

Case No. 1942 (China/Hong Kong Special Administrative Region)

26. The Committee examined this case at its November 1998 meeting [see 311th Report, paras. 235 to 271] on which occasion it made the following recommendations:

- (a) the Committee requests the Government to take steps to repeal section 5 of the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997 (ELRO), which restricts union office to persons actually employed in the trade, industry or occupation of the trade union concerned;
- (b) the Committee requests the Government to take the necessary steps to repeal: (i) section 8 of the ELRO which subjects the use of union funds in certain instances to the approval of the Chief Executive of Hong Kong; and (ii) section 9 of the ELRO which institutes a blanket prohibition on the use of union funds for any political purpose;
- (c) the Committee requests the Government to review the Employment (Amendment) (No. 3) Ordinance, 1997, with a view to ensuring that provision is made in legislation for: (i) protection against all acts of anti-union discrimination; and (ii) the possibility of the right to reinstatement which would not be conditional upon the prior mutual consent thereto of both the employer and the employee concerned;
- (d) the Committee requests the Government, in the near future, to give serious consideration to the adoption of legislative provisions laying down objective procedures for determining the representative status of trade unions for collective bargaining purposes which respect freedom of association principles.

27. In a communication dated 25 May 1999, the Government refers to the above recommendations of the Committee. Concerning the issue of restrictions on the eligibility of union officials to stand for office, the Government points out that section 17(2) of the Trade Union Ordinance provides that persons who are or who have been engaged or employed in the trade, industry or occupation of the trade union concerned can become officers of the union. In addition, any person who is or has not been engaged or employed in the trade, industry or occupation of the trade union concerned can become an officer with the consent of the Registrar of Trade Unions. So far, all applications for consent have been approved. The Government is nevertheless actively reviewing the occupational requirement of trade union officers and will consult the Labour Advisory Board (LAB) in due course on the outcome of the review.

28. *In this regard, the Committee once again recalls that the determination of conditions of eligibility of union office is a matter that should be left to the discretion of union by-laws and the public authorities should refrain from any intervention which might impair the exercise of this right by trade union organizations. Noting that the Government is reviewing the occupational requirement of trade union officers, the Committee once again requests the Government to repeal section 5 of the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997 (ELRO), which restricts union office to persons actually or previously employed in the trade, industry or occupation of the trade union concerned.*

29. With regard to government restrictions on the use of union funds, the Government first of all states that section 33(1) of the Trade Union Ordinance specifies the areas in which unions may expend their funds. According to the Government, those specifications are broad enough to enable trade unions to use their funds to promote the interests of their members. Moreover, to cater to the needs of individual unions, the Chief Executive of Hong Kong can give his approval for unions to contribute or donate funds to trade unions established outside Hong Kong and for other purposes. With regard to restrictions on the use of union funds for political purposes, the Government indicates that through such restrictions, it seeks to ensure that trade unions perform their true functions of promoting and protecting the interests of their members and are not engaged essentially in political activities. While believing that the Trade Union Ordinance provides sufficient flexibility on the use of union funds, the Government states it is actively reviewing the provisions on union funds and will consult the Labour Advisory Board on the outcome of the review.

30. *Recalling that section 8 of the ELRO subjects financial contributions to trade unions or similar organizations abroad as well as the use of union funds for any other purposes than those enumerated in section 33(1) of the Trade Union Ordinance of 1989 to the "approval of the Chief Executive", the Committee would reiterate that provisions which give authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes for normal and lawful trade union purposes are incompatible with the principles of freedom of association. Similarly, recalling that section 9 of the ELRO contains a blanket prohibition on the use of union funds for any political purpose, the Committee would remind the Government that provisions imposing a general prohibition on political activities by trade unions for the promotion of their specific objectives are contrary to the principles of freedom of association. Noting the Government's statement that it is actively reviewing the provisions on union funds, the Committee once again requests the Government to take steps to repeal sections 8 and 9 of the ELRO.*

31. With regard to the issue of protection against acts of anti-union discrimination, the Government indicates that the Employment Ordinance provides protection against all acts of anti-union discrimination which are not confined to dismissals only. Moreover, Part VIA of the Employment Ordinance provides for reinstatement or re-engagement subject to the prior mutual consent of the employer and employee concerned. Where no order for reinstatement or re-engagement is made, the labour tribunal may award to the employee termination payments and compensation of up to a maximum of HK\$150,000.

32. As regards the issue of the scope of protection against acts of anti-union discrimination, the Committee notes that section 32A(1)(c)(i) of the Employment Ordinance provides for protection only against dismissal of workers on grounds of union activities and section 32A(5)(a) of the same Ordinance entitles an employee to make a claim for remedies only in relation to a dismissal on grounds of trade union membership, office or activities. The Committee once again reminds the Government that protection against acts of anti-union discrimination should cover not only dismissal but also any discriminating measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker. As regards the requirement of prior mutual consent in the absence of which a worker may not be reinstated but instead awarded compensation, the Committee does not consider that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities. The Committee therefore once again requests the Government to review the Employment (Amendment) (No. 3) Ordinance, 1997, with a view to ensuring that provision is made in the legislation for: (i) protection against all acts of anti-union discrimination; and (ii) the possibility of the right to reinstatement which would not be conditional upon the prior mutual consent of both the employer and the employee concerned.

33. Finally, with regard to the issue of promoting collective bargaining through legislation, the Government points out that there is no consensus on this issue within the Legislative Council. On 9 December 1998, the Legislative Council voted down a motion requesting the Government to submit to the Council for reconsideration, among others, the repealed legislation on compulsory collective bargaining. On 28 April 1999, the Council also voted down a motion requesting the Government to consider, among others, legislation for compulsory collective bargaining. An amended motion requesting legislation for a bargaining mechanism and union recognition was also voted down at the same sitting.

34. The Committee deeply regrets this state of affairs which runs contrary to the principle that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. Since the Committee had previously considered that the case at hand furnished a clear illustration of the appropriateness of adopting provisions laying down objective procedures for determining the representative status of trade unions for collective bargaining purposes, the Committee once again requests the Government to give serious consideration to the adoption of appropriate provisions which respect freedom of association principles.

35. The Committee requests the Government to keep it informed of measures taken to give effect to its recommendations.