

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



2 March 2005

**Collective Complaint No. 24/2004
Syndicat SUD Travail Affaires Sociales v. France**

Case Document No. 4

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

registered at the Secretariat on 11 February 2005

**Observations
of the European Trade Union Confederation (ETUC)**

on Collective Complaint No. 24/2004

lodged by

SUD Travail Affaires sociales

[SUD ANPE and SUD Collectivités territoriales¹]

against France

(11 February 2005)

¹ The ETUC notes that as far as these two trade unions are concerned the complaint is inadmissible.

Introduction

The European Trade Union Confederation (ETUC) congratulates France on ratifying not only the Revised European Social Charter (the Revised Charter) but also the collective complaints protocol. It hopes that with the help of the new procedures France will improve its compliance with its international obligations.

The ETUC helps to monitor the application of the European Social Charter and the Revised Charter. In this context, it refers to the observations it has made repeatedly since the first collective complaint².

The Complaint

The complaint alleges that French legislation outlawing discrimination in employment conflicts with Article 1§2 of the Revised Charter, firstly because certain categories of workers are excluded from the scope of Article L.122-45 of the Labour Code, which prohibits discrimination and reverses the burden of proof, and secondly because certain public service employees without tenure are not sufficiently protected against discrimination by the legislation and regulations governing their employment.

The complaint has to be seen in the current context of the inadequate transposition of European Union anti-discrimination directives. The object is to eliminate discrimination in legislation aimed at outlawing discrimination. In the interests of consistency the outcome should be a body of legislation with strictly no discrimination.

The principles

1. Non-discrimination in general

The right to non-discrimination is a fundamental social right. There is an impressive list of international instruments embodying this right. Three examples may be cited in support:

- the inclusion of Article 1 in the "hard core", thus emphasising its particular importance;
- the Committee's case-law on Article E emphasises the importance of "the principle of non-discrimination with respect to the achievement of ... substantive rights", and refers also to the European Convention on Human Rights:

² Council of Europe Complaint No. 1/1998 International Commission of Jurists v. Portugal – Documents, Human Rights, (Social Charter Monograph No. 9, Strasbourg 2000, p. 98 ff.)

"51. The Committee considers that the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein. It further considers that its function is to help secure the equal effective enjoyment of all the rights concerned regardless of difference. Therefore, it does not constitute an autonomous right which could in itself provide independent grounds for a complaint. It follows that the Committee understands the arguments of the complainant as implying that the situation as alleged violates Articles 15§1 and 17§1 when read in combination with Article E of the Revised Charter.

Although is not explicitly listed as a prohibited ground of discrimination under Article E, the Committee considers that it is adequately covered by the reference to "other status".

52. The Committee observes further that the wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14 and most recently in the Thlimmenos case [Thlimmenos v. Greece, no 34369/97, CEDH 2000-IV, § 44)], the principle of equality that is reflected therein means treating equals equally and unequals unequally. In particular it is said in the above mentioned case:

"The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.

In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all"³.

- developments in the European Union, whose Charter of Fundamental Rights and, more recently, Constitutional Treaty have drawn on the relevant articles of the Revised Charter.

To summarise, the right to non-discrimination makes an important contribution to achieving other rights.

³ European Committee of Social Rights – Decision on the merits – Complaint No. 13/2002 Autisme-Europe v. France

2. The case-law of the European Committee of Social Rights

This is the approach adopted by the Committee in interpreting Article 1§2 of the Revised Charter. In its decision on the merits of complaint 6/1999, the Committee interpreted Article 1§2 as follows:

"24. The Committee points out that Article 1 para. 2 of the revised Charter requires those states which have accepted it to protect effectively the right of workers to earn their living in an occupation freely entered upon. This obligation requires inter alia the elimination of all forms of discrimination in employment whatever is the legal nature of the professional relationship.

25. A difference in treatment between people in comparable situations constitutes discrimination in breach of the revised Charter if it does not pursue a legitimate aim and is not based on objective and reasonable grounds.

26. The Committee points out that "the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact" (Complaint No. 1/1998, International Commission of Jurists v. Portugal, para. 32). It is therefore of the opinion that compliance with Article 1 para. 2 cannot result from the mere existence of legislation if the legislation in question is not applied in practice.⁴"

Although this complaint is concerned with legislation, practice must clearly conform with legal obligations. Since the burden of proof is at the centre of the complaint and is a key aspect of both the legislation and practice, as reflected in case-law, this right must be enforced without discrimination.

Application to specific cases

3. Personal scope – exclusion

The complaint refers to certain categories of persons who are not covered by the anti-discrimination legislation in general and the reversal of the burden of proof in particular. What makes this even more regrettable is the fact that it facilitates discrimination in sectors where special protection against such discrimination is necessary.

