

Resolution CM/ResChS(2013)18

European Council of Police Trade Unions (CESP) v. Portugal Collective Complaint No. 60/2010

*(Adopted by the Committee of Ministers on 11 December 2013
at the 1187th meeting of the Ministers' Deputies)*

The Committee of Ministers,¹

Having regard to Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints;

Taking into consideration the complaint lodged on 18 March 2010 by the European Council of Police Trade Unions (CESP) against Portugal;

Having regard to the report transmitted by the European Committee of Social Rights containing its decision on the merits, in which it concluded:

- by a majority of 13 to 1, that there is a violation of Article 4§2 of the Revised Charter on the grounds that police officers on active prevention (prevenção activa) duties and shift duties (serviço de piquete) do not receive increased remuneration as required nor even remuneration equivalent to their basic hourly pay.

It is recalled that the principle of this provision is that work performed outside normal working hours requires an increased effort on the part of the worker and must be compensated. Therefore, as a general rule, not only must the worker receive payment for overtime, therefore, but also the rate of such payment must be higher than the normal wage rate (Conclusions I, Statement of Interpretation of Article 4§2). Compensation for overtime work may also be granted as time off in lieu, however in that case Article 4§2 requires that this time be longer than the additional hours worked (Conclusions XIV-2, Belgium).

It is also acknowledged that there may be mixed systems for compensating overtime, for example where an employee is paid the normal rate for the overtime worked but also receives time in lieu, or where the extra time worked is "banked". Exceptions may be authorised in certain specific cases such as that of managers with particular responsibilities and staff whose activities warrant exceptions. Therefore some high-ranking police officials need not receive supplements/increased remuneration for overtime work but this exception cannot be extended to all ranks of police officers performing management duties but having no particular responsibilities, irrespective of what the corps to which they belong is called (CESP v. France Complaint No. 57/2009, decision on the merits of 1 December 2010).

It was found in the case CESP v. France (Complaint No. 57/2009, abovementioned decision, §53) that neither the members of the supervision and enforcement corps nor those of the command corps of the national police force could all be categorised as staff to which the exceptions provided for in Article 4§2 of the Charter could apply; and therefore the flat-rate nature of the remuneration paid for overtime by the supervision and enforcement corps constituted a violation of the Charter and this was not the case for the command corps, because overtime pay amounted to 1.5 times the normal hourly rate.

Also, the notion of overtime exceeding normal working hours or hours of service may be viewed differently depending both on the type of responsibility exercised or the

nature of the activity and on the way in which the work is organised and the basic means of calculation.

Many of the States Party which have accepted Article 4§2 have adopted schemes providing for flexible working hours, in which working hours are calculated as an average over given reference periods. The result of these schemes is that hours worked in excess of the average number are compensated in practice by rest periods in the course of other weeks within the reference period. Such arrangements are, *prime facie*, not in breach of Article 4§2 (General Introduction to Conclusions XIV-2).

The special nature of police activities, particularly those of the criminal investigation branches, implies that in order to provide the continuous service required by the Portuguese Organic Law of 2000, patterns of work organisation and methods of calculating pay need to be adjusted.

It is in the light of these considerations that will be examined in turn the remuneration of passive prevention (*prevenção passiva*), active prevention (*prevenção activa*) and shift duties (*serviço de piquete*).

As regards to passive prevention duties, when police officers are on these duties they are not in fact required to work but are on call. The employees on call or standby but not actually working must be compensated for this (CESP v. Portugal, Complaint No. 37/2006, decision on the merits of 3 December 2007, §33). Once the situation arises in which employees have to give up any private activity which would prevent them from responding immediately to a request from their employer, the only acceptable form of remuneration is one which is based on a variable percentage according to the amount of time spent on call. It has been repeatedly held that it is a breach of the Charter, for employees on call or standby to be paid at a lower rate if they are actually called on to work. This reasoning applies to all such situations in the police regardless as to what name they are given (CESP v. France, Complaint No. 57/2009, abovementioned decision).

