EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

20 March 2023

Case Document No. 1

***Fédération nationale des syndicats de salariés des mines et de l'énergie – Confédération générale du travail* (FNME-CGT) v. France**
Complaint No. 222/2023

COMPLAINT
(translation)

Registered at the Secretariat on 14 March 2023

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EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COMPLAINT

BY: The *Fédération nationale des syndicats des salariés des mines et de l'énergie – Confédération générale du travail (FNME-CGT)*, whose headquarters are located at 263 rue de Paris in Montreuil (93516), in the person of its legal representative, duly domiciled in this capacity at those headquarters,

Complainant
SCP Rocheteau, Uzan-Sarano & Goulet (partners in law)

AGAINST: The French State

Respondent

I. The complainant organisation, the FNME-CGT, is a federation of the CGT trade unions of employees currently working or inactive in or retired or receiving a survivor's pension from the electricity, nuclear, gas and mining industries (IEGs).

It brings together all the CGT trade unions of these industries' employees.

Its goal is to co-ordinate and stimulate the actions and protests of the trade unions from which it is composed in order to protect and promote the individual and collective occupational, material, non-material, social and economic rights and interests of its members and more generally speaking, women's and men's salaries, irrespective of their social and professional status and circumstances (**see supporting documents**).

The CGT is a representative trade union in the sector of the electricity and gas industries, as certified by a ministerial decree of 6 October 2021 (**see supporting documents**).

It is even the most representative trade union in the sector, accounting for 39.68% of its trade union members, compared to 26.74% for the Confédération française de l'encadrement-Confédération générale des cadres (CFE-CGC), 17.46% for the Confédération française démocratique du travail (CFDT) and 16.12% for the Confédération générale du travail-Force ouvrière (CGT-FO).

II. Under Article 47 of Law No. 46-628 of 8 April 1946 on the nationalisation of electricity and gas, employees of the French electricity and gas industries are covered by a special social security scheme, whose content is determined by decree.

Through Decree No. 46-1541 of 22 June 1946, the French Government approved the national regulations of the staff of the electricity and gas industries.

Under Article 22, paragraph 1, of these staff regulations, in the event of an illness not covered by the legislation on employment injury, staff rendered incapable of work are entitled to full salary or pay including allowances and benefits of all types.

Under Article 22, paragraph 6, to enable workers' state of ill health to be checked, a special regulation must be established by a decree of the minister in charge of social security and the minister in charge of energy.

This special regulation was enacted through a decree of 13 September 2011.

Based on the model of the medical inspection department of the general scheme, it set up a medical advice service for the special scheme for the electricity and gas industries, whose task it was to check that employees' states of health warranted the award of benefits.

However, this service was not independent from the sector's employers, among other things because they paid the advisors and controlled their recruitment and careers.

Yet this did not previously have any decisive impact on the situation of employees owing to the "social oversight" applied to the medical advice service through several measures up to 2011 and, after this, through the use of expert medical reports where sick leave was disputed.

For until recently, disagreements between the general practitioner who issued the sick leave notice for the employee and the scheme's medical advisor were settled by means of the expert medical report provided for by Article L. 141-1 of the Social Security Code and instigated by the medical advisor, during whose preparation the employee concerned was able to continue with their paid sick leave until the expert decided, if such was the case, that the employee should go back to work.

As soon as a medical dispute arose concerning a patient or victim's state of health, an expert was appointed, and their conclusions were binding on everyone. And pending these conclusions, the sick leave notice issued by the employee's doctor continued to apply, along with the guarantee of continued remuneration set out in Article 22.

Now, however, Article 87 of Law No. 2019-1446 of 24 December 2019 on social security funding for 2020 has done away with the system of expert medical reports for the general social security scheme.

Since then, medical disputes have been subject to a prior mandatory appeal by the employees themselves, to be brought before a medical conciliation commission (CMRA), made up of an expert and a medical advisor.

Consequently, under the guise of harmonisation with the new general scheme and despite the incontrovertibly distinct features of the IEG scheme, the French Government amended the decree of 13 September 2011 establishing the special regulations on medical control of the special social security scheme for the electricity and gas industries but failed to incorporate the necessary safeguards.

The purpose of the amending decree of 27 December 2021 was:

- firstly, to give IEG medical advisors the power, despite the fact that they are not independent from the employers in this sector because they are paid by them, to invalidate sick leave granted to employees by their general practitioners; invalidation has the effect of obliging employees to go back to work within 24 hours of being notified of the decision on pain of having their wages fully withdrawn;

- secondly, to set up a medical conciliation commission, located in Paris and also lacking independence, to deal with challenges to invalidation decisions by the sector's medical advisors, but to which referral is not suspensive and whose decision can be made up to three months after the referral.

