

## DOCUMENTS

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### Interpretation of Decisions of the International Labour Conference

In accordance with the usual practice, the Director-General has submitted to the Governing Body, for information, the text of a memorandum prepared by the Office in response to a request from a government concerning the interpretation of a Conference decision. In communicating this reply, the Director-General made the usual reservation that the Constitution of the ILO does not contain any provision authorising him to interpret the decisions of the Conference.

LABOUR RELATIONS (PUBLIC SERVICE) CONVENTION, 1978 (No. 151)

MEMORANDUM BY THE INTERNATIONAL LABOUR OFFICE

1. By letter of 12 December 1979, the Director of the Swiss Federal Office for Industry, Arts and Crafts, and Labour, requested information and advice on three points relevant to the question whether national legislation prohibiting the participation of public servants in organisations "providing for or having recourse to strikes of public servants or using means which are illicit or dangerous for the State" is compatible with the Labour Relations (Public Service) Convention, 1978 (No. 151).

*Relationship between the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Labour Relations (Public Service) Convention, 1978 (No. 151)*

2. The Swiss Federal Office requests information on the legal relationship between the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)—particularly Articles 2, 5, 6, 8 and 10 thereof—and the Labour Relations (Public Service) Convention, 1978 (No. 151).

3. International Labour Conventions—of which 153 have been adopted to date—are designed to form a coherent body of minimum standards in the field of competence of the International Labour Organisation. The standard-setting body—the International Labour Conference—takes care to ensure that there is neither duplication of nor conflict between the provisions of different Conventions; one means regularly used by it is to refer in the preamble to an instrument to relevant existing texts—the substance of which is then not repeated—and to define, again in the preamble, the legislative gap which the new instrument is designed to fill. The supervisory organs equally proceed on the assumption of the coherence of the total body of standards. The foregoing does not, of course, mean that the Conference cannot, in a new Convention, raise the level of an earlier standard contained in another instrument; its intention to do so is, however, then clearly expressed.

4. The procedures which led to the adoption of the Labour Relations (Public Service) Convention, 1978 (No. 151), were set in motion by a meeting of the Joint Committee on the Public Service—a body advisory to the Governing Body of the International Labour Office—in March 1971. In a resolution concerning freedom of association and procedures for staff participation in determining conditions of employment in the public service, the meeting noted that the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), applied integrally to public servants, but that the same was not true of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and expressed the view that public servants should have, in accordance with the latter, adequate protection against any act

which might impair trade union freedom. In April 1975 a technical conference on the public service prepared a preliminary outline of a possible international instrument on the public service which begins by noting that Convention No. 87 is applicable to all public servants (other than the police and armed forces), whereas the same is not true of Convention No. 98; the substantive issues dealt with in the outline accordingly do not include any covered by Convention No. 87. The matter was then placed on the agenda of the International Labour Conference for double discussion in 1977 and 1978, which discussion led to the adoption of the Convention here under consideration. From the outset it was made clear by the International Labour Office that it was not intended to duplicate the provisions of Convention No. 87 (see Report VII (1) to the 63rd Session of the Conference, pages 2 and 93); the first report to governments noted, in particular, that "there has been no suggestion that the guarantees provided by the Convention are not adequate as far as public employees are concerned" (op. cit., page 93). When proposals were subsequently made by particular governments to include in the new instrument provisions duplicating provisions contained in Convention No. 87, the Office pointed out that this was unnecessary (see, for instance, Report V (2) to the 64th Session of the Conference, pages 14–16). Although the title of the item on the agenda of the Conference—recalled, as always, in the preamble of the new instrument—was "Freedom of Association and Procedures for Determining Conditions of Employment in the Public Service", the full title of the Convention finally adopted is "Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service" a title paralleling that of Convention No. 98, but not that of Convention No. 87. The preamble of the new Convention, in the manner explained above, indicates the relevance of Convention No. 87, but refers to legislative gaps only as regards Convention No. 98. Finally, it is interesting to note that, during the second Conference discussion, in 1978, it was expressly accepted, with particular reference to the admissibility of organisations composed both of public servants and of other workers, that Article 8 of Convention No. 87 was applicable.

5. It would seem to be amply clear from the foregoing that, in adopting the Labour Relations (Public Service) Convention, 1978 (No. 151), the Conference did not intend to deal at all with the questions of freedom of association covered by Convention No. 87, but rather to give protection equivalent to that provided for in Convention No. 98 to public servants not covered thereby. Some light on the present problem is accordingly thrown by the views of the Committee of Experts on the Application of Conventions and Recommendations as to the relationship between Conventions Nos. 87 and 98. Those views—as stated, for instance, in paragraphs 22 to 26 of the General Survey on Freedom of Association and Collective Bargaining made in 1973 (58th Session of the International Labour Conference, Report III (Part 4B), pages 8–9)—may be resumed as follows: Convention No. 87 deals with the exercise of the right to organise in relation to the public authorities, exercising the power of the State in relation to all citizens; Convention No. 98 deals with the exercise of the right to organise in the framework of the employment relationship (in the case of public servants, this would also be in relation to a public authority, but in a different capacity). That the distinction holds good as regards Convention No. 151 is made clear by the express terms of the report on the second discussion at the Conference, to the effect that it was agreed "that the protection afforded was in respect of public authorities as employers" (64th Session of the Conference, *Provisional Record*, No. 25, paragraph 34).

