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EUROPEAN SOCIAL CHARTER

European Committee of Social Rights

Conclusions XXII-3 (2022)

POLAND

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.

The following chapter concerns Poland, which ratified the 1961 European Social Charter on 25 June 1997. The deadline for submitting the 21st report was 31 December 2021 and Poland submitted it on 2 November 2021.

The Committee recalls that Poland 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).

Poland has accepted all provisions from the above-mentioned group except Articles 2§2, 4§1, 6§4 and the Additional Protocol.

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

The conclusions relating to Poland concern 12 situations and are as follows:

- 7 conclusions of conformity: Articles 2§3, 2§4, 2§5, 4§5, 6§1, 6§2, 6§3,
- 5 conclusions of non-conformity: Articles 2§1, 4§2, 4§3, 4§4, 5.

The next report from Poland 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 2 - Right to just conditions of work

Paragraph 1 - Reasonable working time

The Committee takes note of the information contained in the report submitted by Poland.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted questions for Article 2§1 of the 1961 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 1961 Charter in respect of the provisions falling within the thematic group “Labour rights”).

In its previous conclusion, the Committee considered that the situation in Poland was not in conformity with Article 2§1 of the 1961 of the Charter on the grounds that in some jobs the working day could exceed sixteen hours and even be as long as 24 hours and on-call periods where no effective work was performed were assimilated to rest periods (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 targeted questions.

Measures to ensure reasonable working hours

The Committee notes that in its previous conclusion, it found the situation in Poland not to be in conformity with Article 2§1 of the 1961 Charter on the ground that, in some jobs, the working day could exceed sixteen hours and even be as long as 24 hours (Conclusions XXI-3 (2018)). The Committee also asked that the next report provide further information establishing that the workers who have agreed to the new arrangements for organising working time over long reference periods were neither subject to unreasonable working hours nor expected to work for an excessive number of long working weeks.

The report provides no answer to the question and, with regard to non-conformity, the report states that the legislation has not been changed and no changes are coming up.

The Committee notes that five previous conclusions with regard to Poland resulted in non-conformity on the same issue, a warning was issued by the Governmental Committee and the country stated that it had no intentions to bring the situation in conformity with Article 2§1 of the 1961 Charter. The Committee strongly reiterates the conclusion of non-conformity on the ground that in some jobs, the working day can exceed 16 hours and even be as long as 24 hours.

In its targeted question, the Committee asked for updated information on the legal framework to ensure reasonable working hours (weekly, daily, rest periods, ...) and exceptions (including legal basis and justification). It also asked for detailed information on enforcement measures and monitoring arrangements, in particular as regards the activities of labour inspectorates (statistics on inspections and their prevalence by sector of economic activity, sanctions imposed, etc.).

The Committee recalls that teleworking or remote working may lead to excessive working hours. It also reiterates that it is necessary to enable fully the right of workers to refuse to perform work outside their normal working hours or while on holiday or on other forms of leave (sometimes referred to as the ‘right to disconnect’). States Parties must ensure that employers have a duty to put in place arrangements to limit or discourage unaccounted for out-of-hours work, especially for categories of workers who may feel pressed to overperform. In some cases, arrangements may be necessary to ensure the digital disconnect in order to guarantee the enjoyment of rest periods (Statement on digital disconnect and electronic monitoring of workers).

The report states that the National Labour Inspection carried out a number of inspections between 2017 and 2020 and most violations were found with regard to failure to respect daily working time (in 2017: 2,940, in 2018 – 2,869, in 2019: 2,447 and in 2020: 1,430) and the

failure to respect the average weekly working time (in 2017: 2,844, in 2018: 2,791, in 2019: 2,391 and in 2020: 1,391). The measures taken included follow-up requests and oral instructions.

Law and practice regarding on-call periods

In its previous conclusion, the Committee found the situation in Poland not to be in conformity with Article 2§1 of the 1961 Charter on the ground that on-call periods where no effective work was performed were assimilated to rest periods (Conclusions XXI-3 (2018)).

In the targeted question, the Committee asked for information on law and practice as regards on-call time and service (including as regards zero-hour contracts), and how are inactive on-call periods treated in terms of work and rest time as well as remuneration.

In reply, the report states that during the reference period no amendments were made to the legislation, and none is coming up soon. In these circumstances, the Committee reiterates the conclusion of non-conformity on the ground that on-call periods where no effective work is performed are considered as rest periods.

The report provides no information on zero-hour contracts and the Committee reiterates its request for information.

Covid-19

In the context of the Covid-19 crisis, the Committee asked the States Parties to provide information on the impact of the Covid-19 crisis on the right to just conditions of work and on general measures taken to mitigate adverse impact. More specifically, the Committee asked for information on the enjoyment of the right to reasonable working time in the following sectors: healthcare and social work; law enforcement, defence and other essential public services; education, transport.

The Committee refers to its statement on Covid-19 and social rights of 24 March 2021.

The report states that, in connection with the Law of 2 March 2020, telework was established. Employers could reduce the worker's working hours by 20%. In the event of damage as a result of Covid-19, employers were allowed to introduce the system of equivalent working time which permitted to extend the daily working time up to 12 hours over a reference period of a maximum of 12 months. If a daily rest period is reduced, the worker shall be entitled to the difference between 11 hours and the number of hours of the shorter rest period taken. Furthermore, for a limited period during the state of epidemic emergency, employers were allowed to modify the system of working hours to the extent necessary to ensure the continuity of the company's activities.

