



December 2007

## **European Social Charter**

European Committee of Social Rights

Conclusions XVIII-2 (GERMANY)

Articles 1§4, 2, 3, 4, 9, 10 and 15 of the Charter



## Introduction

The function of the European Committee of Social Rights is to judge the conformity of national law and practice with the European Social Charter. In respect of national reports, it adopts “conclusions” and in respect of collective complaints, it adopts “decisions”.

A presentation of this treaty as well as general comments formulated by the Committee figure in the General Introduction to the Conclusions<sup>1</sup>.

*The European Social Charter was ratified by Germany on 27 January 1965. The time limit for submitting the 24<sup>th</sup> report on the application of this treaty to the Council of Europe was 31 March 2006 (reference period: 1 January 2001 to 31 December 2004) and Germany submitted it on 24 April 2006.*

This report concerned the following “non-hard core” provisions of the Charter:

- right to just conditions of work (Article 2);
- right to safe and healthy working conditions (Article 3);
- right to a fair remuneration (Article 4);
- right to vocational guidance (Article 9);
- right to vocational training (Article 10);
- right of persons with disabilities to education, training and employment (Article 15).

Germany has accepted these articles with the exception of Articles 4§4 and 10§4.

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1. The conclusions as well as state reports can be consulted on the Council of Europe's Internet site ([www.coe.int](http://www.coe.int)) under Human Rights.

The present chapter on Germany contains 19 conclusions<sup>1</sup>:

- 15 cases of conformity: Articles 1§4, 2§2, 2§3, 2§4, 2§5, 3§2, 3§3, 4§2, 4§5, 9, 10§1, 10§2, 10§3, 15§1 and 15§2;
- 4 cases of non-conformity: Articles 2§1, 3§1, 4§1 and 4§3.

The next German report will be the first under the new system for the submission of reports adopted by the Committee of Ministers<sup>2</sup>. It concerns the accepted provisions of the following articles belonging to the thematic group “Employment, training and equal opportunities”:

- the right to work (Article 1);
- the right to vocational guidance (Article 9);
- the right to vocational training (Article 10);
- the right of persons with disabilities to education, training and employment (Article 15);
- the right to engage in a gainful occupation in the territory of other States Parties (Article 18);
- the right of men and women to equal opportunities (Article 1 of the Additional Protocol).

The report should be submitted to the Council of Europe before 31 October 2007.

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1. The 19 conclusions correspond to the paragraphs of the Articles which are part of the non-hard core and Article 1§4. This latter provision is usually examined together with Articles 9, 10 and 15 due to the links between these provisions.

2. Decision adopted at the 963<sup>rd</sup> meeting of the Ministers' Deputies on 3 May 2006.

## **Article 1 – Right to work**

### *Paragraph 4 – Vocational guidance, training and rehabilitation*

The Committee takes note of the information in the German report.

As Germany has accepted Article 9, 10§3 and 15§1 of the Charter, measures relating to vocational guidance, to vocational training and retraining of workers, and to guidance, education and vocational training for persons with disabilities are dealt with under these provisions.

The Committee concluded that the situation with regard to vocational guidance (Article 9), vocational training of adult workers (Article 10§3) and vocational education and training of persons with disabilities (Article 15§1) is compatible with the Charter.

The Committee concludes that the situation is in conformity with Article 1§4 of the Charter.

## **Article 2 – Right to just conditions of work**

### *Paragraph 1 – Reasonable daily and weekly working hours*

The Committee takes note of the information contained in the German report.

It notes that provisions on working hours are the key elements in all collective agreements. They lay down the number of weekly working hours, the possibility of introducing flexible working time arrangements and workers' rights in case of overtime work. At the end of 2004 the average weekly working hours were 37.35 in western Germany and 39.0 in eastern Germany.

The Committee observes the amendments to the Working Time Act concerning on-call and in-readiness periods at work. According to the report, following the ruling of the European Court of Justice of 9 September 2003 that inactive on-call time be considered as working time, the Working Time Act was amended which took effect on 1 January 2004. Following this amendment all hours of on-call duty are now counted in their entirety as working time. They are also taken into account in the calculation of the maximum average working time of eight hours per day.

The Working Time Act provides for a maximum working time of eight hours per day on a maximum of six weekdays which may only be exceeded if adequate compensation is granted.

In its previous conclusion the Committee noted that reference periods for averaging working hours under flexible working arrangements were too long. In this connection, the Committee observes the amendments to the Working Time Act of 1 January 2004 which sets out that in cases where the reference period for averaging is extended by a collective agreement, a weekly working time of 48 hours shall under no circumstances be exceeded over an average of 12 calendar months. In this way, according to the report, protection of workers' health and safety is guaranteed. In this connection, the Committee also notes that in some collective agreements, such as the chemical industry, the averaging may take place over a period of up to 36 months where project-oriented work is concerned.

In the metal

industry of Baden-Württemberg the reference period may be extended to up to 24 months in certain non-recurring cases and up to 27 months in exceptional cases.

The Committee recalls that flexibility measures regarding working time are not as such in breach of the Charter. However, in order to be found in conformity with the Charter, national laws or regulations must fulfill certain criteria, such as provide for a reasonable reference period for calculation of average working time. The reference periods must not exceed six months. Extending a reference period to one year is only acceptable in exceptional circumstances.

The Committee concludes that the situation in Germany is not in conformity with Article 2§1 of the Charter on the grounds that certain reference periods for averaging working hours under flexible working arrangements are too long.

#### *Paragraph 2 – Public holidays with pay*

The Committee notes from the German report that there have been no changes to the situation which it has previously found to be in conformity with the Charter (Conclusions XVI-2).

It nonetheless asks the next report to provide updated information on the increased remuneration paid in respect of work done on a public holiday.

The Committee more concludes that the situation in Germany is in conformity with Article 2§2 of the Charter.

#### *Paragraph 3 – Annual holiday with pay*

The Committee notes the information provided in Germany's report.

