CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 46210/99
by Inga-Lill WRETLUND
against Sweden

The European Court of Human Rights (Fourth Section), sitting on 9 March 2004 as a Chamber composed of:

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

Having regard to the above application lodged on 3 November 1998,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Inga-Lill Wretlund, is a Swedish national who was born in 1958 and lives in Påskallavik. She was represented before the Court by Mr B. Villner, a trade union lawyer practising in Stockholm. The respondent Government were represented by Ms I. Kalmerborn, Ministry for Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant is since 1986 employed as an office cleaner at a nuclear plant in Oskarshamn. Assigned to clean the offices at the plant, she is not working in an area where she might be subjected to radioactivity and is thus not obliged to undergo any radiological examinations under the security rules for nuclear plants in Sweden.

The applicant is a member of the Swedish Electricians' Union (*Svenska elektrikerförbundet*) which has approximately 170 members working at the nuclear plant. Her employer – *OKG Aktiebolag* (hereinafter "OKG"), a privately owned limited liability company that owns the plant – is a member of the Energy Companies' Employers Confederation (*Energiföretagens Arbetsgivareförening*). The central collective agreement in force between the two organisations concerned (*Kraftverksavtalet*) does not provide for any drug or alcohol tests on the employees. In 1991, following discussions within a working group which included the OKG's medical doctor and representatives of the company and the four trade unions represented at the company, a drug policy programme was agreed upon which stipulated, *inter alia*, that job applicants should undergo a drug test in connection with the health examination before they could be employed. In the autumn of 1993 the working group proposed that those already employed should also undergo tests. OKG and three of the four trade unions then concluded local collective agreements which introduced at the plant a drug policy programme involving compulsory drug and alcohol tests for all the members of those unions. OKG wished to conclude a similar agreement with the applicant's trade union but the union declared on 20 December 1993 that it did not accept it. Nevertheless, in 1994 OKG decided that also members of the applicant's trade union should be subjected to drug and alcohol tests. As from March 1995 contractors' employees who perform work for OKG are also tested. Further negotiations on this issue with the applicant's union, held at local and central level, were fruitless and terminated at the end of 1995.

The drug policy programme, which was replaced by a new, essentially identical, programme in December 1995 and which is contained in an instruction issued by OKG (*Vår syn på alkohol och narkotika*), involves the taking of urine samples from the employees every third year. The tests aim to detect the use of both drugs and alcohol but the drug part of the tests concerns only the presence of cannabis. The employee is notified about a week in advance of the test, which consists of delivering a urine sample in private. The sample is taken care of by an occupational health nurse working under instructions from the hospital at Huddinge and the sample is sent to a laboratory at the hospital for analysis. The employee should state on a form, *inter alia*, what kind of medication, if any, he or she has taken during the preceding week. He or she further signs a referral, thereby consenting to the testing and giving permission to the laboratory to inform the occupational health service of the result. By signing a special form, the employee may also consent to his or her immediate supervisor being informed. If a test is positive, the employee will be requested to talk to the company doctor who shall provide information on possible rehabilitation measures, which may include detoxification and transfer to other duties, if the latter is motivated by reasons of security and safety. The last consequence of continued drug or alcohol abuse may be dismissal. According to the programme, a refusal to undergo the test is treated as a positive test result. However, if an employee refuses to participate in the testing for reasons of principle and there are no signs of drug abuse, the employee will not be dismissed. The OKG staff was informed of the programme, both orally and in writing, through an extensive information campaign.

In 1996 the Swedish Electricians' Union introduced proceedings against OKG and the Energy Companies' Employers Confederation before the Labour Court (*Arbetsdomstolen*) seeking a declaratory judgment that the applicant was not obliged to participate in the drug and alcohol tests. The trade union claimed that OKG had no right to require that the applicant undergo such tests. The union argued that the tests were in breach of Article 8 of the Convention, the collective agreement in force and the Swedish Secrecy Act (*Sekretesslagen*; 1980:100). Should the tests be considered not to be in breach of the collective agreement, the union argued, in the alternative, that the matter must be considered as unregulated. Furthermore, the union held that the individual employment contract between OKG and the applicant did not provide for such tests. Also, the union alleged that the tests were unjustified having regard to the applicant's tasks at the nuclear plant.

