CONFEDERATION SYNDICAT EUROPEÆN TRADE UNION

# Application no. 57818/10

*Tibet MENTEŞ against Turkey*
**and 4 other applications**

## Submission

**by**

**the European Trade Union Confederation (ETUC) under Rule 44(5)**

(15/10/2014)

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## Introduction

1. The European Trade Union Confederation (ETUC) represents the interests of workers at European level. Founded in 1973, it now represents 85 trade union organisations in 36 European countries, plus 10 industry-based federations. The ETUC's prime objective is to promote the European Social Model and to work for the development of a united Europe of peace and stability where working people and their families can enjoy full human civil and social rights and high living standards.

2. The ETUC attaches great important to the working conditions which appear in this case to be focused only on the pecuniary aspect. However, the substantive question in this case relates to the inhuman working conditions in the sense that excessive working hours prevent the enjoyment of private life in two major aspects. The first relates to the health issue (safety and health at the workplace). The second relates to the free time available for workers to take part in normal life. Both issues are of grave concern to the ETUC which represents thousands of workers in potentially similar situations. The ETUC is concerned that states will not sufficiently protect workers' lives in potentially dangerous situations in the workplace.

3. The ETUC is well aware of the fact that the Court has focussed its question to the parties on the substance (i.e. besides the procedural question concerning Article 6 ECHR) on Article 1 of the (1st) Protocol. However, the applicants have referred to Article 4 ECHR pointing sharply to the inhuman working conditions under which they had to work. That is why the ETUC will develop its analysis on this aspect.

4. The ETUC will not go into much detail concerning the procedural question which was raised by the Court, In particular, whether the decision of the Court of Cassation adopted on 28 October 2008, and subsequently the decision of the Labour Court dismissing the applicants' case, were adequately reasoned *vis-à-vis* the applicants' claims. However, the ETUC would like to point out that **Article 6 ECHR** is violated if the Court of Cassation (Decision 28 October 2008) only accepts 14 working hours in a case where it is proven that 24 had been worked. This represents a denial of taking into account evidences which are not only available but which concern the core of the case. Article 6 ECHR should therefore be considered as violated.

5. The same applies to **Article 1 of Protocol No. 1** in respect of the non-paid overtime supplements and all other related remuneration issues. The criteria which the Court applies in examining an alleged violation of this provision appear to be satisfied. The (domestic) legal situation as described by the Court in its 'Statement of Facts' allows to establish that there has been a right to remuneration and that there is no justification to interfere with it, in particular the so-called 14-hours rule as applied by the Court of Cassation has no legal base at all. Even if there were a legitimate aim for such an interference it would obviously not be necessary in a democratic society.

## Article 4 of the Convention

6. As already mentioned, the core of this submission will deal with the problems arising out of the working time arrangements in this case. In the applicants' opinion the denial of remunerating 10 hours which have been worked during a 24-hours-shift in which only 14 hours were remunerated amounted to forced or compulsory labour within the meaning of Article 4 of the Convention.

7. Although the Court did not address this issue in its questions to the parties, this aspect should be examined in more detail. First, there are several issues pending before the Court which relate to this issue:

   - Application no. 5429/12 - *Tolga EYİBİL v. Turkey* – lodged on 28 November 2011 – communicated on 17 September 2014 (concerning Article 4 ECHR more generally)[1],
   - Application no. 45288/07 - *Nusret Yüksel AYKURT v. Turkey* – lodged on 13 August 2007 – communicated on 22 October 2012,
   - Application no. 7442/08 - *ADIGÜZEL v. TURKEY*- lodged on 5 February 2008 – communicated on 7 June 2011 (the latter two more specifically dealing with overtime issues).

8. Second, the jurisprudence of the Court finding a violation of Article 4 ECHR appears to set rather high thresholds. Nevertheless several elements of this case merit the acknowledgment of a very serious situation which could amount to a forced labour situation:

   - inhuman (daily) working hours (24 hours per shift),
   - denial of any adequate remuneration (in terms of supplementary payment for overtime, public holidays and weekends as well as annual leave payments),
   - systematic problem (see the number of not only one single worker but five workers affected as applicants)[2].

9. However, having regard to the high threshold set by its jurisprudence the Court might perhaps consider that the situation at hand does not yet amount to forced labour. This would bring the case to Article 8 ECHR.

## Article 8 of the Convention

10. The ETUC is well aware of the fact that Article 8 has been mentioned neither by the applicants nor in the Court's questions. It will therefore justify more in detail why and to which extent the 'Right to respect for private and family life' is relevant for the solution of this case.

