EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

27 November 2008

Case document no. 3

Confédération Française Démocratique du Travail (CFDT) v. France
Complaint no. 50/2008

WRITTEN SUBMISSIONS BY THE GOVERNMENT ON THE MERITS

(TRANSLATION)

registered at the Secretariat on 21 November 2008

OBSERVATIONS BY THE FRENCH GOVERNMENT ON COMPLAINT No. 50/2008 BY THE CFDT TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

1. In a letter of 8 April 2008, the European Committee of Social Rights notified the French Government of its admissibility decision concerning Collective Complaint no. 50/2008 by the CFDT, as lodged in accordance with Article 5 of the Additional Protocol to the Charter, and asked the Government to submit observations on the merits of the complaint.
2. These observations constitute the French Government's reply to the CFDT's allegations, seeking to show that its arguments should be dismissed.

I. Background

3. To satisfy the needs of the French forces stationed in the Federal Republic of Germany, the member states of NATO agreed that the German state would be in charge of recruiting civilian staff under local contracts governed by German legislation. It was under this agreement that the French forces stationed in Germany benefited from the services of this civilian staff, whose main tasks were the upkeep of machinery and gardens. The staff comprised both German and French nationals, who, although living in France in frontier towns, had agreed to be employed not under French private law contracts but under German ones, which had both advantages and drawbacks.
4. As a result, civilian staff working for the French forces fell into three categories:
    a. Civil servants and public employees of the French state;
    b. Employees whose contracts were governed by French private law;
    c. Foreign civilian staff, including French nationals with an employment contract governed by German private law.
5. The reorganisation of the French forces from 1997 onwards, leading ultimately to their dismantlement, had an impact on these civilian staff. However, support measures designed to help them change jobs were adopted by the French and German governments.
6. For the civilian staff governed by German private law an agreement between France and Germany was signed on 10 October 1996, including specific measures such as a substantial increase in the redundancy payments provided for by the German

employment contracts and collective agreements and special arrangements for French nationals who so wished to return to France and enjoy full unemployment benefit rights even if they had contributed to the German scheme.

7. At the same time, members of the French staff set up the "*association de défense des personnels civils étrangers de nationalité française*" (the "Association for the defence of foreign civilian staff of French nationality") in order to promote their interests and ask the French Ministry of Defence to grant the staff concerned public employee status and, by extension, the various rights that this entails such as the validation of their years of service for pension rights or access to public service posts. The Ministry of Defence rejected their application and its decision was upheld by the administrative courts.

8. For instance, in a decision of 25 July 2001, the *Conseil d'Etat* upheld the Ministry's decision on the following grounds:

> "*Although the foreign civilians employed by French forces stationed in Germany contribute to the work of the French public defence services, it follows from the aforementioned provisions of the agreements negotiated between the states party to the North Atlantic Treaty with regard to the French forces stationed in the Federal Republic of Germany that employment contracts negotiated between these employees and these French forces are private law contracts subject to German labour law ...* ***Consequently, the Ministry of Defence was required to reject the applicant association's request for the employees it represents to be granted public employee status. The duty to redeploy employees that was said to derive from a collective agreement … governing employment relationships in Germany under supervision of the German courts could not be considered to impose any obligation on the French authorities.***"

9. The various redeployment measures introduced by the French Government, which was, incidentally, under no obligation to take such steps, made it possible for some of the persons concerned to be integrated into the staff of the French Ministry of Defence as state manual employees (*ouvriers d'Etat*).

10. State manual employees form a particular category of employee. They are neither civil servants nor private law employees but non-established public employees, who are still subject to basic civil service rules but covered by special provisions. As a result, they do not enjoy any status as such but are covered by a series of ministerial

or interministerial regulations (decrees, orders, circulars, instruction and decisions) which give them certain advantages and guarantees relating in particular to the following matters:

- wage structure, negotiation and rises;
- social protection;
- disciplinary rules;
- pensions (access to old-age pension rights, constitution of pension rights and payment of and qualification for pensions).

11. Some state manual employees formerly employed by the French forces in Germany applied to the administrative courts for the provisions relating to non-established public employees to be applied to them. Specifically, they asked for Article 6 of Decree 70-79 of 27 January 1970 on the career structure of C and D category public officials to be applied to them. This article provides as follows:

    "Non-established officials of central government, local government or bodies responsible to them who are recruited in accordance with the normal statutes to one of the grades or posts specified in Article 1 above shall be classified with reference to three-quarters of the period of civilian service they have completed, on the basis of the average period of service required for each advancement to a higher grade".

