INTERNATIONAL LABOUR OFFICE

Governing Body

325th Session, Geneva, 29 October–12 November 2015

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Institutional Section

INS

FIFTEENTH ITEM ON THE AGENDA

Report of the Director-General

Ninth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), made under article 24 of the ILO Constitution by the General Confederation of Workers (CGT)

I. Introduction

1. In a communication received on 29 October 2014, the General Confederation of Workers (CGT) submitted a representation to the International Labour Office under article 24 of the ILO Constitution, alleging non-observance by Colombia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), and the Collective Bargaining Convention, 1981 (No. 154).

2. Conventions Nos 111, 144 and 154 were ratified by Colombia on 4 March 1969, 9 November 1999 and 8 December 2000 respectively.

3. The provisions of the ILO Constitution concerning the submission of representations are as follows:

Article 24

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

4. The representations procedure is governed by the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, as revised by the Governing Body at its 291st Session (November 2004). In accordance with articles 1 and 2(1) of the above Standing Orders, the Director-General acknowledged receipt of the communications, informed the Government of Colombia thereof and brought the matter before the Officers of the Governing Body.

5. At its 323rd Session (March 2015), the Governing Body, on the recommendation of its Officers, decided that the representation submitted by the CGT was receivable only with respect to Conventions Nos 111 and 144.

6. The Governing Body appointed Mr Carlos Flores (Government member, Bolivarian Republic of Venezuela); Mr Juan Mailhos (Employer member, Uruguay); and Ms Silvana Cappuccio (Worker member, Italy) to serve on the Committee.

7. In a communication received on 9 June 2015, the CGT requested an extension of the deadline set in order to submit additional information. The Committee agreed to the request and granted an extension until 15 July 2015. In a communication dated 3 November 2015, the General Confederation of Workers (CGT) submitted additional information.

8. In a communication received on 17 September 2015, the Government sent its observations.

9. The Committee met and adopted the present report on 4 November 2015.

II. Examination of the representation

The complainant's allegations

10. In its communication of 21 October 2014, received on 29 October 2014, the General Confederation of Workers (CGT) notes that, according to article 17 of Law No. 4 of 1992 on the wage and benefit system for public employees, members of Congress and law enforcement officials, the pensions of former parliamentarians may not be less than 75 per cent of the salary of serving parliamentarians. This provision was declared constitutional by the Constitutional Court in its ruling C-608-99. The complainant adds that, following

adoption of this law, Decree No. 1359 of 1993 was adopted, which ruled that former parliamentarians who had been beneficiaries of the scheme in place before the adoption of Law No. 4 of 1992 would have their pensions readjusted. Furthermore, Decree No. 1293 of 1994 was adopted, which established that the aforementioned readjustment would be capped at 50 per cent of the pension received by a former parliamentarian in 1992. The legitimacy of Decree No. 1293 of 1994 was challenged before the Council of State, and confirmed in a judgment of 29 September 2011. The complainant alleges that this difference in pensions awarded to former parliamentarians constitutes age-based discrimination, in violation of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). The CGT considers that former parliamentarians who began receiving pensions before the 1992 law are entitled to a readjustment of 75 per cent. The CGT argues in support of the above that, between 1994 and 1995, when recalculating the pensions of former parliamentarians who began receiving their pensions before the 1992 law, they were awarded a readjustment of 75 per cent. According to the complainant, this strengthens the right of the pensioners concerned to receive the 75 per cent adjustment, and not 50 per cent.

11. The CGT adds that Legislative Act No. 1 of 2005 established a new pensions system and stipulated that acquired rights must be respected. Despite this, after 2005, the Social Welfare Fund of Congress (FONPRECON) initiated legal action against more than 200 former parliamentarians who had begun receiving pensions before Law No. 4 of 1992 (almost all of whom were over 80 years of age), with a view to reducing their pensions and recovering the sums received exceeding the 50 per cent established by Decree No. 1293 of 1994. According to the CGT, FONPRECON initiated legal proceedings to annul the measures taken by the administration itself, without taking into account the prescription or limitation of the proceedings and without any negotiation whatsoever. The CGT states that the former parliamentarians concerned, who are members of the National Association of Retired Parliamentarians (ANPPE), have initiated *tutela* proceedings (protection of constitutional rights), some of which have been successful. According to the CGT, however, FONPRECON has failed to comply. In its communication dated 23 November 2015, the CGT sent extracts of judicial decisions related to the readjustment of pensions limiting them to a maximum of 25 times the minimum wage pursuant to Legislative Act No. 1 and the decision C-258 of 2013 of the Constitutional Court.

