



March 2023

EUROPEAN SOCIAL CHARTER

European Committee of Social Rights

Conclusions XXII-3 (2022)

The Netherlands in respect of CURAÇAO

This text may be subject to editorial revision.

The function of the European Committee of Social Rights is to rule on the conformity of the situation in States with the European Social Charter. In respect of national reports, it adopts conclusions; in respect of collective complaints, it adopts decisions.

Information on the Charter, statements of interpretation, and general questions from the Committee, are contained in the General Introduction to all Conclusions.

With effect from 10 October 2010, the Netherlands Antilles ceased to exist as a constituent country of the Kingdom of the Netherlands. Two of the five islands which used to be part of the Netherlands Antilles – Curaçao and Sint Maarten – are henceforth separate constituent countries of the Kingdom of the Netherlands, together with Aruba, which is not affected by these changes. The three remaining islands which used to be part of the Netherlands Antilles – Bonaire, Sint Eustatius and Saba (henceforth referred to as “the Caribbean part”) – are now special municipalities, under the direct responsibility of the Netherlands. However, while the Revised Charter applies to the European part of the Netherlands, its Caribbean part remains bound by the engagements subscribed under the 1961 Charter in respect of the Netherlands Antilles, as it is also the case for Aruba, Curaçao and Sint Maarten.

The following chapter concerns the Netherlands in respect of Curaçao. The Netherlands with respect to the Antilles ratified the 1961 European Social Charter on 22 April 1980. On 8 October 2010, the Netherlands Government notified the Treaty Office of the Council of Europe that, with effect from 10 October 2010, the Netherlands Antilles would cease to exist as a constituent country of the Kingdom of the Netherlands and that the international agreements ratified by the Kingdom for the Netherlands Antilles would henceforth continue to apply to Curaçao.

The deadline for submitting the 9th report was 31 December 2021 and the Netherlands in respect of Curaçao submitted it on 8 December 2021.

The Committee recalls that the Netherlands in respect of Curaçao was asked to reply to the specific targeted questions posed under various provisions (questions included in the appendix to the letter, whereby the Committee requested a report on the implementation of the Charter). The Committee therefore focused specifically on these aspects. It also assessed the replies to the previous conclusions of non-conformity, deferral and conformity pending receipt of information (Conclusions XXI-3 (2018)).

In addition, the Committee recalls that no targeted questions were asked under certain provisions. If the previous conclusion (Conclusions XXI-3 (2018)) found the situation to be in conformity, there was no examination of the situation in 2022.

In accordance with the reporting system adopted by the Committee of Ministers at the 1196th meeting of the Ministers’ Deputies on 2-3 April 2014, the report concerned the following provisions of the thematic group III “Labour Rights”:

- the right to just conditions of work (Article 2),
- the right to a fair remuneration (Article 4),
- the right to organise (Article 5),
- the right to bargain collectively (Article 6),
- the right to information and consultation (Article 2 of the Additional Protocol),
- the right to take part in the determination and improvement of the working conditions and working environment (Article 3 of the Additional Protocol).

The Netherlands in respect of Curaçao has accepted all provisions from the above-mentioned group except Articles 2 and 4 of the 1961 Charter, and Articles 2 and 3 of the Additional Protocol.

The reference period was from 1 January 2017 to 31 December 2020.

The conclusions relating to the Netherlands in respect of Curaçao concern 5 situations and are as follows:

- 2 conclusions of conformity: Articles 6§1 and 6§3
- 2 conclusions of non-conformity: Articles 6§2 and 6§4.

In respect of Article 5, the Committee needs further information in order to examine the situation.

The Committee considers that the absence of the information requested amounts to a breach of the reporting obligation entered into by the Netherlands in respect of Curaçao under the 1961 Charter.

The next report from the Netherlands in respect of Curaçao will deal with the following provisions of the thematic group IV “Children, families, migrants”:

- the right of children and young persons to protection (Article 7),
- the right of employed women to protection (Article 8),
- the right of the family to social, legal and economic protection (Article 16),
- the right of mothers and children to social and economic protection (Article 17),
- the right of migrant workers and their families to protection and assistance (Article 19).

