EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

6 September 2017

Case Document No. 1

***Confédération générale du travail* (CGT) v. France**
Complaint No.155/2017

COMPLAINT

Registered at the Secretariat on 28 July 2017

Collective complaint brought by the CGT against the Government of France, with regard to Law No. 87-588 of 30 July 1987 introducing various social measures (Official Journal of the French Republic of 31 July 1987) for the violation of Article 6§4 of the revised European Social Charter ("the Charter")

I. General background to the complaint

I-A The applicant trade union's entitlement to lodge a complaint

1. The Confédération Générale du Travail (the "CGT"), a representative trade union affiliated with the European Trade Union Confederation, is entitled to lodge a collective complaint under Article 1c of the Additional Protocol to the Charter of 9 November 1995, ratified by France. In accordance with Article 38 of the CGT's statutes, the complaint is presented by its Secretary General.

I-B Summary of the complaint

2. The "indivisible thirtieth" rule, which applies to strikes lasting less than one day in the state civil service and the national public services, constitutes a violation of the Charter.

3. The Charter must be implemented by the states, and all individuals, including salaried workers, must be able to take full advantage of it. The decisions of the European Committee of Social Rights must induce governments to amend their legislation and practice if they are found not to be in conformity with the Charter.

4. In its conclusions of 2004 and 2010 on the reports submitted by France, the European Committee of Social Rights ("the Committee") highlighted the persistent non-conformity of French legislation. The Sub-Committee of the Governmental Social Committee of the Council of Europe did not adopt an opinion but, in its reports of 2004 and 2012, it insisted that the French Government should take all the necessary measures to bring the situation into conformity with Article 6§4 of the Charter. Despite the various findings of non-conformity with Article 64 of the Charter of the "indivisible thirtieth" rule in connection with strikes in the civil service, which is the subject of this complaint, there has still been no change in the French law.

Consequently, the CGT requests:

- that the Committee should find a violation by the French Government of the right to strike established by Article 6§4 of the Charter;
- that the French Government should receive a Recommendation from the Committee of Ministers of the Council of Europe calling on it to bring its legislation into

conformity with the Charter.

II. Applicable rules

II-The Charter

5. The articles of the Charter that apply in the context of this complaint are as follows:

Article 6§4 – Right to strike:

"With a view to ensuring the effective exercise of the right to bargain collectively, the Parties … recognise 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."

The Charter recognises that this right is not absolute and that it may be subject to **restrictions**. The latter, however, are strictly defined.

Article G – Restrictions:

"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**. 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."

II-B National legislation

6. **French Law No. 82-889 of 19 October 1982, now repealed (Appendix 1), provided as follows:**

Article 1

"Salary owed after service is rendered, in accordance with Article 22, paragraph 1, of Order No. 59-244 of 4 February 1959 on general civil service regulations, shall be paid according to the procedures laid down in the regulations on public accounting. **If service is not rendered for any part of a day, a deduction shall be made which shall be equal to the share of salary considered indivisible** under the regulations referred to in the previous paragraph.

The provisions of this article shall apply to the **staff of all authorities or services receiving a monthly wage or 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 the monthly salary;
- where it exceeds an hour but not half a day, to a deduction equal to one-fiftieth of the monthly salary;
- where it exceeds half a day but not a full day, to a deduction equal to a thirtieth of the monthly salary."

Article 3

"Article L.521-6 [now Article L. 2512-5] of the Labour Code shall be replaced by 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 concerted work stoppage shall entail a deduction from salary or wages and any supplements thereto other than those for family burdens. Deductions shall be made according to the lengths of absence set out in Article 2 of the aforementioned law."

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."

7. **Law No. 87-588 of 30 July 1987, still in force (Appendix 2), provides:**

Law No. 87-588, promulgated on 30 July 1987, shall repeal Law No. 82-889 of 19 October 1982.

Article 89 of Law No. 87-588 of 30 July 1987 provides:

"I. Articles 1, 2, 5 and 6 of Law No. 82-889 of 19 October 1982 on deductions for non-performance of service by employees of the state, the local and regional authorities and the 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);
- Law No. 77-826 of 22 July 1977, which Articles 5 and 6 of Law No. 82-889 of 19 October 1982, cited above, had repealed."

Article 4 of the re-enacted Finance (Amendment) Law for 1961 (No. 61-825 of 29 July 1961) (Appendix 3), referred to by Article 89 of Law No. 87-588, provides:

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

If service is not rendered for any part of a day, a deduction shall be made which shall be equal to the share of salary considered indivisible under the regulations referred to in the previous paragraph.

