

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



17 September 2007

**Case document No. 5**

**European Council of Police Trade Unions (CESP)  
v. Portugal**  
Complaint No. 37/2006

## **RESPONSE FROM THE CESP TO THE ECSR'S QUESTIONS**

Registered at the Secretariat on 14 September 2007

Collective Complaint No. 37/2006 – CESP v Portugal

Dear Sir or Madam,

Thank you for your letter of 11 July 2007, to which this letter is in reply.

Since each of the European Committee of Social Rights' questions has major implications we have decided to answer them in the same order as they are asked, setting out each time first the question and then our response, in the hope that this will help to clarify the subjects under discussion.

The questions raised do not necessarily contribute to an understanding of the problem under consideration, which has nothing to do with overtime, or as it is incorrectly termed, "active prevention work". On the question of overtime pay, we support the complaint lodged with the Council of Europe by our French colleagues and fully identify with these proceedings, as shown by the conclusions of the conference on 21 March 2003 on police working arrangements<sup>1</sup>, which considered the question of overtime and how it should be paid for.

**1. What, in practice, does the requirement for criminal police officers to be permanently available for duty entail?**

The notion of availability for duty requires criminal police officers to be contactable, even when they have completed their working day or shift. They can be summoned for any emergency at any time outside normal working hours, because crime can occur at any time or place. Criminal police officers may thus be called in at any time

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<sup>1</sup> In connection with this, see the contributions of professors Jorge Leite, pages 61 to 68, and Liberal Fernandes, pages 69 to 72, and Mr Jorge Braga pages, 98 to 105.

of day or night, even when they are on leave or during full rest periods. A distinction must therefore be drawn between what are too often confused, namely availability for duty, or a non-physical presence that treats criminal police officers as being always ready to respond to any summons no matter what the time, and work actually performed. This confusion benefits the state, which remunerates these two situations as if they were one and the same. In other words, two circumstances that are quite different should not be treated as the same and thus cumulative.

The practical implication is that it is impossible for criminal police officers to lead normal lives, like any other employee. They must be ready for duty at any moment, even when they are on leave, which may be interrupted by decision of their management. Availability for duty also implies that all officers answerable to and within the jurisdiction of the department in which they serve must be prepared to take urgent decisions, outside their normal working hours, to prevent, or identify and arrest the perpetrators of, any criminal offence of which they become aware, pending the arrival of duty police officers – section 80 of the Police Act.

**1.1 Is there an established maximum number of hours per week or month during which criminal police officers must be available for duties outside their normal working hours?**

No, because outside of their normal or special working/shift hours, criminal police officers are always available for duty. They are one hundred percent on call outside their working hours and special duties beyond their normal working hours. Under section 79 of the Police Act, criminal police officers must always be available for duty, hence the need for an on-call bonus or allowance. This means that whenever officers are not on normal or special duty, they are available for duty.

However, the problem here is not the number of hours, since the government acknowledges this need, which in any case cannot be denied since it is specifically provided for in law. What it does not acknowledge is the reduction in remuneration for the purposes of calculating the relevant allowance. This is illustrated by the method of calculating the index point 100 on the salary scale, which in no way reflects reality. If it is indeed the case that the

25% on-call allowance forms part of the basic salary, then the index point 100 of the profession (€774.12) has to be reduced by 25% (the on-call allowance), to leave the index point 100 at €580.59. This is the heart of the problem. The Portuguese government cannot claim that it pays an on-call allowance equivalent to 25% and at the same time insist that that allowance is already included in the basic pay, which besides is quite incompatible with any form of public service remuneration system. All this has already been said in the complaint and in replies to the government's response. In other words, the 25% will always be deducted from the salary, whatever the category of official. It clearly makes a difference to any scale to multiply the remuneration index by €580.59 rather than by €774.12.

**2. Are criminal police officers subject to other obligations when they are available for duty, such as a maximum response time after being called in?**

By definition, there are none. After finishing their normal working hours, criminal police officers are automatically available for duty. This follows from section 79.1 of the Police Act, according to which criminal police officers must always be available for duty. Officers may not be called in but if they are they must report for duty immediately.