The deadline for submitting that report was 31 December 2022.

Conclusions and reports are available at www.coe.int/socialcharter

Article 5 - Right to organise

The Committee takes note of the information contained in the report submitted by the Netherlands in respect of Curaçao.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted questions for Article 5 of the Charter, as well as, where applicable, previous conclusions of non-conformity, deferrals, or conformity pending receipt of information (see the appendix to the letter, whereby the Committee requested a report on the implementation of the Charter in respect of the provisions falling within the thematic group “Labour rights”).

The Committee deferred its previous conclusion pending receipt of information on the formation of trade unions, the right to join or not to join them, representativity criteria, autonomy and prerogatives of trade unions, as well as personal scope (Conclusions XXI-3 (2018)).

The assessment of the Committee will therefore concern the information provided in the report in response to the deferral, and to the targeted questions.

Prevalence/Trade union density

No information is provided in the report on this issue.

Forming trade unions and employer’s organisation

The report states that there are no specific requirements for the establishment of a trade union. Anyone may establish an association under the Civil Code, but the statutes of the association must be notarised in order to ensure the association has full legal capacity. Further, the Committee understands that there must be no objection from the relevant Minister. The Committee asks for further information on the possibility of a Minister to object to the establishment of a trade union. Moreover, the Committee asks whether when registering a trade union any fees are payable.

Freedom to join or not to join a trade union

According to the report, the Constitution guarantees the right to organise. The Committee asks the next report to address whether the right not to join is protected.

The Committee recalls in this respect that no worker may be forced to join or remain a member of a trade union. Any form of compulsory trade unionism is incompatible with Article 5. The freedom guaranteed by Article 5 implies that the exercise of a worker’s right to join a trade union is the result of a choice and that, consequently, it is not to be decided by the worker under the influence of constraints that rule out the exercise of this freedom. To secure this freedom, domestic law must clearly prohibit all pre-entry or post-entry closed shop clauses and all union security clauses (including automatic deductions from the wages of all workers, whether union members or not, to finance the trade union acting within the company). Consequently, clauses in collective agreements or legally authorised arrangements whereby jobs are reserved in practice for members of a specific trade union are in breach of the freedom guaranteed by Article 5.

Domestic law must guarantee the right of workers to join a trade union and include effective punishments and remedies where this right is not respected. Trade union members must be protected from any harmful consequence that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination in the areas of recruitment, dismissal or promotion because they belong to a trade union or engage in trade union activities. Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim.

The Committee also asks for information on remedies in cases of discrimination on grounds of trade union membership.

Representativity

The report states that legislation has not yet been adopted on representativeness of unions in the public service but provides examples of case law on the issue. The Committee asks the next report to provide information on the criteria used to determine representativeness.

Trade union activities

According to the report, trade unions have the right to hold meetings and to enter the workplace. The Committee asks the next report to continue reporting on trade union activities.

Personal scope and restrictions on the right to organise

The report provides no information on these issues. The Committee asks whether all workers in all sectors enjoy the right to organise, in particular public officials and police officers. The Committee considers that if this information is not provided in the next report there will be nothing to establish that the situation is in conformity with the Charter.

The Committee notes that a Commission on the revision of labour laws was established in 2019. The Committee asks the next report to provide information on any changes to the legislation, as well as information in response to the questions above. The Committee considers that if this information is not provided there will be nothing to establish that the situation is in conformity with the Charter.

Conclusion

Pending receipt of the information requested, the Committee defers its conclusion

Article 6 - Right to bargain collectively

Paragraph 1 - Joint consultation

The Committee takes note of the information contained in the report submitted by the Netherlands in respect of Curaçao.

The Committee recalls that no targeted questions were asked for Article 6§1 of the 1961 Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the 1961 Charter in respect of the provisions relating to the “Labour rights” thematic group).

