EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 14 September 2022

Notification: 13 October 2022

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Confédération générale du travail (CGT) v. France

Complaint No. 155/2017

The European Committee of Social Rights, committee of independent experts ("the Committee") established under Article 25 of the European Social Charter, during its 329th session in the following composition:

Karin LUKAS, President
Eliane CHEMLA, Vice-President
Aoife NOLAN, Vice-President
Jozsef HAJDU
Barbara KRESAL
Kristine DUPATE
Karin Møhl LARSEN
Yusuf BALCI
Tatiana PUIU
Paul RIETJENS
George N. THEODOSIS
Mario VINKOVIĆ
Miriam KULLMANN

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary,

Having deliberated on 24 March 2022, 18 May 2022, 5 and 6 July 2022 and on 14 September 2022,

On the basis of the report submitted by Yusuf BALCI,

Delivers the following decision, adopted on this last date:

PROCEDURE

1. The complaint lodged by *Confédération générale du travail* (CGT) was registered on 28 July 2017.

2. CGT alleges that the "indivisible thirtieth" rule which is laid down by Law No. 87-588 of 30 July 1987 (whereby any non-performance of service during part of one day gives rise to a deduction of earnings equal to the indivisible fraction of one thirtieth of monthly salary, each month being deemed to have 30 days), and which applies to strikes lasting less than one day in the state civil service, has the aim and effect of unjustifiably infringing the right of public servants to strike under Article 6§4 of the revised European Social Charter ("the Charter").

3. On 23 January 2018, the Committee declared the complaint admissible.

4. Referring to Article 7§1 of the 1995 Additional Protocol providing for a system of collective complaints ("the Protocol"), the Committee invited the Government to make written submissions on the merits of the complaint by 4 April 2018.

5. Referring to Article 7§§1 and 2 of the Protocol, the Committee invited the States Parties to the Protocol and the States having made a declaration in accordance with Article D§2 of the Charter, as well as the international organisations of employers or workers mentioned in Article 27§2 of the 1961 Charter, to notify any observations they may wish to make on the merits of the complaint by 4 April 2018.

6. On 16 March 2018, the Government requested an extension of the time limit set for the presentation of its submissions on the merits. The President of the Committee granted an extension up to 20 April 2018. The Government's submissions on the merits of the complaint were registered on 20 April 2018.

7. In accordance with Article 7§1 of the Protocol and Rule 31§2 of the Committee's Rules ("the Rules"), the time limit set for CGT to respond to the Government's submissions on the merits was 12 July 2018. CGT sent no reply.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

8. CGT asks the Committee to find that France is in breach of its obligations under Article 6§4 of the Charter concerning the right to strike because the "indivisible thirtieth" rule is applicable to strikes lasting less than one day in the state civil service and the national public services (staff of the state and state bodies of an administrative nature).

B – The respondent Government

9. The Government considers that domestic law on the indivisible thirtieth is in conformity with Article 6§4 of the Charter. The Government thus asks the Committee to declare the complaint unfounded in all respects.

RELEVANT DOMESTIC LAW AND PRACTICE

10. In their submissions, the parties refer to the following provisions of domestic law.

11. **Finance (Amendment) Law No. 61-825 of 29 July 1961** (as amended by Ordinance No. 2021-1574 of 24 November 2021; in accordance with Article 11 of this Ordinance, these provisions came into force on 1 March 2022.)

> **"Article 4 (amended by Law No. 87-588 of 30 July 1987 - Art. 89 (V))**
> Salary due for service rendered, in accordance with Article 22, paragraph 1, of Order No. 59-244 of 4 February 1959 on the general civil service regulations, shall be paid in accordance with the procedures laid down in the public accounting rules.
>
> No service shall be deemed to have been rendered:
>
> 1) If the employee fails to carry out all or part of his/her hours of service;
>
> 2) If the employee carries out his/her hours of service but does not discharge all or part of the obligations connected with his/her post, the nature and procedural aspects of which shall be determined by the relevant authority within the framework of laws and regulations.
>
> The above provisions shall apply to staff of any authority or service enjoying particular status and to all those receiving a monthly salary."

12. **Decree No. 62-765 of 8 July 1962 laying down public accounting rules for payment of the salaries of state employees**

> **"Article 1**
> Salaries and assimilated payments due to staff of the state and state bodies of an administrative nature referred to in Article 4 of Finance Law No. 61-825 of 29 July 1961 shall be paid monthly and in arrears. Every month, however many days it actually comprises, shall count as thirty days. Consequently, one twelfth of the annual pay is divisible by thirty; each thirtieth is indivisible."

13. Law No. 82-889 of 19 October 1982 (Articles 1, 2, 5 and 6 are repealed by Law No. 87-588 of 30 July 1987 - Art. 89 (V), *Journal officiel de la République française* 31 July 1987)

"Article 1
Salary due for service rendered, in accordance with Article 22, paragraph 1, of Order No. 59-244 of 4 February 1959 on the general civil service regulations, shall be paid in accordance with the procedures laid down in the public accounting rules.

Non-performance of service for any part of a day shall give rise to a deduction which shall be equal to the share of salary that is indivisible under the rules referred to in the previous paragraph.

The provisions of this article shall apply to staff of any authority or service enjoying particular status and to all those receiving a monthly salary.

These provisions shall also apply to the staff of local and regional authorities and their public bodies.

Article 2
By derogation from the provisions of the previous article, non-performance of service arising from a concerted work stoppage shall give rise, for each day:

- where it does not exceed an hour, to a deduction equal to a hundred-and-sixtieth of monthly salary;
- where it exceeds an hour but not half a day, to a deduction equal to one-fiftieth of monthly salary;
- where it exceeds half a day but not a full day, to a deduction equal to a thirtieth of monthly salary.

