UNION OF EDUCATION NORWAY

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COMPLAINT TO THE COMMITTEE ON FREEDOM OF ASSOCIATION (CFA) CONCERNING UNDUE INTERFERENCE IN THE PRINCIPLES OF FREEDOM OF ASSOCIATION

1. INTRODUCTION

Union of Education Norway ("UEN") is hereby filing a complaint with the Committee on Freedom of Association (CFA) against the Kingdom of Norway with a claim that the prohibition on the right to strike and the use of compulsory arbitration in the dispute between UEN and The Norwegian Association of Local and Regional Authorities ("KS") represented a violation of the Freedom of Association protected by the Right to Organise Convention, 1948 (No. 87), ratified by Norway 4 July 1948, the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ratified by Norway 17 February 1955, as well as the Labour Relations (Public Service) Convention, 1978 (No. 151) ratified by Norway 19 March 1980 and the Collective Bargaining Convention, 1981 (No. 154) ratified by Norway 22 June 1982.

The complaint relates to the enforcement of a special legislative act prohibiting a legal strike among the teachers of Norway who are members of UEN. UEN's complaint also challenges the use of mandatory arbitration, referred to as "tvungen lønnsnemnd" in Norwegian, to settle the dispute between UEN and KS concerning the revision of their collective agreement. UEN is part of the Confederation of Unions for Professionals, named Unio. The questionable act also prohibited strike for the teachers organised in the Norwegian Union of School Employees ("Skolenes landsforbund", here abbreviated "SL"), an affiliate of the Norwegian Confederation of Trade Unions, (abbreviated "LO"), and the Norwegian Association for Graduate Teachers ("Norsk Lektorlag", here abbreviated "NL"), an affiliate of the national confederation of trade unions named Akademikerne. The two latter organisations are not part of this complaint.

There is no legislation in Norway generally prohibiting the exercise of the right to strike or determining when compulsory arbitration may be used to resolve a labour dispute. Such decisions must be adopted on a case-by-case basis either by a provisional ordinance passed by the King in Council or by a special Act of Parliament ("Stortinget"), as was the case in the present disputes.

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On several occasions in recent years, the Norwegian government has used similar legislative interventions in collective bargaining processes (see ILO cases No. 1099, No. 1255, No. 1389, No. 1448, No. 1576, No. 1680, No. 1763, No. 2484, No. 2545, No. 2943, No. 3038, No. 3147, and No. 3372). In most of these cases the ILO Committee on Freedom of Association ("CFA") has criticized Norway for violating its obligations under ILO Conventions Nos. 87, 98, 151 and 154.

The CFA has repeatedly expressed expectations that Norway will make every effort to refrain from having recourse to legislation imposing compulsory arbitration with the effect of bringing to an end all industrial action in a non- essential sector, i.e. a sector where at the time of such action there has been no clear and imminent threat to the life, personal safety or health of the whole or part of the population see case No 3038, Par. 473 (a).

According to the principles of the CFA, the education sector does not constitute an essential service in the strict sense of the term, see Digest Par. 587. In case No 1448 (the Norwegian teachers strike case), the CFA considered that the effects of industrial action in the teaching sector in Norway in May-June 1986 were not sufficient to justify resorting to compulsory arbitration, and that the Act that prohibited the strike and referred the dispute to compulsory arbitration was not compatible with the principles of freedom of association.

The CFA has also on several occasions expressed that the Committee expects the Norwegian Government to ensure that, in the future, consideration will be given to the negotiation or determination of a minimum service rather than imposing an outright ban on industrial action through the imposition of compulsory arbitration, e.g., case No 2545 Par. 1153. The prohibition of industrial action in the education sector and the imposition of compulsory arbitration without any attempt to establish minimum services indicates that the Norwegian Government is not willing to follow up the CFA`s recommendations.

UEN asserts that the circumstances described herein, and the issues raised by the present case, are similar to the cases where the CFA has previously criticized the actions of the Norwegian Government. The imposition of compulsory arbitration constitutes an undue interference in the context of collective bargaining. Such intrusion is not in compliance with the admissible grounds for intervention as set out in the pronunciations and case law from the CFA and the Committee of Experts. It is crucial to state that the education sector is not an essential service under ILO jurisprudence and case law, and that the strike did not pose a clear and imminent threat to the life, personal safety, or health of the whole or part of the population.

2. PARTIES AND AGREEMENT STRUCTURE

2.1 About the Union of Education Norway ("UEN")

UEN (in Norwegian "Utdanningsforbundet") was founded on 2 October 2001 and has more than 190,000 members. UEN is Norway's largest union in the education sector and is at present the country's second largest trade union. UEN represents professionals with teacher and academic qualifications within the entire Norwegian educational system. UEN has members working as teachers or leaders in early childhood education, in primary and secondary education and training, as well as in the university college and university sector. UEN also has members working within the Educational and Psychological Counselling Service, at special needs

education centres, in adult education and in administration. UEN has more than 90,000 members within the KS collective wage agreement area. The largest member groups are teachers, school leaders, early childhood education teachers and directors of such institutions.

2.2 About The Norwegian Association of Local and Regional Authorities ("KS")

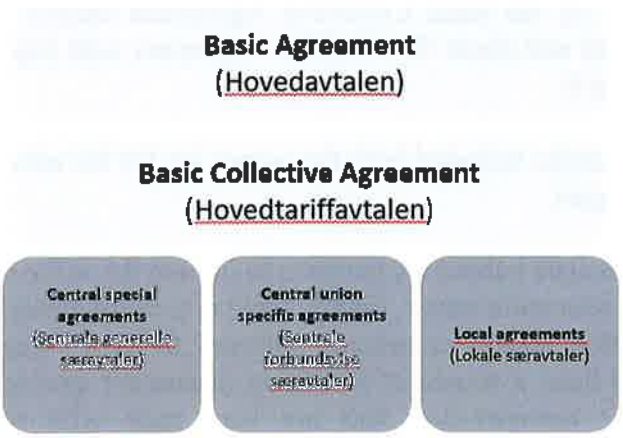
The Norwegian Association of Local and Regional Authorities ("KS") is an employers' association that negotiates on behalf of all Norwegian municipalities and county municipalities, with the exception of the municipality of Oslo. At present, this means 10 county municipalities and 355 municipalities.

KS is the country's largest public employer organization and a negotiating party in collective wage negotiations. KS negotiates wages and working conditions for over 450,000 employees. Employees in municipalities and county municipalities make up approximately 20 percent of the workforce in Norway. This makes KS by far the largest employer organization in the public sector. Approximately 40 percent of the municipal sector workforce are employed within healthcare and social services, while 30 percent work in education, and 10 percent work in early childhood institutions.

