Committee on the Application of Standards

Date: 21 May 2021

Governments appearing on the preliminary list of individual cases have the opportunity, if they so wish, to supply on a purely voluntary basis, written information before 20 May 2021.

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

Romania

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

(Ratification: 1958)

The Government has provided the following written information.

> Comments of the Romanian Government (Ministry of Justice, Labour Inspectorate and Directorate for Social Dialogue) concerning the observations on the application by Romania of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), made by the Committee of Experts on the Application of Conventions and Recommendations in its Report of 2020

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

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

Therefore, in the event that the employee holding an eligible position in a trade union body challenges the legality of the dismissal decision, the special provisions of the Labour Code become applicable, according to which "**The burden of proof with regard to labour disputes rests with the employe**r, being obliged to submit evidence in his defence until the first day of appearance in the court."(art. 272).

If the union leader considers himself to have been discriminated against, he has the possibility to address the National Council for Combating Discrimination (CNCD - Consiliul NaționalpentruCombatereaDiscriminării), according to the procedure regulated by Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination. Thus, according to art. 20 para. 1 of this Act, "The person who considers herself to have been discriminated may notify the Council within one year from the date on which it is committed or from the date on which he could become aware of its commission." Paragraph 6 of the same article also provides that "The person concerned shall present facts on the basis of which it may be presumed that there has been direct or indirect discrimination, and **the person against whom the complaint was made shall have the burden of proving that there has been no breach of the principle of equal treatment**. Any means of proof may be invoked before the Board of Directors in compliance with the fundamental rights deriving from the including audio and video recordings or statistical data. "

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

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

3. **Regarding the actions and remedies applicable in cases of trade union discrimination**, the Ministry of Justice show that according to art. 260 para. 1 lit. r)of the Labour Code ,,**The following acts constitute a contravention** and are sanctioned as follows:... r) **non-compliance with the provisions of art. 5 paragraphs (2) - (9)** and of art. 59 lit. a), with a fine from 1,000 to 20,000 lei. ", Art. 5 para. 2 states that "Any direct or indirect discrimination against an employee, discrimination by association, harassment or victimization, based on the criteria of race, nationality, ethnicity, colour, language, religion, social origin, genetic traits, sex, sexual orientation, age, disability, chronic non-

communicable disease, HIV infection, political choice, family situation or responsibility, membership or trade union activity, members of a disadvantaged category, is prohibited."

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

In the situation in which one person opts for a complaint formulated to CNCD under the conditions of art. 20 of GO no. 137/2000, the decisions pronounced by the Board of Directors can be appealed to the contentious-administrative courts, according to laws (art. 20 para. 9), in case the decision is not contested within 15 days from the communication, these constitutes an enforceable title. The decision pronounced in the first instance court can be appealed within 15 days from the communication, as it results from the provisions of art. 20 para. 1 of the Law regarding the administrative court procedure no. 554/2004.

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

In the case of trade union discrimination, since the alleged act of discrimination occurred in a labour report, a report governed by the special law, respectively the Labour Code, the court competent to resolve the present dispute is the court in whose district the plaintiff is domiciled, **the judgment of the court of first instance being subject to appeal only** (art. 214 of the Law on social dialog no. 62/2011).

In consultation with the social partners and in accordance with national practices, the Law no. 53/2003 – Labour Code was amended in 2020, in order to ensure a proper recognition of harassment, intimidation and victimization of employees and their representatives, including in the exercise of legitimate trade union rights and activities(art. 5), with dissuasive sanctions applied effectively, including pecuniary sanctions of up to 8 minimum monthly gross salary, for individual cases.

In 2020, the Government Ordinance No. 137/2000 on Preventing and Sanctioning All Forms of Discrimination was completed with the adoption of the Law no. 167/2020, for the amendment and completion of the Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, as well as for the completion of art. 6 of the Law no. 202/2002 on the equality of chances and treatment between women and men.

Law no. 167/2020 defines **moral harassment in the workplace** as any behaviour displayed with respect to an employee by another employee who is their superior, by an inferior and/or by an employee with a comparable hierarchical position, regarding the work relationship, which have as purpose or effect a deterioration of the working conditions by harming the rights or dignity of the employee, by affecting their physical or mental health or by compromising their professional future, conduct manifested under

any of the following forms: (i) hostile or unwanted conduct; (II) verbal comments; (iii) actions or gestures.

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

With regard to the promotion of collective bargaining and negotiation with elected workers' representatives – Article4 of the Convention

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

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

The agreement of the social partners for the revision of the collective bargaining sectors, pursued by the Government, was conditioned by the previous adoption of the revision of the law on social dialogue.

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

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

The Government has included in future national programs and strategies 2021-2027 (National Recovery and Resilience Plan, National Reform Program, National Employment Strategy) the objective of strengthening collective bargaining and supporting the structural capacity, organization and action of partners as a premise for motivating and supporting the association, strengthening representativeness and identifying sectoral and national bargaining interests.

The law on social dialogue promotes voluntary negotiation within the meaning of ILO Conventions 98 and 154, at any level of interest to the parties. Art. 153 of the Law on social dialogue guarantees all unions / trade unions the right to bargain, with the conclusion of agreements with the employer / employers' organizations on behalf of members, an eloquent example being the Collective Agreement concluded by unions and employers in the construction sector.

In the same vein, we mention that European directives favour the general notion of workers' representatives, understood as trade unions and / or employee representatives. As such, employees' representatives are regulated nationally as representatives elected by the vote of all employees in the company (not just those not affiliated, within the meaning of C135), respecting the freedom of association and choice of representatives in collective bargaining, also decided by the Court Constitutional Court of Romania no. 62/2019.

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

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

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

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

Additional details related to the comments and direct requests of CEACR regarding the application of Convention no. 98/1949 will be provided in the Government Report based on art. 22 of the ILO Constitution.