F. Communication No. 273/1989, B. d. B. et al. v. The Netherlands (Decision of 30 March 1989, adopted at the thirty-fifth session)

Submitted by: B. d. B. et al.

Alleged victims: The authors

State party concerned: The Netherlands

Date of communication: 14 January 1988 (date of initial letter)

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

Meeting on 30 March 1989

Adopts the following:

Decision on admissibility

1. The authors of the communication (initial letter dated 14 January 1988; further submission dated 29 December 1988) are B. d. B., G. B., C. J. K. and L. P. M. W., four Dutch citizens. They claim to be the victims of a violation by the Government of the Netherlands of articles 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.1 The authors are joint owners of the Teldersweg physiotherapy practice in Rotterdam. They allege that they have been discriminated against by the Industrial Insurance Board for Health and for Mental and Social Interests (hereafter BVG) and the Central Appeals Board (Centrale Raad van Beroep) because of the way in which social security contributions payable by them are regulated under Netherlands social security legislation.

2.2 The authors state that the BVG, as the executive organ of the social security insurance legislation, has the task of assessing social insurance claims and of fixing the contributions payable by employers to finance these employees' insurance schemes. Until 1984, the BVG held the view that part-time physiotherapists working on the basis of a collaboration contract with a practitioner were not in employment; there was thus no question of compulsory insurance for these more or less independent collaborators within the framework of the said employees' insurance scheme.

2.3 This situation changed on 19 April 1983, when the Central Appeals Board ruled, contrary to what the BVG had previously accepted, that part-time physiotherapists working on an invoicing basis were in fact working in such a dependent socio-economic position vis-à-vis the owner or owners of the practice that their work status was socially comparable to employment and had therefore to be regarded as such in the framework of social security insurance legislation. On the basis of this judgement, the BVG informed the national professional organizations of physiotherapists that part-time physiotherapists working on an invoicing basis henceforth would have to be insured and that contributions due would have to be paid by the owner of a physiotherapy practice as if he were an employer. In its

circular, the BVG announced that contributions due would be collected from 1 January 1984, on the understanding that those required to pay the contributions would send their names to the BVG before 1 January 1985. The collection of contributions for the years prior to 1984 would then be waived.

2.4 Despite the BVG view that, from 1984 onwards, there was no longer any question of such a special situation in respect of the obligation for owners of physiotherapy practices to pay contributions, the authors maintain that physiotherapists are still treated differently with regard to the date of commencement of the obligation to contribute. Thus, it has become apparent that those physiotherapy practices which, at an earlier stage, were unambiguously informed in writing by the association that there was no obligation to contribute, were regarded as liable to pay the first contribution in 1986, whereas practices that had not received a letter sent directly by the BVG, in which they were informed that there was no such obligation, were required to pay contributions retroactively to January 1984.

2.5 As soon as the complainants learned that, in the former case, the requirement to pay their contributions could have begun in 1986 and thus did not have retroactive effect to 1 January 1984, they invoked the principle of equality before the law, by means of the appeals procedure then prevailing in the Central Appeals Board. They argued that the situation in their practice had not been essentially different from that in other practices which had learned directly from the BVG that no insurance obligation was required with regard to their part-time physiotherapists. The part-time physiotherapist who collaborated with the authors was also working on an invoicing basis, as others who collaborated with practices that, before 1983, had learned directly from the BVG that there would be no question of an insurance obligation.

2.6 Despite the invocation of the principle of equality before the law, the Central Appeals Board held, in its final judgment in the case on 19 August 1987, that the decision by the BVG to demand contributions from the complainants with retroactive effect to 1984 was based on legal rules of compulsory nature which could not or must not be tested against general principles of law.

