

AS TO THE ADMISSIBILITY OF

Application No. 24949/94
by Tuomo KONTTINEN
against Finland

The European Commission of Human Rights sitting in private on
3 December 1996, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. SVÁBY
A. PERENIC
C. BÍRSAN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection
of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 7 August 1994 by
Tuomo Konttinen against Finland and registered on 19 August 1994 under
file No. 24949/94;

Having regard to the reports provided for in Rule 47 of the Rules
of Procedure of the Commission;

Having regard to the observations submitted by the respondent
Government on 30 April 1996 and the observations in reply submitted by
the applicant on 25 June 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Finnish citizen, born in 1963. He is
unemployed and resides in Hyvinkää. Before the Commission he is
represented by Mr. Matti Wuori, a lawyer practising in Helsinki.

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

A. Particular circumstances of the case

In 1986 the applicant joined the State Railways (Valtion-rautatiet, Statsjärnvägarna), where he apparently held various posts. Most recently, he worked in a goods transportation terminal, where he would feed information concerning completed transports into a computer network. As this post did not entail the exercise of public authority, his working hours were governed by the 1946 Act on Working Hours (työaikalaki, arbetstidslag 604/46) and not by *lex specialis* applicable to civil servants. He performed shift work, his evening shift ending at 18.39 hrs. On Saturdays and Sundays no one worked in the terminal.

In the summer of 1991 the applicant joined The Seventh-day Adventist Church in Finland (Suomen Adventtikirkko, Finlands Adventkyrka). An adventist must refrain from working on the Sabbath (Saturday) which starts at sunset on Friday. By ministerial decision of 7 February 1994 (no. 115/94) the Government approved an amendment to the confession of faith and the form of religious worship within this church, considering that these were not contrary to law or good practices.

When the sun set before his Friday shift had ended on 6 March 1992 the applicant, having informed his employer, absented himself from work at 18.00 hrs. At his employer's request the Board of Civil Servants (virkamieslautakunta, tjänstemannanämnden) within the State Railways then issued him with a disciplinary punishment in the form of a caution (varoitus, varning) on the grounds that he had not observed the working hours. The punishment was upheld by the Supreme Administrative Court (korkein hallinto-oikeus, högsta förvaltningsdomstolen) on 29 December 1992.

On 2 and 16 October and 20 November 1992 as well as on 8 January and 26 February 1993 the applicant, having informed his employer, again absented himself from his work place before his Friday evening shift had ended. He left work at 17.49 hrs, 17.08 hrs, 15.39 hrs, 15.36 hrs and 17.39 hrs, respectively. In discussions with superiors he maintained that he would continue to keep the Sabbath in accordance with his religious convictions.

On 23 March 1993 the Head of the relevant district of the State Railways dismissed the applicant as he had, on six occasions in 1992-93, absented himself from his work place before the end of his Friday evening shift, thereby neglecting the rules regulating his working hours. The duty of all staff to respect their working hours was a precondition for effective working. The employer's efforts to transfer him to another post had failed, as no vacancy had been found. He had repeatedly been warned by superiors that further absence from work would inevitably lead to his dismissal. He had nevertheless continued to show a careless and indifferent attitude towards the applicable rules and his superiors' orders. The applicant and the principal employees' representative were heard prior to the dismissal. Following the applicant's request for a re-examination the Board of Civil Servants, on 28 April 1993, upheld his dismissal, noting, *inter alia*, that he had been obliged to work an evening shift every fifth Friday. On 6 March, 2 and 16 October and 20 November 1992 as well as on 8 January and 26 February 1993 he had absented himself from his work place without permission and in spite of the caution issued in May 1992 and his superiors' orders and warnings. He had stated that he would persist in his behaviour. The Board concluded that he had continuously and fundamentally breached his official duties. Reference was made to sections 20 and 46 of the 1986 Act on Civil Servants of the State (valtion virkamieslaki, statstjänstemannalag 755/86) and the State Railways' staff regulations.

One out of the eight members of the Board dissented, noting, *inter alia*, that the applicant's absence during his Friday evening

shift had only had minor effects, no damage having been caused either to his employer or any third party. He had undertaken to compensate the relevant number of working hours and to this end he had requested that his shifts be modified. As he was experienced and had been trained in various tasks, he should have been issued with a further caution and transferred to another post. A dismissal was not proportionate to the behaviour shown by him on his particular post and would result in absence from work on religious grounds being punished more severely than, for instance, alcohol problems.