The report further states that the medical professionals who were working with Covid-19 patients, received a salary supplement for the additional workload. A majority of parents could telework and between 11 March 2020 and 25 June 2021 parents could benefit from allowances for the care of their children at home if they could not work remotely.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 2§1 of the 1961 Charter on the grounds that:

- in some jobs the working day can exceed 16 hours and even be as long as 24 hours;
- on-call periods where no effective work is performed are considered as rest periods.

See dissenting opinion by Carmen Salcedo Beltrán on Article 2§1 of the 1961 European Social Charter and the Revised European Social Charter.

Article 2 - Right to just conditions of work

Paragraph 3 - Annual holiday with pay

The Committee takes note of the information contained in the report submitted by Poland.

The Committee recalls that no targeted questions were asked for Article 2§3 of the 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).

As the previous conclusion (Conclusions XXI-3 (2018)) found the situation in Poland to be in conformity with the Charter, there was no examination of the situation in 2022 on this point.

Therefore, the Committee reiterates its previous conclusion.

Covid-19

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

The Committee refers to its statement on Covid-19 and social rights of 24 March 2021.

Conclusion

The Committee concludes that the situation in Poland is in conformity with Article 2§3 of the 1961 Charter.

Article 2 - Right to just conditions of work

Paragraph 4 - Elimination of risks in dangerous or unhealthy occupations

The Committee recalls that no targeted questions were asked for Article 2§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.

As the previous conclusion found the situation in Poland 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 Poland is in conformity with Article 2§4 of the 1961 Charter.

Article 2 - Right to just conditions of work

Paragraph 5 - Weekly rest period

The Committee recalls that no targeted questions were asked for Article 2§5 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.

As the previous conclusion found the situation in Poland to be in conformity with the 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 Poland is in conformity with Article 2§5 of the 1961 Charter.

Article 4 - Right to a fair remuneration

Paragraph 2 - Increased remuneration for overtime work

The Committee takes note of the information contained in the report submitted by Poland.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted question for Article 4§2 of the 1961 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 1961 Charter in respect of the provisions falling within the thematic group “Labour rights”).

In its previous conclusion, the Committee considered that the situation in Poland was not in conformity with Article 4§2 of the 1961 of the Charter on the ground that the workers in both public and private sectors did not have a right to increased compensatory time-off for overtime hours worked (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 targeted question.

Rules on increased remuneration for overtime work

Previously, the Committee found that the situation in Poland was not in conformity with Article 4§2 of the 1961 Charter on the ground that the workers in both public and private sectors did not have a right to increased compensatory time-off for overtime hours worked (Conclusions XXI-3 (2018)). The Committee also asked for information on the possible change to the status of state civil servants, and the Human Rights Commissioner’s appeal to the Constitutional Court regarding the violation of the right to increased remuneration for overtime work.

The report states that the legislation has not been changed and no changes are planned with regard to the private sector. With regard to the public sector, the report states that the law provides for compensation for additional hours worked. In the case of a civil servant, the additional hours worked during the night are compensated in accordance with the “hour for hour” principle. A public service worker is entitled to compensatory rest in accordance with the same “hour for hour” principle. All the members of the civil service are subject to restrictions on the number of overtime hours worked (150 hours per calendar year).

The Committee reiterates the aim of Article 4§2 is to ensure that the additional occupation of workers during overtime is rewarded. Under this provision such reward must take the form of an increased rate of remuneration. However, the Committee recognises reward in the form of time off, provided that the aim of the provision is met. This means, that, in particular, where remuneration for overtime is entirely given in the form of time off, Article 4§2 requires that this time be longer than the additional hours worked (Conclusions 2014, Slovak Republic). The principle of this provision is that work performed outside normal working hours requires an increased effort on the part of the worker, who therefore should be paid at a rate higher than the normal wage (Conclusions XIV-2, Statement of Interpretation of Article 4§2).

The Committee notes that, as it appears from the report, the situation in Poland has not changed. The Committee thus reiterates its conclusion of non-conformity on the ground that the workers in both the public and private sectors do not have a right to increased compensatory time-off for overtime hours.

Covid-19

In the context of the Covid-19 crisis, the Committee asked the States Parties to explain the impact of the Covid-19 crisis on the right to a fair remuneration as regards overtime and provide information on measures taken to protect and fulfil this right. The Committee asked for specific information on the enjoyment of the right to a fair remuneration/compensation for overtime for medical staff during the pandemic and explain how the matter of overtime and

working hours was addressed in respect of teleworking (regulation, monitoring, increased compensation).

The Committee refers to its statement on Covid-19 and social rights of 24 March 2021.

The report states that it was not necessary to adopt specific regulations with regard to overtime during the Covid-19 pandemic.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 4§2 of the 1961 Charter on the ground that the workers in both the public and private sectors do not have a right to increased compensatory time-off for overtime hours.

Article 4 - Right to a fair remuneration

Paragraph 3 - Non-discrimination between and women men with respect to remuneration

The Committee takes note of the information contained in the report submitted by Poland.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted question for Article 4§3 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”).