When it dealt with this issue in 2006, however, the Committee considered that the payment of Portuguese police officers' on-call duties should be regarded as having been covered by the on-call allowance which formed part of their basic pay and hence that the situation was not incompatible with Article 4§2 of the Revised Charter (CESP v. Portugal, Complaint No. 37/2006, abovementioned decision, §33). None of the evidence in possession leads to reverse this position on this matter in the present case.

With regard to active prevention duties, which arise when police officers on passive prevention duties must in fact work, it is noted that according to the very precise calculations provided by the CESP, that were not disputed by the government, the remuneration for this type of duty is always lower than the basic hourly rate of pay, at €2.79 to €7.79 per hour depending on the time at which the work is performed and the officer's grade. It is, however, considered whether these tasks should be regarded as being remunerated like those of passive prevention, by the allowance included in the officers' basic pay. This interpretation should not be ruled out straight away but is impossible to be adopted since the law sets no precise limit and therefore there may be an almost unlimited extension of working hours. Consequently, there is a violation of Article 4§2 of the Revised Charter.

As to shift duties, unlike for prevention tasks, it is impossible to see how payment for these tasks could be included in basic pay. The documents provided by the CESP, which were not disputed by the government, show that the extra pay supplement awarded for each working day (of 17 to 24 hours according to whether the day in question was a weekday or weekend, to which this task had been partly ascribed) amounts to an hourly rate which is hardly any higher or slightly lower than the basic hourly wage,

between €2.00 and €2.50 depending on the time when work is carried out and the officer's grade. Therefore there is a violation of Article 4§2 even without taking into consideration the ceiling on payments for overtime which the CESP describes and whose existence the government does not deny.

- unanimously, that there is no violation of Article 6§§1 and 2 of the Revised Charter.

The submissions of the CESP do not distinguish between a violation of Articles 6§§1 and 2 of the Revised Charter, but generally allege that the right of police staff to collective negotiation and to consultation as guaranteed by these provisions is not respected. Given the close link between Article 6§1 and 6§2 of the Revised Charter as regards the right to collective bargaining, the Committee treated these provisions together (CESP v. Portugal, Complaint No. 40/2007, decision on the merits of 23 September 2008).

The complainants have not developed this argument; no information on consultation mechanisms, procedures etc. has been provided, nor has it been stated that there are no such mechanisms or procedures. This allegation was also made in CESP v. Portugal, (Complaint No. 37/2006, abovementioned decision, §37) and then it found no violation on the grounds that the argument was presented somewhat summarily and the CESP did not adduce enough evidence. The same approach is followed in this case.

- unanimously, that there is no violation of Article 22 of the Revised Charter.

It is recalled that this provision guarantees the right of workers to take part in the determination and improvement of their working conditions and working environment within the undertaking. Pursuant to the Appendix, Part II, to the Revised Charter, the term "undertaking" is understood as referring to "a set of tangible and intangible components, with or without legal personality, formed to produce goods or provide services for financial gain and with power to determine its own market policy".

Consequently, even though Article 22 may apply to workers in State-owned enterprises, public employees are as a whole not covered by these provisions (Conclusions XIII-5, Norway). It follows that the right of police staff to participation in the determination and improvement of their working conditions and working environment in the case at hand does not fall within the scope of application of Article 22 of the Revised Charter and therefore there is no violation of this Article (CESP v. Portugal, Complaint No. 40/2007, abovementioned decision).

Having regard to the information communicated by the delegation of Portugal during the meetings of the Rapporteur Group on Social and Health Questions (GR-SOC) of 25 October 2012 and 10 October 2013,

1. takes note of the statement made by the respondent government indicating that Portugal maintains its efforts in finding a satisfactory solution to the issues raised by the European Committee of Social Rights and undertakes to bring the situation into conformity with the Revised Charter (cf. Appendix to the present resolution);

2. looks forward to Portugal reporting that, at the time of the submission of the next report concerning the relevant provisions of the revised European Social Charter, the situation is in full conformity with the revised European Social Charter.