Article 3
Amended the following provisions:
Amends Labour Code - Art. L521-6 (AbD)

Article 5
Law No. 77-826 of 22 July 1977 amending Article 4 of the Finance (Amendment) Law for 1961, No. 61-825 of 29 July 1961, cited above, shall be repealed.

Article 6
Article 4 of the Finance (Amendment) Law for 1961 (No. 61-825 of 29 July 1961), cited above, shall be repealed."

14. Law No. 87-588 of 30 July 1987 introducing various social measures

"Article 89
I. - Articles 1, 2, 5 and 6 of Law No. 82-889 of 19 October 1982 on deductions for non-performance of service by staff of the state, local and regional authorities and **public services** shall be repealed.

II. - Consequently, the following legislation shall be re-established:
- Article 4 of the Finance (Amendment) Law for 1961 (No. 61-825 of 29 July 1961); and Law No. 77-826 of 22 July 1977, previously repealed by Articles 5 and 6 of Law No. 82-889 of 19 October 1982, cited above."

15. Labour Code, Chapter II: Special provisions applicable in public services (Articles L2512-1 and L2512-5)

"Article L2512-1
The provisions of this chapter shall apply:
1. To staff of the state, regions, *départements* and municipalities with a population of more than 10,000;
2. To staff of public or private enterprises, entities and bodies where these enterprises, entities and bodies are responsible for managing a public service."

"Article L2512-5
With regard to the staff referred to in Article L. 2512-1 who are not subject to Article 1 of Law No. 82-889 of 19 October 1982, non-performance of service arising from a concerted work stoppage shall entail a deduction for each day from salary or wages and any supplements thereto other than family allowances. Deductions shall be made according to the lengths of absence set out in Article 2 of the aforementioned law."

16. Constitutional Council (*Conseil constitutionnel*), Decision No. 87-230 of 28 July 1987, Law introducing various social measures

"The Constitutional Council,

(…) 1. Whereas the authors of the referral challenge the constitutionality of Article 89 of the Law submitted for consideration by the Constitutional Council;

2. Whereas Article 89 of that Law reads as follows: "I.- Articles 1, 2, 3, 5 and 6 of Law No. 82-889 of 19 October 1982 on deductions for non-performance of service by staff of the state, local authorities and public services shall be repealed. II.- Consequently, the following legislation shall be re-established: - Article 4 of the Finance (Amendment) Law for 1961 (No. 61-825 of 29 July 1961; and Law No. 77-826 of 22 July 1977, previously repealed by Articles 5 and 6 of Law No. 82-889 of 19 October 1982, cited above; - as a result of Article 6 of Law No. 63-777 of 31 July 1963, rewording of Article L. 521-6 of the Labour Code previously amended by Article 3 of Law No. 82-889 of 19 October 1982, cited above";

3. Whereas the first effect of these provisions is to subject staff of any authority or service enjoying particular status and all those receiving a monthly salary paid in accordance with the public accounting rules to the rule that non-performance of service, for any part of the day, gives rise to a deduction equal to the share of salary that is indivisible under these public accounting rules; whereas, for implementation of this rule it is stated that no service shall be deemed to have been rendered "if the employee fails to carry out all or part of his/her hours of service" or "if the employee carries out his/her hours of service but does not discharge part of the obligations connected with his/her post, the nature and procedural aspects of which shall be determined by the relevant authority within the framework of laws and regulations";

4. Whereas the second effect of the provisions of Article 89 of the Law is to reinstate Article L. 521-6 of the Labour Code appended to Law No. 73-4 of 2 January 1973, reproducing and codifying the provisions of Article 6 of Law No. 63-777 of 31 July 1963; whereas it is clear from this text that, for the staff concerned, "non-performance of service arising from a concerted work stoppage shall entail a proportionate deduction from salary or wages and any supplements thereto other than family allowances", with the reservation that "regardless of the form of remuneration, work stoppages lasting less than one working day shall give rise to a deduction equal to the remuneration payable for that day"; whereas taking account of the amendment to Article L. 521-2 of the Labour Code by Article 56 of Law No. 87-529 of 13 July 1987, these rules are applicable, independently of the case of staff subject to the aforementioned system of salary deductions, "to staff of the state, regions, *départements* and municipalities with a population of

more than 10,000, and to staff of public or private enterprises, entities and bodies where these enterprises, entities and bodies are responsible for managing a public service" and, notably, "to staff of enterprises listed in the decree referred to in Article L. 134-1, paragraph 2" of the Labour Code, that is to say private-sector enterprises with certain categories of staff who are subject to laws and regulations similar to those applicable to public enterprises or bodies;

5. Whereas the Council agrees, primarily, that the provisions of Article 89 are unconstitutional by reason of their aim; they introduce financial penalties designed to discourage the use of a right recognised by the Constitution; they no longer meet a public accounting imperative, as demonstrated by Law No. 82-889 of 19 October 1982; they are not motivated by the wish to prevent breaks in the continuity of public service, since this can be assured by other means, either by banning certain types of strike or by insisting on a minimum continuous service; the authors of the referral also argue that Article 89 is unconstitutional by reason of its scope; it imposes particular constraints on private-law employees who do not themselves take part directly in public-service duties and are not subject to public accounting rules either; the result is a breakdown of equality among employees;

6. Whereas paragraph 7 of the Preamble to the Constitution of 27 October 1946, confirmed by the Preamble to the Constitution of 4 October 1958, states that "The right to strike shall be exercised within the framework of the laws governing it"; whereas in framing this provision its authors sought to make the point that the right to strike is a constitutional principle, but that it has limits, and they empowered the legislator to mark those limits by securing the necessary balance between defending professional interests, of which strike action is one means, and safeguarding the general interest, which strike action may jeopardise;