With respect to Article 4§3, the States were asked to provide information on the impact of Covid-19 pandemic on the right of men and women workers to equal pay for work of equal value, with particular reference and data related to the extent and modalities of application of furlough schemes to women workers.

The Committee recalls that it examines the right to equal pay under Article 20 (Article 1 of the 1988 Additional Protocol) and Article 4§3 of the Charter and does so therefore every two years (under thematic group 1 “Employment, training and equal opportunities”, and thematic group 3 “Labour rights”). As Poland has not accepted Article 1 of the 1988 Additional Protocol, the Committee examines policies and other measures to reduce the gender pay gap under Article 4§3 of the Charter.

The Committee deferred its previous conclusion on Article 4§3, pending receipt of the information requested about job comparisons (Conclusions XXI-3 (2018)).

The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of deferral.

Obligations to guarantee the right to equal pay for equal work or work of equal value

Effective remedies

In reply to the Committee’s request for updated information as regards the burden of proof in discrimination cases (Conclusions XXI-3 (2018)), the report states that there have been no changes to the legislation during the reference period. According to the report, the Labour Code provides for a shift in the burden of proof in all discrimination cases, including those involving violations of the principle of gender equality in pay.

In its previous conclusion, the Committee also asked whether there was an upper limit on compensation in cases of pay discrimination. In reply, the report states that the Labour Code only determines the minimum amount of compensation, not the maximum.

In the light of the above, the Committee finds that the situation is in conformity with the Charter on these two points.

Pay transparency and job comparisons

In its previous conclusion, the Committee asked whether domestic law prohibited pay discrimination in company-level or collective agreements, and whether pay comparison was possible across companies, particularly if remuneration was set centrally for several companies belonging to a holding company.

In reply to the first question, the report states that the provisions of company-level and collective agreements, as well as of regulations and statutes, may not be less favourable to employees than those of the Labour Code or other laws and executive acts. In addition, the provisions of regulations and statutes may not be less favourable to employees than those of company-level and collective agreements. The Committee therefore notes that provisions in

collective agreements and other agreements that infringe the principle of equal treatment in employment may not be applied.

With regard to the Committee's second question, the report notes that workers are entitled to equal pay for equal work or work of equal value. Pay includes all types of remuneration, whatever they may be called and whatever their nature, as well as other work-related benefits granted to workers in cash or in any another form. The report states that work of equal value is work for which employees require comparable professional skills, as confirmed by appropriate qualifications or work experience, and similar degrees of responsibility and effort. The report states that the provisions of the Labour Code concern the remuneration paid by a given employer and do not enable comparisons of employee compensation across different companies. According to the report, when several companies belong to a holding company, the principle of "equal pay for equal work" therefore applies to each of them separately. The Committee notes from the report that the Labour Code does not provide a basis for comparing compensation paid by different employers within a holding company.

In this connection, the Committee notes from the Direct Request on the Equal Remuneration Convention (No. 100) in Poland, published by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2021 (109th Session of the International Labour Conference), that "section 18(3)(c) of the Labour Code provides for equal remuneration for the same work or work of equal value, defined as "work requiring comparable professional qualifications, responsibilities and effort", but that in practice case law of the Supreme Court seems to limit the scope of comparison to the same enterprise referring to the comparability of positions that are "unique in the whole organizational structure of the employer"". The Committee previously noted that the Labour Code did not, in theory, exclude the possibility of comparing pay across several companies (Conclusions XXI-3 (2018)). In the light of the above, however, the Committee notes that the case law refers to pay comparisons between employees working for the same company. The Committee accordingly considers that the situation is not in conformity with Article 4§3 of the Charter on the ground that pay comparisons are not possible across companies.

The Committee asks that the next report provide information on the specific measures provided for in national legislation concerning pay transparency in the labour market, and in particular, the possibility for workers to receive information on the pay levels of other workers and the information available on pay.

Statistics and measures to promote the right to equal pay

For information, the Committee takes note of the Eurostat data on the gender pay gap in Poland during the reference period, which was 7.0% in 2017, 8.5% in 2018, 6.5% in 2019 and 4.5% in 2020 (compared with 7.7% in 2014). It notes that the gender pay gap is well below the EU-27 average of 13% (provisional figure) in 2020 (data as of 4 March 2022).

In its previous conclusion, the Committee requested information on the measures taken to identify the main causes of the gender pay gap and measures taken to address them.

In reply, the report states that in 2017, an application called Equal Pay was developed to help determine whether an employer is engaging in pay discrimination by determining the adjusted pay gap (the difference between workers' wages, taking into account their age, education, seniority and other relevant details). The report adds that this free tool enables employers to introduce fair and non-discriminatory pay policies. The Committee notes from the report that there are plans to update the application and make it widely available to public and private sector employers in 2021-2022 (outside the reporting period).

In view of the above, the Committee finds that the situation is in conformity with Article 4§3 of the 1961 Charter on this point.

The impact of Covid-19 on the right of men and women workers to equal pay for work of equal value

The report does not provide information in response to the question about the impact of Covid-19, but does present the results of a pay discrimination audit carried out by the Labour Inspectorate during the pandemic.

