

Precarious Work - empowering trade unions to address the new challenge

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Better implementation of social rights at national level
– through the European Social Charter

Prof. Dr. Dr. h.c. Monika Schlachter

IAAEU – Trier University



The European Social Charter

a Council of Europe Treaty for the protection of social rights

The ESC (revised) encompasses rights and freedoms and creates a control mechanism for supervising the implementation of such rights by ratifying States

provides two separate legal avenues:


1. The Reporting System

Contracting parties report on the situation in their legal system and in practice, the ECSR takes „Conclusions“ on the conformity/ non-conformity of the report with the obligations undertaken under the ESC

2. The Collective Complaints Procedure

Violations of Charter Rights can be brought before the ECRS, the Committee takes „Decisions“ on the conformity/ non-conformity of the situation with the ESC.

The procedure is based on ratification of the 1998-Protocol to the ESC, i.e. only admissible concerning States having ratified the Protocol (currently 15).




Organizations competent to lodge a collective complaint:

- International unions of workers and employer organizations (such as ETUC, UNICE, IOE)
- Representative national unions/ employer organizations active in the State concerned
- Non-governmental-organizations with participative status with the Council of Europe, inscribed in a list drawn up by the Council.



Procedure

- The ECSR decides on admissibility and on the merits of a collective complaint
- Written procedure, very rarely a public hearing
- All interventions are made public on the CoE- web page, also the final decision (with 4 months delay)
- the CM can („should“) direct a recommendation to the State concerned if non-compliance has been stated by the ECSR

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- the State has to report on how the situation is rectified to the CM in writing
 - to the ESCR via the reporting system
 - no „sanctions“ for violations but „naming and shaming“.



How to challenge situations of precariousness:

1. Via the reporting System

States have to send their reports to national organizations before sending them to the CoE. Unions can and should comment on situations they criticise

2. Via the Collective Complaints Procedure

- Unions based in States having ratified the Protocol are entitled to bring a complaint directly
- Unions based in States not having ratified the Protocol have no part in the procedure

Thorough legal argumentation is strongly recommended. This is a legal instrument, not merely an option for claiming unfair treatment.



Why using ESC mechanisms ?

- Compared to the procedure at the CJEU, the ECSR is easier to approach (less formal procedure/ no procedural costs) and more knowledgeable of and supportive to social rights.
- Compared to the procedure at the ECtHR, the ECSR decisions are much faster to obtain, and the ESC provides many more social and labour rights than the ECHR.
- An impact of the procedure depends on activities in the civil society

■ Challenging precarious working conditions

Specifically: fixed term contracts

- There is no provision in the Charter devoted to fixed term contracts specifically
- Complaints must therefore be based on ESC-Articles concerning the terms and conditions from which fixed term contract workers became excluded
- In combination with Article E (Non-Discrimination)

The Personal Scope of Labour Rights

Article 3 §1 and 2, Right to safe and healthy working conditions

„All workers, all workplaces and all sectors of activity must be covered“;
Conclusions II (1971) Statement of Interpretation on Article 3§2;
Conclusions 2009, Andorra.

Article 4§4, Right to a reasonable period of notice for termination of employment

„All categories of workers independently of their status“ , Conclusions XIV-2 (1998) Spain; Conclusions 2018, Czech Republic



Article 8§2, Right to dismissal protection during pregnancy

„applies equally to women on fixed-term contracts“, Conclusions XIII-4 (1996), Austria

Article 24, Right to protection in case of dismissal

applies equally to workers on fixed-term contracts, Conclusions 2003, Bulgaria

Article 25, Right to protection in case of insolvency of the employer

„no exclusion of employees on fixed-term contracts, Conclusion 2008, Statement of Interpretation on




Including workers under a fixed-term contract:

The personal scope of application of a Charter – provision is to be determined by:

- the inclusive wording of the provisions („workers“, „a woman/mother“, „a person“) (concretised by the ECSR’s statement of interpretation)
- the Appendix to the Charter, potentially providing for exceptions („a Party may exclude from protection the following categories of persons“)

The Right to Work, Article 1 § 1, specifically

- The achievement of as high and stable a level of employment as possible is a State responsibility.
- Even though terms and conditions of employment usually impact on the level of employment, this doesn't imply that they can be examined under Article 1 § 1, CC 111/2014, GSEE v. Greece, §§ 125/26.
- A generally very high proportion of fixed-term contracts may nevertheless be dealt with under this provision(= the aspect of reducing unemployment): Conclusion 2000, Spain, Article 1 § 1; Conclusions XVII-1 (2004), Greece, Article 1 § 1.



The Right to Earn a Living in an Occupation Freely Entered upon, Article 1§2

- this Article requires the elimination of all forms of discrimination in employment, regardless of the legal nature of the professional relationship: CC 6/1999, Syndicats national des professions du Tourisme v France, § 24;
- Compensation in discrimination cases, including fixed-term contracts: Conclusions 2016, Andorra, Art. 1§2
- Discriminatory termination of employment: Conclusions 2016, Turkey Art. 1§2



The combination with Article E

- The Non-discrimination clause is only applicable in combination with substantive provisions.
- → fixed-term contracts are not mentioned as a forbidden ground. It might fall under the material scope of the Charter once it equals an „other status“
 - Not obviously accepted, as this represents a feature of the contract, not the worker. Not obviously excluded either, as CC No. 144/2017, No 146/2017, No.147/2017, No. 153/2017 have been declared admissible.
 - („without prejudice to the decision on the merits“)
- Article E prohibits direct and indirect discrimination: requirement of proportionality between the legitimate goal of the differentiation and the damage done