CONSEIL DE L'EUROPE

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COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF AB KURT KELLERMANN v. SWEDEN

(Application no. 41579/98)

JUDGMENT

STRASBOURG

26 October 2004

FINAL

26/01/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of AB Kurt Kellermann v. Sweden,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Mrs E. FURA-SANDSTRÖM, *judges*
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 28 September 2004,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 41579/98) against the Kingdom of Sweden lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish limited liability company, AB Kurt Kellermann ("the applicant"), on 20 February 1998.

2. The applicant company was represented by Mr J. Tillqvist and Mr A. Lindow, lawyers practising in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Ms E. Jagander, Ministry for Foreign Affairs.

3. The applicant company alleged that, on account of the composition of the Labour Court, it did not have a fair hearing by an impartial tribunal, as required by Article 6 § 1 of the Convention, in proceedings concerning industrial action.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

7. By a decision of 1 July 2003 the Court declared the application partly admissible.

8. On 12 November 2003 third-party comments were received from the Finnish Government, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 December 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms E. JAGANDER, Ministry for Foreign Affairs, *Agent*,
Ms C. LILJA HANSSON, Ministry of Industry, Employment and Communication,
Mr S. HULT, Ministry of Industry, Employment and Communication,
Mr J. ALBERG, Ministry of Industry, Employment and Communication,
Ms C. HELLNER, Ministry for Foreign Affairs,
Mr T.LARSSON, Ministry of Industry, Employment and Communication, *Advisers*;

(b) *for the applicant*
Mr J. TILLQVIST, *Counsel*,
Mr D. KELLERMANN, Former Chairman of the applicant *Adviser.*

The Court heard addresses by Ms Jagander and Mr Tillqvist.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The circumstances of the case

10. The applicant company, which conducted business within the textile industry, was not a member of any employers' association. Thus, it was not automatically bound by any collective bargaining agreement (*kollektivavtal*) negotiated in the industry, and had not signed any such agreement of its own volition. It had about twenty employees two of whom were members of the Industrial Union (*Industrifacket*; hereinafter "the union"), an affiliated member of the Swedish Trade Union Confederation (*Landsorganisationen*; hereinafter "the LO").

11. In the spring of 1997 the union requested negotiations with the applicant company with a view to concluding a collective agreement. Such negotiations were held on 13 May 1997. The minutes of the negotiations stated, *inter alia*, that the applicant company was not interested in reaching

an agreement at that time but would consider the matter. The minutes also recorded that the parties had concluded that the salaries paid by the applicant company were higher than the minimum wage stipulated in the collective agreement proposed by the union.

12. In a subsequent written exchange the applicant company stated that it had no intention of concluding a collective agreement with the union.

13. Soon thereafter the union demanded that the applicant company sign the so-called IG agreement (*IG-avtalet*), a collective agreement specially conceived by the union for employers who were not members of an employers' association. The applicant company declined, stating that its terms of employment were considerably more favourable to the employees than those stipulated in the IG agreement, that the existing employment contracts were perfectly adequate and that the employees belonging to the union objected to the union intervening on their behalf. However, it offered to sign a collective agreement with the union incorporating its existing terms of employment. The union rejected this proposal and announced that it might take industrial action.

14. On 3 October 1997 the union gave the applicant company formal notice (*varsel*) that it would take action by ordering the cessation of all work at the company and by imposing a "blockade" on the company from 13 October onwards unless an agreement had been reached before that date.

15. On 17 October 1997 the applicant company instituted proceedings against the union in the Stockholm District Court (*tingsrätt*), claiming that the threatened industrial action was unlawful and that the union should be ordered to withdraw the notice. The applicant company also requested that the District Court make an interim order to that effect.

16. On 20 October 1997 the union took the industrial action. It lasted only one day. The notice remained effective, however.

17. Negotiations were thereafter held before the National Conciliation Board (*Statens förlikningsmannaexpedition*). The union stated that certain parts of the IG agreement were not negotiable. The applicant company indicated that it was considering joining an employers' association, the Swedish Textile and Clothing Industries' Association (*Tekoindustrierna*), to which the union responded that it would not take any further industrial action against the company. However, the applicant company did not join that association and the negotiations broke down.

18. On 13 November 1997 the District Court rejected the applicant company's request for an interim order.

19. In the substantive proceedings, the union claimed that the District Court had no jurisdiction to decide the dispute and that, instead, it should be referred to the Labour Court (*Arbetsdomstolen*), whose decision should be final. By a decision of 5 December 1997 the District Court, referring to chapter 2, section 1, subsection 4 of the Litigation in Labour Disputes Act (*Lagen om rättegången i arbetstvister*, 1974:371; hereinafter "the 1974 Act")

and section 41 of the Co-Determination at Work Act (*Lagen om medbestämmande i arbetslivet*, 1976:580; hereinafter "the 1976 Act"), agreed with the union and transferred the case to the Labour Court.

