EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

18 March 2004 **Case Document No. 1**

COLLECTIVE COMPLAINT No. 25/2004

Centrale générale des services publics (CGSP) v. Belgium

registered at the Secretariat on 23 February 2004

(TRANSLATION)

Mr Régis Brillat, Executive Secretary
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Collective complaint – Belgium – right to collective bargaining in the public services

Sir,

In accordance with Article 1c of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, approved by Belgium in the Act of 26 June 2000, the Centrale générale des services publics (General Union of Public Service Workers - CGSP) wishes to lodge a collective complaint against Belgium for violation of Articles 6§1 and 6§2 of the European Social Charter, regarding the effective exercise of the right to collective bargaining in the public services.

1. Status and relevance of the collective complaint; authority

1.1. The CGSP is a trade union whose objective under its statute is to defend the interests of all employees throughout the public services in Belgium (appendix 1).

1.2. The CGSP has been recognised as representative in accordance with the Act of 19 December 1974 on relations between the public authorities and organisations representing their staff (appendix 2). This recognition entitles it to take part in the negotiations and consultations required by the Act.

This is the main legislation governing industrial relations in the public sector. Nevertheless, certain specific areas, such as the armed forces, police, and autonomous public enterprises, are covered by other legislation, under which the CGSP's representativity is also recognised (supporting documentation available on request).

1.3. In accordance with Article 20 of the CGSP's statute, at its meeting on 6 February 2004 its permanent secretariat decided to lodge this collective

complaint and instructed its President, Mr Guy Biamont, to represent it in the proceedings (appendix 3).

2. The complaint

2.1 The right to collective bargaining in the Belgian public service

2.1.1 Article 23.1 of the Belgian Constitution of 1994 states that "Everyone has the right to lead a life in conformity with human dignity." To this end, paragraph 2 requires the various legislative bodies (having regard to the country's federal structure) to guarantee economic, social and cultural rights, and determine the conditions for exercising them. According to paragraph 3, these rights include the right to collective bargaining (appendix 4).

By including what is now Article 23, the authors of the Constitution were, among other objectives, seeking to formalise Belgium's international undertakings. In the case of collective bargaining in the public services, the main undertaking is ILO Convention No. 151 (approved by the Act of 4 April 1991), together with Articles 6.1 and 6.2 of the European Social Charter (belatedly ratified by the Act of 11 July 1990).

2.1.2 Article 23.3 of the Constitution and the aforementioned international instruments are implemented via a series of public service "trade union statutes", of which the Act of 19 December 1974 is the archetype. Under section 2 of this Act (appendix 5), any draft regulations (§1) or legislation (§2) drawn up by the competent authority affecting the staff of a public service department or agency must be presented for negotiation with the representative trade unions in the appropriate committee or body. The same clearly applies to proposed modifications to the Act of 19 December 1974 and its implementing instruments.

2.1.3 This obligation to prior consult trade unions also appears in certain legislation to which the "trade union statutes" do not apply. For example, Section 54.2 of the consolidated legislation of 18 July 1966 on the use of languages for administrative purpose stipulates that any measures to implement this legislation that have an effect on staff must be subject to prior (written) consultation with the trade unions (appendix 6). In its *V.V.O.* judgment, No. 40.175 of 27 August 1992, the *Conseil d'Etat* (the supreme administrative court) stated that the prerogative of consultation only related to representative bodies within the meaning of the Act of 19 December 1974.

It is generally acknowledged that Section 54.2 applies to changes to the consolidated legislation itself. For example, when the federal Minister for the Civil Service proposed amendments to this legislation in the 1999-2003 parliament, he consulted trade unions about the bill that eventually became the Act of 12 June 2002 (appendix 7).

2.2 The Act of 5 August 2003 and judgment No. 18/2004 of the *Cour d'Arbitrage* (constitutional court)

2.2.1 Section 40 of the Act of 5 August 2003 (appendix 8) makes further changes to the consolidated legislation on the use of languages for administrative purpose. It was not submitted to the representative trade unions for prior consultation before its enactment by the federal parliament. However one of its effects is that staff of federal ministries and departments belonging to the "strategic cells" are not covered by the rules governing the language quota system for officials. The prerogative established by Section 54.2 of the consolidated legislation has therefore been breached.

2.2.2 Belgium has a system for monitoring the constitutionality of legislation and other instruments, for which the *Cour d'Arbitrage* (constitutional court) is responsible. Article 142 of the Constitution only grants the latter limited powers, laid down in its special Institutional Act of 6 January 1989. However this has recently been amended by the Special Act of 9 March 2003 and the *Cour d'Arbitrage* now has power to strike down legal provisions in breach of one of the rules in Title II of the Constitution: "Belgians and their Rights", particularly Article 23.

2.2.3 The CGSP applied to the *Cour d'Arbitrage* to set aside Section 40 of the Act of 5 August 2003, justifying its interest with reference to the prerogative granted to it by Section 54.2 of the consolidated legislation of 18 July 1966. It argued that by enacting this legislation without prior trade union consultation, parliament had infringed the right to collective bargaining embodied in Article 23 of the Constitution, and in relevant international instruments (see above, 2.1.1).