12. Lastly, the CGT adds that the Government of Colombia unilaterally adopted all of the abovementioned measures without allowing pensioners' rights organizations to participate when public policies on pensions were being adopted, which would constitute a violation of Convention No. 144. Furthermore, the CGT states that the Government failed to take into account the conclusions of the Committee on Freedom of Association in case No. 2434 concerning the adoption of Legislative Act No. 1 of 2005 (349th Report of the Committee on Freedom of Association). [1]

[1] In its 349th report, the Committee made the following recommendations with respect to the allegations concerning the limitation of the right to collective bargaining by virtue of the recent adoption of Legislative Act No. 1 of 22 July 2005, which amends article 48 of the Constitution on social security: (i) with regard to agreements concluded prior to the entry into force of the legislation, once again requests the Government to adopt the necessary measures to ensure that collective agreements containing pensions clauses, which are valid beyond 31 July 2010, remain in effect until their expiry date; (ii) with regard to agreements concluded after the entry into force of Legislative Act No. 1, again requests the Government, in view of the particular circumstances of this case and in order to ensure harmonious industrial relations in the country, to hold new in-depth consultations on retirement and pensions, exclusively with social partners, in order to find a solution acceptable to all the parties concerned in accordance with the Conventions on freedom of association and collective bargaining ratified by Colombia, in particular ensuring that the parties involved in collective bargaining can improve the legal provisions on retirement and pension schemes by mutual agreement.

The Government's reply

13. In its communication of 17 September 2015, the Government rejects the allegations of age-based discrimination. It argues that the issue of the pension sum for former parliamentarians who began receiving pensions before 1992 was considered by the Constitutional Court and the Council of State, which found that the difference agreed does not constitute discrimination, since it involves two different groups of pensioners. Law No. 4 of 1992 established a special salary and pension system for members of Congress. Following this framework law, the Government issued the decree regulating Law No. 1359 of 12 July 1993, whose provisions include that senators or representatives of the Chamber will be entitled to a lifelong retirement pension of not less than 75 per cent of the average monthly income of parliamentarians. The same decree provides for the readjustment of the pensions of former parliamentarians who began receiving pensions before Law No. 4 of 1992 came into force. The Government adds that Decree No. 1293 of 1994, meanwhile, amended Decree No. 1359 and established that the readjustment would be made only once, to a value equivalent to 50 per cent of the average pension to which serving parliamentarians are entitled; in other words, 50 per cent of 75 per cent of the income of serving parliamentarians. The Government states that, in ruling C-608 of 1999, the Constitutional Court found that the implementation of a special scheme for members of the legislative branch was legitimate, given their special role.

14. The Government states that some former parliamentarians filed *tutela* proceedings *(acción de amparo)* with the judicial authorities against the implementation of Decree No. 1359, amended by Decree No. 1293. In two of these *tutela* proceedings (T-456 of 1994 and T-463 of 1995), the Constitutional Court's view was that the pension sum readjustment for former parliamentarians who began receiving pensions before the entry into force of Law No. 4 of 1992 should not be awarded in line with Decree No. 1359 of 1993 (50 per cent), but rather 75 per cent of the salary earned by a serving parliamentarian. As a result, FONPRECON unlawfully extended the effect of those *tutela* rulings, which normally only have inter-party effect, to all former parliamentarians who had begun receiving pensions before Law No. 4 of 1992. However, in a jurisprudence unification ruling, the Constitutional Court changed its view on the percentage to be paid, noting that the readjustment should be equivalent to 50 per cent (ruling SU-975 of 2003). The Government cites the ruling of the Constitutional Court, according to which the equality of pensioners is not breached when a subsequent law establishes more favourable benefits for workers who will receive pensions in the future. The Constitutional Court considered that article 17 of Law No. 4 uses the time factor as a criterion in differentiating between two pension schemes within a special pension system for parliamentarians. The Court argued that, stating that whenever legislators make changes to the pension scheme that include benefits for future pensioners those must be extended to persons who are already enjoying their right, so as not to disregard the right to equality, would be tantamount to restricting its work and preventing the pension system from becoming ever more beneficial.

