

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX



29 March 2010

Case Document No 1

European Council of Police Trade Unions (CESP) v. Portugal
Complaint No 60/2010

COMPLAINT

registered at the Secretariat on 18 March 2010



Conseil Européen des Syndicats de Police

Organisation Internationale Non Gouvernementale au Conseil de l'Europe

Subject: Complaint submitted by the European Council of Police Trade Unions against Portugal for breach of paragraphs 6 and 22 of Part I, and Article 4, paragraph 2 and Article 6, paragraphs 1 and 2 of Part II of the revised European Social Charter.

I. Admissibility

1. Applicability to Portugal of the revised European Social Charter and of the 1995 Additional Protocol to the European Social Charter providing for a system of collective complaints

Portugal signed the 1961 European Social Charter on 1 June 1982 and deposited its instruments of ratification on 30 September 1991. The Charter came into force in Portugal on 30 October 1991. Portugal signed the 1995 Additional Protocol providing for a system of collective complaints on 9 November 1995 and ratified it on 20 March 1998. The protocol came into force on 1 July 1998. Portugal signed the revised Social Charter on 3 May 1996 and ratified it on 30 May 2002.

2. Applicability to Portugal of Article 4, paragraphs 1 and 2 and Article 6, paragraphs 1 and 2 of Part II of the revised European Social Charter

In pursuance of the declarations contained in the instrument of ratification of the revised European Social Charter of 1996 deposited by Portugal on 30 May 2002, it considers itself bound by all the articles of Part II of the revised European Social Charter.

3. Compliance by the European Council of Police Trade Unions with the criteria of the Additional Protocol

3.1. Compliance with Article 1 (b) of the Additional Protocol of 1995

The European Council of Police Trade Unions¹ is an international non-governmental organisation which holds participatory status with the Council of Europe. It appears on the list, drawn up by the Governmental Committee, of international non-governmental organisations entitled to submit complaints².

3.2. Compliance with Article 3 of the Additional Protocol of 1995

The activities of the ECPTU give it the necessary competence in the matters about which it is complaining. Article 8 of its articles of association³ provides as follows:

¹ - hereafter the ECPTU

² - letter of 15 May 2006 to the President of the European Council of Police Trade Unions from Mr Régis Brillat, Executive Secretary, DG II, Secretariat of the European Social Charter (appendix 1)

³ - articles of association of the ECPTU (appendix 2)

"The aim of the ECPTU is:

1. to unite the senior police officers who are members of its constituent organisations;
2. to fight for the full exercise of trade union rights and against any unwarranted restriction on European senior police officers' fundamental and statutory rights by steadfastly opposing any breach thereof;
3. to take action to enhance and harmonise the work, pay and living conditions of European police officers;
4. to defend the pecuniary and non-pecuniary interests of its constituent organisations and their members in the European institutions and courts."

The ECPTU is also committed to carrying out any other lawful activity which may be of benefit to the ECPTU or to its members.

It asks the governments of its 17 member countries to take the necessary steps to sign, ratify and apply the revised European Social Charter and the Additional Protocol thereto.

In this connection, it calls for all European senior police officers to be protected from discrimination in respect of social and human rights (Executive Committee meeting, Lille, France, November 1998)⁴.

The ECPTU plays an active part in INGO activities at the Council of Europe and is competent in areas of activity connected with social rights and the European Social Charter. It is the instigator of collective complaints Nos. 11/2001, 37/2006, 38/2006, 40/2007, 54/2008 and 57/2009.

It is also a member of the INGO Committees on human rights, social cohesion and eradication of poverty, and civil society and democracy.

4. Compliance with Rule 1 of the rules of procedure of the collective complaints system

Article 25 of the articles of association of the ECPTU states that the President shall be the legal representative of the European Council of Police Trade Unions and shall represent it in all European and national, public and private authorities and institutions.

II. The applicability of the right to just conditions of work and to a fair remuneration, with a higher rate of remuneration for the overtime system adopted in Portugal

1. Portugal is bound by the provisions of the revised Charter, and in particular by "the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases".
2. This means that Portugal is required to pay senior police officers and other criminal investigation officers for overtime worked, in other words their remuneration must be increased and not reduced.
3. While recognising the constraints posed by legislation and the particular circumstances of this important police corps, they do not constitute a special case.

