INTERNATIONAL LABOUR OFFICE

Governing Body

GB.300/20/6
300th Session

Geneva, November 2007

FOR DECISION

TWENTIETH ITEM ON THE AGENDA

Report of the Director-General

Sixth Supplementary Report: Report of the committee set up to examine the representation alleging non-observance by France of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No. 158), made under article 24 of the ILO Constitution by the *Confédération générale du travail – Force ouvrière*

I. Introduction

1. In a communication dated 25 August 2005, the *Confédération générale du travail – Force ouvrière*, referring to article 24 of the ILO Constitution, addressed to the International Labour Office a representation alleging non-observance by France of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Termination of Employment Convention, 1982 (No. 158).

2. The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Termination of Employment Convention, 1982 (No. 158), were ratified by France on 28 June 1951, 26 October 1951, 28 May 1981 and 16 March 1989, respectively. They are in force in France.

3. The following provisions of the Constitution of the International Labour Organization relate to representations:

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. In accordance with article 1 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization, as revised by the Governing Body at its 291st Session (November 2004), the Director-General acknowledged receipt of the representation, informed the Government of France and brought it before the Officers of the Governing Body.

5. At its 294th Session (November 2005), the Governing Body found the representation to be receivable and appointed a committee to examine the matter. The Committee consisted of Mr Paolo Reboani (Government member, Italy), Mr Michel Barde (Employer member, Switzerland) and Mr Ulf Edström (Worker member, Sweden). At its 296th Session (June 2006), the Governing Body appointed Ms Francesca Pelaia (Government member, Italy) to chair the Committee, replacing Mr Reboani.

6. In addition, matters relating to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), were referred to the Committee on Freedom of Association in accordance with article 3, paragraph 2, of the Standing Orders mentioned above.

7. In a communication of 25 January 2006, the *Confédération générale du travail – Force ouvrière* provided additional information concerning its representation. The Government of France transmitted its observations in two communications, dated 16 March and 16 May 2006.

8. At its meeting in November 2006 the Committee decided to seek further information and observations from the *Confédération générale du travail – Force ouvrière* and the Government on certain points. In reply to the Committee's request for further information, the complainant and the Government transmitted communications dated 8 February 2007 and 26 March 2007, respectively, which are summarized in Part III of the present report. A further communication dated 27 September 2007 was also received from the Government.

9. The Committee met on 6 November 2007 to examine the case and adopt its report.

II. Consideration of the representation

Allegations of the complainant

10. In its communication of 25 August 2005, the complainant alleged that Ordinances No. 2005-892, adjusting the rules for the calculation of the workforces of enterprises (hereafter "Ordinance No. 2005-892"), and No. 2005-893, relating to the "contract for new employment" (hereafter "Ordinance No. 2005-893") infringed several provisions of the ILO Conventions ratified by France. The Ordinances had been adopted by the Government on 2 August 2005, on the basis of the enabling law No. 2005-846 of 26 July 2005.

11. The complainant referred to section 1 of Ordinance No. 2005-892, which adds a new paragraph to section L.620-10 of the Labour Code, under which "any employee engaged on or after 22 June 2005, who is less than 26 years old, shall not be counted in the calculation of the workforce of the enterprise concerned, whatever the nature of the contract concluded with the enterprise" *(translation)*. The complainant submitted that this provision, which under the Ordinance was to apply until 31 December 2007, allowed enterprises to escape from the obligations which they would normally assume when the size of their workforce passed one of the thresholds fixed by the Labour Code or other laws or regulations. In certain sectors mainly employing young workers, the enterprises would be *ipso jure* relieved of their obligations arising once a threshold is passed. The complainant submitted that this was contrary to the provisions of Convention No. 111, the object of which is to protect workers against discrimination in employment or occupation. Without contesting the need for policies to promote the employment of young people, the complainant considered that the Government could not rely on Article 5, paragraph 2, of Convention No. 111, which provides that "[a]ny Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination". In the complainant's view, the possibility to discount employees under the age of 26 in calculating the workforce of an enterprise could not be assimilated to a positive measure designed to meet the particular requirements of the persons concerned, with a view to providing special protection or assistance, within the meaning of Convention No. 111. Indeed, such a possibility tended to weaken and even nullify the protection or assistance that ensued from the obligation to recognize trade unions and the personnel's representatives in the enterprise.

12. The complainant pointed out, in addition, that the Government was enabling the effects of this measure to be combined with those of the "contract for new employment" (hereafter "CNE"). This was a new form of contract of employment, introduced by Ordinance No. 2005-893 for enterprises with not more than 20 employees, which would give employers a two-year period in which they could terminate without a reason the employment of persons engaged under a CNE.

13. In the complainant's view, the new provisions would encourage enterprises to engage personnel under the age of 26 using the CNE in order to give themselves a permanent exemption from the obligations arising when a threshold is passed, by having a continuous succession of recruitments and dismissals. The complainant submits that this new legislation brings in a general discrimination based on age and weakening protection, particularly in the case of termination of employment.

14. The complainant maintained that Ordinance No. 2005-893 was not in conformity with Article 4 of Convention No. 158, under which the "employment of a worker shall not be

terminated unless there is a valid reason for such termination". During its first two years, the CNE was not governed by the protection provided by the Labour Code's provisions concerning premature termination and termination for economic reasons (sections L.122-4 to L.122-11, L.122-13 to L.122-14-14 and L.321-1 to L.321-17). In addition, the CNE would permit employers, despite the measures provided for with respect to notice and compensation, to end the contract at any time and at the lowest cost and without having to give any reason, simply by sending the employees a registered letter notifying them of the termination.

15. The complainant stressed that the possibility, under Article 2, paragraph 2, of Convention No. 158, to exclude from the Convention's scope "workers serving a period of probation" is made subject to the condition that the period is "of reasonable duration". The CNE, which sets the probationary period at two years, in the case of a contract of employment of indeterminate duration, did not satisfy the requirement for a reasonable duration within the meaning of the Convention. The complainant considered that the two-year duration placed employees in a state of permanent precariousness.

16. According to the complainant, it was not enough for the new provisions to prohibit the conclusion of a new CNE between the same employer and same employee within a period of three months from the termination of the previous contract: this provision did not prevent the possibility of this type of contract being continuously in use. Indeed, in the guide to the use of the CNE that was published on the Government's web site addressed to enterprises, such a possibility was provided for in that "no waiting period is provided for […] between the termination of a CNE and the recruitment of another employee, under a CNE, to the same position" *(translation)*.

