

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**



26 April 2004

**Collective Complaint No. 23/2003
Syndicat occitan de l'éducation
v. France**

Case Document No. 4

**OBSERVATIONS FROM
THE EUROPEAN TRADE UNION CONFEDERATION
(ETUC)
ON THE MERITS**

registered at the Secretariat on 8 April 2004

(TRANSLATION)

I. Introduction

ETUC congratulates France on its ratification of not only the Revised European Social Charter (RESC), but also the Protocol providing for a system of collective complaints. It hopes that, thanks to these procedures, France may better comply with its international obligations relating to fundamental social rights.

Referring to previous observations¹, ETUC points out that it is required to contribute to the process of monitoring the application of both the European Social Charter (ESC) and the Revised European Social Charter (RESC).

II. The facts

A. A description of the situation

The *Syndicat Occitan de l'Education* lodged a complaint against France with the European Committee of Social Rights, which declared the complaint admissible on 13 February 2004.

Complaint No 23/2003, registered on 18 November 2003, relates to Articles 5 (right to organise) and 6 (right to collective bargaining) of the Revised European Social Charter. It is alleged that the prohibition of the putting forward of candidates for elections by non-representative professional organisations constitutes a violation of these provisions.

In pursuance of Article L. 133-2 of the French Labour Code, which is applicable to the public services, the representativity of trade union organisations is determined on the basis of the following criteria: number of members, independence, subscriptions, level and length of experience, and patriotic attitude during the Occupation.

The Act of 16 December 1996 (Section 94) substantially amended the relevant law, inserting an article numbered Section 9 *bis* into the Act of 13 July 1983.

Henceforth, public servants' trade unions or groupings of trade unions are regarded as representative of all officials of the three public services if they either hold at least one seat on each of the higher councils or received at least 10% of all the votes cast in the elections held to choose staff representatives on the joint administrative commissions of the three public services, as well as at least 2% of the votes cast in the same elections within each public service.

Groupings of trade unions for the purposes of the new provisions are those statutorily endowed with their own governing bodies and permanent resources.

¹ Starting with ETUC's first observations (complaint No 1/1998 by the International Commission of Jurists against Portugal).

The same Section 94 amended parts II, III and IV of the general statute by introducing a second round of elections for choosing staff representatives on the joint administrative commissions.

Henceforth, only representative trade union organisations may put forward lists of candidates for the first round. A second round is held if the representative trade union organisations have not lodged lists or, where they have lodged lists, if the number of voters falls below a quorum (namely half of the number of registered electors) set by Decree No 97-40, of 20 January 1997, amending Decree No 82-451, of 28 May 1982, on state joint administrative commissions (*Journal Officiel* of 21 January 1997, p. 1035).

Regarded as representative for the purposes of these provisions are those public servants' trade union organisations properly affiliated to a grouping of trade unions meeting the conditions laid down in Section 9 *bis* of the law of 13 July 1983 and those public servants' trade union organisations which, within the framework in which the election is being held, comply with the provisions of Article L. 133-2 of the Labour Code.

B. International case-law

Where "representativity" and its criteria are concerned, the situation in France has recently been examined by the responsible international committees, which found no contradiction with either the revised European Social Charter or the principles of freedom to organise which underlie Articles 5 and 6 of the European Social Charter (Revised).

1. UN Committee on Economic, Social and Cultural Rights (2001)

The complaint is based mainly on the case-law of the UN Committee on Economic, Social and Cultural Rights, which in 2001 examined the situation in France. In general terms, this committee expressed concern about the situation in France and recommended that the French Government ensure that the participation criteria, particularly the condition of "representativity", should not impede the exercise of trade unions' rights²:

"D. Principal subjects of concern

...

18. The Committee is concerned that the criteria of "representativity" for participation of trade unions in certain processes such as collective bargaining may tend to exclude smaller and newer trade unions in favour of the larger and more established ones and therefore may jeopardize the right of all trade unions to function freely in accordance with article 8 (c) of the Covenant.

² Concluding Observations of the Committee on Economic, Social and Cultural Rights: France. 30/11/2001. E/C. 12/1/Add.72. (Concluding Observations/Comments).

E. Suggestions and recommendations

...

29. The Committee recommends that the State party ensure that the criteria of participation and, in particular, the condition of "representativity" do not impede the right of trade unions to participate freely in processes such as collective bargaining, irrespective of their size, in accordance with article 8 (c) of the Covenant."

2. ILO Committee on Freedom of Association (2003)

In case No 2193³, the Committee on Freedom of Association made an in-depth examination of the situation, concluding that the current legislative system was in conformity with the principles of freedom to organise:

"681. The Committee notes that the complaint concerns the compatibility of the legislative and regulatory provisions applicable to the civil service, and pertaining to the representativeness of trade union organizations and the privileges which that brings, with the principles of freedom of association. The Committee notes that the complainant does not contest the principle of a distinction being made between trade union organizations according to the degree of their representativeness.

[...]

686. Regarding the specific case, the Committee notes by way of introduction that the criteria for determining representativeness are established by law and that they are established for the purposes of participation in the various joint bodies consulted by the administration on civil servants' careers and working conditions.