The Committee refers to its statement on Covid-19 and Social Rights of 24 March 2021.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 4§3 of the 1961 Charter on the ground that pay comparisons are not possible across companies.

Article 4 - Right to a fair remuneration

Paragraph 4 - Reasonable notice of termination of employment

The Committee takes note of the information contained in the report submitted by Poland.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted questions for Article 4§4 of the 1961 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 1961 Charter in respect of the provisions falling within the thematic group “Labour rights”).

In its previous conclusion, the Committee considered that the situation in Poland was not in conformity with Article 4§4 of the 1961 Charter (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 targeted questions.

The Committee refers to its statement of interpretation on Article 4§4 (2018), where the Committee recalled that a reasonable notice period on termination of employment is regarded as one of the components of fair remuneration. The Committee further recalls that a reasonable notice period is one during which workers are entitled to their regular remuneration and that takes account of the workers’ length of service, the need not to deprive workers abruptly of their means of subsistence, as well as the need to inform workers of the termination in good time so as to enable them to seek a new job. The Committee points out that it is for governments to prove that these elements have been considered when devising and applying the basic rules on notice periods.

Following on from its statement of interpretation on Article 4§4 (2018), the Committee recalls that the question of the reasonableness of the notice periods will no longer be addressed, except where the notice periods are manifestly unreasonable. The Committee will assess this question on the basis of:

1. The rules governing the setting of notice periods (or the level of compensation in lieu of notice):
 - according to the source of the rule, namely the law, collective agreements, individual contracts and court judgments;
 - during any probationary periods, including those in the public service;
 - with regard to the treatment of workers in insecure jobs;
 - in the event of termination of employment for reasons outside the parties’ control;
 - including any circumstances in which workers can be dismissed without notice or compensation.
2. Acknowledgment, by law, collective agreement or individual contract of length of service, whether with the same employer or where a worker has been successively employed in precarious forms of employment relations.

Reasonable period of notice: legal framework and length of service

The Committee asked in its targeted question about information on the right of all workers to a reasonable period of notice for termination of employment (legal framework and practice), including any specific arrangements made in response to the Covid-19 crisis and the pandemic.

In reply to the targeted question, the report states that there has been no change in legislation during the reference period. The Committee recalls from its previous conclusion that the notice periods provided for in Article 33 of the Labour Code as amended by the Law of 25 June 2015 are reasonable (Conclusions XXI-3 (2018)).

Notice periods during probationary periods

The Committee previously found the situation to be in conformity with Article 4§4 of the 1961 Charter in this regard (Conclusions XXI-3 (2018)).

Notice periods with regard to workers in insecure jobs

The Committee previously found the situation to be in conformity with Article 4§4 of the 1961 Charter in this regard (Conclusions XXI-3 (2018)).

Notice periods in the event of termination of employment for reasons outside the parties' control

In its previous conclusion the Committee asked whether the worker is entitled to compensation in the event of termination of employment due to the death of the employer who is a natural person (Conclusions XXI-3 (2018)).

In reply to the Committee's question, the report states that, in the event of death of the employer who is a natural person the employment contract terminates at the date of the employer's death. The Labour code does not set out any notice period in this regard. The report adds that despite this, according to the Labour Code the worker is entitled to receive wages in lieu of notice. The report further adds that, in accordance with the law of 5 July 2018 on the management of a company's succession when the employer is a natural person as well as on other measures to facilitate business succession, this does not apply when the worker is hired by the new employer or when management of the succession on the employer's death has been established.

Circumstances in which workers can be dismissed without notice or compensation

In its previous conclusion the Committee found that the situation in Poland was not in conformity with Article 4§4 of the 1961 Charter on the ground that no notice period is required in cases where a worker is dismissed due to long-term illness or accidents (Conclusions XXI-3 (2018)). As noted above, the report states that there has been no change in legislation during the reference period. The Committee therefore reiterates its previous conclusion of non-conformity in this regard.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 4§4 of the 1961 Charter on the ground that no notice period is required in cases where a worker is dismissed due to (i) long-term illness; (ii) occupational accident.

Article 4 - Right to a fair remuneration

Paragraph 5 - Limits to deduction from wages

The Committee takes note of the information contained in the report submitted by Poland.

The Committee recalls that no targeted questions were asked for Article 4§5 of the 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 recalls that the deductions envisaged in Article 4§5 can only be authorised in certain circumstances which must be well-defined in a legal instrument (for instance, a law, regulation, collective agreement or arbitration award (Conclusions V (1977), Statement of Interpretation on Article 4§5). The Committee further recalls that deductions from wages must be subject to reasonable limits and should not *per se* result in depriving workers and their dependents of their means of subsistence (Conclusions 2014, Estonia). With a view to making an in-depth assessment of national situations the Committee has considered it necessary to change its approach. Therefore, the Committee asks States Parties to provide the following information in their next reports:

- a description of the legal framework regarding wage deductions, including the information on the amount of protected (unattachable) wage;
- Information on the national subsistence level, how it is calculated, and how the calculation of that minimum subsistence level ensures that workers can provide for the subsistence needs of themselves and their dependents.
- Information establishing that the disposable income of a worker earning the minimum wage after all deductions (including for child maintenance) is enough to guarantee the means of subsistence (i.e., to ensure that workers can provide for the subsistence needs of themselves and their dependents).
- a description of safeguards that prevent workers from waiving their right to the restriction on deductions from wage.