15. The Government further states that the aforementioned court ruling takes into consideration another factor in the situation of pensioners. Under the amendment to the 1991 Constitution, it was established that parliamentarians are required to devote their professional activities exclusively to legislative work, and they are expressly prohibited from holding any other office or engaging in additional employment. Former parliamentarians who began receiving pensions before the 1992 law were not affected by this restriction. The 1992 law addresses this incompatibility. In fact, parliamentary pay was increased to offset not being allowed to perform other duties. The ruling concludes that, given these circumstances, the principle of equality between the two categories of pensioners has not been violated because the establishment of different schemes for different persons under the regulations was based on objective, and not arbitrary, reasons.

16. Furthermore, the Government notes that, in 2005, Legislative Act No. 1 of 2005 was enacted, which reformed the Colombian pension system in order to make it financially sustainable and prevent disproportionate pension benefits being awarded. In the same year, FONPRECON went to the administrative dispute court to seek annulment of the administrative acts unlawfully readjusting the pensions of former parliamentarians who began receiving pensions before Law No. 4 of 1992. The judicial authority ordered the pension sums to be reduced so that they were in compliance with the law. The Government emphasizes that 165 final judgments and the unification of jurisprudence by the Council of State (administrative litigation chamber decision of 13 September 2007, file No. 25000232500020010776 5-01) found that the readjustment of 75 per cent was awarded unlawfully and ordered the reduction of the pension amount to 50 per cent of the average pension to which serving parliamentarians would be entitled in 1994. The Government adds that the *tutela* proceedings filed with the judicial authority by the former parliamentarians were rejected in the Constitutional Court's ruling T-120 of 2012 because it was considered that the *tutela* judge could not limit the administration's power to bring action against its own acts at any time, given that the law empowers it to initiate appropriate proceedings in defence of public interest.

17. The Government adds that the Constitutional Court, in its ruling C-258 of 2013, capped the pensions of parliamentarians at the maximum limit of 25 times the minimum wage. It also provided that pensions obtained through abuse of rights or in contravention of the law should be recalculated by 31 December 2013. Similarly, it provided that, even in cases where the overpayment was not caused by abuse of rights, but which were nevertheless not in compliance with the law, should be recalculated below the cap of 25 times the minimum wage. This recalculation should be made, according to the court decision, respecting due process and taking into account the minimum subsistence figure, without violating the rights of older persons. The Government states that, in any case, until July 2013 many of the pensions in question exceeded 25 times the minimum wage and on average amounted to 18 times the minimum wage. In addition, the measures adopted by FONPRECON were based on existing legislation and on the decisions of the relevant judicial authorities. The Government notes that these measures rule out any violation of Convention No. 111.

18. Lastly, the Government states that there is no causal link between the alleged facts and Convention No. 144, since they are not related to any of the issues referred to in Articles 2 and 5 thereof.

III. Considerations on which the Committee's conclusions are based

19. The conclusions are based on the Committee's review of the complainant's allegations and the observations transmitted by the Government in the present procedure.

The Committee's conclusions

20. The Committee notes that the CGT alleges that the pension scheme applicable to former parliamentarians belonging to the National Association of Retired Parliamentarians (ANPPE) who began receiving pensions before the adoption of Law No. 4 of 1992 is discriminatory on the ground of age, in violation of Convention No. 111. The CGT also alleges that the Government has unilaterally adopted policies on pensions which, in their view, is a violation of Convention No. 144.