2.3 The agreement structure and the bargaining system in the municipal sector

The agreement structure in the KS area is hierarchical, with the Basic Agreement and the Basic Collective Agreement as the two most prominent agreements. While the Basic Agreement regulates the general principles that apply to the parties, such as the right and obligations of the employer and the union representatives, the Basic Collective Agreement regulates wage and working conditions. Furthermore, there are several other agreements in the KS area that regulate, among other things, working hours in schools and early childhood institutions. These are either central special agreements which can be general (applies to everyone in KS), central union specific agreements (between KS and individual unions), or local agreements. The agreement structure can be illustrated in the following way:

Figure 1:



UEN negotiates the collective wage agreements through Unio, one of the four confederations with bargaining rights in the KS area. Through the negotiation model laid down in the Basic

Agreement, the right to negotiate is given to the four national trade union confederations, namely Unio, LO, YS and Akademikerne. Even though it is the confederation of trade unions that negotiates with the employer's association, it is the individual union (e.g. UEN) in Unio that is a party to the collective agreement with KS and thus has the right to take industrial action. KS enters into identical Basic Collective Agreements with affiliates of all four national confederations.

At the end of negotiations or mediation, the confederation's delegation either recommends or rejects a negotiation or mediation proposal. In the event of the bargaining confederation's rejection of a negotiation proposal, the confederation shall file their collective notice of termination of employment and take responsibility for mediation. If a negotiating confederation recommends a mediation proposal, the individual affiliated union cannot initiate industrial action before the expiry of the response deadline, which cannot exceed 14 days.

3 BACKROUND TO THE STRIKE AND COMPULSORY ARBITRATION

3.1 The dispute regarding new Basic Collective Agreement in 2022

The dispute that led to the strike in question concerned a new Basic Collective Agreement between the parties for the agreement period 1 May 2022 – 30 April 2024, as well as wage adjustments after the main wage settlement 2022 and wage adjustments for 2023. Bargaining concerned both wage supplements, job code questions and a number of provisions in the Basic Collective Agreement between the affiliates of Unio municipal sector and KS.

Appendix 1: Basic Collective Agreement KS 2020 – 2022, chapter 4

Appendix 2: Basic Collective Agreement KS 2022 - 2024, chapter 4

Three chapters in the Basic Collective Agreement, chapters 3 - 5, regulate the salaries of all employees in the municipalities and county municipalities (except Oslo). The members of the teachers' organizations are mainly paid in accordance with the central salary regulations in the Basic Collective Agreement, chapter 4. SL, NL and UEN jointly represent about 25 % of all the employees covered by the Basic Collective Agreement chapter 4 (about 76,000 person-year/ full-time equivalent) and about 50 % of the employees with higher education who fall within the scope of chapter 4.

The reason for the strike included both the wages lag for the education sector as well as severe recruitment challenges.

The underlying rationale behind the decision to initiate the strike was tied to two issues that had been plaguing the education sector. Firstly, there is a conspicuous and persistent wage disparity within the education sector, commonly referred to as a "wage-lag." This discrepancy in compensation had been a source of mounting discontent among educators, who were of the opinion that their remuneration had not kept pace with the increasing demands and responsibilities of their profession. Secondly, the education sector is grappling with a substantial recruitment crisis. The scarcity of qualified individuals willing to embark on a career in education had reached a critical point.

In light of these intertwined challenges—namely, the wage disparities and the acute shortage of educators, the decision to strike was perceived as a necessary and concerted effort to draw attention to these issues and to advocate for their resolution in order to safeguard the quality and continuity of education.

In the 2022 wage negotiations, UEN/Unio argued that the wage settlement had to address and compensate for the backlog accumulated in 2020 and 2021, when the education sector experienced a wage growth that lagged behind that of the industrial sector (also referred to as the "frontline sector", in Norwegian: "frontfaget") and several other sectors. In 2021, the frontline sector obtained a wage growth of 2.2%, while municipal employees, including those in the education sector, had a notably lower wage increase of 1.7%. In 2022 the frontline sector had a 3.1% increase, while municipal employees had 2.6%. The general wage growth in Norway in 2021 settled at 3.5% (SSB Economic Analysis 1/2022). The education sector had a particularly high wage disparity which needed to be addressed through equitable compensation.

In the negotiations with KS, it was important for UEN/Unio to address issues connecting the salary levels with challenges related to retaining, mobilizing and recruiting highly qualified personnel for teaching in primary and upper secondary schools in Norway. These challenges are still prominent in the education sector in Norway to this day.

3.2 The 2022 strike

3.2.1 Overview

After a breakdown in negotiations with KS, the four national confederations filed a notice to strike with effect from 3 May 2022.

Pursuant to provisions in the Labour Disputes Act, the National Mediator issued a ban on work stoppages on 29 April 2022 and summoned the parties to compulsory mediation. During the mediation, the confederations reached a solution in accordance with the mediator's proposal. The negotiated solution was sent to a preliminary vote with a deadline of 22 June at 12.00. The negotiated solution was dismissed by all the education unions: UEN, SL and NL, but not by other affiliates of the four confederations.

SL was the first union to go on strike, calling out 3 members to strike on 8 June 2022. UEN initiated the announced strike on 20 June 2022, by calling out 45 members limited to one school. NL called out 30 members on strike on 15 August 2022.

The first significant call-out to strike took place on August 22 (1,322 UEN members), and then subsequently expanded on different occasions. The largest call-out by far took place on 13 September 2022, in which 2,914 members of UEN were called out. By the time the Government intervened on 27 September 2022, about 8,500 union members in total were called out to strike, 8,300 of whom were members of UEN.[1]

It should be noted that when UEN initiated the strike with its first call-out of 45 members on 20 June 2022, the summer holiday was going to start three days later. The vast majority of pupils

[1] The timeline for withdrawals and expansions of the strike follows from section 3 of Appendix 4.

were only impacted once the strike was expanded, first on 22 August 2022 and then with the subsequent expansions in August and September.

3.2.2 UEN's practice for strike callouts and exemptions

3.2.2.1 Prior arrangements and exemptions according to the Basic Agreement

Section 5-1-2 of the Basic Agreement regulates prior arrangements and exemptions from strike of some employee categories. The clause states that the top management of the enterprise shall not be involved in a strike. Furthermore, the head of the personnel function shall, in general, not be involved in a strike.

The clause also states that before resorting to industrial action in the context of labour disputes, the parties commit to negotiate as soon as possible to exempt individuals or groups whose exclusion is necessary to avoid undue harm to third-party interests. If no agreement is reached through negotiations, the elected employee representatives shall bring the matter before their respective employee organizations, which, with binding effect on their members, will determine whether, and in which cases, individuals/groups should be excluded from the proposed action.

This clause imposes a duty on the parties to discuss with each other which employee groups should be excluded from the strike. This duty gives the parties opportunity to discuss and agree, prior to the start of the industrial actions, and make sure that interest of both the parties directly involved as well as affected third parties are adequately represented and safeguarded.

To safeguard crucial personnel and interests, section 5-1-2 of the Basic Agreement affords employers the opportunity to "*apply for exemptions for named employees who have been included in a strike and who, due to threat to life and health or other vital considerations, must be present or reintegrated into work*".

Dispensations from a strike mean that employers can apply for an exemption from the strike for one or more employees who have been included in the strike, for example, because these employees are crucial to avoid risks to life and health.