As the previous conclusion found the situation in the Netherlands in respect of Curaçao to be in conformity with the 1961 Charter, there was no examination of the situation in 2022. Therefore, the Committee reiterates its previous conclusion.

Conclusion

The Committee concludes that the situation in the Netherlands in respect of Curaçao is in conformity with Article 6§1 of the 1961 Charter.

Article 6 - Right to bargain collectively

Paragraph 2 - Negotiation procedures

The Committee takes note of the information contained in the report submitted by the Netherlands in respect of Curaçao.

The Committee recalls that no targeted questions were asked for Article 6§2 of the 1961 Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the 1961 Charter in respect of the provisions relating to the “Labour rights” thematic group).

The Committee also recalls that in the General Introduction to Conclusions XXI-3 (2018), it posed a general question under Article 6§2 of the 1961 Charter and asked States to provide, in the next report, information on the measures taken or planned to guarantee the right to collective bargaining for self-employed workers and other workers falling outside the usual definition of dependent employee.

In its previous conclusion, the Committee considered that the situation in the Netherlands in respect of Curaçao was not in conformity with Article 6§2 of the 1961 Charter on the ground that it had not been established that collective bargaining was sufficiently promoted (Conclusions XXI-3 (2018)). The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of non-conformity and to the general question.

The Committee previously noted the lack of information on the number of employees covered by collective agreements (Conclusions XXI-3 (2018)). The Government indicates in response that it does not hold the information requested, but that plans are underway to develop a mechanism for collecting it. Accordingly, the Committee reiterates its request for information, as well as its previous conclusion of non-conformity.

As the report does not provide any relevant information in relation to the above-mentioned general question, the Committee reiterates its request for information on the measures taken or planned to guarantee the right to collective bargaining for self-employed workers and other workers falling outside the usual definition of dependent employee.

Covid-19

In reply to the question regarding the special arrangements related to the pandemic, the report does not provide any information.

Conclusion

The Committee concludes that the situation in the Netherlands in respect of Curaçao is not in conformity with Article 6§2 of the 1961 Charter on the ground that it has not been established that the promotion of collective bargaining is sufficient.

Article 6 - Right to bargain collectively

Paragraph 3 - Conciliation and arbitration

The Committee takes note of the information contained in the report submitted by the Netherlands in respect of Curaçao.

The Committee recalls that no questions were asked for Article 6§3 of the 1961 Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the “Labour rights” thematic group).

The Committee deferred its previous conclusion pending receipt of the information requested. It requested information on the procedures for conciliation and mediation and pointed out that if the requisite information was not provided in the next report there would be nothing to show that the situation was in conformity with the Charter (Conclusions XXI-3 (2018)).

In its report, the Government states that the Labour Mediation Bureau deals with collective labour disputes (whereas the Complaints Bureau in the Ministry of Social Development, Labour and Welfare deals with individual labour disputes and the Social Mediation Bureau deals with family and neighbour disputes).

The mediator’s role and the conciliation/mediation procedure (Labour Mediation Bureau) are governed by the Labour Disputes Ordinance of 1946. In particular, Articles 14.a and 14.b of the ordinance provide that the mediator:

- may hold company-level referendums to determine which group of workers/trade union has the support of the majority of workers and may represent them;
- must, at the request of the employer or the workers, assist the parties and provide conciliation/mediation during the negotiation of a collective labour agreement.

These provisions also set out the parties’ rights and obligations during the procedure (e.g. to provide the mediator with all the assistance and co-operation they may reasonably be expected to give).

The Government adds that if the Labour Mediation Bureau fails to facilitate an agreement during the conciliation or mediation process, the parties concerned may take their dispute to the Court of Justice of Curaçao for a judicial settlement.

The Committee notes that the Labour Disputes Ordinance of 1946 also provides for an arbitration procedure (Articles 12 and 13). It understands from these provisions that recourse to arbitration is only possible with the consent of all the parties to the dispute (see, in particular, Article 12§4: “No dispute may be submitted to an arbitral tribunal unless the parties undertake [...] to abide by the decision of the arbitral tribunal”). The Committee asks whether this is indeed the case.