This new, significantly diminished mechanism for medical checks within the electricity and gas industries therefore raises the possibility that the sick leave of employees whose condition has been ascertained by a doctor will be invalidated by a medical advisor who is not independent from their employer, and be required to return to work within 24 hours; their only remedy is a non-suspensive application to a non-independent commission, triggering a procedure which can last up to three months, during which time the employee must choose between preserving their health and continuing to be paid.

In response to this substantial breach of the right of the employees concerned to protection of their health and their physical and moral integrity, of their right to an effective remedy bearing in mind the highly dissuasive effect of the non-suspensive nature of the mandatory prior appeal, and of the right to property owing to loss of pay, the complainant organisation, the Fédération nationale des mines et de l'énergie - Confédération générale du travail (FNME - CGT), requested the Conseil d'État, ruling at first and last instance, to set aside the decree of 27 December 2021, or failing that, at least to set it aside insofar as it made no provision for applications to the medical conciliation commission to have suspensive effect or for the commission to rule as promptly as possible.

It also asked the applications judge to suspend execution of the decree as an interim measure, but this request was rejected by an Order of 3 March 2022, which found that there was no urgency as the Conseil d'État would be able to rule on the merits of the case before summer 2022.

Ultimately, however, it took until 7 November 2022 for the Conseil d'État to rule on the merits of the Federation's application. In this ruling it set aside the decree of 27 December 2021 but only because it came into force without providing for transitional measures up to 1 April 2022, when the medical conciliation commission was set up. All the FNME-CGT's remaining arguments were dismissed.

In ruling in this manner, the Conseil d'État failed to respond properly and adequately to the applicant's argument that IEG medical advisors lack independence because they are paid by the employers in this sector, refused to apply Article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, lastly, found that it was not incompatible with employees' right to appeal, right to health protection and right to property that applications to the medical conciliation commission did not have suspensive effect.

Having regard to the foregoing, France has not satisfactorily applied the European Social Charter (the Charter).

III. Accordingly, the FNME-CGT submits herewith its complaint to the European Committee of Social Rights (the Committee).

III.1. In law, it should be pointed out **first of all** that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact (*International Commission of Jurists (ICJ) v. Portugal*, Complaint No. 1/1998, decision on the merits of 9 September 1999, § 32; *European Federation of National Organisations Working with the Homeless (FEANTSA) v. Slovenia*, Complaint No. 53/2008, decision on the merits of 8 September 2009, § 28).

To apply the Charter, the States Parties are expected to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter (*Autism-Europe v. France*, Complaint No.13/2002, decision on the merits of 4 November 2003, § 53).

More specifically, with regard to the means of truly progressing towards the objectives set by the Charter, it should be said that for the implementation of the Charter, the States Parties are required not just to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein (*International Movement ATD Fourth World v. France*, Complaint No.33/2006, decision on the merits of 5 December 2007, § 61).

Firstly, Article 3 of the Charter guarantees the **right to safety at work**, and this includes the primary aim of preventing accidents and injury to health connected with work:

> "*With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:*
>
> *1 to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment;*"

The right to health and safety at work is a widely recognised principle which stems directly from the right to personal integrity, one of the fundamental principles of human rights (Conclusions I (1969), Statement of Interpretation on Article 3).

By requiring the States Parties to guarantee the right to safe and healthy working conditions, Article 3 protects the right to physical and mental integrity at work. Its purpose is related to that of Article 2 of the European Convention on Human Rights and Fundamental Freedoms, which establishes the right to life (Conclusions XIV-2 (1998), Statement of Interpretation on Article 3).

It is recognised that pursuant to Article 2 of the European Convention on Human Rights and Fundamental Freedoms, the European Court of Human Rights places positive obligations on the States Parties to protect not just life but the moral and physical integrity of persons (ECHR, 27 March 2018, *Ibrahim Keskin v. Turkey*, application no. 10491/12, § 61; see also ECHR, 2 June 2009, *Codarcea v. Romania*, application no. 31675/04, § 101).

The state must take measures, including measures of a regulatory nature, to protect the life and more broadly, the moral and physical integrity of persons within its jurisdiction (ECHR, 27 March 2018, *Ibrahim Keskin v. Turkey*, application no. 10491/12, §§ 62-63)

The State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice (ECHR, Grand Chamber, 9 April 2009, *Šilih v. Slovenia*, application no. 71463/01, § 195).

The state's first obligation under Article 3 of the Charter is to ensure the right to safe and healthy working standards of the highest possible level (*Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, decision on the merits of 6 December 2006, § 224).