17. The complainant also stressed that the CNE would, in certain sectors of activity and certain regions, affect almost the whole of the workforce because of the preponderance of enterprises with less than 20 employees. Paragraph 5 of Article 2 of Convention No. 158 could not be applied to the CNE, which covered all categories of employees who might be engaged in enterprises having no more than 20 employees.

18. The complainant also submitted that the CNE was, in both letter and spirit, contrary to the Termination of Employment Recommendation (No. 166), particularly Paragraph 3, which calls for "adequate safeguards" against recourse to contracts of employment for a specified period of time, the aim of which is to avoid the protection resulting from Convention No. 158. The complainant stated that the CNE, in both form and purpose, was tantamount to a near permanent contract of employment for a specified period of time; its sole purpose was to escape both the protection provided by contracts of indeterminate duration and that provided under regulations governing contracts for a specified period and contracts for interim appointment to positions not yet filled.

19. Finally, the complainant stated that Ordinance No. 2005-893 provided, in section 5, that the conditions for implementing the CNE and its effects on employment would, by 31 December 2008, be assessed by a commission consisting of employers' and employees' organizations that were representative at the national and inter-occupational level. It recalled that the Commission of the National Assembly for Cultural Family and Social Affairs, in a report of 23 June 2005 "on a bill to enable the Government to take emergency measures, by ordinance, in favour of employment" had already stated that the new contract should be considered as an experiment to be closely monitored, with one of the purposes being to judge whether its scope should eventually be widened.

Additional information

20. In the complainant's communication of 25 January 2006, the additional elements transmitted to the International Labour Office related to the Government's decision to create another new type of contract, the "contract for first employment" (hereafter "the CPE"). This contract would be available for young people under the age of 26 recruited in enterprises with more than 20 employees. The CPE, which was modelled on the CNE, established a period for "consolidating employment". The period was for two years, during which the employer could end the contract of employment without any reason, simply by sending the employees a registered letter notifying them of the termination. The CPE constituted an additional violation of Convention No. 158 and introduced a new measure of discrimination against young people under the age of 26 in violation of Convention No. 111.

Observations of the Government

21. With respect to Ordinance No. 2005-892, the Government observed that the representation did not show how discounting employees under the age of 26 in the calculation of the workforce of an enterprise would deprive them of the protection due to all workers against any act of discrimination having the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Nor had any provision whatsoever of the Ordinance been shown as capable of inhibiting access to employment and to the various occupations or access to vocational training, or of creating an obstacle in the terms and conditions of employment.

22. The Government recalled that Ordinance No. 2005-892 concerned the adjustment of the rules for the calculation of the workforces of enterprises. It followed what had already been provided for by the Labour Code in the case of employment under the contract for apprenticeship (section L.117-11-1) or under the assisted contract (section L.322-4-9), namely that young people under the age of 26 are not counted in the calculation of the workforce that would cause the enterprise concerned to pass the thresholds giving rise to certain obligations for employers, including financial obligations, that are provided for, inter alia, by the Labour Code.

23. The Government submitted that this measure was justified by the current difficulties for young people to enter the world of work and was designed to promote their employment without affecting the financial capacity of the enterprises concerned. Thresholds gave rise to cumulative costs, making it much more costly to employ the worker whose recruitment caused a threshold to be passed; this situation had a statistically significant effect on employment.

24. In addition, Ordinance No. 2005-892 was a provisional measure which would cease to have effect on 31 December 2007. From that date onwards, young people recruited on or after 22 June 2005 would, in accordance with the common law rules, be counted in the workforce of an enterprise. The provisional non-inclusion of persons under the age of 26 in the workforce had no implications for their individual situations in any area, including recruitment, terms and conditions of employment, advantages given to other employees or protection under the general law on discrimination.

25. Furthermore, the Government drew the Committee's attention to the fact that the execution of Ordinance No. 2005-892 had been suspended following a decision of the *Conseil d'Etat* of 23 November 2005, pending a decision by the Court of Justice of the European Communities, to which a preliminary question relating to the application of Community law in this case had been referred. In view of the provisional nature of the measures

concerned and their limited validity to the end of 2007, and taking account of the time required for the various procedures, the Government submitted that Ordinance No. 2005-892 could not be the subject of actual implementation in the near future.

26. With respect to Ordinance No. 2005-893, the Government pointed out that it went to the heart of the general policy speech made by the Prime Minister on 8 June 2005. In that speech, the fight against unemployment was declared to be the Government's absolute priority. With an unemployment rate of over 10 per cent and with certain categories being particularly affected (including young people facing severe difficulties in finding any kind of lasting employment), the situation justified recourse to prompt, strong, pragmatic and effective measures designed to boost employment and growth. Reference was made in this respect to Article 1 of the Employment Policy Convention, 1964 (No. 122), which France had ratified.

27. In a context of strong variations in activity and of increased international competition, over 70 per cent of jobs in France were filled under contracts which the Government characterized as "precarious". Seventy-two per cent of the contracts for jobs, excluding interim appointments to positions not yet filled, had been contracts for a specified period of time, with an average duration of two months in small enterprises. The Government also noted a large increase in interim appointments, especially in industry (the proportion of employees made available for temporary work had risen from 2 per cent in 1992 to 6.8 per cent in 2002). The average duration of interim assignments was two weeks; 90 per cent of them were for less than a month.

28. The Government recalled that the small enterprises were more vulnerable than others to fluctuations in activity and more wary of increasing their workforces. Their managements were often hesitant about taking on new personnel even where they had authority to do so under their immediate workload schedules. Their fears were based not only on the volatility of the economy and the uncertainties of market trends, but also on the difficulties and uncertainties – both legal and financial – in bringing an end to a contract of employment, when necessary because of the economic situation or for reasons related to the individual employee. There seemed to be a reticence to recruit on a permanent basis on the part of many managers, who seemed prepared to forgo progress in the development of their enterprises in favour of a resort to temporary work or contracts for a specified period.

29. In the interest of progress in the creation of jobs, the Government considered it necessary to introduce flexibility into procedures which might act as a brake on recruitment and economic development. In the area of employment, this flexibility would take the form of opportunities for entering enterprises and employment, instead of the workers remaining jobless or having a succession of precarious short-term contracts. As a response to this twofold objective, the CNE seemed to be an essential measure in the fight against unemployment.

