December 2010

European Social Charter

European Committee of Social Rights
Conclusions XIX-3 (2010)
(POLAND)

Articles 2, 4, 5 and 6 of the Charter

This text may be subject to editorial revision.

Introduction

The function of the European Committee of Social Rights is to rule on the conformity of the situation in States with the European Social Charter. In respect of national reports; it adopts "conclusions" in respect of collective complaints, it adopts "decisions".

A presentation of this treaty as well as statements of interpretation formulated by the Committee appear in the General Introduction to the Conclusions[1].

The European Social Charter was ratified by Poland on 25 June 1997. The time limit for submitting the 9th report on the application of this treaty to the Council of Europe was 31 October 2009 and Poland submitted it on 13 November 2009.

This report concerned the accepted provisions of the following articles belonging to the thematic group "Labour rights":

- the right to just conditions of work (Article 2),
- the right to a fair remuneration (Article 4),
- the right to organise (Article 5),
- the right to bargain collectively (Article 6),
- the right to information and consultation (Article 2 of the Additional Protocol),
- the right to take part in the determination and improvement of the working conditions and working environment (Article 3 of the Additional Protocol).

Poland has accepted all of these articles, with the exception of Articles 2§2, 4§1, 6§4 of the Charter and Article 2 and 3 of the Additional Protocol.

The reference period was 1 January 2005 to 31 December 2008.

The present chapter concerns 12 situations and contains:

- 7 cases of conformity: Articles 2§3, 2§4, 2§5, 4§3, 6§1, 6§2, 6§3;
- 5 cases of non-conformity: Articles 2§1, 4§2, 4§4, 4§5, 5.

The next Polish report deals with the accepted provisions of the following articles belonging to the fourth thematic group "Children, families and migrants":

- the right of children and young persons to protection (Article 7),
- the right of employed women to protection (Article 8),
- the right of the family to social, legal and economic protection (Article 16),
- the right of mothers and children to social and economic protection (Article 17),
- the right of migrant workers and their families to protection and assistance (Article 19).

The deadline for the report was 31 October 2010.

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

Article 2 - Right to just conditions of work

Paragraph 1 - Reasonable working time

The Committee takes note of the information contained in the report submitted by Poland.

The report indicates that there have been no changes to the legal framework, which was previously found not to be in conformity with the Charter.

It describes again the exact circumstances under which a working day may be extended to 16 or 24 hours (namely for jobs such as surveillance of machines and guards), as well as the compensatory rest periods for work of this type. The Committee recalls that daily working time should in no circumstances exceed sixteen hours per day, even in the context of the above-mentioned occupations. The Committee therefore reiterates its conclusion of non-conformity.

Moreover, the report mentions that during the reference period there has been a sharp increase in the number of inspections by the Labour Inspectorate in respect of working time. In 2007, 547 employers were inspected (covering 86.000 workers), and 389 criminal fines were imposed.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 2§1 of the Charter on the ground that regulations permit daily working time of more than 16 hours in various occupations.

Article 2 - Right to just conditions of work

Paragraph 3 - Annual holiday with pay

The Committee takes note of the information contained in the report submitted by Poland.

In its previous conclusion (Conclusions XVIII-2), the Committee asked for information on the rules of postponement. Under Article 161 of the Labour Code, leave must be granted to workers during the year in which they gained the leave entitlement. Deferral of leave is granted only in exceptional circumstances, as prescribed by Articles 164 and 165 of the Labour Code, justifying postponement of the deadline for leave. According to Article 168 of the Labour Code, leave not taken in accordance with the leave calendar, or determined in consultation with the employer, must be granted to workers not later than the end of the first quarter of the following calendar year.

Conclusion

The Committee concludes that the situation in Poland is in conformity with Article 2§3 of the Charter.

Article 2 - Right to just conditions of work

Paragraph 4 - Reduced working hours or additional holidays in dangerous or unhealthy occupations

The Committee takes note of the information contained in the report submitted by Poland.