The Committee also asks that the Government clarify in the next report whether the conciliation/mediation and arbitration procedures provided for in the Labour Disputes Ordinance of 1946 apply to the private and public sectors.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in the Netherlands in respect of Curaçao is in conformity with Article 6§3 of the 1961 Charter.

Article 6 - Right to bargain collectively

Paragraph 4 - Collective action

The Committee takes note of the information contained in the report submitted by the Netherlands in respect of Curaçao.

The Committee recalls that no targeted questions were asked for Article 6§4 of the 1961 Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the “Labour rights” thematic group).

The Committee also recalls that in the General Introduction to Conclusions XXI-3 (2018), it posed a general question under Article 6§4 and asked States to provide, in the next report, information on the right of members of the police to strike and any restrictions.

In its previous conclusion, the Committee considered that the situation in the Netherlands in respect of Curaçao was not in conformity with Article 6§4 of the 1961 Charter on the ground that it had not been established that the right to strike was sufficiently guaranteed (Conclusions XXI-3 (2018)). The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of non-conformity and to the general question.

Right to collective action

In its previous conclusion, the Committee noted that the Government report provided little information on the right to strike. It therefore asked for full, updated information in the next report on (i) the definition of collective action and the circumstances in which it is legal; (ii) persons entitled to take collective action; (iii) any specific restrictions on the right to strike and procedural requirements; and (iv) the consequences of a strike.

In its report, the Government states that the right to collective action, including the right to strike, is a fundamental social right. The right to strike is not absolute however, and the legitimacy of a strike may be assessed by the courts. The court may outlaw certain actions if it is established that a restriction is urgently required from a “social” viewpoint, or if there is a “need” to do so. In taking its decision, the court will take account of all the circumstances, which may include: the nature and duration of the strike; the relationship between the strike and the goal pursued and; any damage caused to the interests of the employer or third parties. In short, the right to strike is a fundamental workers’ right, which must be respected, but not “at all costs”.

The Committee considers that this information is incomplete and does not enable it to establish whether the situation with regard to the right of workers to collective action is in conformity with Article 6§4 of the Charter. It therefore reiterates its request for detailed information in the next report, with references to the applicable legal texts, and relating to the private and the public sector, on:

- the permitted objectives of collective action (disputes relating to the negotiation/amendment of a collective agreement and/or other disputes);
- groups entitled to take collective action;
- restrictions to the right to strike (general restrictions, restrictions in the essential services sector, restrictions related to public officials);
- procedural requirements;
- consequences of taking part in a strike (deductions from wages, dismissal, etc.).

In the meantime, the Committee reiterates its conclusion of non-conformity on this point.

Right of the police to strike

In its report, the Government states that the police are not prohibited from striking. However, the police are required to maintain day-to-day law and order, and by the very nature of their profession, they must handle the right to strike “very carefully”. At the least, when they exercise this right, an official notice should be issued “well before the strike” by a recognised trade union (the NAPB or the SAP).

The Committee asks for detailed information in the next report on the procedural requirements that must be met by members of the police calling for a strike.

Covid-19

In the context of the Covid-19 health crisis, the Committee asked all States to provide information on:

- specific measures taken during the pandemic to ensure the right to strike;
- as regards minimum or essential services, any measures introduced in connection with the Covid-19 crisis or during the pandemic to restrict the right of workers and employers to take industrial action.

The Committee notes that the Government has not provided the information requested.

The Committee points out that in its Statement on Covid-19 and social rights adopted on 24 March 2021, it specified that Article 6§4 of the Charter entails a right of workers to take collective action (e.g. work stoppage) for occupational health and safety reasons. This means, for example, that strikes in response to a lack of adequate personal protective equipment or inadequate distancing, disinfection and cleaning protocols at the workplace would fall within the scope of the protection afforded by the Charter.

Conclusion

The Committee concludes that the situation in the Netherlands in respect of Curaçao is not in conformity with Article 6§4 of the 1961 Charter on the ground that it has not been established that the right to strike is sufficiently guaranteed.