The right to strike in the public sector in

Switzerland

EPSU
EUROPEAN PUBLIC SERVICE UNION

The right to strike in the public sector – Switzerland

Contents

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1) Legal basis

International level

Switzerland has ratified:

- **UN instruments**[1]:
  International Covenant on Economic, Social and Cultural Rights (ICESR, Article 8) and International Covenant on Civil and Political Rights (ICCPR, Article 22) on 18.06.1992.

- **ILO conventions**[2]:

  - No. 87 on Freedom of Association and Protection of the Right to Organise (25.03.1975);
  - No. 98 on the Right to Organise and to Collective Bargaining (17.08.1999).
  - No. 151 on Labour Relations (Public Service) (03.03.1981);
  - No. 154 on Collective Bargaining (16.11.1983).

European level

Switzerland has ratified:

- Article 11 (the right to freedom of assembly and association) of the European Convention of Human Rights (ratification and entry into force on 28.11.1974),[3] but

Switzerland has not ratified:

- Article 6§4 (the right to collective action) of the European Social Charter.[4]

National level

- Federal **Constitution**[5], Article 28 provides that: "1. *Employees, employers and their organisations have the right to join together in order to protect their interests, to form associations and to join or not to join such associations*. 2. *Disputes must wherever possible be resolved through negotiation or mediation*. 3. *Strikes and lock-outs are permitted if they relate to labour relations and if they do not contravene any requirements to preserve peaceful labour relations or to conduct conciliation proceedings*. 4. *The law may prohibit certain categories of persons from taking strike action*."

- **Applicable laws**

  - The right to strike is set out by Article 28(3) of the Federal Constitution.

- There are no legal regulations pertaining to strike. The framework for strike action is determined by case law and the doctrine.[6]

- **Canton level** (illustrative examples):

  - The Constitution of the canton of Neuchatel provides that: “The right to strike and the right to lock-out are guaranteed if they relate to labour relations and if they comply with the obligations to preserve labour peace or to resort to conciliation. The law can regulate the exercise of these rights; it can restrict or prohibit the recourse to strike action for certain categories of persons, in particular in the public sector.”[7]

  - The Constitution of the canton of Geneva provides that: “The right to strike and the right to lock-out are guaranteed if they relate to labour relations and comply with the obligations to preserve labour peace or to resort to conciliation. The law may prohibit the recourse to strikes by certain categories of persons or limit their strike action in order to ensure a minimum service.”[8]

  - The semi-canton of Nidwalden and the canton of Fribourg have introduced laws banning strikes for the cantons' staff. Certain communes in Fribourg have referred to these canton-level provisions in their own regulations.[9]

- **Collective agreements** may contain the obligation of the parties to preserve industrial peace (Article 357a of Code of Obligations). The obligation to preserve industrial peace implies the duty to refrain from any kind of challenge to matters settled in the agreement while the latter remains in force. In addition, the parties often agree on other contractual provisions, such as clauses establishing compensation funds, joint committees or arbitration tribunals.[10]

2. Who has the right to call a strike?

The right to strike is guaranteed by the Constitution, provided that the strike is related to industrial relations and is in line with the requirements to safeguard social peace or to seek conciliation. It has been interpreted that, to this end, a strike may only be called and led by a trade union which is entitled/has the capacity to engage in collective bargaining.[11]

3. Definition of a strike

As a means of settling labour disputes, strike action plays a role that is strictly subsidiary to conciliation. A strike is therefore only admissible after conciliation has failed. Besides, the parties must respect the obligation to preserve **industrial peace**.[12]

Furthermore, strikes must observe the principle of **fair conduct** of collective disputes and, in particular, that of **proportionality**.[13]

As striking is a means of exerting pressure on the social partner so as to obtain better terms and conditions of employment, it must only be used in pursuit of goals that can be regulated by a collective agreement.[14]

Political strikes or those intended to enforce judicial aspirations are therefore illegal.[15]

The case law has recognised **blockades** as actions akin to strikes, which enjoy the same constitutional protection, but can similarly be declared illegal. For example, surrounding a production unit by a "human chain" has been considered "disproportionate" by a court.[16]

A **lock-out** is a countermeasure by an employer against strike action. It is defined as preventing access of several workers to the place of work and withholding payment of wages so as to enforce certain financial or labour conditions. A lockout may be confined to certain groups of workers, only strikers or non-strikers for example, but it must not target only certain individual persons. The prerequisites for lawfulness of a lock-out are largely the same as for strike action. In particular, lock-outs must respect the principle of proportionality.[17]

4. Who can participate in a strike?

The right to strike is guaranteed in the Constitution, provided that the strike is connected to industrial relations and complies with the requirements to safeguard social peace or to seek conciliation (Article 28(3) of the Constitution).