The Committee refers to the statement of interpretation it made on Article 2§4 of the 1961 Charter in the General Introduction to Conclusions XVIII-2.

Article 2§4 requires states to grant workers exposed to residual risks one form or another of compensation if the risks have not been eliminated or sufficiently reduced despite the full application of the prevention and protection measures deriving from Articles 3 and 11, or if such measures have not been applied. The aim of these measures should be to afford the persons concerned sufficient regular rest time to recover from the stress and fatigue caused by their occupation and thus maintain their vigilance or limit their exposure to the risk. Article 2§4 mentions two forms of compensation, namely reduced working hours and additional paid holidays. In view of the emphasis the article places on health and safety objectives, the Committee considers that other approaches to reducing exposure to risks may also be in conformity with the Charter. Under no circumstances, however, can financial compensation be considered appropriate under Article 2§4 (Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint No. 30/2005, decision on the merits of 6 December 2006 and Conclusions XVIII-2, statement of interpretation of Article 2§4).

The Committee refers to its conclusion under Article 3 of the Charter (Conclusions XIX-2) which describes the dangerous occupations performed and the preventing measures taken in this regard.

Under Article 145§1 of the Labour Code, workers employed under conditions which are significantly harsh or detrimental to their health are entitled to a reduction in working time that may be constituted by additional breaks included in the working time, or by a reduction of working time. Article 145§2 of the Labour Code provides that the list of activities considered arduous or unhealthy shall be drawn up by the employer after consulting the workers or their representatives and obtaining an opinion from the doctor in charge of workers' preventive medical care. Collective agreements may also prescribe a right to additional leave with pay for persons working under such conditions.

In its previous conclusion (Conclusions XVIII-2), the Committee seeked confirmation that workers employed in the ship building industry and the chemical and pharmaceutical industry are entitled to reduced working time or benefit from other measures reducing their exposure to risks. In reply to the Committee's question, the report confirms that workers employed in these sectors receive a reduction in working time having regard to the specific working conditions that obtain in each of the enterprises concerned.

Conclusion

The Committee concludes that the situation in Poland is in conformity with Article 2§4 of the Charter.

Article 2 - Right to just conditions of work

Paragraph 5 - Weekly rest period

The Committee takes note of the information contained in the report submitted by Poland.

The report provides information on the measures taken by the Labour Inspectorate to ensure compliance with the legislation as well as information on the number of violations detected and the trends in violations.

The Committee asks that the next report provides a full and up-to-date description of the situation in law and practice in respect of Article 2§5.

Conclusion

The Committee concludes that the situation in Poland is in conformity with Article 2§5 of the Charter.

Article 4 - Right to a fair remuneration

Paragraph 2 - Increased remuneration for overtime work

The Committee takes note of the information contained in the report submitted by Poland.

The report indicates that there have been no changes to the legal framework, which was previously found not to be in conformity with the Charter.

The report states once again that an amendment to the Labour Code is under consideration with a view to compensating overtime in the proportion of 50% extra time off for employees that request this type of compensation. Likewise, an amendment to the Law on Public Service is also underway, which foresees time off increased by 25% to compensate overtime work of civil servants.

The Committee finds that these draft amendments would bring the situation into conformity with the Charter. However, until they are adopted and enter into force it reiterates its conclusion of non-conformity.

Finally, it asks the next report to provide information on the activities of the Labour Inspection in respect of any breaches related to the failure to pay overtime wages.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 4§2 of the Charter on the ground that time off granted to compensate overtime is not sufficiently long.

Article 4 - Right to a fair remuneration

Paragraph 3 - Non-discrimination between and women men with respect to remuneration

The Committee takes note of the information contained in the report submitted by Poland.

Legal basis

Under Article 11^2 of the Labour Code, all employees must have equal rights and equal obligations, and this relates in particular to equality between women and men. The principle of non-discrimination on grounds of sex is crucial and this must be taken into account in all other labour legislation and its interpretation..

