EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

28 June 2023

Case Document No. 1

***Fédération SUD Santé-Sociaux* v. France**
Complaint No. 226/2023

COMPLAINT
(translation)

Registered at the Secretariat on 6 June 2023

Collective complaint to the European Committee of Social Rights

On behalf of the organisation:

Fédération SUD Santé Sociaux, headquartered at 70 rue Philippe de Girard, 75018 Paris, represented by its two General Secretaries, one male and one female, in accordance with its Statute **(Appendix 1)** and the decision of its Federal Board of 30 March 2023 **(Appendix 2).**

Acting on its behalf is Maître Haiba Ouaïssi, member of the Paris Bar, domiciled in this capacity at 182 rue de Rivoli, 75001 Paris.

Versus:

France

Provisions relied on as grounds for the complaint:

- Article 4 of the revised European Social Charter
- Article 6 of the revised European Social Charter
- Article E of the revised European Social Charter

France has accepted these provisions.

With regard to the representativeness of the complainant federation

1. The complainant federation is a legal entity under private law, within the jurisdiction of France. Its members are health and social care personnel in the public and private sectors **(Appendix 8)**. Its geographical scope covers metropolitan France and the French overseas departments and territories. It has a broad membership base, including employees and trainees in both the public and private sectors and spanning all public and private institutions and companies in the health, medical-social, social care, outreach, integration and social mediation sectors (see Chapter 1 of the Statute and the appendix to the Statute: **Appendix 8**). The Federation brings together, at *département* level, trade unions and bodies which have decided to join it. It therefore carries out activities that are of a trade union nature (*Associazione sindacale "La Voce dei Giusti"* v. Italy, Complaint No. 105/2014, Decision on admissibility of 2 December 2014, *Movimento per la Liberta' della psicanalisi-Associazione Culturale Italiana* v. Italy, Complaint No. 122/2016, Decision on admissibility of 24 March 2017, §§8-11).
2. The Committee has consistently held that "the representative nature of a complainant organisation within the meaning of Article 1 (c) of the Protocol is an autonomous concept, not necessarily identical to the national notion of representativeness" (*Confédération Française de l'Encadrement* (CFE-CGC) v. France, Complaint No. 9/2000, Decision on admissibility of 6 November 2000, §6). Accordingly, "[i]n order to be regarded as representative under the collective complaints procedure, a trade union must be real, active and independent." (ECSR, *Unione sindacale di base* (USB) v. Italy, Complaint No. 208/2022, Decision on admissibility of 7 December 2022, §10).
3. The complainant federation fulfils all the above criteria. Its Statute attests to the independent, real and active nature of its role (**Appendix 8**).
4. Furthermore, "[t]he Committee examines representativeness in particular with regard to the field covered by the complaint, to the aim of the trade union and the activities which it carries out" (*Syndicat de Défense des Fonctionnaires* v. France, Complaint No. 73/2011, Decision on admissibility of 7 December 2011, §6). The complainant federation is active and representative in the field of the remuneration of healthcare personnel and auxiliary healthcare workers. According to Chapter 2 of its Statute, in particular, it acts "in the health and social care sector" in order "to defend and improve the individual and collective rights of workers in employment, unemployment, precarious employment and retirement" (**Appendix 8**).
5. As the present complaint concerns the State's salary adjustments for healthcare personnel and auxiliary healthcare workers, the Federation fully meets the requirements in terms of representativeness for the purposes of these proceedings.
6. Finally, "the Committee takes into account the number of members a trade union represents and the role it plays in collective bargaining, including its role in national negotiations". The Federation is made up of various unions and bodies from all over France and a list of its members is appended to the Statute.
7. The complainant organisation is also considered to be representative at national level in that is has been a member of the *Conseil Supérieur de la Fonction Publique Hospitalière* (Higher Council for the State Hospital Service) without interruption since 2015 (**Appendix 10**). Lastly, it participates in negotiations with the highest State authorities: in particular, as a nationally representative organisation, it took part in the negotiations prior to the 2020 Ségur

Agreements (**Appendix 1**), which it did not sign because it found them to be unsatisfactory. The Ségur Agreements are at the crux of this complaint.