2.2.4 In judgment No. 18/2004, delivered on 29 January 2004 and not yet published in the Belgian official gazette but notified to the parties and available on the *Cour d'Arbitrage's* Internet site, the application was declared manifestly inadmissible. The *Cour d'Arbitrage* referred to Article 142.2.3 of the Constitution, according to which the *Cour d'Arbitrage* rules on "the violation through a law .... of constitutional articles determined by law", and concluded "that in disputes concerning articles of Title II of the Constitution the Court's authority to review the compatibility of the legislation in question with the relevant constitutional provisions only extended to its content and not to how it was drawn up."

2.2.5 The *Cour d'Arbitrage* therefore rejected the CGSP's argument in its statement of grounds, based on Article 36 of the Constitution: "The federal legislative power is exerted collectively by the King, the House of Representatives and the Senate". The CGSP had inferred from this that no distinction should be made between the content of legislation and how it was drawn up.

2.2.6 As a result of the Court's dismissal of these arguments in judgment No. 18/2004, the way in which a legal provision is drawn up cannot be challenged in the *Cour d'Arbitrage*. Is it then possible to challenge the decision of the government concerned, which presented to parliament draft legislation that had not been through the required consultation process, in the *Conseil d'Etat*, which in accordance with Section 14.1 of the consolidated legislation of 12 January 1973 is the supreme administrative court?

Definitely not. Two years ago, an application was submitted for such an order to be set aside: in this case, a French-speaking Community government order concerning a draft decree, decrees being the form of legislation enacted by the parliaments of Belgium's federated entities. In its *Dieu* judgment, No. 48.853 of 1 September 1994, the *Conseil d'Etat* declined jurisdiction to set aside such an order, which was by nature a legislative and not an administrative act (appendix 10).

2.2.7 As a result, the process of drawing up legislation and other legal rules in Belgium is not subject to any judicial review.

2.3 The implications of judgment No. 18/2004 for collective bargaining in the public services

2.3.1 The events leading up to the *Cour d'Arbitrage's* decision are simply anecdotal but the constitutional court's decision has revealed the potential fragility of the industrial relations system in the public sector.

2.3.2 The weaknesses inherent in the Act of 19 December 1974, as in other "trade union statutes", were already well known. The obligation to undertake prior negotiations only applies to legislation sponsored by the executive, and not to proposals emanating from members of parliament. For example, there was no overall negotiation with the trade unions over the Act of 7 December 1998, which combined the various police forces into an integrated service, because it was the result of a parliamentary initiative.

Moreover, Section 2.2 of the Act of 19 December 1974 is concerned with draft legislation or decrees, but not with amendments that the government concerned may propose after the negotiation process. When the 1974 Act was being revised, the representative trade unions secured agreement to the extension of Section 2.2 to include such amendments, but when the matter was debated in the House of Representatives this provision was deleted from the draft legislation, on the grounds that it would have impeded the parliamentary process. It was therefore excluded from the Act of 15 December 1998, which modified that of 19 December 1974. In response to an application from the CGSP to set aside the relevant provision, the *Cour d'Arbitrage* said that it had no jurisdiction to rule on the absence of a provision in legislation (judgment No. 87/2000 of 5 July 2000, appendix 11).

2.3.3 It is clear from the foregoing that if, when draft legislation or decrees affecting public service staff are being drawn up, the competent governments refrain, deliberately or through negligence, from consulting the representative trade unions, the latter have no remedies against such violations of their right to collective bargaining.

Even more seriously, it would be possible for the federal government, by submitting amendments to a parliamentary bill, or members of the federal parliament, by initiating legislation, to substantially modify or even abolish the public service "trade union statute", without any prior negotiation.

2.3.4 In conclusion, it should emphasised that this situation is in no way the fault of the constitutional court. Admittedly its interpretation of its powers could be criticised as being excessively formalistic and restrictive. Nevertheless, it is the legislative deficiency, and the use made of it by the political authorities, that threatens the right to collective bargaining.

Moreover, in the light of the judicial courts' existing case-law, failure of the legislative authorities to comply with their legal duties could lead to the award of compensation for damage suffered as a result. Such a form of reparation is clearly inappropriate, having regard to the problem outlined.

3. Summary: the purpose of the collective complaint

The CGSP believes that it has established that both in law and in fact there is no guarantee of the effectiveness of the legislation on the exercise of the right to collective bargaining in the Belgian public sector. In other words, as a contracting party to the European Social Charter, Belgian is failing to fulfil its obligations under Articles 6.1 and 6.2.

The CGSP is confident that the Committee will conclude that the complaint is well-founded and that this will lead to the consequences provided for in the Additional Protocol of 9 November 1995. It is ready to provide any additional information required.

Yours faithfully,

Guy BIAMONT
President
Centrale générale des services publics (CGSP)