



Governing Body

347th Session, Geneva, 13–23 March 2023

Institutional Section

INS

Date: 31 January 2023

Original: Spanish

Eighteenth item on the agenda

Report of the Director-General

Fourth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Chile of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

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► I. Introduction

1. By a communication received by the Office on 24 December 2020, the Federation of Associations of Officials of Municipal Education Administration Departments of the Ñuble Region (FEFUDAEM-ÑUBLE), with the support of the National Coordinating Body of the Municipal Education Administration Departments (DAEM) of Chile, made a representation to the International Labour Office under article 24 of the ILO Constitution alleging non observance by the Government of Chile of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Convention No. 111 was ratified by Chile on 20 September 1971 and is in force in the country.
2. The following provisions of the ILO Constitution relate to the representation:

Article 24

Representations of non-observance of Conventions

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

Publication of representation

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.

3. In accordance with article 1 of 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), the Director-General acknowledged receipt of the representation, informed the Government of Chile and brought it before the Officers of the Governing Body.
4. At its 341st Session (March 2021), the Governing Body decided that the representation was receivable and set up a tripartite committee for its examination. The tripartite committee was composed of Ms Gloria Gaviria Ramos (Government member, Colombia), Mr Alberto Echavarría (Employer member, Colombia) and Ms Liliana Ocmin (Worker member, Italy).
5. The Government of Chile submitted its observations concerning the representation in a communication received by the Office on 25 November 2021.
6. Before proceeding with the examination of the representation, the Committee invited the parties to consider the possibility granted by the Governing Body, in the framework of the representation discussion procedure, to make use of the voluntary conciliation procedure at the national level. The Committee noted that the parties had not responded to that invitation.
7. The Committee met virtually on 22 September and 17 November 2022 to examine the representation and to adopt its report.

► II. Examination of the representation

A. The complainant's allegations

8. The Federation of Associations of Officials of Municipal Education Administration Departments of the Ñuble Region (FEFUDAEM-ÑUBLE) alleges non-observance of Convention No. 111 by the Government by virtue of the enactment, on 16 November 2017, of Act No. 21.040 establishing the new public education system, commonly known as “the Demunicipalization of Education Act”. According to FEFUDAEM-ÑUBLE, this Act contains provisions that are discriminatory in respect of one of the categories of officials of the municipal education service covered by that Act, namely the officials of the Municipal Education Administration Departments (DAEM) and of the Municipal Education Corporations (CEM), involving a change of status.
9. The complainant organization explains that, following the approval of the Demunicipalization of Education Act, DAEM and CEM officials are discriminated against in terms of access to employment. FEFUDAEM-ÑUBLE considers that the difference in treatment imposed by the Act in question constitutes discrimination that violates the provisions of Article 3 of [Convention No. 111](#).
10. FEFUDAEM-ÑUBLE explains that the Demunicipalization of Education Act establishes differences in treatment for the three categories of officials in the municipal education service, namely: (i) education professionals, contracted under the Teachers’ Statute; (ii) education assistants, contracted primarily under the Labour Code; and (iii) DAEM and CEM officials, contracted under both the Teachers’ Statute and the Labour Code. According to the complainant organization, officials in the three categories work in the senior administration and coordination of education service delivery in the respective communes.
11. According to the complainant organization, this reform of the public education system is discriminatory in three ways:
 - (a) First, only the DAEM and CEM officials category is required to participate in an open competition to move from the old status to the new status established by the Demunicipalization of Education Act.
 - (b) Second, the number of posts allocated by the Demunicipalization of Education Act to the DAEM and CEM officials category in the new public education system – via open competition – is lower than the number of posts that existed before the entry into force of the Demunicipalization of Education Act. FEFUDAEM-ÑUBLE states that under the terms of the Act, 100 per cent of “education professionals” and “education assistants” accede to their new status, while less than 4 per cent of DAEM and CEM officials accede to theirs.
 - (c) Third, only DAEM and CEM officials are affected by the possibility of having to change work location when they go from their previous status to their new one and must cover the associated costs and charges.
12. The complainant organization emphasizes that the three categories of officials are intended for the senior administration and coordination of education service delivery in the respective communes. FEFUDAEM-ÑUBLE considers that Act No. 21.040 is discriminatory in respect of access to employment by virtue of the imposition of a new model of education service delivery on this harmonious group of public servants, which was established in the Public Administration Constitutional Organization Act.