8. In the light of the above, the complainant organisation must be regarded as representative at national level for the purposes of the present proceedings (ECSR, *Confédération française de l'Encadrement* CFE-CGC v. France, Complaint No. 9/2000, Decision on admissibility of 6 November 2000, §6).

9. In addition, the present complaint is signed by the General Secretary of the Federation, who is duly empowered by the Statute and by a decision of 30 March 2023 to bring legal proceedings, in particular, before the European Committee of Social Rights (**Appendices 8 and 9**).

Background to the complaint

10. In 2021, the French Government adopted several decrees relating to the working conditions of public servants in the health and social care sector and, in particular, their pay. They are Decrees Nos. 2021-1406 (concerning category A paramedical staff), 2021-1407 (concerning category B paramedical staff), 2021-1408 (concerning category A medical staff) and 2021-1409 (concerning category B medical staff), all adopted on 29 October 2021 (**Appendices 2 to 5**).

11. In the past, in recognition of the arduous nature of their work, all healthcare personnel in the public hospital service and some medical technicians were classified in the "active" category [i.e. working in jobs that qualify for early retirement due to inherent occupational risks and higher levels of fatigue] and, depending on their qualifications and diplomas, were also assigned to the A or B administrative corps. Since the implementation of the Bachelot Protocol in 2010, they have been given a choice, known as the right of option: either they keep the benefits linked to the arduous nature of their profession (including retirement at age 57 and one additional qualifying pension year for every 10 years spent in frontline patient care), or they give up their active status in order to enjoy a higher salary increase. In return, they agree to defer their retirement to 60 and to move into the "sedentary" category [which by definition, includes all positions which are not "active"]. For some of the healthcare personnel in the B corps, the move to sedentary status led to the creation of a new hierarchical category, the A corps, while healthcare personnel who opted to retain their active status stayed in the B corps, which is being phased out. In cases where the healthcare workers concerned were already in category A (e.g. specialist nurses), a new category A corps was created for the new sedentary staff and the old category A corps is being phased out.

12. The right of option has gradually been extended to almost all healthcare professions, i.e. category A personnel (healthcare managers, nurses, anaesthetists, theatre nurses, paediatric nurses) and category B personnel (general care nurses, physiotherapists and masseurs, psychomotor therapists, occupational therapists, chiropodists, speech therapists, orthoptists and radiographers).

13. Since 2010, new recruits are automatically placed in the sedentary category.

14. In July 2020, the Ministry of Health concluded agreements (known as the Ségur Agreements) with three trade unions, which provided for a pay rise for active personnel "in due proportion" to that of sedentary personnel (**Appendix 1**).

15. By adopting the four abovementioned decrees, the Government failed to honour this commitment. Although the decrees at issue do adjust the progressive pay scale and the rules governing the length of service between each step, the adjustment is different for each public service category. This resulted in a lower pay rise for all active personnel compared with their counterparts in sedentary roles.

16. To provide some specific examples, under the contested decrees, anaesthetic nurses, theatre nurses and nurses with active status are entitled to basic pay at the highest step of the upper pay band, corresponding to a basic index point (*indice brut*) of 833, with a salary index point (*indice majoré*) of 6 821.

17. Previously, the basic index point for anaesthetic nurses was 760 at the last step of the upper band and 715 for nurses and theatre nurses, with a salary index point of 627 (for anaesthetic nurses) and 593 (for nurses and theatre nurses).

18. Similarly, the basic pay for the corps of healthcare managers with active status was set at 883 for the highest step of the upper pay band, with 687 salary index points.

19. Prior to the decrees in question, they were paid according to a basic index point of 767, with 632 salary index points.

20. At the same time, the salary index for anaesthetic nurses, theatre nurses, paediatric nurses and healthcare managers was increased to 764 points at the highest step of the upper pay band.

21. Previously, their salary index points ranged from 658 to 673 for specialist nurses and was fixed at 680 for healthcare managers.

22. In view of these figures, the increase for active personnel was:
    - 8.77% for anaesthetic nurses;
    - 15 % for theatre nurses and paediatric nurses;
    - 8.70% for healthcare managers.

23. The increase for sedentary personnel was:
    - 13.5% for anaesthetic nurses;
    - 16.11 % for theatre nurses and paediatric nurses;
    - 12.35% for healthcare managers.