The Committee previously found that the situation was in conformity with Article 2§3 but noted that both the Federal Annual Holiday Act (Section 7§3) and most collective agreements provide that earned leave must be taken during the holiday year or at the latest within the three first months of the following calendar year (i.e. before 31 March). The deadline by which leave has to be taken may be extended by collective agreement.

Further, the Committee considers that under Article 2§3 of the Charter annual holidays exceeding two weeks may be postponed in particular circumstances defined by domestic law, the nature of which should justify the postponement. It asks the next report to provide information on the rules of postponement.

Pending receipt of the information requested the Committee concludes that the situation is in conformity with Article 2§3 of the Charter.

#### *Paragraph 4 – Reduced working hours or additional holidays for workers in dangerous or unhealthy occupations*

The Committee notes the information provided in Germany's report.

The Committee refers to its Statement of interpretation on Article 2§4 of the 1961 Charter contained in the General introduction to these conclusions. It also refers to its conclusion under Article 3.

Pursuant to Section 8 of the Working Time Act regulations may be issued to limit working time in dangerous and unhealthy work, however so far no such regulations have been adopted, as according to the authorities adequate protective measures are provided for by collective agreement.

In addition, where particular dangerous occupations are concerned, special regulations pertaining to working time do exist, for instance the Compressed-air Regulation (*Druckluftverordnung*).

The Committee had previously (Conclusions XVI-2, p. 288) asked for a more exhaustive overview of the collective agreements which provide for reduced working hours or additional holidays and the type of work involved. The report states that the Government does not have an overview of such collective agreements, however it mentions collective agreements in the coal mining industry, ore mining industry and potash and rock salt mining industry which all provide for additional holidays of up to 5 days a year. The same is true of collective agreements for wage earners in the public sector where they perform shift work.

The Committee notes that the situation is prime facie in conformity with the Charter but it still needs further information in order to properly assess the situation, it therefore asks for further information on all measures taken to reduce exposure to residual risks in certain occupations, such as those involving exposure to ionising radiation, extreme temperatures, noise, steel making etc.

Pending receipt of the information requested the Committee concludes that the situation in Germany is in conformity with Article 2§4 of the Charter

*Paragraph 5 – Weekly rest period*

The Committee notes the information provided in Germany's report.

Pursuant to the Working Time Act as an exception to the principle of Sunday rest, an employee may work for up to twelve consecutive days before being given two rest days. However, pursuant to Section 12§2 of the Working Time Act collective agreements may deviate from this.

The Committee asks for further information on the possibility to derogate from the provisions of the Working Time Act by collective agreement, in particular may collective agreements permit workers to work for longer than 12 days before being granted a rest period., and if so in what circumstances.

Pending receipt of the information requested the Committee concludes that the situation in Germany is in conformity with Article 2§5 of the Charter.



### **Article 3 – Right to safe and healthy working conditions**

#### *Paragraph 1 – Issue of safety and health regulations*

The Committee takes note of the information in the German report.

#### *Content of the regulations on occupational health and safety*

The Committee examined the general scope of the regulations in Conclusions XIV-2 (pp. 299 and 300), and found them adequate. However, in its previous conclusion it noted that the Court of Justice of the European Communities (ECJ) had ruled that Germany had incorrectly transposed Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work<sup>1</sup> (“Framework Directive”), on grounds that employers with ten or fewer workers could be exempted from the obligation of being in possession of an assessment -in documentary form- of the risks to safety and health at work (Conclusions XVI-2, p. 290). The report indicates that legislative amendments have been made to implement the ECJ ruling. The Committee notes that the above-mentioned exemption has now been abolished by Article 5a of the Third Act amending the Trade Regulation Act and other provisions governing Trade, Industry and Commerce.

The report mentions the following regulations which have been adopted and/or updated during the reference period. On the one hand, the Ordinance on Industrial Safety and Health, in force as from 27 September 2002, which applies to all employees who have been provided with work equipment and who use work equipment at work, or who may be exposed to risks due to the operation of equipment which is subject to monitoring, and on the other, the Rules concerning Safety and Health on Construction sites, reflecting the state of the art in the field of occupational safety and health on construction sites.

As regards regulations on the protection against noise and vibration, the Committee notes that the Government intends to transpose in a single Ordinance Directive 2003/10/EC on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise)<sup>1</sup>, and Directive 2002/44/EC on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration)<sup>2</sup>. The Committee asks to be kept informed on developments as regards the situation.

In respect of biological agents, the report indicates that the Committee on Biological Substances has the task of proposing regulations taking account of the state of the art in science, technology and medicine. Likewise, the Committee asks to be kept informed on developments as regards the situation.

On the basis of the above information, the Committee considers that Germany meets the general obligations under Article 3§1 of the Charter.

#### *Protection of temporary workers*

In reply to the Committee’s request, the report describes the manner in which health and safety regulations are applied to non-permanent workers. It mentions that health and safety measures are always addressed to both the employment agency and the host employer. It is the agency’s responsibility to assess the abstract risks for hired-out employees and to provide them with appropriate training, irrespective of the workplace to which they are assigned. The host employer must also inform the temporary worker, at the beginning of the assignment, of potential hazards and on measures and precautions to prevent them, as well as of particular qualifications required and special medical surveillance needed. At the request of the temporary worker, the agency and the host employer must give him/her the opportunity to undergo regular medical checkups, except in cases where, on the basis of risk assessment and due to the safety measures taken, health impairments are not expected. The Committee considers that regulations and practice comply with Article 3 on this point, as they take account of the special nature of temporary work.

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1. Official Journal No. L 42/38 of 15/02/2003.

2. Official Journal No. L 177/13 of 6/07/2002.

### *Personal scope of the regulations*

In reply to the Committee's request for a clarification on how self-employed workers were protected by occupational health and safety provisions, the report states that self-employed workers may always, on a voluntary basis, avail themselves individually of the health and safety provisions applicable to employers and employees. However, the report acknowledges that this does not mean that self-employed workers are generally covered by the provisions on occupational health and safety.

