



# The right to strike in the public services

## France



## **The right to strike in the public services: France**

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This factsheet reflects the situation in July 2021. It was elaborated by Coralie Guedes (independent expert), updated by Diana Balanescu (independent expert) and reviewed by EPSU/ETUI; comments were received from EPSU affiliates, CGT and CFDT (hospital sector), and were integrated.

## 1. Legal basis

### International level

France has ratified:

#### UN instruments<sup>1</sup>

**International Covenant on Economic, Social and Cultural Rights**

(ICESCR, Article 8)

**International Covenant on Civil and Political Rights**

(ICCPR, Article 22)

#### ILO instruments<sup>2</sup>

**Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise**

(ratification on 28 June 1951);

**Convention No. 98 concerning the Right to Organise and to Bargain Collectively**

(ratification on 26 October 1951);

France has not ratified:

Convention No. 151 concerning Labour Relations (Public Service)

Convention No. 154 concerning the Promotion of Collective Bargaining

### European level

France has ratified:

**Article 11 (the right to freedom of assembly and association) of the European Convention on Human Rights<sup>3</sup>** (ratification and entry into force on 3 May 1974)

**The Revised European Social Charter of 1996<sup>4</sup> including Article 6§4 (the right to collective action)** without reservations (ratification on 7 May 1999)

**The Additional Protocol Providing for a System of Collective Complaints<sup>5</sup>** (ratification on 7 May 1999)

### National level

#### General

The right to strike is guaranteed by the French Constitution. The general exercise of the right to strike in the private sector has been mainly shaped by case law.

## In the public sector

The **French public service**, in the broad sense, encompasses all persons who are permanently employed by the State, local authorities and most public institutions.

In France, the public service has **three major branches**: the state or central public service, the territorial public service and the public service in the hospital sector.

These branches are established on the basis of a general statute common to them all which sets out their rights and obligations. Each branch is governed by specific national provisions. The unity of the three public service branches is guaranteed by the Law No. 83-634 of 13 July 1983 laying down the rights and obligations of public servants<sup>6</sup>, which constitutes Title I of the General Statute for Public Servants (*Statut général des fonctionnaires*).<sup>7</sup> This title lays down the rights and obligations of public servants in all three branches of the public service. Titles II to IV of the General Statute for Public Servants set out the specificities applying to each branch of the public service:

- Law No. 84-16 of 11 January 1984 on the state public service;
- Law No. 84-53 of 26 January 1984 on the territorial public service; and
- Law No. 86-33 of 9 January 1986 on the hospital public service.

Article 4 of Title I of the General Statute for Public Servants provides that '*a public servant is in a statutory and regulatory position vis-à-vis the administration*'. A public servant is thus subject to the rights and obligations provided for in this statute and supplementary regulations.

The concept of public servant covers all persons employed by the State to serve the general interest. It encompasses tenured civil servants who enjoy significant guarantees, and non-tenured employees such as contractual staff.

**Public servant status** is granted to persons appointed to a permanent post and established within a grade. A further condition essential to public servant status is the public nature of the person appointing and employing the public servant. Appointment is by means of a unilateral administrative order. Public servants are in a unilateral relationship and not a contractual one, unlike employees in the private sector. Under no circumstances can they negotiate their terms and conditions of employment or avail themselves of acquired rights. But the principle of participation granted to public servants and recognised by the General Statute does something to ameliorate the apparent rigidity of the system.

In addition to the General Statute for Public Servants, there are specific statutes. The purpose of these is to establish the specific rules or regulations that apply in particular to each corps of the public service.

The right to strike in the public sector is recognised by Article 10 of the Law No. 83-634 of 13 July 1983.<sup>8</sup> The exercise of the right to strike, as set out in Articles L521-2 to L521-6 of the Labour Code, is subject to specific obligations applicable to the public sector, set out in Articles L2512-1 to L2512-5 of the Labour Code.<sup>9</sup> These specific obligations apply to public servants and to public or private enterprises, institutions and bodies, where these enterprises, institutions and bodies are in charge of a public service, provided however that these workers participate in the provision of the public service.<sup>10</sup>

As early as 1950, the French Council of State held that administrative authorities may not regulate the right to strike but can, so as to ensure the continuity of public services, organise minimum services on a case-by-case basis (Council of State, *Dehaene*, no. 01645 of 7 June 1950, hereinafter called “Dehaene judgment”).<sup>11</sup>

The continuity of public services<sup>12</sup> and the protection of health and the safety of persons and goods<sup>13</sup> were subsequently recognised as principles of constitutional value. The Constitutional Court leaves it to Parliament to accommodate these principles with the right to strike, allowing a wide margin of appreciation, but retaining some degree of judicial review. The right to strike may only suffer restrictions that are necessary with regard to the constitutional principles on which these restrictions are based, and the Constitutional Court held for instance that a minimum level of service may not be equivalent to a normal level of service.<sup>14</sup>

The Parliament has accommodated these principles in selected sectors:

- **Public broadcasting** (Law No. 79-634 of 26 July 1979 amending provisions of Law No. 74-696 of 7 August 1974 on the continuity of radio and television public services in cases of concerted work stoppage, as amended by Law No. 86-1067 of 30 September 1986 on communication freedom<sup>15</sup>; Law No. 2009-258 of 5 March 2009 on audiovisual communication and public service television);
- **Protection and control of nuclear materials** (Law No. 80-572 of 22 July 1980 on the protection and control of nuclear materials<sup>16</sup>, as included in the Defence Code by Ordinance No. 2004-1374 of 20 December 2004 on the legislative part of the Defence Code, and amended by Law No. 2005-1550 of 12 December 2005 amending various provisions on defence);
- **Air traffic control** (Law 84-1286 of 31 December 1984<sup>17</sup> on the exercise of the right to strike in air traffic control services, as amended by Law No. 87-1014 of 18 December 1987<sup>18</sup> on air traffic control chief officers);
- Regular ground **passenger transport** (Law No. 2007-1224 of 21 August 2007 on social dialogue and service continuity in regular ground passenger transport, as included in the Transport Code by Ordinance No. 2010-1307 of 28 October 2010 on the legislative part of the Transport Code, and amended by Law No. 2012-375 of 19 March 2012 on the organisation of services and passenger information in air passenger transport companies and on various provisions in matters of transport);
- **Nurseries and elementary schooling** (Law No. 2008-790 of 23 July 2008<sup>19</sup> establishing a right for pupils in nurseries and elementary schools to be accommodated during schooling time);
- **Air passenger transport** (Law No. 2012-375 of 19 March 2012<sup>20</sup> on the organisation of services and passenger information in air passenger transport companies and on various provisions in matters of transport).

In practice, the Parliament widely delegates implementing aspects to **administrative regulation** by decree, orders or circulars. Such administrative regulation remains under **judicial review** by administrative courts.

## **2. Who has the right to call a strike?**

Only representative trade unions may give prior notice to call a strike. Once this formality has been completed, any public sector worker<sup>21</sup> may go on strike, regardless of his/her membership of a trade union. Whether or not a public employee is a member of a union, he or she can strike as soon as a union has given notice.

### 3. Definition of strike

There is no legal definition of strike/collective action. Authors generally refer to a concerted and collective work stoppage for the purpose of pursuing occupational or professional claims.

#### Types of collective action:<sup>22</sup>

- go slow or work-to-rule (unlawful)
- repeated or staggered work stoppage of short duration (lawful provided that it does not hamper the enterprise's organisation and inflict excessive economic damage)
- sit-in or occupation (unlawful)
- rotating strike (unlawful); in the public service, as defined above, Article L2512-3 of the Labour Code specifically prohibits staggered or rolling strikes in various professional sectors or categories in the same establishment or service, or different establishments or services of the same company or the same body.<sup>23</sup>
- bottleneck strike (lawful provided that it does not hamper the enterprise's organisation and inflict excessive economic damage)
- self-fulfilling strike (unlawful)
- solidarity strike (unlawful, except when taking place within the same enterprise or group)
- political (unlawful)
- picketing (unlawful where non-strikers are prevented from accessing the premises)
- lock-out (unlawful); The labour legislation in France does not provide for lock-outs. However, the Court of Cassation<sup>24</sup> has consistently held that a lock-out may be justified where, due to the evolution of a collective conflict, a minimum of safety and order is seriously threatened and requires the temporary closure of a firm).<sup>25</sup>

The object to which the strike is applied must be lawful. The problem of abuse has been raised in two main instances.

As the purpose of **political strikes** is not to improve wages or working conditions, courts have ruled that they no longer possess the character of an act in support of professional or occupational demands but are intended as a criticism of government or administration policy<sup>26</sup>. This is considered an abuse of the right to strike and a major offence by strikers. However, strikes against the State in its employer capacity, are justified.

**Solidarity strikes** for political reasons automatically constitute a case of abuse.

#### 4. Who may participate in a strike?

The right to strike is an individual and not a trade union right.

In sectors where continuity of public service is to prevail, some categories of public servants **do not benefit from the right to strike**, as their presence is considered necessary to maintain an element of service which, if it were to be interrupted, would disrupt the essential needs of the country.<sup>27</sup>

These are:

- Members of the **national police**;<sup>28</sup>
- Members of the **judiciary** (civil, criminal and labour)<sup>29</sup> (administrative judges are members of the state service);
- Members of the (air, ground, marine, gendarmerie) **armed forces**<sup>30</sup>;
- Members of the **prison administration**<sup>31</sup>;
- Some categories of staff in **air navigation**<sup>32</sup>;
- Staff of the **national communications network of the Ministry of the Interior**.

Extending its *Dehaene* judgment, whereas workers in public service have the right to strike provided that it is neither abusive nor in conflict with the requirements of public order, the Council of State later specified that a strike may not compromise essential government action,<sup>33</sup> thus also excluding staff from the right to strike who, because of their major responsibilities and their place in the hierarchy, are considered to be part of the government apparatus.

In other sectors, the right to strike is to be accommodated with the continuity of public services, the protection of health and the safety of persons and goods. This requires a **minimum service** obligation, which in some sectors is set out by statute:

- **Public hospitals:** The administrative court has defined, in the context of a hospital strike, the essential needs to be satisfied (CE, 7 January 7, 1976, no. 92162) in relation to physical safety of people; continuity of care and hotel services for hospitalised patients; and conservation of facilities and equipment. Recent case law specifies the obligation to have a safe, minimum number of staff corresponding to that of a Sunday or a holiday, except for services that are reinforced for an increase in activity during these periods.

The director must limit minimum activity only to those services whose operation cannot be interrupted without serious risks, which excludes, for example, outpatient consultations (CE 16 June 1982, CH Forbach, Req 24.016) and, in these services, to the minimum number of staff necessary to deal with emergencies (CE 7 January 1976, CHR Orléans).

The continuity of the public hospital service justifies the director assigning the work of the striking agents, as long as it is a minimum service whose implementation can be verified by the courts (Council of State, 30 November 1998, No. 183359).