30. The Government recalled that it had been enabled by Law No. 2005-846 of 26 July 2005, which had been found to be constitutional by the *Conseil constitutionnel* in its Decision No. 2005-521 DC of 22 July 2005, to establish by ordinance this new contract of employment. The rules on termination in the CNE were adjusted for the first two years following its conclusion. At the end of that period, the contract became subject to the common law rules governing contracts of employment of indeterminate duration.

31. The Government stated that the CNE balanced the rights of employers and those of workers in a way that differed from the balance under other contracts of employment. The CNE initially provided sufficient flexibility to enable the enterprise to adapt to the needs of its activity, while on the other side guaranteeing to its employees financial compensation that was higher than that provided for under the common law. The CNE remained however

subject to the provisions of the Labour Code, including those relating to public order with respect to the protection of the personnel representatives, employees suffering occupational accidents or illness and women expecting a child. The principle of judicial review was not put into question.

32. The Government drew attention to new rights, in derogation from the existing law, with respect to notice and the termination indemnity. In the case of termination during the two-year period of consolidation, employers were bound by a system for giving notice that started at the end of the first month of presence in the enterprise. Where the notification of termination was made less than six months after the conclusion of the contract, 15 days' notice was required; where it was made six months or more afterwards, one month's notice was required. For an employee with less than six months of service, the requirements concerning notice of termination would therefore be more favourable under a CNE than under a contract of employment of indeterminate duration (section L.122-6 1° of the Labour Code).

33. The termination indemnity to be paid to employees by the employer, except in the case of serious or wilful misconduct, was 8 per cent of the total remuneration due to the employee since the conclusion of the CNE. This requirement was more favourable than the indemnity to be paid under a contract of employment of indeterminate duration, which does not provide for any indemnity until the employee has had two years of service (section L.122-9 of the Labour Code). In addition to this indemnity, there was the employers' contribution of 2 per cent of gross remuneration, paid to Assedic (National Association for Employment in Industry and Trade) to finance action for keeping close contact with the employees and arranging for their return to employment as rapidly as possible. The Ordinance provided employees whose contract was terminated during its first months with complementary coverage against the risk of unemployment. Employees who had less than six months of service were entitled to a lump-sum allowance financed by the State to cover a period of one month; its amount was specified by Decree No. 2005-894 of 2 August 2005.

34. In reply to the complainant's allegations concerning the adverse effects of a continuous succession of recruitments and dismissals of employees under the CNE for the same position, the Government stressed that the higher cost of terminations of the CNE would be a disincentive for enterprises in terms of management.

35. The Government pointed out that the social partners had been invited to extend to dismissed employees the benefit of the agreement on personalized reclassification established by the Law on Social Cohesion of 18 January 2005. It added that, in the absence of negotiation, such a measure could be adopted by decree.

36. The Government drew the Committee's attention to the possibility for the parties to a CNE to agree on clauses more favourable to the employee in the contract of employment. The clauses could, for example, relate to the notice period or to the amount of the termination indemnity. Ordinance No. 2005-893 provided a framework which could, where appropriate, be adapted by the parties to the nature of the activity concerned or to the particular situation of an employee. Similarly, industry-specific collective agreements *(conventions collectives de branche)* could provide for more favourable clauses than those of the Ordinance.

37. Referring to Article 2, paragraph 2, of the Termination of Employment Convention, 1982 (No. 158), the Government noted that States could adjust the scope of application of the protection under the Convention and, in particular, decide to exclude the following categories of employees:

– “workers engaged under a contract of employment for a specified period of time or a specified task”;

– “workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration”;

– “workers engaged on a casual basis for a short period”.

38. The national provisions criticized by the complainant referred precisely to workers serving a qualifying period of employment, in accordance with the terms of the Convention. Ordinance No. 2005-893 in fact made adjustments to a process enabling workers to go from a facilitated recruitment to access to a contract of employment of indeterminate duration, thanks to the consolidation gained through this period for establishing the required years of service.

39. The termination conditions, and the derogations from existing law concerning indemnities and close contact following termination, that cover the first two years of the contract of employment constituted a period of consolidation of the employment which, in the Government’s view, did not contravene the Convention. Indeed, this was the way in which the Ministry of Labour had presented the information tools for the public and for enterprises on the use of the CNE: the initial two-year period “is a specific period called consolidation of employment, which, in particular, enables employers to measure the economic viability and development prospects of their enterprise” *(translation)*.

40. The Government pointed out that these arguments had been accepted by the *Conseil d’Etat*, to which the trade union organizations had appealed alleging non-observance by the contested Ordinance of the provisions of Convention No. 158. In a decision of 19 October 2005, the *Conseil d’Etat* had rejected their appeal, holding, on the one hand, that the contested Ordinance did not preclude the possibility of challenging a termination before the courts and, on the other hand, that the Ordinance came within the derogations provided for in Article 2 of the Convention. In its decision, the *Conseil d’Etat* held that “the period of two years during which the common law provisions relating to the termination procedure, and the reasons that might justify it, had been rendered inapplicable can be regarded as reasonable within the meaning of those stipulations” *(translation)*.

41. The Government was aware that the decision of the *Conseil d’Etat* was without prejudice to discussions in other forums and in the framework of the procedures under the ILO Constitution. However, the decision provided evidence of the context in which instruments such as the CNE had been decided, for the purpose of reducing unemployment and, at the same time, introducing measures to promote employment and measures to provide complementary guarantees.

42. The Government noted that, after the conclusion of over 300,000 CNEs, some terminations had already been the subject of legal action before the labour courts *(Conseil de Prud’hommes)*. Termination during the two-year consolidation phase was in no case a discretionary decision; the legality of the conditions in which termination was made was a matter for determination by the courts. Furthermore, the case law against abuse of rights could apply to the CNE. In this respect, a termination which, for example, showed an intention to harm or appeared as a sham to circumvent the labour law would be considered as abusive, giving a right to damages under the common law.

43. The Government referred to the General Survey of 1995 on the protection against unjustified dismissal; the General Survey mentioned several States which were establishing a mechanism for the progressive construction of the rights of employees in the case of dismissal. The time during which such a mechanism was applicable varied from

country to country, and even as between categories of employees. In the Government's view, account must be taken of the overall structure of the mechanism put in place, including the fact that, during its period of application, workers were subject to a special regime which, as a whole, gave them protection that was at least equivalent to that provided for by the Convention and was greater than the protection available from the precarious jobs that they would have had but for the CNE. This overall balance was precisely what was contemplated in the concern expressed by Article 2, paragraph 4, of the Convention.