B. The Government's reply

13. In a communication received on 25 November 2021, the Government provided its comments in response to the allegations of FEFUDAEM-ÑUBLE.
14. First, the Government indicates that Act No. 21.040 dated 16 November 2017 establishes a new public education system, the principal objective of which is to strengthen the education system. The Government states that the system administered by the municipalities and municipal corporations was unable to guarantee conditions of administration and use of resources that would ensure the quality of public education on an ongoing basis and throughout the territory.
15. Second, the Government indicates that the Act proposes institutional restructuring. The problems this reform seeks to resolve are:
 - (a) the lack of continuity due to the political-electoral cycles in the municipalities;
 - (b) low accountability and dilution of responsibilities;
 - (c) uneven and insufficient capacities; and
 - (d) the fragmentation and low territorial coordination of the 345 municipalities.
16. In order to address these problems and under the new institutional set-up provided for in Act No. 21.040, the public education establishments administered by 345 municipalities will gradually come to be administered by 70 local public education services (SLEP), which will cover all the communes in the country. The Government indicates that this system does not make provision in its structure for the DAEM or the CEM.

Distinction between education professionals and assistants, and DAEM and CEM officials in Act No. 21.040 – Transfer arrangements

17. The Government states that the Act differentiated the arrangements for transferring the officials to the new system according to work location, the status by which they are governed, and the function performed by those persons in the provision of the service. In this respect, the Government provides the following indications on the specific legislation for each of the three categories affected by Act No. 21.040:

Education professionals

18. Education professionals are governed by the Teachers' Statute.¹

Transfer arrangements

19. Provisional article 39 of Act No. 21.040 indicates that the transfer takes place "by way of one or more decrees with force of law issued through the Ministry of Education, which must also be endorsed by the Finance Minister". The transfer occurs without an open competition and also "without any break in service" as "the maximum number of teaching staff to be transferred shall be determined in the respective decree with force of law".

¹ According to article 2 of Decree with force of law No. 1 of 1996 (Teachers' Statute): "[e]ducation professionals are persons who hold a teaching or other educational qualification awarded by a teachers' training college or university (...)".

Education assistants

- 20. Education assistants are governed by the Statute for education assistants.²
- 21. The Government indicates that, according to article 2 of this Act, one of the requirements for being considered an education assistant is to work at one or more educational establishments. Furthermore, article 3 stipulates that workers covered by this Act shall be considered to be public servants and that “the Labour Code shall apply to them in a supplementary manner”. In this respect the Government emphasizes that the claim by the complainant organization that education assistants are governed by the Labour Code in the same way as DAEM and CEM officials is incorrect. In fact, the application of the Labour Code to the category of education assistant is merely supplementary.

Transfer arrangements

- 22. Provisional article 41 of Act No. 21.040 indicates that the transfer takes place solely by virtue of the law and “without any break in service” in the same way as for education professionals; namely, without the need to participate in an open competition but also with no guarantee of obtaining a post.

DAEM and CEM officials

- 23. DAEM and CEM officials are governed by the Administrative Statute³ and by the Labour Code.

Transfer arrangements

- 24. Provisional article 38, paragraph 1, of Act No. 21.040 provides that: “Once appointed to office, the Executive Director of the local service shall organize a competition, in which only the previously mentioned staff who were performing functions in the municipalities or municipal corporations whose territory is under the jurisdiction of the local services on 30 November 2014 may participate.”
- 25. The Government notes that the Directorate of Public Education has developed information dissemination and participation channels to guide DAEM and CEM officials regarding how to improve their chances when competing through a closed competition mechanism indicated in Act No. 21.040. It adds that the “massive dismissals” mentioned by the complainant organization are not borne out by reality, as studies demonstrate.