The Committee notes the positive development of specific regulations on health and safety being adopted for self-employed workers under the Ordinance on Biological Agents, the Ordinance on Dangerous Substances or the Construction Sites Ordinance. Given that no other sector specific regulations are mentioned, the Committee takes this to mean that self-employed workers in other "high risk" sectors, such as agriculture, fishing or transport, are not protected by sectoral health and safety regulations.

The Committee recalls that for the purposes of Article 3§1, all workers, including the self-employed, must be covered by health and safety at work regulations (Conclusions I, p. 8 and Conclusions II, p. 182). It has consistently maintained this interpretation, on the grounds that employed and self-employed workers are normally exposed to the same risks. Since the Committee understands that not all self-employed workers, in particular those working in high risk sectors, are covered by regulations on health and safety, and as there is no information in the report indicating that other training or health surveillance measures apply to them, the Committee considers that Germany does not sufficiently safeguard the health and safety interests of self-employed workers.

### *Conclusion*

The Committee concludes that the situation in Germany is not in conformity with Article 3§1 of the Charter because certain categories of self-employed workers are not sufficiently covered by the occupational health and safety regulations.

#### *Paragraph 2 – Provision for the enforcement of safety and health regulations by measures of supervision*

The Committee takes note of the information in the German report.

### *Occupational accidents and diseases*

The Committee notes from Eurostat<sup>1</sup> data that during 2003 the number of accidents at work (4 days absence or more) for ten branches of activity<sup>2</sup> was 836 878.

The Committee also notes from Eurostat that there has been a significant decrease in the number of accidents between 1998 and 2004.<sup>3</sup> Nevertheless, the standardised incidence rate of accidents at work per 100 000 workers was 4 380 in 2001 and 3 586 in 2004. The Committee notes that these rates are still above the average for European Union countries (the European Union average was 3 221 in 2004).

Eurostat data indicates that the number of fatal accidents at work for nine branches of activity<sup>4</sup> increased from 429 (in 2001) to 465 (in 2003). In terms of the standardised incidence rate of fatal accidents at work, excluding road traffic accidents and accidents on board of any mean of transport in the course of work (rate per 100 000 workers), there was a slight increase in Germany from 2.0 (in 2001) to 2.3 (in 2003). However, despite this small increase, these figures are comparatively still positive as they remain below the average for 15 European Union countries, which was 2.7 (in 2001) and 2.5 (in 2003).

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1. Eurostat, Population and Social conditions, in <http://epp.eurostat.ec.europa.eu/portal/>.

2. Agriculture, hunting and forestry; Manufacturing; Electricity, gas and water supply; Construction; Wholesale and retail trade; repair of motor vehicles, motorcycles and personal and household goods; Hotels and restaurants; Transport, storage and communication; Financial intermediation; Real estate, renting and business activities.

3. With 1998=100, the index values for the subsequent years were as follows: 1999: 99; 2000: 96; 2001: 88; 2002: 82; 2003: 74; 2004: 72.

4. Agriculture, hunting and forestry; Manufacturing; Electricity, gas and water supply; Construction; Wholesale and retail trade; repair of motor vehicles, motorcycles and personal and household goods; Hotels and restaurants; Financial intermediation; Real estate, renting and business activities.

### *Activities of the labour inspectorate*

The Committee examined the general organisation of inspection services in Conclusions XIV-2 (pp. 302-304) and Conclusions XVI-2 (p. 293). The report does not provide any new information on the structure, powers and activities of the Labour Inspectorate. The Committee requests that future reports indicate whether there have been changes in the national inspection system during the reference period, or otherwise supply a copy of the labour inspectorate's annual reports.

The Committee notes from the report that the number of companies inspected in 2003 was 190 314 (whilst approximately 465 000 inspections were carried out during that year). These figures did not vary in a too significant manner over the reference period, although the number of inspections was higher at the beginning of the period. If the number of companies inspected is compared with the total number of companies in the country (3 168 715), this gives a 6 % of companies inspected in 2003<sup>1</sup>. The Committee asks the proportion of employees covered by health and safety visits.

The Committee notes from the information submitted by Germany to the European Commission in "Annual Reports of the Labour Inspectorate: 2004 data"<sup>2</sup>, that in 2004 the number of staff assigned to occupational safety and health (OSH) tasks in the country's labour inspectorates was 4 083 persons (3 326 of whom were inspectors).

As regards the enforcement system, the Committee notes from the same source that a total of 850 000 infringements of health and safety law were detected in 2004. That same year, around 12 500 investigations of accidents at work and occupational diseases were carried out. The number of improvement notices issued was 177 000. As to administrative offences, approximately 32 000 cautions were issued, and some 57 000 fines were imposed by the authorities. Criminal proceedings were instituted in 142 cases by the authorities.

### *Conclusion*

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 3§2 of the Charter.

#### *Paragraph 3 – Consultation with employers' and workers' organisations on questions of safety and health*

The Committee notes from the German report that there have been no changes to the situation, which it has previously considered to be in conformity with the Charter (Conclusions XVI-2).

The Committee concludes that the situation in Germany is in conformity with Article 3§3 of the Charter.

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1. Given that some of the supervisory authorities are also responsible for some environmental protection tasks, this figure is not the exact percentage of companies inspected on health and safety matters.

2. European Commission, 2004 National Labour inspections Annual Reports, Germany, in [http://ec.europa.eu/employment\\_social/health\\_safety/slic\\_en.htm](http://ec.europa.eu/employment_social/health_safety/slic_en.htm).

## **Article 4 – Right to a fair remuneration**

### *Paragraph 1 – Adequate remuneration*

The Committee takes note of the information provided in the German report.

In conformity with the system of autonomy of social partners guaranteed by the German Constitution, the social partners are responsible for fixing wages. Collective agreements on minimum wages are part of the system of autonomy of social partners. There are collective agreements for sectors which together account for about 90 % of total employment. According to the survey run by the Establishment Panel of the Institute for Employment Research 61 % of employees work in companies bound by industry-wide collective agreements in western Germany and 41 % in eastern Germany.

