



November 2008

European Social Charter

European Committee of Social Rights

Conclusions XIX – 1 (Germany)

Articles 1, 9, 10, 15 and 18 of the Charter

Introduction

The function of the European Committee of Social Rights is to assess the conformity of national law and practice with the European Social Charter and the Revised Charter. In respect of national reports, it adopts “conclusions” and in respect of collective complaints, it adopts “decisions”.

A presentation of this treaty as well as statements of interpretation formulated by the Committee figure in the General Introduction to the Conclusions¹.

The European Social Charter was ratified by Germany on 27 January 1965. The time limit for submitting the 25th report on the application of this treaty to the Council of Europe was 31 October 2007 and Germany submitted it on 22 November 2007. On 13 March 2008, a letter was addressed to the Government requesting supplementary information regarding Article 1§2. The Government submitted its reply on 21 May 2008.

This report was the first under the new system for the submission of reports adopted by the Committee of Ministers.² It concerned the accepted provisions of the following articles belonging to the thematic group “Employment, training and equal opportunities”:

- the right to work (Article 1),
- the right to vocational guidance (Article 9),
- the right to vocational training (Article 10),
- the right of persons with disabilities to education, training and employment (Article 15),
- the right to engage in a gainful occupation in the territory of other States Parties (Article 18),
- the right of men and women to equal opportunities (Article 1 of the Additional Protocol).

Germany has accepted these articles, with the exception of Article 10§4 and Article 1 of the Additional Protocol.

The applicable reference periods were:

- 1 January 2003 – 31 December 2006 for Article 18;
- 1 January 2005 – 31 December 2006 for Article 1, 9, 10 and 15.

The present chapter on Germany concerns 14 situations and contains:

- 12 conclusions of conformity: Articles 1§1, 1§3, 1§4, 9, 10§1, 10§2, 10§3, 15§1, 15§2, 18§1, 18§2, 18§4;
- 1 conclusion of non-conformity: Article 18§3.

In respect of the 1 other situation concerning Article 1§2, the Committee needs further information. The Government is therefore invited to provide this information in the next report on the article in question.

The next German report deals with the accepted provisions of the following articles belonging to the second thematic group “Health, social security and social protection”:

- the right to safe and healthy working conditions (Article 3),
- the right to protection of health (Article 11),
- the right to social security (Article 12),
- the right to social and medical assistance (Article 13)
- the right to benefit from social welfare services (Article 14),
- the right of elderly persons to social protection (Article 4 of the Additional Protocol).

The deadline for the report was 31 October 2008.

¹ The conclusions as well as state reports can be consulted on the Council of Europe’s Internet site (www.coe.int/socialcharter).

² Decision adopted at the 963rd meeting of the Ministers’ Deputies on 3 May 2006.

Article 1 – Right to work

Paragraph 1 – Policy of full employment

The Committee takes note of the information provided in Germany's report.

It notes that, according to Eurostat, there was sustained economic growth in Germany during the reference period (2.9% in 2006, whereas it was 1.6% in 2004).

The employment rate increased and remains fairly high (67.5% in 2006), whereas the EU-15 average was 66.2% in 2006.

Unemployment remained more or less stable during the reference period (9.8% in 2006) and stayed slightly above the European average (the EU-15 average in 2006 was 7.7%). Female unemployment increased slightly, to 9.4% in 2006, as it did among young persons, from 6% in 2004 to 6.9% in 2006.

Long-term unemployment as a percentage of total unemployment remained stable and was 56.4% in 2006 (the EU-15 average was 42.1% in 2006).

The report states that the unemployment rate among seriously disabled persons fell from 18% in 2004 to 17.8% in 2006. The Committee asks for information on all persons with disabilities.

According to the report, the unemployment rate for migrants also fell, from 25.2% in 2004 to 23.6% in 2006.

Employment policy

The Committee notes that support measures for the unemployed were diversified with the introduction in 2005 of a new scheme combining unemployment and social assistance (*SG II* and *SG III*), including measures to assist persons with disabilities, update skills and encourage business creation. This scheme aims to extend the financial support to all unemployed people but also active persons in need and encouraging at the same time their placement through improved guidance and assistance.

According to the report, in 2006, 209,468 unemployed persons benefited from skills upgrading, 287,462 took part in vocational guidance and training courses and 343,248 in job creation measures. The Committee asks what is the activation rate among unemployed people.

There were various specific measures for women, young persons, older persons and the long-term unemployed.

As for women, the government approved a series of measures to encourage employers to apply the principle of equal opportunities for women in the labour market. 60% of unemployed women were covered by this scheme, compared with 40% in 2005. Moreover, 52.4% of unemployed women received further training in 2005, and 41.1% took part in job creation schemes.

Integrating young persons into the job market is one of the government's priorities, with particular attention to the transition from school to vocational training, from which 375,000 young persons benefited in 2006. Since the aforementioned amendments came into force in 2005, active measures must be provided as rapidly as possible for any young unemployed persons claiming unemployment allowance. In 2006, an average of 600,000 young persons benefited from active measures, representing 55.9% of all young unemployed. Young immigrants are offered more specific activities, such as language courses.

However, the report indicates that there are some regional disparities in youth unemployment between the former east Germany and the west of the country. The Committee asks what steps are planned to reduce this gap.

Two special regional programmes were launched in 2005 to increase the employment prospects of the long-term unemployed aged over 55. They enabled 9,200 persons to find work. Between 2000 and 2006, the employment rate of 55-64 year olds rose from 37.6% to 48.4%.

According to the report, the 2005 reform has enabled the long-term unemployed to benefit more systematically of active measures, from which 41.4% benefited in 2006, compared with 36.2% in 2005.

