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European Social Charter

European Committee of Social Rights

Conclusions XIX-3 (2010)
(GERMANY)

Articles 2, 4, 5 and 6 of the Charter

This text may be subject to editorial revision.

Introduction

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".

A presentation of this treaty as well as statements of interpretation formulated by the Committee appear in the General Introduction to the Conclusions¹.

The European Social Charter was ratified by Germany on 27 January 1965. The time limit for submitting the 27th report on the application of this treaty to the Council of Europe was 31 October 2009 and Germany submitted it on 26 October 2009.

This report concerned the accepted provisions of the following articles belonging to the thematic group "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).

Germany has accepted all of these articles, with the exception of Article 4§4 of the Charter and Articles 2 and 3 of the Additional Protocol.

The reference period was 1 January 2005 to 31 December 2008.

The present chapter concerns 14 situations and contains:

- 8 cases of conformity: Articles 2§3, 2§4, 4§2, 4§5, 6§1, 6§2, 6§3 ;
- 4 cases of non conformity: Articles 2§1, 2§5, 4§1, 4§3, 6§4.

In respect of the other situation concerning Article 2§2, the Committee needs further information in order to assess the situation. The Government is therefore invited to provide this information in the next report on the articles in question.

The next German report deals with the accepted provisions of the following articles belonging to the fourth thematic group "Children, families and 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 the report was 31 October 2010.

¹ *The conclusions as well as state reports can be consulted on the Council of Europe's Internet site (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 Germany.

The Committee recalls that statutory daily working time is 8 hours in Germany (during a 6 day week). There is no statutory weekly maximum, but a 48-hour limit can be deduced from the daily working time rule. An extension of daily working time up to 10 hours is possible if within a six month reference period an average of 8 hours a day is not exceeded.

In its previous conclusions (Conclusions XVIII-2) the Committee noted that certain reference periods for averaging working hours under flexible working arrangements were very long, finding that the situation was not in conformity with the Charter on this ground.

The report explains that Article 7§8 of the Working Time Act establishes, in accordance with Directive 2003/88/EC concerning certain aspects of the organization of working time, that when a reference period is extended by collective agreement, weekly hours should not exceed on average 48 over a 12 month period. When a collective agreement sets a reference period longer than one year, the working week will be shorter than the latter. Therefore, flexibility only exists to the extent that weekly working time does not exceed 48 hours on average during one year.

The authorities argue that by allowing social partners to determine long reference periods in which working time remains below 48 hours per week, employees are guaranteed that any time worked in excess of 48 hours will be compensated within 12 months. They also consider that extended reference periods with shorter working weeks is more advantageous for employees than the situation foreseen under Directive 2003/88/EC.

The Committee considers that the daily limit on working time, which can be calculated over a 6 month reference period, is in conformity with the Charter. It recalls in this respect that the reference period for the calculation of average working hours should not exceed four to six months, or 12 months in exceptional circumstances (General Introduction to Conclusions XIV-2). The extension of the reference period by collective agreement up to a 12 month period would also be acceptable, provided there were objective or technical reasons or reasons concerning the organisation of work justifying such an extension.

However, the existence of longer reference periods for the averaging of working hours are not permissible, irrespective of whether the number of actual hours worked are below 48 per week, as is the case according to the German authorities. This is a question of legal security, since in principle the longer a reference period, the more flexibility exists to distribute working hours unevenly, a situation which could lead to unreasonably long working weeks (of more than 60 hours) at certain times.

The Committee also refers to its Introductory Observation on the relationship between European Union Law and the European Social Charter in collective complaint No. 55/2009, *Confédération Générale du Travail (CGT) v. France*, decision on the merits of 23 June 2010, paragraph 38. It reiterates that the fact that a domestic regulation reproduces or is inspired on a European Union Directive can not prejudice its conformity with the Charter. Therefore, irrespective of whether German legislation is in conformity or contravenes Directive 2003/88/EC on the question of reference periods, a separate assessment on compliance by States Parties with Article 2§1 is carried out by the Committee.

Finally, the Committee notes that the average number of actual hours worked per week – in full-time employment – was 41.1 (in 2007), which is above the European Union average of 40 hours¹. It asks the next report to provide information on the supervision of working time regulations by the Labour Inspection, including the number of breaches identified and penalties imposed in this area.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 2§1 of the Charter on the ground that under certain collective agreements the reference period for the calculation of average working hours can be extended beyond 12 months.