2.7 To the authors, the Central Appeals Board thereby implicitly concluded that the acknowledged difference in treatment in the manner of demands for contributions between various physiotherapy practices is in accordance with law. The authors point to what they consider an inconsistency in the Central Appeals Board's judgement. On the one hand, the Board appears to take the view that the application of compulsory legal rules cannot or must not be tested against general principles of law; on the other hand, it appears from established case-law that such rules must not be applied if they are in conflict with the principle of confidence in the law, i.e. the principle of the certainty of the law. The authors question why owners of physiotherapy practices who were not directly informed by the BVG in the past that part-time physiotherapists co-operating with them were not subject to social security contributions should be subjected to different and less favourable treatment with respect to contributions due after 1984 than those practitioners who had received such direct information.

2.8 The authors claim that since the principle of confidence in the law can, under certain circumstances, prevent the application of compulsory legal rules, it is all the more surprising that this does not apply to the principle of equality before the law, enshrined in article 1 of the Netherlands Constitution and article 26 of

the Covenant. They refer to the decision adopted by the Human Rights Committee on 9 April 1987 in communication No. 172/1984, which states, inter alia, that article 26 of the Covenant is not limited to the civil and political rights provided for in the Covenant but also applies to social insurance law. Concerning the differences noted above in the treatment of owners of physiotherapy practices, the authors allege that it is possible to speak of a violation of article 26 in conjunction with article 14, paragraph 1, of the Covenant. They contend that the distinction made by the BVG in practice is an arbitrary one.

3. By decision dated 15 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party under rule 91 of the Committee's provisional rules of procedure, requesting information and observations relevant to the question of the admissibility of the communication. By note dated 6 July 1988, the State party requested an extension of three months for the submission of its observations.

4.1 In its submission under rule 91, dated 28 October 1988, the State party objects to the admissibility of the communication on a number of grounds. Recapitulating the facts, it points out that the alleged victims are joint owners of a physiotherapy practice where a part-time physiotherapist worked on the basis of a co-operation contract as from 1982; she was paid by invoice, worked more or less independently and was not insured as an employee under social security legislation. The State party further indicates that there are three social security insurance schemes: schemes paid out of public funds, national insurance schemes and employee insurance schemes. Unlike the first two, employee insurance schemes are only applicable where there is an employer/employee relationship. Both employer and employee pay part of the employment insurance contribution, determined in accordance with a standard formula. This contribution is calculated as a certain percentage of the employee's income and is payable to the competent industrial insurance board.

4.2 The State party explains that for the purpose of determining who, as an employee, should pay employment insurance contributions, a broad definition of the term "employment" is used. It is not confined to situations in which there is an employment contract governed by civil law but also extends to co-operative relationships that meet certain criteria defined by the relevant act of parliament or the executive rules and regulations based on it; in accordance with these criteria, employment relationships not governed by employment contracts can be equated with those that entail, with all the relevant consequences concerning entitlement to benefits, an obligation to pay contributions.

4.3 In the past it had been generally assumed that a physiotherapist working for a physiotherapy practice who was paid by invoice should not normally be regarded as being employed by the practice. However, the Central Appeals Board took a different view in its judgment of 19 April 1983. The BVG is entrusted with the implementation of social security legislation with regard to employees in the health sector and must determine the social insurance contributions of employers and employees for employee insurance schemes such as medical insurance, disability insurance and unemployment insurance contributions. As from 1 January 1984, the BVG claimed these contributions from the applicants for the aforementioned physiotherapist. The applicants did not agree that this date was correct and contested the decision on the grounds, inter alia, that the principle of equality had been violated because other physiotherapists had only been required to pay contributions as from 1986. The court of first instance, the Board of Appeals and

the court of second and last instance, the Central Appeals Board, dismissed the case. The main reason for the dismissal of the case was that peremptory statutory provisions had been properly applied, that such provisions must always be applied unless there are special circumstances, and that these were lacking in the authors' case.