By a judgment of 26 August 1998 the Labour Court found that the applicant was obliged to participate in the drug test but not in the alcohol test. The Court first noted that there was no legislation specifically regulating the right of employers to submit employees to drug tests against

their will. It referred, however, to an earlier case before the Labour Court (AD 1991 no. 45) which concerned the question whether two employees in a company that assembled scaffolding had been lawfully dismissed due to their refusal to submit to drug testing. In that case, the court had found that the employees had been obliged under the individual employment contracts to participate in the testing.

In the case at hand, the Labour Court found that a general prohibition against drug testing could not be derived from the right to respect for family life under Article 8 of the Convention. It stated, however, that in certain circumstances such testing might be incompatible with the Convention and therefore contravene Swedish law. Circumstances of relevance were, for example, the employer's interest in carrying out drug tests, the degree of interference with the individual's integrity and the way in which the testing was performed.

The court further considered that the tests in question were naturally connected with the type of business conducted by OKG and, consequently, that the right to order employees to undergo such tests could be seen as part of the company's right to manage and organise the work according to the central collective agreement, *Kraftverksavtalet*. Nevertheless, an employee not bound by a collective agreement on drug testing could not be obliged to submit to such testing without limitations.

In balancing the interests of the company and the individual, the Labour Court first noted that OKG was running a nuclear power plant which entailed certain risks specific to this activity and which was subjected to far-reaching demands on security imposed by the relevant public authorities. The National Nuclear Power Inspectorate (*Statens kärnkraftsinspektion*) had expressed the necessity of conducting drug tests as a means of upholding a drug-free environment at such plants. Moreover, the Labour Court noted that OKG was under an obligation, under the Work Environment Act (*Arbetsmiljölagen*, 1977:1160) to take measures preventing illnesses and accidents at work.

The Labour Court thus concluded that OKG had a strong interest to carry out the tests in question in order to maintain a drug-free work environment. It observed that drug testing was made at all the Swedish nuclear power plants. Furthermore, according to the court, it would be impractical to make a distinction between employees working in areas where there were special security hazards and other employees. It was moreover possible that employees would be moved from a workplace with little risk to another one where there was a specific risk. In addition, having regard to the character of OKG's business, there was an interest in showing to the outside world that the nuclear power plant was absolutely drug-free.

Turning to the interests of the individual, the court had regard to the procedures for the tests and considered that the possible infringement of the test procedures as such on the individual's integrity was of very little

significance. It further noted that the fact that there did not appear to be any drug abuse at OKG did not as such make the testing unnecessary; on the contrary, in the court's view, a drug policy programme would be considerably less credible if no tests were made and, moreover, the knowledge that tests were made had a preventive effect.

Having regard to the foregoing, the Labour Court found that the applicant was obliged to submit to the drug test. It considered, however, that there was a fundamental difference between the use of drugs and the use of alcohol, in that the former was illegal whereas the latter was legal and socially accepted. As a positive test result would lead to an investigation into the individual's use of alcohol – a highly sensitive matter in terms of personal integrity – and as, furthermore, there were some doubts as to the accuracy of the alcohol test, the court concluded that the applicant could not be obliged to take the alcohol test.

No appeal lay against the judgment of the Labour Court.

B. Relevant domestic law and practice

1. The right to manage and organise work

It is a long-standing tradition in Sweden that labour market issues such as wages and other working conditions are dealt with by the parties acting on that market with little interference from public authorities. In 1906-07 the Swedish Trade Union Confederation (*Landsorganisationen*) and the Swedish Employers' Confederation (*Svenska arbetsgivareföreningen*) concluded an agreement, the so-called December Compromise (*decemberkompromissen*), whereby the trade unions accepted, *inter alia*, the employers' right to manage and organise the work and the employers recognised the workers' freedom of association. The agreement has been reflected in many collective agreements since.

In an early judgment (AD 1930 no. 52), the Labour Court considered the employers' right to manage and organise the work as forming a general legal principle. This principle has been confirmed in subsequent judgments by the Labour Court (see, *inter alia*, AD 1964 no. 5 and AD 1983 no. 46). The right to manage and organise the work remains with the employer, unless otherwise stipulated in collective or individual agreements or in legislation. This right is, however, not unlimited. It must not be exercised in contravention of the law or "good labour market practice" ("*god sed på arbetsmarknaden*"). The Labour Court has interpreted the notion of "good labour market practice" in a large number of judgments (see, *inter alia*, AD 1997 no. 74).