Limitations on the right to strike

Article 28(4) of the Constitution provides that: "*The law may prohibit certain categories of persons from taking strike action*."

Public sector

Public sector employees working in certain cantons and municipalities are forbidden to strike. For instance, Nidwalden half-canton and Fribourg canton have banned the right to strike for their employees. Some municipalities in Fribourg have adopted these canton provisions in their own regulations.[18]

The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) has addressed the prohibition of the right to strike in the public service in **the two cantons**. Noting that the right to strike is recognised both in the federal Constitution, and in all other cantons and all communities for public officials, the Committee requested the Government to indicate any initiative by the competent authorities of the cantons concerned to ensure that the prohibition of the right to strike in the public service is limited strictly to public officials exercising authority in the name of the State, or any applications for review by the courts on this subject. In its reply, the Government indicated that there are no new developments or judicial complaint since the last report (see section 7 below).[19]

Essential services

The right to strike may be denied to certain categories of workers in order to guarantee essential public services such as the **security** of the state, **external relations** or the supply of **vital goods and services**[20] (pursuant to Article 96 of the Federal Staff Ordinance (OPers) of 3 July 2001[21]).

Such categories include civil and military senior management, federal prosecuting staff, diplomatic staff abroad, border guards, customs personnel and military air traffic controllers.[22] However, there are no compensatory mechanisms, such as conciliation and arbitration procedures, for resolving industrial disputes in such situations.[23]

Swiss trade unions have noted the lack of mechanisms to provide compensation for state employees who are deprived of the right to strike and thus cannot join strike action. For instance, there are no conciliation and arbitration procedures to resolve public sector disputes.[24]

The ILO CEACR recommended in its comments the need to provide for Confederation personnel, which is excluded from the right to strike, particularly persons exercising authority in the name of the State or providing essential services under federal law, compensatory procedures for the settlement of disputes, such as impartial conciliation or arbitration procedures seen to be reliable by the parties concerned.[25]

The "*essential services in the strict sense of the term*" have been defined by the International Labour Organisation as those services "the interruption of which would endanger the life, personal safety or health of the whole or part of the population."[26]

5. Procedural requirements

- A strike is only **admissible** after conciliation has failed.[27]

- Pursuant to the Federal Constitution, a strike can only relate to **industrial relations** (Article 28 (3) of the Constitution).

- The Federal Constitution provides that strikes and lock-outs are permitted provided that they do not contravene the requirement to preserve peaceful labour relations (Article 28 (3) of the Constitution). Moreover, Article 357a of the Code of Obligations provides for the obligation to maintain **social peace** in connection with all matters governed by a collective agreement. Thus, the parties to a collective agreement may agree on a regime of labour peace for certain aspects of work, implying that they commit to refraining from strikes on the issues covered by the agreement.[28]

- Around two-thirds of collective agreements in force in Switzerland include a peace clause whereby the trade unions undertake not to take strike action as long as the agreement remains in force.[29]

- The Federal Constitution prescribes the employer's right to temporarily deny employees work (**lock-out**) under the same provisions that recognise the right to strike. Swiss trade unions reported that lock-outs can be used selectively, for instance to target strikers exclusively.[30]

- The right to strike may be denied to certain categories of workers in order to guarantee **essential public services** such as the security of the state, external relations or the supply of vital goods and services (see section 4 above).

- Strike action must observe the principles of **fair conduct** of labour disputes and that of **proportionality**.[31]

6. Legal consequences of participating in a strike

Participation in a lawful strike:

- In the event of a lawful strike, the main obligations arising from the employment contract between a striker and an employer are suspended, including the employer's obligation to pay wages.[32]

- Participation in a lawful strike does not represent a sufficient ground for immediate dismissal. Moreover, dismissal intended to break the resolve of striking workers is deemed to be an abuse of rights.[33]

Participation in an unlawful strike:

- If a strike is ruled unlawful, the employer is entitled to terminate the employment contract of any striking employee with immediate effect.[34]

- The employer may claim compensation amounting to one quarter of the monthly salary of the strikers and, where appropriate, payment of additional damages (Article 337*d* 1 Code of Obligations).