687. As regards the criteria themselves, the Committee notes that those on which the presumption of representativeness is based meet the requirements recalled above in that they are based on specific, instantly verifiable data. This also applies to the ordinary law criteria which, even if (as the complainant emphasizes) they are not quantifiable, are sufficiently detailed in the Labour Code and are based on objective elements of the composition and running of a trade union organization which are customarily taken into account in determining representativeness. While noting the Government's observations on jurisprudence in the matter to the effect that the determination of these criteria allows the administration a certain flexibility in assessment, the Committee emphasizes that this flexibility is largely to the benefit of trade union organizations to the extent that they do not have to meet all these criteria concurrently; moreover, this assessment is carried out under the

³ Report No 330 (France): complaint against the government of France lodged by the *Syndicat national de l'enseignement technique, Action, Autonome* (SNETAA), Official Bulletin, Vol. LXXXVI, 2003, Series B, No 1.

supervision of an administrative judge, a point to which the Committee will return later on. Furthermore, the Committee takes full note of the Government's explanations as regards the fact that representativeness is assessed according to ordinary law criteria within the framework of the election and that this condition is by its very nature more favourable to trade union organizations with a local presence.

688. Regarding the distinction between those trade union organizations enjoying the presumption of representativeness and those having to prove their representativeness according to legal criteria, the Committee is of the opinion that this distinction raises the question of knowing whether the presumption favours the former in such a way as to constitute an infringement of the freedom of workers to choose freely the organization they wish to join. In the light of the indications of the legislative and regulatory texts provided by the complainant and the Government, the Committee observes that, whilst the assumption of representativeness tends to favour a certain stability in the representation of trade union organizations within the joint bodies, it does not constitute the exclusive means of designating trade union organizations, and that the law offers other organizations the opportunity to demonstrate their representativeness. In addition, the presumption of representativeness applies only to the candidature admissibility stage; in the election of staff representatives within the joint administrative commissions, candidates from all the representative trade union organizations are on an equal footing. Moreover, the Committee notes that, in particular, the trade union organizations able to enjoy the presumption of representativeness accorded to the federation or confederation to which they belong cannot present concurrent lists, thus avoiding a representative trade union group having a virtual monopoly over the nomination of candidates for elections and therefore preserving the freedom of organizations to join the federations and confederations of their choosing without their decision being influenced by the prospect of automatically enjoying the presumption of representativeness. Furthermore, the Committee notes the explanations provided by the Government to the effect that the preservation of concurrent lists within such trade union organizations does not preclude their participation in elections according to the ordinary law criteria for determining representativeness. Finally, regarding the selection by the federation or confederation of the trade union organization that will benefit from the presumption of representativeness, the Committee notes that this is an internal matter concerning relations between the federation or confederation and its members and that it falls to the interested parties to settle the matter themselves.

689. The Committee notes that the assessment of the admissibility of lists of candidatures by the administration is carried out under the supervision of a judge, and that such supervision can be carried out with full knowledge of the facts because, under the terms of section 15 of Decree No. 82-451 of 28 May 1982, as amended by Decree No. 98-1092 of 4 December 1998, the administration must justify any decision of inadmissibility, which has to be given within a short period (at the latest the day after the deadline for submitting candidatures). The Committee notes, from the implementation documents attached to the complaint and to the reply, that the appeal to the

judge is made and considered according to an emergency procedure and that the role and responsibilities of the administration as regards the admissibility of the lists of candidatures have been set out in detail in the implementing documents of the law and in particular in the memoranda of the Ministry of Education.

690. From the above considerations, the Committee concludes that the **legislative provisions** regarding the determination of the representative civil servants' trade union organizations for the purposes of the election of staff representatives to joint civil service bodies **is not incompatible with the principles of freedom of association.**"

3. European Committee of Social Rights (2004)

The Committee itself examined the situation in France where the private sector is concerned in its latest Conclusions (dated 2004)⁴:

Representativity

Turning to the private sector the Committee takes note of the decision in the *Caisse d'épargne et de prévoyance d'Alsace v. SUD Caisse d'épargne* case, delivered by the Social Division of the Court of Cassation on 3 December 2002. The inferior court had found that although the trade union in question could not claim a certain level or length of experience in the undertaking, the absence of these two key criteria of representativity could be compensated for by other factors that would allow it to be declared representative. The Court of Cassation upheld this decision and stated that once the union's independence and influence had been established with regard to Article 133-2 of the Labour Code there was no appeal against the court of first instance's ruling on its representativity. In this case the Court of Cassation found that the decision had clearly shown that the union's representativity was unchallenged and that it exercised real influence.

The Committee takes note of the fact that the lower courts can now assess unions' representativity according to the criterion of influence, which is not one of those listed in Article 133-2 of the Labour Code (number of members, independence, subscriptions, level and length of experience and patriotic attitude during the occupation). In order that the Committee may evaluate whether the lower courts' assessment of a trade union representativity in the light of the criterion of influence is in conformity with Article 5, the Committee asks that the next reports indicate, by providing relevant extracts of case-law, how the lower courts assess this criterion.

⁴ Conclusions 2004, pp 181 and 182.

C. Conclusions

1. The French system

The conclusions and recommendations of international organisations' responsible committees show the situation in France to be in conformity with the international requirements guaranteeing freedom to organise:

- the assessment of the UN Committee on Economic, Social and Cultural Rights does not express any criticism of the body of legislation, but asks the Contracting Party to ensure that this is applied. Nor was this committee in a position to take account of the specific conclusions of the ILO's responsible body, the Committee on Freedom of Association, which were published after its own concluding observations.
- the ILO Committee on Freedom of Association made an in-depth examination of the situation in France. Its conclusions have specific value because they deal with the same question in the education sector and take into consideration every aspect of freedom to organise (including the issues relating to collective bargaining).
- the conclusions of the European Committee of Social Rights are the most recent, but these relate more to the private sector. And they do not state that there has been a failure to comply.

2. The specific problem of a regional organisation

In this specific case, the problem is further aggravated by the fact that the trade union concerned is a regional one and can make no claim to be nationally representative.

3. Final conclusions

As far as "representativity" and the criteria therefore are concerned, ETUC is consequently unable to support the *Syndicat Occitan de l'Education's* action against this provision.