The applicant appealed to the Supreme Administrative Court, arguing that his right to freedom of religion had been violated. His absence had resulted from an irreconcilable conflict between his religious convictions and work duties and not from negligence. The question concerned a maximum of some five Fridays between October and March, when the sun would set at the most three and a half hours before the end of his shift. In return for a permission to finish his shift at sunset on those days he would have been prepared to work a longer shift in the summertime, when the sun would set late. The State Railways had not argued that such an arrangement would have been unreasonably difficult to implement. Instead of showing indifference towards his duties he had honestly informed his employer that he felt obliged to give priority to his religious convictions, though possibly at the price of being dismissed. Although the State Railways could also order its staff to work on Sundays, it had regulated the working hours at the applicant's work place so that no Sunday work was necessary.

On 17 February 1994 the Supreme Administrative Court upheld the Board's decision, finding no reason for amending it.

B. Relevant domestic law

Finland recognises two State Churches, the Evangelical-Lutheran Church and the Orthodox Church of Finland. Approximately 86 per cent of the population belong to the Evangelical-Lutheran Church and about 1 per cent belong to the Orthodox Church of Finland.

Under the 1919 Constitution Act (Suomen Hallitusmuoto, Regeringsform för Finland 94/19), as in force at the relevant time, a Finnish citizen was entitled to manifest his or her religion both in private and in public, provided this did not violate the law or good practices (section 8). The rights and obligations of a Finnish citizen did not depend on whether or not he or she belonged to a certain religious community, if any (section 9). As of 1 August 1995 the Constitution Act guarantees the freedom of religion to everyone. This freedom includes the right to confess one's faith, to worship, to manifest one's belief as well as to belong or not to belong to a religious community (section 9 of amending Act no. 969/95).

In addition, the 1922 Act on Religious Freedom (uskonnonvapauslaki, religionsfrihetslag 267/22) guarantees the freedom to manifest a religion, again provided this does not violate the law or good practices (section 1). Finally, according to a specific Act of 1921 (no. 173/21), a Finnish citizen is qualified for a post as a civil servant regardless of whether or not he or she belongs to a certain religious community, if any.

Under section 1 of the 1989 Act on the State Railways (laki Valtionrautateistä, lag om Statsjärnvägarna 747/89), as in force at the relevant time, the State Railways was a State enterprise subordinated to the Ministry of Transport and Communications (liikenneministeriö, trafikministeriet). The 1989 Act has later been replaced.

According to the 1986 Act on Civil Servants of the State, as in force at the relevant time, a civil servant was to perform his or her duties properly without delay and behave in accordance with the requirements of the relevant office (section 20). A written warning or

a caution could be issued if the civil servant either deliberately or by negligence acted contrary to his or her duties. A third disciplinary punishment was removal from office. All three disciplinary punishments were to be imposed by decision of a Board of Civil Servants (sections 57 and 58). One or several boards existed within a public authority (section 75). A superior could also issue remarks (section 63).

A civil servant could also be dismissed if, for instance, he or she had continuously or significantly breached the duties relating to the relevant office or continuously had failed to perform those duties (section 46, subsection 2 (3)). On the other hand, for instance his or her religious views did not constitute such grounds for dismissal (subsection 3(4)).

On 1 December 1994 the 1986 Act was largely replaced by a 1994 Act with the same title (no. 750/94).

The Act on Working Hours stipulates that every employee shall be entitled to a weekly rest lasting at least 30 hours. This rest shall be provided on Sunday or, when this is not possible, during another period. Certain exceptions are possible but are not relevant here (section 15).

In a case of the present kind a final appeal lies with the Supreme Administrative Court. No leave to appeal is required.

COMPLAINTS

1. The applicant complains under Article 9 of the Convention that his right to freedom of religion has been violated on account of his dismissal by the State Railways. This right allegedly includes the right to have one's holy day respected as long as this is not unreasonable from the employer's point of view and does not violate the rights of others. Within reasonable limits Article 9 also implies a right for a civil servant to refuse to perform duties contrary to his or her religious belief as long as this does not significantly impinge on the performance of his or her duties as a whole.

More particularly, the conflict between his duty to respect, on the one hand, his religious convictions and, on the other hand, his working hours only arose about five times a year due to the early sunset in the wintertime. His requests to have his occasional Friday evening shift in the wintertime exchanged for the Friday morning shift and to have his Friday morning shift in the summertime exchanged for the Friday evening shift were not unreasonable and would not have afforded him any advantage in comparison with his colleagues. The State Railways never argued that such working hours would have been impossible to implement or that they would have been unreasonable from the point of view of his employer or colleagues.

2. The applicant furthermore complains that his dismissal discriminated against him, since under the legislation on working hours the weekly holiday falls on Sunday, i.e. the holy day for the main religious communities in Finland. As a result the State Railways respected the right of his colleagues to keep the Sabbath on Sunday but failed to respect his right to keep it on Saturday. He invokes Article 14 of the Convention in conjunction with Article 9.