⁴ - Lille final resolution (appendix 3)

4. This issue requires us to focus on two extremely important principles. The first is the need to offer these employees a fair remuneration distinct from that of other state officials, because of both the risk faced in the course of their duties and their specific nature. They should not be required to perform duties that are deemed not to be part of their working hours. Yet in practice, they are paid less than other public service employees, and may even not be paid at all for work performed.
5. Secondly, the Portuguese authorities continue to ignore the interests of senior police officers. Thus, despite their commitment to public service employees they do not negotiate with them over their working conditions, particularly with regard to their working hours.

III. Portuguese overtime legislation as it relates to criminal investigation staff

6. The criminal police force is an integral part of the public service. Under section 10d of Act 12-A/2008 of 27 February, police officers are public officials.
7. In the absence of specific legislation governing such personnel – which the trade union has requested but the government refuses to negotiate over – legislative decree 259/98 of 18 August is applicable. The government has published Act 12-A/2008 of 27 February, which became Act 59/2008 of 27 February and which lays down new working arrangements in the public service. However, the same rules apply to police officers, including the complainants, as will be shown below. The current arrangements are therefore not adapted to the particular circumstances of the police force, and more particularly the corps of senior police officers, which is a serious gap in the legislation⁵. In other words, there is a complete lack of specific regulations. We will now assess chronologically how the legislation relating to the police has evolved.
8. Order 98/97 was published in the *Diário da República* no 37, I series B, sheet 690 on 13/02/1997, after being approved by the prime minister and the justice and finance ministers.
9. The order provided for shift (paragraph 1), prevention (termed passive prevention, paragraph 3) and night duty (paragraph 8) supplements for police officers.
10. The working arrangements for officers on shift duty in prevention or day/night team units are set out in regulations approved by order 248/MJ/96, published in the *Diário da República* II series no. 5 of 7/01/1997. This stipulates that the shift service operates round the clock seven days a week. It starts at 8.30 am and continues to the same time the following morning (article 6), while the prevention unit operates outside normal working hours (article 15).
11. The regulations also specify that the remuneration should be for work actually carried out by members of prevention units (so-called active prevention), so work performed is deemed to be active prevention.
12. According to paragraph 4, work undertaken by the personnel of prevention units is remunerated at an hourly rate, which is calculated as follows:

Value of the shift allowance

⁵ Reference should be made here to the "former-new" system of state non-contractual civil liability, which highlights the state's responsibility for legislative omission.

13. According to paragraph 5, the rate of pay for work performed after midnight is 100% greater than the aforementioned hourly rate.
14. Paragraph 6 states that, in accordance with the provisions of paragraphs 3, 4 and 5, the total amount received may not, in any circumstances, be greater than the shift allowance.
15. In practice, this allowance establishes the level of remuneration for shift duty and active prevention duties and sets a limit to it.
16. These rules, as established in the aforementioned legislation and regulations, have resulted in police officers being obliged to work unpaid.
17. As stipulated in article 79.1 of legislative decree 275-A/2000 of 9/11 (the basic police legislation), prevention duty is permanent and obligatory, so the requirement to work additional days only ends when the investigation is completed and there is no limit to the number of hours that those concerned can be made to work under the prevention arrangements.
18. Thus there should not and must not be any difference between the fact of being available for work and actually performing that work in a specific location after being summoned to duty. The law however differentiates between work actually and not actually performed.
19. As such, it takes on the nature of overtime. Such work is performed outside of normal working hours (article 15 of order 248/MJ/96), but paid according to the hourly rate prescribed in paragraph 4 of order 98/97.
20. Moreover, whenever the total of hours worked would result in payment in excess of the maximum limit laid down – the shift allowance – the financial authorities automatically reduce the total remuneration to which those concerned are entitled to ensure that it is compatible with this limit, irrespective of the number of hours actually worked.
21. The fact that these duties are obligatory and unremunerated means that police officers are discriminated against, to their detriment, when compared to other public officials.
22. Bearing in mind the specific nature of police duties, which are spelt out in the order and in the basic police legislation, this is not compatible with the aim of the legislation concerned, which is to establish remuneration arrangements that are more to the advantage of public officials.
23. This inconsistency arises from the application of the formula in paragraph 4 of order 98/97. In practice, the means used to establish the rate for additional work performed under the prevention scheme reduces by 80% the value of a normal hour worked by each officer.
24. Under Portuguese law, the following formula must be applied to calculate the value of a normal hour worked by each employee:

$$(I \times 12) / (52 \times N)$$

Where I = monthly income and N = number of hours worked per week

25. This formula currently appears in section 71 of Act 12-A/2008 of 27 February,⁶ and the same formula has been in force since 1979, namely:
- 1 — The value of a normal hour of work is calculated using the formula $Ib \times 12 / 52 \times N$, where Ib is the basic monthly salary and N is the normal weekly hours of work.
 2. – The above formula serves as the basis for calculating the remuneration corresponding to any other fraction of working hours.
26. It previously appeared in article 36 of legislative decree 259/98 of 18 August and article 31 of legislative decree 187/88 of 27 May.
27. Yet in practice, under paragraph 4 of order 98/97, police officers carrying out actual duties under the prevention duties arrangements only receive 20% of the value of a normal hour of work in their category of remuneration.
28. It must be emphasised that the government only tried to adapt the arrangements provided for in legislative decree 259/98 to criminal investigation personnel in 2002.
29. Reference is made to this in order 18/2002 of 5 April, which laid down the regulations governing these officers' working hours and was not preceded, as is provided for, by negotiations with employee representatives, in this case the Associação Sindical dos Funcionários de Investigação Criminal (ASFIC).
30. However, the remuneration for work carried out remains unchanged, as the following table shows:

Value of hour of work carried out on prevention duties⁷

PREVENTION	ACTIVE (value per hour of work performed)			
	Working days		Saturdays, Sundays and public holidays	
	Until midnight	After midnight	Until midnight	After midnight
Co-ordinator	3.12 euros	6.23 euros	3.89 euros	7.79 euros
Chief inspector	2.86 euros	5.71 euros	3.57 euros	7.14 euros
Inspector and others	2.79 euros	5.58 euros	3.50 euros	7.01 euros

31. However, as already noted, the total number of hours per day to be paid must not exceed the total shift allowance for any category of staff. This has an extremely detrimental effect, as the following table shows.

⁶ Repeated in section 215 of Act 59/2008 of 11/09.

⁷ Sobral Barbosa, "O Regime especial da prestação de trabalho na investigação criminal da PJ/em 60 "Faq's"", January 2009, p. 43 (the special arrangements for work carried out in the police criminal investigation department in 60 FAQs)

Shift allowances and respective value of an hour worked⁸

SHIFTDUTIES	Working days		Saturdays, Sundays and public holidays	
	Allowance	Allowance per hour worked (/17)	Allowance	Allowance per hour worked (/24)
Co-ordinator	37.38 euros	2.19 euros	46.72 euros	1.94 euros
Chief inspector	34.26 euros	2.01 euros	42.83 euros	1.78 euros
Inspector and others	33.48 euros	1.96 euros	42.05 euros	1.75 euros
NB: Gross values, subject to compulsory contributions				

32. These findings show that officers who perform their duties in their normal working hours receive 100% of the normal hourly rate of pay, but when they work overtime, that is work performed on prevention or similar duties, they receive 20% of the amount in question, and then only up to the daily limit set by the level of the shift allowance. Beyond this limit there is no remuneration for any work performed, which means that compulsory overtime is carried out unpaid.
33. As a result, officers of the police criminal investigation department receive much less income than other public officials for much more work performed, as the following table shows⁹:

EXAMPLE OF OFFICIALS WITH A MONTHLY INCOME OF 1 500 EUROS		
Overtime	General scheme (legislative decree 259/98)	Special police scheme
Maximum time worked	Two hours per day on working days Maximum working day of 9 hours/7 hours on rest days/100 hours annually	Unlimited. Duty compulsory and permanent
Maximum remuneration	One-third of the basic monthly salary	Idem/In practice the salary may not exceed the value of the shift supplement
Increased remuneration	Between 25 and 200% of the normal hourly rate	Increases shown in the table in paragraph 28
Form of compensation	Officials may opt for compensatory time off or the normal rate of pay plus overtime increase	Compulsory: - Compensatory time off between 8 am and 8 pm - The remainder in accordance with the rates shown in the table in paragraph 28
Period of notice	Minimum 48 hours in advance	At any time
Night working	Between 8 pm and 7 am	Between 8 pm and 7 am
Method of calculating the rate for an hour worked	$(I \times 12) / (52 \times N)$ I = monthly income N = number of hours worked per week	Shift ¹⁰ allowance/12
Value of a normal hour worked	article 36 legislative decree 259/98 = 10.00 euros	Shift allowance/ 12 = 2.79 euros

⁸ Ibidem, p. 42

⁹ In "O Regime Especial da Prestação de Trabalho na Investigação Criminal da PJ", p. 49

¹⁰

34. It can therefore be concluded that under the prevention arrangements:
- a) Work performed is only remunerated if the payment is below the level of the specified shift allowance, after which the work is still obligatory, but is unpaid;
 - b) The rate of this remuneration is lower (by 80% on average) than the amount received when the work is performed in normal working hours;
 - c) This is work performed outside of normal working hours, in other words overtime. Yet a 100% increase only applies to work performed after midnight. No payment is made for any other work performed, whether on working or rest days.
 - d) This form of remuneration is much lower than that of other public service employees. Thus the latter, whose hourly rate is considerably higher, are paid for all the hours worked outside their normal working hours.
35. The arrangements just described are in clear breach of Article 59.1.a of the Portuguese constitution, which reads: "... every worker shall possess the right ... to the remuneration of his work in accordance with its volume, nature and quality, with respect for the principle of equal pay for equal work ..."
36. In practice, the constitutional pyramid classifies the right to work as an economic, social and cultural right¹¹.
37. The implication is that in relation to economic, social and cultural rights, the right to work is on an equal footing with the right to life, as it appears under the heading "personal rights, freedoms and guarantees", the listing of which starts in the same way. This is not by chance. In certain respects, the right to work is a precondition for and logical precursor of all the other economic, social and cultural rights. Moreover, seen from another perspective, the right to work is a precondition of the right to life, seen as a right to survive¹².
38. These arrangements are in breach of legislative decree 259/98 of 18 August, particularly article 36, which establishes the formula for calculating the normal hourly rate of pay, thus setting the standard for the remuneration of employment. It is also in breach of article 28.1, according to which all overtime worked must be remunerated/compensated at the normal hourly rate, plus an additional amount. In other words, it guarantees, as a minimum payment, the normal hourly rate for work performed, increased by a percentage calculated in accordance with the provisions of sub-paragraphs a and b.
39. Section 212 of Act 59/2008 of 11 September specifies the form of payment for overtime¹³. In addition, section 163 grants entitlement to compensatory time off for all overtime worked during working days, equivalent to 25% of the hours of overtime worked.

However,

¹¹ See Article 58 of the Portuguese Constitution: 1. Everyone has the right to work. 2. In order to ensure the right to work, the state shall be charged with promoting: a) The implementation of full-employment policies; b) Equal opportunities in the choice of profession or type of work, and the conditions needed to avoid the gender-based preclusion or limitation of access to any position, work or professional category; c) Cultural and technical training and vocational development for workers.

