Committee on the Application of Standards

Date: 21 May 2021

Governments appearing on the list of individual cases have the opportunity, if they so wish, to supply written information to the Committee.

▶ Information on the application of ratified Conventions supplied by governments on the list of individual cases

Romania (ratification: 1958)

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

The Government has provided the following written information.

With regard to effective protection against acts of trade union discrimination and interference – Articles 1, 2 and 3 of the Convention:

Regarding the burden of proof in cases of union discrimination against union leaders, the Ministry of Justice indicates that, by Decision No. 681/2016, the Constitutional Court, ruling on the notification of unconstitutionality regarding the provisions of the sole article, point 1, of the Law amending and supplementing the Law on Social Dialogue, held inter alia, that , "as the Court held in Decision No. 814 of 24 November 2015, the courts, within the analysis of the legality of the decision to dismiss an employee who also has an elected position in a trade union body, examine whether there is any connection between the reason indicated for dismissal (as provided in article 61 – reasons related to the employee, or article 65 – reasons that are not related to the employee, of the Labour Code) and the fulfilment of the mandate that the employee holding an elected position within the union body received from the employees of the unit, and responsibility to demonstrate the legality of the dismissal rests with the employer, according to article 272 of the Labour Code."

Therefore, in the event that an employee holding an elected position in a trade union body challenges the legality of the dismissal, the special provisions of the Labour Code become applicable, according to which "The burden of proof with regard to labour disputes rests with the employer, who is obliged to submit evidence in his defence prior to the first day of appearance in court."(article 272).

If the union leader considers himself to have been discriminated against, he has the possibility to address the National Council for Combating Discrimination (CNCD – Consiliul Național pentru Combaterea Discriminării), according to the procedure regulated by Government Ordinance No. 137/2000 on preventing and sanctioning all forms of discrimination. Thus, according to article 20, paragraph 1, of this Act, "The person who considers himself or herself to have been discriminated against may notify

the Council within one year from the date on which it is committed or from the date on which she could become aware of its commission." Paragraph 6 of the same article also provides that "The person concerned shall present facts on the basis of which it may be presumed that there has been direct or indirect discrimination, and the person against whom the complaint was made shall have the burden of proving that there has been no breach of the principle of equal treatment. Any means of proof may be invoked before the Board of Directors in compliance with the fundamental rights, including audio and video recordings or statistical data."

At the same time, article 27, paragraph 1, of Government Ordinance No. 137/2000 also provides for the possibility for the person who considers himself or herself to have been discriminated against to make a claim before the court, including for compensation and to restore the situation prevailing prior to the discrimination or the cancellation of the situation created by the discrimination, according to common law, with such a request not being conditional upon a notification to the Council. In this case, too, the person concerned shall present facts on the basis of which it may be presumed that there has been direct or indirect discrimination, and the person against whom the complaint was made shall have the burden of proving that there has been no breach of the principle of equal treatment. (article 27, paragraph 4).

Regarding the number of cases of trade union discrimination and interference by employers brought to the attention of different jurisdictions, the average duration of proceedings and their outcome, the Ministry of Justice indicates that the data available in judicial statistical databases that are managed by the Ministry refer exclusively to the activity of courts. The data are collected by specialized staff at the level of each court on the basis of the nomenclature in the ECRIS system (the European Criminal Records System). Within this nomenclature, no elements were identified that would allow reporting of the available data according to the required criteria, respectively the number of cases pending in the courts relating to trade union discrimination and interference by employers. Also, judicial statistics cannot be disaggregated according to certain qualities of the parties/participants.

Regarding the actions and remedies applicable in cases of trade union discrimination, the Ministry of Justice indicates that, according to article 260, paragraph 1(r), of the Labour Code, "The following acts constitute a contravention and are sanctioned as follows:... r) non-compliance with the provisions of article 5, paragraphs (2)–(9), and of article 59(a), with a fine of from 1,000 to 20,000 lei." Article 5, paragraph 2, states that "Any direct or indirect discrimination against an employee, discrimination by association, harassment or victimization, based on the criteria of race, nationality, ethnicity, colour, language, religion, social origin, genetic traits, sex, sexual orientation, age, disability, chronic non-communicable disease, HIV infection, political choice, family situation or responsibility, membership or trade union activity, members of a disadvantaged category, is prohibited."

According to the Labour Inspectorate, between 1 January and 30 April 2021, no fines were applied for violations of the law related to union membership or activity.

In the event that a person opts for a complaint to the CNCD under the conditions set out in article 20 of Government Ordinance No. 137/2000, the decisions pronounced by the Board of Directors can be appealed to the contentious-administrative courts, according to the law (article 20, paragraph 9); if the decision is not contested within 15 days of its the communication, it constitutes an enforceable ruling. A decision pronounced in the court of first instance can be appealed within 15 days of its

communication, in accordance with the provisions of article 20, paragraph 1, of the Law regarding the administrative court procedure No. 554/2004.

If an application is formulated directly to the court, pursuant to article 27 of Government Ordinance No. 137/2000, the Ministry of Justice specifies that, interpreting this law, the High Court of Cassation and Justice, by Decision No. 10/206, in the interests of law established that "the court competent to resolve claims for compensation and to re-establish the situation that existed prior to the discrimination or cancel the effects created by the discrimination is the court or tribunal, as the case may be, as courts of civil law, in relation to proceedings by a court having jurisdiction and its value, except in cases where discrimination has occurred in the context of legal relationships governed by special laws and where the protection of subjective rights is achieved through special jurisdictions, in which case the applications will be tried by these courts, according to special legal provisions."