24. It follows from these figures that the “due proportion” requirement for salary adjustments was not met and that active healthcare personnel have been treated differently from sedentary healthcare personnel in terms of their pay rise.

25. This conclusion has a number of implications for the State’s obligations under the revised European Social Charter.

Grounds for complaint

I) Violation of Article 6 of the revised Social Charter

Article 6 – Right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
1) to promote joint consultation between workers and employers;
2) to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;
and recognise:
4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

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26. The Government did not honour the agreement with the trade unions which provided that any adjustment to the pay of active personnel would be “in due proportion to” the adjustment for sedentary personnel.

27. The complainant organisation maintains that such failure to honour the agreement reached with the trade unions constitutes a violation of the **right to bargain collectively** enshrined in Article 6 of the Charter.

28. The Committee has repeatedly held that “the exercise of the right to bargain collectively, guaranteed by Article 6§2 of the Charter, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter, including for example those relating to just conditions of work (Article 2), safe and healthy working conditions (Article 3), fair remuneration (Article 4), information and consultation (Article 21), participation in the determination and improvement of the working conditions and working environment (Article 22)” (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, op.cit., §109).

29. On the basis of this article, the State Party is obliged "not only to recognise, in [its] legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreement if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other" (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, op.cit., §§110-111; *Confédération Générale du Travail Force Ouvrière* (FO) v. France, Complaint No. 118/2015, Decision on the merits of 3 July 2018, §60).

30. The rights enshrined in the Charter must be interpreted in a practical and effective manner, in accordance with the Charter itself and as the Committee has regularly held (International Commission of Jurists (ICJ) v. Portugal, Complaint No. 01/1998, Decision on the merits of 9 September 1999, §32). More generally, the State is required to take 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).

31. In the present case, the respondent State is accused of having failed to honour the agreement it had signed with the trade unions in the context of the consultation on national healthcare reform *(Ségur de la santé*). Accordingly, if the State is required to promote collective bargaining between private stakeholders, it is a fortiori obliged to respect the commitments it makes as an employer to trade unions.

32. In the Committee's view, "collective bargaining is a negotiation process where not all conditions demanded by one party are likely to be accepted by the other" (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, op.cit., §112). It recently reiterated that "a trade union must maintain its ability to argue on behalf of its members through at least one effective mechanism" (*Confederazione Generale Sindacale* (CGS) and *Federazione dei Lavoratori Pubblici e Funzioni pubbliche*, Complaint No. 161/2018, Decision on the merits of 19 October 2022, §73). On the same occasion, it also noted that "[t]o satisfy this requirement, the mechanism of collective bargaining must be such as to genuinely provide for a possibility of a negotiated outcome in favour of the workers' side".

33. On paper, the State, through the Minister of Health who signed the agreement, undertook to implement its provisions, recognising that the text was intended to "establish practical and reciprocal obligations" (**Appendix 1**). However, it failed to comply with the terms of the agreement when it adopted the implementing regulations. It therefore acted in bad faith by leading the unions – including the complainant federation – to believe that it was sincerely committed to both the collective bargaining process and its outcome.

34. The Committee has previously stated that, even in the public service, "officials nevertheless always retain the right to participate in any processes that are directly relevant to the determination of the procedures applicable to them" (Conclusions III (1973), Germany). It added that "a mere hearing of a party on a predetermined outcome will not satisfy the requirements of Article 6§2 of the Charter. On the contrary, it is imperative to regularly consult all parties throughout the process of setting terms and conditions of employment and thereby provide for a possibility to influence the outcome" (European Council of Police

Trade Unions (CESP) v. Portugal, Complaint No. 11/2002, Decision on the merits of 22 May 2002, §58).

35. It would be completely at odds with the protection of fundamental rights if a State were allowed to restrict a right – not on the basis of the traditional requirements (accessible and foreseeable law, legitimate aim and proportionality) – but by holding a sham consultation and then, after adopting the regulations implementing the reform, reneging on the commitments it had made.

36. The breach of the agreement reached with the social partners is made all the more unacceptable by the fact that it concerns a fundamental right, namely that of fair remuneration.

37. Such practices cannot be considered as fair and in keeping with democratic requirements. They are not provided for by law and serve no legitimate purpose; on the contrary.