Deductions from wages and the protected wage

In its previous conclusion (Conclusions XXI-3 (2018)) the Committee considered that the legislation did not set an absolute limit on deductions for the purpose of recovering maintenance payments, and therefore allowed cases to persist in which workers have access to only 60% of the minimum wage, net of social contributions and tax deductions. Therefore, the Committee found that the situation was not in conformity with the Charter.

The Committee notes from the report that there have been no changes to the legal framework concerning deductions from wages. The deductions for the recovery of maintenance payments, set out in Article 87, paragraph 1 sub-paragraph 1 of the Code, are subject to a sole limit of 60% of remuneration, net of social contributions and tax deductions (Article 87, paragraph 3, sub-paragraph 1 of the Code). According to the report, as regards the maintenance payments, the interests of payers and recipients are weighed up by the courts so as to preserve decent living conditions.

However, as regards the workers earning the minimum wage, the Committee notes that the minimum wage has risen considerably from 1530 zloty in 2018 (€ 320) to 1920 zloty in 2020 (€ 404). According to the report, the minimum subsistence level stood at zloty 641 in 2020 (€ 134). The Committee notes that 60% of the minimum wage is well above the subsistence level. The Committee considers that the situation is in conformity with the Charter. It asks however whether the subsistence level established by the Government can guarantee that the subsistence needs are met.

Waiving the right to the restriction on deductions from wage

The Committee asks whether the workers may be authorised to waive the conditions and limits to deductions from wages imposed by law.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Poland is in conformity with Article 4§5 of the 1961 Charter.

Article 5 - Right to organise

The Committee takes note of the information contained in the report submitted by Poland.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to the 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”).

In its previous conclusion, the Committee found that the situation in Poland was not in conformity with Article 5 of the 1961 Charter on the ground that during the reference period, the legal framework continued to restrict some categories of workers (some categories of civil servants – civil servants “exercising public powers” listed in section 52 of the 2008 Civil Service Act- and home workers) from fully enjoying the right to organise (Conclusions XXI-3 (2018)).

The Committee also recalls that in the General Introduction of Conclusions 2018, it posed a general question under Article 5 and asked States to provide, in the next report, information on the right of members of the armed forces to organise.

The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of non-conformity, to the targeted questions and to the general question.

Prevalence/Trade union density

The Committee asked in its targeted question for data on trade union membership prevalence across the country and across sectors of activity.

The report does not provide the information requested.

Personal Scope

In its previous conclusion, the Committee asked whether the restrictions on the right of members of the Internal Security Agency (ABW) to organise are prescribed by law, pursue a legitimate purpose 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 (Conclusions XXI-3 (2018)).

In reply to the Committee’s question, the report states that the restrictions are prescribed by the Law of 24 May 2002 on the Internal Security Agency (ABW) and the Secret Service Agency (AW). According to the report, these restrictions guarantee the apolitical nature of the service and ensure respect for the rights and freedoms of others and the protection of public order.

The report adds that although ABW officers are prohibited from joining unions, the Law of 24 May 2002 permits membership of national associations (which they are required to inform their superior), as well as membership of foreign or international organisations or associations (subject to authorisation by the head of the ABW or a superior authorized by him /her).

According to the report, a similar limitation to the one imposed on ABW officers also applies to other uniformed services, namely the Secret Service Agency, the Central Anti-Corruption Bureau, the Military Counter-Intelligence Service and the Military Intelligence Service. The restriction of the right to organise is therefore a common characteristic of all the special services existing in Poland, civil and military.

Considering the information at its disposal, the Committee considers that the far reaching restrictions on the right of members of the Internal Security Agency (ABW), the Secret Service Agency, the Central Anti-Corruption Bureau, the Military Counter-Intelligence Service and the Military Intelligence Service to organise are not necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national

security It notes that the restrictions apply to all members of these services and not just the most senior. The Committee therefore considers that the situation in Poland is not in conformity with Article 5 of the 1961 Charter in this respect. However it asks whether persons employed in such services can form representative organisations and if so what are the powers and prerogatives of such associations.

In its previous conclusion, the Committee requested all states to provide information on the right of members of the armed forces to organise (Conclusions 2018 – General Question).

In reply to the Committee's question, the report states that members of the armed forces do not have the right to form trade unions or to join or not to join a trade union. The report further states that career soldiers can form representative bodies of the individual corps of professional personnel of the armed forces in the military units. The conditions of organization, operation, tasks and powers of these representative bodies of career soldiers, as well as the forms of their cooperation with the commanders of military units are specified in the regulation of the Minister of National Defense of 28 June 2004, on bodies representing members of the armed forces. The Committee takes note of the information provided in the report and asks the next report to provide detailed information on the conditions of organization, operation, tasks and powers of such bodies representing members of the armed forces.