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

This is known as the **"indivisible thirtieth" rule, whereby non-performance of service by workers gives rise, irrespective of the length thereof, to deduction of a thirtieth of their salary or wage**, which equates to the deduction of the pay for a full day's work.

The single article of Law No. 77-826 of 22 July 1977 (Appendix 4), referred to by Article 89 of Law No. 87-588 , provides:

"The following paragraph shall be inserted between the current second and third paragraphs of Article 4 of the Finance (Amendment) Law for 1961:

'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, although carrying out his/her hours of service, does not fulfil part of the obligations connected with his/her post, whose nature and procedural aspects shall be determined by the relevant authority within the framework of laws and regulations.

This law shall be executed as a law of the state".

III. The infringement of the right to strike by the legislation on the indivisible thirtieth

8. The application of the rule that an "indivisible thirtieth" must be deducted from the salaries of state civil servants and national public service employees for strikes of less than one day regardless of their actual length **infringes the right to collective action established by Article 6§4 of the Charter.**

III-A Differing situations according to the public service worker concerned

9. Civil servants are subject to differing regulations on the right to strike. There is therefore a difference between the regulations that apply to the following categories:

- employees of the state and other state bodies of an administrative nature;
- staff of public or private undertakings, bodies or establishments which are tasked with managing a public service and staff of undertakings with special status;
- local and regional government officials;
- state hospital staff.

10. **Staff of the state and state public bodies of an administrative nature are subject to the rules of the 1987 law under which deductions are made in accordance with the "indivisible thirtieth" rule for any non-performance of service, including in the case of a strike.**

11. Other public sector staff, however, are covered by the provisions of Law No. 82-889 of 1982, under which rules other than the "indivisible thirtieth" apply to deductions from wages in the event of a strike.

The staff concerned are those of **public or private undertakings, bodies or establishments which are tasked with managing a public service and staff of undertakings with special status**.

Before it was enacted, the draft of Law No. 87-588 of 1987 was subject to a constitutional review. In decision No. 87-230 of 28 July 1987 (Appendix 5) the French Constitutional Council ruled on the compliance of the draft law with the French Constitution.

In its decision, the Constitutional Council held that the repeal of Articles 1, 2, 5 and 6 of the Law of 19 October 1982 by the Law of 1987 was compatible with the Constitution. On the other hand, the repeal of Article 3 of the 1982 Law (providing for a derogation from the application of the "indivisible thirtieth" rule in the event of a concerted work stoppage for staff other than those of the state and state bodies of an administrative nature) was found to be unconstitutional. The ground given for this was that the legislator should not set up a general mechanism for

automatic deductions from pay which failed to take account of the nature of the various services concerned or the harmful impact on the community which such concerted work stoppages could entail.

According to the Constitutional Council, these staff were therefore still subject to Articles 1, 2 and 3 (Article 3 now having been codified in the form of Article L. 2512-5 of the Labour Code) of the 1982 Law, which provided that non-performance of service arising from a concerted work stoppage **entailed a deduction which should be more or less proportionate to the length of the work stoppage.**

12. Similarly, **local and regional government officials are not subject to the indivisible thirtieth rule,** as a result of the same Constitutional Council decision.

However, according to a decision of the *Conseil d'Etat* (No. 146119 of 27 April 1994 (Appendix 6,) such officials are not covered by Article 3 of the 1982 Law (current Article L. 2512-5 of the Labour Code) either.

Striking local and regional government officials therefore are subject to a deduction that is strictly proportionate to their absence (*Conseil d'Etat*, 9 October 2009, No. 284278, *Département* of Aveyron Fire and Rescue Service; Appendix 7; Versailles Administrative Court, No. 882386 of 22 December 1988, Jadot v. Association of the New District of Evry).

13. In the same way, **state hospital staff** are subject neither to the indivisible thirtieth rule nor to Article L. 2512-5 of the Labour Code. Consequently, striking staff in this category **are subject to a deduction that is strictly proportionate to their absence** (*Conseil d'Etat*, 27 April 1994, cited above; *Conseil d'Etat*, 9 October 2009, cited above; Nancy Administrative Court, 25 April 1995, Ostermann v. Nancy Hospital (CHR)).

III-B The lack of any justification for the indivisible thirtieth rule

14. The indivisible thirtieth rule applied to non-performance of service arising from a concerted work stoppage is a restriction on the right to strike (i). The justifications given for this restriction are unfounded and do not fall within the scope of those authorised by the Charter (ii and iii). This rule therefore has the aim and the effect of unjustifiably infringing the right to strike, thus breaching the Charter (iv).