7. Whereas consequently the legislator is authorised to define the conditions under which the right to strike may be exercised and to mark the limit between acts and behaviours that are a lawful exercise of this right and those that would constitute abuse of it; whereas, in the context of public services, recognition of the right to strike must not impede the power of the legislator to restrict that right as necessary in order to ensure continuity of public service which, just like the right to strike, is a constitutional principle; whereas those restrictions may go as far as a ban on strike action by staff whose presence is essential to the functioning of parts of the service, if its interruption would be detrimental to the national interest;

8. Whereas it is also for the legislator to determine the financial consequences of both the non-performance of service or work resulting from a concerted work stoppage and the partial performance of work or service, taking account of the accounting rules for payment of salary to the parties concerned and the practical difficulties inherent in documenting a work stoppage and measuring the length of a strike and the impact of strikes lasting less than one day on the functioning of public services;

9. Whereas for staff of the state and state bodies of an administrative nature, the mechanism of deductions from pay in the event of service interruptions or failure to discharge service obligations – the mechanism is not limited to strike action alone – makes use of the public accounting rules when paying salaries to these staff for service rendered; whereas salary deductions are an accounting measure and not a financial penalty as such;

10. Whereas, whilst it is stated that no service is deemed to have been rendered if the employee fails to carry out all or part of his/her hours of service or if the employee carries out his/her hours of service but does not discharge all or part of the obligations connected with his/her post within the framework of laws and regulations, neither of these two reasons, both of which amount to non-performance of service, can have the effect of making salary deductions into a disciplinary penalty, since this finding of non-performance does not have to entail any assessment of the employee's personal behaviour, as would be the case in disciplinary proceedings; whereas consequently, particularly in the case of service obligations, non-performance must be sufficiently clear as to be materially identifiable without any need to assess the employee's behaviour; whereas subject to this condition, which must be observed in the individual measures applicable and which the civil servant can enforce through the usual legal channels, salary deductions remain an accounting measure; whereas such deductions, given the reasons for them and the terms of their application, are not an infringement of the right to strike;

11. Whereas for public service employees other than staff of the state and state bodies of an administrative nature, the legislator must draw up measures designed to prevent repeated short strikes from disrupting the normal functioning of public services, by securing a balance between defending professional interests and safeguarding the general interest, which strike action may jeopardise;
12. Whereas, however, the mechanism of automatic deductions from the pay of the individuals concerned, adopted by the legislator to that end, might, because of the general nature of its scope which failed to take account either of the nature of the various services concerned or the harmful impact on the community which concerted work stoppages could entail, in many cases unjustifiably obstruct exercise of the right to strike that is enshrined in the Constitution;

13. Whereas in the text of Article 89 of the Law the figure "3" in paragraph I and the second subparagraph of paragraph II must be declared unconstitutional; whereas since Article L. 521-6 of the Labour Code remains in force, in the wording resulting from Article 3 of Law No. 82-889 of 19 October 1982, the references which Article L. 521-6 of the Code makes to Articles 1 and 2 of the Law remain in effect;

14. Whereas in this case the Constitutional Council is not required *ex officio* to review any issue of constitutionality in respect of the other provisions of the law submitted for its consideration;

Delivers the following decision:

Article 1:

In the text of the Law introducing various social measures, the following are declared unconstitutional:

the figure "3" in paragraph I;

the second subparagraph of paragraph II.

Article 2:
The other provisions of the Law introducing various social measures are not unconstitutional.

Article 3:

This decision shall be published in the *Journal officiel de la République française*."

17. General Civil Service Code

As of 1 March 2022 and in accordance with the provisions of Ordinance No. 2021-1574 of 24 November 2021, the legislative part of the General Civil Service Code comes into force, replacing *inter alia* the laws laying down the statutes of the civil service.

LEGISLATIVE PART (Articles L1 to L829-2)

Book VII: REMUNERATION AND WELFARE (Articles L711-1 to L742-6)
Title I: REMUNERATION (Articles L711-1 to L715-1)
Chapter I: Determination of the remuneration of public officials (Articles L711-1 to L711-6)
Section 1: Remuneration for services rendered (Articles L711-1 to L711-2)

Article L711-1 (Created by Ordinance no. 2021-1574 of 24 November 2021)

The remuneration of public officials due for service rendered shall be paid in accordance with the procedures laid down in the public accounting rules.

Article L711-2 (Created by Ordinance no. 2021-1574 of 24 November 2021)

No service shall be deemed to have been rendered:
1° If the official fails to carry out all or part of their hours of service;
2° If the official carries out their hours of service but does not discharge all or part of the service obligations.

Article L711-3 (Created by Ordinance no. 2021-1574 of 24 November 2021)

Non-performance of service for any part of a day shall give rise to a deduction which shall be equal to the share of salary that is indivisible under the regulations provided for in Article L. 711-1, with the exception of its elements allocated as family benefits or sums allocated as reimbursement of expenses.

The provisions of the present Article shall apply only to public officials declared as strikers.
Article L712-1 (Created by Ordinance no. 2021-1574 of 24 November 2021)

Civil servants shall be entitled, for service rendered, to remuneration made up of:
1° basic salary;
2° residence allowance;
3° family allowance;
4° bonuses and allowances established by a legislative or regulatory provision.

Article L712-2 (Created by Ordinance no. 2021-1574 of 24 November 2021)

The amount of the basic salary shall be set on the basis of the employee's grade and step, or of the post to which they have been appointed.