In its previous conclusion the Committee asked the Government to provide more details on the actual wages of the lowest paid workers (gross and net), i.e. information that would allow the Committee to assess the range of wage levels that make up the lowest “sectoral” averages. The Committee wished to know in particular the lowest wages paid to workers who are not covered by collective agreements. It notes that the report does not contain this information. According to the report the German Government has no knowledge of the lowest wages paid to workers who are not covered by collective agreements. The Committee recalls that in those cases where such information is not ordinarily available from national statistics, Governments are invited to provide estimates based on ad hoc studies or sample surveys.

The Committee concludes that the situation in Germany is not in conformity with Article 4§1 of the Charter as there is no evidence that a decent standard of living is guaranteed for a single worker earning minimum wage.

### *Paragraph 2 – Increased rate of remuneration for overtime work*

The Committee notes that the situation which it previously considered to be in conformity with the Charter has not changed.

It therefore concludes that the situation in Germany is in conformity with Article 4§2 of the Charter.

### *Paragraph 3 – Non-discrimination between men and women workers with respect to remuneration*

The Committee notes the information in the German report.

#### *Legal framework*

According to the principle of equality between men and women embodied in Article 3§2 of the Basic Law (*Grundgesetz*), it is prohibited to pay a lower wage or salary to women than to men for the same work or work of equal value. The Committee has also already noted in its last conclusions (Conclusions XVI-2, volume 1, p. 299) that the legal basis for the right to equal remuneration is the Civil Code (BGB, *Bürgerliches Gesetzbuch*), as amended by the two Equality Acts of 1980 and 1994. Section 612§3 of the BGB prohibits employers from paying employees less than they pay employees of the opposite sex for the same work or work of the same value. Pay is taken to include all remuneration, i.e. basic wage, benefits in kind and any other advantages awarded directly or indirectly by the employer to the employee by virtue of an employment contract. Wage agreements (collective wage agreements) and company agreements are required to respect the equal pay principle under Section 3-2 of the Basic Law.

#### *Pay and job comparisons*

The Committee notes that domestic legislation must authorise the extension of comparisons of pay and jobs to other enterprises, where this is necessary for an appropriate comparison. Such comparisons are of fundamental importance for ensuring the effectiveness of objective job evaluation systems in certain circumstances, in particular in enterprises where the workforce is largely, or even exclusively, female (Conclusions XVI-2, Portugal, p. 680). In Germany wage comparisons are performed in the framework of the individual establishment. According to the report, comparisons with employees outside a particular enterprise may be undertaken when internal comparisons are not possible. The Committee asks whether comparisons are possible between employees of different

employers. It also asks whether collective agreements are only concerned with minimum pay, rather than what is paid in practice, since this would preclude the possibility of full comparisons.

#### *Low paid groups*

In its last conclusions, the Committee noted that, historically, "low-wage groups" (*Leichtlohngruppen*) in Germany were predominantly female. It found it consistently difficult, based on the information supplied, to determine the nature of the jobs or work posts concerned by the provisions in question and the profiles of the workers – men or women – who held them. In answer to the Committee's request for information on this subject and further information on the sectors in which these provisions are applied, the report simply states that the principle of equal pay for men and women has been embodied in German legislation for decades. It therefore repeats its request for detailed information.

#### *Statistics and surveys carried out by the government*

According to the report that in 2002 women earned approximately 78 % of men's wages (76 % in the old *Länder* and 92 % in the new *Länder*). The Committee takes note of the more detailed statistics in the brochure "*Kommentierter Datenreport 2005 – Erwerbseinkommen von Frauen und Männern*". Applying the principle of equal pay for men and women is sometimes difficult in practice. According to the report, the government is not directly responsible for the regulation of wage-related matters, which is the responsibility of the social partners. Nevertheless, it has set itself the goal of contributing as far as possible to reducing wage and income differences between women and men, not only for the same work but also for work of equal value. In April 2002, for example, it presented a report on equal pay and on the economic situation of women, "*Bericht des Bundesregierung zur Berufs- und Einkommenssituation von Frauen und Männern*". The government has introduced a number of initiatives and projects designed to raise awareness of wage discrimination among the general public and all those in positions of responsibility, offer positive examples and stimulate policies and political strategies. One example is a code of practice on the implementation of equal pay for work of equal value for men and women (*Leitfaden zur Anwendung des Grundsatzes der Entgeltgleichheit für Männer und Frauen bei gleichwertiger Arbeit*). This is intended to be a tool for employers' associations and trade unions, individual employers and heads of personnel, and anyone else particularly concerned with this issue.

#### *Disputes relating to equal treatment*

In its last conclusion, the Committee asked whether, in addition to back pay, victims of wage inequality could claim any form of compensation and whether in such cases employers might be liable to either criminal or administrative sanctions. In reply, the report states that where unequal treatment also constitutes an invasion of victims' personal privacy, they may be entitled to claim compensation under Article 611a of the Civil Code. Employers are not liable to any criminal or administrative sanctions. The Committee considers that, in order to ensure the observance of labour law and effective guarantee of the rights contained in the Charter, remedies for violations should not be limited to the payment of the amount of money which is owed. This would risk not being sufficiently dissuasive for employers. This is true for the principle of equal pay for male and female workers as well as for reprisal dismissal (see below). The situation in Germany is therefore not in conformity with Article 4§3 of the Charter.

It also considers that the report does not offer sufficiently specific and detailed information on the factors the courts take into account when determining whether there has been a violation of the right to equal pay for work of equal value. It therefore repeats its request for this information.

#### *Protection against reprisals*

Protection against retaliatory measures is afforded by Article 612a of the BGB, which provides that employers cannot discriminate against employees in a contract or unilateral measure on the sole ground that the latter are exercising or claiming their rights. Under Section 134 of the BGB, all reprisal dismissals are null and void. The employment relationship is considered to have been uninterrupted. Employees are therefore entitled to receive any unpaid salary or wages but have no right to compensation.