- **Public broadcasting:** Law No. 74-696 of 7 August 1974, as subsequently amended<sup>34</sup>, provides for the continuation of a minimum service in national programming or broadcasting enterprises and their subsidiaries in charge of a public service, in accordance with the following requirements:



- (i) a prior strike notice must be received by the head of the said enterprises within 5 days before the strike is started, stating the place, date and time of the planned strike, its duration, and where applicable, its limitation;
  - (ii) a new strike notice may be issued by the same trade union only after the first notice expired and, where applicable, of the strike that was carried out on its basis;
  - (iii) the issuance, transmission and broadcasting of radio and television signals must be ensured by the departments or the staff of the programming enterprises in charge;
- **Air traffic control:** Law 84-1286 of 31 December 1984, as subsequently amended<sup>35</sup>, provides for the obligation to maintain in all circumstances:
    - (i) continuity of government action and execution of national defence missions;
    - (ii) preservation of the vital interests or needs of France and respect for its international obligations, inter alia for the right to flyover its territory;
    - (iii) missions required to safeguard persons and goods;
    - (iv) upkeep of traffic to avoid the isolation of Corsica, the overseas *départements* and territories, and of Mayotte;
    - (v) safeguard of premises and of the equipment of these services.
  - Regular **ground passenger transport:** Law No. 2007-1224 of 21 August 2007<sup>36</sup> defines essential services in the transport sector for non-tourist regular ground passenger transport, and establishes a matching minimum service obligation (Articles L1114-2 to L1114-6 and Articles L1324-7 to L1324-11 of the Transport Code);
  - **Nurseries and elementary schooling:** Law No. 2008-790 of 23 July 2008 organises the accommodation of pupils in the absence of teachers in nurseries and elementary schools during schooling time;<sup>37</sup>
  - **Air passenger transport:** Law No. 2012-375 of 19 March 2012 organises essential services and passenger information in air passenger transport companies (Article L1114-2 to L1114-6 and Article L1324-7 to L1324-11 of the Transport Code).

In most other sectors, the required **minimum service** will be organised by the administrative authority, under judicial review by the administrative courts. For instance, in the **hospital sector**, Ministry of Social Affairs Circular No. 5 of 22 April 1983 empowers hospital directors to define and organise:

- (i) the operability of services that may not be interrupted;
- (ii) the physical safety of persons;
- (iii) the upkeep of care and accommodation to patients in hospital;
- (iv) the maintenance of premises and equipment.

In the *Dehaene* judgment, the Council of State ruled that, in the **absence of statutory legislation**, the government may organise minimum service. It subsequently extended this competence to sectors where such legislation is available.<sup>38</sup> Ministries in various sectors have issued circulars organising minimum service for specific categories or public service staff on this basis. The Council of State also extended the competence to organise minimum services to heads of department of

public service<sup>39</sup>, governing bodies of public institutions<sup>40</sup>, and governing bodies of private institutions in charge of a public service<sup>41</sup>.

Government bodies may organise minimum services by designating the functions and/or the personnel that are essential to ensure the continuity of public service.<sup>42</sup>

Article 56 of the 2019 Dussopt law on the transformation of the civil service limits the right to strike in a range of territorial services within the framework of an agreement negotiated with the trade unions. The relevant services include the collection and treatment of household waste; public transport; care for the elderly and disabled; early years education of children under three; after-school care; and collective and school catering. The limitation of the right to strike would be justified by the fact that the interruption of these services, in the event of a strike by public officials, directly participating in their execution would contravene respect for public order, in particular public health, or essential needs.

Employees at whatever hierarchical level whose **presence** at their workplace is **necessary** to ensure the uninterrupted operation of public services within the limits defined above may be summoned or requisitioned.

A **summons** is a written administrative decision by the director of the organisation, under the control of the administrative judge. Its purpose is to ensure continuity of care in case of strike. The summons takes the form of an individual letter from the administration to the agents concerned. Case law has consistently affirmed that it is up to the director, "by virtue of the right that he or she holds from his or her general powers of organisation of the services, to set, under the control of the judge of excess of power, the limits of the right to strike" (CE, 4 February 1976, no. 97685), by taking the necessary measures for the functioning of the services, which may not be interrupted in any case.

Similarly, concerning private establishments providing a public service, the judge has specified that it is up to the management to define "the areas in which the safety and continuity of the public service must be ensured in all circumstances" and to determine "the limitations assigned to the exercise of the right to strike in order to avoid abusive use or use contrary to the needs of public order" (CE, 7 July 2009, no. 329284).

The duration of the summons can be equal to the duration of the strike and indefinite if the notice mentions an unlimited strike (Court of Lyon 19 October 1978, Hospices Civils).

Refusal to respond to a summons will result in liability for misconduct of the personnel involved. The decision to issue a summons is an individual act with a grievance, and is therefore subject to appeal on the grounds of abuse of power. Its notification must be ensured: it can be done by hand delivery with signature, by registered letter with acknowledgement of receipt, by summons during their service obligations, or by any other means allowing its reception to be verified by the interested party.

In addition to times of war<sup>43</sup>, Law No. 2003-239 of 18 March 2003<sup>44</sup> on internal security allows Prefects to requisition strikers by order in cases of emergency, when required by a real or foreseeable breach of the peace, by public health, by public order or public safety, and when the means at the Prefect's disposal no longer allow him to pursue the objectives for which he has powers of enforcement. The order establishes the type of the requisitioned service, the duration of the requisition and how it will be carried out (Article L2215-1 of the General Code of Territorial

Bodies). This power of the Prefect remains under judicial review by administrative courts. Whereas the requisition of all the midwives of a private clinic was held illegal<sup>45</sup>, the requisition of the majority of the workers of a private oil company at a specific oil refinery to restore the oil supply for the *Ile de France* region and its airports was found lawful<sup>46</sup>, as the work was particularly important to maintaining economic activity, meeting the basic needs of the population or operating public services when the disturbances caused by the strike threaten public order.

