

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



1 March 2007

Case document No. 3

**European Council of Police Trade Unions (CESP)
v. Portugal**
Complaint n° 37/2006

OBSERVATIONS FROM THE ETUC

Registered at the Secretariat on 1 March 2007

European Social Charter

Collective Complaint No. 37/2006

by the

European Council of Police Trade Unions (CESP)

against

Portugal

Observations

by the

European Trade Union Confederation

(ETUC)

1 March 2007

The complaint, relating to Article 4 §§ 1 and 2 (the right to a fair remuneration) and article 6 §§1 and 2 (the right to bargain collectively) of the Revised European Social Charter (hereinafter: RESC) alleges that the Criminal Police Act of 21 September 1990 and the current Criminal Police Act of 9 November 2000 are not in conformity with the abovementioned articles because the Portuguese state has not observed the democratic rules of collective bargaining, having decided unilaterally to apply to the criminal investigation personnel of the Portuguese Criminal Police a rule reducing their basic pay by 25%, thus avoiding payment of the on-call bonuses. According to the CESP, this situation is all the more serious in that the Portuguese Government regards bonuses as forming part of overall remuneration, increasing basic remuneration, for all areas of public administration except for the specific case of the Criminal Police.

The European Committee of Social Rights (hereinafter: ECSR) declared the complaint admissible on 5 December 2006. The European Trade Union Confederation (hereinafter: ETUC) was asked to submit observations in accordance with article 7 para. 2 of the Additional Protocol by the 16th of February 2007. Following a demand for extension by the ETUC, which was waiting for contributions of its Portuguese affiliated trade unions, an extension for replying was agreed upon by the ECSR until 1 March 2007.

Before submitting its observations, the ETUC would like to express its appreciation to the government of Portugal, for not only ratifying the RESC but also the Additional Protocol providing for a system of collective complaints (hereinafter: Additional Protocol). In this way, the Government contributes to re-enforce the Charter and the fundamental social rights in general as well as their specific effectiveness by taking active part in the system of supervision provided for in the Additional Protocol in particular.

The observations of the ETUC figuring below are elaborated in consultation with its Portuguese affiliated trade unions UGT-P and in particular CGTP-IN, and are to a very large extent built upon the observations and information send in by these affiliated organisations.

Assessment

This complaint is a follow-up of the struggle of the ASFIC/PJ¹ has been waging against the Portuguese government, concerning the organisation of working time of the criminal investigation personnel of the Judiciary Police Force, which is regulated by a set of regulations (namely regarding picket action, on-call duty, rest periods, overtime pay and their respective forms of remuneration), considered unfair and obsolete and violating the Constitution of the Portuguese Republic and the applicable ordinary legislation, as well as several other international legal instruments dealing with this matter, among which the European Social Charters.

Although the ASFIC/PJ is currently taking legal action in the competent Portuguese Courts, through different legal forms of action, in order to impugn the above mentioned regulations, considering the acknowledged slowness of the national courts and having failed the initiatives taken with members of the Portuguese government, it has decided to take this issue to the CESP, which in turn judged rightly that an important additional way of defending the legitimate rights and interests of its Portuguese members would be to lodge this collective complaint.

¹ ASFIC/PJ : Trade Union Association of the Criminal Investigation Police

Like the ASFIC/PJ and the CESP, the ETUC and in particular its affiliate CGTP-IN, actually consider that the Portuguese State, through the previously mentioned questioned legislation and in particular its refusal to dialogue and to overcome this stalemate, notably through negotiation, is in fact offending the legitimate rights of the Portuguese Criminal Police investigations. It thus concerns rights which are clearly enshrined in the legislation of the Portuguese public administration, as well as violating pertinent regulations of the revised European Social Charter, to which Portugal subscribed.

The following additional comments could be submitted to the ESCR:

The Portuguese State did not assure nor did it comply in our view with the democratic rule of collective bargaining by having unilaterally decided to apply to the criminal police personnel a regulation which reduces their basic remuneration by 25%, thus avoiding paying the supplement for permanent or on-call availability.

The concept of basic remuneration is settled in the Portuguese legislation in the legislative Decree n° 184/89 of 2 June and in particular in its Article 17.

This concept is also complemented with the provision in Article 5 of legislative Decree n° 353-A/89 of 16 October, in which the basic remuneration is decomposed in category remuneration and duty remuneration, with the duty or work remuneration being 1/6 of the basic remuneration, while the category remuneration corresponds to 5/6 and the latter one being essentially pay for the position occupied in the hierarchy.

This means in fact that the inclusion of supplements is not part of the basic remuneration concept. Therefore, any supplement is excluded from the basic remuneration concept. Moreover, the duty or exercise remuneration aims essentially at paying for the performance of the duty or work of a given category, so we have no doubt whatsoever in relation to the non-inclusion of supplements in the basic remuneration, either in a wider or stricter sense. Supplements may never be considered as category remuneration, and, even less, as duty remuneration. In fact there are even some doctrines that say that basic remuneration only covers the remuneration index – its determinant fact- to which supplements are added. Actually, as it will be argued below, the same results form the legal decomposition of the basic remuneration which, as such, differs from the broad concept of remuneration.