### Choice of Article 8 ECHR

11. But before examining the applicability of Article 8 ECHR two main questions will have to be answered.

12. Is the **Court entitled** to examine Article 8 ECHR if the applicants did not raise this issue? Looking at the Courts jurisprudence the answer will be in the affirmative. Indeed, according to its jurisprudence the Court is empowered to look at the case from a different legal perspective (i.e. a different article) than the applicant. The most recent example reads as follows:

    > Since the Court is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by the applicant or the Government. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 29, Series A no. 172; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, 17 September 2009).[3]

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[1] See also *J.V.L. a.o. v. AUSTRIA* - no. 58216/12 – lodged on 4 September 2012 - communicated on 10 June 2014

[2] See also the more general description by the OECD, below paras. 32 and 33.

[3] ECtHR (GC) 30 September 2014 – no. 67810/10 - *GROSS v. SWITZERLAND*, § 46.

13. Is such an approach compatible with the **'*ne ultra petita*' principle**? In other words: Would an examination and potential violation go beyond what the applicants have asked for? This has to be denied. First and foremost, it should be recalled that the applicants also claim a violation of Article 4 ECHR. This article can be considered as a '*majus*' in comparison with Article 8 ECHR as a '*minus*'. The examination of Article 8 ECHR would thus be allowed by the concept of '*a maiore ad minus*'. Moreover, all violations of Article 4 ECHR will, in principle, also encompass a violation of Article 8 ECHR. Second, there is no possibility to define 'overtime' (and its payment what is clearly asked for by the applicants) if the underlying question of limitation of the 'normal' working hours has not been clarified. It has therefore exactly to be analysed what Article 8 ECHR requires in respect of limitation of working time. Thus, an examination under Article 8 ECHR will not go beyond the '*petita*' as claimed by the applicants.

14. In **conclusion**, the Court is entitled to characterise the facts presented by the applicants under Article 8 ECHR without violating the '*ne ultra petita*' principle. Therefore, it will now have to be examined whether Article 8 is applicable in the present case.

## (General) Applicability of Article 8 ECHR in relation to employment issues

15. The Court has developed an ever increasing jurisprudence in relation to employment.[4] This not only true concerning Article 11 ECHR but also as regards Article 8. The Court has developed a concept including employment issues in general:

> Article 8 of the Convention "protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world" (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). The notion of "private life" does not exclude in principle activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B).[5]

16. This approach has been followed in a series of judgments in respect of safety and health:

- 5 December 2013 - nos. 52806/09 and 22703/10 – *VILNES a.o. v. NORWAY* (violation of Article 8 ECHR),
- 20 May 2014 – no. 39438/05 – *BINIŞAN v. ROMANIA* (violation of Article 2 ECHR),
- 24 July 2014 – no. 60908/11 – *BRINCAT a.o. v. MALTA* (violation of Articles 2 and 8 ECHR).

## (Specific) Applicability of Article 8 ECHR in relation to working time

17. As such, (excessive) working time and its limits has not been examined by the Court yet. Of course, in cases related to (modern) slavery or forced labour the Court has mentioned (excessive) working time as an element leading to an assessment of violation. This case, however, requires the in-depth examination.

18. For interpretation purposes, it will be recalled that the Grand Chamber has specifically drawn attention to the importance of international law in the interpretation of the European Convention on Human Rights (Convention):

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[4] *Dorssemont/Lörcher/Schömann* (eds.), The European Convention on Human Rights and the Employment Relation, Hart Publishing Oxford, 2014

[5] ECtHR 9 January 2013 – no. 21722/11 – *OLEKSANDR VOLKOV v. UKRAINE* - § 165

> The Court, in defining the meaning of terms and notions in the text of the Convention, **can and must** take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.[6] (Emphasis added)

19. In assessing the conformity with the requirements of Article 8 ECHR the Court has, in principle, dealt with its substantive limb. In this cases there are two main elements:

    - the guarantee for (safety and) health at work,
    - the guarantee for (sufficient) free time for private and family life.

20. Moreover, there is also a procedural limb. In relation to employment, this is the main aspect of 'labour inspection'.

## Substantive limb

21. Before going into any detail, the question of negative and positive obligations has to be clarified.

### *General principles: Interpretation by taking account of international (labour) standards*

#### Guarantee for safety and health at work

22. The working time has a direct impact on the health of workers. The longer the latter are obliged to work the more health problems will arise.

