Revue de droit comparé du travail et de la sécurité sociale

4 | 2019
English Electronic Edition

United Nations Organization

Elena Sychenko

Electronic version

URL: <https://journals.openedition.org/rdctss/1447>

DOI: 10.4000/rdctss.1447

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2019

Number of pages: 238-241

ISSN: 2117-4350

Electronic reference

Elena Sychenko, "United Nations Organization", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2019, Online since 01 November 2021, connection on 11 November 2021. URL: <http://journals.openedition.org/rdctss/1447> ; DOI: <https://doi.org/10.4000/rdctss.1447>

Revue de droit comparé du travail et de la sécurité sociale est mise à disposition selon les termes de la Licence Creative Commons Attribution - Pas d'Utilisation Commerciale - Pas de Modification 4.0 International.

ELENA SYCHENKO

SAINT PETERSBURG STATE UNIVERSITY

I - THE COMMITTEE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

In the period March 2018- October 2018 the Committee adopted the concluding observations and recommendations in respect of Cabo Verde, Germany, Argentina, Mali, South Africa and Turkmenistan. It also considered one individual case relevant to social security¹. Further the most interesting points of the concluding observations and the views adopted by the Committee in the individual case will be considered.

This individual case concerned the right to pension based on voluntary contributions. The applicant, Mrs Marcia Cecilia Trujillo Calero, was a voluntary affiliate of the social security system, since she was a housewife. She made 305 monthly payments during a number of consecutive years with the exception of 8 months in 1989/1990 which she paid retroactively in 1999. As the Law provided the right to pension after 300 monthly contributions she resigned from her job and applied for special retirement in 2002. The authorities, however, refused to assign her a pension as according to national legislation the voluntary affiliation had terminated in 1989, after non-payment of contributions during 6 months. The applicant claimed that she was not aware of this decision. All the attempts to challenge this decision in national courts were unsuccessful.

The Committee in its opinion considered the case in light of the positive obligations of the State. It noted that the conditions of eligibility should be reasonable, proportionate and transparent, should be communicated to the public in a timely and sufficient manner. The penalty of termination of affiliation to a social security scheme should be reasonable and proportionate. In this case even though such a penalty was provided in law and these provisions were publicly accessible the Committee attached attention to a particular vulnerability of women as voluntary affiliates, as they have no personal monthly income. The lack of notification from the part of the authorities about the termination of affiliation and continuing receipt of contributions for 5 years created a legitimate expectation to receive this pension. The Committee considered that it was disproportionate to be disaffiliated for not being able to pay contributions for six consecutive months.

The Committee also considered that such a penalty constituted indirect discrimination on grounds of gender. In conclusions the Committee made the recommendations of both individual and general nature. It urged Ecuador to ensure the right of all affiliates for timely and appropriate information on their right to social security; to ensure that penalties imposed on affiliates are proportionate.

¹ All the reports are available: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR

This conclusion is very important for women in Ecuador, it represents a scrutiny of social security law through the lens of antidiscrimination principle. It should be noted that the unemployment rate among women in this country is 30% more than among men, and only 29, 9 % of women are engaged in full employment². Therefore, the norms in question hypothetically affect thousands of women.

Turning to the issues considered in the concluding observation of the countries' reports two points of interest will be analysed:

- 1 - Excessive fines for illegal strikes imposed by Argentina;
- 2 - The critics of the National Action Plan on Business and Human Rights adopted in Germany.

1 - The Committee reviewing the report of Argentina noted that the disproportionate use of fines constitutes the acts of intimidation and is a restriction on freedom of association. The google search of the information on the fines imposed on trade unions gave a number of results: trade union of teachers received the fine equal to 23 million US dollars for 2 days strike³, trade union at the sugar mill - about 64 000 USD⁴ and the trade union of truck drivers - about 22 mln USD for breaching a mandatory conciliation provision⁵. The fines in such sums might have only one objective - the dissolution of a trade union. ILO has numerously underlined that the penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence⁶, the fines should not be of an amount that is likely to lead to the dissolution of the union or to have an intimidating effect on trade unions⁷. This position was expressed by UN CESCR in the present concluding observations in respect of Argentina.

2 - Considering German report the Committee welcomed the adoption of the National Action Plan on Business and Human Rights, however it was concerned at its exclusively voluntary nature and the lack of monitoring mechanisms. It recommended to ensure the effective implementation of this plan by all stakeholders, through a comprehensive and transparent monitoring process. It also recommended to ensure that all companies domiciled in Germany or under its jurisdiction identify, can be held liable for the human rights violations not only in Germany but also abroad.