A **requisition** is a written procedure by a judicial authority (prefect, judicial police officer, national police, or gendarmerie) that can be used within the framework of a strike to ensure continuity of service. The prefect can only requisition staff in cases of "necessity for the needs of the nation" (including public health needs, etc.) and with the following three circumstances being met:

- the existence of a serious risk to public health;
- the impossibility of the administration facing this risk by using other means (impossibility for the other establishments of the region authorised for the activity concerned by the strike, to receive and take care of the patients requiring it (CE, 9 December 2003, Ms. Aguillon and others, no. 262186)); and
- the existence of an emergency situation (Cons. const. 13 March 2003, no. 2003-467 DC, 4<sup>th</sup> recital).

If the legal conditions are met, the prefect may decide, by reasoned order (No. 4 of Article L.2215-1 of L. 2215-1 of the general code of local authorities), to requisition personnel working in health, social or medico-social establishments, both public and private (whether or not they provide a public hospital service). The purpose of the requisition must be to guarantee a minimum service, not a full service: only the personnel essential to the minimal functioning of the structure can be requisitioned and it is important that before proceeding, all other organisational solutions have been sought.

## 5. Procedural requirements

In the **public sector**, one (or more) representative unions at national level have the obligation to give **written prior notice** at least five days before the beginning of the intended strike action. This notice must contain the following information: the place, date and time of the beginning of the strike action, its duration and the reasons for calling the strike.<sup>47</sup> Prior written notice can be given at local level but this is not required if a national notice has been filed (CE no.73894, 16 January 1970, Hôpital Rural de Grandvilliers).

During the period of prior notice, the parties have the obligation to carry out negotiations.<sup>48</sup>

Specific requirements may apply in certain sectors as noted above (section 4), for example:

In **preschools and elementary schools**, prior notice can be sent only after a period of negotiations between the State and teachers' trade union representatives.

Regarding the ground and air passenger **transport sectors**, the exercise of the right to strike is subject to specific obligations, such as prior negotiation, the prohibition for unions to file a new notice for the same reasons as the notice in progress and the obligation for employees to declare themselves strikers at least 48 hours before stopping work or to inform the employer 24 hours in advance of the decision to return to work. The lack of information does not make the employee's participation in the strike illegal, but the latter is liable to disciplinary sanctions.

No strike notice is required in the **private sector**, where a strike can be called at any time and without any prior formality. A strike is legal even if it was not preceded by a warning or an attempt to conciliate with the employer. The employer must, however, be aware of the professional demands of the employees at the time of the strike.<sup>49</sup>

## 6. Legal consequences of participating in a strike

**Participation in strike action incurs a loss of wages:** salary deductions for strike action must be strictly proportional to the duration of the absence, and based on the service obligation (usual workload) of the striking agent over the period concerned so one hour for each hour of strike but then a half day of strike is equivalent to 1/60<sup>th</sup> of salary and one day to 1/30<sup>th</sup>. The portion of the wages not received by the strikers is not subject to pension and social contributions. Trade unions can operate compensation funds using resources provided by members (e.g. *Caisse Nationale d'Action Syndicale*).

As the right to strike constitutes a fundamental right, its exercise cannot incur sanctions, except in the case of serious misconduct committed during strike action.

The **abuse of the right to strike** can be subject to disciplinary sanctions. For the categories of workers excluded from the right to strike (members of the national police, judicial judges, see above) the sanction may be issued without following the disciplinary procedure. Refusal of requisitioned public servants to return to work is a criminal offence that may incur up to 6 months in prison and a €10 000 fine.

The exercise of the right to strike **cannot justify the termination** of the employment contract, except for gross misconduct attributable to the employee. In accordance with Article L1132-2 of the Labour Code, its exercise may not give rise to any discriminatory measure, in particular with regard to remuneration and social benefits. Any **dismissal** pronounced in the absence of gross misconduct is automatically **null and void**.<sup>50</sup>

## **7. Case law of international/European bodies**

### **International Labour Organisation**

#### **Complaints before the Committee of Freedom of Association (CFA)**

There are no recent decisions of the CFA relevant for the right to strike. The allegations in the most recent complaint submitted by *General Confederation of Labour (CGT)* and *General Confederation of Labour - Force Ouvrière (CGT-FO)* on 14 February 2017 (Case No. 3270) are confidential to date.<sup>51</sup>

In a previous case, the CFA decided as follows:

*Case No 2841 (France) - Complaint date: 17 February 2011 - General Confederation of Labour (CGT)*

The complainant organization alleges that staff in the oil sector were requisitioned on prefectural orders during industrial action in October 2010. The complainant organization recalls that in France in October 2010, there was a remarkable national protest against pension reform. Workers from every sector exercised their right to strike and extraordinarily large demonstrations were organized (several million people took to the streets), with massive public support.

The complainant organization alleges that, in this context, the Government's attitude was irresponsible on several counts: it completely refused to negotiate with the trade union organizations; it tried to debilitate the industrial action and abused its power to requisition striking workers. According to the CGT, several prefectural authorities implemented multiple requisitions in the oil sector, which was one of those most involved in the industrial action. They issued back-to-work orders for several days before withdrawing them just before the judicial authorities ruled on their legality, in order to avoid any convictions. In the complainant's opinion, the requisitions had two objectives: maintaining economic activity by minimizing the impact of the strikes, and putting a stop to the national protests.

