EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

26 November 2004

Collective Complaint No. 25/2004 **Case Document No. 4**
Centrale générale des services publics (CGSP)
v. Belgium

OBSERVATIONS FROM THE BELGIAN GOVERNMENT ON THE MERITS

registered at the Secretariat on 2 November 2004

(TRANSLATION)

I. INTRODUCTION

a. Background

For many years, Belgium has laid great stress on good industrial relations and collective bargaining between the social partners in both public and private sectors.

In the public sector, a joint committee was set up for the national railway company in 1926. This joint committee is jointly responsible with the board of management for determining the status of staff and any changes that need to be made to it.

Under royal decrees of 2 October 1937, establishing the status of state officials, and 14 December 1937, establishing staff committees of state officials, staff committees were set up in each ministerial department. The committees advise their minister on the functioning of services and improvements to working conditions.

Staff committees had been established in a number of ministries between 1921 and 1937 but the 1937 royal decrees introduced a comprehensive system.

The regency decree of 11 July 1949 on state officials' trade union statute, as amended by the regency decree of 12 October 1949, was fully in line with the principles of the 1937 decrees. The changes were designed to improve the functioning of the joint consultation machinery and relations with trade unions, for example by granting them certain prerogatives and establishing a legal status for union representatives.

The royal decree of 20 June 1955 on the public service staff trade union statute was considerably broader in scope than the 1949 decree.

In 1961, a public services trade union common front issued a memorandum on behalf of representative trade unions calling for recognition of a greater union role in relations with the authorities.

Following this memorandum of 5 December 1961, negotiations were opened and culminated in agreement on a social programme on 1 March 1962.

This first agreement, which reflected a profound change in government-trade union relations, was followed by eight more social programme agreements between 1964 and 1978.

The Act of 19 December 1974 on relations between public authorities and the trade unions representing their staff and the implementing royal decree of 28 September 1984 introduced a new system of industrial relations in many public services.

In particular, it introduced negotiation and bargaining arrangements and a system for scrutinising representativeness to determine eligibility for membership of negotiating and consultative committees.

Two Acts of 11 July 1978 dealt with industrial relations between the authorities and, respectively, the gendarmerie and the armed forces.

The Act of 24 March 1999 governs relations between the authorities and police trade unions.

This legislation is based on the same principles as that of 19 December 1974, namely negotiation, consultation, representativeness and official recognition.

The Act of 21 March 1991 reforming certain public business enterprises established a joint committee for all autonomous public enterprises and individual joint committees for each of them. These committees, on which representative trade unions sit, are responsible for collective bargaining on the status of staff.

It is clear from this brief introduction that collective bargaining is a well established tradition in Belgium, particularly in the public sector.

b. The CGSP complaint

On 18 February, the European Committee of Social Rights registered a collective complaint lodged by the *Centrale générale des services publics* (CGSP) against Belgium.

The CGSP asks the Committee to find that Belgium is in breach of its obligations under articles 6.1 and 6.2 of the European Social Charter because in law and in fact there is no guarantee of the effectiveness of the legislation on the exercise of the right to collective bargaining in the Belgian public sector.

Article 6 of the Charter reads: *"With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:*

1. *to promote joint consultation between workers and employers;*
2. *to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;"*

The Committee has ruled that "*the provisions of Article 6 as a whole [are] applicable not only to employees in the private sector, but to public officials subject to regulations, though with the modifications obviously necessary in respect of persons bound not by contractual conditions, but by regulations laid down by the public authorities. Article 6 paragraph 1 can only be regarded as respected where public officials are concerned if consultation machinery is arranged for the drafting and implementation of the regulations, which should not give rise to any special difficulty*" (Conclusions III, page 33, Federal Republic of Germany).

In response to this collective complaint, Belgium wishes to explain to the Committee in this memorial how the law on collective bargaining is applied in Belgium in the public services.

It will show that the criticisms levelled by the CGSP are unfounded.

II. DOMESTIC LAW

a. The Constitution

Article 23 of Title II of the Belgian Constitution – "Belgians and their Rights – refers explicitly to collective bargaining:

"*Everyone has the right to lead a life in conformity with human dignity.*

To this end, the laws, decrees, and rulings alluded to in Article 134 guarantee, taking into account corresponding obligations, economic, social, and cultural rights, and determine the conditions for exercising them.

These rights include notably:

1. the right to employment and to the free choice of a professional activity in the framework of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;
2. the right to social security, to health care and to social, medical, and legal aid;
3. the right to have decent accommodation;
4. the right to enjoy the protection of a healthy environment:
5. the right to enjoy cultural and social fulfilment."

b. The trade union statutes

- As the CGSP notes, Article 23.3 of the Constitution is applied through the various public service "trade union statutes", including the Act of 19 December 1974 on relations between public authorities and the trade unions representing their staff.