The Committee notes that total spending on active and passive employment policy measures in 2005 was the equivalent of 3.3% of GDP, compared with 3.5% in 2004. The amount spent on active measures was the equivalent of 0.6% of GDP. These figures are significantly above the EU 15 (2.2% and 0.5% in 2005).

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 1§1 of the Charter.

Paragraph 2 – Freely undertaken work (non-discrimination, prohibition of forced labour, other aspects)

The Committee notes the information in Germany's report.

1. Prohibition of discrimination in employment

The Committee notes that under Article 1§2 legislation should prohibit discrimination in employment at least on grounds of sex, race, ethnic origin, religion, disability, age, sexual orientation and political opinion.

As with other states that have accepted Article 15§2 of the Charter, the Committee will examine Germany's legislation banning discrimination based on disability under this provision.

The Committee notes that new equal treatment legislation (*Allgemeines Gleichbehandlungsgesetz – AGG*) came into force on 18 August 2006. This general anti-discrimination law has a very broad coverage, since it includes labour, civil and public law. More specifically, persons may not be discriminated against at work, directly or indirectly, on grounds of ethnic origin or race, sex, age, disability, sexual orientation or religious or political beliefs. The Committee asks whether this list of grounds is exhaustive. It also asks how discrimination based on each of these grounds is determined and repeats its request for information on how the courts define and interpret the notion of indirect discrimination.

The Committee has ruled that exceptions to the prohibition on discrimination may be authorised for essential occupational requirements or to permit positive action (Conclusions 2006, Bulgaria). The AGG authorises such exceptions to permit positive action, particularly to assist women. Special justifications may also be invoked with respect to religious or political opinions and age characteristics. These differences of treatment must be applied in an objective and reasonable manner and have a legitimate purpose. The Committee asks what limits are applied in practice to such exceptions, particularly as interpreted by the courts.

The Committee has ruled that the legislation must ensure that the prohibition of discrimination is effective and that employees who have lodged a complaint –or have taken legal action - are protected against dismissal or other retaliatory action by the employer (Conclusions XVI-1, Iceland). It notes that employees who are victims of a discrimination may lodge complaints to enforce their rights and that employers may not discriminate against them on this ground. However, according to another source¹, the rules governing dismissal constitute an exception to the prohibition on discrimination. The Committee asks for clarification on this point.

The legislation must also at least provide for the power to set aside, rescind, abrogate or amend any provision contrary to the principle of equal treatment which appears in collective labour agreements, in employment contracts or in firms' own regulations (Conclusions XVI-1, Iceland). The Committee asks whether this is provided for in legislation.

The legislation must also provide appropriate and effective remedies in the event of an allegation of discrimination; remedies available to victims of discrimination must be adequate, proportionate and dissuasive. Therefore the imposition of pre defined upper limits to compensation that may be awarded are not in conformity with Article 1§2 as in certain cases these may preclude damages from being awarded which are commensurate with the actual loss suffered and not sufficiently dissuasive (Conclusions 2006, Albania). In the absence of relevant information in the report, despite its requests in previous conclusions, the Committee again asks for further information on the possible remedies in cases of discrimination and whether there are upper limits to compensation. According to another source², in cases of non-pecuniary damage where the discrimination does not lead to unemployment, compensation is limited to three months' salary or wages. The Committee asks how such a ceiling is justified.

The legislation provides for an adjustment of the burden of proof in discrimination cases. Thus, if employees can provide sufficient evidence to establish a presumption of discrimination, it is for the other party to prove that there was no discrimination, as defined in the legislation.

¹ Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report, Germany, Matthias Mahlmann, State of affairs up to 8 January 2007, European Network of Legal Experts in the non-discrimination field, p.4 and 29.

² Idem, p.51.

Works councils or representative trade unions in the work place may ask employers to desist from discriminating or tolerating discrimination and may take the matter to the courts. Those who consider they have suffered discrimination may be assisted in the labour courts by associations active in this field.

The Committee notes that a federal anti-discrimination office (ADS) was established on 1 October 2006. It may be contacted by any person feeling discriminated against on grounds of race or ethnic origin, sex, religious or political opinions, disability, age or sexual orientation. The Committee asks for more information on the office's role and how it operates.

In the absence of information in the report, despite its requests in previous conclusions, the Committee again asks what measures have been introduced to promote equality in employment.

The Committee points out that under Article 1§2 of the Charter, states may make foreign nationals' access to employment subject to possession of a work permit, but they may not issue a general ban on nationals of States Parties occupying jobs for reasons other than those set out in Article 31. Restrictions on the rights embodied in the Charter are only acceptable if they are prescribed by law, serve a legitimate purpose and are necessary in a democratic society to safeguard the rights and freedoms of others or protect the public interest, national security, public health or morals. The only jobs from which foreigners may be banned are therefore ones that are inherently connected with the protection of law and order or national security and involve the exercise of public authority (Conclusions XVIII-1).

In the absence of information in the report, despite its previous requests, the Committee again asks whether nationals of other States Parties can be employed in the public service, local government and so on, in posts that are not concerned with national security or exercising public authority to protect public order and security.

2. Prohibition of forced labour

The Committee recalls that Article 1§2 of the Charter requires strict regulation of prison work, in terms of remuneration, working hours and so on, particularly when the prisoners work for private employers. Prisoners may only be employed by private companies with their consent and in conditions as close as possible to an employment relationship freely entered into (Conclusions XVI-1).

In addition to the information referred to in the last conclusion, the Committee notes that, under the prison legislation (*Strafvollzugsgesetz*), the aim of the penal system is to enable prisoners to reintegrate into society and find work. Prisoners are all examined on arrival in prison to establish what work or training they should undertake, in accordance with their capacities, skills and preferences. They may work inside or outside prison, and their agreement is required. Those working outside prison may have a free working relationship and a civil law employment contract with their employer. Sometimes, prisoners may work inside the prison for a private undertaking. They receive a wage of a little over € 10 per day. This is below the wages negotiated by the social partners but takes account of prisoners' board and lodging. Prisoners who have worked for a year are entitled to 18 working days rest per year.