The Committee recalls that Article 5 of the Charter allows States Parties to impose restrictions on the right of members of the armed forces to organise and grants them a wide margin of appreciation in this regard, subject to the terms set out in Article G of the Charter. However, these restrictions may not go as far as to suppress entirely the right to organise, such as through the imposition of a blanket prohibition of professional associations of a trade union nature and prohibition of the affiliation of such associations to national federations/confederations (European Council of Trade Unions (CESP) v. France, Complaint No.101/2013, Decision on the merits of 27 January 2016, §§80 and 84).

Restrictions on the right to organise

In its targeted question, the Committee asked for information on public or private sector activities in which workers are denied the right to form organisations for the protection of their economic and social interests or to join such organisations.

In its previous conclusion, the Committee found that the situation in Poland was not in conformity with the 1961 Charter on the ground that the legal framework restricted some categories of workers (some categories of civil servants that could not hold trade union positions and home workers that did not enjoy the right to form trade unions) from fully enjoying the right to organise (Conclusions XXI-3 (2018)). In its previous conclusion, the Committee asked for information on the legal developments following the Constitutional Court's ruling of 2 June 2015 on the law on trade unions (Conclusions XXI-3 (2018)).

In reply to the Committee's questions and to the previous conclusion of non-conformity, the report states that with the aim of implementing judgment of the Constitutional Court of 2 June 2015, the 1991 Law on trade unions was amended by the Law of 5 July 2018. As a result, the right to organize has been recognised for workers under civil law contracts (for example, contracts for the provision of services and assignment contracts), self-employed workers, subcontracted manufacturing home workers, volunteers, trainees and other workers voluntarily performing unpaid work. The report further states that as part of the extension of the subjective scope of trade union rights, some mechanisms have been introduced to protect the permanence of the employment relationship of trade union activists who are not workers within the meaning of the Labour Code.

In view of the information at its disposal, the Committee finds that the situation in Poland is in conformity with Article 5 of the 1961 Charter as regards private sector workers. The Committee reiterates its request that the next report provide information on public sector activities in which workers are denied from forming and/or joining organisations for the protection of their

economic and social interests. The Committee reiterates its previous finding of non-conformity as regards the categories of civil servants that cannot hold trade union positions.

Conclusion

The Committee concludes that the situation in Poland is not in conformity with Article 5 of the 1961 Charter on the grounds that

- civil servants exercising public powers listed in section 52 of the 2008 Civil Service Act cannot hold trade union positions;
- members of the Internal Security Agency (ABW), the Secret Service Agency, the Central Anti-Corruption Bureau, the Military Counter-Intelligence Service and the Military Intelligence Service are prohibited from joining and forming organizations for furthering and defending their interests.

Article 6 - Right to bargain collectively

Paragraph 1 - Joint consultation

The Committee takes note of the information contained in the report submitted by Poland.

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).

The report notes that the Law on the Social Dialogue Council and other social dialogue institutions was amended in 2018, by further strengthening the remit of the social dialogue councils operating at the national and regional levels. The report also provides information regarding the implementation of the Law on information and consultation of workers during the reference period, as reported by the National Labour Inspectorate.

As the previous conclusion found the situation in Poland 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 Poland 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 Poland.

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 found that the situation in Poland was in conformity with Article 6§2 of the 1961 Charter (Conclusions XXI-3 (2018)). The assessment of the Committee will therefore concern the information provided in the report in response to the general question.

In response to the general question, the report notes that amendments to the Law on Trade Unions passed in 2018 provided self-employed workers with the right to join or form trade unions and to benefit from protection previously reserved for trade union members, including by entering collective agreements. The report does not provide information on the implementation of the amendments in practice, as they were only adopted on 1 January 2019. The Committee asks for information in the next report concerning the profile of workers or type of activities covered by the amendments in question, as well as their operation in practice, insofar as the right to bargain collectively and conclude collective agreements are concerned.

Covid-19

In reply to the question regarding special arrangements related to the pandemic, the report provides information about reinforced joint consultation practices before the Social Dialogue Council during the period in question.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Poland is in conformity with Article 6§2 of the 1961 Charter.

Article 6 - Right to bargain collectively

Paragraph 3 - Conciliation and arbitration

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).

As the previous conclusion found the situation in Poland to be in conformity with the 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 Poland is in conformity with Article 6§3 of the 1961 Charter.

Dissenting opinion by Carmen Salcedo Beltrán on Article 2§1 of the 1961 European Social Charter and the Revised European Social Charter

Article 2§1 of the 1961 European Social Charter, and the Revised European Social Charter provides that the Contracting Parties, with a view to ensuring the effective exercise of the right to just conditions of work, undertake "to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit".

The European Committee of Social Rights has ruled in the past on this provision and in particular on the guarantees provided for on-call duty, those periods during which the employee, without being at his place of work and without being at the permanent and immediate disposal of the employer, must be contactable and able to intervene in order to carry out work for the company.

The Committee examined their legal regime through the two systems for monitoring the compliance with the European Social Charter. On the one hand, four decisions on the merits, under the collective complaints procedure have been adopted: decision on the merits of 12 October 2004, *Confédération française de l'Encadrement CFE-CGC v. France*, Collective Complaint No. 16/2003; decision on the merits of 8 December 2004, *Confédération Générale du Travail (CGT) v. France*, Collective Complaint No. 22/2003; decision on the merits of 23 June 2020, *Confédération Générale du Travail (CGT) v. France*, Collective Complaint No 55/2009; decision on the merits of 19 May 2021, *Confédération générale du travail (CGT) and Confédération française de l'encadrement-CGC (CFE-CGC) v. France*, Collective Complaint No 149/2017.