12. Foreign civilian staff of the French forces in Germany who had become state manual employees were not covered by this provision because they had not been non-established public employees when they were working in Germany and they had not become civil servants on recruitment. As a result, they failed to satisfy either of the requirements of Article 6 of the Decree of 1970.

<u>The complainant's allegations</u>

13. Relying on Articles 4, 12, 18, 19 and E of Part V of the European Social Charter, the CFDT alleges that there was discrimination against the members of the foreign civilian staff of the French forces stationed in Germany because they could not enjoy the rights enshrined in Article 6 of the Decree of 1970.

The French Government's reply to the complainant's allegations

I. On the public employee status of foreign civilian staff of the French forces stationed in Germany

The status of foreign civilian staff of the French forces

14. Under an agreement signed in London on 29 June 1951 and ratified by France, the member countries of NATO agreed that civilian labour employed by their forces stationed in another country would be covered by the social legislation of the receiving state.
15. Applying this principle, a Franco-German agreement signed in Bonn on 3 August 1959, added to subsequently by an agreement of 18 March 1993, described precisely how these staff would be covered not only by the whole of German labour law but also by its legislation on social protection, including health insurance, pension contributions and unemployment insurance.
16. The only substantial variation from the ordinary law on German employees was that any collective agreements governing labour relations had to be approved by the French military authorities. However, such agreements were still negotiated by German trade unions with the German state and, under Article 56 of the agreement of 3 August 1959, the German state was expected to fulfil all the functions of employer of the civilian staff in question.
17. For example, under paragraph 8 of this article, the German state was to be considered the employer in all legal disputes arising in relation to employment contracts or social insurance – which were, moreover, considered to fall exclusively within the jurisdiction of Germany's ordinary law courts – and the German state was responsible for all salaries and other payments. In short, the same legal framework applied to these employment contracts as to the contractual civilian staff of the German federal state.

The administrative case-law in this field

18. In disputes between the French state and the staff in question, the French administrative courts have held a consistent line, backing up the French

Government's refusal to grant these staff public employee status for the period during which they worked in Germany.

19. For instance in a recent decision of 11 August 2005, the Strasbourg Administrative Court upheld the *Conseil d'Etat*'s previous decision, finding as follows: "*Although the foreign civilians employed by French forces stationed in Germany contribute to the work of the French public defence services,* ***employment contracts negotiated between these employees and the French forces are private law contracts subject to German labour law****; consequently, the authorities were obliged to conclude that* ***Mr X's former activities in this capacity could not constitute "civil service" work within the meaning of the provisions cited above as he did not enjoy the status of non-established public employee***".

20. The Strasbourg Court's position was consistent with the previous decisions of administrative courts which had been required to set out and clarify the rules on the staff of the administrative services of the French state abroad, particularly in cases concerning the legal status of staff holding a local-law employment contract who were recruited abroad to take part directly in the functioning of the public service.

21. In its decision of 19 November 1999 in the Tegos case, the *Conseil d'Etat* established the current case-law, stating that public employee status could only be considered to apply if the employment contract stipulated that the employee's duties were public in nature or the clauses of the contract reflected a choice in favour of French law: "*non-established employees working for a public entity running an administrative public service shall be subject, in their relations with this entity and whatever the nature of their employment, to public law rules, save* ***where a statutory provision provides otherwise***[1]".

II. Whether there was discrimination

22. The complainant, the CFDT, accuses the French state of discriminating between public employees in France and public employees working in Germany.

23. According to the Committee of Social Rights and the case-law of the European Court of Human Rights, particularly in its judgment of 23 July 1968 on the Belgian language case (see also the Thlimmenos v. Greece judgment, no. 34369/97, ECHR 2000), the principle of equality reflected in Article E means treating equals equally and unequals unequally.

[1] Nancy Administrative Court of Appeal, 2 December 2004, No. 99NC010007.