3. Finally, the applicant complains that he was denied a fair hearing, as the Supreme Administrative Court, the only independent tribunal to decide on his case, gave no reasons for its decision but instead de facto refused him leave to appeal. He invokes Article 6 of the Convention and underlines that his working hours were governed by legislation applicable to private employment contracts. The proceedings therefore involved a determination of a civil right of his.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 7 August 1994 and registered on 19 August 1994.

On 28 February 1996 the Commission (First Chamber) decided to communicate the applicant's complaint concerning Article 9 of the Convention to the respondent Government.

The Government's written observations were submitted on 30 April 1996. The applicant replied on 25 June 1996.

On 21 May 1996 the Commission granted the applicant legal aid.

On 26 November 1996 the application was transferred from the First Chamber to the Plenary Commission, by decision of the latter.

THE LAW

1. The applicant complains that his right to freedom of religion was violated on account of his dismissal. He invokes Article 9 (Art. 9) of the Convention which reads, as far as relevant, as follows:

"1. Everyone has the right to freedom of ... religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The Government accept that the State Railways' dismissal of the applicant is imputable to the respondent State under the Convention. They also accept that such a dismissal could in certain circumstances raise an issue under Article 9 (Art. 9). In the present case, however, this provision has not been violated. The State Railways was entitled to rely on its employment contract which the applicant had signed without reservations in 1986. Having joined The Seventh-day Adventist Church in 1991, he was free to relinquish his work if he considered that his professional duties were not reconcilable with his religious convictions. He could also have taken those Fridays off when the beginning of the Sabbath obliged him to leave work before his evening shift had ended.

The Government consider, moreover, that when dismissing the applicant the State Railways did not arbitrarily disregard his freedom of religion. Its efforts to transfer him to another post had failed and changing the shift schedule in accordance with his proposal would have led to inconveniences for the employer and the applicant's colleagues. In these circumstances his dismissal did not interfere with his freedom of religion.

Should the Commission find that the applicant's dismissal limited his freedom to manifest his religion, the Government submit that this limitation was justified under Article 9 para. 2 (Art. 9-2). The dismissal was in accordance with law and pursued legitimate aims, namely the protection both of public order and the rights and freedoms of others. Finally, the dismissal was proportionate to the aims pursued and thus necessary in a democratic society. In most countries only the religious holidays of the majority are celebrated as public holidays. In Finland members of different religious denominations are equal before the law governing working hours. Public officials whose presence

at work is required on Sundays cannot refuse to perform their duties. Accommodating the rules of different religious denominations in order to respect an employer's wishes in this field would be unreasonable as far as the employer and usually also the other employees are concerned.

The applicant recalls that under Article 9 para. 1 (Art. 9-1) the right to freedom of religion must be secured without qualification. Should, however, the Commission consider Article 9 para. 2 (Art. 9-2) applicable, the applicant submits that the limitation of his freedom to manifest his religion was not "prescribed by law". This notion is independent of whether the domestic procedure as such was governed by Finnish law. In this context it is of relevance that he did not receive a fair trial within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

The applicant furthermore contends that his dismissal did not serve any of the legitimate aims referred to by the Government. His manifestation of his religious belief in no way endangered public order. Nor would the proposed minor adjustments of his work schedule have infringed on the rights and freedoms of others. Finally, the State Railways never argued, though the Government does so before the Commission, that the proposed adjustments would have caused inconveniences to his employer or colleagues.

The applicant finally submits that his dismissal was disproportionate to any assumed legitimate aim. Due to the strong position of the Evangelical-Lutheran State Church in Finland toleration of other religious denominations is fairly low, as shown by the State Railways' inflexibility in his case. He was performing ordinary clerical duties of no urgent or otherwise pressing character requiring his physical presence at a specific hour. The proposed adjustments of his work schedule concerned a maximum of three and a half hours on five Friday afternoons per year. His employer was adamantly against any of the arrangements proposed by him, including, for instance, compensating the lost working hours by relinquishing an equivalent part of his vacation or days off. The matter having eventually evolved into an exertion of authority, he was dismissed for an absence lasting 39 minutes. A limitation of the freedom to manifest one's religion must necessarily fit within a narrow margin of appreciation which was overstepped in the applicant's particular case.

The Commission recalls that Article 9 (Art. 9) primarily protects the sphere of personal convictions and religious beliefs. In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form (see, e.g., *Kalaç v. Turkey*, Comm. Report 27.2.96).

While it is true that a right of recruitment to the public service was deliberately omitted from the Convention, it does not follow that a person designated as a public servant is debarred from challenging his dismissal if it infringes one of the rights guaranteed by the Convention. Public servants do not fall outside the scope of the Convention any more than do other citizens. In Articles 1 and 14 (Art. 1, 14) the Convention stipulates that "everyone within [the] jurisdiction" of the Contracting States must enjoy the rights and freedoms in Section I "without discrimination on any ground" (see *Eur. Court HR, Vogt v. Germany* judgment of 26 September 1995, Series A no. 323, pp. 22-23, para. 43 with further references). The Commission therefore considers it conceivable that a dismissal of a civil servant for disobedience could, in certain circumstances, raise an issue under Article 9 (Art. 9) (cf. No. 8160/78, Dec. 12.3.81, D.R. 22 pp. 27-38 at p. 33; No. 11045/84, Dec. 8.3.85, D.R. 42 pp. 247-258 at pp. 257-258).