III.B.(i) A restriction on the right to strike

15. It seems quite obvious that the indivisible thirtieth rule infringes civil servants' right to strike as the resultant deduction from pay is disproportionate to the actual length of the work stoppage involved. If a worker stops work for only an hour, his/her pay will still be cut by one thirtieth of his/her monthly pay. This may have the effect of discouraging workers from striking. Such deductions seem somewhat akin to a disciplinary fine for striking, despite the fact that this is prohibited by French law both for public and for private sector workers.

III.B.(ii) The justification based on the constraints of public accounting

16. When the Constitutional Council validated the deduction of a thirtieth of the monthly wage of striking state civil servants, it asserted that this rule was merely an "accounting" measure (Constitutional Council 28 July 1987, cited above). The argument was that the differing treatment of public-sector workers was justified by constraints connected with budget management and the determination of salaries. This was said to stem from Decree No. 62-765 of 8 July 1962 (Appendix 8), under which every month, however many days it actually comprises, counts for thirty days, and each thirtieth is indivisible. 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, however long he/she is absent for.

This is also the argument put forward by the French Government in its 13th report to the ECSR in 2013.

17. In truth, these accounting rules do not prevent the state at all from deducting a share of pay that is proportionate to the actual length of the work stoppage. The proof is that some civil servants (state hospital staff and local and regional government officials) are also subject to the indivisible-thirtieth accounting rules established by the Decree of 1962, but when they strike, the amount deducted from their pay is strictly proportionate to the length of the strike.

The grounds which prompted the French state to establish a deduction of one-thirtieth in the event of strikes cannot therefore be said to have any connection with accounting constraints.

18. Furthermore, the Charter only allows restrictions to the right to strike which 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).

Justifications connected with accounting requirements do not fall into any of these categories.

19. Lastly, the French Government cannot reasonably claim, as it does in its report of 2013 to the ECSR, that the indivisible thirtieth rule applied to non-performance of service resulting from strikes reflects a desire not to discriminate against employees on the ground of the reason for their absence. Thus, every case of non-performance of service, whatever the reason, results in the deduction of one thirtieth of the employee's monthly salary whenever such non-performance lasts for one day or less, and this is claimed to be non-discriminatory.

Clearly, this argument cannot be accepted. It is not our task here to ascertain whether the other cases in which a thirtieth of the monthly salary are deducted are lawful. What we must determine is whether the infringement of the right to strike is justified and proportionate. The mere fact that this deduction is made in other cases cannot in itself justify the infringement of the exercise of the right to strike.

III.B.(iii) The justification based on the harmful impact on the community of strikes lasting less than one day

20. The Constitutional Council maintained that although it was for legislation "to determine the financial consequences of strikes by taking account of the impact of strikes of less than one day on the functioning of public services", in the case of public sector workers other than state civil servants the law had gone too far. The law could not legitimately establish a general mechanism for automatic deductions from pay which took into account **neither "the nature of the various services concerned" nor "the harmful impact that concerted work stoppages can have on the community"** (Constitutional Council, 28 July 1987, cited above).

This argument is highly questionable. What it actually means is that strikes by state civil servants, regardless of the type of services they provide and whatever the scale of the impact of the strike for the community on the functioning of the public service, automatically justify a deduction of a thirtieth of strikers' monthly pay.

This argument was also taken up by the French Government in its 9th report to the ECSR in 2010: "Furthermore, the right to strike is not an absolute right. The legislator, who is authorised to organise it under French law, has had to reconcile it with other principles of the same value such as **the principle of continuity of service**".

The Constitutional Council and the French Government do accept in this case that the aim of these deductions is to prevent strikes of less than one day in the civil service. "Is this reminder [by the Constitutional Council of the existence of the right of the legislator to restrict the right to strike] not fundamentally an indirect recognition or veiled admission that deductions are, in sum, only one and perhaps not the least, of these restrictions".[1]

Secondly, public sector workers other than state civil servants work together like the latter to ensure the continuity

[1] Henri-Michel Crucis, "Les retenues de traitement pour fait de grève dans la fonction publique", *RDP*, 1988, p. 1315

of the public service entrusted to them. Their absence therefore also has an impact on users. Why would strikes by state civil servants necessarily have a more harmful effect on the community than those of other public-sector workers?

This has moreover been highlighted by some authors: "who can believe that only public services run by the state and state bodies – and, moreover, all of them – are of a nature that justifies differentiated treatment? There are undoubtedly state public services in which short strikes have only a minor harmful impact on the community. And conversely, there are local public services and services managed by public undertakings which are so important that they cannot be interrupted for one instant … without major damage being caused".[2]

21. Furthermore, the only restrictions to the right to strike allowed by the 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).