21. The Committee notes that, according to the CGT: (i) article 17 of Law No. 4 of 1992 established that, following its adoption, the pensions of former parliamentarians should not

be less than 75 per cent of the salaries of serving parliamentarians; (ii) Decree No. 1359 of 1993 provided for the readjustment of the pensions of former parliamentarians that had begun receiving pensions before the entry into force of Law No. 4 of 1992; (iii) Decree No. 1293 of 1994 established that the amount of such readjustment should be 50 per cent of the pensioners' retirement pensions pursuant to Law No. 4 of 1992; (iv) however, between 1994 and 1995, the administrative authority readjusted the pensions in question on the basis of 75 per cent of the salary of serving parliamentarians; (v) henceforth, according to the CGT, former parliamentarians had an acquired right to receive pensions calculated on the basis of 75 per cent; (vi) despite this, the Social Welfare Fund of Congress (FONPRECON) initiated legal proceedings to reduce the pensions of former parliamentarians who began receiving pensions before the entry into force of Law No. 4 of 1992, and sued the pensioners who had benefited with a view to recovering the sums overpaid; and (vii) the Government has failed to respect the acquired rights as established in Legislative Act No. 1 of 2005, or to take into consideration the conclusions and recommendations of the Committee on Freedom of Association in case No. 2434 relating to the limitation of the right of collective bargaining on pensions following the adoption of the aforementioned legislative act.

22. The Committee notes that, in response to the allegations, the Government: (i) refutes that the scheme established by the legislation is discriminatory on the ground of age; (ii) argues that the difference in treatment is due, first, to there being two groups of pensioners covered by different pension schemes and, second, objectively, to the fact that the working conditions of parliamentarians had been amended between one scheme and another; (iii) the 1991 Constitution established an incompatibility with respect to parliamentarians' functions, who thereafter were not allowed to perform other duties or hold another office alongside their parliamentary duties; (iv) this incompatibility was offset by higher pensions; and (v) this puts both groups in different situations, which deserve to be treated differently.

23. With regard to the allegations relating to the payment of 75 per cent of the salary of pensioners during 1994 and 1995 to former parliamentarians who had begun receiving pensions before 1992, the Committee notes that the Government states that is was an administrative mistake, which implemented in blanket fashion a court ruling *(tutela)* that only had inter-party effect. The Committee notes that, according to the Government, this led to a number of legal proceedings being instigated by FONPRECON to obtain a reduction in the pensions that had been incorrectly readjusted and to recover the overpaid amounts, which had been agreed by various bodies of the judicial authority. The latter considered that there can be no acquired right when that right has been granted by mistake. Lastly, the Committee notes that the Government maintains that the alleged facts are not linked to Convention No. 144.

Examination of the allegations concerning Convention No. 111

Principles of the Convention

24. The representation relates to Article 1 of Convention No. 111, according to which:

> 1. For the purpose of this Convention the term **discrimination** includes:
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> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

3. For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Grounds of discrimination provided for in the Convention (Article 1(1)(a))

25. The Committee recalls that the issue raised in the complainant's allegations and in the Government's reply relates to the different treatment received by former parliamentarians with respect to their pensions on the basis of age, depending on whether they began receiving pensions before or after the adoption of Law No. 4 of 1992. In this regard, the Committee recalls that age is not one of the grounds of discrimination provided for in Article 1(1)(a) of Convention No. 111.

Possibility of establishing additional grounds of discrimination (Article 1(1)(b))

26. Article 1(1)(b) establishes the possibility of each member State, in consultation with the social partners, adding other grounds of discrimination. The Convention does not, however, specify a particular mechanism through which States may extend coverage of the Convention so that it includes additional grounds. Given that it cannot be presumed that the State has upheld its obligations under the Convention relating to additional grounds, the Committee should examine all the information available to it, including government statements, laws and regulations, policies and jurisprudence in order to determine whether Colombia has based its decisions on Article 1(1)(b) of the Convention regarding "age". In this connection, the Committee notes that neither the complainant nor the Government have referred to legal or other provisions that establish age as a ground of discrimination in Colombia.