In the present case the Commission finds that the applicant, as

a civil servant of the State Railways, had a duty to accept certain obligations towards his employer, including the obligation to observe the rules governing his working hours. He was cautioned by his employer, not having relinquished his post after the irreconcilable conflict arose between his religious convictions and his working hours.

In these particular circumstances the Commission finds that the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. This refusal, even if motivated by his religious convictions, cannot as such be considered protected by Article 9 para. 1 (Art. 9-1). Nor has the applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief.

The Commission would add that, having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion. In sum, there is no indication that the applicant's dismissal interfered with the exercise of his rights under Article 9 para. 1 (Art. 9-1) (cf. the above-mentioned No. 8160/78, loc.cit.)

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant furthermore complains that he has been discriminated against, since the State Railways respected the right of his colleagues to keep the Sabbath on Sunday but failed to respect his right to keep it on Saturday. He invokes Article 14 (Art. 14) of the Convention in conjunction with Article 9 (Art. 9). Article 14 (Art. 14) reads, as far as relevant, as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... religion ... or other status."

The Commission recalls that Article 14 (Art. 14) of the Convention complements the other substantive provisions of the Convention and the Protocols. It may be applied in an autonomous manner as a breach of Article 14 (Art. 14) does not presuppose a breach of those other provisions. On the other hand, it has no independent existence, since it is effective solely in relation to the enjoyment of the rights and freedoms safeguarded by the other substantive provisions (see, e.g., Eur. Court HR, *Van der Mussele v. Belgium* judgment of 23 November 1983, Series A no. 70, p. 22, para. 43).

Article 14 (Art. 14) does not forbid every difference in treatment in the exercise of the rights and freedoms recognised by the Convention and its Protocols. It safeguards persons, who are placed in analogous situations, against discriminatory differences of treatment. For the purposes of Article 14 (Art. 14) a difference of treatment is discriminatory if it has no objective and reasonable justification. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (see, e.g., Eur. Court HR, *Lithgow v. the United Kingdom* judgment of 8 July 1986, Series A no. 102, pp. 66-67, para. 177).

The Commission considers that the present complaint falls to be examined in conjunction with the above-cited Article 9 (Art. 9). It is true that the Finnish legislation on working hours provides that the weekly day of rest is usually Sunday. However, this legislation does not contain provisions which would guarantee to members of a certain religious community any absolute right to have a particular day regarded as their holy day. Assuming that the applicant could be considered to be in a situation comparable to that of members of other religious communities, the Commission therefore finds that he has not

been treated differently in comparison with such members. Consequently, this complaint does not disclose any appearance of a violation of Article 14 of the Convention taken in conjunction with Article 9 (Art. 14+9) .

It follows that this complaint is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Finally, the applicant complains that his right to a fair hearing was violated on the basis of the inadequate reasons in the decision of the Supreme Administrative Court, the only independent tribunal to examine his case. He invokes Article 6 (Art. 6) of the Convention which reads, as far as relevant, as follows:

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The Commission recalls that disputes relating to the recruitment, careers and termination of service of public servants are, as a general rule, outside the scope of Article 6 para. 1 (Art. 6-1) of the Convention (cf., however, e.g., Eur. Court HR, *Massa v. Italy* judgment of 24 August 1993, Series A no. 265-B, p. 20, para. 26).

In the present case it can be left open whether Article 6 para. 1 (Art. 6-1) is applicable and whether the Board of Civil Servants within the State Railways is a "tribunal" within the meaning of that provision, since the complaint is in any event inadmissible for the following reasons.

The Commission accepts that under specific circumstances the absence of reasons in a court decision might raise an issue as to the fairness of the procedure which is guaranteed by Article 6 para. 1 (cf., e.g., No. 8769/79, Dec. 16.7.81, D.R. 25 p. 240; No. 10412/83, (Art. 6-1) Dec. 14.7.87, D.R. 52 p. 128; cf. also, as regards criminal proceedings, Eur. Court HR, *Hadjianastassiou v. Greece* judgment of 16 December 1992, Series A no. 252, pp. 16-17, paras. 33-37).

The Commission notes that the decision of the Board of Civil Servants mentioned the facts, the relevant legal provisions applied as well as the Board's conclusions. By upholding that decision the Supreme Administrative Court must be considered to have accepted the reasons advanced by the Board. In these circumstances there is no indication that the proceedings were unfair and thereby contrary to Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that this complaint is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission