

Case No. 3443

Definitive report

**Complaint against the Government of Portugal
presented by**

- the Graduate Teachers' Trade Union Association (ASPL)
- the National Teachers' Federation (FENPROF)
- the National Education Federation (FNE)
- the Teachers' Trade Union Association (PRÓ-ORDEM)
- the Union of Educators and Graduate Teachers of Higher Education Schools and Universities (SEPLEU)
- the National Union of Professionals in Education (SINAPE)
- the National and Democratic Union of Teachers (SINDEP)
- the Independent Union of Teachers and Educators (SIPE) and
- the National Union of Graduate Teachers of Polytechnic Schools and Universities (SPLIU)

Allegations: The complainant organizations allege that the arbitration board in the education sector illegally established minimum services during two one-day strikes that they called in March 2023 in several districts of the country

- 405.** The complaint is contained in a communication from several federations and trade union associations of teachers and educators: the Graduate Teachers' Trade Union Association (ASPL), the National Teachers' Federation (FENPROF), the National Education Federation (FNE), the Teachers' Trade Union Association (PRÓ-ORDEM), the Union of Educators and Graduate Teachers of Higher Education Schools and Universities (SEPLEU), the National Union of Professionals in Education (SINAPE), the National and Democratic Union of Teachers (SINDEP), the Independent Union of Teachers and Educators (SIPE) and the National Union of Graduate Teachers of Polytechnic Schools and Universities (SPLIU), dated 23 March 2023, as well as an additional communication from the SPLIU, dated 14 April 2023.
- 406.** The Government sent its observations in communications dated 12 September 2023 and 8 January 2024.
- 407.** Portugal has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

- 408.** In their communication of 23 March 2023, the complainants allege that the arbitration board in the education sector illegally established minimum services during two one-day strikes that they called for teachers and educators in the districts of Aveiro, Braga, Bragança, Coimbra,

Porto, Viana do Castelo, Vila Real and Viseu on 2 March 2023, and in the districts of Beja, Castelo Branco, Évora, Faro, Leiria, Lisbon, Portalegre, Santarém and Setúbal on 3 March 2023.

- 409.** The complainants indicate that the minimum services were deemed to be: (i) in preschool and the first cycle of basic education: three hours of education (preschool) or teaching (first cycle) per day, ending with the opening of the canteen; (ii) in the second and third cycles of basic education and secondary education: three teaching slots (lessons) per day, per class, ensuring weekly coverage of various subjects/disciplines/training components from the curriculum; (iii) irrespective of the cycle of education, the provision of academic and therapeutic support, ensuring support for pupils in vulnerable situations and at risk of dropping out of school and ensuring the continuity of measures provided to support pupils' social and emotional well-being; and (iv) to ensure the above-mentioned minimum services, in every school, depending on the size of the school and the numbers of pupils attending it, there was to be one teacher for each group/class in preschool and the first cycle of education; one teacher for each class/subject in the other cycles, and one teacher or specialist to provide support, according to their specialty, to pupils in need of the measures identified above.
- 410.** The complainants point out that the minimum services determined by the arbitration body would, in their view, correspond to 60 per cent or more of the daily teaching component of an educator or teacher.
- 411.** The complainants allege that the Ministry of Education, as the party requesting the establishment of a minimum service, had an obligation to demonstrate that the two strike days in question were likely to cause irreparable damage warranting the establishment of a minimum service. The Ministry had pointed to the succession of strikes in the sector called by another trade union organization, the Union of Professionals in Education (STOP), since December 2022, while the complainants had declared only one strike day since then.
- 412.** The complainants allege that the establishment of a minimum service is legally justified only when there is an irreparable risk, in this case in the education sector; in the absence of such a risk, unless national final evaluations, exams or tests are being held, which must take place on the same date throughout the country (under section 397 of the General Act on Public Employment), there are no grounds for establishing a minimum service.
- 413.** In the view of the complainants, given that the strike in question was called for a single day (spread over two regions of the country), there were no grounds for the existence of an imperative social need whose fulfilment would take precedence over the legitimate exercise of the right to strike, so that any minimum service during this strike would violate the principles of proportionality, adequacy and necessity. In this regard, the complainants allege that the minimum service provided for the unlimited strikes of STOP had adverse legal effects on the members of other unions, as it was eventually extended to strike notices issued by the complainant unions, due to the analysis of the arbitration board. The complainants allege that it was not up to the arbitration board to rule on the combined effect of strike notices issued by other trade union structures, as this undermines the free exercise of trade union activities and the constitutional right to strike, as well as the autonomy of organizations (see communication of 23 April 2023), thereby setting a dangerous precedent likely to jeopardize the fundamental rights acquired by workers.
- 414.** Lastly, they allege that such decisions could also cause confusion in establishments about the very notion of a minimum service, and even lead to its misuse.
- 415.** The trade union organizations state that they have challenged the arbitration decision before the courts.

B. The Government's reply

- 416.** In its communication of 12 September 2023, the Government states that the above-mentioned unions sent the competent authorities strike notices for teachers and educators for the period between 00.00 and 24.00 on 2 March 2023 in the districts of Aveiro, Braga, Bragança, Coimbra, Guarda, Porto, Viana do Castelo, Vila Real and Viseu, and for the period between 00.00 and 24.00 on 3 March 2023 in the districts of Beja, Castelo Branco, Évora, Faro, Leiria, Lisbon, Portalegre, Santarém and Setúbal.
- 417.** The Government states that the Ministry of Education had requested the initiation of proceedings with a view to negotiating an agreement on the definition of minimum services and the means of providing them, in accordance with the law and for legal purposes, without seeking to undermine the constitutional right to strike, but rather with a view to safeguarding another equally important constitutional right, namely the right to education. The Government points out that: (i) in the absence of a provision in a collective labour regulation instrument or an agreement between the parties on the definition of minimum services, the public employer may request a meeting with the Directorate General for Public Employment with a view to negotiating an agreement between the parties on minimum services and the means required to provide them, in accordance with the provisions of the General Act on Public Employment (section 398(2)). In the absence of an agreement by the end of the third day following a strike notice, an arbitration board must define such services (section 398(3) of the Act); (ii) a meeting was held on 17 February 2023 at the Directorate General for Public Employment to negotiate a minimum service agreement for the strikes in question, but it was unsuccessful; (iii) as a result, on the same day, in accordance with section 8(4) of Decree-Law No. 259/2009 of 25 September, applicable under section 405 of the above-mentioned Act, an arbitration board was established. Arbitrators are selected at random from the lists of arbitrators for workers, public employers and presidents to ensure impartiality; (iv) on 19 February 2023, following the establishment of the arbitration board and prior to the issuance of its decision (on 27 February 2023), the Ministry of Education requested that the case be closed, under section 95 of the Administrative Procedure Code, on the grounds that the request for minimum services and the means required to provide them had become superfluous; and (v) the arbitration board nevertheless decided to rule on the need to define minimum services.
- 418.** As to the arbitration board's grounds for defining minimum services, the Government states that the arbitration board: (i) considered that the strike concerned a sector of undeniable social importance, which underpins the pursuit of rights equally important to those on which the right to strike is based, which, in principle, would warrant the introduction of a minimum service to safeguard them; (ii) reached a majority decision, after analysing and weighing the nature and scope (in terms of staff and duration) of the strike and the circumstances in which it would take place; and (iii) took into account, among other factors, the combined effect of other strikes that had taken place in the sector, held by various trade union organizations, and concluded that the strike in question formed part of a longer period of strikes that had taken place virtually non-stop since 9 December 2022. As a result, the strike in question could not be viewed as a simple one-day strike, causing only the usual and legitimate inconveniences inherent in any strike, but rather as one more strike forming part of a series of strikes, which, taken as a whole, risked jeopardizing the right to education and the right to learn of children and young people.
- 419.** The Government specifies that the arbitration decision is a judicial act that is equivalent to a first-instance judgment for all legal purposes and may be challenged before the Court of

Appeal. It is up to the Ministry of Education to define, organize and implement the minimum services previously decreed by decision of the arbitration body.

420. In its communication of 8 January 2024, the Government emphasizes that the trade unions had appealed the arbitration board's decision before the Lisbon Court of Appeal, which had ruled in their favour (Decision of 17 May 2023). Following an appeal by the Ministry of Education, the Supreme Court of Justice ruled that the Court of Appeal's ruling on the arbitration body's decision could not be appealed (Decision of 3 November 2023). The decision on the merits handed down by the Lisbon Court of Appeal, which revoked the arbitration decision, is therefore final.
421. Lastly, as to the alleged misuse of the minimum service in educational establishments, the Government considers that these allegations are not supported by documents submitted in support of the complaint or by other evidence.

C. The Committee's conclusions

422. *The Committee notes that the present case concerns the complainants' criticism of the arbitration board's decision of 27 February 2023, to establish a minimum service in the education sector during two one-day strikes in several districts of the country on 2 and 3 March 2023. In particular, the organizations denounce the fact that the board in question based its decision to introduce a minimum service on other, supposedly unrelated, industrial actions, thereby undermining the free exercise of trade union activities and the constitutional right to strike, as well as the autonomy of organizations. The Committee notes in this regard that they consider that: (i) the minimum service provided for the unlimited strikes of STOP had adverse legal effects on the members of other unions, as it was eventually extended to the strike notices issued by the complainant unions, due to the analysis of the arbitration board; (ii) the establishment of a minimum service is legally justified only when there is an irreparable risk for the sector concerned. In the absence of such a risk, and given that the strike in question was called for a single day (spread over two regions of the country), there was no justification for the existence of an essential social need whose fulfilment would take precedence over the legitimate exercise of the right to strike; and (iii) unless national final evaluations, exams or tests are being held, which must take place on the same date throughout the country (under section 397 of the General Act on Public Employment), there are no grounds for establishing a minimum service. According to the complainants, any minimum service during this strike would violate the principles of proportionality, adequacy and necessity.*
423. *The Committee notes that the Government, for its part, indicates that: (i) the Ministry of Education had requested the initiation of proceedings with a view to negotiating an agreement on the definition of minimum services and the means of providing them, in accordance with the law and for legal purposes, without seeking to undermine the constitutional right to strike, but rather with a view to safeguarding another equally important constitutional right, namely the right to education; and (ii) the arbitration body's decision was issued after negotiations at the Directorate General for Public Employment failed.*
424. *The Committee notes that the Lisbon Court of Appeal overturned the arbitration body's decision (Judgment of 17 May 2023) on the grounds that there was no factual basis to support an infringement on the right to education and that the right to strike, which is a constitutional right, may only be restricted when necessary, to the strict extent of what is appropriate and proportionate to the defence and maintenance of another fundamental right which, in this case, comes into conflict. The Committee notes in this regard that the Supreme Court of Justice subsequently ruled that the appeal lodged by the Ministry of Education against the Court of Appeal's decision was inadmissible (Judgment of 3 November 2023).*