The aim of this article is to ensure the right to safety and health at work for all workers whatever their status and that it applies to all sectors of the economy (Conclusions II (1971), Statement of Interpretation on Article 3; Conclusions XIII-1 (1993), Greece, article 3-1).

Secondly, the **right to a fair remuneration** is protected by Article 4 of the Charter, according to which workers have to the right to a remuneration such

as will give them a decent standard of living and deductions from wages can only be made under certain strict conditions:

> "*With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:*
>
> *1 to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;*
>
> *…*
>
> *5 to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.*
>
> *The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.*"

Article 4-1, which guarantees that the level of the minimum wage and any bonuses meets the requirement of a decent standard of living, applies to all workers whatever their status (Conclusions XX-3 (2014), Greece, Article 4-1).

The notion of a "decent standard of living", which lies at the core of this provision of the Charter, goes beyond merely material basic necessities such as food, clothing and housing, and includes resources necessary to participate in cultural, educational and social activities (Conclusions 2010, Statement of Interpretation on Article 4-1).

A wage does not meet the requirements of the Charter if it does not ensure a decent living standard for a worker (Conclusions XIV-2 (1998), Statement of Interpretation on Article 4-1).

In addition, the precise conditions and limits within which wage deductions are authorised must be set out in legislation and they **must not deprive workers of their means of subsistence** (Conclusions 2014, Estonia, Article 4-5).

In this connection reference can be made by analogy to a decision in which the Committee found, on the basis of Article 13 of the Charter (protecting the right to social and medical assistance), that a law which has the effect of interrupting social assistance for unemployed persons in active age after 18, 12 or 6 months, cannot be considered to be a permissible restriction on the right to receive social assistance, particularly as persons denied continuing entitlement to monthly social assistance as a result of these legislative measures will face the risk of the loss of

basic means of subsistence (*European Roma Rights Centre (ERRC) v. Bulgaria*, Complaint No. 48/2008, decision on the merits of 18 February 2009, §§ 40-41).

All forms of wage deductions are covered by Article 4-5, including those relating to tax debts, social contributions, civil claims, maintenance claims, fines, and union dues (Conclusions 2014, Estonia, Article 4-5).

Third, Article 11 of the Charter establishes **the right to protection of health**, which is supposed to lead to the adoption of appropriate measures to remove the causes of ill-health:

> "*With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia*
>
> *1 to remove as far as possible the causes of ill-health;*"

The right to health protection guaranteed by Article 11 of the Charter complements Articles 2 and 3 of the European Convention on Human Rights as interpreted by the case law of the European Court of Human Rights, by imposing a range of positive obligations designed to secure its effective exercise (Conclusions 2005, Statement of Interpretation on Article 11).

The rights enshrined in the two instruments are indissociable as human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights – and health care is a prerequisite for the preservation of human dignity (Conclusions 2005, Statement of Interpretation on Article 11).

Respect for physical and psychological integrity is also inextricably part of the right to the protection of health guaranteed by Article 11 (*Transgender Europe and ILGA-Europe v. the Czech Republic*, Complaint No. 117/2015, decision on the merits of 15 May 2018, § 74).

Article 11-1 of the Charter establishes, in particular, the right to the highest possible standard of health and the right of access to health care. Under Article 11, health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in accordance with the definition of health in the Constitution of the World Health Organisation (WHO), which has been accepted by all Parties to the Charter (*Transgender Europe and ILGA-Europe v. the Czech Republic,* Complaint No. 117/2015, decision on the merits of 15 May 2018, § 71).

Fourth, Article 12 of the Charter guarantees the right to social security, which entails maintaining a system of social security and progressively improving it:

> *"With a view to ensuring the effective exercise of the right to social security, the Parties undertake:*
>
> *1 to establish or maintain a system of social security;*
>
> *[…]*
>
> *3 to endeavour to raise progressively the system of social security to a higher level;"*

Article 12-1 establishes the right to social security for workers and their dependants, including self-employed workers, and States Parties are required to ensure this right through the existence of a social security system established by law and functioning in practice (Conclusions 2017, Bosnia and Herzegovina).

Social security, which includes universal schemes as well as professional ones, includes contributory, non-contributory and combined allowances related to certain risks (Conclusions 2017, Georgia).

Under Article 12-1, income-substituting benefits should be in reasonable proportion to the previous income, and they should in any event not fall below a threshold defined as 50% of the median equivalised income (*Finnish Society of Social Rights v. Finland*, Complaint No. 88/2012, decision on the merits of 9 September 2014, § 63).

Even if certain restrictions are compatible with the Charter in themselves, their cumulative effect may bring about a violation of Article 12§3 (*Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, Complaint No. 77/2012, decision on the merits of 7 December 2012, § 73).