Reduction in the number of posts in the new Act

- 26. In this respect, the Government indicates that the reduction in the number of posts is due to: (i) the existence of over-allocations at the level of the Departments of Municipal Administration and Municipal Corporations; and (ii) the need for efficiency and economies of scale in centralizing the management of the specialized service into a single entity. This influences the reallocation of resources that were previously earmarked for the administration of services and not the education service itself. Consequently, the circumstance of reducing the number

² According to article 2 of Act No. 21.109 of 2018 (Statute for public education assistants): “[F]or the purposes of this Act, education assistants are officials who (...) collaborate in the process of teaching and training students and correctly providing education services, (...)”.

³ According to article 3(a) of Decree with force of law No. 29 of 2004 (Administrative Statute), officials in this category perform administrative functions.

of positions available to DAEM and CEM officials cannot be described as arbitrary or unfounded.

Change of worksite

27. With respect to the allegations whereby only DAEM and CEM officials must change worksite pursuant to Act No. 21.040, the Government states that, due to the fact that the SLEP form part of the new public education system, new locations are being established for their operations and the transferred officials must change the location where they perform their functions. However, this does not necessarily imply a change of residence by the transferred officials. In this respect, according to the findings observed in the 11 SLEP already installed in the territory, it can be seen that in at least six of them, ⁴ the transferred officials were able to maintain the same place of residence for the performance of their functions.
28. Furthermore, the Government indicates that there are some cases of SLEP in the process of being established, namely in the regions of Magallanes and Aysén, where, given their geographic size, the possibility of keeping one's place of residence when changing worksite decreases. Act No. 21.040 addresses this particular circumstance in article 16(3), indicating that "Each local service may establish local offices by way of a decree substantiated by the Ministry of Education when necessary for reasons of good service and for the proper discharge of its functions, with attention given to considerations of distance, connectivity and enrolment figures (...)". The Government adds that provisional article 42 of the same Act stipulates that "The transfer referred to in this paragraph shall in no case (...) entail changing the usual place of residence of the officials to outside the region in which they provide their services, except with their express consent ...".

Implementation of Act No. 21.040

29. The Government notes that, in three opinions, the General Comptroller of the Republic highlighted the protective purpose of the transitional arrangements for officials, mainly in relation to remuneration. In effect, in its Opinion No. 3.279 of 2020, the Comptroller indicated that *"this provision [provisional article 38] states that the change in the legal regime governing the workers selected shall in no case mean a reduction in the remuneration they were earning at the time of the transfer. (...). [T]he purpose of the supplementary payroll is to maintain the level of emoluments that the public servants received previously (...) so that it constitutes a safeguard against any decrease resulting from the process in question". In its Opinion No. 1.902 of 2020, the Comptroller indicates: "the transfer referred to in paragraph 8 of its transitional arrangements, one of which is provisional article 38, shall in no case mean a reduction in remuneration nor a change in the statutory or social security rights of such staff". Lastly, in its Opinion No. 30.279 of 2018, the supervisory body indicated "with respect to the damage suffered by officials as a result of the change of regime when transferred as contracted workers through the competition in question [this concerns the DAEM and the CEM], it should be noted that no such effect can be observed."*
30. Furthermore, the Government indicates that the Labour Court of Concepción, when ruling on the dismissal of a manager from the Municipal Education Administration Department, considered, on the basis of the provisions of Act 21.040, that no discriminatory or arbitrary act had taken place. The Government states that an appeal against this decision is pending before the Court of Appeal of Concepción.

⁴ Local service of Puerto Cordillera, Barrancas, Costa Arauca, Gabriela Mistral, Andalién Sur, Colchagua.

31. The Government concludes that, in accordance with Article 1(2) of Convention No. 111, any distinction in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination. It indicates that this is why the contested Act does not constitute a discriminatory rule, and that the requirement for greater professionalization on the part of SLEP officials requires that their officials focus their efforts exclusively on the sphere of education and that they have greater technical capacity to meet the needs of the educational establishments that come under them.