¹*Eironline*, at <http://www.eurofound.europa.eu/eiro>

Article 2 - Right to just conditions of work

Paragraph 2 - Public holidays with pay

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

In its previous conclusion (Conclusions XVIII-2), the Committee asked for updated information on the increased remuneration paid in respect of work done on a public holiday. According to the report, increased wages are provided for by collective agreements. At the end of 2008, supplements for work carried out on public holidays varied between 62% and 149% of standard pay. The Committee asks what percentage of workers receive less than 100% of standard pay.

Federal public service employees receive a supplement of 135% of the hourly pay rate set by the standard wage scale when they work on a public holiday without taking compensatory time off and 35% of this rate when they do take compensatory time off.

The Committee considers that work performed on a public holiday imposes a constraint on the part of the worker, who should be compensated with a higher remuneration than that usually paid. Accordingly, in addition to the paid public holiday, work carried out on that holiday must be paid at least double the usual wage. The compensation may also be provided as time-off, in which case it should be at least double the days worked. The Committee asks whether the base salary is maintained, in addition to the increased pay rate.

Conclusion

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

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 Germany.

In its previous conclusion (Conclusions XVIII-2), the Committee asked for information on the rules on the postponement of annual leave. Postponement of leave is permissible under section 7§3 of the Federal Paid Leave Act (*Bundesurlaubsgesetz – BUrlG*), which entitles employees to carry over leave to the year following that in which the entitlement to leave was acquired if imperative reasons related to the company's activities or the worker's circumstances warrant the decision. Imperative reasons related to the company's activities may be, for example, the need to fulfil orders by a deadline or the absence of other employees for health reasons.

According to the report, since 1982, the Federal Labour Court (*Bundesarbeitsgericht – BAG*), which has jurisdiction over the right to leave, had interpreted the relevant provisions of the Federal Paid Leave Act (*BUrlG*) to mean that employees lost their right to leave, and hence their right to pay for leave, if, as a result of incapacity for work due to illness, they were unable to take their leave before the deadline by which carried-over leave had to be taken (that is by 31 March of the following year). Following a judgment of the European Court of Justice of 20 January 2009 in the case of Schultz-Hoff, the Federal Labour Court changed its case-law in this respect. In a judgment of 24 March 2009 (case No. 9 AZR 983/07) given in a dispute relating to the question of the loss of entitlement to leave in the event of illness, the Court decided that employees did not lose their legal right to leave if they suffered from a condition rendering them incapable of work up to the expiry of the leave deadline.

Conclusion

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

Article 2 - Right to just conditions of work

Paragraph 4 - Reduced working hours or additional holidays in dangerous or unhealthy occupations

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

The Committee refers to the statement of interpretation it made on Article 2§4 of the 1961 Charter in the General Introduction to Conclusions XVIII-2.

Article 2§4 requires states to grant workers exposed to residual risks one form or another of compensation if the risks have not been eliminated or sufficiently reduced despite the full application of the prevention and protection measures deriving from Articles 3 and 11, or if such measures have not been applied. The aim of these measures should be to afford the persons concerned sufficient regular rest time to recover from the stress and fatigue caused by their occupation and thus maintain their vigilance or limit their exposure to the risk. Article 2§4 mentions two forms of compensation, namely reduced working hours and additional paid holidays. In view of the emphasis the article places on health and safety objectives, the Committee considers that other approaches to reducing exposure to risks may also be in conformity with the Charter. Under no circumstances, however, can financial compensation be considered appropriate under Article 2§4 (*Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, complaint No. 30/2005, decision on the merits of 6 December 2006 and Conclusions XVIII-2, statement of interpretation of Article 2§4).

The Committee refers to its conclusion under Article 3 of the Charter (Conclusions XIX-2) which describes the dangerous occupations performed in Germany and the preventing measures taken in this regard.