- The Act of 19 December 1974 is based on four basic principles: negotiation, consultation, representativeness and official recognition.

- It has numerous implementing instruments, including in particular:

    - the royal decree of 28 September 1984 implementing the Act of 19 December 1974 on relations between public authorities and the trade unions representing their staff;

    - the royal decree of 29 August 1985 establishing basic regulations pursuant to section 2.1.1 of the Act of 19 December 1974 on relations between public authorities and the trade unions representing their staff.

- Belgium has already described the industrial relations system established by the Act of 19 December 1974 and its implementing instruments in its reports to the Committee.

- The term "negotiation" should be understood in its normal sense of a detailed discussion of the issues under consideration, having regard to the various points of view represented. The parties, acting on behalf of, respectively, the authorities and representative trade unions, try to resolve these matters in a manner acceptable to each side.

If agreement is reached, the conclusions of the negotiations are recorded in a so-called protocol of agreement. Such protocols have the status of agreements once they have been signed by the parties. In the government's case, such agreements then have the status of a political commitment. The authorities undertake to embody the agreed measures in legislation or regulations. Protocols are not legally binding on authorities.

If negotiations do not culminate in agreement, the respective positions are also recorded in a protocol, in accordance with legal requirements, and the authority can then decide whether or not to implement the measures discussed in the negotiations.

Section 2 of the Act of 19 December 1974 reads:

"*1. Other than in urgent and other cases specified by the Crown, in the absence of prior negotiations with the representative trade unions in the committees established for that purpose the competent administrative authorities may not issue:*

i. basic regulations concerning:

a. administrative status, including leave arrangements;

b. remuneration;

c. the pensions scheme;

d. relations with trade unions;

e. the organisation of social services.

The Crown shall specify what constitute basic regulations, with reference to their subject matter or the provisions they shall contain. The orders issued to that effect shall be preceded by the negotiations provided for in this section.

The basic regulations specified by the Crown pursuant to items a, b and c of sub-section i, which are only applicable to established staff, shall apply in similar fashion to staff members with employment contracts.

ii. other regulatory provisions and internal orders and directives of a general nature affecting staffing structures and levels and the length and organisation of working hours.

2. The tabling of draft legislation, decrees or orders concerning one of the subjects covered in sub-section 1 shall also be preceded by the negotiations provided for in this section.

If the draft legislation also concerns autonomous public enterprises specified in Section 1.4 of the Act of 21 March 1991 reforming certain public business enterprises, the committee in question shall also consult the public enterprises committee instituted by Section 31 of that Act before starting negotiations.

3. The Crown shall specify the negotiation procedure."

- For so-called "less important" matters", the legislation establishes a consultation procedure for involving staff in the process of drawing up organisational measures.

Following such consultations, the committee concerned issues an opinion on the proposed measures, together with its reasoning, which offers the authority a clear understanding of why the trade unions support or reject the proposals.

Negotiations take place in negotiating committees and consultations in consultative committees. Negotiating and consultative committees are composed of delegations representing the authority concerned and representative trade unions.

- In 1998, it was proposed to modify Section 2.2 of the Act of 19 December 1974 and extend the obligation to negotiate to government amendments to draft legislation and decrees. A parliamentary bill for that purpose was tabled in Parliament.

As a rule, after they have been tabled, draft government legislation (bills), decrees or orders and any private members' proposals taken into consideration are referred to the relevant committee, which is where most parliamentary work is carried out. Debates are generally attended by the minister concerned or his or her junior minister.

In committee, members of parliament and the government have a right of amendment, that is to propose changes, additions or deletions to the initial sections.

The right of members of the two houses to amend legislation is embodied in Article 76 of the Constitution.

The government's right of amendment derives from Article 100 of the Constitution, which grants ministers right of access to both houses and the right to be heard, which implies a right to present amendments to government and private members' bills that are discussed.

To avoid any abuse of the system, amendments must be supported by either three or five members, depending on the house, in order to be admissible.

The House of Representatives amended the provision of the bill that would have required any amendments to draft legislation or decrees proposed by the various governments, the common Community Commission assembly or the French Community Commission to be preceded by negotiation.

The wording therefore remained unaltered, on the grounds that prior consultations must not impede Parliament's freedom of action.

Parliament considered that if, pursuant to Section 2.2 of the Act of 19 December 1974, discussion on government amendments had to be preceded by negotiations, this could considerably slow down, or even paralyse, parliamentary business.

As a result, negotiations on proposed changes take place before bills are tabled in Parliament.

Parliament retains its freedom, in accordance with democratic procedure, to modify bills on the basis of amendments tabled by the government or by members of its own houses.