23. The fundamental social right to safe and healthy working conditions as such is not yet explicitly recognized as lying within the scope (*ratione materiae*) of Article 8 ECHR. However, an important element of further interpretation of this provision in respect of healthy environmental conditions has been acknowledged by the Court in an impressive series of judgments. The latest example may be quoted:

> As the Court has noted in a number of its judgments, Article 8 has been relied on in various cases in which environmental concerns are raised (see, among many other authorities, *Fadeyeva v. Russia*, no. 55723/00, § 68, ECHR 2005-IV). However, in order to raise an issue under Article 8 the interference about which the applicant complains must directly affect his home, family or private life and must attain a certain minimum level if the complaints are to fall within the scope of Article 8 (see *López Ostra v. Spain*, 9 December 1994, § 51, Series A no. 303-C; and *Fadeyeva*, cited above, § 69-70). Therefore, the first point for decision is whether the environmental pollution of which the applicant complains can be regarded as affecting adversely, to a sufficient extent, the enjoyment of the amenities of his home and the quality of his private and family life (see *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 66, 2 December 2010). In this respect, the Court recalls that water pollution was one of the factors which was found to affect the applicants' health and hence their ability to enjoy their home, private and family life in the case of *Dubetska and Others v. Ukraine* (no. 30499/03, §§ 110 and 113, 10 February 2011).[7]

24. Generally speaking, there is no reason why this jurisprudence could and should not be applied also to employment insofar as this is a component of life equally important as the environment.

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[6] ECtHR 12 November 2008 - no. 34503/97 - *DEMIR AND BAYKARA v. TURKEY*, [2008] ECHR 1345, in particular § 85

[7] ECtHR 4 September 2014 – no. 42488/02 – *DZEMYUK v. UKRAINE*, § 77.

25. Moreover and even more importantly in relation to labour issues, the consolidated *Demir and Baykara*[8] approach makes this point even more obvious and requires such an interpretation of the scope. Analysis of the **international labour standards**[9] in this respect reveals that there is a tendency to fully recognise this right. As a starting point, Article 7(b) of the UN Covenant on Economic, Social and Cultural Right (ICESR)[10] requires "(s)afe and healthy working conditions". Turning to the ILO, there is a rich set of relevant Conventions.[11] Two fundamental Conventions, namely, ILO Convention No. 155, Occupational Safety and Health Convention, 1981, and the newly adopted Convention No. 187, Promotional Framework for Occupational Safety and Health Convention, 2006, have to be mentioned specifically.[12] Although they are not (yet) included in the ILO core labour conventions, the ILO strengthens the importance especially of those two conventions by a plan of action. They can be described as the heart of the right to safe and healthy working conditions. In the Council of Europe, equally, the protection of workers' health is taken seriously. Whereas the original ESC[13] already recognizes in Article 3 the "right to safe and healthy working conditions", the RESC[14] amplifies these obligations by adding a promotional and a preventive dimension (new para. (4)). Last but not least, the EU has not only referred to this right in No. 7 of the Community Charter of Fundamental Rights of Workers, 1989, but has, more importantly, recognized this right as a legally binding (Article 6(1) TEU) fundamental social right in Art. 31(1) CFREU.

26. Looking more closely at the **supervisory bodies'** activities, the General Survey 2009 on Conventions No. 155 and 187 serves as a general source to the more concrete elements enshrined in both Conventions. Furthermore, the CEACR deals, in principle, at five-yearly intervals, with the OSH Conventions. Though there is no 'General Comment' on Article 7 ICESCR, the CESCR deals continuously with States' reports which include coverage of this issue. Its 'Concluding observations' often raise concerns about specific problems. The ECSR again works at four-yearly intervals with States' reports on Article 3 (R)ESC[15]. As such, a rich source of case law is available in order to clarify specific questions which might have to be decided by the ECtHR when dealing with safety and health of workers under Article 8 ECHR.

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[8] See *Demir and Baykara*, note 6.

[9] According to the principle that the Court refers to international standards irrespective whether they have been ratified/accepted (see *Demir and Baykara*, note 6, § 86) the following provisions are mentioned even if Turkey has (or had) not (yet) ratified/accepted them at the relevant moment in time for this case.

[10] Ratified by Turkey on 23 September 2003.

[11] http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:3111216123659933::::P12000_INSTRUMENT_SORT:2 (Occupational Safety and Health).

[12] Both Conventions have been ratified by Turkey but only on 22 April 2005 and on 16 January 2014 respectively.