20. Before the Labour Court, the applicant company claimed that the composition of the court which would determine the case should be restricted to professional judges – i.e. without members representing employers' and employees' interests – as it would otherwise not meet the requirement of objective impartiality under Article 6 of the Convention.

21. On 14 January 1998 a bench of the Labour Court composed of members who did not represent labour market interests rejected the applicant company's claim, stating that at the main hearing of a case, the composition of the court had to be in accordance with chapter 3, section 6 of the 1974 Act.

22. The Labour Court held a hearing in the case on 23 January 1998.

23. The applicant company maintained that the industrial action taken by the union was aimed at forcing it to join an employers' association or to accept the collective IG agreement drawn up by the union. It stated that only two union members were employed at the company and both of them had declared that they did not want to take part in the industrial action. The applicant company also claimed that its terms of employment were more favourable than those stipulated in the IG agreement. Since the means employed by the union were not reasonably proportional to the aim sought to be achieved, the industrial action had violated the applicant company's right not to join an employers' association and thus its right to negative freedom of association under Article 11 of the Convention. Alternatively, the applicant company asserted that the industrial action conflicted with a general principle of proportionality which it maintained was applicable under Swedish law, as it could entail serious economic consequences for the company.

24. For its part, the union claimed that, on the whole, the terms of employment provided by the applicant company were not more favourable than those contained in the IG agreement although it accepted that the salaries of its two members were higher than the minimum salary prescribed by that agreement. The union also stated that the IG agreement could be adapted to meet the special requirements of the applicant company. It further argued that the Convention was not applicable to the dispute as it only governed relations between individuals and the State and the 1976 Act was applicable as *lex specialis*. Alternatively, it asserted that Article 11 of the Convention did not afford any protection to a limited liability company and that, in any event, the judgment of the European Court of Human Rights in the case of *Gustafsson v. Sweden* (judgment of 25 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 637 *et seq.*) showed that Article 11 did not confer any right not to sign a collective agreement. As regards the industrial action that had been taken, the union stated that it served the legitimate aims of improving the employment situation for union members and protecting them in various ways and could not be considered

disproportionate to those aims. The union also claimed that a general principle of proportionality, as invoked by the applicant company, could not be used to limit the constitutional right to take industrial action. In its submission, the right to take such action against employers who were not bound by collective agreements was in principle unlimited under Swedish law.

25. By a judgment of 11 February 1998 the Labour Court found in favour of the union. Noting at the outset that the parties agreed that the industrial action in question was not unlawful under the 1976 Act, it went on to examine in detail whether it could involve a violation of the applicant company's right to negative freedom of association under Article 11 of the Convention, which had been part of Swedish law since its incorporation into domestic law on 1 January 1995.

First, the Labour Court rejected the union's preliminary objections as to the applicability of the Convention, as such, to the dispute at hand. It noted, *inter alia*, that the rules on industrial action in the 1976 Act – which were based on the constitutional principle that the right to take such action is unlimited unless otherwise provided by law – prescribed the situations in which such action would be unlawful. Thus, it could not be excluded that further restrictions on the right to take industrial action could follow from other legislation, including the Convention. The provisions of the 1976 Act, therefore, did not prevent Article 11 of the Convention from being applicable.

The Labour Court then went on to examine whether the industrial action had violated Article 11. It noted that the rationale behind the union's action was not to force the applicant company to join an employers' association but to conclude a collective agreement with it which, according to the union, would promote the economic interests of its members. Among other things, the proposed agreement prescribed that compensation be paid for overtime work, which, indisputably, was not the case under the applicant company's terms of employment. Having regard, *inter alia*, to the aforementioned judgment in the case of *Gustafsson v. Sweden*, the Labour Court concluded that the industrial action had not violated the applicant company's rights under Article 11. It found also that there was no basis in law for the applicant company's contention that a general principle of proportionality was applicable in labour disputes.

26. The Labour Court which heard the case and delivered judgment was composed of seven members. In accordance with the 1974 Act, the Labour Court was composed of two legally trained and qualified judges and five lay assessors. One assessor had been appointed because of her special knowledge of the labour market. However, she did not represent any employers' or employees' interests. Of the other four assessors, two had been nominated by employers' associations (a director of the Swedish Employer's Confederation (*Svenska Arbetsgivareföreningen*; hereinafter “the SAF”) and an employee of

the Ministry of Finance representing the State employers) and two by employees' associations (ombudsmen in the LO and the joint Central Organisation of Salaried Employees and Central Organisation of Swedish Academics (*Tjänstemännens Centralorganisation* and *Svenska Akademikers Centralorganisation*; hereinafter "the TCO/SACO"), respectively).