- Lock-outs have also the effect of suspending the main obligations stemming from the employment contract. They are not tantamount to the cancellation of a contract, however. If the lockout is illegal, the employer must continue to pay workers' wages and indemnify any damages caused.[35]

7. Case law of European and international bodies

International Labour Organisation

- **Committee on Freedom of Association (CFA)**

Case No 2265, The Swiss Federation of Trade Unions (USS) v. Switzerland (active case)[36]

The complainant organisation alleged that, in respect of anti-union dismissals in the private sector, Swiss legislation is not in keeping with international labour standards, particularly Convention No. 98, which Switzerland has ratified, in that it does not provide for the reinstatement of trade union officials or representatives and only results in the payment of nominal compensation which fails to act as a deterrent, amounting to approximately three months' salary and limited to six months' salary.

Interim Report - Report No 343, November 2006[37]

1143. As regards the penalty as such, the Committee recalled the following principles: (1) the Committee has stated that it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities [see Digest, op. cit., para. 707; see also 326th Report, Case No. 2116, para. 592; 332nd Report, Case No. 2262, para. 394; 333rd Report, Case No. 2186, para. 351]; (2) legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98 [see Digest, op. cit., para. 743].

With regard to the issue of reinstatement in cases of anti-union dismissal, the Committee recalled that: (1) no one should be subjected to anti-union discrimination because of his or her legitimate trade union activities and the remedy of reinstatement should be available to victims of anti-union discrimination [see Digest, op. cit., para. 755]; and (2) the necessary measures should be taken so that trade unionists who have been dismissed for activities related to the establishment of a union are reinstated in their functions, if they so wish [see Digest, op. cit., para. 757]. In this regard, the Committee has in many cases requested governments to ensure that the workers concerned are reinstated without loss of pay. It has also, in cases where such reinstatement is not possible due to specific workplace circumstances, recommended that the government ensure that the workers concerned are paid appropriate compensation sufficient to constitute a deterrent against anti-union dismissals.

1147. The Committee also noted that, according to the Government, there had recently been some positive changes in the jurisprudence of Swiss courts with regard to protection from unfair dismissal, one feature of this being the possibility of obtaining damages over and above

the standard compensation if the maximum compensation of six months' wages appears not to reflect the harm suffered by the victim. The Committee noted, however, that as regards unfair termination of an employment contract for anti-union reasons, there were differences between the cantons and the compensation varied according to the specific circumstances, ranging from less than three months' wages to more than that sum. Since the compensation for anti-union dismissal in some cantons was unlikely to have a deterrent effect, the Committee invited the Government to continue tripartite dialogue on this specific issue as well as in respect of the whole matter. The Committee recalled that the technical assistance of the Office is available to the Government.

The CFA addressed the following main recommendations:

(a) The Committee requested the Government to take measures to provide the same protection to trade union representatives who suffer anti-union discrimination as for victims of dismissals that violate the principle of equal treatment for men and women, including the possibility of reinstatement, with due regard to the fundamental principles referred to above and Conventions Nos. 87 and 98, ratified by Switzerland.

(b) The Committee encouraged the continuation of tripartite discussions on the whole matter, including a review of the situation in certain cantons with regard to compensation for anti-union dismissal.

Case No 3023 (Switzerland) - Public services Trade Union (SSP-VPOD), Complaint of 10 April 2013 – the case is still active, however the allegations are confidential and the reports are not available to date.[38]

- **The Committee of Experts on the Application of Conventions and Recommendations (CEACR)[39]**

Direct Request CEACR – adopted 2018, published 108th ILC session (2019)[40]

Article 3 of Convention 87 – the right of organisations to organise their activities and to formulate their programmes. The Committee recalled that its previous comments addressed the prohibition of the right to strike in the public service in two cantons. In its previous replies, the Government had indicated that the right to strike is recognised both in the federal Constitution, and in all other cantons and all communities for public officials and specified that, on the basis of the federal Constitution and the case law of the federal court, the two cantonal laws would be declared void in the event of a review procedure before a court. Nevertheless, in view of the principle of separation of powers, the Government is not entitled to intervene as such cases are ruled on directly by the courts.

The Committee had requested the Government to indicate any initiative by the competent authorities of the cantons concerned to ensure that the prohibition of the right to strike in the public service is limited strictly to public officials exercising authority in the name of the State, or any applications for review by the courts on this subject. In its reply, the Government

indicated that there are no new developments or judicial complaint since the last report. The Committee noted these indications and requested the Government to indicate any new developments, including any applications for review by the courts on this subject.