It follows from the established case-law of the Labour Court that an employer may have the right to carry out control measures in relation to the employees. Such a right may be based on collective agreements, individual

employment contracts or on the employer's right to manage and organise the work. Examples of control measures are work-time studies, physical searches (AD 1943 no. 77) and drug and alcohol tests (AD 1991 no. 45 and AD 2001 no. 3).

An employer may not exercise his right to apply control measures in an arbitrary, unreasonable or inappropriate manner. The employer must make sure that such measures are carried out in conformity with both legal provisions and "good labour market practice". In assessing whether a control measure decided by the employer meets the standards of "good practice", the Labour Court has applied a principle of proportionality, balancing the employer's interest in using the measure in question and the employee's interest in protecting his or her integrity.

2. Dismissal

Rules on dismissal from employment are contained in the Employment Protection Act (*Lagen om anställningsskydd*, 1982:80). A collective agreement or an employment contract is invalid to the extent that it excludes or limits employees' rights under the Act. Pursuant to section 7 of the Act, dismissal of an employee must be based on objective grounds (*saklig grund*). Such grounds do not exist where it may reasonably be required that the employer provide other work for the employee. There is an extensive body of case-law from the Labour Court dealing with the interpretation of the requirement of objective grounds. Two cases concern employees who were dismissed because of their refusal to participate in drug testing. In both cases, the Labour Court found, in balancing the opposing interests involved, that the employer's request that the employees undergo a drug test was justified. In one of the cases (AD 1991 no. 45) the court concluded, however, that the requirement of objective grounds for dismissal was not satisfied. In the other case (AD 2001 no. 3) it reached the opposite conclusion. That case concerned a person, employed as a school help, who was suspected of having relapsed into drug abuse and was dismissed after repeatedly refusing to comply with the employer's request that he submit to a drug test.

3. Nuclear safety

The Nuclear Activities Act (*Lagen om kärnteknisk verksamhet*, 1984:3) contains basic provisions on safety in connection with nuclear activities, such as the operation of nuclear power reactors. Nuclear activities require a licence and the licence holder has full responsibility for the safe operation of the facility. A licence may be revoked if safety conditions or safety regulations are not complied with.

The National Nuclear Power Inspectorate (*Statens kärnkraftsinspektion*) supervises all nuclear activities in Sweden. It has laid down basic

regulations on nuclear safety (SKIFS 1998:1) which entered into force after the Labour Court's judgment in the present case. In recommendations accompanying these regulations, it underlines that there should be a documented policy for dealing with different factors which could affect staff performance in a way that is relevant to safety and security, for example alcohol and drugs. Such a policy should include directions on, *inter alia*, the testing of personnel and the action to be taken when someone is found to be under the influence of alcohol or drugs or in the event of abuse.

4. Professional secrecy

Provisions on professional secrecy for medical staff working in the private sector were, at the material time, to be found in the Act on Duties for Personnel in the Health and Medical Service (*Lagen om åligganden för personal inom hälso- och sjukvården*, 1994:953). The obligation to observe secrecy does not usually apply if the individual concerned consents to information being disclosed. Thus, with the individual's consent, information may be submitted to another individual, for example his or her employer.

5. Official investigations

A committee appointed by the Government in 1994 to look into the issue of medical testing in the workplace submitted its report in April 1996 (SOU 1996:63) in which it found no grounds for proposing legislation concerning drug tests in the workplace. It considered that this issue should be solved by the parties on the labour market. It recommended that, where drug tests were to be applied, there should be a written drug policy, including an action programme, drawn up jointly by the employers and employees.

COMPLAINT

The applicant complained that her obligation to undergo drug testing, as laid down in the judgment of the Labour Court, interfered with her right to respect for her private life under Article 8 § 1 of the Convention. She claimed that there was no Swedish legislation giving employers the right to conduct drug tests on their employees and that, consequently, the Labour Court's judgment had no basis in law. Thus, the interference in the case was not “in accordance with the law” as prescribed by Article 8 § 2. Further, even assuming that the interference was lawful, she argued that the compulsory drug test could not be considered a justifiable measure having regard to her duties as an office cleaner.

THE LAW

The applicant complained that her obligation to undergo drug testing violated her right to respect for her private life under Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The respondent Government submitted that the application should be declared inadmissible *ratione materiae*, as the drug testing did not entail adverse effects for the applicant's moral and physical integrity sufficient to bring it within the scope of Article 8 of the Convention, or *ratione personae*, as, firstly, the complaint did not concern any particular drug test but the obligation to undergo tests under the 1995 drug policy programme and it could therefore be questioned whether the applicant could claim to be a victim and as, secondly, there had not been any interference with the applicant's rights for which the Swedish State could be held responsible.