27. The member nominated by the SAF disagreed with the Labour Court's judgment and considered that the industrial action in question violated Article 11 of the Convention, as the union had failed to show that the terms of employment stipulated by the IG agreement were more favourable than those provided by the applicant company.

28. Following the Labour Court's judgment, the union made a further approach to the applicant company with a view to concluding a collective agreement. The applicant company again refused but informed the union that the rules on overtime work set out in the IG agreement had been introduced at the company.

29. On 23 February 1998 the union applied to the Labour Court for a declaratory judgment establishing the union's right to take immediate industrial action against the applicant company. It also requested the court to take an interim decision on this matter.

30. The applicant company opposed the union's claims and again objected to the composition of the Labour Court. It also requested an order requiring the union to provide security for any damage the company might sustain.

31. By a decision of 9 March 1998 the Labour Court, composed of members who did not represent labour market interests, rejected the applicant company's challenge to its impartiality on the same grounds as in its decision of 14 January 1998.

32. Following a hearing on 12 March 1998, the Labour Court, by a decision of 13 March, granted the union's request for an interim declaration that the proposed industrial action was lawful. It thus rejected the applicant company's claims that the union's application was *res judicata* on account of its previous judgment and that the requirements under Swedish law for a declaratory decision – whether final or interim – were not met. It also rejected the applicant company's claim that the proposed action should be deemed unlawful as the rules on overtime work set out in the IG agreement had been introduced at the company – an assertion which was not confirmed by the union – and as the two union members had been dismissed owing to scarcity of work at the company. Referring to its established case-law, the Labour Court further found that the union, being an organisation, did not have to provide security.

33. The composition of the Labour Court which heard and examined the union's claims was the same as for the judgment of 11 February 1998 (see paragraph 25 above), including two assessors nominated by employers' associations (another SAF director and the same employee of the Ministry of Finance) and two by employees' associations (a former vice-president of a

trade union affiliated to the LO and a former head lawyer of a trade union affiliated to the TCO/SACO).

34. The member nominated by the SAF submitted an opinion dissenting from the Labour Court's decision, on the ground that it was not perfectly clear that the proposed industrial action was lawful, for which reason the union's interim request should be rejected.

35. The applicant company complained to the Supreme Court (*Högsta domstolen*), requesting that the Labour Court's decision of 13 March 1998 be set aside owing to a grave procedural error (*domvilla*). It argued that the Labour Court could not rule on the union's request unless security had been furnished for the applicant company's potential loss. Alternatively, the applicant company's negative freedom of association had been breached as a consequence of the union having been afforded procedural privileges in its capacity as an organisation. On 26 March 1998 the Supreme Court refused the applicant company's request, finding that it had not established any grounds for quashing the Labour Court's decision.

36. It would appear that the union proceeded with industrial action on 6 April 1998. Supportive industrial action was also taken by other trade unions. On 8 April the applicant company joined the Swedish Textile and Clothing Industries' Association and thus became bound by a collective agreement. The union's own industrial action was immediately suspended but supportive action by another trade union lasted over the Easter weekend until 13 April.

37. On 30 April 1998, following a settlement between the applicant company and the union and the latter's withdrawal of the application it had lodged on 23 February 1998, the Labour Court struck the proceedings out of its list.

38. Due to declining profitability, the applicant company went into voluntary liquidation in June 1998. By a decision of 17 June the District Court of Nacka declared the applicant company insolvent. On 30 March 2001 the winding up was terminated and the applicant company dissolved.

B. Relevant domestic law

1. The relations between employers and employees

39. The right to take industrial action is guaranteed under the Swedish Constitution. Chapter 2, section 17 of the Instrument of Government (*Regeringsformen*) provides the following:

> "Any trade union or employer or association of employers has a right to take industrial action unless otherwise provided by law or by agreement."

40. The law referred to is the Co-Determination at Work Act ("the 1976 Act"). The right of association is defined in section 7:

"Right of association means the right of employers and employees to belong to an organisation of employers or employees, to benefit from their membership as well as to work for an organisation or for the founding of one."

This right is further regulated in section 8:

"The right of association shall not be violated. A violation ... will occur, if anyone from the employer's side or the employee's side takes any action to the detriment of anybody on the other side by reason of that person having exercised his right of association, or if anybody on either side takes any action against anybody on the other side with a view to inducing that person not to exercise his right of association. A violation will occur even if the action so taken is designed to fulfil an obligation towards another party.