Information communicated by the delegation of Portugal during the meetings of the Rapporteur Group on Social and Health Questions (GR-SOC) of 25 October 2012 and 10 October 2013

Statement by the Permanent Representative of Portugal at the GR-SOC meeting of 25 October 2012 (document [DD\(2012\)1010](#)):



*Missão Permanente de Portugal
junto do
Conselho da Europa*

**INTERVENTION OF THE PERMANENT REPRESENTATIVE OF
PORTUGAL ON COMPLAINT No. 60/2010**

This Delegation would like to share with you information just received from the Portuguese authorities on the steps taken in connection with complaint n° 60 of the European Council of Police Unions under the collective complaints protocol to the European Social Charter.

The Ministry of Justice of Portugal has been in negotiations with the Union Association of the Criminal Investigation Officers of the Criminal Police (ASFIC/PJ) in order to find a solution acceptable for both parties on the payment of active prevention, shift duties and overtime work, that could lead to the drafting of a proposal for a legal instrument, in the framework of the compromise between the Association of the Criminal Investigation Officers of the Criminal Police (ASFIC/PJ) and the Ministry of Justice, since the beginning of the current legislative period.

Taking into consideration the present financial and economic situation and the related budgetary constraints of Portugal, that goal has not yet been reached. However, the parties are continuing their best efforts in order to reach agreement on a draft legislation that can meet the concerns expressed on the Decision of the European Committee of Social Rights on complaint n° 60 and that, at the same time, is viable within the framework of the above mentioned budgetary circumstances.

Portuguese authorities are hopeful that a solution can be found in the near future, as a result of mutual understanding between the Government and the police officers Union.

We believe the ongoing process of negotiation is the most appropriate measure to bring the situation into conformity with the Charter.

Intervention of the Portuguese Delegation at the GR-SOC meeting of 10 October 2013 (document [DD\(2013\)1073](#)):

"This delegation would like to inform that the Portuguese Government is still in negotiations with the Criminal Police to find a solution that can be acceptable to both parties in order to find the best model for the payment of active prevention, shift duties and overtime work to the criminal law enforcement officers. We just received information on the strong commitment of the Portuguese authorities to find the right solution.

These efforts are being pursued in good faith and with a sincere wish to provide a sustainable solution, through the adoption of a legal instrument, which will contain a set of rules for the proper regulation of the issues raised in the Collective Complaint No. 60.

The Portuguese authorities recognise and understand the steps that need to be taken and would have been very satisfied if a solution had already been found. However, this has not yet been possible.

As a Party to the Revised Social Charter, of which we accepted to be bound by all articles, and also as a Party to the collective complaints protocol, Portugal is one of Europe's most advanced countries concerning social rights and has been at the forefront of the protection and promotion of these rights for all its citizens.

The Social Charter and the collective complaints protocol have an evolutive nature. By ratifying these instruments, the Parties commit themselves to pursue by all appropriate means the attainment of the conditions for the realisation of the rights enshrined in the Charter.

In this context, the Portuguese authorities are using the means available to them to comply with the Charter. In the case of this complaint, these means have not been enough for the moment, taking into account, in particular, the financial and economic circumstances of the country.

These circumstances led to the adoption by the Portuguese Government, in co-operation with European partners and international institutions, of very hard but provisional measures and policies, that will, in the future, bring benefit to all our citizens.

In light of the above, this delegation proposes the drafting of a resolution acknowledging the strong commitment of the Portuguese authorities which are doing their best efforts in the framework of their commitments to their obligations under the Social Charter and the collective complaints Protocol, but need more time and, as soon as possible, would provide further information to the Committee of Ministers on the results of the steps taken towards bringing the situation in conformity with the Social Charter."

¹ In accordance with Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints the following Contracting Parties to the European Social Charter or the revised European Social Charter have participated in the vote: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and United Kingdom.