► III. The Committee's conclusions

32. The Committee's findings are based on its review of the allegations presented by the Federation of Associations of Officials of Municipal Education Administration Departments of the Ñuble Region (FEFUDAEM-ÑUBLE) and of the reply sent by the Government.
33. The Committee notes the allegation of the complainant that Act No. 21.040 of 16 November 2017 establishing a new public education system contains provisions that stipulate different treatment between the three categories of municipal education service officials: (i) education professionals contracted under the Teachers' Statute; (ii) education assistants contracted under the Statute for public education assistants; and (iii) the officials of the Municipal Education Administration Departments (DAEM) and of the Municipal Education Corporations (CEM), contracted under the DFL [decree with force of law] for those working in public institutions (municipalities) and under the Labour Code for those working for private institutions (municipal corporations).
34. The Committee observes that, according to the complainant organization, the difference in treatment is established by virtue of provisional articles 38, 39 and 41 of Act No. 21.040, which provide for the transfer of education officials from the old public education system to the new one. The complainant organization alleges that, as a result of the difference in treatment between the three categories of municipal education officials: (i) DAEM and CEM officials are required to participate in an open competition to move from their old status to their new status; (ii) there are fewer posts available for DAEM and CEM officials; and (iii) DAEM and CEM officials must change worksite with the resulting relocation costs to be borne by them. In the view of the complainant organization, this constitutes a violation of the provisions of Article 3 of Convention No. 111.
35. The Committee notes that, according to the Government, Act No. 21.040, the principal objective of which is to strengthen the education system, proposes institutional restructuring in order to achieve greater efficiency and economies of scale (public education establishments previously administered by 345 municipalities will gradually come to be administered by 70 local public education services (SLEP)).
36. In this respect, the Committee observes the Government's indication that: (i) the reduction in the number of posts is due to the reallocation of resources from the administration of services to the education service itself; (ii) given that the SLEP form part of the new public education system, new sites are established for their operation and the transferred officials must indeed change the location where they perform their functions; and (iii) however, this does not necessarily imply a change of residence by the transferred officials (see paragraph 26).
37. The Government also states that the General Comptroller of the Republic issued opinions regarding the implementation of Act No. 21.040, in which it highlighted the protective purpose of the transitional arrangements for officials, mainly in relation to remuneration.

38. The Committee observes that the three categories of public education officials mentioned by the complainant organization do not perform the same functions in the provision of education services⁵ and are governed by different legal statutes.
39. The Committee further notes that, prior to the approval of Act No. 21.040, the three categories of officials were already governed by different statutes and that this has not changed as a result of the contested Act.
40. The Committee recalls that Article 3 of the Convention, alleged by the complainant organization to have been violated, complements Article 2 of the Convention, and they provide as follows:

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice--

- (a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
 - (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
 - (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
 - (d) to pursue the policy in respect of employment under the direct control of a national authority;
 - (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
 - (f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.
41. After analysing all the available information, the Committee considers that the difference in treatment between the three categories of municipal education officials resulting from the implementation of Act No. 21.040 (requirement for the DAEM and CEM officials to participate in an open competition to move to their new status, fewer available posts, and change of work site) does not imply a violation of the provisions of Convention No. 111 which stipulates the obligation: (i) to declare and pursue a national policy; and (ii) to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof (*Article 2*).

⁵ See the descriptions of the tasks of the various categories of public education officials in paras 17, 19 and 22 above.

► IV. The Committee's recommendations

42. In the light of the conclusions contained in paragraphs 31 to 40 above with regard to the matters raised in the representation, the Committee recommends that the Governing Body:
- (a) approve the present report;
 - (b) make the report publicly available and close the procedure initiated by the representation.

17 November 2022

(signed) Gloria Gaviria Ramos
Government member

Alberto Echavarria
Employer member

Liliana Ocmin
Worker member