18. *Conseil d'État*, 3 / 8 SSR, Judgment No. 351229 of 4 December 2013

"(…) 1. Whereas under Article 20 of the Law of 13 July 1983 laying down the rights and obligations of civil servants 'Civil servants shall be entitled, for service rendered, to remuneration made up of basic salary, residence allowance, family allowance and any allowances provided for by law or regulation'; whereas Article 4 of the Finance (Amendment) Law of 29 July 1961, supplemented by the Law of 22 July 1977, defines non-performance of service as follows: 'No service shall be deemed to have been rendered: 1) If the employee fails to carry out all or part of his/her hours of service / 2) If the employee carries out his/her hours of service but does not

discharge part of the obligations connected with his/her post, the nature and procedural aspects of which shall be determined by the relevant authority within the framework of laws and regulations'; whereas under Article 1 of the Decree of 6 July 1962 laying down public accounting rules for payment of the salaries of state employees: 'Salaries and assimilated payments (…) shall be paid monthly and in arrears. Every month, however many days it actually comprises, shall count as thirty days. Consequently, one twelfth of the annual pay is divisible by thirty; each thirtieth is indivisible';

2. Whereas it follows from these provisions that non-performance of service for any part of the day, due in particular to participation in a strike, gives rise to a deduction equal to the share of salary that is indivisible, that is to say one thirtieth of monthly salary; whereas moreover, given that salary as defined in Article 1 of the Decree of 6 July 1962 is paid monthly and as a lump sum, the deductions to be made from a public servant's monthly salary will, in principle, be equivalent to as many thirtieths as there were days of non-performance of service, even if no service was required of the individual concerned on some of those days; whereas application of the rules for calculating deductions from monthly salary for striking public servants must not infringe their right to annual leave where they have, before giving prior notice of their intention to strike, been authorised by their head of department to take leave during a specific period; (…)"

19. ***Conseil d'État*, 4 / 1 SSR, Judgment No. 03918 of 7 July 1978**

"(…); Whereas under Article 4 of the Law of 29 July 1961, 'Salary due for service rendered, in accordance with Article 22, paragraph 1 of the Order of 4 February 1959 on the general civil service regulations, shall be paid in accordance with the procedures laid down in the public accounting rules. Non-performance of service for any part of a day shall give rise to a deduction which shall be equal to the share of salary that is indivisible under the rules referred to in the previous paragraph', that is to say one thirtieth of monthly salary as stipulated by the Decree of 6 July 1962 on payment of the salaries of staff of the state;

(…)

Whereas, on the other hand, where there is non-performance of service over several successive days, deductions from a public servant's monthly salary must be equivalent to as many thirtieths as there were days between the first day inclusive and the last day inclusive on which no service was rendered, even if, for whatever reason, no service was required of the individual concerned on some of those days; (…)".

20. ***Conseil d'État*, 3 / 5 SSR, Judgment No. 146119 of 27 April 1994**

"(…) Whereas Article 89 of the Law of 30 July 1987 introducing various social measures repealed Articles 1, 2, 5 and 6 of the Law of 19 October 1982 on deductions for non-performance of service by staff of the state, local authorities and public services but preserved the validity of Article 3 of that same Law, which replaced Article L. 521-6 of the Labour Code with the following provisions: 'Article L. 521-6 – With regard to the staff referred to in Article L. 521-2 who are not subject to Article 1 of Law No. 82-889 of 19 October 1982, non-performance of service arising from a a concerted work stoppage shall entail a deduction from wages or salary (....). Deductions shall be made according to the lengths of absence set out in Article 2 of the aforementioned Law'; whereas because these provisions remain in force, the references which Article L. 521-6 makes to the repealed articles of the Law of 19 October 1982 remain in effect;

Whereas Article 1 of the Law of 19 October 1982 stated that it applied to staff of local authorities and their employees; whereas it follows from this that these staff, who include firefighters in the Fire and Rescue Service of the *département* of Haute-Garonne, do not count as 'staff referred to in Article L. 2512-1 who are not subject to Article 1 of Law No. 82-889 of 19 October 1982' to whom the aforementioned Article L. 521-6 of the Labour Code applies; whereas as a result, the Toulouse Administrative Court was wrong to use Article L. 521-6 of the Labour Code as its legal basis when overturning decisions by the Fire and Rescue Service of the *département* of Haute-Garonne to make deductions from the pay of 200 firefighters;

Whereas, however, it is the duty of the *Conseil d'Etat*, which must rule on the case as a whole due to the transfer of jurisdiction on appeal, to consider the other grounds cited by the firefighters in their application to the Toulouse Administrative Court;

Whereas, on the one hand, under Article 2 of the Law of 13 July 1983 laying down the rights and obligations of civil servants: 'This law shall apply to civil servants employed in administrative departments of the state, regions, *départements*, municipalities and their public bodies (...)' and under Article 20 of that same Law: 'Civil servants shall be entitled, for service rendered, to remuneration (...)'; whereas it follows from this that, in the absence of any provision of law to the contrary, the firefighters of the Fire and Rescue Service of the *département* of Haute-Garonne, a public *département* body, who are not accused of failing to carry out their full hours of service during the period in question, could not be deprived of their entitlement to full pay; whereas the fact that they allegedly refused to perform certain tasks and thereby committed punishable offences did not mean that deductions could lawfully be made from their pay; whereas the decisions by the Fire and Rescue Service of the *département* of Haute-Garonne to make deductions from the pay of the individuals concerned following the protests between 10 December 1990 and 28 January 1991 constitute an exceeding of its powers; (…)".

21. ***Conseil d'État*, Judgment No. 329636 of 19 October 2012**

"(…) it follows from paragraph 1 [of Article 4 of the Law of 29 July 1961], which refers to salaries payable under Article 22 of the Order of 4 February 1959, that it is applicable only to civil servants of the state and its public bodies (…)".

RELEVANT INTERNATIONAL MATERIALS

22. International Labour Conference, Report III (Part 1B), Third item on the agenda: Information and reports on the application of Conventions and Recommendations, General Survey of the reports concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), 2003.

"246. Mention may also be made, in passing, of the problem of deductions from pay for strike days. The Committee wishes to recall in this connection that, although such deductions in principle give rise to no objection, deductions which are higher than the amount corresponding to the period of the strike may be deemed punitive in character, and as such should be avoided."

23. International Labour Office, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva, International Labour Office, Fifth (revised) edition, 2006.