44. In the Government's view, the derogations from the common law rules on termination, in the case of the CNE, were balanced by the increased rights of employees with respect to compensation and to their return to employment. The measures taken were justified by the requirements of an active policy on employment and must be regarded as covered by the provisions of Article 2 of Convention No. 158.

45. The Government submitted that Ordinance No. 2005-893 did not contravene Article 4 of the Convention, which required the existence of a valid reason for termination "connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service". Terminations would still be illegal if they were made for a reason connected with the employee's health condition, political or religious opinion, custom or for one of the discriminatory reasons covered by section L.122-45 of the Labour Code.

46. The Government stressed that the CNE was, under the terms of Ordinance No. 2005-893, a contract concluded "without specification of a period of time" *(translation)*. Employees had a greater chance of having a permanent employment relationship than if they had been subject to a contract of employment for a specified period of time. Having regard to Paragraph 3, subparagraph (2)(a), of the Termination of Employment Recommendation, 1982 (No. 166), French law was thus closer to the objective of "limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration". The Ordinance excluded the use of a CNE for seasonal jobs or in the case of jobs for which contracts of indeterminate duration were not customarily used.

47. In its communication dated 16 May 2006, the Government pointed out that, as a result of legislative changes, the part of the representation concerning the "contract for first employment" (CPE) was now without any object. Parliament had adopted Law No. 2006-457 of 21 April 2006, on young people's access to enterprise life, amending section 8 of the Law on equality of opportunities (No. 2006-396 of 31 March 2006). The new provisions had replaced the rules governing the CPE.

III. Replies to the Committee's request for further information

48. The further information requested from the complainant and the Government (see paragraph 8 above) related to the CNE and its compliance with Convention No. 158. The first group of questions from the Committee were designed to obtain views on whether or not workers who had concluded a CNE could be excluded from the scope of that Convention under its Article 2, paragraph 2, referred to by the Government (see paragraphs 37–39 above). This question depended in particular on whether, as maintained by the Government, the period of employment consolidation under the CNE could be considered "a qualifying period of employment", referred to in Article 2, paragraph 2(b), and whether it was "of reasonable duration". In this connection, the Committee requested

information and observations, in particular, on the *Conseil d'Etat's* conclusion, in its decision of 19 October 2005, that the two-year duration was reasonable (see paragraph 40 above) as well as those of other relevant bodies in France.

49. The complainant submitted that considering the period of employment consolidation as a qualifying period of employment amounted in any event to a distortion of the spirit of Convention No. 158 as it was unrelated to the employee in an individual capacity. The kind of considerations put forward by the Government, relating to the economic viability and development prospects of the enterprise, could only be envisaged with respect to Article 2, paragraph 5, of the Convention, which would however only have allowed the exclusion of limited categories of employed persons in respect of which special problems of a substantial nature arose. The complainant referred to contracts for a specified period of time, which were intended to give enterprises a certain flexibility for employment, but even these could only be terminated in the case of serious fault or force majeure. For judging the reasonableness of the duration of periods of probation and qualifying periods of employment referred to in Article 2, paragraph 2(b), the Government's considerations were not relevant. Only such factors as the time needed to gain the necessary experience or qualifications could be taken into account. Employees recruited under a CNE were excluded from the protection relating to termination of employment for a period of two years and were accordingly subject in practice to the equivalent of a period of probation lasting two years, which could not be considered as being of reasonable duration. Most collective agreements envisaged probation periods of between one and three months. With regard to the decision by the *Conseil d'Etat*, the complainant noted that the *Commissaire du Gouvernement* had stated in his conclusions in this case that "we would be fairly reluctant to propose that a period of two years during which the requirement for a valid reason for termination, a "termination upon cause" *(licenciement causé)*, is rendered inapplicable can be considered to be of a reasonable duration. If you did judge such a duration to be reasonable, there would be a significant risk of contradiction by the Governing Body of the ILO or by the *"Cour de cassation" (translation)*.

50. The Government confirmed that the two-year period of consolidation (which could be made shorter by contract or collective agreement) was conceived as a qualifying period of employment (it included a one-month period of probation). Its purpose was to enable the contractual relationship to be consolidated as the small enterprise developed and to become part of a stabilized economic environment upon the achievement of two years of service. In determining whether the duration of the consolidation period was reasonable within the meaning of the Convention, the period in absolute terms and the time needed to acquire the skills or experience required for the job were not the only factors to be taken into account. Rather, the consolidation period should be assessed in the light of the public interest aim of activating the employment-generation potential in small enterprises and providing them with a strong incentive for recruitment under contracts of indeterminate duration. Other relevant considerations were the limitation of the CNE to small enterprises, without however excluding workers in small enterprises in general from the scope of Convention No. 158, which would have been possible under Article 2, paragraph 5; the proportionate nature of the derogation from the common law rights in that, during the two-year period, the employee would not be deprived of all protection under Convention No. 158, as well as the new balance of rights giving employees under CNEs more favourable conditions in case of termination than was the case under contracts of indeterminate duration together with special assistance in finding a new job. The continued application of existing safeguards as well as the addition of new rights were factors to be considered in the context of the consolidation period. This period was quite different from a probationary period allowing termination without notice or indemnity, which necessarily had to be kept short. Due to the secrecy of deliberations that applied to the *Conseil d'Etat's* decisions, the Government could not make any authoritative statement concerning the kinds of consideration that had led to the finding that the two-year duration of the consolidation

period was reasonable. It believed, however, that four arguments were determinant: the strict limitation of the derogation from the common law in terms of time and content; the introduction of new rights for employees with the aim of ensuring their more rapid reemployment; the continued existence of judicial review for CNEs, including their termination; and the underlying employment policy aims for very small enterprises.

51. The other questions of the Committee took account of the possibility that the derogations made under Ordinance No. 2005-893 might not come within the scope of Article 2, paragraph 2, of the Convention. They concerned the extent to which the protection required by Convention No. 158 in its Article 4 read with Article 7 (reproduced in paragraph 72 below) might be provided by the French courts. To what extent could the courts examine the validity of terminations? For example, could a court declare a termination made just before the expiry of the two-year period to be null and void as an abuse of rights? How could employees under a CNE obtain the necessary information as to the reasons why their employment was being terminated and to what extent would they bear the burden of proving what the reasons were?