An employers' or employees' organisation shall not have to tolerate a violation of its right of association encroaching upon its activities. Where there is both a local and a central organisation, these provisions shall apply to the central organisation.

If the right of association is violated by termination of an agreement or another legal measure or by a provision in a collective agreement or other contract, that measure or provision shall be void."

Section 10 provides a right of negotiation:

"An employees' organisation shall have the right to negotiate with an employer regarding any matter relating to the relationship between the employer and any member of the organisation who is or has been employed by that employer. An employer shall have a corresponding right to negotiate with an employees' organisation.

A right of negotiation ... shall also be enjoyed by the employees' organisation in relation to any organisation to which an employer belongs, and by the employer's organisation in relation to the employees' organisation."

41. Under section 41 there is an obligation for parties bound by a collective agreement to maintain peaceful industrial relations:

"Employers and employees who are bound by a collective agreement may not initiate or take part in a work stoppage (lockout or strike), blockade, boycott or other comparable industrial action, if the agreement has been concluded by an organisation and that organisation has not decided on the measure in the prescribed manner, if the measure is contrary to a provision on peaceful industrial relations in a collective agreement or if the measure is designed:

1. to exert pressure in a dispute concerning the validity, continuance or meaning of the collective agreement or whether particular conduct is contrary to the agreement or this Act,

2. to bring about changes to the agreement,

3. to give effect to a provision which it is intended will be applied once the agreement ceases to be valid, or

4. to support a person who has no right to take industrial action.

Industrial action taken in contravention of the first paragraph shall be unlawful.

..."

2. Litigation in labour disputes

42. Labour disputes are generally governed by the provisions of the Code of Judicial Procedure (*Rättegångsbalken*). However, the Litigation in Labour Disputes Act ("the 1974 Act") contains specific rules relevant to disputes concerning the application of the 1976 Act and to other labour disputes. The courts' jurisdiction is set out in chapter 2 of the 1974 Act. Section 1 provides:

"The Labour Court shall, as a court of first instance, hear and decide disputes referred to it by an employers' or an employees' organisation or by an employer which has itself entered into a collective agreement, if the case concerns:

1. a dispute relating to a collective agreement or other labour dispute referred to in [the 1976 Act],

2. another labour dispute on condition that there is a valid collective agreement between the parties or that an individual employee concerned by the dispute is employed in work covered by a collective agreement by which the employer is bound.

The Labour Court shall also be the competent court under the first paragraph when a collective agreement temporarily ceases to be valid.

Other labour disputes between the same or other parties may be heard together with a labour dispute under the first or second paragraphs, if the Court finds it expedient in the light of the investigation or other circumstances. When appropriate, the cases may be severed again.

The Labour Court shall have jurisdiction, as a court of first instance, to hear and decide all disputes referred to in section 41 of [the 1976 Act]".

43. Other labour disputes are heard by the District Court (section 2) and an appeal lies to the Labour Court (section 3). The Labour Court's judgments and decisions are final (section 4).

44. The composition of the Labour Court is regulated in chapter 3 of the 1974 Act. Sections 1-3 contain rules on the number of members of the Labour Court and the eligibility, term of office, nomination and election of members. Section 1 states:

"The Labour Court shall be composed of no more than four presidents, no more than four vice-presidents and seventeen other members.

Members shall be Swedish citizens and may not be minors, undischarged bankrupts or under guardianship ... . Before taking up office in the Labour Court, they shall take the judicial oath.

...

Members ... shall be appointed by the Government for a period of three years."

Section 2 provides:

> "The presidents, vice-presidents and three other members shall be elected from among persons who cannot be considered to represent employers' or employees' interests.
>
> The presidents and vice-presidents shall be legally qualified and experienced in the judicial profession.
>
> The three other members shall have special knowledge of the conditions on the labour market."

Section 3 reads:

> "Of the other fourteen members, four shall be elected on the proposal of the Confederation of Swedish Enterprise [*Föreningen Svenskt Näringsliv*; until 2001 the Swedish Employers' Confederation], one on the proposal of the Swedish Association of Local Authorities [*Svenska Kommunförbundet*], one on the proposal of the Federation of County Councils [*Landstingsförbundet*], one on the proposal of the Swedish Agency for Government Employers [*Arbetsgivarverket*; until 1 July 2001 the text read "one as a representative of the State as employer"], four on the proposal of the Swedish Trade Union Confederation, two on the proposal of the Central Organisation of Salaried Employees and one on the proposal of the Central Organisation of Swedish Academics.
>
> ..."