“Wage deductions

654. Salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles.
(See the 1996 *Digest*, para. 588; 304th Report, Case No. 1863, para. 363; and 307th Report, Case No. 1899, para. 83.)

655. In a case in which the deductions of pay were higher than the amount corresponding to the period of the strike, the Committee recalled that the imposition of sanctions for strike action was not conducive to harmonious labour relations.
(See the 1996 *Digest*, paras. 589 and 595.) »

THE LAW

PRELIMINARY CONSIDERATIONS

24. The Committee observes that the indivisible thirtieth rule is applicable to strikes lasting less than one day in the state civil service and the national public services.

25. In its complaint, CGT invokes Article 6§4 of the Charter alleging that France is in breach of its obligations concerning the right to strike on the ground that the indivisible thirtieth rule is applicable to strikes lasting less than one day by staff of the state and state bodies of an administrative nature. The Committee will therefore assess this situation under Article 6§4 having regard to Article G of the Charter.

26. CGT also refers to the question of possible discrimination arising from the indivisible thirtieth rule, primarily in respect of the Government’s long-standing and constant argument pertaining to the application of this rule to all cases of non-performance of service and not solely non-performance of service caused by strike action.

27. The Government in its submissions affirms that the application of the rule to all forms/causes of non-performance of service reflects a non-discriminatory approach. At the same time, it seeks to justify the difference in treatment that follows from the fact that the rule is applied only to staff of the state and state bodies of an administrative nature, and not to other public sector staff, such as staff of public or private enterprises, entities and bodies responsible for managing a public service, civil servants employed by local and regional authorities; and staff of the state hospital service.

28. As regards the material scope of the indivisible thirtieth rule, the Committee notes that since 1 March 2022, i.e. after the date of the Government’s submissions, the rule applies solely to non-performance of service by public officials declared as strikers (see §17 above). The staff categories concerned remain unchanged, namely staff of the state and state bodies of an administrative nature.

29. In view of the above, the Committee considers it appropriate to also assess whether the application of the indivisible thirtieth rule gives rise to discrimination contrary to Article E in conjunction with Article 6§4 of the Charter.

I. ALLEGED VIOLATION OF ARTICLE 6§4 OF THE CHARTER

30. Article 6§4 of the Charter reads as follows:

> **Article 6 – The right to bargain collectively**
>
> Part I: "All workers and employers have the right to bargain collectively."
>
> Part II: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties
> […]
> and recognise:
> 4. The right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."
>
> **Appendix to Article 6§4:**
>
> "Article 6, paragraph 4
> It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G."

31. Article G of the Charter reads as follows:

> **Article G – Restrictions**
>
> "1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
>
> 2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

A – Arguments of the parties

1. The complainant organisation

32. CGT alleges that application of the indivisible thirtieth rule to a concerted work stoppage by staff of the state and state bodies of an administrative nature is a restriction of the right to strike, that the grounds adduced in support of this restriction are unfounded and do not qualify as cases justifiable under the Charter, and that the aim and effect of this rule is thus an unjustifiable infringement of the right to strike, in breach of the Charter.

33. CGT provides general information on legislation concerning the right of public service employees to strike, and the development of French law in this regard. A distinction is made, according to CGT, between the rules that apply: (1) to staff of the state and state bodies of an administrative nature; (2) to staff of public or private

enterprises, entities and bodies responsible for managing a public service, and staff of undertakings with special status; (3) to civil servants employed by local and regional authorities; and (4) staff of the state hospital service.

34. As regards staff of the state and state bodies of an administrative nature, CGT points out that they are subject to the rules of Law No. 87-588 which provides for deductions under the indivisible thirtieth rule for all non-performance of service, including strikes.

35. Regarding staff of public or private enterprises, entities and bodies responsible for managing a public service, and staff of undertakings with special status, CGT states that under Decision No. 87-230 of the Constitutional Council of 28 July 1987 that these are subject to Articles 1, 2 and 3 of Law No. 82-889 (Article 3 is now codified as Article L. 2512-5 of the Labour Code). Under these articles, non-performance of service due to a concerted work stoppage gives rise to a deduction approximating to a deduction proportionate to the length of the work stoppage.

36. Regarding civil servants employed by local and regional authorities, CGT says that under the aforementioned decision of the Constitutional Council these are not subject to the indivisible thirtieth rule either. Nor, under the *Conseil d'État*'s Judgment No. 146119 of the 27 April 1994, are these staff covered by Article 3 of Law No. 82-889 (current Article L. 2512-5 of the Labour Code). CGT argues that, consequently, civil servants employed by local and regional authorities have amounts deducted from their pay that are strictly proportionate to the length of their absence, if they go on strike.

37. Regarding staff of the state hospital service, CGT states that they are subject neither to the indivisible thirtieth rule nor to Article L. 2512-5 of the Labour Code, and thus have amounts deducted from their pay that are strictly proportionate to the length of their non-performance of service if they strike.

38. CGT observes that when the Constitutional Council validated the deduction of a thirtieth of the monthly wage of striking state civil servants, it stated that this rule was merely an "*accounting measure*"; the argument was that the differing treatment of public-sector workers was justified by constraints connected with budget management and the determination of salaries. According to CGT, this follows from Decree No. 62-765 of 8 July 1962, under which every month, however many days it actually comprises, counts as thirty days, and each thirtieth is indivisible. CGT claims that under these rules, every instance of an employee failing to render service, including when he/she is striking, will automatically entail the deduction of a thirtieth of the monthly salary, whatever the length of his/her absence.

39. However, CGT states that in reality these accounting rules in no way prevent the state from deducting a share of pay that is proportionate to the actual length of the work stoppage. By way of example it says that some civil servants (staff of the state hospitals service and local and regional authorities) have amounts deducted from their pay that are strictly proportionate to the length of the strike. Consequently, CGT argues that the reasons behind the French state's introduction of a mechanism of deducting one-thirtieth of pay in the event of strikes have nothing to do with accounting constraints.

