



SEVENTH ITEM ON THE AGENDA

Reports of the Committee on Freedom of Association**338th Report of the Committee on Freedom of Association***Contents*

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42. In its communication dated 28 April 2005, the Government states that the court of first instance rejected the motion for anti-union practices on the basis of prescription and because the former member who had made the claim did not have the legal interest. Also, the court fined the enterprise (80 “*unidades tributarias*”) for not having fully discounted the union dues; this ruling was confirmed by the Court of Appeal of Santiago.
43. *The Committee takes note of this information. The Committee again requests the Government to inform it of the decision handed down with regard to the dismissal of seven unionized pilots from the Lan Chile enterprise.*

Case No. 2186 (China/Hong Kong Special Administrative Region)

44. The Committee last examined this case, which concerns allegations that Cathay Pacific Airways dismissed the Hong Kong Aircrew Officer’s Association (HKAOA) members and officers by reason of their trade union activities, refused to enter into meaningful negotiations, tried to break up the union and committed other acts of intimidation and harassment, at its March 2004 meeting and formulated the following recommendations on which it requested to be kept informed of developments [see 333rd Report, approved by the Governing Body at its 289th Session, para. 362]:
- (a) The Committee notes with concern that the civil action for unreasonable and unlawful dismissal brought before the High Court by several pilots of Cathay Pacific Airways, has been pending since June 2002 without a date for a hearing having been fixed yet. It therefore requests the Government to take all necessary measures as soon as possible to end the dispute through a negotiated settlement which may be considered by both parties as fair and equitable. In the absence of such settlement, the Committee requests the Government to intercede with the parties with a view to promoting interim measures preventing irreparable damage for the dismissed pilots pending final judgement on this case. It also reiterates its previous request to the Government to communicate the High Court ruling once rendered.
 - (b) The Committee notes that the Government has been working on a legislative amendment to empower the Labour Tribunal to make an order of reinstatement/re-engagement in cases of unreasonable and unlawful dismissal without the need to secure the employer’s consent and requests the Government to keep it informed of developments in this respect.
 - (c) The Committee requests the Government to take all necessary measures, in consultation with the social partners, so as to consider the adoption of appropriate machinery geared to prevent and redress acts of anti-union discrimination, given that the generally applicable (criminal and civil) procedures for unjustified and unlawful dismissal do not seem to be sufficiently effective in affording protection against acts of anti-union discrimination, as required by Article 1 of Convention No. 98.
 - (d) The Committee recalls that it is incumbent on the authorities to ensure the application of Article 2 of Convention No. 98 and therefore requests the Government to take all necessary measures as soon as possible with a view to adopting legislative provisions prohibiting acts of interference in the establishment, functioning and administration of workers’ organizations and establishing efficient procedures coupled with sufficiently dissuasive sanctions so as to ensure their implementation in practice.
 - (e) The Committee expects that relations between HKAOA and Cathay Pacific Airways will improve, and requests the Government to renew its efforts for the effective promotion of bipartite collective bargaining, both in general and between the parties, and to take all necessary measures so as to ensure that negotiations are genuine and meaningful.
45. In a communication dated 11 May 2005, the Government provided information on the above recommendations. In particular, the Government indicated with regard to recommendation (a) above that, when the dispute came to light in 2001, the Labour

Department (LD) of the HKSAR Government actively mediated between the two parties to help resolve their differences and made strenuous efforts with a view to bringing the dispute to a negotiated settlement which would be agreeable to both parties. These conciliation efforts did not, however, yield the desired results. After the dismissal of the pilots in July 2001, the LD promptly advised HKAOA of the relevant provisions of the Employment Ordinance (EO) and the channels available for pilots to seek redress should they feel aggrieved. A complaint by nine of the pilots that the termination of their employment constituted a contravention of anti-union discrimination provisions in the EO was promptly investigated. Statements from the pilots and a submission from Cathay Pacific Airways were submitted to the Department of Justice (DoJ), which subsequently advised that there was insufficient evidence to establish an offence under the EO. In 2002, the LD was approached by 21 of the pilots to assist in the filing of claims for civil remedies before the Labour Tribunal. Prompt action was taken in this regard, but the Labour Tribunal ruled that, since civil action had been initiated in the High Court in 2001, the matter should be dealt with by the High Court. The Government added that as some of the dismissed pilots had resorted to civil action to seek legal redress against Cathay Pacific Airways, it remained a decision of the Court to award remedies to the aggrieved party for any damage incurred should the Court find the dismissal unreasonable and unlawful. Given the independence of the judiciary, the HKSAR Government was not in a position to intervene in the judicial process or exert any influence on the parties in litigation. At present, litigation was in progress at the High Court.

46. The Government further indicated, with regard to recommendation (b) above, that the HKSAR Government had been working on a draft amendment bill which sought to empower the LT to make an order for reinstatement/re-engagement in cases of unreasonable and unlawful dismissal (including dismissals on the ground of anti-union discrimination), without the need to secure the employer's consent if the LT considered it appropriate and reasonably practicable. As the bill was rather complex, more time was needed to complete the legal drafting process.
47. The Government added with regard to recommendation (c) above, that the HKSAR Government subscribed fully to the requirement under Article 1 of Convention No. 98 and that adequate protection against acts of anti-union discrimination was guaranteed by the basic law, the Hong Kong Bill of Rights Ordinance and section 21B and Part VIA of the Employment Ordinance. Notwithstanding the existing legislative protection against anti-union discrimination, the HKSAR Government had been working on the abovementioned draft amendment bill concerning reinstatement/re-engagement.
48. With regard to recommendation (d) above, the Government indicated that the HKSAR Government subscribed fully to the requirement under Article 2 of Convention No. 98 to protect workers' and employers' organizations against interference by each other and measures had been put in place to give effect to the Article. In particular, under section 36 of the Trade Unions Ordinance (TUO), all registered trade unions in the HKSAR were required to submit to the Registry of Trade Unions (RTU) their annual audited statements of account on the receipts and payments in the financial year and the assets and liabilities of the unions. Contributions from employers and employers' organizations, if any, must be highlighted in these accounts. Section 37 of the TUO further provided that the account books of a registered trade union should be open to inspection by members of the union and the RTU. Through regular examination of the audited annual statements and accounts books of the unions, the RTU ensured that no employer could gain domination over an employees' organization through the provision of financial support. The RTU also conducted inspection visits to trade unions and employers' organizations to provide advice and assistance on the management of their organizations and to ensure that employees and employers were free from acts of interference by each other in the establishment, functioning or administration of their organizations. The above measures had worked well

to give effect to Article 2 of Convention No. 98. There had been no report or complaint from employees' unions, including the HKAOA, about acts of interference from their employers or employers' organizations. The full application of Article 2 would continue to be ensured.

49. The Government indicated, moreover, with regard to the Committee's statement in paragraph 357 of the 333rd Report to the effect that managements could hinder the activities of a trade union as a dismissed trade union leader would have to resign his trade union post by law, that the TUO does not require an officer to resign from his trade union post when he is dismissed by the employer. In particular, under section 17(2) of the TUO, a person who is or has been engaged or employed in a trade, industry or occupation with which the trade union is directly concerned, can be an officer of a trade union. Thus, even when dismissed, the officer should have been engaged in the trade with which the trade union is directly concerned. The employer can in no case make use of the provisions of the TUO to force the resignation of a trade union officer by dismissing him. As such, the relevant legislative provisions are not contrary to Article 2 of Convention No. 98. The rules of some trade unions, including the HKAOA, stipulate that their trade union officers should be voting members of the trade unions. In these cases, a trade union officer who ceases to be a voting member of the trade union after his dismissal would be required to resign from his trade union post. Restrictions of this kind are imposed by the trade unions themselves, and not by the TUO. Indeed, it would be up to the trade unions to modify their own union rules should they see a need to do so.
50. With regard to recommendation (e) above, the Government indicated that the HKAOA and Cathay Pacific Airways had put in place a longstanding, sophisticated and efficient collective bargaining machinery. Although communication between the two parties had ceased for some time after the 2001 dispute, towards the end of 2003 a new executive committee of the HKAOA renewed its dialogue with Cathay Pacific Airways and collective bargaining between the two parties had since achieved good results in resolving the outstanding issues. In 2004, the two sides reached an agreement on a new rostering arrangement, which was put into effect in January 2005. This signified not only an end to the protracted dispute on rostering practices but also an improved relationship between the HKAOA and Cathay Pacific Airways. There were positive signs that the two parties would continue to engage in constructive and meaningful discussions to resolve the other outstanding issues by bipartite collective bargaining.
51. The Government emphasized the firm belief of the HKSAR Government that the employer and employees of an enterprise were in the best position to deal with matters of mutual concern by direct negotiation. The Labour Department stood ready to render conciliation services to the parties concerned when direct negotiation failed. It would also spare no effort in promoting voluntary negotiation between employers and employees and their respective organizations, for instance, by encouraging employers to maintain effective communication with their employees or their unions and to consult them on matters pertaining to employment through a wide range of promotional activities, such as seminars and talks regularly organized for employers, employees and human resource professionals and a variety of promotional materials on related topics for free distribution to the public (e.g. guidebook titled "Guide to Workplace Cooperation", VCD titled "Break the barrier, be communicative" and VCD titled "Key to Business Success: Workplace Cooperation"). In 2004, the publicity activities of the Labour Department focused on promoting the message of "partnership between employers and employees at work", considering that this partnership spirit was crucial to the success of effective communication and cooperation between employers and employees. To inculcate this partnership spirit in the community, the Labour Department had launched a new television announcement of public interest (API) on "Success through Partnership", a "Good People Management Award", and an informal survey on the mode of labour-management communication in 110 establishments

employing 500 people and above. The findings revealed that about 26 per cent of the establishments surveyed had formed joint consultative committees at the enterprise level for the purpose of labour-management communication and consultation. These establishments employed about 133,515 employees (or 49 per cent of the total number of employees in the 110 establishments surveyed). The survey illustrated that a considerable proportion of sizeable enterprises in the HKSAR were already engaged in some form of voluntary negotiation with their employees on terms and conditions of employment through the machinery of joint consultative committees.

52. *The Committee notes the information provided by the Government. The Committee notes with concern that the civil action for unreasonable and unlawful dismissal brought before the High Court by several pilots of Cathay Pacific Airways in November 2001 is still pending. The Committee further recalls from the last examination of this case that the dismissed pilots were subject to a legal requirement to fly at least one trip per month to maintain recency [see 333rd Report, para. 350]. Thus, in the light of the delay in the judicial proceedings, the Committee had requested the Government (see under (a) above, to take measures so as to end the dispute through a negotiated settlement or, in the absence of such settlement, to intercede with the parties with a view to promoting interim measures preventing irreparable damage for the dismissed pilots pending final judgement on this case.*
53. *Against this background, the Committee observes that the Government has confined itself to reiterating previously submitted information and states, in particular, that it is not in a position to intervene in the judicial process or exert any influence on the parties in litigation, while it does not provide any indication as to the current stage of the proceedings or the approximate time when a final ruling could be rendered by the High Court. The Committee recalls once again that justice delayed is justice denied and that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 56 and 739]. The Committee regrets that the Government has not taken any measure to end the dispute through a negotiated settlement which may be considered by both parties as fair and equitable and requests the Government to take such measures without delay given that the proceedings before the High Court are still pending, four years after the lodging of a complaint by several pilots of Cathay Pacific Airways for unreasonable and unlawful dismissal. The Committee also requests the Government to inform it of the actual stage of the proceedings before the High Court.*
54. *With regard to the recommendation made under (b) above on a possible amendment to the Employment Ordinance concerning the issue of reinstatement/re-engagement, the Committee notes that, according to the Government, more time is needed to complete the legal drafting process. The Committee recalls that the amendment in question has been approved by the Labour Advisory Board which has an equal number of employer and employee representatives [see 326th Report, para. 44, and 333rd Report, para. 351] and emphasizes once again the conclusions it reached in Case No. 1942 concerning Hong Kong SAR (China), wherein it considered that it would be difficult to envisage that the requirement of prior mutual consent to reinstatement would be easily forthcoming if the true reason for a dismissal was based on anti-union motives [see 311th Report, paras. 235-271, and 333rd Report, para. 351]. The Committee requests the Government to keep it informed of the progress made in amending the Employment Ordinance.*
55. *With regard to the recommendations made under (c) above on the adoption of appropriate machinery geared to prevent and redress acts of anti-union discrimination, the Committee takes due note of the existing provisions enumerated by the Government in this respect, but*

also observes that in the particular case before it, the 50 dismissed HKAOA members and officers have not had an opportunity to effectively voice their grievances, due to various procedural reasons. In particular, the Department of Justice considered that there was insufficient proof to establish an offence under the Employment Ordinance because the requisite standard of evidence for acts of anti-union discrimination is very high and the relevant proceedings are criminal ones, every element having to be proven beyond reasonable doubt; the Labour Tribunal moreover considered that the case was not receivable because a civil action had been previously initiated before the High Court. The Committee also observes that the proceedings currently pending before the High Court for unreasonable and unlawful dismissal tend to be time-consuming and might perhaps not be sufficiently focused on the specific issue of anti-union discrimination. The Committee further recalls from its previous examination of this case that 50 out of 51 dismissed pilots were trade union members including eight officers and three members of the union negotiating team. The dismissals took place immediately following the staging of lawful industrial action. The grounds put forward for the dismissals included disciplinary warnings for reasons which could be seen as closely related to trade union membership and activities, and other generic reasons such as “unhelpful and uncooperative” attitude. The Committee recalls that in a similar case, the Committee found it difficult to accept, as a coincidence unrelated to trade union activity, that heads of departments should have decided, immediately after a strike, to convene disciplinary boards which, on the basis of service records, ordered the dismissal not only of a number of strikers, but also of the seven members of their union committee [see *Digest*, op. cit., para. 717].

56. The Committee regrets that workers who consider themselves prejudiced because of their trade union activities could not find access to appropriate machinery for the prompt investigation and settlement of their grievances. It recalls that respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress, which are expeditious, inexpensive and fully impartial [see *Digest*, op. cit., para. 741]. It also notes that, although the possibility of criminal prosecution against acts of anti-union discrimination might appear in theory to afford a very high level of protection to the workers, in the particular circumstances of this case it is likely to be ineffective due to the inhibitory effect of the high standard of proof required in criminal proceedings and the difficulties involved in proving beyond a reasonable doubt that the dismissal was by reason of trade union activities. The Committee therefore once again requests the Government to take all necessary measures in consultation with the social partners, so as to consider the adoption of appropriate machinery geared to prevent and redress acts of anti-union discrimination. The Committee requests to be kept informed in this respect.
57. With regard to the recommendations made under (d) on the issue of interference, the Committee takes due note of the measures taken by the Trade Unions Registry pursuant to sections 36 and 37 of the Trade Unions Ordinance so as to prevent acts of interference such as the establishment of workers’ organizations under the domination of employers’ organizations or support for workers’ organizations by financial or other means with the object of placing such organizations under the control of employers or employers’ organizations, as required by Article 2(2) of Convention No. 98. However, the Committee also notes from the Government’s observations that there is no explicit prohibition of acts of interference in the law or any prompt and effective mechanism of examination of relevant complaints. The Committee observes that acts of interference are not limited to financial domination and that the dismissal of a large number of trade union members, including the leadership of the trade union in question, in the context of a collective dispute, might possibly aim at weakening the trade union and influencing its negotiating power and strategy. The Committee regrets that there is no prompt mechanism in place to investigate such grievances. The Committee recalls that legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of

*interference by employers against workers and workers' organizations to ensure the practical application of Article 2 of Convention No. 98 [see **Digest**, op. cit., para. 764]. It once again requests the Government to adopt legislative provisions prohibiting acts of interference coupled with efficient appeal procedures and sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.*

58. While noting that the relationship between HKAOA and Cathay Pacific Airways has improved and that a new rostering agreement was reached in 2004, thus ending a longstanding dispute on this issue, the Committee also notes that the initiative for the new round of negotiations appears to have come from HKAOA and regrets that the Government does not indicate any initiatives by the Labour Department to assist the parties in bringing an end to their dispute, as requested by the Committee (see under (e) above). The Committee hopes that the Government will give consideration to more proactive measures in the future in the context of promoting negotiated solutions to collective disputes, in conformity with Article 4 of Convention No. 98.
59. Finally, while taking due note of the information provided by the Government on various promotional activities, **the Committee must observe that joint consultative committees are not negotiating bodies** in the meaning of Article 4 of Convention No. 98 since they seem to play a merely advisory role and that effective communication between the management and workers does not amount to negotiations. The Committee requests the Government to renew its efforts for the effective promotion of bipartite collective bargaining and to take all necessary measures, including appropriate protection against anti-union discrimination and interference, so as to ensure that negotiations are genuine and meaningful.

Case No. 2253 (China/Hong Kong Special Administrative Region)

60. The Committee last examined this case, which concerns allegations that by enacting the Public Officers Pay Adjustment Ordinance in 2002, the Government unilaterally reduced civil service pay without proper negotiations with civil service unions and refused to settle the dispute over pay adjustment through continued dialogue or through a committee of inquiry, as provided in the 1968 Agreement between the Government and the main staff associations, at its November 2004 meeting and formulated the following recommendations [see 334th Report, approved by the Governing Body at its 290th Session, para. 320]:
- (a) The Committee requests the Government to engage in consultations with the staff sides of the central consultative councils without delay with a view to taking the appropriate legislative measures so as to establish a collective bargaining mechanism allowing public employees who are not engaged in the administration of the State to negotiate collectively their terms and conditions of employment in accordance with Article 4 of Convention No. 98, applicable in the territory of China/Hong Kong Special Administrative Region without modifications. The Committee requests to be kept informed of developments in this respect.
 - (b) The Committee expects that the staff sides of the central consultative councils will be allowed in the future to engage in full and frank consultations with the Government over the terms and conditions of employment of public employees who are engaged in the administration of the State in accordance with Article 7 of Convention No. 151, applicable in the territory of China/Hong Kong Special Administrative Region without modifications.
 - (c) The Committee expects that the authorities will accept in the future the appointment of the committee of inquiry provided in the 1968 Agreement between the Government and