



# Governing Body

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Institutional Section

INS

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## Report of the Director-General

Fifth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Spain of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

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## ▶ I. Introduction

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1. By communications received on 23 June and 6 July 2022, the Federation of Trade Unions of Public Administration Workers of the General Labour Confederation (FETAP-CGT) made a representation to the International Labour Office under article 24 of the Constitution of the International Labour Organization alleging non-observance by the Government of Spain of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Convention No. 111 was ratified by Spain on 6 November 1967 and is in force in the country.
2. The provisions of the ILO Constitution concerning the submission of representations are as follows:

*Article 24*

*Representations of non-observance of Conventions*

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

*Article 25*

*Publication of representation*

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

3. Pursuant to article 1 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization, as revised by the Governing Body at its 291st Session (November 2004), the Director-General acknowledged receipt of the representation, informed the Government of Spain and brought it before the Officers of the Governing Body.
4. At its 346th Session (October–November 2022), the Governing Body decided that the representation was receivable and set up a tripartite committee to examine it, composed of Ms Simona Trino (Government member, Italy), Mr Guido Ricci (Employer member, Guatemala) and Ms Liliana Ocmin (Worker member, Italy).
5. The FETAP-CGT submitted its representation online. It indicated on the form its agreement to explore the possibility granted by the Governing Body within the framework of the procedure for the examination of representations to make use of the voluntary conciliation procedure at the national level.
6. The Government of Spain submitted its observations on the representation in a communication dated 2 February 2023. The Committee notes that the Government indicated in its observations that it does not consider it necessary to engage in the voluntary conciliation procedure at the national level.

7. The Committee met virtually on 24 April and 11 May 2023 to examine the representation and adopt this report.

## ► II. Examination of the representation

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### A. The complainant's allegations

8. The complainant alleges that Act No. 37/2011 of 10 October 2011 on measures to expedite judicial proceedings, which reforms administrative law and amends article 139 of Act No. 29/1998 of 13 July 1998 governing administrative courts, violates Articles 1(1)(b) and 3(c) of Convention No. 111, in that only those public sector workers governed by administrative law must pay the costs if their complaint before an administrative court is dismissed.
9. Referring to the elements of Article 1(1)(b) of the Convention, the complainant alleges discrimination on the basis of: (i) a difference in treatment; (ii) a ground of discrimination; and (iii) the nullification or impairment of equality of opportunity and treatment.
10. Firstly, the FETAP-CGT indicates that the difference in treatment arises from the legislative reform of Act No. 37/2011. It explains that, prior to the reform, the administrative courts did not order the losing party to pay procedural costs unless the court considered there to be bad faith or recklessness, and that rulings on costs were therefore exceptional. It indicates that, through the legislative reform, the test for ordering costs was amended to "objective defeat", under which the unsuccessful party must pay the costs unless the court considers that there are serious doubts in the case in either law or fact.<sup>1</sup>
11. Secondly, the complainant explains that this difference in treatment among public sector workers depends on contractual arrangements: workers governed by administrative law must apply to the administrative courts to settle disputes concerning their working conditions and labour rights, and are liable to pay costs if they are unsuccessful; however, workers governed by labour law have any disputes concerning the same rights handled by the labour courts, which do not order the losing party to pay costs.
12. Lastly, the complainant alleges the nullification or impairment of equality of opportunity and treatment, as the procedural costs of administrative courts are so high that, in practice, they severely limit the opportunities for the workers concerned to claim their rights in court. In that respect, the complainant refers to various rulings in which the workers concerned were ordered to pay costs of, for example €500 and €2,500. It also provides examples of rulings of labour courts in which no costs were ordered.
13. The complainant considers that this discrimination falls within the scope of "employment and occupation".
14. Accordingly, the FETAP-CGT alleges a violation of Article 3(c) of the Convention, which states that each Member must "repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy".

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<sup>1</sup> The FETAP-CGT explains that this measure was adopted to reduce the existing litigiousness and to safeguard and improve the right of citizens to effective legal protection.

## B. The Government's reply

15. In its observations, the Government indicates that the basis of the representation exceeds the scope of the Convention for two reasons. Firstly, regarding the grounds of discrimination, the Government refers to Article 1(1)(a) and (b) of the Convention and affirms that the alleged difference between the legal framework governing civil servants and that governing other (non-statutory) staff members is not based on any of the grounds expressly prohibited under Convention No. 111. Furthermore, the Government adds that the grounds of discrimination that may be prohibited in accordance with the Convention are understood to include trade union membership or union activities, age, sexual orientation, disability and HIV/AIDS infection. Secondly, the Government refers to the objective scope of the Convention as "employment and occupation". In that regard, it emphasizes that the subject of the representation is the test for the imposition of costs in administrative courts, which relates entirely to effective legal protection but not to specific working and employment conditions.
16. Moreover, the Government considers it important to indicate the different legal nature of the relationship between the administration and civil servants, who have a statutory employment relationship, and non-statutory staff members, who have a bilateral contractual relationship.
17. In its observations, the Government also explains that, under article 235 of Act No. 36/2011 of 10 October 2011 governing the labour courts, the test for imposing costs on the losing party also applies in the labour courts, except where the losing party "enjoys legal aid, or in the case of trade unions or civil servants or statutory employees who must exercise their rights as public sector employees before the labour courts". The Government therefore indicates that under this article, costs are not imposed on civil servants or statutory employees whose cases were unsuccessful, but are imposed on non-statutory staff, who are exempt only if they benefit from legal aid. The Government adds that the determination of the test of objective defeat in the ordering of costs in administrative courts has become more nuanced through subsequent legislative reforms. In that regard, the Government informs the Committee that under Act No. 42/2015, civil servants may represent themselves in court to defend their statutory rights in personnel matters that do not involve the separation of non-removable public employees.
18. Accordingly, the Government considers that Act No. 29/1998 of 13 July 1998 governing the administrative courts is in accordance with the law and does not contravene Convention No. 111.