The Committee has always ruled that in the event of reprisal dismissals, reparation must, in principle, take the form of reinstatement in the same or a similar post. Where this is not possible or not desired by the employee, financial compensation may be acceptable, but only if it is sufficient to deter the employer and to compensate the worker (see, in particular, Conclusions VII, p. 26

and VIII, p. 66; Conclusions XIII-5, pp. 254-255, Statement of Interpretation; Conclusions XIV-2, pp. 480-481, Luxembourg, and p. 374, Iceland). However, German legislation does not provide for compensation if reinstatement is not possible or not desired by an employee.

According to the report, the courts could terminate employment relationships at employers' request if they were no longer viable. In such cases, employees were awarded compensation (*Abfindung*). The law did not lay down any minimum level or criteria to guide the courts in making such decisions. It merely established a maximum level of compensation whereby up to twelve or, exceptionally, eighteen months' wages could be awarded, depending on employees' age and length of service (*Kündigungsschutzgesetz, KSchG*). The Committee considers that the situation in Germany is not in compliance with Article 4§3 of the Charter as, due to its ceiling, the appropriate compensation paid to the employee in case of dismissal and where the contract is terminated by the courts at the request of the employee is neither sufficiently dissuasive nor compensatory.

#### *Part-time employees*

The Committee notes that the principle of non-discrimination between male and female workers implies respect for the principle of equal pay between full-time and part-time employees, since the latter are predominantly female and this can lead to indirect discrimination (Conclusions XVI-2, Poland, p. 615).

The Part-Time Work and Limited Employment Act (TzBfG) came into force on 1 January 2001. Under section 4.1 of the Act, part-time employees must not be treated more unfavourably than comparable full-time employees, unless there are objectively justified reasons for different treatment. Equal treatment is reinforced by the so-called *pro-rata-temporis* principle, whereby employers may only reduce the wages and other monetary benefits of part-time workers in proportion to their reduced work load compared with their full-time equivalents. Where pay increases with length of service, part-time employees are entitled to remuneration in proportion to that of a comparable full-time employees with the same length of service.

However, according to the report, difference of treatment between full and part-time employees is permissible when:

- different treatment is due not to part-time work but to other reasons such as performance, qualifications or experience on the job;
- different treatment is justified by objective reasons, such as different job requirements which can only be fulfilled by full-time workers.

The Committee asks for more detailed information in the next report on this second exception, including practical examples.

The Committee concludes that the situation in Germany is not in conformity with Article 4§3 of the Charter on the grounds that:

- in the event of infringement of the principle of equal pay for equal work, German law only provides for the payment of lost wages. This is not sufficiently dissuasive to ensure the respect of the principle at issue
- due to its ceiling, the compensation paid to the employee in case of retaliatory dismissal and where the contract has been terminated by a court at the request of the employee is neither sufficiently dissuasive nor compensatory.

In accordance with Article 21-1§3 of the Committee's Rules of Procedure, a dissenting opinion of Mrs M. SCHLACHTER, joined by Mr S. EVJU, members of the Committee, is appended to this conclusion

#### *Paragraph 5 – Limitation of deduction from wages*

The Committee notes from the Germany report that there have been no changes to the situation with regard to the limitation of deductions from wages, which it has previously considered to be in conformity with the Charter.

The Committee therefore concludes that the situation in Germany is in conformity with Article 4§5 of the Charter.

## **Article 9 – Right to vocational guidance**

The Committee takes note of the information in the German report.

### *Vocational guidance in the education system*

#### *a. Functions, organisation and operation*

Vocational guidance is co-ordinated by the federal employment agency, which has a nationwide network of 178 employment agencies and 650 local offices.

It is provided free of charge by all employment agencies, and can also be provided by private service providers and by municipal bodies certified under Book II of the Social Code.

In answer to the Committee, the report states that students can choose whether or not to follow the advice received through guidance. Book III of the Social Code does not provide for penalties for failure to comply with advice given.

#### *b. Expenditure, staffing and number of persons assisted*

Despite the Committee's request, there is nothing in the report on staffing, expenditure or the number of beneficiaries in the education system. It therefore repeats its request.

The Committee notes that nearly 230 000 vocational guidance seminars and programmes for pupils, students, parents, teachers and other target groups took place in the 2002/2003 school year. Moreover, since 2002, Book III, section 33, of the Social Code has authorised employment agencies to promote 'in-depth' job orientation programmes, on condition that third parties meet at least 50 % of the costs.

The Committee also notes that programmes such as the one entitled "transition from school to work" add a practical dimension to guidance. It includes activities such as multiple company visits, open days and company placements for pupils and teachers. Another programme follows an agreement between the federal employment agency and the education ministries of the various Länder and places particular emphasis on the future requirements of working life and the need to make job and career decisions independently and responsibly.

### *Vocational guidance in the labour market*

#### *a. Functions, organisation and operation*

The Committee notes that, in recent years, increasing emphasis has been placed on working in networks, as in the case of the "how to become a university student" network, concerned with removing obstacles to resuming studies. This network supplies educational and labour market information for school leavers with a higher leaving certificate and promotes regional cooperation in the choice of study course and occupational orientation.

As part of the restructuring of employment agencies, so-called "youth teams" are being established that focus on guidance and placement of young people aged under 25.

#### *b. Expenditure, staffing and number of persons assisted*

The Committee notes that there have been no changes to the situation, which it has previously found to be satisfactory (Conclusions XVI-2, p. 304).

### *Dissemination of information*

The Committee notes that there have been no changes to the situation, which it has previously found to be satisfactory (Conclusions XVI-2, p. 304).

### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 9 of the Charter.

## Article 10 – Right to vocational training

### *Paragraph 1 – Promotion of technical and vocational training and the granting of facilities for access to higher technical and university education*

The Committee takes note of the information in the German report.