In addition, the Committee noted the communication by the Government of the Federal Court's decision dated 6 September 2017, the broad scope of which covers various issues, including the recognition of trade unions' right to access the employer's premises, as an essential component of freedom of association.

Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016)[41]

Article 3 of Convention 87 – the right of organisations to organize their activities and to formulate their programmes. The Committee's previous comments addressed the need to provide for Confederation personnel, which is excluded from the right to strike, particularly persons exercising authority in the name of the State or providing essential services under federal law, compensatory procedures for the settlement of disputes, such as impartial conciliation or arbitration procedures seen to be reliable by the parties concerned. The Committee noted the Government's indication that the amendment of the Act on Confederation Personnel, which entered into force on July 2013, did not introduce compensatory measures for the settlement of disputes. The Committee requested the Government indicate situations, if any, in which section 24 of the Act on Confederation Personnel or section 96 of the Ordinance on Confederation Personnel have been used, and to specify the possible avenues for redress that serve as compensatory guarantees for the settlement of disputes.

Observation CEACR – adopted 2018, published 108th ILC session (2019)[42]

The Committee had previously requested the Government to provide its comments in response to the September 2015 observations of the International Trade Union Confederation (ITUC) concerning anti-union dismissals in the press, publishing industry and health sector, and intimidation towards trade union members in the service-providing enterprises at Geneva airport. The Committee noted the Government's reference to the replies it had sent to the Committee on Freedom of Association concerning dismissals in a hospital in the canton of Neuchâtel.

The Committee recalled that the protection afforded to workers and trade union officials against acts of anti-union discrimination constitutes an essential aspect of freedom of association and invited the Government to provide information on the status of the other cases raised in the ITUC communication. The Committee was of the opinion that such information contributed to the assessment of the overall effectiveness of the protection offered at national level against acts of anti-union discrimination.

Articles 1 and 3 of the Convention 98. Adequate protection against anti-union dismissals. In its previous comments, the Committee welcomed the continuing tripartite dialogue relating to an increase in penalty limits for anti-union dismissals.

The Government had commissioned a study into the protection afforded to workers' representatives, which was completed in January 2015 by the Study Centre for Industrial Relations of the University of Neuchâtel, which was the subject of discussion with the Tripartite Federal Committee for ILO Affairs in February 2015 in order to decide on the follow-up to the draft bill on the partial revision of the Code of Obligations.

In its last report, the Government indicated that a seminar was held on 8 May 2017, involving the Tripartite Federal Committee for ILO Affairs, federal administration, and representatives of trade union and employer movements, for a frank and open exchange on the complaints lodged against the Government with the ILO. According to the Government, the social partners held to their opposing positions. The employers' representatives considered that the number of anti-union dismissals was contestable owing to the lack of specific data from the courts. They did not wish to amend the provisions on the contract of employment by increasing penalties for cases of unfair dismissal and referred to solutions at the branch level to improve protection through collective labour agreements, such as that which had been signed in the machinery sector. The workers' representatives, however, demanded that the solution of reintegration in the post be retained or, at a minimum, that the maximum total for compensation in cases of anti-union dismissal fixed by law at the equivalent of six months' wages be increased to 12 months, as solutions through agreements were in their view insufficient.

The Government added that, in the spirit of the seminar's conclusions, the State Secretariat for the Economy (SECO) and the Federal Office of Justice had initiated an assessment of the outcome of the seminar with the Swiss Federation of Trade Unions and the Union of Swiss Employers. The Government stated that, in the social partners' view, the two sides are irreconcilable. It nevertheless intended to continue its efforts to find a solution.

The Committee emphasised that "compensation envisaged for anti-union dismissal should fulfil certain conditions and in particular: (i) be higher than that prescribed for other kinds of dismissal, with a view to the effective dissuasion of this type of dismissal; and (ii) be adapted in accordance with the size of the enterprises concerned" (see General Survey of 2012 on the fundamental Conventions concerning rights at work, paragraph 185). The Committee hoped that the open tripartite dialogue that the Government intends to maintain on the matter of adequate protection against anti-union dismissal will continue and enable a solution to be reached which gives full effect to Article 1 of the Convention. The Committee invited the Government to report on any new developments in this regard.

8. **Recent developments**

Strikes are relatively rare in Switzerland, which has no history of widespread industrial action.