According to the report a bill designed to transpose the relevant European Union directives on equal treatment into Polish law was adopted by the Cabinet Committee on 29 June 2009 and referred to the Cabinet. The Committee asks to be kept informed of future developments in relation to the adoption of this bill, particularly as regards its content and the effects of its adoption at national level.

In reply to the Committee's question on how wages are fixed, the report states that employers are required to apply Article 18^{3C} of the Labour Code, which guarantees employees the right to equal pay for equal work or work of equal value. Furthermore, under Articles 77^1 and 77^3, arrangements for pay and the award of other work-related benefits must be established by employers through collective agreements within their company or between several companies or, in the case of employees of public sector

employers , through regulations of the Minister of Labour adopted at the request of the relevant Minister. In companies employing at least 20 people, arrangements for pay are set out in pay regulations. If the company is not covered by a collective agreement or has no pay regulations, these arrangements are set out directly in the individual employment contract. The Committee wishes to know what methods are used to fix wages and if provision is made for penalties in case the principle of equal pay is breached, particularly where individual employment contracts are concerned.

Disputes over equal pay

Although there is not very much case-law on equal pay for women and men, the report outlines the main lines of the Supreme Court's reasoning in cases relating to breaches of the general principle of equal pay. For instance, in judgment II PK 154/05 of 15 March 2006, the Supreme Court ruled in relation to professional duties performed on a post that was unique to the employer's organisational set-up, that there was no real means of assessing and comparing the wages for similar types of job (alleged infringement of Article 18^{3C} of the Labour Code). In a second judgment of 22 February 2007 (I PK 242/06), the Supreme Court ruled that, where different wages were paid to employees doing the same job (Article 18^{3C}, paragraph 1 of the Labour Code), employers were required to prove that the difference was based on objective criteria (the end of paragraph 1 of Article 18^{3B} of the Labour Code). Employers who use professional qualifications and length of service as criteria must prove that these criteria are essential for the employees concerned to carry out their tasks. Where the principle of non-discrimination in the workplace has been breached, Article 18^{3D} provides that employers must pay compensation, which must be no lower than a minimum amount fixed in accordance with other provisions of the law. There is no upper limit on the amount that the court may order them to pay. To ensure that compensation provides sufficient reparation for employees and acts as a sufficient deterrent for employers, the Committee asks for specific examples of compensation awarded for breaches to the principle of equal pay. The Committee also asks whether domestic law provides for the burden of proof to be shifted away from the employee in cases of alleged sexual discrimination.

Other measures taken to ensure equal pay treatment

Numerous factors account for the fact that there is still a wage gap between women and men. Among the main ones are objective differences linked to individuals (age, training, experience), jobs (profession, contract type or working methods) or companies (sphere of activity or company size). The Committee takes note of the two projects set up by the Ministry of Labour and Social Policy which are to touch, among other things, the problem of the wage gap, namely a project for the social and economic activation of women at local and regional level, running from December 2008 to April 2011, and another on reconciling women's and men's work and family roles, from January 2009 to April 2011. These projects get the social partners, the public employment services, employer organisations and trade unions more directly involved in action to combat sex discrimination in employment, including wage discrimination.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Poland is in conformity with Article 4§3 of the Charter.

Article 4 - Right to a fair remuneration

Paragraph 4 - Reasonable notice of termination of employment

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

The situation was found not to be in conformity with Article 4§4 in its previous conclusion (Conclusions XVIII-2) because the Labour Code made a distinction with regard to notice of termination of employment between employees on fixed-term and permanent contracts. For employees on fixed-term contracts the notice period was two weeks for those with over six months' service whereas, for employees on permanent contracts, the notice period was two weeks for those with fewer than six months' service, one month for those with six months' to three years' service and three months for those with over three years' service. However, fixed-term contracts could only be terminated if they were negotiated for a period of over six months and if the contracting parties had added a special termination clause.