3. Other aspects of the right to earn one's living in an occupation freely entered upon

Privacy at work

The Committee refers to the Government's reply to its letter for more information on the matter. The reply stresses the importance of protecting the individual's dignity and right to privacy in all situations including employment relationships. The legal basis of this principle lies in Articles 1(1) and 2(1) of the Basic Law. The Labour Courts have also established a comprehensive body of case-law on information and data protection in the workplace.

Section 6b (1) of the Federal Data Protection Act sets out the rules on video surveillance in premises that are open to the public. In particular, surveillance may not be conducted without the knowledge of those being filmed. In places that are not open to the public, the ordinary law applies and it is for employees to decide whether images may be recorded and used against them.

Interference in the private lives of employees may be justified if the employer has an overriding legitimate interest. Conflicts of interest are examined on a case-by-case basis. According to the Federal Labour Court, clandestine surveillance by technical devices is permissible only under the following circumstances:

- there is some clear indication that an offence has been committed against the employer;
- other less drastic means of dispelling suspicions have been used to no avail;
- covert surveillance is the only practical means left;
- surveillance is not a disproportionate response.

These principles also apply to private telephone conversations.

Under section 87 (1) (6) of the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG), works councils have co-determination rights where employers intend to install surveillance devices so that they can gauge the degree to which these devices will intrude into employees' private lives. One of the main implications of this is that employers must provide full information about their plans. If surveillance devices are installed without the works council's consent, it may prohibit their use.

In one case, the Federal Labour Court found that an employee who had given a false answer on being recruited could not be dismissed on that ground as the question asked constituted an infringement of privacy.

Interference by the employer in the employee's privacy rights is an infringement of the obligations arising from the employment contract. Employees may claim compensation where their employers have been found guilty of infringements (Articles 280 (1) and 823 (1) of the Civil Code read in conjunction with Article 253). Employees may order their employers to halt the interference or prevent any future interference even if they are not found guilty.

The Committee considers that these measures make it possible to protect employees' freedom and dignity against intrusions into personal or private life that may be associated with or result from the employment relationship (see observations on Article 1§2, General Introduction to Conclusions 2006, §§13-21). It asks that, in its next report, Germany continues to provide more detailed information so that it can make a more accurate assessment of the situation.

Restrictions linked to the fight against terrorism

The Committee notes that Germany has no anti-terrorism legislation.

Conclusion

Pending receipt of the information requested, the Committee defers its conclusion.

Paragraph 3 – Free placement services

The Committee notes the information in the German report.

The report confirms that the 2002 reform of the federal employment service (BA) is designed to improve the placement system and the individual approach. The Committee notes that in 2006 the placement services introduced a new technological tool, in the form of the VerBIS system, an Internet search system.

The report says that the number of vacancies notified to the employment services increased from 2,557,839 in 2005 to 2,732,884 in 2006. The *utilisation rate* (which may be seen as an approximation of the placement rate) among all unemployed has also increased from 34.3% in 2005 to 34.9% in 2006.

The public employment services have been advised to co-operate with private agencies on placements. The Committee would like to receive further information. It also asks what percentage of the market the public employment services represent, that is placements made by the public employment services as a percentage of the total number of persons recruited on to the labour market.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 1§3 of the Charter.

Paragraph 4 – Vocational guidance, training and rehabilitation

The Committee takes note of the information in the German report.

As Germany has accepted Article 9, 10§3 and 15§1 of the Charter, measures relating to vocational guidance, to vocational training and retraining of workers, and to guidance and vocational training for persons with disabilities are dealt with under these provisions.

The Committee concluded that the situation with regard to vocational guidance (Article 9), vocational training of adult workers (Article 10§3) and vocational education and training of persons with disabilities (Article 15§1) is in conformity with the Charter.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 1§4 of the Charter.

Article 9 – Right to vocational guidance

The Committee takes note of the information in the German report.

As Germany has accepted Article 15 of the Charter, measures relating to vocational guidance for persons with disabilities are dealt with under that provision.

Vocational guidance within the education system

a. Functions, organisation and operation

Vocational guidance is co-ordinated by the Federal Employment Agency, which had a nationwide network of 178 agencies and 614 local offices in 2005/2006. Counsellors offer guidance to school-pupils and students but also to pupils' parents and teachers and other target groups. Employment agencies promote vocational guidance for pupils at schools offering a general education in accordance with Book III of the Social Code (SGB III), in order to help them find work more easily when they leave school and to dissuade them from dropping out.

A new strategy of encouraging schools and companies to work in partnership to promote vocational guidance was adopted in 2006 in co-operation with the Conference of Ministers of Education of the Länder.

b. Expenditure, staffing and number of beneficiaries

There were 2,742 guidance counsellors for school-leavers and university students in 2005 and 2,686 in 2006. Counsellors come from broad professional backgrounds, having worked in diverse spheres such as economics, company management, law and psychology.

During the 2005/2006 academic year, 2.06 million people made use of vocational guidance services. In September 2005, 48.4% of beneficiaries were women, 67.6% were between the ages of 15 and 19, 25.8% were aged 20 to 24 and the remainder were 25 or over.

The Committee asks for the next report to provide up-to-date information on the amount of spending on vocational guidance in the education system.

Vocational guidance in the labour market

a. Functions, organisation and operation

Under Book II of the Social Code, jobseekers without vocational qualifications and disadvantaged young people are entitled to special vocational training support in addition to ordinary guidance measures (careers advice, psychological and medical examinations and aptitude tests).