52. The complainant stated that in any event the abusive termination mentioned by the Committee could not be declared null and void. It could give rise to the award of damages but not to the reinstatement of the employee. Employees under a CNE could not know the reason for their termination, had the burden of proving an abuse of rights and could not request the court to order investigation due to the derogation from sections L.122-14, L.122-14-2 and L.122-14-3, in particular. The requirement under the normal law for the employer to show a real and serious cause for termination did not apply.

53. The Government noted that any refusal to recognize the validity of the derogation would be tantamount to declaring all terminations invalid ipso facto since by definition the adversarial procedure would not have been respected, and warned of the destabilizing consequence of such a refusal. At the same time, it stressed that appeals to the courts concerning the termination of a CNE during its first two years were covered by exactly the same protective rules as those that applied in the case of termination of labour contracts as a whole. The Ordinance on the CNE did not affect the rights granted in accordance with Article 5 of Convention No. 158 or the rights under the general law relating to discrimination and disciplinary proceedings. Certain terminations of CNEs had been annulled by the courts or had given rise to the award of damages in cases where the employer had not been able to prove the existing and objective nature, under the common law, of the ground of termination. The derogations from the normal conditions in the case of termination that had been introduced for the CNE were of limited scope. The employees' procedural rights, including those concerning court procedures, were preserved: with respect to Article 7 of Convention No. 158, adversarial procedures were still provided for in the case of terminations of a disciplinary nature. With respect to Article 4, the derogation from the requirement on employers to show a real and serious cause did not mean that termination was discretionary. Employers still needed to explain the reason justifying termination to the courts, which would be subject to the normal rules based on public order, such as those prohibiting discrimination. The only real effect of the CNE was to render judicial review less extensive than that exercised in the context of real and serious cause.

54. The complainant and the Government also referred to a significant development at the level of the French courts, although at the time of their replies it was at an early stage: namely, the recognition of the competence of the civil courts hearing appeals against terminations to apply the relevant provisions of Convention No. 158. The *Conseil des Prud'hommes* (industrial relations tribunal) of *Longjumeau (Essonne)*, in a decision of 28 April 2006, had held that the two years under the CNE exceeded the reasonable duration envisaged by Convention No. 158 and that Ordinance No. 2005-893 was

consequently inapplicable under French law (according to the complainant, there had been decisions of other such tribunals to the same effect). Upon appeal to the Paris Court of Appeal, the Prefect of Essonne, applied for the removal of the case from the civil courts, on the ground that the legality of administrative acts, such as Ordinance No. 2005-893, including their conformity with international law, came within the jurisdiction of the administrative courts. The Paris Court of Appeal set the Prefect's application aside and the Prefect adopted an order *(arrêté de conflit)* which brought the case before the Court of Conflicts *(Tribunal des Conflits)*. By decision of 19 March 2007, this Court found that Ordinance No. 2005-893 had been implicitly ratified by two recent laws mentioning the CNE and now had the force of a law. [1] The civil courts have thus been found competent to assess the compatibility of the Ordinance with respect to the international obligations of France under Convention No. 158.

IV. Subsequent developments

55. The Committee was informed of the subsequent judgement of the Paris Court of Appeal on the merits of the case. In this judgement, dated 6 July 2007, the Court found (inter alia) that, during the two-year period, the CNE "deprives employees of the essential part of their rights with respect to termination" and that "having regard to the principle of proportionality it is not possible to consider the two-year period to be reasonable; accordingly, this instrument cannot take advantage of the implied benefit of the temporary derogation from the application of Convention No. 158" *(translation)*.

56. In addition, the Committee took note of a letter addressed to the Office by the complainant on 16 July 2007, informing it of the judgement of the Paris Court of Appeal of 6 July 2007, just referred to, as well as of a decision of the *Conseil d'Etat*, also of 6 July 2007, which annulled Ordinance No. 2005-892, whose execution had been suspended following a decision of the *Conseil d'Etat* of 23 November 2005, pending a decision by the Court of Justice of the European Communities, to which a preliminary question relating to the application of community law in this case had been referred (see paragraph 25 above). In its judgement on 18 January 2007 (Case C-385/05), the Court of Justice had ruled that Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as precluding national legislation which excludes, even temporarily, a specific category of workers from the calculation of staff numbers set out in the relevant provisions of these Directives.

V. The conclusions of the Committee

57. The Committee has based its conclusions on the review of the complainant's allegations, the observations transmitted by the Government in the present procedure, the replies by the complainant and the Government to the Committee's questions and the information previously communicated by the Government in the framework of its reports on the application of ratified Conventions, due under article 22 of the ILO Constitution. The conclusions also take account of statistical information provided by the Government at the Committee's request as well as of observations made by the complainant in this respect.

[1] Court of Conflicts, *Prefect de L'Essone* c. *Cours d'appel de Paris*, No. 3622, 19 Mar. 2007.

58. Law No. 2006-457 of 21 April 2006, on young persons' access to the active life of enterprises has amended section 8 of the Law on equality of opportunities of 31 March 2006, by replacing the CPE by state support for employers concluding contracts of indeterminate duration, for full-time or part-time work, with young people aged between 16 and 25 whose level of education is below a second cycle degree or who reside in a sensitive urban area or who hold a "contract of insertion". The allegations relating to the CPE do not therefore give rise to a cause of action for the purposes of the present procedure.

59. The Committee takes due note of the importance that the Government, through its action, has attached to full employment within the meaning of the Employment Policy Convention, 1964 (No. 122), as well as of the complainant's concern about the need for an employment policy favouring the employment of young people. At the same time, measures aimed at promoting full employment and at being conducive to the creation of productive and lasting employment should be adopted in conditions that are socially adequate for all persons affected and in conformity with international instruments ratified by the country concerned.

60. The Committee limits its analysis to Ordinances No. 2005-892, adjusting the rules for the calculation of the workforces of enterprises, and No. 2005-893, relating to the "contract for new employment", from the point of view of their compatibility with the Termination of Employment Convention, 1982 (No. 158), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). It will examine the possible effects of these Ordinances, first, on the application of Convention No. 158, and, second, on Convention No. 111.