**3. What cases are concerned by the payment of 25% of the basic salary under section 79.6 of the Police Act of 9 November 2000?**

Under existing legal provisions, only the basic salary of the category or grade of the officer in question. In other words, 25% of the basic pay of a criminal police officer is considered to be the on-call allowance, which we also consider to be unlawful. The fact that the salary scale of the public service, and of criminal police officers, is an indexed scale means that point 100 on the scale is fixed. In this case, scale point 100 is 785.73, with the result that any remuneration index will be multiplied by this value. As a result, an inspector on grade 1, which corresponds to scale point 195, will receive €1532.17, whereas he or she should receive €1915.22. To take another example, an inspector on grade 4, or point 265 (in the middle of the scale), will receive €2082.18, rather than this amount plus 25% for the on-call allowance, or

€2602.73.

We therefore have to subtract 25% from the remuneration index point of each category to obtain the net remuneration. In other words, this is not a proper salary scale and the Portuguese government is wrong to claim otherwise. Either they are not telling the truth when they claim to be paying a 25% on-call allowance or they are not applying a proper salary scale to criminal police officers.

In practice, point 100 on the scale is not 785.73 but 589.30. Seen from this standpoint, contrary to what the government claim, scale point 100 is the second lowest of the entire Portuguese public service – see Appendix 1<sup>2</sup>, which would imply that the police are not treated as a senior and special branch of the public service (section 62.1 of the Police Act) but simply as part of the general public service scheme.

It is interesting to compare the value of index point 100, reduced by 25%, with the equivalent point on the Aliens and Frontier Service scale (790.10), which is based on the police scale. Moreover, even taking scale point 100 on the police scale as corresponding to €785.35, the aliens service scale is unfairly higher, which is quite inconsistent with the government's claim that "for these reasons among others, officials working in the criminal investigation and criminal investigation support branches have higher salary scales than other public officials".

### **3.1 Does this payment cover just the fact of being liable to be called in for duty or also (totally or partially) periods of work outside normal working hours?**

The on-call allowance is only intended to cover availability for duty and not the actual exercise of these duties, but this assumes that it is paid over and above the basic

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<sup>2</sup> Note that, according to the Portuguese government, the 25% relating to the on-call allowance must be subtracted from the values of index point 100 of the staff of the police criminal investigation service.

salary, which as we have seen has not been demonstrated.

It needs to be generally recognised that criminal police officers must always be available for duty and that if they were not required to be permanently on call outside of normal hours there would not be enough police officers to meet the needs of the service. In other words, there would be nothing to be gained from compensating for overtime worked with additional leave or rest time if the officers concerned could then simply put their work behind them, as all other public servants are legally entitled to do. To take a simple example, medical and other hospital staff operating under a similar scheme receive an additional allowance of 50% on top of their remuneration – see Article 9.2 and 3 of Legislative Decree 62/79 of 30 March.

**4. Whenever staff are required to work outside normal duty hours, are these periods of service considered to be overtime?**

In practice, although staff are paid for such periods of duty, the Portuguese government does not treat them as overtime for payment purposes. Instead, it has invented the notion of "active prevention work", which results in a level of remuneration well below that set for overtime. To illustrate, we would cite a short extract from a 2004 report on police working arrangements commissioned by the then justice minister, Celeste Carmona, and produced by the eminent professor of law, João Caupers<sup>3</sup>, which reads:

**“... A. Current situation.**

1. c. Adoption, for this purpose, of internal administrative regulations to compensate for the lack of appropriate legal standards; these regulations are extremely imaginative and also of very dubious legality. (...)

4. The practical consequence of this unorthodox system is a clearly excessive workload outside of normal hours. In practice, any work undertaken outside the normal working day should, under the general rules that apply, be subject to the overtime

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<sup>3</sup> Professor of law at the new University of Lisbon.

remuneration system, in terms of both compensatory time off and additional payments. (...)