Special guidance measures (such as lectures, visits to companies and working groups) are also available to young women who wish to engage in an occupation traditionally carried out by men.

b. Expenditure, staffing and number of beneficiaries

Public spending by the Federal Employment Agency on vocational guidance services was € 196 million in 2005 and € 192 million in 2006.

In 2005/2006, the Federal Employment Agency's European office offered services in 15 agencies throughout the country to bring people's attention to job opportunities in other European countries. In 2006, 70,000 people made use of these services.

The Committee asks for the next report to provide up-to-date information on total staff numbers and the total number of beneficiaries of vocational guidance in the labour market.

Dissemination of information

Potential candidates for guidance can get information brochures from local employment offices, consult electronic data bases, attend public events and access information on numerous official Internet sites.

An information note published by the Federal Employment Agency provides an overview of the guidance and counselling services that are available. The Agency also publishes special brochures for particular target groups (such as foreign students, girls and young disadvantaged people).

Equal treatment of nationals of the other States Parties

The Committee notes that there has been no change in the situation which it previously considered to be in conformity (Conclusions XVI-2).

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 9 of the Charter.

Article 10 – Right to vocational training

Paragraph 1 – Promotion of technical and vocational training and the granting of facilities for access to higher technical and university education

The Committee takes note of the information provided in the German report and refers to its previous conclusions (XVI-2 and XVIII-2) for a general description of the secondary and higher education system where it found the situation regarding access to and organisation of secondary and higher education systems to be in conformity with the Charter.

Secondary and Higher Education

The Committee notes from Eurydice that in 2004-2005 there were 15,569 secondary schools attended by 5,903,701 pupils. During the same academic year there were 370 institutions of higher education (including universities and equivalent higher education establishments) attended by 1,957,000 students.

Measures to facilitate access to education and their effectiveness

The Committee notes from Eurostat that the total spending on education amounted to 4,56% of GDP in 2004. According to the report more than € 3.8 million in 2005 and almost € 3.4 million in 2006 were spent on active employment measures for young people transitioning from school to apprenticeships. The Committee takes note of information concerning the allocation of funds to vocational and pre-vocational education such as vocational training schools, vocational extension schools, full-time vocational schools, upper vocation schools etc. € 7.2 million in 2005 and € 6.8 million in 2006 were allocated for vocational schools. The Committee asks whether there were enough places in all educational institutions to satisfy the demand.

In the absence of information in the report, the Committee asks what proportion of graduates find employment and how long it takes for them to find their first skilled job.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 10§1 of the Charter.

Paragraph 2 – Apprenticeship

The Committee takes note of the information provided in the German report and refers to its previous conclusions (Conclusions XVI-2 and XVIII-2) for a general description and functioning of the apprenticeship system.

According to the report there are approximately 350 recognised apprenticeship occupations pursuant to the Vocational Training Act or the Crafts Code. The Committee observes an increased share of young women enrolled in full-time vocational training courses. The Committee takes note of the positive outcomes of the implementation of the National Pact for Career Training and Skilled Manpower Development which provided 63,400 new apprenticeship places in 2005 and 67,900 in 2006. Within the framework of this Pact approximately 40,000 new business enterprises could be convinced to offer vocational training. New training contracts have been signed (550,200 in 2005 and 576,200 in 2006). The share of company-based training contracts has increased.

The Committee notes that in terms of availability of apprenticeship places for all those seeking them, in the framework of the above mentioned Pact any unplaced applicants were invited for an extra placement campaign at the beginning of the training year. Most of the young people who applied for extra placement could be offered training places or other forms of training. Thus the remaining number of unplaced applicants (49,500) was reduced by 65% (to 17,400) by January 2007. The unplaced applicants were able to choose among apprenticeship places available in specialised training centres of the Federal Employment Agency. The report states that the relationship between the stakeholders responsible for the training market and the placement of young people has significantly improved by the Training Pact. The Committee also takes note of the JOBSTARTER programme which provided further apprenticeship training places. This programme will run until 2010. The Committee wishes to be kept informed about the outcomes of this programme.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 10§2 of the Charter.

Paragraph 3 – Vocational training and retraining of adult workers

The Committee takes note of the information provided in the German report and refers to its previous conclusions (XVI-2 and XVIII-2) for the information on the organisation and functioning of continuing training.

Employed persons

The Committee notes the new instruments available to improve the skills of employed workers, such as, among others, the wage subsidies which employers can receive from the Federal Employment Agency in order to grant their employees time off for training. These subsidies can be paid up to the amount of the wage itself, including the employer's share in the overall contribution towards social insurance. The wage subsidy is intended as an incentive for employers to support their employees' continuing vocational training efforts.

The Committee also takes note of support measures for workers aged over 50 towards continuing vocational education. By acquiring up-to-date skills, skills-related dismissals of workers can be prevented. Older workers are reimbursed for the costs of further training if they participate in an educational programme recognised by the employment agency, provided that their employers give them time off and continue to pay their remuneration while they participate in continuing education measures. The Employment Agency pays a supplement towards the necessary accommodation away from home and child-care fees on a case-by-case basis.

According to the report in 2006, the Federal Employment Agency initiated the special training programme entitled "Continued education of low-skilled and employed elderly workers in companies" with a funding at € 200 million. More than 110,000 persons were covered by the programme.

Unemployed persons

The Committee notes from Eurostat that although the unemployment rate decreased from 10.7% in 2005 to 9.8% in 2006, the long-term unemployment continued to rise. It rose to 56.4% of all unemployed persons in 2006, the EU-15 average being 42.1%. In its previous conclusion the Committee took note of measures specifically targeted at the long-term unemployed especially in the light of the implementation of the Fourth Act on Modern Public Services which aimed at increasing the activation rate of the long-term unemployed. The Committee notes from the report under Article 1§1 that 36.2% of the long-term unemployed in 2005 and 41.5% in 2006 took part in various labour market policy measures, including vocational further training (20.5% in 2006) and training (21.6% in 2006). Given the rising long-term unemployment rate the Committee requests that the next report provide more detailed information on specific measures geared towards continuing training for long-term unemployed and activation rate of this category.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 10§3 of the Charter.