In the case of trade union discrimination, as the alleged act of discrimination occurred in a labour relationship, which is governed by a special law, respectively the Labour Code, the court competent to resolve the present dispute is the court in whose district the plaintiff is domiciled, and only the judgment of the court of first instance is subject to appeal (article 214 of the Law on Social Dialogue No. 62/2011).

In consultation with the social partners and in accordance with national practice, Law No. 53/2003 – the Labour Code was amended in 2020 in order to ensure proper recognition of harassment, intimidation and victimization of employees and their representatives, including in the exercise of legitimate trade union rights and activities (article 5), with dissuasive sanctions applied effectively, including pecuniary sanctions of up to eight minimum monthly gross wages, for individual cases.

In 2020, Government Ordinance No. 137/2000 on the preventing and sanctioning of all forms of discrimination was supplemented by the adoption of Law No. 167/2020 amending and supplementing Government Ordinance No. 137/2000, as well as supplementing article 6 of Law No. 202/2002 on equality of opportunity and treatment for women and men.

Law No. 167/2020 defines moral harassment in the workplace as any behaviour displayed with respect to an employee by another employee who is their superior, by an inferior and/or by an employee with a comparable hierarchical position, regarding the work relationship, which has the purpose or effect of a deterioration of working conditions by harming the rights or dignity of the employee, by affecting their physical or mental health or by compromising their professional future, conduct manifested under any of the following forms: (i) hostile or unwanted conduct; (II) verbal comments; (iii) actions or gestures.

It also strengthened the attributions of the National Council for Combating Discrimination, as the national authority responsible for preventing, monitoring, assisting and mediating between the parties and for investigating and sanctioning cases of discrimination and acts of anti-union discrimination.

With regard to the promotion of collective bargaining and negotiation with elected workers' representatives – Article 4 of the Convention

The regulation of social dialogue responds to the national situation and the lack of cooperation between the parties, against the conflicting background of labour and industrial relations, also reported by the European Commission in the 2018 Country Report.

Parliament is currently in the process of adopting, in the Chamber of Deputies (decision-making body), a draft law revising the Law on Social Dialogue, initiated in 2018, which includes in its current form the proposals and amendments made by trade unions and employers in the field of association, representativeness and collective bargaining in the context of the consultations held in Parliament, as well as the aspects accepted of the ILO recommendations in the 2018 Technical Memorandum.

The agreement of the social partners for the revision of the collective bargaining sectors, pursued by the Government, was conditional on the prior adoption of the revision of the Law on Social Dialogue.

As the ILO Report on Social Dialogue pointed out, sectoral collective bargaining has declined since the 2008 crisis, with priority being given to enterprise-level bargaining to adapt and make work and employment more flexible, a trend that continues today. Following the development of new economies and new forms of work and employment, interest in unionization and collective bargaining has diminished.

The revision of the legal framework will not directly eliminate the problem of the low interest of national employers in engaging in bargaining at higher levels of the company due to the difficulties of reconciling the individual interests of employers.

The Government has included in future national programmes and strategies for 2021–27 (the National Recovery and Resilience Plan, the National Reform Programme, and the National Employment Strategy) the objective of strengthening collective bargaining and supporting the structural capacity, organization and action of [the social] partners as a premise for motivating and supporting association, strengthening representativeness and identifying sectoral and national bargaining interests.

The Law on Social Dialogue promotes voluntary negotiation within the meaning of ILO Convention No. 98 and the Collective Bargaining Convention, 1981 (No. 154), at any level of interest to the parties. Article 153 of the Law on Social Dialogue guarantees all unions/trade unions the right to bargain, and to conclude agreements with the employer/employers' organizations on behalf of their members, an eloquent example being the collective agreement concluded by unions and employers in the construction sector.

In the same vein, we mention that European directives favour the general notion of workers' representatives, understood as trade unions and/or employee representatives. As such, employees' representatives are regulated nationally as representatives elected by the vote of all employees in the company (not just those who are not affiliated, within the meaning of the Workers' Representatives Convention, 1971 (No. 135)), in respect of freedom of association and the choice of representatives in collective bargaining, also decided by the Constitutional Court of Romania in ruling No. 62/2019.

The coverage rate of collective bargaining takes into account only the number of employees covered by collective agreements concluded in units with more than 21 employees as a result of the application of erga omnes, without taking into account all collective agreements in force, group level and sectoral contracts, voluntary agreements concluded by the parties and/or collective agreements of civil servants.

With regard to collective bargaining in the public sector and public servants not engaged in the administration of the State – Articles 4 and 6 of the Convention

The Government adopted in 2021 a working memorandum for the revision of the Law on remuneration in the public system, which is the responsibility of the Ministry of Labour.

The elaboration and adoption of the initiative will follow the legal procedures for consulting the social partners, as was the case with the current Law on the remuneration of staff in the public system, approved by the European Trade Union Confederation (ETUC) and based on a system of coefficients negotiated with trade unions.

Additional details related to the comments and direct requests of the CEACR regarding the application of Convention No. 98 will be provided in the Government report under article 22 of the ILO Constitution.