While the employers' leave to request dispensation is primarily reserved for cases where there is a risk to life and health or other vital considerations, as the account under will show, UEN approved such requests for dispensations very liberally and generously.

3.2.2.2 UEN's practice for strike callouts and exemptions during the 2022 strike

In connection with the strike, UEN took various measures to minimize and mitigate the possible adverse effects the strike could have on pupils.

Prior to each strike call-out, the local strike offices received directives to conduct impact assessments in close collaboration with the central strike office. The aim was to protect especially vulnerable pupils, including those with special needs who were receiving special needs education, from significant disruption to their learning process.

Some teacher categories were completely exempted from the strike. These categories were, inter alia: (1) early childhood education teachers; (2) first grade teachers; (3) teachers responsible for pupils with special needs education; (4) teachers responsible for prison educational programmes.

During the strike there were two methods for reintegrating teachers who had been called out to strike.

Firstly, the social partners could agree to remove the names of teachers who ought to have been exempted but accidentally appear on the strike lists. Secondly, the employer could apply for dispensation for named teachers if they considered that individual pupils were particularly affected by the strike. UEN was generous and accommodating in granting dispensations and more than 90 percent of the requests were granted (see chart in Appendix 3.)

UEN's practice for selecting strikers and granting exemptions is more closely described in a letter sent to the Directorate for Education and Training (Norwegian "Utdanningsdirektoratet", abbreviated "Udir") on 26 September 2022, the day before the Minister of Labour and Social Inclusion initiated compulsory arbitration:

> **Appendix 3:** Letter from UEN to Udir regarding callouts for the strike and exemptions, 26 September 2022

3.3 Process leading up the compulsory arbitration

3.3.1 Minister of Labour and Social Inclusion summoned parties to meeting

On the basis of reports received from the Ministry of Education and Research and the Ministry of Health and Care Services, the Minister of Labour and Social Inclusion summoned the parties to a meeting at the Minister's office on Tuesday 27 September at 19:00. After concluding that there was no immediate possibility for a solution in the dispute between the parties, the Minister informed the parties that the Government would intervene with compulsory arbitration. The negotiation or determination of a minimum service rather than imposing an outright ban on industrial action through the imposition of compulsory arbitration was not included in the Government's considerations. At the request of the Minister, the three teachers' unions agreed to resume work upon this notification.

Although the obligation to end the strike only comes into effect when there is a formal legislative decision in place, it is a usual practise in Norway to follow the Minister's request when informed that the Government will intervene with compulsory arbitration, but this does not always happen.

3.3.2 Proposal for compulsory arbitration from the Ministry of Labour and Inclusion

The Ministry of Labour and Inclusion advised that a proposal for compulsory arbitration be submitted to Parliament.

> **Appendix 4:** Prop. 3 L (2022-2023) Proposal for a Legislative Decision (Proposisjon til Stortinget)

In the proposal, the suggestion to invoke compulsory arbitration referred to "concerns over the grave societal consequences" of the current situation. In the Proposition, the Ministry states that:

> "The Ministry's decision is based on a comprehensive assessment of the grave consequences of the strike for the **educational offering to children and youth, their psychosocial environment**, and their **mental health**.", cf, Prop. 3 L (2022-2023) p. 8 (Our highlighting)

These are consequences that to a certain degree always will occur as a result of industrial action among teachers, but they do not convert the education sector into an essential service in the strict sense of the term. It is UEN's opinion that the Ministry, and later the Norwegian Parliament (Stortinget), did not sufficiently consider whether the stated reasons for intervening in the lawful strike were in compliance with the strict exemptions as set out in CFA case law based on ILO conventions No. 87, 98, 151 and 154.

The Ministry expressed a general opinion, which was not based upon the existing situation, that the intervention was within the scope of the conventions Norway has ratified, including ILO Conventions No. 87, 98 and 154. Convention No 151, however, which regulates the right to strike for public employees, was not mentioned.

> "The Ministry of Labour and Social Inclusion is of the opinion that an administrative decision on compulsory arbitration in the disputes referred to above is within the scope of the conventions ratified by Norway", cf. Prop. 3 L (2022-2023) p. 10

Apart from this statement, the Ministry did not detail why the compulsory arbitration was deemed to be within the narrow scope of what the CFA has accepted as legitimate grounds for intervening in a legal strike. The Ministry did not discuss whether the current situation entailed a clear and imminent threat to the life, personal safety or health of the whole or part of the population.

The Ministry's proposal to invoke compulsory arbitration because of the consequences the strike had for children and young people's "educational offering, psychosocial environment and mental health" was based on several reports from, inter alia, the Ministry of Education and Research, the Norwegian Directorate for Education and Training, and from the Ministry of Health and Care Services. The reports stated that the strike had some negative consequences for the pupils' educational offering, their psychosocial environment, and mental health. The reports also expressed that pupils had already experienced a difficult time adapting to the covid-19-regulations that applied in the years prior to the strike. However, there was no mention of the extent to which these issues were present, let alone any quantification of the perceived problems, nor of who should be responsible for these possible negative effects, and whether they entailed a clear and imminent threat to the life, personal safety or health of the whole or part of the population.

In UEN's opinion, the reports do not describe a situation which gives sufficient grounds for invoking compulsory arbitration based on an imminent threat to the life, personal safety, or health of the whole or part of the population. We emphasise that the Ministry stated that the reports about the situation were inconclusive regarding the consequences of the strike on 27 September 2022, the point in time when the Minister of Labour and Social Inclusion requested that the parties go back to work.

UEN made their view clear in written input to the Standing Committee on Labour and Social Affairs on 25 October 2022. In the conclusion of their input, UEN stated (in our translation):

> "UEN believes that the government's decision on 27 September and the proposed legislation to intervene in the strike was and is in violation of the teachers' right to strike."

3.3.3 Recommendation by the Standing Committee on Labour and Social Affairs

In accordance with standard legislative procedures, the proposed Act was referred to the Standing Committee on Labour and Social Affairs for consideration. The committee recommended that the Act be passed as proposed by the Ministry of Labour and Inclusion:

> **Appendix 5:** Innst. 65 L (2022-2023) Recommendation by the Standing Committee on Labour and Social Affairs (Innstilling til Stortinget fra arbeids- og sosialkomiteen)

However, some members of the Committee opposed the recommendation, stating that the legislation was insufficiently substantiated by facts and that it was in violation of Norway's obligations according to the ILO conventions.