Fifth, and lastly, under Article G of the Charter, the rights and principles cited above may only be subject to restrictions or limitations if these are prescribed by law, pursue certain clearly defined aims and are necessary in a democratic society:

> "*1 The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.*"

III.2. – In the instant case, the **initial point** to be made is firstly that the overall arrangement of the new rules on medical checks under the special social security scheme for the electricity and gas industries seriously undermines the rights of the staff concerned to safety in the workplace, fair remuneration, protection of health and social security.

Under the initial provisions of the Decree of 13 September 2011, medical advisors were local, and this helped to secure protection for the life and physical and moral integrity of the staff concerned most effectively as this proximity made it easier for them to attend medical examinations.

Above all, the original provisions of Article 6 of the Decree of 13 September 2011, referring to Article L. 141-1 of the Social Security Code, guaranteed employees arbitration by an expert in the event of disagreement between the general practitioner and the medical advisor on the person's state of health and the justification for sick leave – a measure to be taken at the instigation of the medical advisor, whose responsibility it was to contest the general practitioner's sick leave notice. This arrangement still secured the right of employees to protection of their lives, their physical and moral integrity and, more generally, their health as effectively as possible.

In addition, and this is crucial of course, staff remained on sick leave in accordance with their general practitioner's advice until such time as the expert decided that they should return to work and they were notified of the administrative decision to this effect, this being a guarantee that the worker's life and physical and moral integrity were not threatened during the dispute proceedings and that their right to an effective remedy was secured.

Undoubtedly the fact that a challenge by the medical advisor to the general practitioner's recommendations did not call the employee's sick leave into question during the arbitration procedure and during the expert medical assessment was a key to the effectiveness for the employee of protection in the event of a dispute, which would have been totally lacking if the dispute had had in itself the effect of calling the sick leave into question; for, ultimately, the final confirmation of the justification of the sick leave following an expert procedure would have had a purely academic effect for any employee who had been forced to resume work pending the decision – to the very serious and obvious detriment, moreover, to the protection of their life and their physical and moral integrity.

Yet now, pursuant to the amending Decree of 27 December 2021, this arrangement has been totally disrupted, not to say overturned, causing serious potential harm to employees.

First of all, medical advisors have lost all proximity with employees as they are no longer appointed locally. Furthermore, the commission before which any objection must be brought is now national, making it very remote from the employees concerned, especially when the conditions from which they are suffering may complicate their access to a distant commission for physical, material or financial reasons, thus potentially dissuading them from entering any kind of appeal, particularly if it does not have any suspensive effect.

Worse still, one decision by the medical advisor now immediately calls the effects of a sick notice into question, leaving it to the employee concerned to raise an objection, which moreover has no suspensive effect.

Employees therefore will be obliged to take up work again within 24 hours, failing which their pay will be docked, and their appeal, which will now be addressed to a medical conciliation commission, will not have any suspensive effect. And all of this is regardless of the fact that their GP has granted them sick leave, whose effect will be wiped out while the prior mandatory appeal is examined.

Objections must be raised before a medical conciliation commission (CMRA) made up of two doctors, one of whom is the medical advisor to the electricity and gas industries and both of whom are designated by the national medical advisor in this branch.

Furthermore, if the employer does not respond, this is regarded as a rejection after only three months, which is far too long a time considering that the objection relates to the legitimacy of a decision through which a general practitioner has concluded that the employee's state of health makes it necessary for him or her to stop work. And the very principle that no answer means "no" is questionable because the imperative need to guarantee employees' right to safety and protection of their health should mean that they can benefit from their sick leave if the employer does not respond.

Bearing in mind that most sick leave is relatively short and will therefore be over when the commission makes its ruling, the commission will therefore be tempted in practice to "step in line" with the medical advisor's decision so as to avoid any retrospective questioning of the ruling through which an employee whose sick leave notice was in fact valid was forced to return to work.

It must also be emphasised – and this is an absolutely crucial point of differentiation with the general scheme and hence profound imbalance in the new arrangements for the electricity and gas industries compared to those of the general scheme – that the IEG medical advisor is not independent enough to guarantee the rights of the employees covered by these arrangements to safety in the workplace, fair remuneration, protection of health and social security.

For whereas the medical advisor to the general scheme has the necessary independence from his/her employers, the IEG medical advisor is beholden to them, particularly from a financial viewpoint – a fact which influences

his/her independence and does not sufficiently guarantee it in all cases; and this is the case at the same time, as seen above, that under the new arrangements, it is the medical advisor's exclusive decision to oppose sick leave, against which the employee does not have a suspensive remedy.