45. Section 6 regulates the composition of the Labour Court in individual cases. It reads as follows:

> "The Labour Court shall sit with a president and no more than six or less than four other members. Of the members referred to in section 2, no more than three or less than one shall take part. Of the members referred to in section 3, no more than four or less than two shall take part, in equal numbers from the employers' side and the employees' side.
>
> The Labour Court may also sit with a president and one member each from the employers' side and the employees' side:
>
> 1. at a main hearing in a case which has no jurisprudential significance and is in other respects uncomplicated;
>
> 2. in the determination of a case without a main hearing;
>
> 3. in other proceedings not conducted at a main hearing.
>
> The Labour Court may further sit with three professional judges in proceedings referred to in subsections 2 (2) and (3) if the examination essentially concerns matters unrelated to labour law.
>
> ..."

46. Chapter 11, section 2 of the Instrument of Government, which contains provisions on safeguarding the independence of the judiciary, is applicable to the members of the Labour Court. It provides:

"Neither a public authority nor Parliament may decide how a court should adjudicate an individual case or otherwise apply a rule of law in a particular case."

THE LAW

47. Referring to the composition of the Labour Court, the applicant company claimed that it had not had a fair hearing by an impartial tribunal, as required by Article 6 § 1 of the Convention, the relevant parts of which provide:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Applicability of Article 6 § 1 of the Convention

48. The Court reiterates that, in its decision of 1 July 2003, it found that Article 6 § 1 of the Convention was applicable in the present case.

B. Compliance with Article 6 § 1 of the Convention

1. The submissions of the parties

(a) The applicant company

49. The applicant company challenged the objective impartiality of the Labour Court as composed in the present case. However, at the hearing before the Court, it stated that it did not consider that any member of the Labour Court had been personally biased.

50. As regards the question of objective impartiality, the applicant company pointed out, *inter alia*, that a member of the LO, the organisation to which the Industrial Union, the applicant company's counterpart, was affiliated, had sat in the two cases before the Labour Court. It further claimed that the lay assessors of the Labour Court, who together formed a majority of the court's members, may have had either a common interest which conflicted with those of the applicant company or, in any event, interests which, though not common, nonetheless conflicted with the applicant company's. It stated that its primary argument in both sets of proceedings was that its right to remain outside the labour market organisations had been infringed by the union action. Irrespective of whether that argument was justified or not, those organisations might regard employers and employees who chose to remain unaffiliated as disruptive elements in the Swedish labour market. Moreover, Swedish labour legislation had granted the organisations extremely broad authority in matters concerning the labour market. In order to examine properly the applicant company's argument that the union action had to be

proportionate and socially relevant, the Labour Court could not, in the applicant company's view, be composed of members representing the special interests of those organisations. The Labour Court therefore did not fulfil the requirement of impartiality under Article 6 § 1.

51. The applicant company also maintained that, although the Labour Court might be dependent on labour market expertise, this did not make it necessary for the experts to sit in the court as judges. In labour law, as well as other fields of law, the necessary expertise could be obtained through the testimony of witnesses or expert witnesses.

52. In the applicant company's opinion, the Court's conclusions in the case of *Langborger v. Sweden* (judgment of 22 June 1989, Series A no. 155) were also applicable in the present case.

(b) The Swedish Government

53. The Government, noting that the applicant company had not disputed that the Labour Court was independent or its professional judges impartial, firstly submitted that, before that court, the applicant company had challenged only the objective impartiality of the lay assessors and had failed to show that the lay assessors were not impartial in the subjective sense.

54. The Government then claimed that the balance of interests inherent in the composition of the Labour Court was not liable to be upset when the court came to determine the dispute between the applicant company and the union, and the applicant company could not legitimately have feared that it would be. They submitted, generally, that the lay assessors – who were appointed in equal numbers from the employers' and employees' sides – made a positive contribution to the Labour Court's work with their specialist knowledge and experience of the labour market and were not in any sense to be viewed as representatives or spokespersons for the parties in an individual case.

55. The Government further maintained that the present case could be distinguished from the case of *Langborger v. Sweden* (judgment cited above) in which the Court found a violation of the requirement of objective impartiality on the part of the lay assessors sitting in the Swedish Housing and Tenancy Court. Only two of the four lay assessors sitting in the Labour Court had been nominated by organisations that were, broadly speaking, involved in matters concerning the applicant company's business sector. Moreover, they had been nominated by the head organisations and not by either the association of employers that the applicant company later chose to join or the trade union that was the applicant company's counterpart in the domestic proceedings. Although the two lay assessors nominated by the LO and the SAF respectively could be said to have been linked to associations which were interested, generally speaking, in the system of collective agreements established by them on the labour market, that did not mean, in the Government's opinion, that they had a common interest contrary or an