38. The conclusion is clear: by flouting the agreement reached by the parties, the State has debased the right to bargaining collectively and by failing to honour a "majority agreement" approved by the unions that won a majority in workplace elections, the unions' credibility as a representative body has been sabotaged. In addition, by failing to implement the agreement with the unions, the State has acted in bad faith, contributing to the erosion of trust between public healthcare workers and their employer. Above all, it has undermined the Federation's ability to defend the interests of its members.

39. The Federation's right to bargain collectively was also infringed in court, as the Conseil d'État, hearing proceedings seeking the annulment of the decrees in question, went so far as to declare that the signed agreement "*has no legal force and is not binding*" (**Appendices 6 and 7**).

40. The effective exercise of the right to bargain collectively is therefore not ensured. Consequently, Article 6 of the revised European Social Charter has not been complied with.

II) Violation of Article E taken in conjunction with Article 6 of the revised Social Charter

Article E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

41. The position adopted by the national courts constitutes a specific violation of Article E of the Charter because of the discrimination to which it gives rise.

42. Had the agreement been signed between private sector workers and their employer, it would have had legal force and been binding on the parties. The fact that public servants have to rely on the adoption of a regulatory instrument over which they have no control means that they are treated differently in the exercise of their right to bargain collectively.

43. There is no objective and reasonable justification for this difference in treatment, particularly as it could be abused to restrict trade unions' right to bargain collectively, which is not provided for by law.

44. The Committee has previously stated that, even in the public service, "officials nevertheless always retain the right to participate in any processes that are directly relevant to the determination of the procedures applicable to them" (Conclusions III (1973), Germany). It added that "a mere hearing of a party on a predetermined outcome will not satisfy the requirements of Article 6§2 of the Charter. On the contrary, it is imperative to regularly consult all parties throughout the process of setting terms and conditions of employment and thereby provide for a possibility to influence the outcome" (European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 11/2002, Decision on the merits of 22 May 2002, §58).

45. It would be completely at odds with the protection of fundamental rights if a State were allowed to restrict a right – not on the basis of the traditional requirements (accessible and foreseeable law, legitimate aim and proportionality) – but by holding a sham consultation and then, after adopting the regulations implementing the reform, reneging on the commitments it had made. Such practices cannot be considered as fair and in keeping with democratic requirements and cast doubt on the State's good faith during the negotiation process.

46. Unlike employees in the private sector who are covered by a collective agreement reached through collective bargaining, the injured parties, as public servants, had, at the time, no means of enforcing the agreement they had signed with their employer.

47. There is no justification for such difference in treatment between the two categories with respect to an agreement based on a collective bargaining process concerning pay, which is an essential element of the employment contract and, in the present case, of the statutory guarantees afforded to public servants and one that is specifically protected by the revised European Social Charter.

48. In view of the foregoing, there has been a violation of Article E taken in conjunction with Article 6 of the Charter.

III) Violation of Article E taken in conjunction with Article 4 of the revised European Social Charter

Article 4 – Right to a fair remuneration

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;
2) to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;
3) to recognise the right of men and women workers to equal pay for work of equal value;
4) to recognise the right of all workers to a reasonable period of notice for termination of employment;
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 E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

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49. The right to fair remuneration applies to public servants (Conclusions XX-3 (2014), Greece).

50. The right to fair remuneration comprises the right to freedom from discrimination in the determination of remuneration.

51. While the decrees at issue increase the salaries of public healthcare personnel, they also establish a difference in treatment between those in the "active" category and those in the "sedentary" category. The distinction is based on administrative categories artificially created by the authorities. If this artificial distinction did not exist, all nurses, anaesthetists, etc. would receive the same salary according to the same pay scale.

52. The complainant organisation considers that such difference in treatment is discriminatory.

53. The Committee has already had occasion to define discrimination as an unwarranted difference in treatment (ECSR, *Syndicat national des Professions du Tourisme* v. France, Complaint No. 6/2000, Decision on the merits of 10 October 2000, §25). It subsequently specified that a measure has no "objective and reasonable" justification if "it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'" (ECSR, *Confédération Française Démocratique du Travail* (CFDT) v. France, Complaint No. 50/2008, Decision on the merits of 9 September 2009, §38).