It should be emphasised that membership of a trade union and trade union activity require particular protection against anti-trade union discrimination.

⁴ European Committee of Social Rights – Decision on the merits – Complaint No. 6/1999 Syndicat national des professions du tourisme v. France

4. Equality for public law employees

Persons working in the public service must provide services to all individuals without any discrimination. This is the very essence of the public service. It is therefore quite unreasonable not to grant them the same rights as private sector employees.

a. established public employees (civil servants)

The Senate has considered the specific issue of the burden of proof and has noted that the National Assembly has not gone so far as to reverse the burden of proof, as a result of which the law applied to civil servants differs substantially from that applied to ordinary employees⁵:

Section 10

(Section 6 of Act No. 83-634 of 13 July 1983 on the rights and obligations of civil servants)

Discrimination in the public service

I. The text approved by the National Assembly on second reading

At first reading, the Senate approved an amendment presented by the Socialist group and further amended by this committee which would extend to civil servants the anti-discrimination provisions in the new wording of Article L. 122-45 of the Labour Code.

At second reading, apart from drafting changes, the National Assembly clarified the application of the principle of non-discrimination based on age, in accordance with Section 2 bis (paragraph II).

It also stipulated that no decision may be taken likely to be detrimental to a civil servant's career progression on the grounds that he or she has lodged a hierarchical or judicial appeal based on discrimination or given evidence or related facts in such a case (paragraph III). This paragraph also stipulates that any official who has engaged in such discrimination is liable to disciplinary action.

II. The position of the committee

The committee welcomes the improvement to this section introduced by the Senate, following the bill's shuttling between the two chambers, which extends the new anti-discrimination provisions to civil servants. However, it notes that the National Assembly has not gone so far as to reverse the burden of proof, as a result of which the law applied to civil servants differs substantially from that applied to ordinary employees.

Subject to this reservation, the committee proposes that this section be approved unamended.

⁵ <http://www.senat.fr/rap/I00-391/I00-3911.html>

b. Non-established public officials

It is interesting to note that certain legal safeguards for civil servants also apply to officials without established status:

- **Section 6 c⁶**

No decision may be taken concerning the recruitment, establishment, training, assessment, discipline, promotion, allocation or transfer of a civil servant that is influenced by the fact that:

1. he or she has been the victim or refused to be the victim of harassment by any person with the aim of securing sexual favours for the latter's benefit or that of a third party.
2. he or she has given evidence or related facts concerning such harassment.

This section is applicable to non-established public officials.

- **Section 6 e⁷**

Officials may not be subjected to repeated acts of psychological harassment whose purpose or effect is a deterioration in their working conditions likely to impinge on their rights or dignity, alter their physical or psychological health or jeopardise their professional future.

No decision may be taken concerning the recruitment, establishment, training, assessment, discipline, promotion, allocation or transfer of a civil servant that is influenced by the fact that:

1. he or she has been the victim or refused to be the victim of psychological harassment as referred to in the first sub-paragraph.
2. he or she has appealed to a hierarchical superior or taken court action aimed at terminating such harassment.
3. he or she has given evidence or related facts concerning such harassment.

This section is applicable to non-established public officials.

It is therefore all the more difficult to see why non-established public officials are excluded from the basic protection against discrimination in Section 6⁸.

⁶ As amended by Act No. 2002-73 of 17 January 2002 Section 179 (Official Journal 18 January 2002).

⁷ As established by Act No. 2002-73 of 17 January 2002 Section 178 (Official Journal 18 January 2002).

⁸ As amended by Act No. 2001-1066 of 16 November 2002 Section 11 (Official Journal 17 November 2001).

c. *employees of the national employment agency (ANPE)*

The public service arguments carry even more weight in the case of a department concerned with jobs and persons seeking employment. Reference may be made to Article 9 of ILO Convention No. 88 concerning employment service (1948), which has been ratified by France and which requires the staff concerned to have a particular status in which discrimination has no place:

"Article 9

1. The staff of the employment service shall be composed of public officials whose status and conditions of service are such that they are independent of changes of government and of improper external influences and, subject to the needs of the service, are assured of stability of employment.
2. Subject to any conditions for recruitment to the public service which may be prescribed by national laws or regulations, the staff of the employment service shall be recruited with sole regard to their qualifications for the performance of their duties."

Conclusions

The ETUC supports the conclusion of the complaint that France is not satisfactorily meeting its obligations under Article 1§2 of the Revised Charter.

As a country with a direct historical ("equality") and legal commitment to combating discrimination France should have little difficulty filling these gaps.