author, as a person who had reached the age of 55, the right to refuse new work assignments, the Committee notes that the author has not supported his contention to the contrary with any relevant materials or arguments. Consequently, the Committee finds that the claim under article 26 taken together with article 5, paragraph 2, is not substantiated for purposes of admissibility and is therefore inadmissible under article 2 of the Optional Protocol.

7.5 With regard to the author's claim under freedom of expression, the Committee notes that disciplinary or other sanctions against a municipal official for writing a critical report to his employer, when the latter considers the language as defamatory, could raise issues under article 19 of the Covenant. However, as all disciplinary sanctions imposed as a consequence of the author writing the report in question were later quashed by the courts of the State party, the Committee considers that the author has no remaining claim under article 19. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.6 With regard to the author's claim under article 7 of the Covenant, that he has been subjected to inhuman treatment following the Central Board of Appeal's decision on medical restrictions and his employer's failure to implement the Central Board of Appeal's decisions in his favour, the Committee finds that the author has not substantiated for the purposes of admissibility, how this treatment would raise an issue under article 7.

7.7 In the light of the conclusions reached above, the Committee need not address the State party's additional arguments against the admissibility of the communication.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3, of the Optional Protocol;

(b) That this decision shall be communicated to the author, and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Gl l Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hip lito Solari Yrigoyen and Mr. Maxwell Yalden.

Notes

1/ The Optional Protocol entered into force for the Netherlands on 10 December 1978.

2/ This is a Civil Service Court.

3/ The case was declared inadmissible by the European Commission of Human Rights on 29 October 1998.