Yet punishing state officials financially to try to encourage them to arrange concerted work stoppages that last at least one day is an unjustified restriction on the right to strike in view of the aim pursued. The Constitutional Council does not offer up any tangible evidence that would prove that strikes of less than one day do more to undermine the continuity of public service than strikes of more than one day. Nor does it make any distinction between the various public services to which state officials are attached or between the various functions they perform. This argument therefore is unfounded.

In this connection, it should be stressed that the state has many means of ensuring continuity of public service and planning for strikes, ranging from compulsory prior notice, through statements of intention to strike in some sectors, to requisition.

III.B.(iv) A measure taken with the aim and the effect of unjustifiably undermining civil servants' right to strike

22. In truth, these rules were indeed introduced with the aim – and have the effect – of stopping strikes in the public sector. The law-makers' intentions were very clearly reflected in the parliamentary debates of 11 June 1987[3] (Appendix 9) on the Law of 1987 which introduced the "thirtieth" rule for all non-performance of service, regardless of its length. A member of the National Assembly, Michel Pelchat, defended a motion for an amendment, whose aim was to apply this rule to air traffic controllers, in the following terms: "For nearly two months now, a minority of air traffic controllers – about 900 out of 2 600 – have been resorting to work stoppages which, although very short, have still been seriously disrupting the activities of airline companies, and hence the economic life of the country.

Wage deductions have been tiny compared to the damage inflicted on the national economy. They have all been less than or equal to 200 francs per month, which is, I think you will agree, not exactly a very strong deterrent. …

Bearing in mind the small wage deductions which the strikers have had to bear, it is only if they become fully aware of their duties and the national interest that this strike might be prevented from continuing. The facts show that unfortunately there is no such recognition of the public interest! **We should therefore be increasing the deductions from these air traffic controllers' wages when they go on strike**."

To avoid unequal treatment of civil service staff but still with a view to limiting strikes, it was not, however, Mr Pelchat's amendment which was adopted, but Mr Lamassoure's. This amendment introduced the rule of the indivisible thirtieth for all striking civil servants, not just traffic controllers. "Article 2 of Law No. 82-889 of 19 October 1982 on deductions for non-performance of service by staff of the state, the local and regional authorities and the public services shall be repealed".

[2] Fabrice Melleray, "Les retenues pécuniaires pour fait de grève dans les services publics", *AJDA*, No. 31, 22 September 2003, p. 1650
[3] Official Gazette of the National Assembly, 1987, p. 2290

23. The Civil Service Minister, Hervé de Charrette, supported the Lamassoure amendment, stating that rules establishing a proportionate deduction for strikes resulted in "**inequality between the loss incurred by the striking employee and the damage incurred both by the public service and the users** – damage which, moreover, it is generally impossible to put a figure on because it is very difficult to gauge all the adverse consequences for users.

Consequently, such measures, if I may be so bold, encourage irresponsibility vis-à-vis an act which should by its very nature be a responsible one, namely exercising the right to strike".

What this shows is that the aim of deducting a thirtieth of employee's wages for absences resulting from concerted work stoppages was to penalise staff to a degree that was comparable to the damage suffered by public service users. The rule had nothing to do with public accounting rules because prior to this, wage deductions for strikes had been proportionate to the length of the absence, showing that public accounting rules are no reason at all not to make proportionate deductions.

24. This desire to punish striking civil servants was already present in 1960. "By signing the Decree of 19 May 1961 [which introduced a deduction of one-thirtieth in the event of a strike], the Government was attending to the most urgent matters first. As Minister of Post and Telecommunications Bokanovski said to the Senate at the 20 July sitting, the goal was to put an end to short rotating strikes that were alleged to be illicit. These strikes, said the Minister, were the direct consequence of the Conseil d'Etat's judgment [Conseil d'Etat, 22 April 1960, PTT v. Boucher, judgment which prohibited deduction of an entire day's pay for an absence of a shorter length]".[4]

25. However, whatever the goal of the law, the fact remains that **the <u>effect</u> of the deduction of one thirtieth of the monthly wage is to infringe public employees' right to strike**. A deduction that is disproportionate to the length of the strike will only prompt staff not to stop work so as not to undergo an excessive financial penalty.