In its previous conclusion (Conclusions XVIII-2), the Committee needed further information in order to properly assess the situation, it therefore asked for further information on all measures taken to reduce exposure to residual risks in certain occupations, such as those involving exposure to ionising radiation, extreme temperatures, noise, steel making etc. Section 3 of the Federal Working Hours Act (*Arbeitszeitgesetz – ArbZG*) sets a limit of ten hours on the working day. Although this Act also sets the limit for weekly working hours at 48 hours, the maximum set in collective agreements lies well below this (at 37.4 hours in the western *Länder* and 39 hours in the eastern *Länder*). Annual leave amounts to nearly six weeks (28.5 days in the western *Länder* and 27.5 in the eastern *Länder*). According to the report, this means that it is not necessary to adopt a regulation under section 8 of the *ArbZG* to arrange for specific measures regarding working hours for dangerous occupations. The Committee asks how, in companies or sectors where it is not possible to eliminate or reduce significantly the risks, the working time actually ruling on the basis of collective agreements can satisfy the requirements of Article 2§4.

The report also states that public service employees to whom the relevant collective agreement applies and who work in shifts, either in teams or at night, are entitled to up to six days' additional leave for the year used as a reference to calculate leave entitlement (Article 27 of the *TVöD* collective agreement, and Article 53, *mutatis mutandis*).

Conclusion

Pending receipt the information requested, the Committee concludes that the situation in Germany is in conformity with Article 2§4 of the Charter.

Article 2 - Right to just conditions of work

Paragraph 5 - Weekly rest period

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

In its previous conclusion (CVIII-2), the Committee asked for further information on the possibility to derogate from the provisions of the Working Time Act by collective agreement, in particular whether collective agreements permit workers to work for longer than 12 days before being granted a rest period, and if so in what circumstances. Under section 11§3 of the Federal Working Hours Act (*Arbeitszeitgesetz – ArbZG*) employers are entitled to a compensatory day off when they are required to work on Sunday. The day off must be granted within two weeks of the Sunday concerned, inclusive. Under section 12§2 of *ArbZG*, provision may be made in collective, company or departmental agreements for this two-week period to be prolonged.

The Committee points out that, although the rest period must be weekly, it may be deferred until the following week provided that no-one is made to work more than twelve days in succession before being granted a two-day rest period. In view of the fact that the time limit for granting compensatory time off for work on Sunday may exceed two weeks, the Committee finds that the situation is not in conformity.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 2§5 of the Charter on the ground that the time in which a weekly rest day is granted may exceed twelve successive working days.

Article 4 - Right to a fair remuneration

Paragraph 1 - Decent remuneration

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

In its previous conclusion the Committee held that the situation in Germany was not in conformity with the Charter as it had not been established that the lowest wage paid was adequate. The Committee asked the next report to provide the information on the net amounts of minimum and average wages. It notes in this regard that the average monthly gross wage of a full-time worker amounted to € 3,042 in 2006, which, according to the report, by way of example, can be transformed into a net wage of € 1,815. The report also provides information on the lowest wages paid in enterprises with more than 10 employees. In the instant case the Committee takes into consideration the lowest net wage, which amounted to € 881 for a single person in 2006 and thus represents only 48% of the average net wage. Therefore the Committee holds that the lowest wage paid is manifestly unfair.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 4§1 of the Charter on the ground that the lowest wage paid is manifestly unfair.

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 Germany.

The report recalls that substantially all collective agreements foresee an enhanced pay rate or time off in lieu in compensation for overtime. By the end of 2008, the increased pay rate/time off for overtime work varied between 24% and 41%. The Committee reiterates that this is in conformity with the Charter.

It asks that the next report provide information on whether the Labour Inspection has identified any breaches related to the failure to pay overtime wages.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 4§2 of the Charter.

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 Germany.

Legal basis

It notes the entry into force, on 18 August 2006, of the Equal Treatment Act (*AGG, Allgemeines Gleichbehandlungsgesetz*) in the fields of labour, public and civil law. This legislation forms the legal basis of the right to equal pay and replaces the provisions of the Civil Code on equal treatment between women and men (BGB, articles 611a, 611b and 612§3).

Section 7 of the AGG establishes a general ban on discrimination on grounds of ethnic origin, race, sex, age, disability, sexual orientation, religion or beliefs. It includes direct and indirect discrimination and applies explicitly to remuneration. Section 7§1, in conjunction with sections 2§1 no. 2 and 8§2, guarantees the right to equal remuneration for the same work or work of equal value, by stating that remuneration below that received by an employee of the opposite sex for the same work or work of equal value cannot be justified by the application of special provisions to protect employees on account of their sex, such as the ban on working to protect pregnant women.