Article 15 – Right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement

Paragraph 1 – Vocational training for persons with disabilities

The Committee takes note of the information provided in the report of Germany.

In 2005, the number of persons with severe disabilities was 6,765,355 (of whom 47.9% female and 52.1% male), corresponding to 8.2 % of the population (3,041,171 in the age bracket 15-64).

The Committee asks the next report to provide the following up-to date figures:

- number of students (children and adults) with disabilities attending mainstream education and vocational facilities;
- number of students with disabilities attending special school education or training facilities and the percentage of those entering the labour market following such education/training.

Non-discrimination legislation

The Committee notes that there has been no change in the situation which it previously (Conclusions XVI-2 and XVIII-2) considered to be in conformity with the requirements of Article 15§1.

Education

In its previous conclusion (Conclusions XVIII-2), the Committee had asked whether the principle of presumption of mainstreaming -unless compelling reasons justify special education- was transposed in legislation at the Länder level. The report replies in the affirmative. As to the Committee's question on general teacher training and whether this incorporates special needs education as an integral component, the report also replies in the affirmative.

In reply to the Committee, the report indicates that in accordance with the university acts of the Länder, universities have to ensure that students with disabilities are not discriminated against, and that they can make use of the education offered at university without the help of others wherever possible. The examination regulations must take into account the special needs of students with disabilities in order to protect their equal opportunities, i.e. the various forms of disability must be adequately considered by the requirements for evidence of academic achievement and examinations.

Vocational training

The report indicates that in the vocational year 2004-2005, the Federal Employment Agency placed 73.2% of young applicants with disabilities in apprenticeships and 24.1% in alternative training courses, such as pre-vocational training measures. As a result, applicants with disabilities were placed at a very high rate of 97.3%.

Notwithstanding this positive score, the report points out that young people with disabilities encounter difficulties in finding a job because they lack a real workplace experience. To improve the situation "interlinked training" has been developed. This is a special form of training in specialised centres where young disabled persons are sent for most of the training in partner companies. This improves the practical orientation of the training, providing its beneficiaries with some experience in the labour market. The report highlights that a pilot project accompanied by scientific research has shown that young people trained under interlinked schemes were more successfully integrated than young people exclusively receiving training in a specialised facility.

The Committee observes that the awareness raising initiative "Job - Jobs without Barriers" designed to improve the situation of persons with (severe) disabilities in working life will be continued until 2010. The initiative involves numerous partners: employers, trade unions, associations and organisations of persons with disabilities, the Federal Employment Agency, rehabilitation funds, integration authorities, rehabilitation services and institutions as well as the Advisory Council for the Participation of People with Disabilities and other organisations. The Committee takes note of the substantial financing which has been apportioned for the continuation of the initiative and requests the next report to inform it about its concrete impact on the effective right to training of persons with disabilities.

The Committee takes note of the information provided in the report concerning specialised training centres (BBW) for young people with disabilities and vocational training centres (BFW) for the reintegration of adult persons with disabilities in the labour market and sheltered workshops. It asks the next report to indicate whether the offer of places available matched the demand. It also notes that no details were yet available concerning the total number and qualification of the personnel of these centres and asks the next report to provide such information.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 15§1 of the Charter.

Paragraph 2 – Employment of persons with disabilities

The Committee takes note of the information provided in the report of Germany.

In reply to the Committee, the report indicates that the employment situation of persons with severe disabilities has improved since 2003. It highlights that from 2003 to 2005, the number of gainfully employed persons with severe disabilities increased by 1.2 % (and for women by 4 %). In the year 2005, approximately 914,000 persons with severe disabilities and disabled persons with assimilated status were gainfully employed, including 771,000 persons working with employers subject to mandatory employment and 143,000 with employers not subject to mandatory employment. According to the report, this demonstrates that persons with severe disabilities have benefited from positive economic development in general but also from the measures taken to promote their employment.

Non-discrimination legislation

In its previous conclusion (Conclusions XVIII-2), the Committee considered that the situation was in conformity with the requirements of Article 15§2. However, the Committee asked whether employers met their obligation to adjust working conditions (reasonable accommodation) in practice and whether such an obligation prompted an increase in the employment of persons with disabilities in the ordinary market.

The Committee reiterates its request for information concerning any relevant case-law related to the reasonable accommodation obligation.

Measures to promote employment

In reply to the Committee, the report provides detailed information on the system of mandatory employment and compensation levy. It clarifies that employers with 20 workplaces or more are obliged to hire persons with severe disabilities for a minimum of 5% of these workplaces. If this employment obligation is not complied with, in whole or in part, they must pay a compensation levy to the integration offices, which should use it to promote the employment of persons with severe disabilities. The aim of the compulsory quota is to motivate companies to hire more persons with disabilities.

The report highlights that since early 2001, the amount of the compensation levy depends on the degree to which compulsory employment is complied with. The higher the degree of non-compliance, the higher the compensation levy. According to the report, the introduction of the graduated compensation levy has prompted positive results as the number of mandatory workplaces occupied by severely disabled persons, and thus the actual rate of compliance with the quota increased significantly (from 748,435 mandatory workplaces occupied in 2002 to 800,429 in 2005; the rate of compliance having increased during the same time-frame from 3.8% to 4.2%). The report also indicates that the number of employers who did not employ any persons with severe disabilities decreased by approximately 45%. The Committee asks the next report to provide similar figures with a view to demonstrating whether this positive trend continues.