The Committee also noted certain shortcomings in the access to judicial protection by non-nationals, whose rights have allegedly been violated by German companies abroad. It recommended to take measures, including the provision of enhanced legal assistance for victims. These measures should also include the introduction of collective

3 <https://rpp.pe/mundo/argentina/argentina-sindicato-de-docentes-recibe-multa-de-us-23-millones-por-huelga-noticia-1140555>

4 <https://survey.ituc-csi.org/argentina.html?lang=en#tabs-3>

5 <https://www.nacion.com/el-mundo/conflictos/multa-de-28-millones-a-camioneros-por-protesta-ZIPFSPKDDFBIDPUHXC6IA2ZXO/story/>

7 ILO CFA, Case no. 3011 (Turkey) - Complaint date: 04-MAR-13 Turkish Civil Aviation Union (Hava-İş) and International Transport Workers' Federation (ITF).

redress mechanisms in civil proceedings, criminal liability of corporations and disclosure procedures. These steps should guarantee that the victims of human rights abuses by companies domiciled in Germany or under the country's jurisdiction have access to effective remedies and compensation in Germany.

It is particularly important that for the first time the Committee has referred to the State's obligations developed in the Statement on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights (E/C.12/2016/1). CESCR broadly interprets the Covenant, attaches attention to the obligations of the States not only in respect of people under its jurisdiction but also as the members of international institutions. It expressed regrets that Germany, as a member of the International Monetary Fund and the European Stability Mechanism, has not exercised its great leverage to ensure that the conditionalities that these institutions attach to a loan do not result in unjustified retrogression in the enjoyment of the rights covered by the Covenant in borrowing States.

II - THE HUMAN RIGHTS COMMITTEE

During its 123d and 124th sessions the Human Rights Committee (HRC) reviewed the implementation of the ICCPR in Belarus, Belize, Bulgaria, Guinea, Sudan, Algeria, Bahrain, Lao People's Democratic Republic, Liberia and Lithuania. It also considered one relevant to labour rights individual complaint against Turkmenistan⁸. In this case the applicant claimed that his prosecution and conviction for refusing to perform compulsory military service owing to his religious beliefs have violated his rights under the Covenant. The Committee has already dealt a number of times with this problem in Turkmenistan and established the violation of the Covenant in this case as well. It also recalled its recommendation to Turkmenistan to abolish criminal responsibility for such acts and ensure the possibility of alternative service in the concluding observations on the second periodic report considered in 2017 (CCPR/C/TKM/CO/2, para. 40)⁹.

In the concluding observations on the countries' reports the Committee was concerned with the problem of discrimination of women in the labour market, protect the rights of disabled people, guarantee protection from forced labour and human trafficking. The latter two issues will be considered in some detail below.

In Belarus the Committee noted the that elements of forced labour continue to be enshrined in legislation. For example, the duty for parents whose children are under State care to reimburse the expenses for this care, which may result in an employment order (enforceable by criminal sanction) against such parents if they are unemployed or underemployed. Compulsory labour required from persons subject to involuntary isolation and medical and social rehabilitation was also mentioned in the observations. The issue of forced labour has been considered also by the UN CESCR in the concluding observation in 2016¹⁰ and by ILO Committee on the Application of Standards (CAS)¹¹. Recommendations

8 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CCPR

9 Views adopted by the HRC under article 5 (4) of the Optional Protocol, concerning communication no. 2268/2013, 06/12/2018.

10 CESCR, Concluding observations on the combined fourth to sixth periodic reports of Belarus, 13/12/2013.

11 Individual Case (CAS) - Discussion: 2018, Publication: 107th ILC session (2018) Forced Labour Convention, 1930 (no. 29) - Belarus

of these bodies made Belarus repeal the famous Presidential decree no. 9. This document stated that during the modernization of woodworking enterprises, employees can only terminate their labour contracts with the consent of the employer. Therefore the impact of international human rights bodies might be evidenced in Belarus. Hopefully the regulations mentioned in the present observations by HRC will be also amended.

The problem of human trafficking was noted in almost all the reports. In particular, in Bahrain migrant domestic workers were subjected to abuse and exploitation. HRC underlined the lack of effective remedies for such abuses and urged the State to provide them. In respect of Liberia it noted the very low rate of prosecution and conviction, as well lenient sanctions handed down against traffickers, which should be proportionate to the gravity of such offences. HRC underlined the need to ensure adequate support to victims, such as government-run shelters. In Gambia human trafficking for forced labour and sexual exploitation was widespread and the State, in the opinion of the HRC, should conduct training for judges, prosecutors and law enforcement officials, enhance the identification of victims and provide victims with access to effective remedies, including rehabilitation. These requirements of the HRC are in line with the provisions of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which was ratified by all the states mentioned above.