27. The Committee notes, however, that Colombia has adopted Law No. 931 of 2004, which establishes the right to work under conditions of equality and prohibits age-based discrimination. The Committee also notes that, while this law was adopted after the occurrence of the initial facts that led to the submission of the present representation, the relevant decisions in this case, which are said to have contributed to the alleged discrimination, were adopted after the entry into force of Law No. 931 of 2004. It should be noted that the law relates to labour matters and not pensions, but the Constitutional Court, in its ruling C-177/98, held that a pension is the "Worker's deferred salary, the result of forced savings during a lifetime's work". The Committee therefore takes the view that in this particular case, pensions could be considered as part of the terms and conditions of employment. The Committee therefore believes that age has been established in Colombian legislation as an additional ground of discrimination, in accordance with Article 1(1)(b) of the Convention.

Allegation of age-based discrimination

28. Having established that age is an additional ground of discrimination under Article 1(1)(b) of the Convention, the Committee must determine whether in the present case the alleged facts constitute discrimination on this ground. In this regard, the Committee considers that in this particular case, a worker's pension is linked to the terms and conditions of employment and to the corresponding pension scheme of which the worker will become a beneficiary at a given point in time. The fact that this pension scheme may be amended over time for various reasons and provide different benefits, including more favourable ones, to workers retiring in the future cannot be considered as discriminatory.

29. Furthermore, the Committee notes that, in the present case, there is in addition to the time factor an objective difference based on the fact that, since the adoption of the 1991 Constitution, parliamentarians cannot perform other duties or hold another office alongside their parliamentary duties. This incompatibility with respect to other functions is offset by more favourable future pensions. Under these circumstances, the Committee considers that in this particular case, the difference in treatment based on time and objective criteria, which gave former parliamentarians the right to different pensions depending on whether they had begun receiving the pensions before or after Law No. 4 of 1992, does not constitute discrimination.

30. The Committee considers, moreover, that the fact that at some point the administration erroneously readjusted the pensions of former parliamentarians who had begun receiving pensions before the 1992 law on a 75 per cent basis (between 1994 and 1995), and that it subsequently sought to remedy the situation in accordance with existing legislation, is not an issue relating to the implementation of Convention No. 111. The Committee also considers that Legislative Act No. 1 of 2005 and case No. 2434 of the Committee on Freedom of Association, referred to by the complainant and concerning the reform of the general pension system from 2005 onwards, have no bearing on the allegations. The Committee notes that the additional information received from the complainant organization on 3 November 2015 only refers to these issues.

31. The Committee therefore concludes that the alleged acts do not constitute a violation by the Government of Colombia of its obligations under Convention No. 111.

Examination of the allegations concerning Convention No. 144

32. With regard to the alleged violation of the Convention No. 144, the Committee notes that the alleged lack of consultation is not related to the consultation procedures provided for in Article 5 of the Convention, according to which:

> 1. The purpose of the procedures provided for in this Convention shall be consultations on:
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> (a) government replies to questionnaires concerning items on the agenda of the International Labour Conference and government comments on proposed texts to be discussed by the Conference;
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> (b) the proposals to be made to the competent authority or authorities in connection with the submission of Conventions and Recommendations pursuant to article 19 of the Constitution of the International Labour Organisation;
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> (c) the re-examination at appropriate intervals of unratified Conventions and of Recommendations to which effect has not yet been given, to consider what measures might be taken to promote their implementation and ratification as appropriate;

(d) questions arising out of reports to be made to the International Labour Office under article 22 of the Constitution of the International Labour Organisation;

(e) proposals for the denunciation of ratified Conventions.

33. The Committee therefore concludes that the alleged acts do not constitute a violation by the Government of Colombia of its obligations under Convention No. 144.

The Committee's recommendations

34. ***In light of the considerations on which the Committee's conclusions, as set out in paragraphs 24–33 above, are based, the Committee recommends that the Governing Body:***

(a) approves the present report and, in particular, the conclusions formulated by the Committee in paragraphs 31 and 33; and

(b) makes this report publicly available and closes the procedure initiated by the representation made by the General Confederation of Workers (CGT) alleging the non-observance by Colombia of Conventions Nos 111 and 144.

Geneva, 4 November 2015 *(signed)* Carlos Flores

Silvana Cappuccio

Juan Mailhos

Point for decision: paragraph 34