In its previous conclusion (Conclusions XVIII-2), the Committee had noted that in 2003 out of the around three million severely disabled persons in working age, two million were not active. It had therefore asked what measures were foreseen to activate these persons and whether sheltered employment was the only alternative available.

In reply to the Committee, the report provides figures concerning the evolution (increase) of the following financial benefits paid to employers:

- Integration and apprenticeship subsidies: under specific conditions, these may reimburse up to 70% of the eligible wage of the severely disabled employees for a determined amount of time and may pay for company training or further education of persons with severe disabilities;
- Benefits from the integration offices, which take the form of assistance in working life (e.g. fitting a Braille display to a computer workstation or ensuring barrier-free access, sign language interpreters for persons with a hearing impairment, etc.) aimed at enabling persons with severe disabilities to be employed at workplaces in which they can fully exploit and further develop their skills and knowledge.

The report also highlights that the following measures were taken to increase employment or keep in employment persons with severe disabilities:

- Support by specialised integration subsidies: as of January 2005, the Länder were assigned the structural responsibility to offer third-party services to guide and support specially affected persons with disabilities looking for a training place or a job, and to place them in adequate training or workplaces. In addition, they also have to inform, guide and support employers desiring to recruit persons with severe disabilities. The report provides figures highlighting an increase in placement results in the years 2005 and 2006 which would demonstrate the successful quality of the placement activities supported by the Länder.
- Integration management at company level: since May 2004 all employers are obliged to put in place “workplace integration management” based on the principle of “prevention and rehabilitation instead of dismissal or pension payments”. If an employee is unable to work for more than six consecutive weeks or if he/she is repeatedly ill within one year, various relevant actors (employer, employee or his/her representant, doctor) have to examine how the incapacity to work can be overcome and identify which benefits or kinds of assistance are necessary to support the employee. The report indicates that employers may request financial support for this obligation within the framework of the “Job – Jobs without Barriers” initiative (the Committee refers to its conclusion under Article 15§1 for a description of this initiative). The Committee requests the next report to provide it with information on the implementation in practice of this new obligation and its impact on the maintainment in employment of persons with severe disabilities.

The Committee notes that in 2005 (no data was available for 2006) the number of persons with severe disabilities working on the general labour market increased by 0.9 % compared to 2004. It also observes that during the same year the number of persons with disabilities employed in sheltered workshops increased much more (plus 4.4 % compared to 2004). The Committee reiterates its request for the rate of transition from the sheltered working environment to the ordinary working environment as this rate was not provided in the current report with regard to the reference period. The report however indicates that in 2003, this rate amounted to 0.32 % throughout Germany.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 15§2 of the Charter.

Article 18 – Right to engage in a gainful occupation in the territory of other Contracting Parties

Paragraph 1 – Applying existing regulations in a spirit of liberality

The Committee notes the information in the German report.

It notes that new immigration legislation came into force on 1 January 2005.

Foreign population and migratory movements

According to the report, on 31 December 2006 Germany had 6,751,000 foreign nationals recorded in the population registers, representing 8.2% of the total population. The largest single group were Turkish nationals, followed by Italians, nationals of the former Yugoslavia and other EU nationals .

Work permits

The Committee notes that prior to the new Immigration Act, foreign nationals other than nationals of the States Parties to the Agreement on the European Economic Area wishing to undertake gainful employment in Germany required a work permit. Since 1 January 2005, however, work permits have been incorporated into the various categories of residence permit. On this point, the Committee refers to its conclusion under Article 18 paragraphs 2 and 3. Henceforth, therefore, foreign nationals wishing to work in Germany must obtain a residence permit for that purpose.

The Committee notes that, apart from Cypriots and Maltese, nationals of countries that joined the EU on 1 May 2004 may only work in the country if they have a Community work permit issued by the federal employment agency. However, under the legislation on freedom of movement of EU citizens the latter no longer need authorisation to spend time or reside in Germany .

Relevant statistics

The report provides statistics on work permits requested, issued and refused, and residence permits issued for the purposes of employment. The Committee notes that:

- the number of applications for work permits fell by over a half between 2004 and 2005 (from 916,360 to 370,322).
- the percentage of applications refused was fairly low in 2003-2004 (about 4.7%) and very low in 2005-2006 (2.1% on average).
- in 2006, the number of residence permits issued for employment purposes (70,100) was the equivalent of almost a quarter of the Community work permits issued (284,139).

With regard to the first point, the report states that the general decline in work permit applications is partly the result of the flow of workers from the eight new EU member states to countries, such as the UK and Ireland, that have placed no restrictions on workers' freedom of movement.

Turning to the second point, to assess the degree of liberalism in applying existing regulations the Committee requires figures showing the refusal rates for work permits – in this case Community work permits and residence permits for employment purposes - for both first-time and renewal applications by nationals of States Parties (Conclusions XVII-2, Spain). Although such figures are not available, given the low overall rate of refusal, the Committee considers that the situation in Germany is in conformity with Article 18§1 of the Charter. However, it does ask for these figures in the next report.

It also asks for statistics on the number of Community work permits/residence permits requested, issued and refused, broken down by paid employment and self-employment.

Regarding the third point, the Committee assumes that in 2006 only a fifth of the foreign nationals admitted for employment purposes were nationals of States Parties and not covered by Community regulations. The Committee ask whether this gap is due to the priority given to nationals of the eight new EU member states in recruitment procedures.

Conclusion

Pending receipt of the information requested the Committee concludes that the situation in Germany is in conformity with Article 18§1 of the Charter.

Paragraph 2 – Simplifying existing formalities and reducing dues and taxes

The Committee notes the information in the German report.

It notes that new immigration legislation came into force on 1 January 2005.