Employees of different oil companies therefore suffered a clear violation of their right to strike. Requisitioning constitutes a very effective obstacle to exercising the right to strike, in that striking workers who are requisitioned and refuse to return to work are committing a criminal offence and are liable to six months' imprisonment and a €10,000 fine. In fact, according to the complainant, in October 2010, some 160 workers were requisitioned and received notifications from the prefect detailing the criminal sanctions to which they would be liable if they refused to return to work.

The Committee requests the Government to ensure that, in the future, in cases where a non-essential service is paralysed, but there is justification for taking measures to ensure a minimum operational service, the workers' and employers' organizations concerned are involved in the decision-making process, and that measures are not implemented unilaterally.<sup>52</sup>

#### **Observations of the Committee of Experts on the Application of Conventions and Recommendations (CEACR)**

More recent comments of CEACR refer to, among other issues, the free choice of trade union representatives, parity in occupational elections and the ability of trade union organizations to take legal action.<sup>53</sup>

*Observation – adopted 2008, published 98th ILC session (2009), concerning Convention No. 87:*

The Committee notes the Government's report and the detailed information supplied in response to the observations made by the General Confederation of Labour – Force Ouvrière (CGT-FO) concerning the Act on social dialogue and continuity of the public service in scheduled land passenger transport of 21 August 2007 (Act No. 2007-1224).

The CEACR stressed that in the event of any dispute in the land passenger transport sector and in the absence of an agreement on the determination of the minimum service to be maintained in the event of a strike, the Government must ensure the principle is observed whereby the workers' organisations concerned shall be able to participate, alongside the employers and the public authorities, in the definition of this minimum service, and that, in the event of disagreement, the possibility is guaranteed for the parties to have recourse to a joint or independent body, according to existing or specially established mechanisms.<sup>54</sup>

## **Council of Europe**

### **European Convention on Human Rights**

#### **Matelly v. France<sup>55</sup>**

(Application No. 10609/10, Judgment of 2 October 2014)

This case concerned the absolute prohibition on trade unions within the French armed forces. In the case of Matelly, an officer in the French gendarmerie, which in France forms part of the military, was forced to resign from an association named *Forum gendarmes et citoyens*. The forum was considered by the Director General of the National Gendarmerie to be a trade-union-like occupational group, which was prohibited under Article L. 4121-4 of the Defence Code. This article states that the existence of occupational organisations for military personnel as well as membership of such organisations is incompatible with the prescriptions of the military personnel. The applicant complained in particular of an unjustified and disproportionate interference in the exercise of his freedom of association.

The European Court of Human Rights (ECtHR) held that there had been **a violation of Article 11 of the Convention**.

The ECtHR found in particular that the authorities' decision in respect of the applicant (an order to resign from an association of which he was a member) amounted to an absolute prohibition on military personnel joining a trade-union-like occupational group, formed to defend their occupational and non-pecuniary interests, and that the grounds for such a decision had been neither relevant nor sufficient. The ECtHR concluded that, while the exercise by military personnel of freedom of association could be subject to legitimate restrictions, a blanket ban on forming or joining a trade union encroached on the very essence of this freedom and could not be considered proportionate and necessary in a democratic society.

### **Adefdromil v. France**<sup>56</sup>

(Application No. 32191/09, Judgment of 2 October 2014)

The applicant association, the *Association de Défense des Droits des Militaires* (Association for the Protection of the Rights of Military Personnel, ADEFDROMIL), had been set up in 2001 by two servicemen, Captain Bavoil (then a serving officer) and Major Radajewski, with the statutory aim of “examining and defending the collective or individual rights and pecuniary, occupational and nonpecuniary interests of military personnel”. From June 2007 onwards, the applicant association lodged several applications for judicial review, on the grounds of abuse of authority, against administrative decisions that it considered to have an adverse effect on the pecuniary and nonpecuniary situation of military personnel. The *Conseil d’État* dismissed these applications on the ground that the applicant association was in breach of the provisions of Article L. 4121-4 of the Defence Code, and that, in consequence, it did not have standing to request that the decisions in question be set aside.

In this case the ECtHR also concluded, unanimously, that there had been **a violation of Article 11 of the Convention** on account of the blanket ban which prohibited military personnel from forming or joining a trade union.

Following the judgments of the ECtHR in the above mentioned cases, the Law of 28 July 2015 was adopted. According to this law, French military personnel can now freely create and join a national professional association and exercise responsibilities in it. These associations’ detailed rules of functioning were established by decrees in 2016. Their creation is based on a declarative system and can therefore not be subjected to a refusal of registration unless for specific reasons by judicial decision. Such national professional associations, also known under the French acronym APNM, were registered.<sup>57</sup>

### **European Social Charter**

#### **Collective Complaints under article 6(4) of the European Social Charter**

- In its decision on the merits on collective complaint no. 16/2003 *Confédération française de l’Encadrement CFE-CGC v. France*, the European Committee of Social Rights (ECSR) considered that the Act n° 2003-47 of 17 January 2003 on the reduction of working hours **did not constitute a violation** of amongst others **Article 6(4)** of the Revised European Social Charter. The CFE-CGC alleged that the provisions on the annual working days system “constituted a real, though indirect, discrimination as regards the right to strike”. The complainant organisation considered that since the working time of managerial staff is calculated in days and half-days only, a strike lasting for one hour would entail a reduction in remuneration equivalent to half of one day’s pay for managerial staff in the annual working days system. It inferred that this situation represents a limitation on the right of managerial staff to strike, and discrimination against them in relation to other employees. It added that by extending the annual working days system, the Act of 17 January 2003 makes the situation worse.<sup>58</sup>
- *European Council of Police Trade Unions (CESP) v. France*, collective complaint no. 101/2013

The complainant organisation alleged that the French Government, in deliberately subjecting the so-called “military” personnel of the National Gendarmerie, i.e. officers, NCOs



and volunteers of the National Gendarmerie, to military regulations has violated Articles 5 (the right to organise) and 6 (the right to bargain collectively) of the Revised European Social Charter. Violation of Article 6(4) was not alleged in this case; however the case is important for the trade union rights of military personnel in general.