Reference is made to the remarks from the Committee's member from Sosialistisk Venstreparti ("SV") who stated:

> "The member of the committee from Sosialistisk Venstreparti disagrees with the Ministry's assessments in Proposition 3 L (2022-2023) that concerns over the grave societal consequences speak in favour of resolving the labour disputes between the Union of Education Norway, the Norwegian Union of School Employees and the Norwegian Association for Graduate Teachers, and KS, without further industrial action. This member refers to written input from UEN, SL, and NL, in which all three unions state that the justification for compulsory arbitration is deficient, weak, and poorly reasoned. They also believe that intervening in the strike infringes teachers' right to strike. This member notes that the COVID-19 pandemic was used as a rationale for considering pupils to be in a particularly vulnerable situation and that the government therefore deemed it necessary to put a stop to the strike. This member believes that the right to strike must be safeguarded and strengthened, but there are several examples of strikes being ended on insubstantial grounds through compulsory arbitration. This member points out that Norway has been criticized on multiple occasions for using broad and unrestricted criteria to implement compulsory arbitration, particularly by the ILO's Committee on Freedom of Association."

Furthermore, reference is made to the remarks from the dissenting Committee member from Rødt:

> "The committee member from Rødt is concerned that the government's justification for ending the teachers' strike could have significant consequences, not only for teachers but for several large professional groups. In their rationale, the **government describes consequences of the strike that are obviously to be expected in a teachers' strike**, such as "consequences for children and young people's educational offering, psychosocial

environment, and mental health." The government emphasizes pupils with special needs but cannot state the actual extent of the consequences for these pupils:

> "schools expressed that they struggled to identify pupils who potentially might have special needs."

This member refers to the fact that the Ministry states that the decision to end the strike is not illegal. However, the ILO convention that the Ministry quotes requires that the strike:

> "endanger the life, health, or personal safety of the whole or a large part of the population."

This member is very uncertain whether 72,000 pupils can be defined as "the whole or a large part of the population."

This member believes that the government's justification is vague and poorly substantiated and fears that if this proposition is adopted, any teacher strike, as well as other strikes that last long enough, may be ended by compulsory arbitration. This member points out that the trade unions UEN, SL and NL state that the basis for stopping the strike was too weak and urge Parliament to vote against the proposition. This member supports the trade unions' assessment." (our highlighting).

UEN agrees with the objections raised by the Committee members from Sosialistisk Venstreparti and Rødt.

3.3.4 Legislative resolution by the Storting

By Legislative Resolution 8 (2022-2023) of 1 December 2022, the Storting decided that the National Wages Board ("NWB") should settle the dispute. The Act (L16.12.2022 no. 89) was sanctioned by the Cabinet on 16 December 2022 and entered into force immediately..

Appendix 6: Act L16.12.2022 no. 89 concerning compulsory arbitration by the National Wages Board of the labour disputes between Utdanningsforbundet, Skolenes landsforbund, Norsk Lektorlag, and KS (Lov om lønnsnemndbehandling av arbeidstvistene mellomUtdanningsforbundet, Skolenes landsforbund og NorskLektorlag og KS i forbindelse med hovedoppgjøret i 2022)

3.4 The National Wage Board's handling of the case

Norway has no general legislation limiting the right to strike, nor any general legislation on the use of compulsory arbitration. Interventions in an impending or current labour dispute must therefore be decided on a case-by-case basis through the regular procedure for legislative enactments according to the Constitution.

When a legislation on compulsory arbitration is enacted, the NWB is the institution that is given the authority and mandate to resolve the dispute. NWB is a permanent board arbitrating interest disputes raised by the labour market parties and disputes that are referred to it by the Storting to be resolved by compulsory arbitration.

The functioning of the NWBs is regulated by Act No. 10 of 27 January 2012 relating to wage committees in labour disputes (the National Wages Board Act).

> **Appendix 7:** The National Wages Board Act (Lov om lønnsnemnd i arbeidstvister (lønnsnemndloven)) (Act No. 10 of 27 January 2012 relating to wage committees in labour disputes)

The same procedural rules that apply to the Labour Court of Norway also apply to the National Wages Board. The Act of 27 January 2012 relating to labour disputes, which is the fundamental piece of legislation in Norwegian labour law, regulates the procedural rules.

> **Appendix 8:** Act of the 27th of January 2012 relating to labour disputes (Lov om arbeidstvister [arbeidstvistloven])

While the National Wages Board Act directly regulates voluntary arbitration, it has mostly been used to resolve disputes using compulsory arbitration as a consequence of governmental intervention.

According to Section 3 of the National Wages Board Act, the parties to the individual dispute must each appoint two members to the NWB. When the tribunal makes a decision, only one of the members appointed from each party has the right to vote. The parties must decide which of the members has the right to vote, cf. National Wages Board Act Section 4.

Decisions rendered by the NWB have the status of a collective agreement. When ruling in a given case, NWB follows its own established practice and principles. NWB has a conservative approach that in most cases leads to the Board upholding the employer's claim. The current case was not different.

Another NWB practice that advantages employers is the principle of deferred payment. If the parties come to an agreement voluntarily, meaning without compulsory arbitration, the retroactive payment of the general wage supplement is granted from the date of expiry of the former collective wage agreements or from whatever date the parties agree upon during the negotiations. However, if the conflict is resolved through compulsory arbitration, retroactive payment of the general wage supplement is granted only from the date that work is resumed after the strike or, in some cases, from the date of the NWB decision. This is a financial incentive to discourage strikes, that also encourages employer representatives to avoid negotiation.

This incentive for the employers to not cooperate during the negotiations has the potential to damage the entire bargaining system. The CFA has on numerous occasions pointed out that the actions of the employers often can be seen as an "application" for compulsory arbitration, which the Government tends to accept rather quickly.

In the case between UEN and KS, the NWB upheld the National Mediator's proposal and none of the employees' claims were successful. The retroactive payment of general supplements was deferred until the day work resumed on 27 September 2022.

4 RELEVANT ILO LEGISLATION AND PRACTICE

4.1 The right to strike

The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. It is a fundamental right of workers and of their organizations "only in so far as it is utilized as a means of defending their economic interests" (ILO *Digest* 2006, para 520). In the ILO, the right to strike can be deduced from the Right to Organise Convention, 1948 (No. 87), ratified by Norway 4 July 1948, and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). For public employees the same right to strike can be inferred from the ratification of the Labour Relations (Public Service) Convention, 1978 (No. 151) by Norway on 19 March 1980.

The right to strike is "an intrinsic corollary to the right to organize protected by Convention No. 87" (ILO Digest, para. 523). Article 3 in the Convention states that worker and employer organisations "have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes". On this basis, the CFA has stated that the right to strike is protected by ILO Convention No. 87. ILO Convention No. 98 article 4 promotes voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to regulating terms and conditions of employment by means of collective agreements. Article 4 of Convention No. 151 has the exact same wording as article 4 of Convention 98.

Article 5(2) (d) and (e) of Convention No. 154 states that collective bargaining "should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules" and that the "bodies and procedures for settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining."

4.2 Possible limitations to the right to strike

The ILO supervisory bodies have taken the position that in cases where compulsory arbitration prevents strike action, "it is contrary to the right of trade unions to organize freely their activities" (ILO Digest, para. 565). It is, however, permissible to limit or even prohibit the right to strike in certain cases. Limitations on the right to strike are, under given circumstances, permitted within "essential services in the strict sense of the term" (ILO *Digest* 2006, para 564). Essential services are understood to mean services of which an interruption would endanger the life, personal safety, or health of the whole or part of the population (ILO *Digest* 2006, para 576).