To Belgium's knowledge, no country with a parliamentary system similar to its own obliges members of parliament to consult or negotiate with representative trade unions before carrying out their legislative task, since such a requirement would hinder or even paralyse the parliamentary process and encroach on members' prerogatives.

Finally, as representatives of the nation, when carrying out their legislative work members of parliament are clearly not insensitive to information and arguments submitted by trade unions.

III. THE COMPLAINTS

- The CGSP does not really challenge the existing collective bargaining system in Belgium.

- Its complaints concern a potential (our emphasis) weakness of the industrial relations system in the public sector in the event of a violation by the authorities of the Act of 19 December 1974 on relations between public authorities and the trade unions representing their staff.

- It must therefore be emphasised that the CGSP's complaint is based on a purely hypothetical violation of the legislation by the competent authorities.

- The complaint, which purports to show that Belgium is not in compliance with the Social Charter, is not supported by any evidence that the Belgian authorities actually intend to violate the legislation and Constitution in force in Belgium.

1. The drafting of legislation and decrees

The CGSP's concerns mainly relate to situations where in drawing up draft legislation or decrees likely to affect public service staff, the competent government deliberately or negligently fails to consult the representative trade unions. It claims that it would have no remedy against such a breach of the right to bargain collectively.

The power to initiate legislation represents the right to propose to one of the houses of parliament the modification or repeal of existing or the enactment of new legislation.

Any member of either house is entitled to table draft legislation, or a bill, in the bureau of the assembly to which he or she belongs.

Members of the government also have this power of initiative.

a. Private members' bills

When the draft legislation is tabled by one or more members of parliament it takes the form of a private members' bill. It is submitted to the president of the house to which the author of the bill belongs.

It is at this point that the first screening takes place. The president of the house must decide whether the bill that has just been tabled may be printed and circulated.

There is a second screening, because the author of the bill must ask for it to be included on the order of business. This is the opportunity for the first political discussion, on whether the bill should be considered.

At this stage, the house concerned must ensure that the bill that has been tabled is not manifestly unconstitutional and that it would not unnecessarily disrupt parliamentary proceedings.

If a bill is not included on the order of business it cannot be reintroduced in the same session.

b. Government bills

Government bills take the form of royal decrees countersigned by one or more ministers.

Such bills are immediately printed, together with an explanatory memorandum and the opinion of the legislation section of the *Conseil d 'Etat*.

In principle, such bills are prepared by ministerial departments. The form of wording is then submitted to the Council of Ministers (or cabinet) and for any other consultations such as those provided for in the Act of 19 December 1974.

Ministers must submit the text of any draft legislation to the legislation section of the *Conseil d 'Etat* for a reasoned opinion. This opinion is appended to the explanatory memorandum.

The legislation section of the *Conseil d 'Etat* thus acts as the government's "legal adviser" when it exercises its legislative function. The section's examination is concerned not just with the form of the text but also with its legal validity.

The formal examination is mainly concerned with the terminology used in the bill and its presentation.

In its legal scrutiny, in contrast, the *Conseil d 'Etat* considers the bill's substance to ensure that it is legally in order. In doing so, the legislation section generally asks certain questions:

- Does the proposed wording adequately reflect the author's concerns?

- Does the authority that produced the draft legislation have the power to act in this field? The *Conseil d 'Etat* pays particular attention to the division of powers between the executive and legislative functions. Another of its concerns is the apportionment of responsibilities between the federal state and the other political entities. Its role here is to prevent the emergence of unconstitutional legislation.

- Does the bill serve a legal purpose? Does it contain mandatory provisions? Does it simply reiterate, in a different form, existing legislation? Is it compatible with rules with greater authority than its own, and in particular, is it fully compatible with all the provisions of the Constitution?

The legislation section of the *Conseil d 'Etat* thus undertakes a prior scrutiny of legislation.

If draft legislation were presented without first completing all the formalities required by the Act of 19 December 1974, the legislation section would undoubtedly draw this to the attention of its author.

The CGSP therefore fails to take account of the various important precautionary measures that have been introduced to ensure that government is fully aware of any legal requirements that must be satisfied before presenting new draft legislation.

If the government failed to consult the representative trade unions, it would be called to order by the *Conseil d 'Etat*.

2. Repeal of or fundamental changes to the trade union statute

The CGSP also cites in its complaint the risk that the federal government, by submitting amendments to a parliamentary bill, or members of the federal parliament, though a private members' bill, could substantially alter or even repeal the public service "trade union statute", without any prior negotiation.

It should first be noted that this is a purely hypothetical contingency.

It is difficult to imagine that an amendment to draft legislation could by itself result in a substantial change to or even the abolition of the trade union statute.