Legal protection

The AGG grants employees the rights to lodge complaints (section 13), to refuse to perform certain work (section 14) and to receive appropriate compensation for pecuniary and non-pecuniary damage suffered. Section 16 makes it unlawful for employers to penalise employees who wish to exercise their rights under the act. This also applies to persons who support such employees and to witnesses. The Committee asks how, in practice, the courts ensure that victims of wage discrimination based on sex receive adequate compensation. Under the Charter, any compensation granted for unequal wages on grounds of sex must, as a minimum, cover the difference in pay and provide adequate reparation for the victim and act as a sufficient deterrent for the perpetrator. The Committee notes that in the previous supervision cycle (Conclusions XVIII-2) the situation was found not to be in conformity with the Charter because the only compensation for discrimination provided for in article 611a of the Civil Code (BGB) was for the payment of lost wages. This was not considered sufficiently dissuasive to ensure that employers would not again commit the same offence. It therefore asks whether the new legislation provides for other forms of compensation.

Section 22 of the AGG (Equal Treatment Act) provides for an adjustment of the burden of proof in discrimination cases. In practice, when a party can adduce evidence to establish a presumption of discrimination on one of the grounds specified in the legislation, the other party must prove that there has been no violation of the provisions prohibiting discrimination.

Section 17 of the AGG authorises works councils or trade unions represented in the workplace to require employers to take action against violations of the right not to be discriminated against. Under section 23, disadvantaged persons wishing to bring actions in the labour courts are entitled to legal assistance from anti-discrimination associations. An independent anti-discrimination centre (*ADS, Antidiskriminierungsstelle*) has also been established, under the auspices of the federal ministry for the family, elderly persons, women and youth (*BMFSFJ, Bundesministerium für Familie, Senioren, Frauen und Jugend*). Persons who consider themselves to be the victims of sexual discrimination can apply to it. In the event of disputes, the ADS can provide victims with free advice and if necessary refer them to other agencies or seek an out-of-court settlement between the parties. The Committee asks whether the ADS has already had to deal with cases of wage discrimination on grounds of sex and what action it took to rectify the situation.

Protection against reprisals

In the previous conclusions (Conclusions XVIII) the situation was considered not to be in conformity because there was a ceiling on the compensation payable to employees dismissed as a reprisal and the compensation paid to employees where the contract had been terminated by a court was not sufficiently dissuasive or compensatory. According to the report, reprisal dismissals are prohibited under article 612a of the BGB, and section 134 of the BGB makes them null and void. Employees are entitled retroactively to any unpaid salary or wages for the period following such unlawful dismissal and employers are obliged to reinstate them in the same post **or in a similar one**. On the other hand, even if the courts rule that dismissals are null and void, when employees do not consider reinstatement to be a desirable or viable option they can also ask them to end the employment contract and order the payment of compensation. Such compensation is an alternative to continued employment and its amount set by the court, within the legal maximum level which is of 12 monthly wages (or 18 monthly wages if the employee is 50 years old and if the working relationship lasted for more than 15 years). The Committee considers that courts should be free to decide upon the amount aimed at compensating the damage caused by the termination of the working relationship.

Salary and job comparisons

In its last conclusion (Conclusions XVIII-2) the Committee asked whether comparisons were possible between employees of different employers especially when one employer has predominantly female employees. In reply, the report states that it is possible to compare the wages of part-time and full-time employees with different employers. This is based on sections 2§1 and 4§1 of the legislation on part-time work and fixed-term contracts (*TzBfG, Teilzeit- und Befristungsgesetz*), which provide that where intra-firm comparisons are not possible because

there are no comparable employees, employees may refer to the relevant collective agreement. If there is no collective agreement, it is possible to refer to employees performing similar work in the relevant sector of employment.

The Committee notes from comments presented by the German trade union federation (DGB) that when pay is determined by individual negotiations this leads to wide differences in wages or salary. On the other hand, when there are collective agreements and/or works councils the salary structure is more transparent in formal terms, though in practice it is difficult to prevent discrimination. In answer to the Committee's question as to whether collective agreements are concerned with minimum pay or what is paid in practice, the report states that for employees covered by collective agreements it is the minimum level of pay that is set. The parties may, at any time, agree on a higher level of pay than that specified in the collective agreement, which makes it impossible to make full and relevant comparisons. The Committee asks to be kept informed regularly of any developments of jurisprudence regarding non-discrimination cases with respect to remuneration and problems encountered in practice by employees who wish to make wage comparisons and who do not work for the same employer.