24. In the instant case, the staff in question had an employment contract that was covered entirely by German private law and validated by the member states through an international agreement, but also by the staff themselves, who agreed to these contracts in full knowledge of the facts.
25. As private law contractual employees of the German state, these staff were covered by working and wage conditions negotiated under highly favourable collective agreements that cannot be compared with those of non-established public employees of the French state.
26. In view of the foregoing considerations, which show that the staff concerned did not have public employee status and could not therefore legitimately claim that the provisions in question should be applied to them, the French Government considers that the Committee should dismiss this argument because the situation of non-established public employees and that of foreign civilian staff cannot be regarded as comparable.
27. It follows that the allegation of discrimination is unfounded and should be dismissed.

i. <u>The alleged violation of Article 4 of the Charter</u>

26. Article 4 of the revised European Social Charter establishes the principle that "all workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families".

a. *Article 4§1 guarantees the right to a remuneration which ensures a decent standard of living*

28. The Committee has stated that to be considered to comply with Article 4§1, remuneration must be above the poverty threshold of the country concerned, which it considers to be 50% of the national average wage.
29. Appended to these observations is a wage scale setting out the remuneration of state manual employees, which is the current status of some of the civilian staff represented by the complainant. It is worth noting that these wages are considerably higher than the average wages of employees of the French state, particularly those of the non-established public employees covered by the Decree of 1970.

b. *Article 4§3 states that "with a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake to recognise the right of men and women workers to equal pay for work of equal value".*

30. The Government wonders what may have prompted the complainant to refer to this provision, which guarantees the right to equal pay without discrimination on the ground of sex, as there is nothing in the case file to indicate that there was any discrimination between women and men among the staff in question or between them and non-established public employees. Clearly, the arguments submitted by the complainant do not justify any reference to this provision of the Charter.
31. As a result, the Government considers that this allegation is irrelevant and that it is particularly unjustified for the complainant to refer to Article 4§3 of the Charter.

ii. The alleged violation of Article 12 of the Charter

32. Article 12 of the European Social Charter establishes the principle that all workers and their dependents have the right to social security, implying that states party have a duty to set up a social security system and ensure that it is properly run.

33. Article 12§4 a) provides as follows:
"*With a view to ensuring the effective exercise of the right to social security, the Parties undertake to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties*".
34. The Committee will note in the instant case that French legislation does not impose any prohibition or restriction on the enjoyment by its nationals of social benefits to which they are entitled as a consequence of having worked in another state.
35. It follows that French civilian staff who worked for the French forces in Germany must have preserved the pension rights they acquired under German legislation for the period when the Federal Republic of Germany was their employer. The French state cannot take the place of the German state and cover the entire cost of the pension benefits to which these staff may be entitled.

36. The staff in question may therefore claim their right to a pension from the Federal Republic of Germany corresponding to the periods when their working conditions in Germany were determined by a German-law employment contract and collective agreements between the German state and German trade unions.

Given these circumstances, the complainant cannot reasonably claim that the French state has violated Article 12 of the European Social Charter.

iii. The alleged violation of Article 18 of the Charter

37. Article 18 of the Charter provides: "The nationals of any one of the Contracting Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons …".

> *"With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake:*
>
> - *to apply existing regulations in a spirit of liberality;*
> - *to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;*
> - *to liberalise, individually or collectively, regulations governing the employment of foreign workers; and recognise:*
>
> - *the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties".*

38. Article 18 lays down the general rules governing the right of workers to engage in an occupation in the territory of a state of which they are not a national.
39. The French Government considers that that this provision does not apply in the current case as the staff concerned were French nationals. The assertion that this Article of the Charter has been violated is unfounded.

iv. The alleged violation of Article 19 of the Charter

40. The French Government is surprised to find a reference to this article in the CFDT's collective complaint. Article 19 of the Charter, which has been the subject of many complaints to the European Committee of Social Rights and much interpretation by

it, enshrines the right of migrant workers and their families to protection and assistance on the territory of states party.

41. The French workers in the instant case, who have since been integrated into the French public service, cannot claim to have "migrant worker" status.
42. The Government considers that, in view of their working conditions when they were working in Germany under the responsibility of the German state and their particularly advantageous integration into the administrative services of the French Ministry of Defence, the complainant's reference to Article 19 is particularly ill-founded, especially when these workers' situations are compared to the considerably more difficult ones of true migrant workers and their families.

In view of the foregoing comments, the French Government concludes that the complaints deriving from the misunderstanding of the articles of the European Social Charter referred to by the complainant are unfounded and asks the European Committee of Social Rights to reject the CFDT's complaint.