



Governing Body

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Institutional Section

INS

FIFTEENTH ITEM ON THE AGENDA

Report of the Director-General

Tenth Supplementary Report: Report of the committee set up to examine the representation alleging non-observance by Poland of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), made under article 24 of the ILO Constitution by the All-Poland Alliance of Trade Unions and the Trade Unions Forum

I. Introduction

1. In communications dated 23 September 2013, 25 November 2013 and 5 May 2014, the All-Poland Alliance of Trade Unions made a representation to the International Labour Office under article 24 of the ILO Constitution alleging non-observance by the Government of Poland of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), ratified by Poland in 1961. The Convention is in force for Poland.
2. In a communication dated 2 January 2014, the Trade Unions Forum made a similar representation to the International Labour Office under article 24 of the ILO Constitution alleging non-observance by Poland of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), ratified by Poland in 1961.
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 Poland and brought it before the Officers of the Governing Body.
5. At its 321st Session (June 2014), the Governing Body found the representations to be receivable and appointed a Committee to examine the matter. The Committee is composed of Mr Cano Soler (Government member, Spain), Ms Pineau (Employer member, France) and Mr Ohrt (Worker member, Denmark).
6. On 2 December 2014, the Government of Poland submitted its written observations concerning the representations.
7. The Committee met on 18 March 2015 and decided to request the complainant organizations and the Government to provide additional information regarding any interpretation of article 32(2) of the Constitution of Poland by 24 April 2015. In a communication received in the Office on 22 April 2015, the Government requested an extension of the deadline to submit this information by 31 May 2015 and the tripartite Committee granted the extension of the deadline as requested. In a communication received by the Office on 4 May 2015, the All-Poland Alliance of Trade Unions provided supplementary information in relation to article 32(2) of the Constitution of Poland.
8. The Committee also met on 5 and 9 November 2015 to examine the case and adopt its report.

II. Consideration of the representation

Allegations of the complainant organizations

9. In the communications dated 23 September 2013, 25 November 2013, 2 January 2014, and 5 May 2014, the All-Poland Alliance of Trade Unions and the Trade Unions Forum allege that Poland has violated *Article 1(1)(b)* of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) by establishing a different legal status for the firefighters of the Aircraft Rescue and Firefighting Service (ARFFS) as compared to those of the State Fire Service (SFS). Consequently, the age at which the ARFFS firefighters are entitled to a pension is different from that of the SFS firefighters. In this respect, the complainants refer to the principle of equal treatment as established in article 32 of the Constitution of Poland, which provides that all persons shall be equal before the law and have the right to equal treatment by public authorities and states that “no one shall be discriminated against in political, social or economic life for any reason whatsoever”.