¹² See J. J. Gomes Canotilho, Vital Moreira, *Constituição da República Portuguesa Anotada*, p. 762, 4th Edition ;

40. None of these provisions apply to the criminal police, despite the fact that legislative decree 259/98 – the previous regulation - has not been formally repealed and is still applicable. Thus the government should have entered into negotiations to ensure that the way the regulations were applied did not harm anyone's interests, which is not the case with orders 98/97 or 18/2002. It is reasonable to assume that responsible, intelligent and serious negotiations would have led to working time regulations that satisfied both parties.
41. The Portuguese government is therefore in clear and deliberate breach of paragraph 6 of Part I of the revised Social Charter because the state refuses to bargain collectively with the police trade union representatives and simply imposes its regulations wholesale, whereas both national law and the revised Social Charter provide that "all workers and employers have the right to bargain collectively".
42. In practice, all the attempts by the Portuguese criminal police trade unions, and more specifically ASFIC, to negotiate on the regulations governing overtime worked by police officers have failed.
43. The Portuguese government therefore quite simply ignores the European Social Charter's provisions on the negotiation of working conditions, particularly the most elementary rules of collective bargaining, and is acting as an authoritarian state that decides on and imposes whatever it wants without negotiation.
44. We call on the government to present the written record of the collective bargaining process, signed by the police officers' representatives, to show that negotiations have taken place.
45. Evidence is also needed that, in accordance with paragraph 22 of Part I of the revised Social Charter, "workers have the right to take part in the determination and improvement of the working conditions and working environment in the undertaking". This has clearly never been the case in Portugal as far as the criminal police are concerned.
46. So when this member state refuses to negotiate with the legitimate representatives of criminal police officers on their working conditions, particularly the regulations governing overtime payments, they are in clear violation of the Charter, particularly regarding the failure to comply with paragraph 22 of Part I.
47. We do not understand why, when the police trade union representatives have expressed a wish to negotiate on these subjects the Portuguese government systematically refuses to do so. As such, it is openly abrogating its responsibilities to abide by its European Social Charter obligations.

In addition:

48. The current arrangements are also in breach of Article 4.2 of the revised Social Charter, which reads:
"Article 4 – The right to a fair remuneration
Part I: to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;

¹³ It should be pointed out that Act 59/2008 reduces the rate of overtime payments for public officials in general. However, these remain higher than those for which officers of the police criminal investigation department are eligible.

Part II: With a view to ensuring the effective exercise of the right to work, the Parties undertake:

(...)

2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases; (...)"

According to the interpretation of the European Committee of Social Rights;

"... the principle of this provision is that work performed outside normal working hours requires an increased effort on the part of the worker, who therefore should be paid at a rate higher than the normal wage" (Conclusions XIV-2, statement of interpretation of Article 4.2, pp. ...).

Moreover:

"... By normal working hours, it understands the standard daily and weekly working periods determined by national legislation and collective agreements; this is on condition that these periods comply with Article 2§1 of the European Social Charter, which guarantees reasonable working hours (see Conclusions I, general observation on Article 2§1, p. 18). Overtime is hours worked in addition to the normal working hours referred to above (see Conclusions I, statement of interpretation of Article 4§2, p. 28)."¹⁴

- 49. It is not possible for a state that wishes to comply with Article 4.2 of the revised Social Charter to pay some of its officials overtime at a higher rate while paying overtime to criminal police officers at a lower level than their normal hourly rate.
- 50. This violates not only the Portuguese Constitution and its ordinary legislation, but also the revised European Social Charter, in particular Article 4 paragraph 2 and Article 6 of Part II.

IV - Conclusion

This complaint lodged by the European Council of Police Trade Unions asks the Committee to acknowledge and state that Portugal is in breach of paragraphs 6 and 22 of Part I and Article 4.2 of the revised Social Charter and that to comply with these provisions it should apply legislative decree 258-98 of 18 August on remuneration for overtime worked by officers of the Portuguese criminal police force. It is also asked to find that there has been a violation of Article 6 because the Portuguese state has refused to enter into negotiations with the relevant national trade unions on the implementing orders of the regulations in question.


Branko PRAH

Président du CESP

¹⁴ Decision on the merits of 3 December 2007 on Complaint No. 37/2006, European Council of Police Trade Unions (CESP) v. Portugal – paragraphs 29, 30 and 31.

Appendix to the complaint

No. 1 Report by Mr Sobral Barbosa, graduate in law of the University of Coimbra and chief inspector of the Portugal criminal police.

"The special working arrangements in the criminal investigation department of the criminal police force"