interest otherwise opposed to that of the applicant company. The fact that in each set of proceedings the lay assessor nominated by the SAF did not agree with the majority view demonstrated that there were no such common or opposing interests at hand. Furthermore, only two of the lay assessors were in any way linked to the LO or SAF. Thus, in the hypothetical situation that these lay assessors had a common interest in securing the widespread acceptance of the particular collective agreement in question, they would easily have been outnumbered by the other five members of the Labour Court. In this connection, the Government submitted that the applicant company could not legitimately have feared that the other two lay assessors had any interests that were opposed to its own, as they had no links to those associations which, in general, might be supposed to have an interest in the system of collective agreements pertaining to the applicant company's business sector. In conclusion, the Government maintained that the realities of the present case were different from those in the *Langborger* case. The balance of interests was not upset, nor had the applicant company legitimate grounds for fearing that it would be.

56. Finally, the Government contended that the fact that a majority of the Labour Court's members were not professional judges was of no consequence in the context of the compatibility of the court's composition with Article 6.

(c) The Finnish Government

57. The Finnish Government first noted that, under the Finnish system, the jurisdiction of the Labour Court was more extensive than that of its Swedish equivalent, whose jurisdiction was strictly restricted to disputes arising out of collective agreements. If there was no such agreement in force, industrial action could be challenged in an ordinary court of law on the ground that it undermined public order or was contrary to good practice.

58. Pursuant to section 8, subsection 1 of the Finnish Labour Court Act (646/1974), a quorum was normally constituted by the president and one member not representing employer or employee interests, as well as four members of whom two were appointed on the recommendation of the most representative central organisations of employers' unions and two on the recommendation of the most representative central organisations of employees' unions. Thus, in its most usual composition, the majority of the members of the Finnish Labour Court represented those central organisations in the same way as their counterparts in Sweden. In accordance with the Code of Judicial Procedure (441/2001), as interpreted by the Labour Court, a court member appointed on the recommendation of a central organisation was not prevented from examining a case in which a member union of that organisation was a party, unless the member in question had a personal interest in the case. In practice, no member employed by a central organisation had been found to be disqualified from examining a case concerning a member union of that organisation, or related issues, merely on

account of the employment relationship. Despite the union's association with the central organisation, it was an independent legal person with its own duties, and the central organisation or its employees did not necessarily have any link to the dispute. However, the situation had to be subject to a different assessment if, in one way or another, the case had been dealt with by the person concerned, or if he or she had otherwise been involved in it.

59. In the light of the foregoing, the Finnish Government did not find anything to support the allegation that a Labour Court member appointed on the recommendation of a central organisation would in all cases be disqualified from examining a case in which one of its member unions was a party. To accept such a view could lead to the loss of those benefits that had, in the light of experience gained thus far, been obtained from the availability of court members with expertise in labour market issues.

2. The Court's assessment

60. The Court first observes that the lay assessors sitting on the Labour Court, who take the judicial oath, have special knowledge and experience of the labour market. They therefore contribute to the court's understanding of issues relating to the labour market and appear in principle to be highly qualified to participate in the adjudication of labour disputes. It should also be noted that the inclusion of lay assessors as members of various specialised courts is a common feature in many countries. However, their independence and impartiality may still be open to doubt in a particular case.

61. The Court reiterates that the applicant company has not called into question the independence of the Labour Court nor the impartiality of its professional judges. Furthermore, at the hearing before the Court, the company stated that it did not challenge the subjective impartiality of any of the lay assessors. As it has not found any evidence to suggest any irregularities in these respects, the Court will limit its further examination to the question of the objective impartiality of the lay assessors who sat in the Labour Court.

This examination aims at ascertaining whether the lay assessors offered guarantees sufficient to exclude any legitimate doubt as to their objective impartiality (see, among other authorities, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, pp. 13-14, § 24; and *Langborger v. Sweden*, judgment cited above, p. 16, § 32).

62. In the above-mentioned case of *Langborger v. Sweden*, the Court was confronted with an issue of a similar nature regarding the Swedish Housing and Tenancy Court (*Bostadsdomstolen*) where the two lay assessors had been nominated by the dominant organisations on the housing and rent market – the Swedish Federation of Property Owners (*Sveriges fastighetsägareförbund*) and the National Tenants' Union (*Hyresgästernas riskförbund*) – and where the dispute before that court concerned the question whether a negotiation clause in the applicant's lease should be retained. The

clause in question prescribed that the parties to the lease – the landlord and the applicant tenant – accept the rent and other conditions agreed upon on the basis of the negotiation agreement in force between, on the one hand, a landlords' union affiliated to the first-mentioned organisation and a landlord and, on the other hand, a tenants' union affiliated to the second organisation. For conducting the negotiations on the rent and other conditions the tenants' union received a commission of 0.3% of the rent. The Court, which considered it difficult to dissociate the question of impartiality from that of independence, reached, *inter alia*, the following conclusions (judgment cited above, p. 16, §§ 34-35):