On the other hand, directly or indirectly, 68 conclusions on the reporting system, of which 35 were of non-conformity, have been adopted (Conclusions 2018, Conclusions XXI-3, Conclusions 2014, Conclusions XX-3, Conclusions 2013, Conclusions 2011, Conclusions 2010, Conclusions XVIII-2, Conclusions 2007, Conclusions XVII-1, Conclusions XVI-2, Conclusions XVI-1).

As a result of this consolidated case law, the Committee has focused its attention on on-call periods, in order to decide whether or not article 2§1 of the European Social Charter has been complied with, or violated, on two specific points that it has clearly identified in this respect:

1°. On one hand, on the payment to the on-call employee of a compensation, either in financial form (bonus) or in the form of rest, in order to compensate for the impact on his/her ability to organise his private life and manage his personal time in the same way as if he/she was not on call.

2°. On the other hand, on the minimum duration of the compulsory daily and/or weekly rest period which all States must respect and which all workers must enjoy. It is common for employees to start their on-call period, totally or partially, at the end of their working day and end it at the beginning of the next working day. Even if the employee is not required to carry out actual work, the consequence is that he/she will not have had his/her rest time at his/her disposal in full freedom or without any difficulty, i.e. the conditions and purpose of the minimum rest period are difficult to achieve *stricto sensu*.

In this perspective, I would like to emphasise the two effects mentioned which impact on two different elements of the employment relationship (salary and minimum rest period). States often integrate them together into one, so that the payment of a bonus is the most usual (only) remedy (compensation for the first effect) and the legal assimilation of the on-call period without carrying out actual work to rest time (i.e. it has no consideration for the second effect).

The case law that the ECSR has adopted in recent years has considered both effects separately. Both must be valued and respected at the same time. On one hand, the availability of the employee to intervene must be compensated. On the other hand, the consequences for the minimum period of compulsory rest must be considered. For this reason, in the four

decisions on the merits mentioned above, France was condemned for the violation of article 2§1 of the revised European Social Charter. As far as France is concerned, even though Article L3121-9 of the Labour Code provides that "the period of on-call duty shall be compensated for, either financially or in the form of rest", it should be noted that considering on-call duty without intervention for the calculation of the minimum daily rest period undermines the second condition. Indeed, it is necessary to point out that the ECSR specified in the last decision on the merits that this considering will involve a violation of the provision if it is "in its entirety" (decision on the merits of 19 May 2021, *Confédération générale du travail (CGT) and Confédération française de l'encadrement-CGC (CFE-CGC) v. France*, Collective Complaint No. 149/2017).

In the 2022 conclusions, on-call duty was specifically examined. The Committee requested information on the legislation and practice regarding working time, on-call duty and how inactive periods of on-call duty were treated in terms of working time and rest and their remuneration.

It should be noted that most responses did not answer in the affirmative. In other words, the State reports did not inform the Committee simply that "on-call time is working time or rest time". However, the answers had a negative meaning, i.e., the responses stated verbatim that on-call duty "is not considered as working time".

The majority of the Committee felt that this information did not answer the question asked and decided to defer most of the conclusions.

I regret that I am unable to agree with these conclusions. I will explain my reasons below. Firstly, I consider that the negative responses from the Member States provide sufficient information on the legislative frameworks in place regarding the inclusion of on-call duty in daily or weekly rest periods. In my opinion, it is meaningless not to examine or value the replies, because the sentence "on-call duty is rest time" is not transcribed positively, but "on-call duty is not working time" is transcribed negatively. I believe that the Committee has sufficient information to assess conformity or non-conformity.

In my view, the consequences of not assessing this information are remarkable. Firstly, it encourages States not to provide the information within the time limits set by the Committee and to take advantage of an attitude that, in addition, does not comply with an obligation that they know perfectly well and that they have become accustomed to not fulfilling.

Secondly, it should be remembered that the legal interpretation of the European Social Charter goes beyond a textual interpretation. It is a legal instrument for the protection of human rights which has binding force. A treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Art. 31 Vienna Convention on the Law of Treaties). In the light of the Charter, it means protecting rights that are not theoretical but effective (*European Federation of National Organisations Working with the Homeless (FEANTSA) v. Slovenia*, Collective Complaint No. 53/2008, decision on the merits of 8 September 2009, §28). As such, the Committee has long interpreted the rights and freedoms set out in the Charter in the light of current reality, international instruments and new issues and situations, since the Charter is a living instrument (*Marangopoulos Foundation for Human Rights v. Greece*, Collective Complaint No. 30/2005, decision on the merits of 6 December 2006, §194; *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Collective Complaint No. 39/2006, decision on the merits of 5 December 2007, §64 and *ILGA v. Czech Republic*, Collective Complaint No. 117/2015, decision on the merits of 15 May 2018, §75).