The Committee has already looked into the organisation of the secondary and higher education system and considered it to be in conformity with the Charter (Conclusions XVI-2, pp. 312-315).

In reply to the Committee's question, the report states that students can transfer between different types of school. Recognition of academic qualifications is guaranteed in principle provided that there are agreements between *Länder*.

In 2002, there were 16 376 secondary schools attended by a total of 1 006 400 pupils<sup>1</sup>. In the 2002-2003 academic year, there were some 1.9 million students in higher education and 359 higher education establishments (including universities and equivalent higher education establishments such as university institutes of technology, higher colleges of applied sciences and colleges of arts and music).

Central government and the governments of the *Länder* allocated some 200 million euros (EUR) to special training programmes intended to create additional places for vocational training. The number of enrolments of new students into vocational training increased from 265 000 in 2001 to 266 000 by the end of the reference period.

From Eurostat data the Committee notes that Germany allocated 4.4 % of its GDP in 2002 to education at all levels (the European Union average was 4.9 % in 2002).

In the absence of information in the report, the Committee asks what proportion of graduates find employment and how long it takes for them to find their first skilled job.

Pending receipt of the information requested, the Committee considers that the situation in Germany is in conformity with Article 10§1 of the Charter.

### *Paragraph 2 – Promotion of apprenticeship*

The Committee takes note of the information in the German report.

In reply to the Committee's question, the report states that the length of apprenticeship varies between two and three-and-a-half years depending on the occupation. Employers are free to choose which apprentices they want to train and apprentices are free to choose employers, with the assistance of the Federal Labour Agency. Under section 22 of the Vocational Training Act, either party can terminate the contract without notice during the probationary period. After the probationary period the contract can only be broken without notice for serious reasons or with four months' notice by the employer if he or she wishes to discontinue training. In December 2002, apprentices' monthly wages were 440 euros (EUR) in the first year and EUR 555 in the third.

According to the report, following a decline in the number of apprenticeship contracts signed in 2003 (557 634 new contracts, i.e. 14 689 fewer than in 2002), the number increased again, to 572 980 contracts in 2004 (a 2.8 % rise). On 16 June 2004, the government and the employers' associations signed a "National Pact for Career Training and Skilled Manpower Development in Germany" – a three-year agreement under which they undertook to provide training for every young person who was willing and able to take part. The employers' associations announced that 30 000 new apprenticeship places would be created, together with an additional 25 000 places for company-based introductory training. To support the companies concerned, the Federal Employment Agency will pay them EUR 192 a month to cover apprenticeship costs and a flat rate of EUR 102 per month to cover social insurance contributions. These payments are made for six to twelve months, i.e. for the whole length of the introductory training period. In 2004, 59 500 apprenticeship places were created, along with 31 000 introductory training places. The Government also helps any of the new *Länder* having difficulty in creating new apprenticeship places.

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1. Eurydice database ([www.eurydice.org](http://www.eurydice.org)).



In 2002, there were 1.62 million apprentices in all sectors combined, 42 % of whom were women<sup>1</sup>.

According to the report, companies' total expenditure on the 1.56 million apprentices trained under the dual system in 2004 was about EUR 14 billion. The same year, the *Länder* spent about EUR 2.81 billion on the vocational colleges providing the apprentices' compulsory theoretical training.

The Committee concludes that the situation is in conformity with Article 10§2 of the Charter.

#### *Paragraph 3 – Vocational training and retraining of adult workers*

The Committee takes note of the information in the German report.

#### *Employed persons*

The "National Pact for Career Training and Skilled Manpower Development in Germany", signed by the Government and employers' associations on 16 June 2004, includes several measures that relate to older workers, including wage guarantees, exemption from employers' contributions to unemployment insurance, wage subsidies for workers with insufficient work, measures to facilitate the negotiation of temporary work contracts and promotion of further training.

In reply to the Committee's question, the report states that the Act on Modern Public Services in the Labour Market of 1 January 2003 promotes continuing education and draws on the principles in Book III of the Social Code. The Act introduces a system of three-month "training vouchers", which allow participants to choose freely among the training courses on offer. Employed workers are entitled to a continuing training allowance to consolidate their knowledge in order to keep their job, to attend training if they have never had the chance to do so or to avoid becoming unemployed.

The Job-AQTIV Act (which came into force in January 2002) has introduced new measures to promote training for employees:

- employers who give employees one day a week off to attend continuing training are entitled to wage subsidies, which also cover their share of the overall contribution to social insurance;
- companies with up to 100 employees are entitled to support for the continuing training of workers over 50 who require training to avoid unemployment. Such workers are granted an allowance if the training is approved by the employment agency, which will then refund all training costs.

In reply to another question by the Committee, the report states that there is no statutory or individual right to training if a worker has already attended a training course. Continuing education for workers is governed by the continuing education legislation of the *Länder*, collective agreements, company agreements and various other types of agreement between employers and employees. Individual training leave is provided for by the legislation of twelve *Länder*. Under this legislation, workers are entitled to five days' paid leave per year to attend continuing education courses. However, fewer than 1.5 % of persons entitled to such leave have actually taken it.

#### *Unemployed persons*

The Committee notes that unemployment has continued to rise. From 8.2 % in 2002, it increased to 9 % in 2003 and 9.5 % in 2004. The proportion of long-term unemployed has also grown, increasing from 47.7 % of total unemployed in 2002 to 49.6 % in 2003.

In reply to the Committee's question, the report states that the activation rate of young long-term unemployed people was 42.8 % in 2002 whereas that of adults was around 24 %. In 2003, the rate was 41.7 % for young people and 16.4 % for adults. Under the relevant guidelines, 25 % of the long-term unemployed should take part in training programmes by 2010. The implementation of the Fourth Act on Modern Public Services in the Labour Market should also increase the activation rate for the long-term unemployed.