61. As indicated above (paragraph 6 of this report), matters relating to the application of Conventions Nos 87 and 98 were referred to the Committee on Freedom of Association. In its 348th Report, the Committee on Freedom of Association took note of a communication dated 13 September 2007 from the complainant informing that Committee of its wish to withdraw its complaint following the decision of the *Conseil d'Etat* of 6 July 2007 cancelling Ordinance No. 2005-892 of 2 August 2005 and thus finding in favour of the complainant. The Committee on Freedom of Association took note of this information with satisfaction and decided to withdraw the complaint.

Termination of Employment Convention, 1982 (No. 158)

62. Ordinance No. 2005-893 establishes a contract of employment of indeterminate duration, called a "contract for new employment", for any new employment in enterprises with not more than 20 employees. In accordance with section 2 of the Ordinance "this contract is subject to the requirements of the Labour Code, with the exception, during the first two years following its conclusion, of those contained in sections L.122-4 to L.122-11, L.122-13 to L.122-14-14 and L.321-1 to L.321-17 of that Code" *(translation)*. These latter provisions in the Labour Code concern protection under the common law with respect to individual or collective terminations of employment. In derogation from the common law rules, the CNE may be terminated during the first two years, as from the date of conclusion, on the initiative of either party, through a notification of termination sent by registered letter. Where termination is on the employer's initiative, the required period of notice is from two weeks to one month, depending upon the number of years of service concerned and the employer must pay an indemnity amounting to 8 per cent of the total amount of gross remuneration due to the employee as from the conclusion of the contract. Legal claims relating to the termination are statute-barred twelve months after the despatch of the letter of notification.

63. Essentially two issues need to be considered in relation to Convention No. 158, namely:

(a) whether, as the Government claims, workers recruited under the CNE can validly be excluded from the protection of the Convention on the basis of its Article 2, paragraph 2(b); and

(b) whether and to what extent the application of Ordinance No. 2005-893 deprives workers of the protection that is provided for by Article 4 of the Convention.

Concerning the exclusion under Article 2, paragraph 2, of the Convention

64. Article 2, paragraph 2, of the Convention reads as follows:

> A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
>
> (a) workers engaged under a contract of employment for a specified period of time or a specified task;
>
> (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
>
> (c) workers engaged on a casual basis for a short period.

65. The Committee notes that the Government has stated, in it reports on the application of the Convention, submitted in 1991 and 1994, that workers engaged under a contract for a specified period of time and workers serving a period of probation have been excluded from the scope of application of the Convention pursuant to the exclusions provided for in Article 2, paragraph 2.

66. Those exclusions may be made at any time and without any particular procedure. However, without wishing in any way to question the appropriateness of the objectives that the Government is seeking to pursue through the establishment of the CNE, the Committee has doubts as to whether Article 2, paragraph 2, of the Convention offers an appropriate basis for justifying any exclusions from protection that might be considered necessary to achieve those objectives. The policy considerations underlying the establishment of the CNE, including in particular the promotion of full and productive employment, are of the kind that might have justified measures under paragraph 4 or 5 of Article 2, to which the Government referred. [2] But the Committee feels that those considerations have little relevance to the situations covered by Article 2, paragraph 2, and that the purpose of characterizing the period of employment consolidation as a "qualifying period of employment" was essentially to enable employees under the CNE to be excluded from certain provisions of the Convention.

67. The Committee nevertheless considers that the period of employment consolidation could be covered by the term "qualifying period of employment" in the sense of a specified period of service which is required before the employees concerned can have the benefit of a contract of indeterminate duration. In this connection, the Committee recalls that the notion of "qualifying period of employment" *(période d'ancienneté requise)* has been included in Convention No. 158 with a view to taking into account the situations in which

[2] However, both paragraphs 4 and 5 of Article 2 prescribe a procedure to be followed before the exclusions can be decided. In addition, paragraph 6 of Article 2 has been interpreted as implying that such exclusions can only be made at the time of the first report made with respect to the Convention under article 22 of the ILO Constitution.

certain kinds of protection, such as protection relating to unjustified dismissal, the right to a period of notice or severance pay, are only available if the worker concerned had been engaged for a specified period. [3] Different qualifying periods may exist establishing exclusions of varying substantive scope and length and for different purposes.

68. Although CNEs are concluded without specification of a period of time, the derogations from the common law are only for a period characterized by the Government as a "period of consolidation of employment" which has been "determined in advance" and which is defined as "a specific period which, in particular, enables employers to measure the economic viability and development prospects of their enterprise" [4] *(translation)*. From the viewpoint of Article 2, paragraph 2(b), the remaining requirement is that the period should be "of reasonable duration". This is a question to be determined by each country for which the Convention is in force, having due regard to the object of the Convention, which is to protect all employees in all branches of economic activity against unjustified dismissal. In this respect the Committee of Experts on the Application of Conventions and Recommendations has considered that an excessively long qualifying period could deprive workers of the protection provided by the Convention. [5]

69. The Committee notes that the French judicial authorities have had the opportunity to take decisions on the reasonableness of probation or qualifying periods in reference to Article 2, paragraph 2(b), of the Convention. Deciding a petition for the annulment of Ordinance No. 2005-893, the *Conseil d'Etat* held "that, having regard to the purpose for which this derogation has been decreed and to the fact that the 'contract for new employment' is a contract of employment of indeterminate duration, the period of two years during which the common law provisions relating to the termination procedure, and the reasons that might justify it, had been rendered inapplicable can be regarded as reasonable within the meaning of [the relevant provisions of Convention No. 158]" *(translation)*. [6]

70. The Committee also notes that the *Cour de Cassation* (Social Chamber), in a decision of 29 March 2006 concerning the right to a period of notice provided for under Article 11 of the Convention, has held a period of less than six months to be a qualifying period of reasonable duration within the meaning of Article 2, paragraph 2(b), of Convention No. 158. In its established case law concerning the duration of a period of probation, the *Cour de Cassation* accepted as reasonable periods between two weeks and a maximum of six months according to the employee's post. [7]

71. The Committee notes that the aim of the Convention in Article 2, paragraph 2(b), is to ensure that any exclusion from the protection of the Convention of workers serving

[3] International Labour Conference, 67th Session, 1981, Report VIII(1), *Termination of Employment at the Initiative of the Employer*, p. 10.