And moreover, as has already been pointed out, the Decree of 27 December 2021 forces an employee whose sick leave has been questioned by the medical advisor to resume work within 24 hours of being notified of this decision by their employer, **failing which their pay will be docked**, and this despite the fact that their health may be endangered as a result.

Employees therefore have a (bogus) choice between taking the risk of jeopardising their health by going back to work although their doctor believes that they should stop, or exposing themselves to the immediate withdrawal of their pay, in other words their means of subsistence.

Nor does the Decree of 27 December 2021 make any provision for the consequences to be drawn from a decision by the commission which ultimately validates the sick leave notice whereas the employee will have resumed work in the meantime because of the non-suspensive nature of the appeal.

Nothing is said about what must happen if the employee's health is affected or their condition is worsened through this forced return to work or if, not having full capacity, they unintentionally cause damage, jeopardising their own or other's safety or the environment; all of which raises the issue of the civil and criminal liabilities of the employer and the medical advisor.

This results in a totally lopsided arrangement to the detriment of the employees and the advantage of the employers in the branch, in breach of the fundamental rights referred to above and, in truth, leaving the employees concerned the Cornelian choice (because of the non-suspensive nature of the appeal) of either jeopardising their health by going back to work when they should be off work pending the commission's ruling or of having their pay docked, which will obviously place them in a situation of extreme hardship.

These circumstances are quite clearly of a nature to **dissuade employees from lodging an appeal with the CMRA** as they are required in any case to go back to work within 24 hours or have their pay docked. And alongside this, absolutely nothing is said in the disputed decree about the consequences of a retrospective annulment of the medical advisor's decision by the medical conciliation commission.

These inadequate safeguards are directly liable to affect and undermine the rights of employees to life and physical and moral integrity, fair remuneration and social security. Clearly, the "arbitration" which preceded the enactment of the disputed decree was intended to deliberately sacrifice the fundamental rights of the employees concerned, with everything combining to dissuade them from lodging what is now in all respects a very remote and largely ineffective appeal.

What is more, there is a key distinction between the special IEG scheme and the general scheme in that under the special scheme, it is not a social security body, pooling all the employers' contributions and risks, which provides cash benefits, as is usually the case in the general scheme.

Instead, under the IEG scheme, it is the employer him or herself who must continue to pay the wages of employees on sick leave, meaning that the cost and the risk lie with each employer individually, not with the branch as a whole.

In other words, nothing like the same balancing and arbitration processes come into play when decisions are taken on whether, when a medical advisor challenges a sick leave notice issued by a general practitioner, an appeal should have suspensive effect enabling employees to retain their wages while the medical issue is decided.

A mention must also be made of the statement made by the representatives of the Ministry of Solidarity and Health at the hearing of 24 February 2022 before the Conseil d'État's urgent applications judge. In this they say that if a sick leave notice issued to an employee of the electricity and gas industries is invalidated by the medical advisor and therefore, in principle, the employee must go back to work but the employee considers that to do so within 24 hours would be harmful to their health and they cannot await the decision of the medical arbitration commission to be issued within three months, they are then at liberty to seek another sick leave notice from their general practitioner – the goal being, as we understand it, to foil the medical advisor's decision.

However, apart from the fact that such a situation could be regarded as an abuse of power intended to circumvent the decision of the IEG medical advisor through the delivery of a new sick leave notice by the general practitioner, placing both the employee and the GP in a situation of high legal uncertainty, this assertion actually reflects the untenable nature in practice of requiring employees in this branch to return to work within 24 hours and hence of the fact that their appeal to the CMRA does not have suspensive effect.

Only such a suspensive effect would be capable of preserving employees' rights to safety at work, fair remuneration, protection of health and social security. It is both legally questionable and moreover totally unrealistic in practice to try to make up for the absence of this essential feature of the appeal, which the employee is now expected to lodge as the medical advisor may now immediately call the GP's sick leave notice into question, by conjecturing that it might be worthwhile for employees to persuade their GP to "defy" the decision of the medical advisor, who could moreover challenge the GP's decision again. This highly unconventional suggestion, made by the authorities in a hearing before France's highest administrative court, actually sounds like an admission as to how harmful and detrimental this situation is for the essential rights of employees, a situation in which they are placed because the appeal which they must now lodge with the medical arbitration commission does not have suspensive effect.

Secondly, unless the CMRA is clearly and materially independent from the industry's employers, appeals lodged by employees before it can in no way offset the breaches of the employees' fundamental rights.

To determine whether this is so, it is necessary to review the history of the dependence of the electricity and gas industries' medical advice service on industrialists.

Since 1947, medical advisors have been grouped into a single body, the General Medical Advice and Control Service (SGMCC), attached historically to the companies EDF and now Engie. From 1947 to 2011, the medical checks under the special IEG scheme were governed by the circular PERS. 97, which was intended to "secure" the issue of the independence of the medical advisors to these industries by establishing true social oversight of the organisation and functioning of the medical advice service.