4.4 With respect to the requirement of exhaustion of domestic remedies, the State party acknowledges that the authors pursued legal proceedings up to the court of last instance. It points out, however, that the authors did not invoke either article 26 or article 14, paragraph 1, before the Board of Appeal and, on appeal, before the Central Appeals Board. It was merely in a supplementary petition to the Central Appeals Board, dated 29 April 1987, that the principle of equality was also mentioned, if only in general terms and without specific reference to provisions of domestic or international law. Nor were the articles of the Covenant invoked by the authors in either of the judgements given in the case. In these circumstances, the State party does not "consider it to be altogether clear that the applicants have exhausted domestic remedies, as they did not explicitly invoke any provisions of the Covenant during domestic proceedings". The State party requests the Committee to decide on whether and to what extent authors of a communication must invoke the provisions of the Covenant purported to have been violated in the course of domestic legal proceedings.

4.5 With respect to the alleged violations of article 14, paragraph 1, and article 26, the State party contests that the actions complained of by the authors can be brought within the scope of application of these provisions and thus considers the communication to be inadmissible pursuant to articles 2 and 3 of the Optional Protocol. With respect to article 14, paragraph 1, first sentence, it points out that article 14 is concerned with procedural guarantees for trials and not with the substance of judgements handed down by the courts. Individuals who believe that the law has been wrongly applied to them in the Netherlands may seek redress through the courts. The rules governing appeals against decisions under social security legislation are laid down in the Appeals Act of 1955. The State party emphasises that it has not been alleged that the Board of Appeal or the Central Appeals Board failed to observe these rules, which are compatible with article 14, and that there is no evidence that the boards failed to observe them.

4.6 With respect to the alleged violation of article 26, the State party questions the authors' apparent assumption that article 26 also applies to the contributions that employers and employees are required to make, and invites the Committee to give its opinion on this question. It further indicates that the authors do not appear to have complained about the substance of the statutory provisions concerning mandatory social insurance but only about the fact that the BVG set 1 January 1984 as the date from which contributions were payable. The issue thus is whether the application of a law which is not in itself discriminatory and which the Central Appeals Board considers to have been correct can run counter to article 26. Earlier communications concerning Netherlands social security legislation submitted to the Committee a/ related to provisions laid down by an act of parliament which the authors deemed to be discriminatory. The present communication, however, does not relate to the provision's substance, which is neutral, but to the application of social security legislation by an industrial insurance board. The State party invites the Committee to formulate its opinion on this point and refers to the Committee's decision in communication No. 212/1986, where it was stated, inter alia, that the scope of article 26 of the Covenant does not extend to differences of results in the application of common rules in the

allocation of benefits. b/ This statement, according to the State party, should apply all the more to situations in which social insurance contributions are determined by an industrial insurance board.

4.7 The State party expresses doubts as to whether an action by an industrial insurance board can be attributed to its State organs, in the sense that the State party could be held liable for it under the Covenant or the Optional Protocol thereto. In this context, it emphasises that an industrial insurance board such as the BVG is not a State organ: such boards are merely associations of employers and employees established for the specific purpose of implementing social security legislation, and the management of such a board consists exclusively of representatives of the employers' and employees' organizations. Industrial insurance boards operate independently and there is no way in which the State party's authorities could influence concrete decisions such as that complained of by the authors.

5.1 Commenting on the State party's observations, the authors, in a submission dated 29 December 1988, affirm that it was not necessary for them to invoke either the principle of equality or article 26 of the Covenant in domestic proceedings. In Netherlands administrative law, the principle of equality has traditionally been a legal standard against which the courts test the administrative practices of governmental authorities. They consider it to be unnecessary to invoke, in administrative procedures, sources of law that embody the principle of equality, since the judge is bound to accept this principle and should ex officio test the case against it. The fact that the contested judgements do not refer to the provisions of the Covenant is, therefore, irrelevant.

5.2 With respect to the alleged violation of article 14, first sentence, of the Covenant, the authors acknowledge that the provisions of article 14 contain further guarantees intended to secure the conduct of a fair trial and add that they have no reason to complain about the conduct of the judicial proceedings as such. They reiterate, however, that the judicial review of general principles of justice in their case by the Central Appeals Board was contradictory, and that the Board treated them differently from others and, therefore, unequally.