40. CGT rejects the argument of justification based on the harmful impact on the community of strikes lasting less than one day. It points to the Constitutional Council's decision which states that it is for the legislator "*to determine the financial consequences of the strike, taking account of the impact of strikes lasting less than one day, on the functioning of public services*". However, according to CGT, the Constitutional Council also held that the legislator could not establish a general mechanism for automatic deductions from pay, without taking into account either "*the nature of the various services concerned*" or "*the harmful impact that concerted work stoppages can have on the community* (...)".

41. CGT alleges that the Government, in adopting the position of the Constitutional Council, accepts that the aim of these one-thirtieth deductions is to prevent strikes of less than one day in the civil service. CGT again refers here to the Constitutional Council's decision which held that "*for public service employees other than staff of the state and state bodies of an administrative nature, the legislator must draw up measures designed to prevent repeated short strikes from disrupting the normal functioning of public services, by securing a balance between defending professional interests and safeguarding the general interest, which strike action may jeopardise*".

42. CGT further contends that the only restrictions on the right to strike allowed by the European Social Charter are those that are necessary, in a democratic society, "*for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*" (Article G). And it claims that penalising public servants financially in an attempt to push them towards concerted work stoppages lasting at least one day is an unjustified restriction of the right to strike in view of the aim pursued. CGT does not believe, either, that accounting considerations are a factor justifying a restriction of the right to strike permissible under Article G of the Charter.

43. CGT also argues that the one-thirtieth deduction has the effect of infringing the right of public servants to strike, because in addition to being disproportionate to the length of strike action, it will inevitably deter workers from striking for fear of suffering an excessively high financial penalty. In addition, existing case law holds that where there is non-performance of service over several successive days, deductions must be "*equivalent to as many thirtieths as there were days between the first day inclusive and the last day inclusive on which no service was rendered, even if, for whatever reason, no service was required of the individual concerned on some of those days*". According to CGT, a strike that straddles a weekend, a public holiday or a part-time day may give rise to a salary deduction for those days. This, CGT claims, is also detrimental to strikers who work irregular hours or nights.

44. In light of the above, CGT considers that application of the indivisible thirtieths rule to strikes lasting less than one day in the state civil service and the national public services interferes with their exercise of the right to strike and is an infringement of Article 6§4 of the Charter.

2. The respondent Government

45. The Government, whilst cognisant of the Committee's interpretation of Article 6§4 of the Charter, believes that French law on the indivisible thirtieth rule is compatible with Article 6§4 of the Charter and proposes to prove this using two arguments: (1) the indivisible thirtieth rule is merely an accounting measure which derives from the principle of payment for service rendered and is not specific to the strike context, and (2) its effect is limited since it applies only to staff of the state and state bodies of an administrative nature.

46. With regard to the first argument, the Government states that Article 1 of Decree No. 62-765 of 8 July 1962 lays down the indivisible thirtieth rule, whereby the civil servant's monthly pay, equal to one twelfth of annual pay, is divisible by thirty, each month being deemed to have thirty days and each thirtieth being indivisible.

47. The Government states that non-performance of service gives rise to a pay deduction, except where an official text expressly authorises a public servant not to work (for example, when annual leave is taken) (in accordance with Article L711-3 of the General Civil Service Code, since 1 March 2022).

48. The Government also points out that the indivisible thirtieth rule is favourable to staff when they strike for several whole days. It explains, referring to *Conseil d'État* Judgment No. 351229 of 4 December 2013, that in any given month counted effectively as 30 days, namely four weeks plus two days worked, the time actually worked by the employees is 22 days. If they are on strike for two days, the deduction should, if exactly proportionate to the period of non-performance of service, amount to 2/22ths of the salary. But application of the indivisible thirtieth rule means that the deduction will be 2/30ths. According to the Government, the difference arises from the fact that part of the pay for the days worked is notionally spread over the days when no service is required of the civil servant.

49. The Government rejects CGT's allegation that this deduction is tantamount to a disciplinary financial penalty for strike action, and points to the Constitutional Council's decision and the consistent case law of the *Conseil d'État* on this issue which have deemed this rule to be an accounting measure and independent of the right to strike.

50. Regarding the second argument, the Government points to the ruling of the Constitutional Council in its decision No. 87-230 of 28 July 1987 that the indivisible thirtieth rule applies only to staff of the state and state bodies of an administrative nature. Consequently, as of 1987, civil servants employed by local and regional authorities, the state hospital service and public bodies of an industrial and commercial nature are not subject to the indivisible thirtieth rule.

51. Regarding staff of local and regional authorities and their public bodies, the Government states that these are not covered by any official text following the aforementioned Constitutional Council's decision. In the view of the *Conseil d'État*, the supreme court for administrative justice, "*it follows from paragraph 1 of Article 4 of the Law of 29 July 1961, which refers to salaries payable under Article 22 of the Order of 4 February 1959, that it is applicable only to civil servants of the state and its public bodies*", and that "*in the absence of legislative provisions applicable to these civil servants that lay down rules for this deduction, the amount of it must be proportionate to the length of the strike*".

52. In the case of staff of the state hospital service, the deduction from pay for non-performance of service must be strictly proportionate to the length of that non-performance.

53. In the case of staff of public or private enterprises, entities and bodies responsible for managing a public service, the Government states that these are subject to a semi-proportionate system established by L 2512-5 of the Labour Code: where the length of the strike does not exceed one hour, the deduction is 1/160th of monthly salary; where it is longer than an hour but shorter than half a day the deduction is 1/50th of monthly salary; and where it is between half a day and a full day the deduction is 1/30th of monthly salary.

54. In light of the above the Government considers that French law on the indivisible thirtieth rule constitutes neither a financial nor a disciplinary penalty for staff of the state and state bodies of an administrative nature and that it cannot, therefore, be seen as unjustifiably restricting the right to strike.