A strike within an essential service does not automatically create a basis for legally applying compulsory arbitration. Whether a strike can be prohibited depends on the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population (ILO *Digest* para 581).

Whether a service is essential or not will depend to a large extent on the circumstances prevailing in the country. The concept is not absolute, as a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population (ILO *Digest* 2006, para. 582). This entails that the severity of the situation that a strike in a non-essential service has caused

must be considered equivalent to an interruption in an essential service for there to be a situation in which strike can be prohibited. Prolonged conflicts and fruitless negotiations and so-called deadlocks do not in themselves justify compulsory arbitration.

4.3 Prohibition of the right to strike within the education sector

The education sector is *not considered an essential service*, thus does not fall within the scope of the limited exceptions to the right to strike (see Compilation of decisions of the CFA, 2018, para 842, as well as 2006 Digest, para. 587; 344th Report, Case No. 2364, para. 91; 346th Report, Case No. 2489, para. 463, Case No. 1865, para. 772; 348th Report, Case No. 2364, para. 122; 349th Report, Case No. 2562, para. 406, Case No. 2552, para. 422, Case No. 2489, para. 686; 351st Report, Case No. 2569, para. 639; 353rd Report, Case No. 2619, para. 573; 354th Report, Case No. 2587, para. 1057; 355th Report, Case No. 2657, para. 573; and 360th Report, Case No. 2803, para. 340). Teachers' right to strike has been expressly protected from the restriction on strike that apply to civil servants (ILO *Digest*, para. 589). It is evident from CFA case law that the possible long-term consequences of strikes in the teaching sector do not justify their prohibition (see ILO Digest 2006 para. 590 as well as 262nd Report, Case No. 1448, para. 117; and 327th Report, Case No. 2145, para. 303). In this connection we would once again like to draw attention to Case No 1448 where the CFA in its recommendations stated that the effects of industrial action in the teaching sector in Norway in May-June 1986 were not sufficient to justify resorting to compulsory arbitration. Accordingly, the Committee concluded that the Act of 12 June 1986 was not compatible with the principles of freedom of association, see Par. 123 a).

Reference is also made to case No. 2803, Report nr. 360 against Canada, para 340, where the CFA summarizes the prevailing state of law regarding the possibility to limit strikes in the education sector. It is stated that:

> "Furthermore, while the right to strike can be subject to certain limited exceptions, the Committee recalls that the **education sector does not fall within these exceptions** [see Digest, op. cit., para. 587]. The Committee recognizes that **unfortunate consequences** may flow from a strike in a non-essential service, but considers these **do not justify a serious limitation of the right to strike unless they become so serious as to endanger the life, personal safety or health of the whole or part of the population**. In examining a previous complaint involving the education sector, the Committee stated that the **possible long-term consequences of strikes in the teaching sector did not justify their prohibition** [Case No. 2145, para. 303, 327th Report, and Digest, op.cit., para. 590]. In this respect, however, the Committee has considered that in cases of strikes of long duration, **minimum services may be established** in the education sector, in full consultation with the social partners [see Digest, op. cit., para. 625]." (Our highlighting)

As the CFA points out in, inter alia, Case 2803, para 341 and case 2145, para 303, the repeated recourse to such legislative restrictions – as the situation is in Norwegian labour law – "can only in the long term destabilize the labour relation climate".

5 ALLEGATIONS

5.1 General and specific arguments - overview

UEN alleges that the interference through compulsory arbitration in a legal strike in the education sector was unjustified and in breach of the the principles of freedom of association as laid down by ILO in conventions Norway is bound by (Convention Nos. 87, 98, 151 and 154). The education sector is not classified as an essential service, and the strike in question did not pose a clear and imminent threat to the life, personal safety or health of the whole or part of the population.

UEN further claims that, in any case, minimum services could have been established in full consultation with the social partners instead of prohibiting industrial action and imposing compulsory arbitration.

5.2 Lack of assessment of grounds for interference in the right to strike

Norwegian authorities have been criticized by ILO on several occasions for improper and unjustified use of compulsory arbitration.

It has long been common practice for successive Norwegian governments to intervene in conflicts through compulsory arbitration, without conducting prior evaluations of whether the specific intervention entails a violation of the international conventions ratified by Norway. An example of this can be found in the recent provisional Act on the wage arbitration procedure for the labour dispute between Lederne (The Norwegian Union of Managers and Executives) and Norwegian Oil and Gas in connection with the main settlement in 2022. From the Ministry of Labour and Inclusion's assessment we quote (our translation):

> "If a contradiction were to be detected between international conventions and Norway's use of compulsory arbitration, the Ministry of Labour and Social Inclusion believes that it is under any circumstances necessary to intervene in the current conflict.", cf. PRE-2022-08-12-1434 point 4.

When deciding that the strike in the case that is the subject of this complaint should be stopped and referred to NWB for compulsory arbitration, the Government did not carry out any form of evaluation regarding whether the decision would comply with the right to strike. Without any assessment whatsoever, the Government concluded that compulsory arbitration in this case was compliant with the conventions ratified by Norway, stating that

> "The Ministry of Labour and Social Inclusion is of the opinion that a decision regarding compulsory arbitration in the labour disputes in question is within the scope of the conventions ratified by Norway.", cf. cf. Prop. 3 L (2022-2023) p. 10.

The lack of a discussion of whether compulsory arbitration in this case was in compliance with international conventions indicates lack of awareness of and respect for the safeguards and limits that the ILO-conventions are meant to impose on States regarding the freedom of strike for workers.

It is also surprising that the Government, in light of the Norwegian teacher case (No 1448), where the government admitted that the strike did not in itself constitute a threat to life, health or security, chose to not assess the situation in May 2022 and the criteria for limiting freedom of association more thoroughly this time around.

It is the UEN's opinion that the absence of an assessment as to whether compulsory arbitration entailed a breach of ILO conventions in this case creates a relevant backdrop to the CFAs assessment of whether the legislation in question imposed a violation of the right to strike.

5.3 Lack of sufficient knowledge regarding the negative impacts of the strike

UEN asserts that the Government did not have a sufficient knowledge base when making the decision on compulsory arbitration. In its assessment, the Government stated that by 27 September 2022, the "situation appeared to be unclear", cf. Prop. 3 L (2022-2023) p.9. The Government had received concerns from various sources, both of a general nature and related to specific pupils. At the same time, the Government clearly stated that they were not able to obtain a complete overview of the specific consequences of the strike for individual pupils.

UEN also notes that the reports seemed to be more concentrated on the impact of the strike on "individual pupils" rather than the question of whether there was an imminent threat to a part of or the group as a whole.

In its report of 21 September 2022, the Ministry of Education and Research stated that the reduction of activity in the schools had a negative impact on the cooperation between the different services responsible for the wellbeing of the children, but that the magnitude of this impact was unclear.

As mentioned in section 3.3.3, several members of the Standing Committee on Labour and Social Affairs also pointed out that the Government's justification for their decision to impose compulsory arbitration in the case was vague and poorly documented.