We must emphasise however that current practice generates a very significantly excessive workload, with each hour's work being paid, from what we have been told, at up to five times below the normal hourly rate (if the generally applicable law was applied, overtime would be paid with a supplement of between 25 and 90%). (...)

**7. It should also be noted that the general law on daily overtime limits is often breached.** There is now a clear need for specific working arrangements for police criminal investigation staff that reflect their particular work requirements and conditions and to move beyond the pretence of applying a would-be general public service employment system, with the aid of imaginative constructions and manipulations that might have been necessary in the context in which they were developed but have now exhausted their potential. (...)

**Lisbon, 6 May 2004<sup>4</sup>**

Even reports commissioned by the government therefore acknowledge the validity of criminal police officers' arguments. What is incomprehensible is the government's unwillingness to resolve the problem with the trade unions, which is why the complaint has been lodged with the Council of Europe.

#### **4.1 Is remuneration paid for these periods separately?**

This question has been substantially answered in the previous replies. Each one is paid for separately because, clearly, being physically on duty and in action is different from being on call, that is awaiting a possible call out. This was the subject of a serious report requested by the Portuguese government<sup>5</sup> which, let us repeat, supported the contentions of police criminal investigation officers.

This complaint is only concerned with the form – or non-form – taken by the on-call allowance that the Portuguese government claims has been included, by law, in criminal police officers' basic pay, thus reducing this pay by 25%. This is how we understand the Portuguese government's response, and the enormous

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<sup>4</sup> Observations taken from the second version of the report, 23 June 2004.

<sup>5</sup> Already referred to in sections 2 and 3.

incompatibility between what it says in section 3 and in sections 4 to 7 of its submission. How can the government claim in its submission that "[criminal police officers] have higher salary scales than other public officials ... and a supplement to compensate for the requirement to be permanently available for duty", and that these categories therefore have "specific pay scales", when in practice this level of pay is reduced by 25%?

It should also be borne in mind that the basic salary reduced by 25% is practically the same as that earned by the majority of public servants. It seems therefore that the Portuguese government considers that the on-call allowance also serves as recompense for the professional aspects of the task of officials working in the criminal investigation branch, which is not otherwise acknowledged,

#### **4.2 If so, what are the criteria and rates of remuneration for these periods?**

The Portuguese government's approach to payment for these additional hours worked is embodied in three decisions of the national police director: nos 006/2002-SEC/DN of 15 February, 11/2002-SEC/DN of 20 March and 024/2002-SEC/DN of 26 June. These do not treat such time worked as overtime, even though they should be paid for as such under Legislative Decree 259/98. Nevertheless the approach adopted could be acceptable, if the on-call allowance were paid – in accordance with the law – in addition to the basic salary, which is definitely not the case.

#### **5. What are the practical provisions governing the call-out system?**

Work is organised into normal work time – 35 hours per week – and so-called intervention and prevention duties. However there is still a great deal of supplementary work, of which this form of work organisation takes no account. In addition to their scheduled daily seven hours, criminal police officers have to work additional hours for which they are not paid overtime. It would be helpful if the Portuguese government could produce documentary evidence of payments made to



these professionals for the supplementary work performed, so that this additional work could be compared with hours actually worked over the period in question. It should be noted that the additional work, or overtime, referred to here should be recompensed in accordance with Legislative Decree 259/98<sup>6</sup>.

### **5.1 How are call outs allocated between officers (for example, rotation system)?**

This is clearly a problem that affects all officers, because of staff shortages and/or crime levels. It is therefore a question not of rotation but rather of a need for constant availability, if one really wishes to combat organised and lesser forms of crime, which are both the responsibility of the criminal police.

Call outs therefore affect all criminal police officers equally. A rotation system would not be possible with criminal investigations because a continuous service has to be provided, which is incompatible with the transfer of files from one investigating officer to the next. The reason for this is quite simple. Each file has to be studied by the same investigator until the crime is solved, without the former's having to constantly ask for assistance from colleagues who have their own cases to deal with. It is not possible therefore to talk about the allocation of call outs among criminal police officers, rather than the performance of duties with no distinction between staff irrespective of call outs.