[13] Ratified by Turkey 24 November 1989 (however, Turkey had not accepted Article 3 ESC).

[14] Ratified by Turkey on 27 June 2007 (has accepted all four paragraphs of Article 3 RESC)

[15] The acronym (R)ESC is used in order to clarify that both instruments (i.e. in its original (1961) and its revised (1996) version) are meant.

27. In **conclusion**, not only would the right to safe and healthy working conditions be, *ratione materiae*, part of Article 8 ECHR, but many elements enshrined in e.g. ILO Convention No. 155 or Article 3 (R)ESC would give this right an effective content.

### Guarantee for (sufficient) free time for private and family life

28. Working time has also a direct impact on the 'free' time which is necessary to enjoy private and family life. Working time might indeed be considered one of the most obvious elements linking employment to private and family life insofar as the longer working hours are extended the shorter the time available for private and family life.

29. Concerning **international labour standards**, it should be recalled that the ILO started its standard-setting activities as early as 1919 by adopting the principle of an 8-hour working day with Hours of Work (Industry) Convention, 1919 (No. 1), followed by Hours of Work (Commerce and Offices) Convention, 1930 (No. 30) and Forty-Hour Week Convention, 1935 (No. 47).[16] After World War II, the limitation of working time was already included in the UNDHR.[17] The general idea was followed in the 1960s by Article 7 d) ICESCR[18] and, at the European level, by Article 2(1) ESC which not only provides for reasonable working hours but includes the dynamic concept of a (continuous) reduction of working time.[19] Article 31(2) CFREU also requires a limitation of maximum working hours.[20]

30. For the case law of the **supervisory bodies**, the same applies, in principle, to the framework of examination of States' reports but the respective CEACR General Survey dates from 2005.[21]

31. In **conclusion**, not only would the general principle of reasonable/limited working hours be enshrined but equally and more concretely so would some of the many arguments in favour of a limitation to the principle of an 8 hours working day (subject to certain exceptions).

### *Application to the present case*

32. As preliminary observation and background information the **working time situation in Turkey** should be highlighted. According to the OECD Turkey has the highest proportion of employees working very

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[16] Internally, all three Conventions have a so-called "interim status", for all relevant Conventions see http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:3111216123659933::::P12000_INSTRUMENT_SORT:2 (Working time).

[17] Article 24 "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." (emphasis added)

[18] "Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays." (emphasis added)

[19] "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" (emphasis added).

[20] "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave." (emphasis added)

[21] International Labour Office, International Labour Conference, 93rd Session, 2005, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), General Survey of the reports concerning the Hours of Work (Industry) Convention, 1919 (No. 1), and the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30), Geneva 2005.

long hours, among 35 OECD countries.[22] Concerning the relevant years for the present case the figures are as follows:

**Average annual hours actually worked per worker[23]**

| Time | | 2000 | 2001 | 2002 | 2003 |
|---|---|---|---|---|---|
| **Country** | | | | | |
| Turkey | | 1937 | 1942 | 1943 | 1943 |
| OECD countries | | 1844 | 1828 | 1818 | 1810 |

33. Moreover, the OECD notes:

> Evidence suggests that long work hours may impair personal health, jeopardize safety and increase stress. **People in Turkey work 1 855 hours a year**, more than the OECD average of 1 765 hours. The share of employees working more than 50 hours per week is not very large across OECD countries. In Turkey, however, **43%** of employees work very long hours, by far the highest rate in the OECD where the average is 9%.[24]

34. Concerning the **daily maximum of working hours**: In its 'Statement of Facts' the Turkish legislation is mainly referred to Section 41 (Overtime pay: … Overtime work is work which, under conditions specified in this Code, exceeds forty-five hours a week.) and Section 66 (Periods considered as hours of work: The following periods shall be considered as the employee's daily working hours: ... c) the time during which the employee has no work to perform pending the arrival of new work but remains at the employer's disposal.). However, Section 63 provides for a maximum of 11 hours per day (… Provided that the parties have so agreed, working time may be divided by the days of the week worked in different forms on condition that the daily working time must not exceed eleven hours …).

35. Comparing the situation in the present case (based on the work in 24-hours shifts) with the internal legal requirement not to exceed 11 hours per day the conclusion can only be that this is clear violation even if one would assume that 11 hours were worked at the first day and the other 11 hours at the second day. If work is had to be provided in one single day it was even more a most flagrant violation of this maximum provision required by internal legislation.