In May-June 1986, the Committee considered that the effects of industrial action in the teaching sector in Norway were not sufficient to justify resorting to compulsory arbitration and stated that:

"The Committee recognises that in **certain highly exceptional circumstances** the dislocation caused by industrial action in a number of "non-essential" sectors may **cumulatively create** a state of emergency such as to justify some curtailment of the right to strike - especially if the disputation is of extended duration.", cf. Case No. 1448 (the Norwegian teacher case) para. 117 (our highlighting).

It is UEN's opinion that the decision to impose compulsory arbitration was made without adequate knowledge, was premature and hasty, and therefore constituted a violation of the right to strike.

5.4 Lack of basis for justifying interference in the right to strike

The three reasons that were indicated as decisive for intervening in the ongoing strike were the possible consequences for children and young people's educational offering, their psychosocial

environment, and mental health. Additionally, the Government argued that the negotiations between the social partners were in deadlock with no prospect of finding a solution.

As shown above, the research and knowledge that informed the decision were vague and unclear. The teachers were also given responsibility for a lot of consequences that are outside of the scope of their professional obligations (such as the mental health of pupils). Furthermore, the consequences pointed out by the government are consequences that will follow from *any* strike in the education sector, thus creating an effective ban on any future strike in the education sector if upheld as legitimate.

5.4.1 The Government's argument regarding children's and young people's educational offering

An important aspect in the Government's assessment and decision to intervene with compulsory arbitration was that the strike was affecting the children and young people's learning opportunities. The reports from the county governors showed that concerns were raised by schools, parents, and pupils regarding loss of learning and the implication for the final student assessments in the spring. A report from the Directorate for Education and Training highlighted the learning opportunities for children with special needs, and vulnerable children. UEN argues that this description of the situation was not accurate.

In UEN's perspective it was, at the time of the Government decision, quite possible to catch up with the school program and make sure that the pupils received the amount of education that they were entitled to during the school year. This view was also stated in the report from the Directorate for Education and Training on 27 September 2022, in the morning of the very same day the Government prohibited the strike. The Directorate stated that it was still early in the school year and at that point there would be time to provide pupils with a good and sufficient academic and social outcome for the rest of the school year, even if the school did not offer all the class hours the pupils had missed at that point.

UEN reiterates that even though the first call-out of strikers started close to the end of June, the vast majority of pupils were only impacted after the school year resumed and the strike was expanded, first on 22 August 2022 and then with the subsequent expansions in August and September.

Furthermore, UEN recalls that it has been long acknowledged that the "possible **long-term consequences** of strikes in the teaching sector **do not justify their prohibition**" (se ILO *Digest* para 590).

This principle has been reiterated numerous times within the relevant case law. In Case 2145, para. 303, the CFA pointed stated that:

> "While the Committee recognizes that **unfortunate consequences** may flow from a strike in a **non-essential service**, these **do not justify a serious limitation** of the right to strike unless they become so serious as to endanger the life, personal safety or health of the whole or part of the population [Digest, op. cit., para. 541]. Also, in examining a previous complaint involving the education sector, the Committee stated that the **possible long-term consequences of strikes in the teaching sector** did not justify their

> prohibition [Case No. 1448, 262nd Report, para. 117]. In the present case, while appreciating that the **continuation of the dispute might have affected pupils**, the Committee is not convinced that there existed, in the circumstances and at this stage of the dispute, a situation which warranted the legislative action taken by the Government" (our highlighting).

This means that consequences of strikes for pupils' learning opportunities do not in themselves justify restricting the teachers right to strike.

These main rules and principles also apply in cases where industrial action by teachers may lead to challenges in connection with exams and final assessments at the end of the school year. In case No. 1448, the teachers went on strike mid-May 1986 and were on strike until early June, i.e., right before and during the period for final assessments and exams. Nevertheless, the CFA noted that imposing compulsory arbitration in the teachers' strike was not compatible with freedom of association and recalled that teaching is a non-essential service.

The main rule outlined above has also been acknowledged by European Committee of Social Rights (ECSR). The ECSR has criticized Norway's interventions in strikes on multiple occasions, including the strike that teachers took part in during the spring/summer 1998. According to the Government's report, the work stoppage had a severe impact on the school sector. The strike led to problems in organising exams, especially in respect of pupils who needed the exam results for admission to higher education. Some oral examinations had to be cancelled at universities and other higher education institutions. Exams and application deadlines for admission to higher education had been rescheduled to take account of the strike. Even so, the Committee considered that the intervention was in breach of the European Social charter (ESP) article 6 regarding the right to bargain collectively.

As for pupils entitled to special needs education, UEN underlines that this education is generally provided though a predetermined number of hours/classes, on the basis of individual administrative decisions. This allows schools to be flexible when organizing and providing this type of education to their pupils, which in turn means that the right to special needs education could have been fully satisfied during the remaining time of the school year. In other words; their rights were not at all lost by 27 September 2022.

The 27 September 2022 report stated that the county governors described significant variations in how the strike had affected the provision of special needs education to entitled children. The county governors also pointed out that the extent to which the strike affected pupils with greater needs for adapted training varied greatly.

As mentioned in point 3.2.2.2, UEN was very liberal in granting dispensations from the strike when requested. Special needs education was one of the areas that UEN attempted to shield in their strike call-outs, exemptions and dispensations. UEN also notes that it is apparent from the government reports that while all of the employers had the right to request exemptions for teachers who were responsible for and provided special needs education, there were multiple employers that did not apply for such exemptions.

UEN asserts that the possible impact of the strike on the educational offering to children and youth did not constitute legitimate grounds for intervening in the strike with compulsory arbitration.

5.4.2 The Government's argument regarding psychosocial environment and mental health

The Government has invoked the effect of the strike on pupil's psychosocial environment and mental health as grounds for imposing compulsory arbitration.

UEN argues that the consequences of the strike did not lead to a clear and imminent threat to the life, personal safety, or health of the whole or part of the population. Additionally, UEN observes that in its assessments, the Government has, omitted to mention and clearly define the extent and limitations of the teachers' obligations with regards to pupils' psychosocial environment and mental health.

5.4.2.1 No imminent threat to the life or health of the whole or part of the population

UEN reiterates that based on the information available at the time, there was no imminent threat to the life or health of the whole or part of the population. The Government has primarily based their decision on isolated incidents reported on behalf of individual pupils. The assessment and the reports highlight stories of individual pupils who were more adversely affected by the strike than most other pupils. Even an incident prior to the strike, i.e with no relevance to the strike at all, has been drawn upon to demonstrate the importance of the pupils' presence at school.

The attention paid to individual cases is not in conformity with the strict criteria for intervening in the right to strike. This is especially intriguing since the Government has expressly stated in its assessment that "[m]ajority of children are robust enough to withstand intermittent absences of instruction," cf. Prop. 3 (2022-2023) s. 9.