- 10.** The complainants indicate that the ARFFS is regulated by the Aviation Act of 3 July 2002 and is a fire protection unit which is part of “other rescue units”, specified in section 15(8) of the Fire Protection Act of 24 August 1991. Firefighters in the ARFFS are under an employment contract with the entity that administers the aerodromes which covers all the functioning costs of the ARFFS. In addition, they are not considered firefighting officers. The SFS is a professional service established by the State Fire Service Act of 24 August 1991. Firefighters in the SFS are considered firefighting officers and are covered by the state budget.
- 11.** The complainants further state that SFS firefighters, as firefighting officers, have the right to a special pension regime established under the Act of 18 February 1994 on Pensions for Officers of Police Forces, Internal Security Agency, Foreign Intelligence Agency, Military Counter-intelligence Service, Military Intelligence Service, Central Anti-Corruption Bureau, Polish Border Guard, Government Security Bureau, State Fire Service and Prison Services, and members of their families. As provided for in section 12 of this Act, pensions are granted to SFS firefighters released from service who, on the release day, have completed 15 years of service in the SFS. Following an amendment of the Act of 1994 on 11 May 2012, articles 18(a) and 18(b) were added, which grant a pension to all SFS firefighters employed for the first time after 31 December 2012 and who, when released from service, fulfil two conditions on the release day: they are at least 55 years of age and have 25 years of service in the SFS.
- 12.** According to the complainants, ARFFS firefighters are in a different situation and fall under the general pension regime set out in the Act on Pensions and Allowances from the Social Insurance Fund of 17 December 1998. In accordance with this Act, the pensionable age for firefighters in the ARFFS is 60 years of age for women and 65 years of age for men. Following the amendment of the Act of 17 December 1998 by the Act of 11 May 2012, the general pensionable age for women born after 30 September 1973 and for men born after 30 September 1953 is 67 years. The Act entered into force on 1 January 2013.
- 13.** The complainants highlight that although firefighters in the SFS and the ARFFS are required to perform the same tasks (fight fires, natural disasters and other local hazards), are exposed to the same risks (loss of life and injuries) and mental stress, are required to have the same professional qualifications and are both considered firefighters by the legislation, they are not entitled to a pension at the same age, due to their different legal status. This entails heavy consequences for the ARFFS firefighters, who must face the high responsibilities and risks of their profession after the age of 55. The complainants also state that this situation might also have negative consequences on the health and security of the public in general in aerodromes.
- 14.** The All-Poland Alliance of Trade Unions further submits that a legislative proposal to equalize the conditions under which ARFFS and SFS firefighters are entitled to receive a pension was prepared by the Aircraft Rescue and Firefighting Service and submitted to Parliament, following various meetings and consultations. The organization indicates that a vote took place in Parliament on 11 May 2012, rejecting the proposal with 230 votes against and 222 votes for.
- 15.** In a communication dated 22 April 2015, received on 6 May 2015 by the Office, the All-Poland Alliance of Trade Unions and the Trade Unions Forum submitted additional information, in response to the tripartite committee request made on 18 March 2015. The additional information presents judgments of the Polish Constitutional Tribunal related to the interpretation of article 32 of the Constitution of Poland and the trade unions’ comments upon these judgments.

The Government's response

- 16.** In its reply, the Government provides information on the legal developments that led to a differentiation in the legal status of the SFS firefighters and the firefighters in the ARFFS. The Government indicates that until 1 January 1992, all persons serving as firefighters had the same status and were officially firefighting officers under the Ordinance of 27 December 1974. The Act of 24 August 1991 on State Fire Service introduced a difference in the status of persons performing fire protection tasks. The first group included the SFS firefighters employed on the basis of an appointment in the SFS as a professional uniformed unit with specialized equipment for fighting fire, natural disasters and other local threat. The second group was comprised of employees of fire protection units, including the ARFFS, having the status of employees under employment contracts performing tasks in specific conditions and of specific nature. The employment entitlements of firefighters in the ARFFS are governed by the labour law.
- 17.** The Government further indicates that pursuant to section 129(6) of the Act of 24 August 1991 on the State Fire Service, all the then firefighter officers had the possibility, through a written statement to be made before 31 January 1992, to take up service in the newly established State Fire Service. In accordance with this section of the Act, the firefighters who expressed their consent and obtained the status of firefighter would lose such status if they had not been appointed or nominated to a position within the SFS by 30 June 1999. The Government underlines that the employees of company fire services and company rescue services who did not expressly choose to take up service at the SFS remained in the company fire protection units transformed into private sector companies. According to the Government, this was a much more advantageous solution in financial terms in comparison to remuneration in the SFS.
- 18.** The Government further submits that the fundamental difference between the status of employees of the ARFFS and SFS firefighters is that the latter act as public officials, which entails a range of specific obligations, such as availability around the clock, service subordination and disciplinary liability. SFS firefighters terms and conditions for a pension are therefore provided for in the Act of 18 February 1994 on Pensions for Officers of Police Forces, Internal Security Agency, Foreign Intelligence Agency, Military Counter-intelligence Service, Military Intelligence Service, Central Anti-Corruption Bureau, Polish Border Guard, Government Security Bureau, State Fire Service and Prison Services, and members of their families whereas the entitlements of firefighters in the ARFFS to a pension is regulated by the Act of 17 December 1998 on Old-age and Disability Pensions from the Social Insurance Fund and the Act of 19 December 2008 on Transitional Pensions.
- 19.** The Government adds that employment in the ARFFS is being treated as employment in specific conditions or of a specific nature, employees thereof born before 1 January 1949 and some of them born after 31 December 1948 who meet the length of service criteria as of 1 January 1999 are entitled to retire at an earlier age than the age stipulated in the Act of 17 December 1998. Employees born after 31 December 1948 who do not meet the requirements for early retirement and who are more than 55 years old for women and 60 for men may have the option to receive a transitional pension until they reach the statutory retirement age under the Act of 17 December 1998 on Old-age and Disability Pensions from the Social Insurance Fund (the general pension scheme).
- 20.** The Government concludes that levelling out the entitlements of employees of the ARFFS with those of the SFS firefighters would result in awarding the status of SFS firefighter to employees who are under an employment contract and who perform tasks in specific conditions and of a specific nature. The Government also underlines that such a solution