In its decision on the merits of 27 January 2016, the ECSR unanimously found that: (i) there is a violation of Article 5 of the Charter where the National Gendarmerie is functionally equivalent to a police force; (ii) that there is no violation of Article 5 of the Charter where the National Gendarmerie is functionally equivalent to an armed force; (iii) that there is no violation of Article 6§1 of the Charter; (iv) that there is a violation of Article 6§2 of the Charter.<sup>59</sup>

With regard to the violation of Article 5 of the Charter, the ECSR considered that members of the police force must be free to form or join genuine organisations for the protection of their material and moral interests, and these organisations must be able to enjoy the bulk of trade union prerogatives. These constitute minimum guarantees relating to (i) the formation of their professional associations; (ii) the prerogatives of a trade union nature which they may exercise; and (iii) the protection of their representatives. With regard to the violation of Article 6§2 of the Charter, the ECSR noted that national professional associations of military personnel (NPMs) are not equipped to effectively defend the moral and material interests of their members in all respects.

In its **Follow-up to decisions on the merits of collective complaints** (Findings 2020)<sup>60</sup>, the ECSR decided as follows:

- (i) on the measures put in place to meet the provisions of Article 5 of the Charter, the Committee considers that the situation has not been brought into conformity on this point and that the rights guaranteed by the Charter are not guaranteed in a concrete and effective manner. On the participation of retired members in APNMs, the Committee notes that in its current composition, the CSFM includes three representatives of military pensioners. Consequently, the Committee considers that the situation complies with Article 5 of the Charter on this particular point.
  - (ii) on the measures put in place to meet the provisions of Article 6§2 of the Charter, the Committee considers that the situation has not been brought into conformity on this point.
- On 23 January 2018, the ECSR declared admissible the Collective Complaint No. 155/2017, *Confédération générale du travail (CGT) v. France*, in which the CGT alleges that the so-called rule of indivisible thirtieth (which means that any absence from work during a part day leads to a salary deduction of an amount equal to a thirtieth part of a monthly salary) provided by law 87-588 of 30 July 1987, which applies to strikes less than one day in the public service entails an unjustified violation of the right to strike of public officials in breach of Article 6§4 of the Charter.<sup>61</sup> The decision on the merits is pending on this date.<sup>62</sup>

## ECSR Conclusions

The negotiation of the right to strike and the guarantees accompanying it, the measures imposed by law in order to secure the continuity of the functioning of public services and the strictly

necessary administrative measures that the administrative judge may allow the administration to take in order to ensure a minimum service in essential public services have generally been considered as in conformity with the Charter.

Nevertheless, the ECSR has often raised questions concerning the *way* in which the relevant laws are applied in the public service and on the adequacy of the restrictions which may be imposed on the grounds of public interest (within the meaning of Article G of the Charter). The ECSR adopted its latest Conclusions on Article 6(4) during the monitoring cycle of 2014, since in 2018 France submitted a simplified report on the follow-up to decisions in collective complaints.<sup>63</sup>

## **Conclusions 2014<sup>64</sup>**

### **Entitlement to call a collective action**

The Committee previously considered that limiting the right to call a strike in the public sector to the most representative trade unions constitutes a restriction on the right to strike which does not conform with Article 6§4 of the Charter (see Conclusions XV-1 (2001), 2002, 2004, 2006 and 2010).

The report states that since the revision of the legislation on labour, although there has been no change in the scope of the rule, the term "most representative trade unions" has been replaced with "representative trade unions". Article L. 2512-2 of the Labour Code provides that notice of a strike shall be given by a "representative trade union at national level, within the occupational category concerned or the relevant undertaking, agency or department." It is stipulated that notice may also be given by a trade-union branch established by a representative trade union. Representativeness is to be assessed in the light of non-cumulative criteria laid down in Article L. 2121-1 of the Code, namely a union's membership, independence, membership fees, experience and age, to which the administrative courts have added its activities and its level of support, with particular consideration being paid to this last criterion.

To justify this restriction, the report put forward the following points:

- **Public officials' right to strike** must be reconciled with other principles of the same order, such as the principle of continuity of the public service, so as to ensure that it is not misused or used in a manner inconsistent with service needs, to reconcile the right to strike and the continuity of the public service, a strike notice cannot be served by just anyone.
- Article 6§4 of the Charter refers to the holders of this right – workers – but says nothing as to which body is able to call a strike. The States parties are therefore free to confer this right on a given collective group. The requirement to serve notice of a strike in no way constitutes a "restriction of the right to strike", since that is a personal right. A restriction would consist in forbidding certain officials the right to participate in a concerted work stoppage, which is not the case here.
- Officials may legally stop work in response to a call issued by a union of which they are not members.
- Insofar as a strike entails the existence of work-related demands and, in accordance with the last paragraph of Article L. 2512-2 of the Code, the parties concerned must bargain over these demands, it is desirable that these parties should have as much legitimacy as possible

to negotiate on behalf of the largest possible number of officials concerned by the issues at stake in the strike.