Interventions are only permitted in cases where there is a in clear and imminent threat to the health of the whole or part of the population. Using individual cases as grounds for limiting the teachers' right to strike is thus not justifiable and further supports UEN's allegation that the Government lacked sufficient knowledge about the negative effects of the strike prior to making their decision (se point 5.3)

It is UEN's opinion that the Government's intervention in the strike was unjustified and that the references to the possible negative consequences for the pupils' psychosocial environment and mental health do not in any way fulfil the criteria for exemptions to the right to strike as set out in ILO case law, as the consequences of the strike did not lead to a clear and imminent threat to the life, personal safety, or health of the whole or part of the population.

5.4.2.2 The teachers' obligations and pupils' psychosocial environment and mental health

The responsibilities of teachers in primary schools and lower secondary education as well as upper secondary education in public schools, and apprenticeships, are regulated by the Act relating to Primary and Secondary Education and Training (the Education Act).

Appendix 9: Act No. 61 of July 17th, 1998 relating to Primary and Secondary Education and Training (the Education Act) (Lov om grunnskolen og den vidaregåande opplæringa (opplæringslova))

The Act states that, among other things, education and training in schools and training establishments must, in collaboration and agreement with the home, open doors to the world and give the pupils and apprentices insight into and a firm foundation in history and culture, cf. section 1-1. The Education Act also states that all pupils are entitled to a safe and supportive school environment that promotes health, well-being and learning, cf. section 9-1.

Section 13-10 states that it is the responsibility of the municipal authority (for primary and lower secondary schools) and the county authority (for upper secondary schools) to ensure compliance with the requirements of the Education Act and regulations issued pursuant to the Act, which includes providing the necessary resources for complying with these requirements. Ultimately, it is thus the municipality and the county who bear the responsibility for making sure that the regulations are observed.

According to the Act on municipal health and care services, etc. (Health and Care Services Act) (Lov om kommunale helse- og omsorgstjenester m.m. (helse- og omsorgstjenesteloven) the municipal authorities shall ensure that individuals residing in their municipality are offered the necessary health and care services, cf. section § 3-1.

Appendix 10: Act No. 30 of June 24th, 2011, relating to on municipal health and care services, etc. (Health and Care Services Act) (Lov om kommunale helse- og omsorgstjenester m.m. (helse- og omsorgstjenesteloven)

To fulfil their responsibility pursuant to Section 3-1, the municipal authorities shall, inter alia, provide health-promoting and preventive services in schools.

The Regulation on the Municipality's Health-Promoting and Preventive Work in the Maternal and Child Health Care and School Health Services (Forskrift om kommunens helsefremmende og forebyggende arbeid i helsestasjons- og skolehelsetjenesten) Section 6, letters a, c, and f, states that the services provided to children and young people in the school health service shall include, among other things, health-promoting and preventive psychosocial work, collaboration with the school on measures that promote a positive psychosocial and physical learning and working environment, and information, assistance and education in groups, classes, and parental meetings to the extent desired by the school.

In the report on which the Government's assessment relied, weight was given to information from the medical services regarding the deterioration of individual patients' health conditions in the form of increased suicidal thoughts and weight loss, cases of self-harm, and emotional disorders such as depression and anxiety. These are matters that fall outside the responsibility of teachers according to the Education Act and clearly fall within the remit of healthcare providers.

Although teachers have a duty to ensure that pupils have a safe and supportive school environment that promotes health, well-being and learning, teachers do not have any professional responsibility for the overall health of pupils, including their mental health. This responsibility rests primarily with the health care providers. Nor do teachers have the necessary formal qualifications to assist pupils with health-related issues, such as self-harm and emotional disorders.

The Government has also pointed out schools' function as cooperation platforms, they are a link between pupils and the social and healthcare services, and then goes on to state that this cooperation does not function properly when the teachers are absent.

Under regular circumstances, teachers, in addition to providing pupils with education, also operate as a link to other services that are set up for the protection of children. This is a natural and practical consequence of teachers spending a lot of time with the pupils. However, while school is an important arena for identifying pupils with mental and social challenges, it is not the primary responsibility of the teachers to function as a support mechanism for other authorities meant to take care of the pupils.

The report dated 27 September 2022 recognises that schools had difficulties in identifying vulnerable pupils and that the social services, including the child protection authorities, had difficulties following them up. Teachers are often an important provider of information about welfare needs of children and youth to the pupils' support system, but the onus is not solely on the teachers.

The report also states that the child protection services experienced that case management team meetings for pupils were not being conducted properly with the correct authorities. It must be noted that representatives from the school (teacher/principal) are only one of the multiple authorities that partake in such meetings.

The fact that the lack of teachers leads to the collapse of the whole system indicates that there are serious flaws in the system that are not connected to the strike. The Government has omitted to mention that the support services tasked with supporting children in need had already been overloaded for a long time prior to the strike. A report dated 15 June 2021 regarding the state of the schools after Covid-19, emphasised that the service apparatus around the pupils had come under pressure during the pandemic, and that at that point there was a risk that there would not be enough resources for children in need of support.

Appendix 11: Report "School After the Coronavirus Pandemic: A Boost for Well-being and Learning" (2021: 12) (Rapport "Skolen etter koronapandemien: Et løft for trivsel og læring" (2021: 12))

The report also stated that there were indications that several services assisting vulnerable children and youth had operated at reduced capacity.

As a result, measures were proposed to strengthen the team around pupils. The Ministry of Education is currently working on a reinforcement strategy to be submitted to the Storting in the form of a Parliamentary Resolution.

Imposing compulsory arbitration on teachers on the grounds that the lack of teachers is making it difficult for other sectors to fulfil their jobs, is unjustifiable, disproportionate, and an unsuitable means of addressing the difficulties municipalities face in providing adequate levels of services to pupils. In so doing, the Government neglects the division of responsibilities that exists between different sectors working for the interest of pupils and it de facto classifies the education sector as an essential service in the strict sense of the term, on an equal footing with the health sector. Furthermore, restricting teachers' rights to strike in this context appears to

shift a responsibility, originally incumbent on other sectors, onto teachers. This is contrary to CFA case law that clearly states that the education sector is not an essential service.

5.4.3 The Government's argument regarding deadlock

In its justification for imposing compulsory arbitration, the Government also stressed that the conflict between the parties appeared to be in deadlock.

The ILO has recognized that there comes a time in bargaining where, after protracted and fruitless negotiations, the authorities might be justified in stepping in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part (ILO Digest 2005, para 1003). However, the ILO has also clearly expressed that the

> "mere existence of a deadlock in a collective bargaining process is not in itself a sufficient ground to justify an intervention from the public authorities to impose arbitration on the parties to the labour dispute", (ILO Digest 2006 para. 1004).

In the current case, the strike officially started on 20 June 2022 with the call-out of 45 unionised teachers from their workplace. The summer holidays for the pupils started three days after the strike was declared. Consequently, the strike did not have any real effect as a leverage mechanism until the school year resumed and the strike was expanded, first on 22 August 2022 and then with the subsequent expansions in August and September. The whole rationale behind a strike is the fact that the parties have not come to an agreement during the collective negotiations. The strike is used as a form of coercion tactic to influence the other party in further negotiations. The mere presence of a deadlock is the fundamental prerequisite for trade unions to opt for striking.