Situation of part-time employees

In answer to the Committee's request for practical examples of objective reasons that might justify different treatment of full and part-time employees, the report states that the criteria used to assess such differences of treatment are those used by the European Court of Justice. Pertinent reasons are deemed to include objective factors associated with the real needs of the undertaking that are appropriate and necessary in order to achieve its objectives. The reasons may be linked to employees' performance at work, workload, qualifications, training, responsibilities or professional experience, or to different requirements linked to the work or the post. The report presents two examples. The first concerns a part-time female employee who only works afternoons. When a new position becomes available for which the employee might apply, her application will not be taken into account because she will only work afternoons whereas the post to be filled has to be worked in the mornings. The second case concerns a better paid position for which knowledge of a second language, such as Russian, is necessary. The part-time employee in question cannot be considered for this post because he lacks the required language skills.

Other measures

According to the report, women's gross hourly pay is on average 23% below that of men. Federal government studies of the reasons for this differential have identified three main explanations:

- horizontal and vertical segregation of the labour market because of the lack of women in certain sectors and branches and in senior management positions;
- women interrupt their working lives and reduce their hours more frequently and for longer periods than men for family reasons;
- typically female occupations are less well paid than those traditionally performed by men, despite a considerable number of individual and collective wage and salary negotiations.

To reduce the wage gap between women and men, the government encourages a number of positive measures under various forms. Thus, the Committee notes a federal statistics office project on differences in remuneration between women and men designed to achieve a lasting improvement in the data on wage equality as well as the project on differences in wages and salaries at the start of working life carried by the Hans Böckler foundation (*HBS, Hans-Böckler-Stiftung*), with the support of the federal ministry for the family, elderly persons, women and youth.

The Committee also notes the Logib-D pilot study sponsored by the federal government. This enables firms that so wish to enter data on their wages and salaries into the Logib-D programme in order to analyse the reasons for wage differentials between women and men in their enterprise. Many firms are encouraged to adopt this system for the purposes of self-evaluation. In its comments, the German trade union federation (DGB) criticises the lack of relevant legislation on the salary evaluation method used in the Logib-D system. The DGB considers that the project requires further analysis and research.

Other initiatives such as "Equal Pay Day", the "Fair P(l)ay" guide and "Girls' Day" represent further positive measures to reduce discrimination between women and men in the field of pay.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with the Article 4§3 of the Charter on the ground that there is a ceiling on the compensation payable to employees dismissed as a reprisal.

Article 4 - Right to a fair remuneration

Paragraph 5 - Limits to deduction from wages

The Committee notes that there have been no changes to the situation with regard to the limitation of deductions from wages, which it has previously considered to be in conformity with the Charter.

As the most recent reports have not submitted any information, the Committee requests that the next report provide a full and up-to-date description of the situation in law and practice in respect of Article 4§5.

Conclusion

The Committee therefore concludes that the situation in Germany is in conformity with Article 4§5 of the Charter.

Article 5 - Right to organise

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

It notes from the report that there have been no changes, either in law or practice, in the situation which was previously considered to be in conformity (Conclusions 2006).

The Federation of German Trade Unions (DGB) raised the question of access to undertakings by external union representatives. In reply, the Government draws attention to a judgment of the Federal Constitutional Court of 1995 and a judgment of the Federal Labour Court of 2006 which guarantee the right of external union representatives to enter any undertaking for the purpose of seeking new members.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 5 of the Charter.

Article 6 - Right to bargain collectively

Paragraph 1 - Joint consultation

The Committee notes from the report submitted by Germany and all the information at its disposal that there have been no changes to the situation, which it has previously considered to be in conformity with Article 6§1 of the Charter. It asks that the next report provide a full and up-to-date description of the situation.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 6§1 of the Charter.