The Government argued that the drug testing was not connected with any compulsion or coercion, as the OKG employees in fact gave their informed written consent in connection with each particular test. In any event, should there have been an interference with the applicant's rights under Article 8, such interference was of a modest nature. Furthermore, the relationship between the parties to the labour market had for a long time been characterised by the principle of non-intervention by public authorities and the drug policy programme in question was the result of the work of a special group in which trade union representatives had taken part. An employer's right to apply drug testing was subject to considerable limitations under Swedish law and it was possible to have an obligation to undergo testing at work reviewed by a court, a possibility of which the applicant had availed herself. In examining the case and finding that the company had had a strong interest in conducting the tests and that the possible infringement of the applicant's personal integrity had been of very little significance, the Labour Court had struck a fair balance between the competing interests. In this connection, the Government maintained that no work at a nuclear power plant was insignificant from the point of view of safety and that an employee could be moved to another workplace within the plant.

Should the Court not find the application inadmissible *ratione materiae* or *ratione personae*, the Government asserted that it was manifestly ill-founded. In so doing, they essentially relied on the above arguments and added that the drug testing, as pointed out by the Labour Court, had a basis in both the legal principle of the employers' right to manage and organise the work and in work environment legislation, that it served several legitimate aims enumerated in the second paragraph of Article 8 and that it had been proportionate to those aims since, as has been mentioned above, a fair balance had been struck between the competing interests. The Government also claimed that the State should be afforded a wide margin of appreciation in these matters.

The applicant maintained her complaint. She submitted that the drug testing involved a violation of her personal integrity in breach of Article 8 of the Convention, that she was personally affected by the relevant drug policy programme as, fearing adverse consequences in case of a refusal, she had submitted to the tests after the Labour Court judgment and that the Swedish State, through its justice system, had an obligation to protect her against the interference with her rights under Article 8.

The applicant claimed that the drug testing was compulsory as a refusal to undergo the tests could lead to dismissal. The written consent referred to by the Government allegedly only concerned the right for the employer to be informed of the result. In any event, the compulsion to undergo drug testing followed from the Labour Court judgment. Moreover, the possibility of adducing principal reasons for not taking part in the testing was subject to OKG's evaluation of the reasons; if they were not found to be of a principal nature, the person adducing them could be dismissed.

The applicant further submitted that the drug testing in question was not in accordance with law and did not serve any of the aims enumerated in Article 8 of the Convention. Moreover, it was not proportionate. While accepting that special security considerations had to be made with regard to controlled areas of the power plant where there was a risk of being subjected to radioactivity, the applicant stressed that she was an office cleaner without access to such sensitive areas. There were therefore no reasons of security which justified the drug testing on her, as her duties was not such that she could put anyone in danger. The persons cleaning the controlled areas belonged to a different personnel category and, in the unlikely event that she be promoted to that category, she would receive special training and undergo radiological examinations, including blood tests, for security reasons. She therefore stated that that it was not difficult to distinguish between different categories of employees at OKG. She also questioned whether, in any event, the testing as applied could be considered efficient, taking into account that it was carried out only every third year and only aimed at detecting the presence of cannabis. Moreover, the lack of security reasons should be contrasted with the degrading treatment to which

she was subjected, having to prove, through the drug testing, that she was not using cannabis and having to submit information on medication taken. In sum, she claimed that the Labour Court had failed to strike a fair balance between the competing interests in the case.

The Court first considers that the applicant can reasonably claim to be a victim in the present case, as the drug policy programme in question was applied by OKG in relation to her as an employee of the company, as the Labour Court found, in its judgment of 26 August 1998, that she was obliged to participate in the drug test and as, apparently on account of that judgment, she has submitted to subsequent tests.

However, the Court finds it unnecessary to examine whether there has been an interference with the applicant's rights under Article 8 of the Convention for which the Swedish State can be held responsible as, even assuming that there has been such an interference, the Court considers, for the reasons set out below, that it was justified under the second paragraph of Article 8.

The Court recalls that an interference with the exercise of a right under Article 8 of the Convention will not be compatible with Article 8 § 2 unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society" for the aforesaid aim or aims (see, among other authorities, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 19, § 43, and *Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002, § 68).