5.3 The authors further reject the State party's contention that the communication should be declared inadmissible because it was directed against discriminatory application of legislation which in itself is neutral. They refer to the Committee's decision in communication No. 172/1984 c/ which stipulated, inter alia, that "article 26 is concerned with the obligations imposed on States in regard to their legislation and the application thereof". With respect to the State party's argument that because it left the implementation of some aspects of social security legislation to industrial insurance boards and is therefore unable to exercise influence on concrete decisions adopted by such boards, they argue that the mere inability to supervise the implementation of social security legislation by industrial insurance boards cannot detract from the fact that the State party is responsible for seeing to it that these bodies charged with the implementation of the law perform their statutory assignments in conformity with legal standards. Where loopholes become apparent, it is for the legislator to eliminate them. Therefore, according to the authors, the State party should not be allowed to claim that it cannot influence the decisions of bodies such as the BVG. Were this to be allowed, it would be easy for States parties to undermine the "basic rights" of their citizens. The authors conclude that in their case, the State party seeks to deny its responsibility for the concrete application of social security legislation by invoking a situation which it had created itself.

6.1 Before considering any claims contained in a communication, the Human Rights Committee shall, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee has taken note of the State party's argument that it is doubtful whether the authors have complied with article 5, paragraph 2 (b), of the Optional Protocol, given that they did not invoke any provisions of the Covenant in the course of domestic proceedings. The Committee observes that whereas authors must invoke the substantive rights contained in the Covenant, they are not required, for purposes of the Optional Protocol, necessarily to do so by reference to specific articles of the Covenant.

6.4 With regard to an alleged violation of article 14, paragraph 1, of the Covenant, the Committee notes that while the authors have complained about the outcome of the judicial proceedings, they acknowledge that procedural guarantees were observed in their conduct. The Committee observes that article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results or absence of error on the part of the competent tribunal. Thus, this aspect of the authors' communication falls outside the scope of application of article 14 and is, therefore, inadmissible under article 3 of the Optional Protocol.

6.5 With regard to an alleged violation of article 26, the Committee recalls that its first sentence stipulates that "all persons are entitled without discrimination to the equal protection of the law". In this connection, it observes that this provision should be interpreted to cover not only entitlements which individuals entertain vis-à-vis the State but also obligations assumed by them pursuant to law. Concerning the State party's argument that the BVG is not a State organ and that the Government cannot influence concrete decisions of industrial insurance boards, the Committee observes that a State party is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs.

6.6 The authors complain about the application to them of legal rules of a compulsory nature, which for unexplained reasons were allegedly not applied uniformly to some other physiotherapy practices; regardless of whether the apparent non-application of the compulsory rules on insurance contributions in other cases may have been right or wrong, it has not been alleged that these rules were incorrectly applied to the authors following the Central Appeals Board's ruling of 19 April 1983 that part-time physiotherapists were to be deemed employees and that their employers were liable for social security contributions; furthermore, the Committee is not competent to examine errors allegedly committed in the application of laws concerning persons other than the authors of a communication.

6.7 The Committee also recalls that article 26, second sentence, provides that the law of States parties should "guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The Committee notes that the authors have not

claimed that their different treatment was attributable to their belonging to any identifiably distinct category which could have exposed them to discrimination on account of any of the grounds enumerated or "other status" referred to in article 26 of the Covenant. The Committee, therefore, finds this aspect of the authors' communication to be inadmissible under article 3 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the authors.

Notes

a/ Communications Nos. 172/1984 (Broeks), 180/1984 (Danning) and 182/1984 (Zwaan-de Vries), final views adopted on 9 April 1987 (twenty-ninth session).

b/ P. P. C. v. the Netherlands, inadmissibility decision adopted on 24 March 1988 (thirty-second session), para. 6.2.

c/ See note 1; Committee's final views (twenty-ninth session), para. 12.3.