For this purpose, a medico-social technical committee, responsible for the organisation and functioning of medical checks and occupational medicine, was set up and placed under the authority of the general secretariat of EDF and GDF. The committee members included two staff representatives appointed by the central

social works council and four representatives of the medical committee appointed in agreement with this council.

From that point on the representatives of the medico-social technical committee gave their opinion on the appointment of a regional medical advisor. Staff representatives could also instigate a request for medical checks. This meant that any worthwhile investigations could be carried out with the secondary staff committee, made up jointly of employers' and employees' representatives, and set up in every electricity and gas company. Lastly, substitute medical advisors could be appointed following agreement with trade union representatives.

Thus for sixty years, the powers of the IEG medical advisors were strongly limited or at the least counterbalanced by social oversight. In other words, there was a compromise, under which this social oversight made it possible to offset a lack of structural independence in the medical advice services compared to the historic employers in the branch.

However, with the publication of the Decree of 13 September 2011, the social oversight over the medical control in this branch was totally removed. Yet, this loss, which was undoubtedly problematic in itself, was at least offset by the procedure for contesting sick leave notices, which limited the powers of the IEG medical advisors (who were not independent from the sector's employers) as it was the medical advisor's role to contest sick leave, which continued to apply while the dispute was settled, since the employee remained on sick leave pending the presentation of the report by the expert, prepared in agreement with the employee's GP.

To demonstrate the inadequate or completely deficient independence from employers of the medical advisors in this branch, it is enough to point to the structural dependence of medical advisors arising from the rules on and procedures for promotion, which is quite clear from the agreement of 15 October 2010 on the contractual rules governing medical advisors – as well as pointing to what had gone before.

This amounts to a major difference with the medical advisors of the general social security scheme, whose status, grade scales and remuneration are set out in a national collective labour agreement and who depend for their career and promotion on the Union of National Social Security Offices. This explains why in the electricity and gas industries, there has always been pressure from the branch's employers to influence the way that the medical advice service manages sick leave. Moreover, a plan for total control by employers over medical advice services was launched in 2013 via an employers' association but it was successfully opposed and hence abandoned.

In short, although the gradual elimination of social oversight is regrettable, the balance, in terms of respect for employees' fundamental rights, though weakened, was still provided at least by the specific features of the dispute procedure, which did not allow medical advisors purely and simply to question GPs' sick leave notices or therefore to force the employees concerned to go back to work before the dispute was settled through an expert medical report. This is what was expressed, in particular, by Article 2 of the Decree of 2011, which is still in force, under which employees are under the "medical authority" of their GP; and this is what the system complained of herein has now, and not without some contradiction, completely destroyed, as medical advisors may now directly question GP's sick leave notices. In other words, it was only this legitimate and persistent specific feature of the system for the management of sick leave in the electricity and gas industries, differing from the arrangements for the general scheme, which made it possible, despite the erosion and eventually the complete collapse of social oversight, to avoid a breakdown in the balance of the system which would undermine the fundamental rights of the branch's employees.

Yet it is precisely this last balancing item, this last "safety net", which the Decree of 27 December 2021 has just dismantled, removing the procedural safeguard relating to the means of contesting sick leave notices. All that is left now is the power of the IEG medical advisors, who have no independence from the sector's employers and over whom there is no social oversight – a situation which is clearly liable to infringe employees' rights to safety in the workplace, to fair remuneration, to protection of health and to social security, for the reasons already outlined by the complainant Federation.

The infringement of employees' fundamental rights is all the more obvious in view of the fact that the abolition of the former dispute procedure occurred in the context of pressures being exerted on medical advisors to meet the employers' aim of lowering numbers of days of sick leave. It is true that the goal of reducing sickness-related absenteeism has resulted for years now in a battery of notes from employers calling for all sick leave to be avoided. For instance, in the electricity and gas companies (EDF, Enedis, etc.), notes have been drafted on "returning to and staying at work" with a standard letter which employees are expected to give to their GP to encourage him or her to consider the possibility of recommending adapted working arrangements instead of issuing a sick notice or to call employees to (strongly) urge them to return to work under such arrangements. In addition, systematic meetings with a superior are now arranged for employees granted sick leave, with the superior being of increasingly high rank each time they are granted leave in the same year. For instance, an employee who was absent three times in 2022 would have been received the first time by their team leader (RE), the second time by their office head and the third time by the deputy unit director (AD).