The Committee notes from the report that that no changes have been made to increase the notice periods granted to employees on fixed-term contracts.

According to the report, the justification for this differentiation lies in Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, which, it claims, allows the working conditions of employees on permanent contracts and those on fixed-term contracts to differ in some respects provided that the latter are covered by measures protecting them from abuses by their employers.

The Committee reiterates that the fact that a domestic regulation reproduces or is inspired on a European Union Directive can not prejudge its conformity with the Charter. Therefore, irrespective of whether Polish legislation is in conformity or contravenes Directive 1999/70/EC, a separate assessment on compliance with Article 4§4 is carried out by the Committee.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 4§4 of the Charter on the ground that a two-week notice period granted to workers who's working relationships are terminated before the end of the fixed-term contracts is not long enough.

Article 4 - Right to a fair remuneration

Paragraph 5 - Limits to deduction from wages

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

The Committee notes from the report that there has been no change in the situation as regards limitations on deductions from wages, which it previously found not to be in conformity with Article 4§5 of the Charter. The Committee notes that after deductions employees must always earn at least 80% of the minimum national wage (report of Governmental Committee on Conclusions XVIII-2). Nevertheless, it considers that after these deductions, the incomes of employees with the lowest wages do not enable them to provide properly for themselves or their dependants. The same applies to the rule that

the total amount of deductions may not exceed half the employee's wages or three-fifths in the case of the recovery of maintenance payments.

The report states that under the Labour Code, the financial penalties imposed on employees for disciplinary offences or unjustified absences are relatively low. Deductions from wages for such purposes may not exceed one day's wages and, in total, financial penalties may not exceed one-tenth of the employee's wage after the deductions referred to in Article 87, paragraph 1, points 1 to 3 of the Labour Code.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 4§5 of the Charter on the ground that the wages of workers with the lowest wages, after deductions, do not ensure means of subsistence for themselves and their dependants.

Article 5 - Right to organise

The Committee takes note of the information contained in the report submitted by Poland.

The Committee already examined the situation with respect to the right to organise (forming trade unions and employer associations, freedom to join or not join a trade union, trade union activities, representativeness, and personal scope) in its previous conclusions. It will therefore only consider recent developments and additional information in this conclusion.

Personal scope

The Committee previously ruled that Section 69§4 of the 1998 Civil Service Act, which prevents public officials from performing trade union functions, impairs their right to organise. The report indicates that a new Act on civil service was enacted in 2008 in replacement of the 1998 Act. According to Section 67§6 of the 2008 Act public officials are now able to undertake trade unions functions. The only exception concerns senior civil servants exercising public powers. Section 52 lists these civil servants. The Committee notes that the ILO Committee of Experts for the Application of Conventions and Recommendations had asked at the drafting stage of this Act that deputies to the voïvodeship veterinary offices, to the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products, and the Office for Forest Seed Production be removed from the draft list of civil servants deprived of the right to exercise trade union functions.[1] However, the Committee notes that the text enacted does include these civil servants in above-mentioned Section 52 of the 2008 Act. The Committee considers that depriving such categories of civil servants cannot be considered as justifiable, and therefore finds that the situation is not in conformity with Article 5.

The Committee notes that the Internal Security Agency (ISA) is composed on the one hand of staff who whilst not members of the armed forces are assimilated to them and on the other of civilian staff. The former, in the same way as members of the armed forces, do not enjoy the right to organise, whilst the latter do. It examined in its last conclusion (Conclusions XVIII-1) the functions of the ISA and found that it was indirectly involved in national defence. It considered this restriction in the light of Article 31 of the Charter, which permits restrictions on the right to organise if they are prescribed by law, have a legitimate aim and are necessary in a democratic society. It noted that the restriction is prescribed by law and pursued the legitimate of national security. However, it considered that simply removing ISA personnel's right to organise cannot be deemed proportionate to the legitimate aim pursued and therefore cannot be considered necessary in a democratic society. It found that the situation is not in compliance with Article 5 of the Charter. The Committee asks whether ISA staff who cannot form or join trade unions are entitled to form or join associations with a view to defending their social and economic interests. However, in the meantime and since the report indicates that there has been no change in the situation, the Committee reiterates that the situation is not in conformity with the Charter on this point.