Article 6 - Right to bargain collectively

Paragraph 2 - Negotiation procedures

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

It is recalled that following the privatisation of the post and railway services, their employees were entitled to choose whether or not to retain their status as civil servants. The Committee asked for clarifications concerning the scope of the right to collective bargaining of those employees having retained civil servant status in the privatised enterprises.

The Committee notes that the German Federal Constitutional held (in June 2002) that it may not be expected that the advantages of two different regimes (i.e. that of civil servant and that of employee in the private sector) are cumulated in the situation of civil servants working for privatised companies who choose to retain their civil servant status. In this regard, the Committee notes that the employees having retained their civil servant status do not enjoy the right to strike. It refers to its conclusion under Article 6§4 concerning this issue. As to the right to bargain collectively, the Committee understands that collective agreements may not be concluded on the issue of remuneration of these employees. However, they are entitled to participate in the bargaining processes that result in the determination of all other conditions of employment applicable to them.

In the light of the above, the Committee holds that the interference in the right to bargain collectively of the employees in question is not disproportionate and satisfies the requirements of Article 6§2. This does not affect its conclusion of non conformity under Article 6§4.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 6§2 of the Charter.

Article 6 - Right to bargain collectively

Paragraph 3 - Conciliation and arbitration

The Committee notes from the report submitted by Germany and all the information at its disposal that there have been no changes to the situation, which it has previously considered to be in conformity with Article 6§3 of the Charter. It asks that the next report provide a full and up-to-date description of the situation.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 6§3 of the Charter.

Article 6 - Right to bargain collectively

Paragraph 4 - Collective action

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

Meaning of collective action - Permitted objectives of collective action

The Committee recalls that the German law pertaining to collective action, based on Article 9 para. 3 of the Constitution as interpreted by the courts, still forbids strikes which are not concerned with the conclusion of collective agreements, since report does not indicate that there has been any change to this situation the Committee still finds the situation not to be in conformity with Article 6§4 of the Charter.

Who is entitled to call collective action

In its previous conclusions, the Committee has taken note of the conditions laid down by the courts before trade unions can call lawful strikes (see Addendum to Conclusions XV-1, p. 29) and has found that these are difficult to satisfy. It observes that the situation has not changed in this respect and given that a group of workers may not readily form a union for the purpose of a strike, considers the situation not to be in conformity with the Charter.

Restrictions on the right to strike

The Committee recalls that it falls to it to examine whether domestic courts act reasonably and that in particular their interventions do not strike at the very substance of the right to strike, thus depriving it of its effectiveness (Conclusions XVII-1, Germany).

The Committee notes that in the case of preliminary injunctions issued by a court at the request of an employer against a strike, there is no possibility of appeal at federal level, in particular to the Federal Labour Court. This means that, in the absence of legislation guaranteeing the right to strike, there is a risk of legal uncertainty given that different courts in different Länder may reach diverging rulings in similar cases. The examples of case-law provided in the report regarding the principle of proportionality demonstrate the fluctuation of case law between courts. The Committee therefore asks again for further information on ways and means to avoid any legal uncertainty that may restrict the right to strike in this respect, and reserves its position on this point.

The Committee recalls that in the case of civil servants who are not exercising public authority only a restriction can be justified, not an absolute ban (Conclusions XVII-1, Germany). As regards the absolute strike ban applied to civil servants employed in privatised postal and rail undertakings which the Committee held not to be in conformity with the Charter, it refers to its observations in its conclusion regarding Article 6§2 with respect to the decision of the Federal Administrative Court of 7 June 2000 stating that a civil servant who is being granted leave to take up work under a private law contract with the privatised companies of the German Mail and Railway "is generally not subject to a prohibition to strike". The Committee reiterates its question whether the scope of application of the court decision extends to all post and rail employees with civil service status who do not exercise public authority or whether there are civil servants, assigned to posts in privatised enterprises without being granted leave to take up work who are denied the right to collective action. Meanwhile, it reserves its position on this point.

Procedural requirements - Consequences of collective action

As regards the procedural requirements pertaining to and the consequences of collective action, the Committee refers to its assessment of the situation in Conclusions XV-1 and XVI-1. The report mentions no change to the situation in this respect.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 6§4 of the Charter on the following grounds:

- strikes not aimed at achieving a collective agreement are prohibited;
- the requirements to be met by a group of workers in order to form a union satisfying the conditions for calling a strike constitute an excessive restriction to the right to strike.