A) The existence of a difference in treatment

54. The difference in treatment is patently obvious in this case. The two categories of healthcare personnel are not on the same pay scale, even though they all perform the same duties and have the same qualifications and the same responsibilities. They are recruited on the basis of their qualifications and not of their administrative category: their duties are completely identical (anaesthetic nurses have the same qualifications and carry out the same duties and tasks under the same superiors whether they have active or sedentary status; the same applies to the other jobs).

55. Yet, although the duties, tasks, qualifications and rank are the same, there is a difference in terms of promotion and pay depending on their administrative status.

<u>With regard to decrees 1408/1406</u>

56. To provide some specific examples, under the contested decrees, anaesthetic nurses, theatre nurses and paediatric nurses are entitled to basic pay at the highest step of the upper pay band, corresponding to a basic index point (*indice brut*) of 833, with a salary index point (*indice majoré*) of 6 821.

57. Previously, the basic index point for anaesthetic nurses was 760 at the last step of the upper band and 715 for nurses and theatre nurses, with a salary index point of 627 (for anaesthetic nurses) and 593 (for nurses and theatre nurses).

58. Similarly, the basic pay for the corps of healthcare managers with active status was set at 883 for the highest step of the upper pay band, with 687 salary index points.

59. Prior to the decrees in question, they were paid according to a basic index point of 767, with 632 salary index points.

60. At the same time, the salary index for anaesthetic nurses, theatre nurses, sedentary nurses and healthcare managers was increased to 764 points at the highest step of the upper pay band.

61. Previously, their salary index points ranged from 658 to 673 for specialist nurses and was fixed at 680 for healthcare managers.

62. In view of these figures, the increase for active personnel was:
    - 8.77% for anaesthetic nurses; 2
    - 15% for theatre nurses and paediatric nurses; 3
    - 8.70% for healthcare managers. 4

63. The increase for sedentary personnel was:
    - 13.5% for anaesthetic nurses; 5
    - 16.11 % for theatre nurses and nurses; 6
    - 12.35% for healthcare managers. 7

64. It follows from these figures that the “due proportion” requirement for salary adjustments was not met and that, therefore, active healthcare personnel have been treated differently from sedentary healthcare personnel in terms of their pay adjustment, with active personnel all receiving a lower pay rise compared with their counterparts in sedentary roles. The case of anaesthetic nurses is particularly striking here: the pay rise for those in the active category was almost half that of their sedentary counterparts.

With regard to decrees 1409/1407

65. Under the decrees at issue, nurses, physiotherapists and masseurs, speech therapists and radiographers with active status have the same basic pay at the highest step of the upper pay band, corresponding to a basic index point of 751, with a salary index point of 620.

66. Previously, their basic index point was 707 at the last step of the upper band, with a salary index point of 587.

67. Under the “sedentary” scheme, the basic index point for exactly the same occupational categories rose from 760 (and 627 salary index points, for radiographers and nurses) and from 801 (and 658 salary index points, for physiotherapists, masseurs and speech therapists) to 885 (and 722 salary index points) and 940 (764 salary index points, for speech therapists only).

68. The increase for active personnel was therefore:
    - 6% for general care nurses; 2
    - 6% for physiotherapists and masseurs; 3
    - 6% for radiographers; 4
    - 6% for speech therapists.

69. The increase for sedentary personnel was:
    - 16% for general care nurses; 5
    - 10% for physiotherapists and masseurs; 6
    - 16% for radiographers; 7
    - 17% for speech therapists. 8

70. It follows from these figures that the “due proportion” requirement for salary adjustments was not met. Active personnel all received a lower pay rise which was not proportionate to that of their counterparts, meaning that active healthcare personnel have been treated differently from sedentary healthcare personnel in terms of their adjustment. Furthermore, the disparity is so great that the pay rise for sedentary personnel is between double and triple the one awarded to active personnel.

B) The grounds for making a distinction

71. The ground for distinction is based on the official categories that exist for healthcare personnel. Such a difference was created by the State: the Government then relies on it to justify its differential treatment. Often in discrimination cases there is a kind of circular

reasoning at play: the ground for discrimination invoked is taken as proof of the difference between situations. In short, the State makes a distinction where there is no reason to do so and artificially creates a ground for distinction.