Administrative formalities

Issuing of work permit/work and residence permit

The Committee has previously found the situation in Germany to be incompatible with the Charter because of the complex formalities for the granting of work and residence permits, particularly the fact there were two distinct procedures (Conclusions XV-2 and XVII-2).

The new Immigration Act, based on the one-stop-government principle, establishes a simplified procedure for obtaining the work and residence permits simultaneously. In practice, the two permits are now merged into one residence permit.

The new law has reduced the number of categories of residence permit from five to three:

1. The limited residence permit, granted for various reasons such as work (paid or self-employment), family reunion, training or humanitarian grounds;
2. The settlement permit, granted for an unlimited period of time and entitling its holder to unlimited access to the national labour market;
3. The visa: this special visa is issued for a period not exceeding three months. It grants the holder the right not only to enter the country but also to take up employment. However, visas are only valid for the activities for which they are granted. If the foreign workers concerned wish to extend their stay, they must apply for a limited residence permit before their visa's expiry.

Limited residence and settlement permits can only be issued by local aliens offices whereas visas are issued by the German consular authorities in applicants' country of residence.

In each case, permits are not granted until the aliens office has checked that the conditions governing the period of residence are met and the federal employment agency has given its approval. Foreign workers holding a visa who apply for a limited residence permit do not normally have to seek fresh approval from the employment agency as the initial one given for the visa remains valid.

The Committee has ruled that under Article 18§2 it should be possible to complete the formalities for obtaining the required residence and/or work permit in the country of destination or of origin using one and the same procedure (Conclusions XVII-2, Finland and Germany).

Given the changes in the Immigration Act, namely the merging of the work and residence permits into one single document, which is issued under a single procedure and applications for which may be made either in foreign workers' country of origin or in Germany, the Committee considers that the formalities to which these foreign workers are subject have been simplified. However, it does ask for more detailed information in the next report on the formalities governing the issuing of the different residence permits.

The Committee notes from another source¹ that the Community residence permit for nationals of eight of the new European Union member states (see conclusion on Article 18§1) is issued by the federal employment agency. It asks for information in the next report on the formalities for obtaining this permit.

Renewal conditions

The conditions for the renewal of limited residence permits are the same as those governing their issuing. However, the report states that, given the temporary nature of this type of permit, when they are granted or renewed the relevant authorities may exclude any possibility of subsequent renewal. This applies particularly to permits granted for seasonal work, whose duration may not exceed four months per year.

Waiting times

The report reports an absence of statistics on the average period for obtaining residence permits. However, following the simplification of the procedures, the period for processing applications should no longer be three months, as indicated in the previous report.

The Committee asks for the next report to provide, as far as possible, statistics on the time taken to issue residence permits.

¹ <http://europa.eu.int/eures>

Chancery dues and other charges

The report states that there is a fee for the issuing of the various residence permits, which is now set under new regulations governing residence. It refers to an increase of 15% (€ 10 to 15) over the previous fees but does not specify the precise amounts of the fees for the different permits. The Committee asks for this information in the next report.

Finally, It notes that there is no charge for changes from one residence permit to another.

Conclusion

Pending receipt of the information requested the Committee concludes that the situation in Germany is in conformity with Article 18§2 of the Charter.

Paragraph 3 – Liberalising regulations

The Committee notes the information in the German report.

It notes that new immigration legislation came into force on 1 January 2005.

Access to the national labour market

Paid employment

The Committee previously (Conclusions XVII-2) noted that access to the national labour market is subject to the prior authorisation of the federal employment service, which carries out checks to ensure that vacancies cannot be filled by a German national or one from certain specified European countries – the priority principle – and that recruiting a foreign worker will not have a negative effect on the labour market (the labour market test). On this point, it refers also to its conclusion under Article 18§2.

However, the Immigration Act modifies this rule slightly according to foreign workers' level of qualifications. Accordingly, two new regulations – on the admission of foreign nationals for employment purposes and on the procedure to enable resident foreigners to take employment – distinguish between highly skilled, skilled and low-skilled jobs.

Highly skilled persons, such as researchers, senior teaching personnel, specialists and managerial staff with special job experience and a minimum annual income of € 85,500 can apply for a residence permit of unlimited duration offering full access to the labour market. On this point, the Committee refers to its conclusion under Article 18§2.

Approval for skilled persons to enter the labour market is only granted exceptionally, in particular to IT specialists and others with a technical university degree. The Committee notes from another source¹ that for certain skilled professions, nationals of the eight new European Union member states have priority over ones from other countries. The Committee asks for information in the next report on the interim regulations applicable to them.

The general ban on the recruitment of low or unskilled workers remains in force, with possible exceptions for certain categories such as seasonal workers, au pairs, fairground workers and domestic employees. However, their access to the labour market is limited, with authorisation only granted for the relevant period of employment.

The Immigration Act also introduces a significant change to the rules governing the employment of foreign workers' family members admitted for the purposes of family reunion. Under the old regulation, they were subject to a one-year waiting period, after which the labour market test applied. They now have the same right to work as the person they have joined, which means unlimited access if the reference person is highly skilled.

The Committee considers that the changes in the rules on access to the labour market for foreign workers' family members are evidence of greater flexibility. However, the general ban on the recruitment of low or unskilled workers and the exceptional nature of the recruitment of skilled workers constitute restrictive measures, even though exemptions are possible. The Committee asks whether it is planned to make the regulations more flexible. It also asks whether different regulations apply to nationals of State Parties.

¹ <http://europa.eu.int/eures>

Self-employment

Access to the labour market for self-employed persons is subject to particular conditions relating to their specific occupation and their financial means. Their business activity must have a “higher-level economic interest” or a “special regional interest”. During the reference period, there was assumed to be an economic interest if the investment amounted to at least € 1 million and at least ten jobs were created. The report states that the criteria have now been relaxed and an investment of € 500,000 and the creation of five new jobs are now deemed to qualify. Additionally, the proposed investment must be financed from the entrepreneur’s own resources or approved loans.