In this concept, there is –in our view- a clear unlawfulness in the contents of Paragraph 6 of Article 97 of the Criminal Police Act (LOPJ), adopted through Legislative Decree 295-A/90 of 21 September. In fact, this provision defines, in paragraphs 1 to 4, the concept of monthly basic remuneration of the Criminal Police personnel. In its Article 6, it clearly contradicts the concept contained in Article 17 of Legislative Decree 184/89 and in Article 5 of Legislative Decree 353-A/89 in the same way. In addition, it must also consider unlawful Article 79 n° 6 of Legislative Decree n° 275-A/2000 of 9 November –which constitutes the currently applicable Criminal Police Act- as it upholds the same principle.

This situation is indeed even more serious because the Portuguese government considers supplements, in the whole of Public Administration with the exception of the Criminal Police Force, as part of the total remuneration by adding them to the basic remuneration.

The concept of supplements derives directly from the law, in other words, the legislator intended in fact to avoid a possible confusion between basic remuneration and supplements,

and this is not in compliance with the regulation included in article 79 of Legislative Decree 259-A/90, and more precisely with article 79 n° 6. This means that it is not acceptable that the Portuguese state includes in the PJ Act a regulation which contradicts the general public service regime, in which is undoubtedly included the Criminal Police Force.

There seem to remain no doubts that supplements are an addition to the basic remuneration and that they serve to remunerate the specific conditions of work done or the specificities of its performance, and this is exactly the case with the availability or on-call supplement. On the other hand, this supplement is added to the remuneration and must never be subtracted from it.

Along this same line, it has to be considered that it concerns here an addition to the basic remuneration, meaning that any sort of supplement, namely the availability supplement, can only be added to the remuneration.

Therefore, when considering supplements, it must always be considered as amounts that form an addition to the basic remuneration, and this is easily understandable since we are not talking here of any remuneration resulting from holding a given category for a period of time or any career hierarchy, but which results from work specificities, thus making it incomprehensible that the Portuguese State deducts this subsidy from the basic remuneration.

Even if the existence of some doubts would be admitted, which in any case seem redundant given the clarity of the concepts laid down in the legislation and deepened by the general doctrine, the final enlightenment is found, in an obvious way, in article 11 n°1 of Legislative Decree 353-A/89, when it states that “supplements are the additional remunerations attributed for specific particularities of work performance.

For information we also refer to the note added by an eminent expert, Dr. Manuel Tavares, to this provision follows the same reasoning:

“1. From the provision we may immediately extract two conclusions on the nature of supplements:

a) they are additional payments and, therefore, they are not part of the basic remuneration (article 19 §§ a and c of Legislative Decree n° 184/89 of 2 June and article 5 of this Decree)

b) (...)”

In fact there is no comparable situation with what the Portuguese State tried to do with n° 6 of article 97 of the Criminal Police Act adopted by Legislative Decree 295-A/90 of 21 September and recently with n° 6 of article 79 of Legislative Decree 275-A/2000 of 9 November.

It is therefore hardly understandable how the Criminal Police Act can, in this respect, contradict the remuneration regime laid down for the whole Public Administration, in what concerns the concept of basic remuneration, supplements and remuneration in a wider sense and that, on top of that, what it is doing in detriment of the workers, also to our view openly violates the provisions contained in the revised European Social Charter, in particular in its n° 6 and 22 of Part I, article 4 §§ 1 and 2 and article 6 §§ 1 and 2 of Part II.

Finally, it should be reiterated that all the attempts by ASFIC/PJ up till now to reinstall legality have proved to be fruitless because of the expressed jus imperium, be it for the successive violations of the right to freely negotiate working conditions.

Considering that in Portugal, according to the abovementioned information, remunerations are part of a regime which is similar to that concerning rights, freedoms and guarantees, it should therefore be considered that there persists a violation of the right to a fair remuneration. In this particular instance translated into a reduction of the remuneration as such. In fact, the attribution of the availability or on-call allowance, in accordance with articles 97 of the Legislative Decree 295-A/90 and 79 of Legislative Decree 275-A/2000, corresponds to a true reduction of the Criminal Police Personnel's remuneration.

Conclusion

Given the submitted information by the complainant but in particular that provided by its Portuguese affiliates², ETUC considers that Portugal has not ensured the satisfactory application of article 4 §§ 1 and 2 and article 6 §§ 1 and 2 RESC and therefore supports the complaint by CESP.

Brussels, 1 March 2007

² In the file submitted by the Portuguese affiliates, in particular CGTP-IN, to the ETUC, several other documents/annexes were provided next to their actual observations. It concerned in particular:

1. A copy of the ECSR Decision of Admissibility of 5/12/2006
2. A copy of the complaint by CESP as registered on 29 September 2006 by the Secretariat of the Social Charter. This was also accompanied by 8 appendixes.
3. These 8 appendixes consisted of:
 - a. Letter of 15 May 2006 to the President of the CESP from Mr. R. Brillat
 - b. Statutes of the CESP
 - c. Final Resolution of the CESP Executive Committee meeting held in Lille in 1998
 - d. 4 appendixes with extracts from relevant doctrine on the matter published by authors such as Paulo Viego e Moura, Joao Alfaia and Manuel Tavares.
 - e. A copy of article 19 para 1 of Legislative Decree 184/89

If any of these documents would not (yet) be in the possession of the ECSR, we would be more than willing to submit them when requested and/or found useful!!!