In 2017, research showed that Switzerland lost only two working days per 1,000 workers to strikes between 2005 and 2015.[43] The Federal Statistics Office has launched a questionnaire in order to collect data on the labour disputes in Switzerland in 2021.[44]

Employees of the hospital La Providence in Neuchâtel, who were dismissed in 2013 after participating in a strike, submitted an application to the European Court of Human Rights in Strasbourg.[45] In a judgment published in January 2019, the Federal Supreme Court of Switzerland (*Tribunal fédéral*) considered that the continuation of the strike which took place between the end of 2012 and the beginning of 2013 was illegal and that the dismissal of the strikers was justified. The Supreme Court based its decision on the fact that a strike must imperatively relate to labour relations. Moreover, according to the Supreme Court, the strike did not respect the principle of proportionality. The Court also considered that the strike was not representative of the staff either, since, as of 23 January 2013, it was only followed by 22 people out of 340.[46]

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4 Switzerland only signed the 1961 Charter on 06.05.1976, but it has not yet ratified it; see the list of ratifications at: https://www.coe.int/en/web/european-social-charter/signatures-ratifications
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21 See Federal Staff Ordinance of 3 July 2001 (as amended as of 1 January 2021), Article 96, available (in French, German and Italian) at: https://www.fedlex.admin.ch/eli/cc/2001/319/fr ; Article 96 'Deprivation of the right to strike' provides that: 'The exercise of the right to strike is prohibited for members of the following categories of personnel who perform essential tasks for the protection of State security, the safeguard of important interests required by external relations or for the guarantee of supplying the country with vital goods and services: (a) members of the civil and military management staffs of the departments; (b) federal authorities responsible for

criminal prosecution; (c) staff of the Ministry of Foreign Affairs staff subject to the transfer discipline who work abroad; (d) border guards and customs personnel; (e) members of the surveillance wing, military air navigation safety personnel and military security professional training.'

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26 See Compilation of decisions of the Committee on Freedom of Association (ILO CFA), 6th edition, 2018, Chapter 10, paras. 836 - 841 – ILO CFA has defined and listed as "*essential services in the strict sense of the term*" where the right to strike may be subject to restrictions or even prohibitions, the following: the hospital sector, electricity services, water supply services, the telephone service, the police and armed forces, the fire-fighting services, public or private prison services, the provision of food to pupils of school age and the cleaning of schools, air traffic control. The ILO CFA has stressed that compensatory guarantees should be provided to workers in the event of prohibition of strikes in essential services, see paras. 853 - 863; See also Clauwaert, S. and Warneck, W. (2008) Better defending and promoting trade union rights in the public sector. Part I: Summary of available tools and action points, Report 105, pp. 79-81, Brussels: ETUI.

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32 ILO, National labour law profile: the Swiss Confederation, available at: https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158921/lang--en/index.htm.

33 ILO, National labour law profile: the Swiss Confederation, available at: https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158921/lang--en/index.htm.

34 International Trade Union Confederation (ITUC), "Core Labour Standards in Switzeland and Liechtenstein", Geneva, 15-17 December 2008, Report available at: https://www.ituc-csi.org/IMG/pdf/WTO_report_Suisse_et_Liechtenstein_ENGLISH_final.pdf .

35 ILO, National labour law profile: the Swiss Confederation, available at: https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158921/lang--en/index.htm .

36 ILO CFA, Case No 2265 (Switzerland) - Complaint of 14 May 2003 (still active), *The Swiss Federation of Trade Unions (USS)*, available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:50001:::NO:::.

37 This case is still active and the last Interim Report dates to November 2006

38 Case still active on 22 February 2021, though no information was available (https://www.ilo.org/dyn/normlex/en/f?p=1000:50001:::NO:::)

39 See Observations and Direct Requests of CEACR concerning the implementation of ILO Convention No. 87, in respect of Switzerland, available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::.

40 Direct Request (CEACR) adopted 2018, published 108th ILC session (2019), Convention 87, available 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:3962353,102861,Switzerland,2018 .

41 Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016), Convention 87, available 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:3255441,102861,Switzerland,2015 .
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43 Information available at: https://www.thelocal.ch/20181016/industrial-action-in-switzerland-construction-workers-take-to-the-streets .
44 Federal Statistical Office, Survey on collective labour disputes in Switzerland 2021, available at: https://www.bfs.admin.ch/bfs/fr/home/statistiques/travail-remuneration/enquetes/kase.assetdetail.15284764.html .
45 Information available at: https://www.uss.ch/themes/travail/detail/le-ssp-a-strasbourg-pour-defendre-le-droit-de-greve-en-suisse .
46 Information available at: https://www.tdg.ch/suisse/suisse-romandegrevistes-providence-strasbourg/story/31179068 .