This becomes especially clear in cases of intermittent or night work. For instance, an employee who goes on strike from 0 hours on day n and resumes work at 0 hours on day n+1 will have two-thirtieths of his/her monthly wage deducted[5] (Appendix 10). Although he/she has stopped work for only 24 hours she will lose two days' wages. One author explains it in these terms, "In other words, a strike lasting only one working day in total will result in an identical deduction to that of an employee who stops work at 6 a.m. on day n-1 and resumes at 8 p.m. on day n+1."[6]

26. Adopting an accounting-based approach to strikes has another consequence when strikes last a long time. There is case-law (Conseil d'Etat, judgment No. 03918 of 7 July 1978, Omont; Appendix 11) which states that after several successive days of a strike, deductions must be "equivalent to as many thirtieths as the number of days between the first day inclusive and the last day inclusive on which no service has been rendered even if, for whatever reason, the employee concerned has no service to perform on some of these days". In other words, if a strike straddles a weekend, a public holiday or a part-time day, the wages for these days may be deducted.[7]

IV. Prior findings of an infringement of the right to strike

27. The European Committee of Social Rights has already indicated to France in its Conclusions of 2004 and 2010

[4] Renée Bourot, "Chronique de la Fonction Publique, L'utilisation d'un Règlement centenaire de Comptabilité Publique contre le Droit de Grève des Fonctionnaires", *Le Droit Ouvrier*, 1961, p. 355

[5] Pursuant to the case-law of the Conseil d'Etat (CE Ass. No. 10248, 15 February 1980, Minister of Post and Telecommunications v. Faure).

[6] Fabrice Melleray, "Les retenues pécuniaires pour fait de grève dans les services publics", *AJDA*, No. 31, 22 September 2003, p.1650

[7] André Narritsens, CGT Social History Institute, *Prélèvements de grève et trentième indivisible*, 2003

that the indivisible thirtieth rule applied to strikes infringes the right to collective action enshrined in Article 6§4 of the Charter.

28. This rule's incompatibility with the Charter was explicitly acknowledged in the report by the Foreign Affairs Committee of the French Senate presented by Senator André Boyer during the 1998/99 sitting and appended to the minutes of 20 January 1999 (Appendix 12). In this report, whose purpose was to support the approval of the revised European Social Charter and the Additional Protocol to the revised Charter, there is a part under section B, entitled "A certain influence on French legislation", headed "Cases of clear contradiction".

In this part of the report dealing with cases of clear contradiction between existing French legislation and the revised Charter, the following is stated: "Right to collective action (Article 6§4) – Deductions from the wages of striking state civil servants are not always proportionate to the length of the strike – As we know, French law provides for a deduction of one-thirtieth of the monthly wage of state civil servants and the employees of other national public services for strikes which may last less than a day."

Despite the fact that in an official report, presented on behalf of the committee of a legislative body in 1999, a "clear contradiction" was highlighted between the disputed provision of the legislation and the text of the Charter, nothing has been done since to bring the French legislation into line with the Charter in this respect.

29. Repeatedly, the European Committee of Social Rights has pinpointed the incompatibilities between French law and the Charter.

It did so firstly in a report of 2004, then again in 2010.

In its conclusions of 2010 on the conformity of French law with the Charter, the European Committee of Social Rights stated as follows: "**The Committee previously found that this [deduction of one thirtieth of the monthly salary] was not in conformity with Article 6§4 of the Revised Charter on the grounds that it might deter an individual from taking part in a strike.** The Committee therefore reiterates its previous finding of non-conformity. **It recalls that according to its case law any deduction from strikers' wages should not exceed the proportion of their wage that would be attributable to the duration of their strike participation**".

30. The French Government is perfectly well aware of this irregularity but has deliberately chosen not to bring the situation into line. This is quite clear from the following reaction, in 2012, by the Minister for the Civil Service, to a request from a member of the National Assembly to amend the French legislation on this subject: "The Conseil d'Etat has consistently found that the articles of the European Social Charter do not have any direct effect on individuals and cannot therefore be properly relied upon in support of submissions whose aim is for an administrative measure to be set aside *(*CE, 2 October 2009, No. 301014; 19 March 2010, No. 317225; 23 December 2010, No. 335738; 24 August 2011, No. 332876). … Accordingly, where service is not rendered, particularly as the result of a strike, deductions from wages equal to a thirtieth of employees' monthly pay shall be made by the authorities, even if the work stoppage lasts only a part of a day. *There are no plans to alter the regulations in this respect.*"[8]

31. As it is a disguised financial penalty imposed on strikers or potential strikers to try to deter them from exercising the right to strike enshrined in the Charter, such an unjustified infringement constitutes a serious violation. This fact must be confirmed and form the subject of a firm recommendation to France, whose successive governments have persisted in preserving legislation whose non-conformity with the Charter has already been noted on several occasions.

[8] Minister's reply of 3 January 2012, question No. 121945