The Court reiterates that the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law and that the law in question should be accessible to the person concerned – who must moreover be able to foresee its consequences for him or her – and compatible with the rule of law (see, *inter alia, Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, § 49, and *Kruslin v. France*, judgment of 24 April 1990, Series A no. 176-A, p. 20, § 27). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see, among other authorities, *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, p. 24, § 48).

Turning to the facts of the present case, the Court notes that the applicant and other employees of OKG were informed of the drug policy programme, including the drug testing. It has not been claimed that the information given was insufficient. Moreover, although the obligation to submit to drug testing does not follow from legislation, the Court observes that labour market issues are, according to long-standing tradition in Sweden, mainly regulated by the parties on the labour market. The employer's right to manage and organise the work is a principle agreed upon by those parties

and the Labour Court has established that this right constitutes a general legal principle. According to the Labour Court's case-law, the employer may have a right to carry out control measures as part of the right to manage and organise the work. The Labour Court had concluded, before the events of the present case, that such control measures could include drug and alcohol tests. Also in the judgment in the present case, the Labour Court considered that the tests in question were naturally connected with OKG's activities and that the right to order employees to undergo such tests therefore could be seen as part of the company's right to manage and organise the work according to the central collective agreement.

In these circumstances, the Court is satisfied that the measure challenged by the applicant had a sufficient basis in Swedish law and thus was "in accordance with the law" within the meaning of Article 8 § 2 of the Convention.

The Court further considers that the measure in question pursued legitimate aims under Article 8 § 2, including "public safety" and "the protection of the rights and freedoms of others".

It remains to be determined whether the assumed interference in dispute was "necessary in a democratic society" for the aforesaid aims. In this respect, the Court reiterates that, according to its established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether the interference is "necessary in a democratic society" the Court will take into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake (see, *inter alia*, *Pretty v. United Kingdom*, judgment cited above, § 70).

In regard to the present case, the Court concludes firstly that the operation of a nuclear power plant obviously requires a very high level of security and that, in order to attain that, it is necessary for the responsible operating company to apply various procedures, including control measures in relation to its employees. It is also evident to the Court that the use of drugs among the employees may jeopardise the security at such a plant. A drug policy programme involving regular drug testing of staff must therefore as such be considered justified. It remains to be determined, however, whether the implementation of the programme in question was reasonable and, in particular, whether due regard was had to the applicant's interest of protecting her personal integrity.

The Court acknowledges that the obligation to submit to drug tests may be discomforting to the individual employee and be seen as interfering with his or her integrity. However, it notes that the testing performed at OKG is

done in private and that the test results are disclosed only to persons involved in the drug policy programme and are not used for any other purpose than to detect the employees' possible consumption of alcohol and drugs. In the applicant's case, the purpose of the test was further limited by the Labour Court's judgment to only concern the presence of cannabis. In regard to the question of personal integrity, it is further of importance that the testing is performed on all employees of OKG. Thus, the test procedures do not single out the applicant or any other employee as being personally suspected of abusing drugs.

It is true that the applicant works as an office cleaner and, as such, does not have access to certain areas of the power plant that are more sensitive from the point of view of security. The applicant has claimed that it is unlikely that she would be given any duties in these areas and that, if so, she would have to undergo tests according to special regulations. In its judgment, the Labour Court nevertheless concluded that it would be impractical to distinguish between different categories of employees and that it was possible for employees to be moved from a workplace with little risk to another one where there was a specific risk. Noting that it is in the first place for national authorities to assess the facts of a case, the Court sees no reason to question that conclusion. It further considers that it cannot be ruled out that, in case of an accident at the power plant, the applicant may be required to perform tasks with importance for the security at the plant.

The applicant has also challenged the efficiency of the drug testing as such, submitting that, if at all, it should be performed in a more comprehensive manner. In this respect, the Court takes note of the fact that the Labour Court considered the test methods and, *inter alia*, rejected the alcohol test partly due to doubts as to its accuracy. The Court finds no reason to further examine the methods and coverage of the testing, noting that one of its main purposes, in any event, must be its preventive effect.

Having regard to the above, the Court finds that operational considerations at OKG relating to the public safety and the protection of the rights and freedoms of others, in particular other employees, justified the control measure in question. It further finds that the Labour Court, in its judgment of 26 August 1998, struck a fair balance between that interest and the applicant's interest of protecting her personal integrity. In sum, the Court considers that the present case discloses no elements which could lead to the conclusion that the control measure or the way it was carried out was disproportionate. Accordingly, the assumed interference in the case was “necessary in a democratic society” for the aforesaid aims.

It follows that the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President