Exercise of the right of employment/consequences of job loss

Once the federal employment agency has granted authorisation to take up a specific job with a specific employer, the foreign national concerned cannot change either of them. However, this does not apply to foreign nationals who have been lawfully resident in Germany for at least four years and ones who have been employed and contributed to compulsory social insurance for at least three years. The Committee asks for more detailed information on these exceptions, particularly regarding the conditions of access to the labour market of the foreign workers concerned.

Self-employed persons are initially entitled to a residence permit of up to three years, after which they can apply for an “establishment” permit, offering unlimited access, if their businesses are successful and enable them to meet their own needs.

The report states that if foreign workers lose their job, the aliens office may decide retroactively to reduce the period of validity of their work permit. The office has wide discretion, not only to determine the period beyond which the residence permit will cease to be valid but also to decide whether the worker concerned can seek other work. In so doing, it is required to take account of all the circumstances of each case, including length of stay, type and scope of the previous job and unemployment benefit contributions.

The Committee has ruled that persons who have been legally resident in a State Party for a certain period of time must have the same rights as nationals. As a consequence, any initial restrictions on access to employment, which may be acceptable if they are not excessive, must be gradually lifted (Conclusions II, statement of interpretation of Article 18).

In connection with Article 18§3, the Committee has also ruled that loss of a job must not lead to the cancellation of a residence permit, which would oblige the individual concerned to leave the country as soon as possible. The validity of the residence permit should in fact be extended to provide sufficient time for a job to be found (Conclusion XVII-2, Finland).

The Committee considers that regulations such as these that limit the right to enter gainful employment to a specified job and a specified employer cannot be deemed to be in conformity with Article 18 of the Charter.

In the present case, it notes that foreign workers who lose their job are dependent on the decision of the aliens office, with regard to both the period of validity of their residence permit, which may be reduced because they are no longer employed, and their prospects of finding fresh employment. The office is required to take individual circumstances into account but it nevertheless enjoys considerable discretion in this matter. Making employees dependant on one employer, with the threat if they lose their jobs of being obliged to leave the host country cannot be considered to reflect a spirit of liberality or flexible regulations (see, *mutatis mutandis*, Conclusions II, Statement of Interpretation of Article 18).

In the light of the foregoing, the Committee considers that the situation in Germany is not in conformity with Article 18§3 of the Charter on this point.

Conclusion

The Committee considers that the situation in Germany is not in conformity with Article 18§3 of the Charter on the ground that foreign workers are dependent on one specific employer and if they lose their job their right of residence can be curtailed and they can be prevented from seeking new employment.

In accordance with Article 21-1§3 of the Committee’s Rules of Procedure, a dissenting opinion of Ms. M. SCHLACHTER, member of the Committee, is appended to this conclusion.

Paragraph 4 – Right of nationals to leave the country

The Committee notes from the report that the situation which it previously considered to be in conformity with the Charter has not changed.

The Committee asks for the next report to provide a complete list of practical circumstances in which German citizens may be prevented from leaving the country, and their legal basis.

Conclusion

The Committee concludes that the situation in Germany is in conformity with Article 18§4 of the Charter.

Dissenting opinion of Ms. M. SCHLACHTER

Conclusion relating to Article 18§3

The Committee bases the conclusion firstly on a report of measures taken by Germany during the reference period, all of which aim at gradually softening existing regulations. These legal developments have the purpose of reducing obstacles to foreigners seeking to engage in gainful occupation in Germany. The legal framework thereby provides for the liberalisation of existing rules.

As legal ground for nevertheless concluding negatively the Committee refers to the fact that the foreigner's office is entitled to review an earlier decision for granting a foreign worker a limited residence permit if later he loses the job. The foreigner's office is entitled to discretion, but legally obliged to base the decision on a review of all relevant circumstances of the individual case. From the margin of discretion vested into the administration the Committee seems to deduce that this amounts to a total vulnerability of the foreign worker to be left in the hands of an official deciding at will, thereby creating his total dependency of one specific employer.

This underlying suggestion is beside the point. The causal link between a residence permit and the actual fulfilment of a labour contract is neither morally nor legally suspicious but based on a factual problem. As the foreign worker would not have been admitted to the country at all were it not for the purpose of obtaining work, the permit is legally dependent from the other. To decide otherwise would allow for gaining access to a country via a contract of employment that could safely be terminated immediately after the issuing of a residence permit. To prevent this from happening, the country will opt for the possibility of reviewing a permit whose purpose has expired earlier than expected. This technique of reviewing an administrative act is neither exceptional nor unrestricted. The reviewing process does not have the consequence of an employee having to leave the country, thereby creating a threat to maintain the original employment at all costs. Instead, the reviewing of the residence permit is done in a framework determined by law. The administration has to take into account all individual circumstances of the case, such as the earlier duration of residence, the previous payment of contributions to the social security scheme with entitlement to unemployment benefits or any other aspect of influence for the prospect of either finding a new job rather soon or in the meantime being able to support themselves otherwise.

If the law would not follow this approach of providing the administration with a margin of discretion, the alternative might either be a rather vague general clause covering all possible cases or a firm rule in need to be taken by analogy whenever unforeseen aspects emerge. As all alternatives finally also offer discretion to an official deciding the case, neither is obviously unfair to the worker concerned.

This is underlined by the fact, that a worker whose limited residence permit had been withdrawn can challenge this decision in Court to guarantee that the administration had to truly consider all circumstances of the case without misusing the margin of discretion vested in it. As judicial review of administrative acts secures the rule of law and is no less effective on framework regulations than on other forms of regulations, neither way is "illiberal" in the sense of running contrary to Art. 18 (3) of the Charter.