36. Moreover, it should be recalled that even this 11-hours maximum has been questioned by the ECSR under the provision of Article 2 para. 1 of the (R)ESC as being too high:

> The Committee asks whether the regulations in place would allow a worker to work 66 hours (11 hours per day during a 6 day working week) in some of the weeks of the reference period on condition that the average weekly working time has not exceeded 45 hours. It recalls in this respect that weekly working time of more than 60 hours is too long to be considered as reasonable under this provision. This is a limit which cannot be exceeded even in the context of flexibility schemes, where compensation is

[22] 8 November 2013 - http://www.hurriyetdailynews.com/turks-work-longest-hours-among-oecd-members.aspx?pageID=238&nID=57552&NewsCatID=347

[23] Data extracted on 16 Jul 2014 15:19 UTC (GMT) from OECD.Stat. http://stats.oecd.org/Index.aspx?DataSetCode=AVE_HRS.

[24] **http://www.oecdbetterlifeindex.org/topics/work-life-balance/** (the figure of 1,855 hours for Turkey (against 1,765 hours as OECD average) appears to relate to 2012, see note 15).

> granted by rest periods in other weeks. Pending clarification on this point, it reserves its position as to whether the situation is in compliance with the Revised Charter.[25]

37. Concerning the **weekly maximum working hours**: The domestic legislation provides for a 45-hours maximum (Sections 41 and 61: "In general terms, working time is forty-five hours maximum weekly.") In consequence, two 24-hours shifts per week already exceed this limit. Moreover, overtime is only allowed under specific circumstances (Section 41(1)):

> Overtime work may be performed for purposes such as the country's interest, the nature of the operation or the need to increase output.

It is not conceivable how the situation at hand could comply with these requirements.

38. In **conclusion**, the situation in the present case lasting for years violates to a dramatic extent the internal legal requirements. The latter might even be not in conformity with obligations stemming from international standards (in particular Article 2(1) (R)ESC, Article 7 ICESCR) thus requiring to lower the maximum national thresholds.

### Procedural limb

39. This case not only raises substantive questions but even more obviously procedural questions. Turkey is bound by several international requirements to supervise the implementation of its legislation.

40. The most relevant standard in this respect is the ILO Labour Inspection Convention, 1947 (No. 81), ratified by Turkey.[26] But it should be recalled that also the (R)ESC requires in a general way (Article 20(4) ESC and Article A(4) RESC):

> Each Party shall maintain a system of labour inspection appropriate to national conditions.

Concerning in particular safety and health Articles 3(2) ESC and 3(3) RESC Turkey undertook

> to provide for the enforcement of such regulations by measures of supervision.

41. In supervising the Turkish situation the ECSR noted

> that fines for not complying with the legal requirements on working time - set out in Article 104 - are very low: 100 million to 500 million Turkish Lira (about 50 to 260 €). 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
> Pending receipt of the information requested, the Committee defers its conclusion.[27]

42. The labour inspection system has obviously failed to prevent such dramatic violation of the relevant protective legislation in respect of working time. There is no explanation to justify this failure. In **conclusion**, there is also a violation of Article 8 in its procedural limb.

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[25] Conclusions 2010 on Article 2 para. 1 RESC.

[26] Ratified by Turkey on 5 March 1951

[27] Conclusions 2010 on Article 2(1) RESC.

### International human rights law in the Turkish internal legal order

43. Finally, it would appear important to clarify to what extent Turkey is bound by international treaties. As mentioned above, Turkey has ratified a series of pertinent international standards. In assessing the respondent State's obligations the Court has attributed important weight to the fact that it is bound by international treaties dealing with the issue at stake and the competent organ's views.[28]

44. Moreover, the question as to legal impact in the internal order arises. Article 90(5) of the Turkish Constitution clarifies the relationship between International law and national law in the sense of priority in cases of fundamental rights and freedoms as follows:

> **ARTICLE 90(5)**
> International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.[29]

45. In conclusion, Turkey is not only bound in its internal legal order by the interpretation and application of Articles 6 and 4 or 8 ECHR as well as Article 1 of Protocol No. 1 via international standards but also directly.

## Conclusions

46. Taking the domestic and international legal situation into account and comparing the present case with its previous case-law the Court might wish to hold that Turkey has violated

- the procedural rights of the applicants under Article 6 ECHR and
- - in substantive terms – Article 4 or at least Article 8 (both, in its substantive and procedural limbs) and, finally,
- Article 1 of Protocol No. 1.

[28] See *Demir and Baykara* judgment, note 6, para. 166.

[29] http://global.tbmm.gov.tr/docs/constitution_en.pdf.