would involve considerable financial consequences for the state budget, as the pensions of SFS firefighters are fully financed from this budget.

21. Further to the request of the tripartite committee for supplementary information, the Government submitted the analysis of the Constitutional Tribunal case law, regarding article 32 of the Constitution of Poland, prepared by the Office of the Tribunal.

III. Elements for the conclusions of the Committee

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

The principles of the Convention

23. The representations relate to *Article 1* of Convention No. 111, which reads as follows:

1. For the purpose of this Convention the term "discrimination" includes:
 - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
 - (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.
2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.
3. For the purpose of this Convention the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Grounds of discrimination under the Convention

24. Firstly, the Committee wishes to recall that the issue raised by the complainants relates to distinctions made on the basis of the "legal status" of two categories of workers (civil servants – SFS firefighters – and employees in the private sector – firefighters in the ARFFS). Secondly, it is important to note that "legal status" is not among the seven grounds of discrimination enumerated in *Article 1(1)(a)* of the Convention.

Possibility to determine additional grounds of discrimination

Convention No. 111

25. Under *Article 1(1)(b)*, the Convention allows the ratifying member State to determine additional grounds of discrimination, after consultation with representative employers' and workers' organizations, and with other appropriate bodies. The participation of employers' and workers' organizations, either directly or through a specialized body, is of particular importance since it provides an additional guarantee of the acceptance and implementation of national policies adopted in accordance with the Convention. The Convention does not

set out a particular mechanism for States to extend the coverage of the Convention to additional grounds nor does it provide for a specific requirement to communicate such determination.

26. As obligations under the Convention in respect of additional grounds are not to be assumed, the Committee would have to examine all the elements before it, including any governmental statement, laws and regulations, policies or case law, to decide whether a determination under *Article 1(1)(b)* of the Convention has been made by Poland with respect to “legal status”. In this regard, the Committee notes that no indication, such as a formal statement or declaration, was received from the Government of Poland, as well as from the complainants, with respect to any additional grounds of discrimination.