B – Assessment of the Committee

55. The Committee firstly observes that the right to strike is intrinsically linked to the right to collective bargaining, as it represents a means to achieve a favourable result from a bargaining process. Consequently, restrictions on this right may be acceptable only under specific conditions. This also means that sanctions and other negative consequences, such as termination of employment contracts or excessive deductions from pay imposed on workers participating in lawful strikes are incompatible with the requirements of Article 6§4 of the Charter.

56. The Committee further recalls that any restrictions on the right to strike must comply with the terms of Article G of the Charter, namely that they must be prescribed by law, serve a legitimate purpose and be necessary in a democratic society. This also applies to restrictions of a procedural nature.

57. The Committee finally recalls that it has already ruled on the issue raised by the present complaint – deductions from pay of strikers (the indivisible thirtieth rule) who are staff of the state and state bodies of an administrative nature – in the context of the

procedure of examination of national reports. In its Conclusions XV-1 (2000), 2002, 2004, 2006 and 2010, the Committee found that the situation in France was not in conformity with Article 6§4 on the ground that deductions from the pay of striking state employees were not always proportional to the duration of the strike.

58. With respect to the legislative basis for the indivisible thirtieth rule, the Committee notes of Ordinance No. 2021-1574 of 24 November 2021, which established the legislative part of the General Civil Service Code entered into force on 1 March 2022. This Code replaces, in particular, the laws on the statutes of the public service: Law No. 83-634 of 13 July 1983 laying down the rights and obligations of civil servants; Law No. 84-16 of 11 January 1984 on statutory provisions relating to the civil service of the state, etc. Under Articles 3 and 4 of the said Ordinance, the provisions of the aforementioned laws are repealed and replaced by references to the corresponding provisions in the Code in its version annexed to the Ordinance. In view of this, and recalling that within the scope of the collective complaints procedure it bases its assessment of conformity with the Charter on the domestic law and practice applicable on the date of the decision on the merits of the complaint (European Council of Police Trade Unions (CESP) v. France, Complaint No. 57/2009, decision on the merits of 1 December 2010, §52) the Committee decides to refer to the provisions of the General Civil Service Code in its assessment of the situation.

59. The Committee notes that, in accordance with Article L711-1 of the General Civil Service Code, *"the remuneration of public officials due for service rendered shall be paid in accordance with the procedures laid down in the public accounting rules"* (see also Article 4, paragraph 1, of the Finance (Amendment) Law No. 61-825 of 29 July 1961). It also notes that Article L712-1 sets out the components of the remuneration (after service rendered) of a civil servant, namely: basic salary, residence allowance, family allowance as well as bonuses and allowances established by a legislative or regulatory provision. Article L711-3, paragraph 1, specifies that the *"elements allocated as family benefits or sums allocated as reimbursement of expenses"* are not taken into account for the calculation of the amount of the deduction for non-performance of service.

60. The Committee further notes that Article L711-2 of the General Civil Service Code, which entered into force on 1 March 2022, defines the cases in which "*No service shall be deemed to have been rendered*" (see also Article 4, paragraphs 3-5, of the Finance (Amendment) Law No. 61-825 of 29 July 1961).

61. In addition, the Committee notes that Article L711-3, in its first paragraph, provides that *"(n)on-performance of service for any part of a day shall give rise to a deduction which shall be equal to the share of salary that is indivisible under the regulations provided for in Article L. 711-1 (…)"*. Conversely, paragraph two of the same Article states that *"(t)he provisions of the present Article shall apply only to public officials declared as strikers".*

62. In view of the foregoing, the Committee considers that the arguments put forward by the Government seeking to demonstrate that the indivisible thirtieth rule is a neutral accounting rule (and not a disciplinary measure) which derives from the principle of remuneration after service has been rendered and which is not limited to the case of a strike, are not supported by the legislation in force since 1 March 2022.

The Committee notes in particular that paragraph 2 of the aforementioned Article L711-3 restricts the application of the rule of deduction for non-performance of service exclusively to staff of the state and state bodies of an administrative nature who are declared to be strikers. Consequently, the Committee considers that, following the legislative changes, the fact triggering the deduction is precisely the strike and not the non-performance of service as such, contrary to what the Government stated in its submissions.

63. In addition, as noted above (§57), the Committee in accordance with its longstanding interpretation considers that under Article 6§4 of the Charter deductions from the pay of striking workers must be proportionate to the length of the strike. In other words, deductions from strikers' pay cannot be greater than the amount of pay that would normally have been earned during the strike period.

64. In taking this view, the Committee also refers to the Report of the ILO Committee of Experts on the Application of Conventions and Recommendations (2003) where the question of deductions from pay for strike days was mentioned. In this report, the committee recalls that, "although such deductions in principle give rise to no objection, deductions which are higher than the amount corresponding to the period of the strike may be deemed punitive in character (…)".

65. While the indivisible thirtieth rule is provided for by legislation and pursues the legitimate objective in part of ensuring the continuity of public services and in part of rationalising and simplifying public accounting procedures, in its effect the rule amounts to a restriction of a fundamental right - the right to strike guaranteed by Article 6§4 - which has not been shown to be necessary in a democratic society and thus goes beyond what is permitted under Article G of the Charter. In this respect, the Committee does not consider it demonstrated neither that an adequate continuity of the public services cannot be achieved by other means nor that the practical difficulties inherent in documenting a work stoppage and measuring the length of a strike are such as to prevent the application of proportionate deductions as required by Article 6§4.

66. On this basis, the Committee considers that the indivisible thirtieth rule allows a disproportionate deduction from the pay of striking workers and in effect has a punitive nature which is not compatible with the exercise of the right to strike.

67. The Committee consequently holds that the indivisible thirtieth rule applicable to strikes by staff of the state and state bodies of an administrative nature constitutes a violation of Article 6§4 of the Charter.