> "34. Because of their specialised experience, the lay assessors, who sit on the Housing and Tenancy Court with professional judges, appear in principle to be extremely well qualified to participate in the adjudication of disputes between landlords and tenants and the specific questions which may arise in such disputes. This does not, however, exclude the possibility that their independence and impartiality may be open to doubt in a particular case.
>
> 35. In the present case there is no reason to doubt the personal impartiality of the lay assessors in the absence of any proof.
>
> As regards their objective impartiality and the question whether they presented an appearance of independence, however, the Court notes that they had been nominated by, and had close links with, two associations which both had an interest in the continued existence of the negotiation clause. As the applicant sought the deletion from the lease of this clause, he could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim.
>
> The fact that the Housing and Tenancy Court also included two professional judges, whose independence and impartiality are not in question, makes no difference in this respect."

63. With respect to the objective impartiality of the lay assessors in the present case, the Court considers that, in accordance with the principles developed in the *Langborger* case, the decisive issue is whether the balance of interests in the composition of the Labour Court was upset and, if so, whether any such lack of balance would result in the court failing to satisfy the requirement of impartiality in the determination of the particular dispute before it. This could be so either if the lay assessors had a common interest contrary to those of the applicant or if their interests, although not common, were such that they were nevertheless opposed to those of the applicant (see *Stallarholmens Plåtslageri o Ventilation Handelsbolag and Others v. Sweden*, no. 12733/87, Commission decision of 7 September 1990, Decisions and Reports 66, p. 111, at p. 118).

64. The Court first notes that, with regard to both the Labour Court's judgment of 11 February 1998 and its decision of 13 March 1998, one of the four lay assessors – the relevant SAF director – disagreed with the majority's

findings and thus found in favour of the applicant company (see §§ 27 and 34 above). It could not be said therefore that there was an interest common to all four lay assessors which could be said to be opposed to those of the applicant company. Nevertheless, the question remains whether the three lay assessors in the majority – in both proceedings an employee of the Ministry of Finance representing the State employers, a person nominated by the LO and a person nominated by the TCO/SACO – represented interests which were contrary to those of the applicant company.

65. The applicant company's main contention in the domestic proceedings was that its right to remain outside the labour market organisations had been infringed by the allegedly unlawful industrial action taken against it by the Industrial Union. The measures taken by that union – the cessation of all work at the applicant company and the imposition of a "blockade" – lasted for a total of three days.

66. The Court reiterates that, as the applicant company and the Industrial Union had agreed that the industrial action in question was not unlawful under the 1976 Act, the Labour Court's examination in the two cases centred on the question whether that action had violated the applicant company's right to negative freedom of association under Article 11 of the Convention. The main point in that examination was whether the terms of employment of the collective agreement proposed by the union were more favourable than those provided by the applicant company.

67. The Court considers that the nature of the dispute between the applicant company and the Industrial Union was such that the lay assessors who sat in the Labour Court and the organisations that had nominated them could not objectively have had any other interest than to ensure that the above terms of employment were correctly examined and interpreted and that the principles of Article 11 of the Convention, which form part of Swedish law, were correctly interpreted and applied. These interests could not be contrary to those of the applicant company. It would be wrong to assume that their views on these objective issues would be affected by their belonging to one or other of the nominating bodies. Distinguishing the present case from that of *Langborger v. Sweden*, the Court notes that, in the latter case, the organisations which had nominated the lay assessors to the Housing and Tenancy Court had an interest in their affiliated unions' continued participation in rent negotiations, a participation which Mr Langborger wished to end by having the relevant negotiation clause deleted from his lease. Furthermore, the affiliated tenants' union had an economic interest in the retention of that clause, as it received a commission of 0.3% of the negotiated rent. No such links between the dispute in the present case and the labour market organisations that had nominated the lay assessors are to be found.

68. The Court also has regard to the fact that the applicant company was not affiliated to any employers' association and so could not be said to have

had any representation on the Labour Court, whereas the opposing party, the Industrial Union, was affiliated to the LO which had nominated one of the members of the court. However, to accept that this gives rise to doubts as to the Labour Court's impartiality would, in the Court's opinion, be tantamount to considering that, in cases where lay assessors have been nominated by any labour market organisation, the Labour Court would fail to meet the requirement of being an "impartial tribunal" in all disputes where one of the parties is not affiliated to such an organisation. The Court considers that it would be contrary to the considerations underlying the statement in § 34 of the *Langborger* judgment (see above) to accept such a proposition (see *Stallarholmens Plåtslageri o Ventilation Handelsbolag and Others v. Sweden*, Commission decision cited above, at p. 119).