It also has to be said that since the publication of the Decree of 13 September 2011, there has been a rise in reports of irregular conduct by the IEG medical advisors, some of whom have been omitting, sometimes deliberately, to respect the rules (for instance requiring employees to return to work without initiating the expert reporting procedure or asking their doctor to extend their sick notices so that they can be put on disability). This resulted in the dismissal of a medical advisor in 2020 following a large number of complaints by employees.

In addition, the Committee can only conclude that the independence of the IEG medical advisors is seriously deficient in view of the undertaking made, particularly before the urgent applications judge of the Conseil d'État, by the body responsible for medical checks in this branch, the General Medical Advice and Control Service, that medical advisors would not carry out any controls on sick leave pending the establishment of the Medical Conciliation Commission. Either these medical advisors are independent and can perform their duties by carrying out controls on any sick leave granted, or they are not, and can be subject to orders by the General Medical Advice and Control Service. Yet, the authorities' "undertaking in court" made it very clear that it was possible for the IEG medical advice services to be given instructions to initiate or drop sick leave dispute procedures, thus confirming their lack of independence.

Ultimately, we have arrived at a system which, as the disputed decree currently stands, entirely fails to secure the independence required given that the social oversight which existed previously has now disappeared and no equivalent safeguard has replaced it. We have even now completely done away with medical assessment in co-operation with the employee's GP by placing the handling of sick leave entirely under the control of medical advisors whose management lies very largely in the hands of the branch's employers.

And this lack of independence of the medical advisors has an impact on the CMRA itself as it is now made up of only two doctors, one of whom is one of the IEG medical advisors. Even though the other member, the medical expert, has the casting vote, this is most certainly not an adequate safeguard. And the members of the commission are all appointed by the national medical advisor to the special scheme. This poses the risk that the IEG medical advisors' lack of independence will influence the assessment by the CMRA of the appeals brought before it, causing it to rule in favour of employers.

This risk is compounded especially by the **non-suspensive nature of appeals to the CMRA**.

If there is no suspensive effect, the medical commission may find itself having to invalidate medical advisor's decisions to challenge sick leave notices, thus highlighting the unlawfulness of the situation in which employees have been placed through the order to return to work when their state of health made this inadvisable or through the denial of their pay when they would have been entitled to refuse to work when in the state described in the notice issued by their GP, under whose medical authority they lie in spite of everything. It has to be acknowledged therefore that this can only strongly encourage the CMRA to validate most of the medical advisors' decisions so as not to place both the employer and the medical advisor in an objectively extremely delicate situation, as they will have wrongly and hence negligently forced an employee placed on sick leave by their GP because of their state of health to work during the examination of their appeal or otherwise to forfeit their pay.

The commission's dependence on the branch's employers is made all the clearer moreover by the fact that its head office will be located in Paris in a building belonging to the EDF DRH Group. By contrast, the medical control service of the special security scheme for the mining industry is based on structures which have no structural link with the sector's employers.

And in any case, there can be no justification for the resultant restrictions and limitations to the rights to safety at work, fair remuneration, protection of health and social security.

The second main point is that the Conseil d'État's decision No. 461581 of 7 November 2022 is singularly unconvincing and inadequate in the light of the serious and particularly well-argued submissions brought before it, as cited above.

Firstly, the Conseil d'État dealt only superficially with the complaint that the IEG medical advisors lack independence, referring only to the ethical obligations of the medical control services and failing to address the argument that this branch's medical advisors are economically and hierarchically subordinate to their employers, thus ignoring one of the key points of the applicant's reasoning (points 6 and 7).

In response to the FNME-CGT's argument concerning the lack of independence of IEG medical advisors from the employers in this branch, the court considered it sufficient to refer to Articles R. 4127-100 to 4127-104 of the Public Health Code, which set out the specific ethical obligations of persons carrying out medical checks.

Yet, the mere existence in the abstract of legal texts intended to guarantee that medical checks are objective is not enough to be able to ignore the practical requirements for carrying out such checks, namely whether the medical advisors are independent from third parties, and specifically in this case, from the branch's employers.

This is indeed the implication of the fact that the purpose and aim of the Charter, as a human rights instrument, is to protect rights not merely theoretically, but also in fact.

However, the decision of 7 November 2022 says nothing about the dependent link described above nor about what impact this has on the impartiality of the IEG's medical advice service and hence on the CMRA.

Secondly, the Conseil d'État refused to examine the merits of the case from the viewpoint of Article 6, paragraph 1, of the European Convention on Human Rights (point 8).

Third, the Conseil d'État does not describe any factual or legal circumstances from which it could legitimately conclude that the non-suspensive nature of appeals to the CMRA is compatible with the right to health protection, which is understood here to include the right of employees to protection of their life and their physical and moral integrity (point 9).