II. ALLEGED VIOLATION OF ARTICLE E IN CONJUNCTION WITH ARTICLE 6§4 OF THE CHARTER

68. Article E of the Charter reads as follows:

> **Article E – Non-discrimination**
>
> "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

A – Arguments of the parties

1. The complainant organisation

69. CGT addresses the Government's argument (put forward in its 13th national report (2013) on the application of the European Social Charter) that the application of the indivisible thirtieth rule to all cases of non-performance of work, including due to strike action, reflects a non-discriminatory approach. CGT rejects the Government's argument and emphasises that the issue at stake is not whether the application of the indivisible thirtieth rule to cases of non-performance of work other than strikes is legitimate or not. On the contrary, CGT considers that the issue to be resolved is whether the restriction on the right to strike resulting from the rule is justified and proportionate.

70. CGT concludes that the simple fact that the indivisible thirtieth rule applies to other cases than strikes cannot by itself justify the restriction on the right to strike.

71. CGT also points out that the indivisible thirtieth rule does not apply to all categories of public sector staff, but makes no specific allegation in this respect.

2. The respondent Government

72. The Government firstly states that non-performance of work due to different causes is treated in the same way out of deference to the principle of non-discrimination among staff and thus the indivisible thirtieth rule is applied automatically to any non-performance of work, regardless of the cause, and is in this sense a general rule. The Government emphasises that treating different causes of non-performance of work differently might breach the principle of non-discrimination.

73. Secondly, the Government refers to the decision of the Constitutional Council of 28 July 1987, which limits the application of the indivisible thirtieth rule to staff of the state and its state administrative bodies while exempting other categories of public sector staff. According to the Government, the Constitutional Council took into account a number of factors in reaching its decision:

- the public accounting rules for payment of staff salaries, notably the public accounting rule of the indivisible thirtieth;
- the practical difficulties inherent in documenting a work stoppage and measuring the length of a strike (for example, a system of limited flat-rate financial deductions for strikes);
- the impact of strikes lasting less than one day on the functioning of public services (for example, a system of deductions more than proportionate to the length of the strike, to prevent “go-slows” and the creation of a “stop-and-go” State).

74. In conclusion, the Government states that the decision of the Constitutional Council validating the difference in treatment of different categories of staff strikes a balance between, on the one hand, the exercise of the right to strike and, on the other hand, the need to ensure the continuity of public services provided by the State and its administrative institutions. In other words, by considering that the character of the public services of the State and its administrative institutions justifies that different rules apply, the Constitutional Council adapted the indivisible thirtieth rule to the diversity of the challenges and issues facing the different public services and thus ensured a necessary balance between occupational interests and the general/public interest depending on the type of “community” (*collectivité*) in which the strike takes place.

B – Assessment of the Committee

75. The Committee recalls that in order for an issue to arise under Article E there must be a difference in the treatment of persons in similar or comparable, but not necessarily identical, situations. The Committee also reiterates that in the enjoyment of the rights and freedoms guaranteed by the Charter, Article E affords protection against a difference in treatment of persons in comparable situations, except where there is an objective and reasonable justification (see e.g., Central Union for Child Welfare (CUCW) v. Finland, Complaint No. 139/2016, decision on the merits of 11 September 2019, §66).

76. In the instant case, the Committee considers that the sole question which poses itself from the angle of Article E is whether the difference of treatment of staff of the state and state bodies of an administrative nature when it comes to the application of the indivisible thirtieth rule in case of strike action compared with other public sector staff, such as staff of public or private enterprises, entities and bodies responsible for managing a public service, civil servants employed by local and regional authorities and staff of the state hospital service, has an objective and reasonable justification.

77. The question of whether the indivisible thirtieth rule is applied equally to all forms/causes of non-performance of service (and since the entry into force of the General Civil Service Code on 1 March 2022 it is applied only to non-performance of service by declared strikers) is examined above under Article 6§4 taken alone and does not raise any separate issue under Article E.

78. The Committee takes due note of the Government's argument, relying on the terms of the decision of the Constitutional Council of 28 July 1987, according to which the difference of treatment of different categories of public sector staff is justified by the different character of the public services involved and in particular by the general interest in ensuring the continuity of certain public services. In the Government's view it is in the general interest to disincentivise repetitive strikes of short duration so as to avoid creating a "stop-and-go" State as referred to by the Constitutional Council.

79. However, the Committee considers that the Government's argument is too sweeping and general. It does not convincingly demonstrate what it is in the nature of the public services provided by staff of the state and state bodies of an administrative nature that makes it necessary to disincentivise short strikes of less than one day and conversely what it is in the nature of the public services provided by other public sector staff, such as staff of public or private enterprises, entities and bodies responsible for managing a public service, civil servants employed by local and regional authorities and staff of the state hospital service that obviates the need for any such disincentives in their respect.

80. Furthermore, it does not consider it demonstrated that the practical difficulties inherent in documenting a work stoppage and measuring the length of a strike are any different for staff of the state and state bodies of an administrative nature than for other public sector staff, such as staff of public or private enterprises, entities and bodies responsible for managing a public service, civil servants employed by local and regional authorities and staff of the state hospital service.

81. Consequently, the Committee considers that the difference in treatment between the different categories of staff with respect to the application of the indivisible thirtieth rule in case of strike action has not been shown to have an objective and reasonable justification and it therefore holds that there is a violation of Article E in conjunction with Article 6§4 of the Charter.

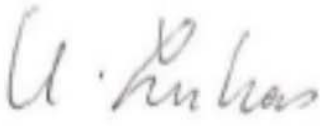
CONCLUSION

For these reasons the Committee concludes:

- unanimously, that there is a violation of Article 6§4 of the Charter;

- by 7 votes to 6, that there is a violation of Article E in conjunction with Article 6§4 of the Charter.

Yusuf BALCI
Rapporteur



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