As regards home workers, unemployed workers, and retired workers, the report indicates that no changes have taken place and these categories do not enjoy the right to form trade unions but can form associations (see Conclusions XVIII-1):

- First, the Committee considers that there can be no satisfactory justification to deprive altogether home workers of the right to form trade unions and thus finds the situation in breach of Article 5.
- Secondly, insofar as unemployed and retired workers are concerned, the Committee notes that in Poland they can participate in existing trade unions or form associations to further their specific interests. The Committee considers that organisations of retired and unemployed workers, irrespective of their status, should have access to consultation procedures open to trade unions in which they are formally consulted on public policies or legislative developments that may affect retired or unemployed workers. The Committee therefore asks the next report to indicate whether the associations of unemployed and retired workers which exist in Poland are entitled to participate in consultation procedures which are concerned with public policies of legislative developments which can affect their situation.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 5 of the Charter on the gounds that:

- some categories of civil servants (deputies to the voïvodeship veterinary offices, to the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products, and the Office for Forest Seed Production) cannot perform trade union functions;
- part of the staff of the Internal Security Agency do not enjoy the right to organise;
- home workers do not enjoy the right to form trade unions.

[1] *ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR): Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (document No. 062009POL087, published in 2009).*

Article 6 - Right to bargain collectively

Paragraph 1 - Joint consultation

The Committee takes note of the information contained in the report submitted by Poland.

It recalls that in its previous conclusions (Conclusions XV-1, XVI-I, XVII-1 and XVIII-1), it held the mechanisms for joint consultation in Poland to be in conformity with Article 6§1 of the Charter. In its last conclusion, it asked for further information on:

- the introduction of legislation which was under discussion to implement the Directive of the European Parliament and of the Council 2002/14/EC establishing a general framework for informing and consulting employees;
- joint consultation at the enterprise level outside the scope of the negotiation of collective agreements and in enterprises with no trade union representation takes place.

In reply, the report indicates that legislation on information and consultation of workers was indeed enacted on 7 April 2006 to implement the above mentioned Directive. The report also points out that the establishment of work councils and their functioning gave rise to several complaints and inspection which increased during the reference period (15 employers were controlled in 2006 and 86 in 2008; a violation was found in 5 cases in 2006 and 24 in 2008).

The report also highlights that on 1 July 2008, the Constitutional Tribunal (*Trybunal Konstytucyjny*) held that Article 4, paragraphs 1, 3 and 5 of the Law of 7 April 2006 on information and consultation of workers was in contrast with the Constitution. Consequently, on 22 May 2009 amending legislation was adopted (outside the reference period). The Committee asks that the next report to describe the amendments introduced and provide details on the implementation of the law as amended.

Meanwhile, the Committee also notes from a source other than the national report**Error! Hyperlink reference not valid.** that employers often ignore the law that obliges them to consult trade unions prior to taking decisions that affect workers. According to the same source, the works council at the Factory of Motor Cars (*Fabryka Samochodów Osobowych*) in Warsaw had its right to be informed and consulted enforced via a court ruling. This set a precedent, and some 20 similar petitions were brought before courts.The Committee asks the next report to comment on the above statement and to up-date the Committee on the situation.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Poland is in conformity with Article 6§1 of the Charter.

Article 6 - Right to bargain collectively

Paragraph 2 - Negotiation procedures

The Committee takes note of the information contained in the report submitted by Poland.

Legislative framework

The Committee refers to it previous conclusions (Conclusions XVII-1 and XVIII-1) for a description of the rules governing collective bargaining in the private and in the public sector and recalls that it held this framework to be in conformity with Article 6§2 of the Charter (Conclusions XVIII-1). It however had asked for clarifications concerning the applicable provisions in between collective agreements and applicable rules in specific cases in the public sector (for the latter see below).