Constitution

27. With regard to anti-discrimination provisions in the Polish legislation, the Committee notes that the Constitution of Poland, to which the complainants refer in the representations, sets out a general non-discrimination and equal treatment provision and does not expressly mention any prohibited grounds of discrimination. However, article 32(2) of the Constitution of Poland prohibits discrimination “for any reason whatsoever”. From the additional information provided by both the complainants’ organizations and the Government (in particular, the Office of the Constitutional Tribunal) - in response to the request of the Committee for information on the interpretation by the Constitutional Tribunal of Poland of article 32(2) – it is worth noting that interpretation of article 32(2) is relatively scarce, in particular as regards the wording “for any reason whatsoever”; and that most of the time, article 32(2) is interpreted jointly with article 32(1) – as the Constitutional Tribunal considers that it is complementary to the general principle of equality expressed in article 32(1). According to the Office of the Constitutional Tribunal, unequal treatment of similar entities does not have to be unconstitutional, as the Constitution allows such differentiations of legal situation, *provided that they pass the “equality test”* (that is an assessment of relevance, proportionality and compliance with constitutional principles, values and standards).
28. Among the numerous decisions of the Constitutional Tribunal provided by the All-Poland Alliance of Trade Unions in May 2015, there is a ruling dated 3 March 2015 (Reference: No. K39/13) where the Tribunal had to decide whether the different treatment between customs officers and police officers vis-à-vis their pension entitlements was discriminatory. In reviewing that case, the Constitutional Tribunal stated that, excluding the professional group of customs officers is not in itself a sufficient reason to believe that such differentiation violates the principle of equality and non-discrimination under article 32 of the Polish Constitution. In that particular case, the Tribunal decided that the difference in pension entitlements was *not* constitutionally justified and therefore discriminatory.
29. In its supplementary information (including the analysis provided by the Bureau of the Constitutional Tribunal), the Government indicates that similarity of the tasks performed by the two categories of firefighters is not enough to claim violation of the principle of non-discrimination. It stresses that others points have to be taken into account such as the conditions of work of the two categories of firefighters and, in particular, the fact that the scope of SFS’ obligations, availability, service subordination and disciplinary liability is of specific nature (for example, the SFS are obliged to be available around the clock).
30. The tripartite committee is not aware of whether an action against the texts governing the ARFFS (Labour Code) and the SFS (Civil Service Regulations) has been brought before the Constitutional Tribunal to enable it to carry out the “equality test”. The tripartite committee understands that this evaluation can only be conducted by the Tribunal on a case-by-case analysis. In these circumstances, the tripartite committee hopes that the

Committee of Experts on the Application of Conventions and Recommendations, while examining the application of Convention No. 111 by Poland, in conformity with article 22 of the ILO Constitution, will take into consideration any ruling related to the issue under consideration.

Labour Code

- 31.** Section 11, paragraph 3, of the Labour Code on prohibition of discrimination in employment reads as follows “any discrimination in employment, direct or indirect, in particular in respect of gender, age, disability, race, religion, nationality, political views, trade union membership, ethnic origin, creed, sexual orientation or in respect of the conditions of employment for a definite or indefinite period of time or full or part time, are prohibited”. The list of prohibited grounds of discrimination, while not limited to the grounds enumerated (with the use of “in particular”), does not expressly refer to the “legal status” of a worker. No information on any judicial decisions that would indicate that section 18(3a)(1) of the Labour Code has been interpreted by the courts to include “legal status” as a prohibited ground of discrimination, has been communicated by the complainants. In addition, the Committee does not have any information on whether consultations have been held with representative workers’ and employers’ organizations and specialized bodies with a view to determining “legal status” as a ground of discrimination, in accordance with *Article 1(1)(b)* of the Convention. There is also no evidence that Poland has included “legal status” in its national policy to promote equality of opportunity and treatment in employment and occupation, as envisaged in *Article 2* of the Convention.
- 32.** In light of the elements at its disposal, the Committee considers that a determination within the meaning of *Article 1(1)(b)* of the Convention concerning additional grounds of discrimination does not appear to have been made by Poland with respect to “legal status”. In addition, the complainants have not established that “legal status” is covered by *Article 1(1)(b)* of the Convention ratified by Poland. Consequently, the Committee considers that the distinctions on the basis of this ground with respect to pension entitlements in Poland do not amount to discrimination as defined in *Article 1* of the Convention.

The committee’s recommendations

- 33. *In light of the above conclusions, the committee recommends to the Governing Body that it:***
- (a) approve the present report and, in particular, the recommendation stated by the committee in paragraph 32; and***
 - (b) make the report publicly available and close the procedure initiated by the representation made by the All-Poland Alliance of Trade Unions and the Trade Unions Forum, alleging the non-observance by Poland of Convention No. 111.***

Geneva, 9 November 2015

(signed) Diego Cano Soler
Garance Pineau
Jens Erik Ohrt

Points for decision: paragraph 33