According to the Conseil d'État, the fact that employees who are asked by their employers to return to work are at risk of having their pay withdrawn is not enough on its own to infringe the right of appeal.

This assessment is clearly peremptory and seriously mistaken, as this circumstance is actually quite capable of dissuading employees from lodging an appeal – sick leave is quite frequently granted for a period of less than three months, meaning that they have no interest in contesting the invalidation of the relevant notice while returning to work if, while the commission deliberates, their sick leave will have expired anyway, and equally, they cannot reasonably be expected to renounce their pay for three months by refusing to return to work. Besides this it says nothing either about the impact of this circumstance on the right of employees to protection of their life, their physical and moral integrity and, more broadly, their health.

The Conseil d'État also takes the view that the entitlement of employees to recover remuneration withheld when they did not return to work if the CMRA considers, in contrast to the medical advisor, that the sick leave was justified, is enough to rule out any infringement of the right to property.

However, here again, this is a very questionable interpretation as the employees concerned will have been deprived of their pay for three months during the appeal, and this is a completely unjustified situation given that the sick leave granted by their GP was in fact warranted, with repercussions on their lives which the potential retrospective reimbursement will not be capable of erasing. Furthermore, it still says nothing about the impact of this circumstance on the right of employees to protection of their life, their physical and moral integrity and, more broadly, their health.

It is indeed quite clear that the mere fact that employees may claim back the remuneration which was wrongly withheld from them if the medical advisor's decision is ultimately invalidated by the CMRA (which will hardly be encouraged to do so given the non-suspensive effect of the appeal, as we saw above), makes it no less true that if the medical advisor's decision to question the sick leave granted is itself challenged, employees must decide whether to go back to work within 24 hours

of the decision although their GP has judged that their state of health prevents them from doing so or to resign themselves to receiving no more pay while the CMRA rules.

We cannot seriously overlook the highly dissuasive effect on employees of having to appeal to the CMRA and the risk that in the event of an appeal the latter will feel obliged to "step in line" with the medical advisor's opinion so as to avoid highlighting the fact that the employee was unduly compelled to go back to work when he/she should have been on sick leave or, failing that, was at risk of losing his/her remuneration and hence his/her income.

Contrary to the Conseil d'État's authoritative ruling, the fact that employees may be retrospectively granted pay wrongly withheld from them does not erase the harmful effects and the irreparable infringements of employees' fundamental rights.

No argument was put forward by the Conseil d'État to support its ruling that "*the applicant federation is unjustified in arguing that the non-suspensive nature of an employee's appeal against the employer's decision before the CMRA infringes … the right to protection of health*".

This was despite the fact that it had been amply demonstrated, as shown above, that the non-suspensive nature of employees' appeals to the CMRA seriously jeopardised their right to protection of their life, their physical and moral integrity and, more broadly, their health.

III.3. – It follows from all the above that France has not satisfactorily implemented the provisions of the Charter.

IV. – We trust that the Committee will award the complainant organisation, the FNME-CGT, compensation for the costs incurred in connection with this complaint, as it has accepted it should (*European Roma Rights Centre (ERRC) v. Portugal*, Complaint No. 61/2010, decision on the merits of 30 June 2011, §§ 74-76).

In this respect, the complainant organisation has incurred costs for legal representation before the Committee of €3 000.

FOR THESE REASONS, and subject to any others to be produced, inferred or added, where necessary on its own initiative, the Fédération nationale des syndicats de salariés des mines et de l'énergie – Confédération générale du travail requests the European Committee of Social Rights:

- TO FIND that there has been a violation of Articles 3, 4, 11 and 12 of the Charter,

- TO INVITE the Committee of Ministers to recommend that France should award it €3 000 in costs,

with all ensuing legal consequences.

Attachments:

1°) The Constitution of the FNME-CGT.

2°) Ministerial Decree on representativeness of 6 October 2021.

3°) Decree of 13 September 2011 establishing the special regulations on medical control of the special social security scheme for the electricity and gas industries.

4°) Decree of 27 December 2021 amending the Decree of 13 September 2011.

5°) Order No. 461592 of 3 March 2022 by the urgent applications judge of the Conseil d'État.

6°) Decision No. 461581 of 7 November 2022 of the Conseil d'État.

7°) Application to the Conseil d'État to set aside the decree.

8°) Application to the Conseil d'État to suspend execution.

9°) Further observations to the Conseil d'État.

10°) Observations in reply to the Conseil d'État.

11°) Observations on public policy and in rejoinder before the Conseil d'État.

12°) Copy of the identity document of the FNME-CGT's legal representative

13°) Official certification of the FNME-CGT

SCP ROCHETEAU, UZAN-SARANO & GOULET
Lawyers at the Conseil d'État