## ▶ III. The Committee's conclusions

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19. The Committee's conclusions are based on its examination of the allegations made by the complainant and the observations submitted by the Government in these proceedings.
20. According to the complainant, Act No. 37/2011 of 10 October 2011 on measures to expedite judicial proceedings, which reforms administrative law and amends article 139 of Act No. 29/1998 of 13 July 1998 governing administrative courts, establishes a difference in treatment based on the contractual arrangements of public sector workers governed by administrative law and those governed by labour law, in that the former are subject to the court ordering them to pay the procedural costs in the event of objective defeat. It indicates that, on the one hand, workers governed by administrative law must apply to the administrative courts to settle disputes concerning their working conditions and labour rights, and are subject to being ordered to pay costs under the objective defeat test. It also alleges

that, on the other hand, workers governed by labour law have any disputes concerning the same rights handled by the labour courts, which do not order the losing party to pay costs. According to the complainant, the procedural costs of administrative courts are so high that, in practice, they severely limit the opportunities for the workers concerned to claim their rights in court.

21. Accordingly, the complainant alleges a violation of Articles 1(1)(b) and 3(d) of Convention No. 111. The Committee also recalls that Article 3 of the Convention complements Article 2. The first three Articles of the Convention provide that:

*Article 1*

1. For the purpose of this Convention the term **discrimination** includes:
  - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
  - (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.
2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.
3. For the purpose of this Convention the terms **employment** and **occupation** include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

*Article 2*

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

*Article 3*

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice:

- (a) to seek the co-operation of employers' and workers' organizations and other appropriate bodies in promoting the acceptance and observance of this policy;
  - (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
  - (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
  - (d) to pursue the policy in respect of employment under the direct control of a national authority;
  - (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
  - (f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.
22. The Committee notes that the Government considers that the basis of the representation exceeds the objective scope of the Convention. In that regard, it indicates that the contractual arrangements do not constitute a ground of discrimination prohibited under the Convention, and that an order to pay costs concerns effective legal protection but not specific working and employment conditions.

23. The Committee notes that the Government also provides information about the different legal nature of the relationship between the administration and civil servants and non-statutory staff members. The Government also refers to other legislative provisions on orders to pay procedural costs, indicating that under article 235 of Act No. 36/2011, civil servants and statutory staff members are not ordered to pay costs if they lose a case, whereas non-statutory staff members do have to pay costs if they lose, unless they benefit from legal aid.
24. The Committee notes that “contractual arrangements” is not one of the grounds of discrimination expressly prohibited under Article 1(1)(a) of the Convention (namely, race, colour, sex, religion, political opinion, national extraction or social origin).
25. Furthermore, the Committee recalls that Article 1(1)(b) of the Convention provides the possibility for Member States to determine other prohibited grounds of discrimination in addition to those included under Article 1(1)(a). However, the Committee notes that the complainant did not provide information about any legislative or other provisions that specify the contractual arrangements as a prohibited ground of discrimination in respect of employment and occupation under Convention No. 111. Furthermore, the Committee notes that the Government does cite other grounds of discrimination that it considers to be included under the Convention (trade union membership or union activities, age, sexual orientation, disability and HIV/AIDS infection).
26. **In these circumstances and in view of all the information at its disposal, the Committee concludes that contractual arrangements cannot be considered to be a prohibited ground of discrimination in respect of employment and occupation under Convention No. 111 in Spain and, accordingly, will not pursue its examination of the allegations.**

## ▶ IV. The Committee’s recommendations

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27. **In the light of the conclusions set out in paragraphs 19 and 26 of the document concerning the matters raised in the representation, the Committee recommends that the Governing Body:**
  - (a) **approve the report contained in the document, in particular the conclusions set out in paragraph 26;**
  - (b) **publish the report and close the procedure initiated by the representation of the Federation of Trade Unions of Public Administration Workers of the General Labour Confederation (FETAP-CGT).**

Geneva, 11 May 2023

*(Signed)* Ms Simona Trino  
(Government member)

Ms Liliana Ocmin  
(Worker member)

Mr Guido Ricci  
(Employer member)