[4] Ministry of Employment, Social Cohesion and Housing. Questions and answers relating to the "Contract for new employment", points 26 et 27, (www.travail.gouv.fr).

[5] International Labour Conference, 82nd Session, 1995, Report III (Part 4B), *General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982*, para. 43.

[6] Decision No. 283471 of 19 Oct. 2005.

[7] Under this Court's case law a reasonable probation period is between two weeks and a maximum of six months according to the employee's post. One year was thus held to be an excessive duration in the case of an employee in the managerial category (Cass. soc. 17 Mar. 1993), six months for a financial adviser (Cass. soc. 30 Nov. 2000) or a shorthand typist (Cass. soc. 25 Feb. 1977) or three months for an employee who had carried out the same functions under previous contracts (Cass. soc. 9 June 1988).

probation or qualifying periods is of reasonable duration. The raison d'être of the reference to reasonableness can thus be seen as linked to the exclusion from protection. Accordingly, the underlying policy considerations referred to above, as well as measures taken to counterbalance the exclusion from protection or to limit the scope of the exclusion, could help to justify a relatively long period of exclusion. However, the main concern should be to ensure that the duration of the period of exclusion from the benefits of the Convention is limited to what can reasonably be considered as necessary in the light of the purposes for which this qualifying period was established, namely "in particular, [to enable] employers to measure the economic viability and development prospects of their enterprise" and to enable the workers concerned to acquire skills or experience. The Committee notes that the length that is normally considered reasonable in France for qualifying periods of employment does not exceed six months. The Committee would not exclude the possibility that a longer period might be justified to enable employers to measure economic viability and development, but finds itself unable to conclude, from the considerations which were apparently taken into account by the Government in determining the duration, that a period as long as two years was reasonable.

72. The Committee therefore concludes that there is no sufficient basis for considering the period of employment consolidation as "a qualifying period of employment … of reasonable duration", within the meaning of Article 2, paragraph 2(b), justifying the exclusion of the workers concerned from the benefits of the Convention during that period.

73. The Committee accordingly invites the Government, in consultation with the social partners, to take such measures as may be necessary to ensure that the exclusions from the protection provided by the laws and regulations implementing the Termination of Employment Convention, 1982 (No. 158), are in full conformity with its provisions.

Concerning the extent of compliance with Article 4 of the Convention

74. Article 4 of Convention No. 158 reads as follows:

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

This Article must be read with Article 7 of the Convention:

> The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

75. The Committee notes that the provisions of the Labour Code which Ordinance No. 2005-893 renders inapplicable in the case of the CNE include sections L.122-13 (right to damages in the case of abusive dismissal), L.122-14 (required discussion prior to termination), L.122-14-1 (statement of the reason(s) for termination in the notification by registered letter), L.122-14-3 (determination by the courts in the case of disputes as to the "real and serious" nature of reasons for termination), and L.321-1 and the following sections (protection in the case of collective termination for economic reasons), requiring the reason(s) for termination to be made known by the employers prior to termination. In this regard, the Committee recalls the Government's report on the application of the Convention, which was reviewed by the Committee of Experts on the Application of Conventions and Recommendations in 1993, in which it was stated that "effect is given to [the] article [4] by section L.122-14-3 of the Labour Code, which provides that the courts

are to determine whether the reasons for termination given by the employer are 'real and serious'" *(translation)*.

76. The Committee understands from the Government's communications that, in the case of termination during the period covered by the CNE:

(a) employees would have the benefit of an adversarial procedure prior to or at the time of termination only in cases of a disciplinary nature; in other cases, workers whose employment is terminated for reasons of performance or conduct need not be provided an opportunity, prior to or at the time of termination, to defend themselves against the allegations made, as is required by Article 7 of the Convention unless the employer cannot reasonably be expected to provide this opportunity;

(b) the requirement under Article 4, read with Article 7, of the Convention that the employee must be given a valid reason, prior to or at the time of termination, at least in cases relating to conduct or performance, need similarly only be complied with where the termination is of a disciplinary nature;

(c) employees could be obliged to take court proceedings simply to obtain information as to the reason why their employment had been terminated;

(d) a valid reason for the termination must exist, in accordance with Article 4, in the sense that the termination must not be an abuse of rights or for reasons connected with the employees' health condition, their political or religious opinions or their customs or in circumstances showing harassment or any of the discriminatory reasons referred to by section L.122-45 of the Labour Code, giving effect to Article 5 of the Convention. However, as the derogation affects the judicial review relating to the "real and serious" nature of reasons for termination, it is not clear that Ordinance No. 2005-893 allows action to be effectively taken against terminations for invalid reasons other than those of the kinds just referred to.

77. In the above circumstances, the Committee concludes that Ordinance No. 2005-893 significantly departs from the requirements of Article 4 of Convention No. 158, which, as indicated by the Committee of Experts, is the cornerstone of the Convention. [8]

78. At the same time, the Committee notes that the provisions of the Convention have been declared by the *Conseil d'Etat* and the *Cour de Cassation* to be directly applicable under French law and that certain court decisions indicate a clear possibility that the Ordinance will not be given any application by the French judiciary that is found to conflict with Convention No. 158. The Committee accordingly considers that while France is not, at the present time, securing the effective observance of Convention No. 158, it is possible but not certain at present that an adequate remedy is available to the workers concerned from the French courts.

79. The Committee accordingly invites the Government, in consultation with the social partners, to give effect to Article 4 of the Termination of Employment Convention, 1982 (No. 158), by ensuring, in accordance with that Convention, that "contracts for new employment" can in no case be terminated in the absence of a valid reason.

[8] General Survey of 1995, para. 75.

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

80. The complainant raises concerns regarding Convention No. 111 in the context of Ordinances No. 2005-892 and No. 2005-893. As stated in paragraph 56 above, Ordinance No. 2005-892, whose execution had been suspended since the end of November 2005, was subsequently annulled by the *Conseil d'Etat* by decision of 6 July 2007. In so far as that Ordinance is concerned, the Committee's observations below relate to the situation during the four months following the adoption of the Ordinance on 2 August 2005.

81. With respect to Ordinance No. 2005-892, the Committee notes that it amended section L.620-10 of the Labour Code to provide that "any employee engaged on or after 22 June 2005, who is less than 26 years old, shall not, until he or she reaches the age of 26, be counted in the calculation of the workforce of the enterprise concerned, whatever the nature of the contract concluded with the enterprise. This provision may not be given any effect which would lead to the suppression of an institution representing the personnel or of the mandate of a representative of the personnel" *(translation)*. The Ordinance went on to state that "the provisions of this Ordinance shall cease to have effect on 31 December 2007. They shall be the subject of an evaluation on that date".