Finally, even if this purely hypothetical event were to occur, legislation that substantially altered or repealed the Act of 19 December 1974 could be referred to

the Court of Arbitration (constitutional court), which would then decide whether the enacted provisions were compatible with Article 23 of the Constitution.

3. The Court of Arbitration

Under Article 142 of the Constitution, the Court of Arbitration acts as the Constitutional Court. It is the sole body to exercise this function.

"There is, for all of Belgium, a Court of Arbitration, the composition, competencies, and functioning of which are established by law.

This court statutes by means of ruling on:

1) those conflicts described in Article 141;

2) the violation through a law, a decree, or a ruling as described in Article 134 of Articles 10, 11, and 24;

3) the violation through a law, a decree, or through a ruling as described in Article 134, of constitutional articles determined by law. ..."

The Court of Arbitration does not issue rulings of its own motion. Before it can carry out any of its functions, cases must be referred to it.

Under Article 142, sub-paragraph 3 of the Constitution: "*The court may be solicited by any authority designated by law, by any person with justified interests, or, on an interlocutory basis, by any jurisdiction*".

Cases may therefore be referred to the Court of Arbitration in the form of applications to set aside.

These are "abstract" applications concerning rules of law that have come into force. They are direct applications in which the Court is asked to set aside, in whole or in part, a federal law, decree or order, without the need for the applicants to bring other proceedings or refer the matter to other courts.

The Special Act of 9 March 2003 extended the number of legal rules with reference to which the court can exercise its powers of supervision. It is now empowered to review the constitutionality of legislation with regard to cases involving Title II of the Constitution, including Article 23, which explicitly recognises the right to bargain collectively.

4. The trade union statute and its implementing decrees

The right to bargain collectively under the trade union statute is governed in large measure by the royal decrees that implement the Act of 19 December 1974.

These make the prior negotiation and consultation procedures with trade unions essential formalities.

There are various supervisory or screening mechanisms:

- As with all preliminary draft legislation, draft royal decrees must be submitted to the legislation section of the *Conseil d 'Etat.* This is a significant preventive form of supervision or screening.

- If, nevertheless, the competent authority chose to amend these implementing decrees without submitting the proposed modifications to the negotiation and consultation procedures, the royal decree concerned could be set aside by the administration section of the *Conseil d 'Etat* for breach of an essential formality, failure to comply with which makes the procedure void.

- In addition to these preventive and reparative checks, breach of this requirement may also be raised as an objection in the courts.

Article 159 of the Constitution states that "*courts and tribunals may apply decisions and general, provincial, or local rulings only inasmuch as these are in conformity with the law*", which means that the courts would be empowered not to apply such decrees.

5. The Programme Act of 5 August 2003 amending section 43ter of the consolidated legislation on the use of languages for administrative purposes and the Court of Arbitration decision of 29 January 2004

Section 54.2 of the consolidated legislation of 18 July 1966 on the use of languages for administrative purposes makes it obligatory for trade unions to be consulted about any proposed measures to implement this legislation that would have an impact on staff.

The law does not extend this obligation to consult to amendments to the consolidated legislation itself.

Nevertheless, despite the absence of a legal obligation on this point, consultations have in fact taken place, in various forms and on several occasions.

In the case referred to by the CGSP, apart from the fact that there was no legal obligation to consult, there was an urgent need to amend section 43ter of the consolidated legislation.

As part of the reform of the federal public service, new federal ministries and departments have been established. Among their other duties, the "strategic cells" are responsible for the interface between the executive and the public service.

Since these cells were intended to replace the ministerial private offices that were scheduled to disappear after the end of the 1999-2003 legislature, it was urgently necessary for the government that emerged from the elections of 18 May 2003 to amend section 43ter of the consolidated legislation so that members of these cells would not be covered by the language quota rules. This was the purpose of section 40 of the Programme Act of 5 August 2003.

As the CGSP itself acknowledges, the alleged events leading up to the Court of Arbitration's decision are purely anecdotal.

IV. CONCLUSION

Although the Court of Arbitration has ruled that its authority to review the compatibility of the legislation in question with the articles of Title II of the Constitution only extends to its content and not to how it was drawn up, it cannot be inferred from this that Belgium is in breach of its obligations under the European Social Charter.

The CGSP's reasoning is based on the purely hypothetical premise that Belgium would not observe the negotiating arrangements that it has established, which as such the CGSP does not question.

As noted in this memorial, the laws and regulations establishing collective bargaining in the public services and the existing preventive and reparative arrangements for securing compliance with the state's obligations form a balanced whole that operates perfectly well.

These unsupported accusations cannot form the basis for a collective complaint.

The various institutional authorities in Belgium have a duty to observe the law, the Constitution and the country's international obligations.

ON THESE GROUNDS

Belgium asks the European Committee of Social Rights to declare the collective complaint lodged by the CGSP unfounded.

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