The Committee takes note of the range of active employment policies aimed at specific categories. According to the report, 447 626 women took part in an active employment measure in 2003 (mainly in the form of further vocational training) and new measures were introduced, particularly following the

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1. Eurydice database ([www.eurydice.org](http://www.eurydice.org)).

adoption of the Job-AQTIV Act, including wage supplements for vocational training, recruitment subsidies, aid for the creation of jobs and grants for persons setting up businesses.

According to the report, 1 336 365 people entitled to the measures provided for in Book III of the Social Code attended a training course during the reference period. In 2000, 40 % of employed persons between the ages of 19 and 64 attended vocational training courses, i.e. 12.8 million people. By 2003, this figure had risen to 67 %, or 22 million people.

In 2004, some EUR 2.17 billion were spent on promoting vocational training. The Committee asks for detailed information on how the cost of vocational training is shared between public bodies (state or other collective bodies), unemployment insurance systems, enterprises and households.

#### *Conclusion*

The Committee concludes that the situation is in conformity with Article 10§3 of the Charter.

## **Article 15 – Right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement**

### *Paragraph 1 – Vocational training for persons with disabilities*

The Committee takes note of the information provided in the German report. The Committee also received additional information on Article 15 in general, and specifically on Germany, by the INGO members of the Grouping for the Social Charter of the Council of Europe.

In 2003, the number of persons with severe disabilities was around 6.6 million, i.e. 8 % of the population (47 % in the age bracket 15-65 and 51 % over 65). The Committee notes that the definition of disability in Germany was examined in the light of the ICF standards (International Classification of Functioning, Disability and Health) by a working-group and was considered to essentially meet them (e.g. the notion of participation). The Committee asks to be kept informed of any further developments in the definition.

### *Education*

The Committee recalls that, as stated in the Autism-Europe decision (Autism-Europe v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003, §48), “the underlying vision of Article 15 is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of “independence, social integration and participation in the life of the community. Securing a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights”. Under Article 15§1, the Committee therefore considers necessary the existence of non-discrimination legislation as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, as a minimum, require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an effective right to education.

It should be noted that, in the view of the Committee, Article 15 applies to all persons with disabilities regardless of the nature and origin of their disability and irrespective of their age. It thus also covers both children and adults who face particular difficulties in education, such as persons with intellectual disabilities.

The Committee notes that a decision of the Federal Constitutional Court<sup>1</sup> considered that Article 3(3) of the Basic Law was infringed by the refusal to mainstream a girl with disabilities and her consequent admission to a special school. The Court decided that the exclusion of the child from mainstream education would amount to discrimination under Article 3(3) of the Basic law, unless special educational needs would justify it. In the particular case, it considered that the existence of such needs had not been sufficiently established by the authorities.

The Committee considers that the situation is in conformity with the requirements of Article 15§1, which is based on the presumption of mainstreaming, unless compelling reasons justify special education. It nonetheless asks whether the principle has been transposed into legislation at Lander level, as well as whether general teacher training incorporates special needs education as an integral component.

Mainstreaming is recommended by the Conference of the Ministers of Education and Culture of the Federal States. The Committee notes from the additional information provided by the German Government upon request that children with disabilities are also subject to compulsory education. 100 % of these children between the age of 6 and 17 attend school. In 2003, 5.6 % of all pupils in Germany received special educational support. 13 % of these children were educated in integrated classes at general schools with pupils without such special needs. Wherever necessary, additional special educational support is offered in terms of a special teacher for a regular class, technical aids, or a reduced number of pupils in the class. Similarly, architectural adjustments are carried out. Children with disabilities are assessed through a comprehensive learning and development report instead of grades.

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1. BVerfG, NJW 1997, p. 1062.

### *Vocational training*

The report indicates that the purpose of training activities for persons with disabilities is to provide them with a qualification for a recognized occupation. In 2003, the ratio of applicants who have not been placed in training at the end of vocational guidance was lower for persons with disabilities (2.6 %) than for non-disabled young persons (6.2 %). Similarly, the training rate was higher (72.9 %) if compared to 48.1 % for non-disabled. During the period of reference, persons with disabilities undertaking training increased from 11 200 to 35 800.

The Act to Promote Training and Employment for Persons with Disabilities, which entered into force in 2004, provides for measures aimed at increasing the offer of training places for persons with disabilities, in particular in companies. Specialized integration services have been put in place to help the Federal Employment Service in providing counseling and guidance, as well as transition from school to work (Book IX of the Social Code).

Employers, when filling vacant jobs, must consult with the workers' representatives and the body representing employees with disabilities. Employers may receive subsidies and bonuses towards the cost of the vocational training given to persons with disabilities. Hiring severely disabled persons counts double in filling the quota with respect to persons with disabilities. Finally, to improve the prospects of employment at the end of training, companies are to be more actively involved in training activities of specialized training centers. In these cases, the Social Code provides for the combination of in-company and extra-company training. The specialized training centers remain responsible for the organization and the cost of the training.

The Committee asks the next report to provide information on the impact of the above-mentioned measures on vocational training. It also recalls that under Article 10 of the Charter it regards vocational training as encompassing all types of higher education including university education. It considers that this interpretation applies *mutatis mutandis* to Article 15 and therefore asks information on access to higher education for persons with disabilities.

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 15§1 of the Charter.

### *Paragraph 2 – Employment for persons with Disabilities*

The Committee takes note of the information provided in the German report.

### *Non-discrimination legislation*

The Federal Constitution (Article 3(3)) prohibits discrimination on the basis of disability and IX Book of the Social Code develops it further with respect to employment (Section 81(2)) for persons with severe disabilities. It provides that employers may not unfairly treat a severely disabled employee with respect to access, dismissal, etc. The 2002 Act on the Equalization of Disabled Persons (BGG) covers, *inter alia*, the abolition of discriminatory provisions in occupational regulations in the public sector and provides for a disability Ombudsman.