69. Having regard to the foregoing, the Court considers that the applicant company could not legitimately fear that the lay assessors who sat in the Labour Court had interests contrary to those of the applicant company or that the balance of interests was upset to such an extent that the Labour Court failed to meet the requirement of impartiality in the determination of the dispute before it.

There has accordingly been no breach of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

Holds by five votes to two that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 26 October 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mr Garlicki and Mr Borrego Borrego is annexed to this judgment.

N.B.
M.O.B.

JOINT DISSENTING OPINION OF JUDGES GARLICKI AND BORREGO BORREGO

(Provisional translation)

We regret that we are unable to agree with the reasoning of the majority of the Chamber in the instant case. In our opinion, under the Court's case-law in this sphere there should have been a finding of a violation of the Convention for the following reasons:

1. As regards the objective test of impartiality within the meaning of Article 6 § 1, the Court has held that the test must enable it to be ascertained whether the judge concerned offered guarantees sufficient to exclude any legitimate doubt as to his or her impartiality. In this respect, even appearances may be of some importance. Accordingly, the decisive factor for determining in a given case whether there is a legitimate reason to fear that a particular judge lacks impartiality is whether this fear can be held to be objectively justified (see, among other authorities, *Saraiva de Carvalho v. Portugal*, judgment of 22 April 1994, Series A no. 286-B, § 35).

2. In the instant case, we consider that such fears could be held to be objectively justified for three fundamental reasons:

(a) The nature of the dispute

The litigation which the Labour Court was called upon to adjudicate was between an applicant company unaffiliated to any employers' association and a trade union with only a small minority of the company's workforce (approximately 10%) on its books.

At the origin of the dispute was an attempt by the trade union to get the applicant company to sign up to a collective bargaining agreement between the employers associations and the trade unions active in that sector. The applicant company considered that it paid its workers higher wages than those payable under the collective bargaining agreement and refused to sign.

In our opinion, these factors clearly show that the dispute was between, on the one hand, an independent employer and, on the other, the employers associations and trade unions which had entered into the collective bargaining agreement (see paragraph 17 of the judgment).

(b) Procedural issues

Faced with the threat of a blockade, the applicant company suggested that the dispute be referred to the Stockholm District Court. The trade union argued that it was the Labour Court which had jurisdiction, as the first and only judicial instance. The District Court accepted the union's argument and relinquished jurisdiction in favour of the Labour Court.

Subsequently, the applicant company requested that the bench that would examine the case should be composed solely of professional judges, in accordance with domestic law, without the assistance of lay assessors representing employers' and employees' interests. The Labour Court turned down that request.

(c) The composition of the Labour Court

In our view, the fact that the Labour Court included four lay assessors, two of whom were appointed by the employers associations and two by the trade unions, who together formed a majority, raised objectively justified fears as to its impartiality.

This is because the balance which the usual composition of the Labour Court seeks to achieve between conflicting interest groups (employers and unions) proved totally unfair in the instant case, since the aim of the organisations represented in it was to secure the applicant company's signature to the collective bargaining agreement.

3. We agree with the Court's observation in paragraph 68 of the judgment that "to consider ... that, in cases where lay assessors have been nominated by any labour market organisation, the Labour Court would fail to meet the requirement of being an 'impartial tribunal' in all disputes where one of the parties is not affiliated to such an organisation ... would be contrary to the considerations underlying the statement in § 34 of the *Langborger* judgment". However, in our view, the present case is not representative, as what the applicant company objects to is the very principle of becoming a party to the collective bargaining agreement. One cannot rule out the possibility (since we are dealing with "appearances") that all the organisations which have appointed lay assessors may be perceived as being in favour of affiliation. Consequently, it becomes difficult to distinguish the present application from the case of *Langborger v. Sweden* (judgment of 22 June 1989, Series A no. 155, § 35). In that case, the Court noted that the lay assessors: "had been nominated by, and had close links with, two associations which both had an interest in the continued existence of the negotiation clause". In the instant case, there were both links with the system of collective bargaining agreements and an interest in it, as even the Government acknowledged: "the two lay assessors nominated by the LO and the SAF, respectively, could be said to have been linked to associations which were interested, generally speaking, in the system of collective agreements established by them on the labour market".

This factor, combined with the question of the origin of the dispute and the trade union's insistence on referring it to a Labour Court largely composed of lay assessors, shows that the applicant company's fears were objectively justified.