82. With respect to Ordinance No. 2005-893 relating to the "contract of new employment", as described above in the context of Convention No. 158, the complainant maintained that the new legislation would lead to additional discrimination, particularly in certain sectors, namely those characterized by a high level of flexibility and precarious employment, difficult working conditions and poor remuneration, and which employed mostly young workers. While the CNEs did not target young people specifically, the complainant submitted that the combined effect of Ordinances No. 2005-892 and No. 2005-893 could result in a disproportionate use of CNEs for workers under 26 years of age, who would then be trapped in a situation where they were permanently deprived of the right to organize and job security.

83. The Government stated that the allegations did not show how Ordinance No. 2005-892 would deprive young workers of protection against acts of discrimination having the effect of nullifying or impairing equality of opportunity and treatment in employment and occupation. According to the Government, the communication did not show how this measure was capable of inhibiting access to employment and various occupations, vocational training or conditions of work. The Government submitted that the objective of Ordinance No. 2005-892 was to facilitate recruitment of those categories of workers that were most exposed to unemployment, and the fact that young workers were temporarily not being counted had no effect on their individual situation in terms of recruitment, conditions of work, advantages offered to other employees or the legislation protecting them against discrimination. While not contesting policies to promote youth employment, the complainant expressed the view that the measures could not be considered "special measures" within the meaning of Article 5, paragraph 2, of Convention No. 111, as the exclusion of workers under 26 when calculating the workforce of an enterprise could not, from the standpoint of the right to organize and staff representation, be deemed a measure designed to meet the particular requirements of persons allowing for special protection or assistance.

84. With respect to the complainant's principal argument centred on Convention No. 111 relating to the combined effect of Ordinances No. 2005-892 and No. 2005-893, the Committee recalls the definition of discrimination in Article 1, paragraph 1(a), of Convention No. 111:

> … 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.

While this definition does not explicitly cover age discrimination, paragraph 1(b) provides that discrimination may also include

> 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' organizations, where such exist, and with other appropriate bodies.

The Committee notes that such a determination appears to have been made by France with respect to age discrimination as section L.122-45 of the Labour Code prohibits age discrimination with respect to all aspects of employment and occupation.

85. In the framework of Convention No. 111, the use of the CNEs raises the issue as to whether a certain group of workers protected by the Convention was thus discriminated against, since Ordinance No. 2005-893 does not single out any particular group of workers, but is rather aimed at the size of the enterprise. Linked with Ordinance No. 2005-892, however, which was aimed at those under 26, the Committee notes that there was a possibility that the combined effect could have impaired equality of opportunity and treatment in employment or occupation on the basis of age. However, since Ordinance No. 2005-892 was in force for less than four months and since the concerns expressed by the complainant are not supported by information of any specific instances of discrimination resulting from the impugned measures, the Committee is not in a position to reach a conclusion on whether or not the combined effect of the impugned measures, in fact, resulted in a nullification or impairment of equality of opportunity and treatment in employment and occupation of workers under 26 years of age.

86. With regard to the issue raised regarding Article 5, paragraph 2, of the Convention, the Committee nevertheless recalls that Article 2 of Convention No. 111 requires each Member 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 discrimination in respect thereof. Such methods may include special measures, pursuant to Article 5, paragraph 2, of the Convention, which provides that:

> Any member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed discrimination.

87. The Committee emphasizes the importance of the consultation process provided for under Article 5, paragraph 2, of the Convention with a view to ensuring that special measures of protection and assistance are adopted and implemented in accordance with the letter and spirit of the Convention. In this connection, the Committee recalls that in applying this provision it is important that the special measures concerned do in fact pursue the objective of offering protection and assistance and that the measures tend to ensure equality of opportunity and treatment in practice, taking into account the diversity of the situations of certain persons, so as to halt discriminatory practices against them. These types of preferential treatment are thus designed to restore a balance and are and should be part of a broader effort to eliminate all inequalities. Furthermore, the Committee of Experts on the Application of Conventions and Recommendations has emphasized that a careful re-examination, in consultation with workers' and employers' organizations, of certain measures may reveal that they are conducive to establishing or permitting actual

distinctions, exclusions or preference falling under Article 1 of the Convention. Once adopted, the special measures should be examined periodically, in order to ascertain whether they are still needed and remain effective. It should be borne in mind that such measures are clearly of a temporary nature inasmuch as their objective is to compensate for imbalances resulting from discrimination against certain workers or certain sectors. [9]

88. Noting further that Ordinance No. 2005-893 provides that the conditions of implementation of the CNE and its effects on employment will, by 31 December 2008, be assessed by a committee made up of representative employers' and workers' organizations, the Committee considers it essential that this review also include an assessment of whether the measures have resulted in any indirect or direct discrimination against young workers, taking into account the effects of multiple discrimination based on age and the grounds referred to in Article 1, paragraph 1(a), of the Convention, especially sex, race, colour and national extraction.

VI. The Committee's recommendations

89. ***In the light of the conclusions set out above concerning the issues raised in the representation, the Committee recommends to the Governing Body:***

(a) that it approve the present report;

(b) that it invite the Government, in consultation with the social partners, to take such measures as may be necessary:

(i) to ensure that the exclusions from the protection provided by the laws and regulations implementing the Termination of Employment Convention, 1982 (No. 158), are in full conformity with its provisions;

(ii) to give effect to Article 4 of the Termination of Employment Convention, 1982 (No. 158), by ensuring, in accordance with that Convention, that "contracts for new employment" can in no case be terminated in the absence of a valid reason;

(c) that it entrust the Committee of Experts on the Application of Conventions and Recommendations with following up the questions raised in this report with respect to the application of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Termination of Employment Convention, 1982 (No. 158);

(d) that it make this report publicly available and close the procedure initiated by the representation of the Confédération générale du travail – Force ouvrière, alleging non-observance by France of Conventions Nos 111 and 158.

Geneva, 6 November 2007. *(Signed)* Francesca Pelaia,
Ulf Edström,
Michel Barde.

Point for decision: Paragraph 89.

[9] Special Survey on equality in employment and occupation, 1996, paras 135–136.