The Committee recalls that non-discrimination legislation must provide for the adjustment of working conditions (reasonable accommodation) in order to guarantee the effectiveness of non-discrimination legislation in the field of employment. It notes that Section 81(4) of the IX Book of the Social Code provides for reasonable accommodation for severely disabled employees. The employer is under the obligation to provide them with a job in which they can use and improve their skills and knowledge to the fullest extent possible. They also have the right to an adjusted work place, work organization and technical equipment according to their specific needs, as well as with respect to the essential functions of the job (toilets, lifts, canteens). However, the measures needed must amount to a disproportionate burden for the employer, i.e. involving unreasonable costs or infringing occupational health and safety regulations or civil service law. The employer has the possibility to apply for loans, which are granted on a case-by-case basis and generally cover the majority of the cost of the adjustment.

In order to assess whether the right to non-discrimination in employment is effectively guaranteed for persons with disabilities, the Committee asks the next report to indicate how reasonable accommodation is implemented in practice, whether there is case law on the issue and whether has prompted an increase in ordinary market employment of persons with disabilities.

### *Measures to promote employment*

There must be obligations on the employer to take steps in accordance with the requirement of reasonable accommodation to ensure effective access to employment and to keep in employment persons with disabilities, in particular persons who have become disabled while in their employment as a result of an industrial accident or occupational disease.

In 2003, the number of persons with severe disabilities was around 6.6 million, i.e. 8 % of the population (47 % in the age bracket 15-65 and 51 % over 65). Out of the around 3 million severely disabled persons in working-age, the report indicates that 1 million were available for placement in the ordinary labour market, and 2 million were not. In 2003, 884 000 persons with disabilities were employed in commercial establishments and in administrations; 167 800 were unemployed (i.e. a specific unemployment rate of 17.6 %); and 245 800 were employed in workshops for the disabled.

In reply to the Committee, the report indicates that the implementation of the Act on the reduction of unemployment among severely disabled persons (see Conclusions XVII-2, p. 317 for its description), entered into force in 2000 and incorporated in the IX Book of the Social Law Code, was successful in improving the employment of persons with disabilities. The report provides figures on the implementation of the legislation. In 2002 unemployment fell to 144 300, which amounted to 23.9 % decrease in comparison with 1999 figures. Nonetheless, due to a difficult labour market situation, it increased again to 172 500 in 2004. The Committee takes note of these figures, but it observes that they are rather close to those of 2000 (see Conclusions XVII-2, p. 317) and it therefore asks whether, beyond figures, the various measures introduced by the reform have had a positive impact on employment opportunities of persons with disabilities. It also asks what are the measures foreseen to activate the 2 million persons and whether sheltered employment is the only alternative available.

Integration subsidies, which are direct wage subsidies, were paid to a total of 17 600 severely disabled employees and apprentices for a period varying from three to eight years. Individual benefits are also provided to employers in order to adapt and maintain in the job persons with disabilities (around 36 000 cases in 2003).

Employers are required by law to ensure 5 % of the workforce has serious disabilities. The Committee recalls that Article 15§2 does not require the introduction of quotas but, when such a system is applied, the Committee examines its effectiveness when assessing conformity with Article 15§2. Since there is no information on the application of quotas in practice, the Committee is unable to assess the situation. It

therefore asks: whether quotas are filled; whether there are sanctions in the event of non-fulfillment; and whether there are alternatives to comply with the obligation.

The Committee recalls that Article 15§2 of the Charter requires that persons with disabilities be employed in an ordinary working environment. Sheltered employment facilities must be reserved for those persons who, due to their disability, cannot be integrated into the open labour market. They should aim nonetheless to assist their beneficiaries to enter the open labour market. According to the report, measures exist to ease transition, such as transition groups, the intervention of the specialized integration services, the possibility for the employer to receive a subsidy for hiring former workshop employees and compensate their reduced performance, as well as to include them in the quota. The Committee asks the next report to provide figures on persons with disabilities in sheltered employment and the transition rate to the open labour market.

Persons with disabilities in sheltered employment work on a workshop contract in a quasi-employment relationship. They receive a performance-based wage, which depends on the economical viability of the activity (Sheltered Workshop Ordinance), and subsistence guarantee benefits. Employees are insured for pensions, health, long-term care, and occupational accidents. As a result of the 2001 Workshop Participation Ordinance, trade unions participate in sheltered employment.

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 15§2 of the Charter.

**Dissenting opinion by Mrs SCHLACHTER,  
joined by Mr EVJU**

*Conclusion relating to Article 4§3*

Art. 4.3 of the Charter provides for equal pay for work of comparable worth to male and female employees. Nothing in the text allows for the conclusion that States are obliged to enact criminal or administrative sanctions for violations of that right. Introducing civil liability will do as long as the victim is fully compensated and damages are sufficiently dissuasive for employers. Whether or not financial compensation has a deterrent effect on employers is not a question of the amounts' composition. A duty to compensate lost wages, a payment due for time periods without any work performed by the employee, can be very dissuasive by the mere level of the amount of money due. Additionally, deterrence only works against intentional wrongdoing. If an employee is directly discriminatory paid less, (= because she is a woman), German law allows for additional compensation for non-pecuniary damages under (then) Art. 611a of the Civil Code on top of the compensation for lost wages, because direct discrimination constitutes a violation of the victim's "right of personality".

As for protection against reprisal dismissals, States are requested to provide in principle for reinstatement. Primarily I doubt that this request is soundly rooted in the principle of non – discrimination in wages, Art. 4.3 is not about dismissals, anyway. But even if some form of dismissal is singled out for survey under Art. 4.3, the requests are met. German law provides for the very "sanction" of reinstatement, and in retaliatory dismissal cases there is no possibility for an employer to initiate dissolution of the labour contract in court against the employee's will. If the law were to provide for reinstatement only, all requirements would have been met. The situation certainly gets not worse for employees because they are given an additional alternative to choose according to their own free will. If the contract is dissolved in court on the employee's request, they are entitled to back pay and additional compensation, the dissuasive effect thereof again is reached by the total amount due.