Finally, in the event that the Committee does not have all the relevant information, in my view it should take the most favourable meaning for the social rights of the Charter. In other words, States must provide all the information, which becomes a more qualified obligation when this information has been repeatedly requested. Furthermore, I would like to point out that this

information was requested in previous Conclusions (Conclusions 2018, Conclusions XXI-3, Conclusions 2014, Conclusions XX-3). Therefore, the States were obliged to provide all the information that the Committee has repeatedly requested.

In view of the above arguments, my separate dissenting opinion concerns, firstly, those deferred conclusions by the majority of the Committee members regarding the States which, on one hand, replied that on-call duty "is not working time", and then that they take it into account in the minimum rest period which every employee must enjoy. These include Belgium, Bosnia and Herzegovina, Finland, Germany, Italy, Lithuania, North Macedonia, Malta, Montenegro, Slovak Republic and Spain. Similarly, on the other hand, it concerns States that did not respond or did so in a confused or incomplete manner. These are Albania, Estonia, Georgia, Hungary, Ireland, Latvia and the Republic of Moldova. It follows from all the above considerations that the conclusions in relation to all these States should be of non-conformity.

Secondly, my separate dissenting opinion also concerns the "general" findings of conformity with Article 2§1 of the Charter reached by the majority of the Committee in respect of four States. More specifically, with regard to Andorra, the report informs about the on-call time. It "is not considered as actual working time for the purposes of calculating the number of hours of the legal working day, since it does not generate overtime. Nevertheless, it is not considered as rest time either, it being understood that in order to comply with the obligation to benefit from at least one full day of weekly rest, the worker must be released from work at least one day in the week - of course from actual work, but also from the situation of being available outside of his working day-". The document expressly states that one day of weekly rest is respected in relation to on-call duty, but it does not communicate anything about the respect of daily rest (except for a mention of the general minimum duration of 12 hours). In relation to Greece, the report informs that the provisions of labour law do not apply to on-call duty without intervention since, even if the worker has to remain in a given place for a certain period of time, he/she does not have to be physically and mentally ready to work. As regards Luxembourg, the document informs that on-call duty is not working time. Finally, as regards Romania, the report informs, first of all, that Article 111 of the Labour Code, considers the period of availability of the worker as working time. However, immediately, on the organisation and on-call services in the public units of the health sector, informs that on-call duty is carried out on the basis of an individual part-time work contract. On-call hours as well as calls received from home "must be recorded on an on-call attendance sheet, and 'only' the hours actually worked in the health facility where the call is received from home will be considered as on-call hours". Consequently, on the basis of this information, if there are no hours worked or calls, this time is not work. It follows from all the above considerations that the conclusions in relation to these four states should also be of non-conformity.

Thirdly, in coherence, my separate dissenting opinion also concerns the finding of non-conformity with regard to Armenia. This State has informed that the time at home without intervention should be considered as at least half of the working time (Art. 149 of the Labour Code). This legal regulation is in line with the latest case law of the Committee (decision on the merits of 19 May 2021, *Confédération générale du travail (CGT) and Confédération française de l'encadrement-CGC (CFE-CGC) v. France*, Collective Complaint No. 149/2017). In my view, a positive finding on this point should be adopted expressly, independently of the finding of non-conformity on the daily working time of certain categories of workers.

Finally, I would like to raise two important questions following some of the answers contained in the reports. The first question relates to the governmental reports that have justified the national legal regime of on-call duty or non-compliance with previous findings of non-conformity on the basis of the judgments of the Court of Justice of the European Union, including some responses that challenge the Committee's ruling on "misinterpretation" of the Charter. These are Bosnia and Herzegovina, Spain, Italy, Ireland and Luxembourg. It is necessary to recall that the European Committee of Social Rights has affirmed that "the fact that a provision complies with a Community Directive does not remove it from the ambit of the Charter and from the supervision of the Committee" (*Confédération française de*

l'Encadrement (CFE-CGC) v. France, Collective Complaint No. 16/2003, decision on the merits of 12 October 2004, §30). Furthermore, it stressed that, even if the European Court of Human Rights considered that "there could be, in certain cases, a presumption of conformity of European Union law with the Convention, such a presumption - even if it could be rebutted - is not intended to apply in relation to the European Social Charter". On the relationship between the Charter and European Union law, it pointed out that "(...) they are two different legal systems, and the principles, rules and obligations which form the latter do not necessarily coincide with the system of values, principles and rights enshrined in the former; (...) whenever it is confronted with the latter, the European Union will have to take account of the latter.) whenever it is confronted with the situation where States take account of or are constrained by European Union law, the Committee will examine on a case-by-case basis the implementation by States Parties of the rights guaranteed by the Charter in domestic law (*General Confederation of Labour of Sweden (LO) and General Confederation of Executives, Civil Servants and Clerks (TCO) v. Sweden*, Collective Complaint No. 85/2013, decision on admissibility and merits of 3 July 2013, §§72-74).

The second issue is that the Charter sets out obligations under international law which are legally binding on the States Parties and that the Committee, as a treaty body, has "exclusive" responsibility for legally assessing whether the provisions of the Charter have been satisfactorily implemented (*Syndicat CFDT de la métallurgie de la Meuse v. France*, Collective Complaint No. 175/2019, decision on the merits of 5 July 2022, §91).

These are the reasons for my different approach to the conclusions of Article 2§1 of the European Social Charter in relation to on-call duty.