The Committee takes note of these points. In reply to them, it considers that:

- Article L. 2512-2 of the Labour Code does not solely concern the staff of **essential services** in the strict sense, that is to say sectors necessary in a democratic society to guarantee respect for the rights and freedoms of others or the **protection of the public interest, national security, public health or morals** (sectors for which restrictions to the right to strike could be permitted in the light of Article G of the Charter). This article indeed concerns both officials of central government, the regions, the *départements* or municipalities and other staff of undertakings, agencies or public or private establishments responsible for running a public service.
- The reference to "workers" in Article 6§4 of the Charter concerns the holders of the right to collective action and the Article says nothing about the nature of a group entitled to call a strike. It follows that this Article does not require States to authorise all groups of workers to decide on strike action, but offers States the possibility of making a choice as to the groups entitled to call a strike and hence of restricting this right to trade unions. However, such a restrictive choice is consistent with Article 6§4 of the Charter only if the establishment of a trade union is not subject to formalities such as to hamper the sometimes speedy decision-making necessary when calling a strike. In view of the conditions required to form a "representative trade union at national level, within the occupational category concerned or the relevant undertaking, agency or department" the Committee considers that giving organisations that are meeting these conditions a monopoly on calling a strike constitutes a restriction of the right to strike which is not in conformity with Article 6§4.
- The restriction of the right to call a collective action, imposed on officials and trade union organisations who do not meet the criteria of representativeness laid down by law, still exists even if officials may lawfully cease work in response to a call issued by a union of which they are not members.
- The principle of recognition of workers' right to take collective action in cases of conflicts of interests, including the right to strike, established by Article 6§4 of the Charter, should under no circumstances be subordinate to the State's interest in fostering relations with trade union organisations which, in the event of a dispute, can legitimately negotiate on behalf of the largest possible number of officials concerned.

The Committee recalls that both in the public and private sectors limiting the right to call a strike to the representative or the most representative trade unions constitutes a restriction which is not in conformity with Article 6§4 (cf. Conclusions XV-1 (2000), France).

### **Specific restrictions to the right to strike and procedural requirements**

In its last conclusion the Committee noted that, in the **public sector**, Decree No. 2008-1246 of 1 December 2008 on the right to strike for primary and kindergarten teachers imposed an obligation on the parties to engage in conciliation proceedings prior to giving notice of a strike. The Committee also noted the adoption of Decree No. 2008-82 of 24 January 2008 relating to the application of

Article 2 of Law No. 2007-1224 of 21 August 2007 on social dialogue and continuity of the public service, concerning strikes in the public transport sector.

The legislation *inter alia* requires parties to negotiate before giving notice of a strike, to organise a guarantee of service so as to "satisfy the essential needs of users" and to inform the public about the proposed strike. In its above-mentioned conclusion, the Committee asked how this is implemented in practice and who decides what level of service is needed. The report does not contain the requested information. The Committee reiterates its question on these points. Should the next report not provide the information requested, there will be nothing to establish that the situation is in conformity with Article 6§4 of the Charter.

### **Consequences of a strike**

The Committee notes that the legislation continues to provide for a deduction of one thirtieth of the monthly wage from the wages of State civil servants and other national public servants for strikes of less than one day, regardless of their duration.

The report states that this deduction from wages for state officials is just one of the grounds on which wages can be withheld for absence from work and is based *inter alia* on the public accounting regulation regarding the settlement of wages (Section 4 of the Budget Amendment Act No. 61-825 of 29 July 1961, as clarified by Decree No. 62-765 of 6 July 1962 laying down public accounting regulations for the settlement of the wages of State officials and reinstated by Act No. 87-588 of 30 July 1987) pursuant to which a flat rate deduction equal to one thirtieth of the remuneration is applied in the event of absence.

The report points out that this accounting rule is generally applicable and does not constitute a disciplinary penalty. In the event of absence from work, for any reason whatsoever, one thirtieth of the remuneration is withheld from the wages; the event triggering the deduction is accordingly not the strike action but the absence from work.

The Committee wishes to be informed about the consequences of the implementation of the above-mentioned rule in practice. In this respect, it notes that within the framework of the collective complaints' procedure, the Committee has never received complaints concerning the issue at stake from the entitled organisations.<sup>65</sup>

Pending receipt of the requested information, the Committee reserves its position on this point.<sup>66</sup>

### **Conclusion**

The Committee concludes that the situation in France is not in conformity with Article 6§4 of the Charter on the ground that only representative trade unions have the right to call strikes in the public sector.