### **6. In practice, approximately how frequent are such call outs?**

As already noted, the point at issue is not how often officers are called out but the fact that they must remain constantly in touch with the service, which infringes on their right to rest periods. Moreover, as everyone is aware, payment for on-call duty is itself inadequate. Corroboration may be found in the 2004 report on police working arrangements produced by the eminent legal specialist João Caupers at the request

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<sup>6</sup> Articles 28 and 33 of the legislative decree.

of the then justice minister, Celeste Cardona, an extract from which appears earlier in this letter. Irrespective of whether they are actually called out and the frequency with which this occurs, criminal police officers are always considered to be available for duty and must always be prepared to enter into action, even during leave, rest periods, compensatory rest periods or public holidays. This availability via their mobile phones has a price, which the state has set at 25% of their salary. They have never been paid this allowance, because it is deemed to form part of their basic pay. This is the subject of this complaint.

**6.1 Can you provide relevant data? Specifically, how often and for how many hours each week or month (on average) are criminal police officers asked to work outside their normal duty hours?<sup>7</sup>**

Criminal police officers are required to work overtime practically every day. Even when, as is sometimes the case, they are not, they must always be conscious of the fact that they are permanently available for duty. During investigations, for example, officers must remain on surveillance duty until they can be relieved. Examples include colleagues responsible for the Madeleine McCann investigation in Lagos, or the "*apito dourado*" investigation into Portuguese professional football.

At the end of each month, therefore, it is rare for any officer to have worked fewer than 170-180 hours, compared with the 140 of their normal working time.

**7. What are the current real rates of basic pay and weekly and monthly working hours of criminal police officers? Please indicate separately the rates of remuneration for the obligation to be on call for the period of availability. Please indicate the minimum national wage for the same periods of time.**

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<sup>7</sup> We have asked the police authorities for accurate official statistics on hours worked by criminal investigation officers outside normal working hours, but have not yet received a reply.

Criminal police working hours are 35 per week. Normal overtime rates are +25% for the first hour and +50% for subsequent hours during the day. The equivalent night-time figures are +60 and 90%. The rate is +100% for weekly or additional leave days and public holidays. These are all laid down in articles 28 and 33 of Legislative Decree 259/98.

Instead, the police authorities pay between €2.73 and 3.81 per hour up to 24 hours, and between €5.47 and 7.63 after 24 hours, according to category<sup>8</sup>, and describe this work, unilaterally, as "reinforced active prevention" so that it can be recompensed as such, even though there is no doubt that in fact it constitutes overtime.

As can be seen, workers in the general employment scheme on lower pay end up earning more than the criminal police. Moreover, comparisons cannot be made in connection with the present complaint. The problem does not concern the forms of remuneration for overtime actually worked. What is at issue is the on-call allowance which, contrary to what the government maintains, is not paid to criminal police officers. I respectfully submit therefore that this questionnaire misses the real problem.

## **CONCLUSIONS**

Contrary to what seems to be generally thought and what underlies this questionnaire, collective complaint 37/2006 centres on criminal police officers' availability for duty and the consequent remuneration they receive for this availability under section 79.6 of the Police Act.

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<sup>8</sup> Comparison of these sums with what would be payable under articles 28 and 33 of Legislative Decree 259/98 for a category such as inspector with an average hourly pay of € 18 shows that those concerned should receive a minimum of € 22.50 per hour rather than € 2.73, and a maximum of € 36 rather than € 3.43!

It is not correct to maintain, as the Portuguese government does in its response, that scale point 100 on the criminal police salary scale is the highest in the public service. This can be disproved by simple comparison, as shown in appendix 1. Moreover, this index must be considered to be reduced by the value of the on-call allowance, which is in manifest breach of the law, in the form of legislative decrees 184/89 and 353-A/89.. This has all been clearly explained in the complaint and is corroborated in submissions by the two Portuguese trade union federations.

This is the situation that members of the Portuguese criminal police force currently face.



Branko PRAH

Président du CESP