The Committee takes note that during the period between termination of a collective agreement and conclusion of a subsequent one, Article 77 of the Labour Code applies. According to this provision, employers employing at least 20 employees have to set out the modalities concerning remuneration in their rules. Such rules have to be discussed with the work councils.

The Committee asks whether in practice this is the case and if not how employees may seek to have their rights guaranteed.

Conclusion of collective agreements

The Committee notes from the figures provided in the report that during the reference period the number of collective agreements remained overall stable.

It however also notes from other sources that it is estimated that about 30% of the workforce is covered by collective agreements[2] and that where there are no unions to take up the issue, pay and conditions are set unilaterally by employers – subject to the national minimum wage[3].

Furthermore, the Committee notes from ILO[4] that a number of complaints concerning employers' refusal to negotiate in 2006 and 2007 were made. From information in the report it appears that most of these complaints were solved due to interventions of the labour inspectors. The Committee requests that the next report indicate the measures taken or contemplated to resolve the remaining cases of refusal to bargain so as to promote collective bargaining.

The Committee recalls that according to Article 6§2, if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements. Whatever the procedures put in place are, collective bargaining should remain free and voluntary (Conclusions I, Statement of Interpretation on Article 6§2). The Committee has noted from the report that in 2008 measures were taken to encourage social partners to participate further in social dialogue. However, since the report does not indicate any concrete detail and in the light of the above, it requests the Government to indicate precisely what measures it has taken or plans to take to facilitate and encourage the conclusion of collective agreements.

Public sector

In its previous conclusion (Conclusions VIII-1), the Committee asked whether collective bargaining rights of employees in the nationalized sector enjoy the same collective bargaining rights as in the private sector. The report confirms that the rights of the former resemble those of the latter. However, in accordance with paragraphs 4 and 5 of Article 240 of the Labour Code, negotiations concerning remuneration of employees in the

nationalized sector have to respect budgetary thresholds set by law. The content of collective agreements negotiated is thus subject to preliminary verification by the public authority and the agreements may be registered only if it has been found that the budgetary thresholds are respected.

In the light of the above, the Committee observes that Polish legislation admits, under certain conditions, that collective negotiations take place in the public sector even on wages. The situation is therefore in conformity with the requirements of Article 6§2 of the Charter in this regard.

In its previous conclusion (Conclusions VIII-1), the Committee asked the next report to show that effective consultation of the different categories of civil servants occurs. The report indicates in this regard the role of the Committee for Dialogue established in 2004 to offer a framework to social partners to discuss questions relating to the public administration. The report however also highlights that this Committee has ceased to exercise its functions in 2006. The Committee therefore asks the next report to indicate what alternative mechanisms are foreseen to ensure that effective consultation of employees in the public sector takes place to allow them to participate in the determination of their working conditions.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Poland is in conformity with Article 6§2 of the Charter.

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[1] *See the country profile on Poland on the European industrial relations observatory on-line (eironline) website: http://www.eurofound.europa.eu/eiro/country/poland_1.htm*

[2] *See the country profile on Poland by the European trade union institute available at: http://www.worker-participation.eu/National-Industrial-Relations/Countries/Poland/Collective-Bargaining*

[3] *CEACR: Individual Observation published in 2009 on Poland and ILO Convention No. 98 on the Right to Organise and Collective Bargaining.*

Article 6 - Right to bargain collectively

Paragraph 3 - Conciliation and arbitration

The Committee notes from the information provided in the Polish report that and all the information at its disposal that there have been no changes to the situation, which it has previously considered to be in conformity with Article 6§3 of the Charter. It asks that the next report provide a full and up-to-date description of the situation.

Conclusion

The Committee concludes that the situation in Poland is in conformity with Article 6§3 of the Charter.