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## Notes

- 1 Status of ratification by France of UN instruments, available at: <https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=en>.
- 2 For an overview of all ILO Conventions ratified by France, see [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102632](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102632) (accessed on 14 July 2021).
- 3 Status of ECHR ratifications: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?module=signatures-by-treaty&treatyid=005> (accessed on 14 July 2021).
- 4 Status of ratifications of the Revised European Social Charter: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?module=signatures-by-treaty&treatyid=163> (accessed on 14 July 2021); see also ESC, Country profile: France (<https://www.coe.int/en/web/european-social-charter/france>).
- 5 Status of ratifications of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?module=signatures-by-treaty&treatyid=158> (accessed on 14 July 2021); France has not yet made a declaration enabling national NGOs to submit collective complaints.
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- 8 [Article 10](#) of Law No. 83-634 of 13 July 1983 (“Loi dite loi Le Pors”) accessed on 16 July 2021
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- 13 Conseil constitutionnel, Décision n° 80-117 DC du 22 juillet 1980, Loi sur la protection et le contrôle des matières nucléaires : [Décision n° 80-117 DC du 22 juillet 1980 | Conseil constitutionnel \(conseil-constitutionnel.fr\)](#).
- 14 Reference can for instance be made to the decision of the Constitutional Court of 16 August 2007 in which the Court reaffirmed that it is within the power of the legislator to put the necessary limitations in order to secure the continuity of the public service as the latter has, like the right to strike, a character of a principle of constitutional value; see the decision (in French) at: [Décision n° 2007-556 DC du 16 août 2007 | Conseil constitutionnel \(conseil-constitutionnel.fr\)](#).
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- 21 Except for workers who do not benefit from the right to strike (see below).
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- 24 See Cass. soc., n° 63-40.558, Coupri et autres c. Société des chantiers de l'Atlantique, 2 décembre 1964 ([COUR DE CASSATION, Chambre sociale, du 2 décembre 1964, Publié au bulletin - Légifrance \(legifrance.gouv.fr\)](#)) and more recent decision : [Cour de cassation, civile, Chambre sociale, 18 janvier 2017, 15-23.986 15-23.987 15-23.988 15-23.989 15-23.990 15-23.991 15-23.992 15-23.993 15-23.994 15-23.995, Inédit - Légifrance \(legifrance.gouv.fr\)](#)
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- 27 Conseil constitutionnel, Décision n° 87-230 DC, Loi portant diverses mesures d'ordre social ([Décision n° 87-230 DC du 28 juillet 1987 | Conseil constitutionnel \(conseil-constitutionnel.fr\)](#) )
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- 32 Law No. 84-1286 of 31 December 1984 on the exercise of the right to strike in the air navigation services : [Loi n° 84-1286 du 31 décembre 1984 abrogeant certaines dispositions des lois n° 64-650 du 2 juillet 1964 relative à certains personnels de la navigation aérienne et n° 71-458 du 17 juin 1971 relative à certains personnels de l'aviation civile, et relative à l'exercice du droit de grève dans les services de la navigation aérienne - Légifrance \(legifrance.gouv.fr\).](#)
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- 35 Law 84-1286 of 31 December 1984 was amended by Law No. 87-1014 of 18 December 1987.
- 36 As included in the Transport Code by Ordinance No. 2010-1307 of 28 October 2010, and amended by Law No. 2012-375 of 19 March 2012.
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- 39 Conseil d'Etat, 19 janvier 1962, Bernardet
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- 41 Conseil d'Etat, Ass., 12 avril 2013, Fédération Force ouvrière Energie Mines et autres, n° 329570 et al. : [Conseil d'État, Assemblée, 12/04/2013, 329570, Publié au recueil Lebon - Légifrance \(legifrance.gouv.fr\)](#)
- 42 Conseil d'Etat, Ass., 4 févr. 1966, Syndicat national des fonctionnaires et agents du groupement des contrôles radio-électriques, Lebon 80.
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- 47 Code du travail [Article L2512-2](#) (in French as updated by 16 July 2021).
- 48 *Ibid*
- 49 Conditions and procedure for strikes in private sector (in French) at: <https://www.service-public.fr/particuliers/vosdroits/F117>
- 50 Code du travail, [Article L2511-1](#) "Dispositions generales" (in French as updated by 16 July 2021).
- 51 On 14 July 2021; see list of Freedom of association cases in respect of France at: <https://www.ilo.org/dyn/normlex/en/f?p=1000:20060::FIND:NO::>

52 For the case documents and reports, see:

[https://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001\\_COMPLAINT\\_FILE\\_ID:2897737](https://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:2897737)

53 See for example Direct Request (CEACR) - adopted 2020, published 109th ILC session (2021), Convention 87, at:

[https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID,P11110\\_COUNTRY\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:4060414,102632,France,2020](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4060414,102632,France,2020) .

54 See the full text of the Observation at:

[https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID,P11110\\_COUNTRY\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:2299025,102632,France,2008](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2299025,102632,France,2008)

55 See the ECtHR judgment in this case (in French): <http://hudoc.echr.coe.int/eng?i=001-146695>

56 See the ECtHR judgment in this case (in French): <http://hudoc.echr.coe.int/eng?i=001-146700>

57 See information on the execution of the ECtHR judgments at: <http://hudoc.exec.coe.int/eng?i=004-39845>; see also Laulom, S. and Leclerc, O., 2019, pp. 161-163

58 See the decision on the merits and the case documents at: <http://hudoc.esc.coe.int/eng?i=cc-16-2003-dmerits-en>

59 See the decision on the merits and the case documents at: <http://hudoc.esc.coe.int/eng?i=cc-101-2013-dmerits-en>

60 See ECSR, Follow-up to the decision on the merits of collective complaint 101/2013, France, pp. 99-104, at:

<https://rm.coe.int/findings-ecrs-2020/1680a1dd39>

61 See the decision on admissibility and the case documents in collective complaint No. 155/2017 (pending) at:

<https://www.coe.int/en/web/european-social-charter/pending-complaints> (accessed on 14 July 2021).

62 14 July 2021

63 More information is available at: European Social Charter, Country profile: France:

<https://www.coe.int/en/web/european-social-charter/france> (accessed on 14 July 2021).

64 ECSR Conclusions (2014), France (<http://hudoc.esc.coe.int/eng?i=2014/def/FRA/6/4/EN>).

65 In the meantime, after the date of publication of Conclusions 2014, a collective complaint (No. 155/2017) was submitted on the same matter (see details above in section 7).

66 To note is that in its Conclusions 2010 (and before), the ECSR has found this not to be in conformity with article 6§4 of the ESC.