72. Such an approach leads to circular reasoning in order to hide discrimination.

73. The Conseil d'État's reasoning is par for the course and in fact amounts to creating a new difference in treatment between public servants – for whom the principle of equality would apply only within the same category – and private sector employees for whom the application of the principle of equality would by implication be wider. Such a distinction would also be unjustified and would epitomise an unacceptable paradox in a State governed by the rule of law: some people would be "more equal" than others.

74. The discrimination in this case is therefore based on "other status".

C) No objective and reasonable justification

75. The complainant organisation considers that it is extremely questionable whether there is an objective and reasonable justification, for several reasons.

76. Firstly, at this stage, the Government has not provided any serious justification for this difference in treatment in the course of domestic proceedings. As for the court, it merely gave a very cursory and superficial analysis which did not address the arguments of the appellants who had established the existence of a difference in treatment. Moreover, the Conseil d'État, by distinguishing between categories of healthcare professionals where there was no reason to do so, extended the discrimination introduced by the regulations and did not even consider the argument of objective and reasonable justification.

77. Secondly, it should be noted that in its submissions to the Conseil d'État, the Ministry stated that "the short time remaining in the career [...] of active public servants" could be used to justify the difference in treatment. In addition to being factually incorrect, such reasoning is inadmissible as it is based on the (higher) age of public servants in that category and thus constitutes a new ground for prohibited discrimination.

78. Thirdly, even supposing that a margin of appreciation and/or a legitimate aim existed, the discussions with the trade unions at the time of the Ségur agreement and the Government's intentions at that stage (**Appendix 1**) clearly show that a different solution could have been envisaged, one that would have interfered less with the appellants' rights. The very existence of the agreement, signed by the same ministers who subsequently signed the impugned decrees, proves that another course of action was possible. The solution which was then unilaterally imposed by the Government requires more by way of justification therefore, since a "softer" alternative was within reach.

79. Last but not least, developments since 2010 have illustrated the lack of reasonable justification for the decisions taken. The gap between the two categories has grown and

further decisions will only widen it. Even supposing that there was a difference between the two categories of healthcare personnel to begin with, this has not changed over the years: the benefits enjoyed by public servants in one category have not increased over the years, while the gap between the two categories has widened considerably. This is due to a disproportionate increase in the pay of active healthcare personnel compared with the pay of those with sedentary status. So on the one hand, the difference in situation has remained the same, while on the other, the difference in treatment has grown. Discrimination may also arise from overly differentiated treatment of situations that are not comparable. The difference in treatment must be proportionate to the difference between the situations, otherwise it becomes discriminatory. In the present case, there is nothing to justify the widening of the gap between the categories as a result of the adoption of the impugned decrees.

80. It follows from all of the foregoing considerations that the difference in treatment, as it stands, is not justified.

81. The Committee has stated that, in respect of complaints alleging discrimination, "the burden of proof should not rest entirely on the complainant, but should be shifted appropriately" (Conclusions XIII-5, p.272). Therefore, once the complainant organisation has established the existence of an unexplained difference in treatment – as in the present case – "[i]t is then for the Government to demonstrate that there is no ground for this allegation of discrimination" (ECSR, Mental Disability Advocacy Centre (MDAC) v. Bulgaria, Complaint No. 41/2007, Decision on the merits of 3 June 2008, §52). This shift in the burden of proof applies in the context of the collective complaints procedure before the Committee (ECSR, *Syndicat Travail Affaires Sociales* v. France, Complaint No. 24/2004, Decision on the merits of 8 November 2005, §34).

IV) Costs and expenses

82. It would be unfair if the Federation were obliged to bear the expenses it has incurred in preparing the complaint. It asks the Committee to invite the Committee of Ministers to direct the Government to pay it the sum of €3 600 based on the supporting documents appended.

List of appendices:

1. Ségur Agreements of 13 July 2020
2. Decree No. 2021-1406
3. Decree No. 2021-1407
4. Decree No. 2021-1408
5. Decree No. 2021-1409
6. Decision of the Conseil d'État of 5 December 2022
7. Decision of the Conseil d'État of 5 December 2022
8. Statute of the Federation
9. Federal Board decision of 30 March 2023

10. Order of 23 January 2023 appointing the Federation to the *Conseil supérieur de la fonction publique hospitalière*
11. Invoice for costs and expenses

General Secretary representing the Federation

Maître Haiba Ouaïssi
CASSIUS AVOCATS