*Views of the Supervisory Organs on the Compatibility, with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), of Certain Restrictions on the Freedom of Association of Public Servants*

6. The Swiss Federal Office requests information regarding the views of the Committee of Experts on the Application of Conventions and Recommendations and of the Freedom of Association Committee of the Governing Body on the compatibility, with Convention No. 87, of certain restrictions on the freedom of association of public servants, such as those prohibiting participation in organisations providing for or having recourse to strikes of public servants.

7. In the General Survey on Freedom of Association and Collective Bargaining made in 1973 (58th Session of the International Labour Conference, Report III (Part 4B)), the Committee of Experts on the Application of Conventions and Recommendations stated, first, that, with regard to public servants, "it may be considered that the recognition of the principle of freedom of association does not necessarily imply the right to strike" (paragraph 109). Second, it noted, with reference to the right of federation, that in several countries public servants' unions are not allowed to affiliate with organisations composed of workers of the private sector, and that, in some of these cases, this prohibition is brought about by stipulations which prevent

public servants from belonging to organisations which contemplate or impose the use of strike action; while considering that a general provision prohibiting federation between organisations of public servants and organisations of the private sector is not compatible with Article 5 of Convention No. 87, it made an express exception for the case in which affiliation might carry with it the obligation of having recourse to strike action (paragraph 119).

8. Given this general position, the Committee of Experts has not made any observations, in connection with its work on the application of Convention No. 87 by States parties thereto, either on the relevant Swiss legislation or on that of other countries having analogous legislative provisions.

9. The Governing Body Committee on Freedom of Association has agreed that the right to strike could be restricted or even prohibited in the public service (see *Freedom of Association, Digest of decisions of the Freedom of Association Committee of the Governing Body of the ILO*, Second edition (1976), paragraph 314). It has, in such case, stressed the importance of ensuring adequate alternative guarantees for the interests of those concerned (*ibid.*, paragraph 322).

*The Requirements of Article 4, Paragraph 2(b), of the Labour Relations (Public Service) Convention, 1978 (No. 151)*

10. The Swiss Federal Office requests advice regarding the compatibility, with Article 4, paragraph 2(b), of Convention No. 151, of certain restrictions on the freedom of association of public servants, such as those prohibiting participation in organisations providing for or having recourse to strikes of public servants.

11. Article 4 of Convention No. 151 reads as follows:

*Article 4*

1. Public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to—

- (a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of a public employees' organisation;
- (b) cause the dismissal of or otherwise prejudice a public employee by reason of membership of a public employees' organisation or because of participation in the normal activities of such an organisation.

12. For the full understanding of paragraph 2(b) of that Article reference should also be made to Article 3 of the Convention, to the effect that "the term 'public employees' organisation' means any organisation, however composed, the purpose of which is to further and defend the interests of public employees". The drafting of that provision is based on that of Article 10 of Convention No. 87 (which defines "organisation" for the purpose of that Convention). Moreover, it was in connection with that provision that, as indicated above, there was an understanding accepted at the Conference during the second discussion "that the term 'however composed' was intended to refer to composite unions and was not intended to affect the position referred to in Article 8, paragraphs 1 and 2, of Convention No. 87"<sup>1</sup> (64th Session of the International Labour Conference, 1978, *Provisional Record*, No. 25, paragraph 36).

13. The indications which have been given concerning the relationship of Convention No. 151 and Convention No. 87, and the specific understanding regarding the applicability of Article 8 of Convention No. 87 to the composition of public employees' organisations, make it clear that Article 4, paragraph 2(b), does not deal with the question of the legality or otherwise of participation in particular organisations, but only with the consequences, within the framework of the employment relationship, of such participation. It has also been indicated that, under the instrument applicable to the question of the legality of participation in particular organisations—namely Convention No. 87—it has been accepted by the supervisory organs that certain restrictions, by reference in particular to recourse to strikes, are permissible in the case of public servants. The general principle of the coherence of the body of international labour standards, as well as the specific acceptance of the applicability of Convention No. 87 to the

<sup>1</sup> Article 8 of Convention No. 87 reads as follows:

"1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention."

composition—and hence definition—of public employees' organisations, would seem to imply that the protection of Article 4, paragraph 2(b), of Convention No. 151 applies to cases of membership in a public employees' organisation which is lawful in accordance with Convention No. 87.

14. This conclusion would seem to be supported by the understandings arrived at in connection with the adoption of Convention No. 151 that the Convention did not deal in one way or the other with the question of the right to strike and that its terms did not restrict the right of governments to declare strikes to be unlawful (63rd Session of the International Labour Conference, 1977, *Record of Proceedings*, page 637, paragraph 62; 64th Session of the International Labour Conference, 1978, *Provisional Record*, No. 25, paragraphs 62 and 74). These understandings emphasise the fact that it was not the intention of the Conference in any way to extend the rights of public servants under Convention No. 87.