If the interpretation of the right to strike includes a provision where the mere existence of a deadlock in a collective bargaining process automatically constitutes grounds for compulsory arbitration, this will undermine the genuine right to strike. This is especially the case during collective bargaining processes in the public sector which KS represents, as the public sector has no real economic incentives to come to an agreement with the other parties to the labour dispute.

As a public sector employer organisation, KS does not lose income when employees strike. On the contrary, KS saves money by not paying salaries during the strike. For a public sector employer, such as KS's affiliated municipalities, it is more profitable to not compromise but rather wait until the Government decides to impose compulsory arbitration. This is reinforced by the principles on retroactive payment of the general supplements to employees that are only granted once work resumes, followed by the NWB, described above in section 3.4. It is thus directly profitable for an employer within the public sector to delay, or at least not actively engage in reaching an agreement.

This being the case, the government should be even more cautious when considering restricting the right to strike for public workers in non-essential services. A deadlock should not in and of itself give rise to compulsory arbitration.

5.5 Failure to impose minimum services

The ILO has pointed out that minimum services should be considered as an alternative to prohibiting a strike through compulsory arbitration, as such an intervention in the right to collective bargaining is less intrusive.

The establishment of minimum services constitutes in itself a limitation to the right to strike. However it is permitted in cases of strike within essential services in the strict sense of the term; i.e., within public services of fundamental importance or within services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an *acute national crisis endangering the normal living conditions* of the population (ILO *Digest*, para 606). The threshold for implementing minimum services it thus quite high and the measures must be implemented with caution.

The teaching sector, as mentioned above, is a non-essential sector and UEN is of the opinion that the situation in August-September 2022 did not constitute an imminent threat to life, personal safety or health nor created such a state of emergency that would lead to classifying the teaching sector as essential in the strict sense of the term. UEN, however, is of the opinion that if the Government believed the circumstances at the time demanded considering the teaching sector an essential service in the strict sense of the term, then the Government had an obligation to consider and implement minimum services instead of imposing compulsory arbitration.

A minimum service could be appropriate as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the majority of workers, one might consider ensuring that users' basic needs are met or that facilities operate safely or without interruption. (ILO Digest 2006 para. 607).

A minimum service may be set up in the event of a strike, the extent and duration of which might be such as to result in an acute national crisis endangering the normal living conditions of the population. Such a minimum service should be confined to operations that are *strictly necessary* to avoid endangering the life or normal living conditions of the whole or part of the population; in addition, workers' organizations should be able to participate in defining such a service on a par with employers and public authorities.

The ILO has opened for minimum services in the education sector in "full consultation with the social partners, in cases of strikes of long duration" (see ILO Digest 2066, para 625 as well as 330th Report, Case No. 2173, para. 297).

Establishing minimum services in cases of strike in the education sector is thus conditioned on cooperation with the parties affected by the interference. The experience from the strike exemptions and dispensations given by the unions both prior to and during the strike indicates that a successful cooperation between all the parties regarding minimum services could have been achieved. As mentioned above, more than 90% of the dispensation applications was granted by UEN.

Norway has on several occasions been criticized by ILO for not imposing minimum services instead of compulsory arbitration. (Among others, Case No 2484, Case No 2545, Case No 3038). Nevertheless, the Government did not carry out any genuine discussions regarding whether they could have intervened using less intrusive methods in this case, neither with the parties involved nor in general.

In their discussion of the question, the Government just stated that, based on the reports from Ministry of Education and Research (20 September), compulsory arbitration should be imposed. The reports emphasized that the strike had a negative impact on vulnerable children and that this impact increased as the strike progressed and that it would be "especially challenging, as there is a scarcity of competent professionals", cf. prop.3 L (2022–2023) p. 4.

The shortage of competent professionals mentioned in this case is not a consequence of the particular strike, but rather an ongoing challenge. The failure to address the shortage of education professionals is the responsibility of the Government, and not of the teachers themselves. Restricting the right to strike/freedom of association on the grounds of a lack of sufficient professionals is irrelevant, disproportionate, unreasonable, and unsuitable. The rights and freedoms enjoyed by citizens should not be curtailed because of decisions made by governments regarding resources.

The government did not explore remedying the shortage of professionals, heightened during the strike, by considering minimum services instead of stopping the strike and resorting to compulsory arbitration. Minimum services would allow the utilization of limited resources, i.e., the professional expertise for children with the right to special needs education, while at the same time safeguarding the freedom of strike/association.

The Directorate of Education's report of 27 September 2022 noted the "good cooperation on dispensations from the strike" at the local level in the schools and that dispensations were suitable for mitigating the impact of the strike on individual children, cf. prop.3 L (2022–2023) p. 7. The government did not examine the extent to which the employers had utilized the existing dispensation scheme when concerns were raised about individual pupils who were at risk of experiencing greater learning loss than others.

The same report acknowledged, as mentioned earlier, that most children/pupils are resilient enough to withstand occasional disruptions to their learning opportunities; it is the vulnerable children lacking secure environments and support systems that were at risk. The mere fact that the Government itself acknowledged that only a minority of children were adversely affected by the strike is a strong argument for considering minimum services in order to mitigate the risk for this group of children while respecting the teachers' right to strike.

The ECSR has also used the possibility of minimum services as a reason to deem a decision regarding compulsory arbitration to be in breach of the ESP. During the 1998 strike, that included, inter alia, the transportation and communication sectors, all flights in the south of Norway were cancelled due to the strike, as were international flights to and from that part of the country. The strike also led to a halt in an important training program for flight controllers that forced the new airport, Gardermoen, to operate at reduced capacity. Moreover, the strike led to delays in the postal services with an average delay for A-post estimated at two to five days.

Nevertheless, the Committee did not consider that the intervention pursued an aim of public interest and concluded that it was in breach of the Charter. In its assessment, the Committee pointed out that "exemptions were made for necessary ambulance and military flights as well as for search and rescue operations". The Committee thus approved of the minimum services put in place and believed that these were enough to secure the population if the strike were to continue.

UEN alleges that the decision to refer the dispute to compulsory arbitration in the strike that is the subject-matter of this complaint was unjustified. UEN believes that minimum services could have been envisaged to ensure that the strike did not endanger life, personal safety or health. This would have secured the right to strike in harmony with the obligations identified in Convention Nos. 87, 98, 151 and 154.

6 FINAL REMARKS

UEN hereby asks the ILO to conclude that the use of compulsory arbitration in the abovementioned dispute is contrary to the ILO conventions, as these principles are set out in Conventions Nos. 87, 98, 151 and 154. We seek confirmation from the ILO that the intervention by the Government was not compatible with the principles of freedom of association on the grounds elaborated above.

UEN is pleased to provide additional information upon request.

Appendix 12: Glossary

Yours sincerely,

Steffen Handal
President