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Solidarność

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Gdańsk, 14 January 2015

Mr Guy Ryder
Director-General
International Labour Office
Route des Morillons 4
CH 1211 Genewa 22
Switzerland

Dear Director-General,

Acting pursuant to Art. 24 of ILO Constitution, the National Commission of NSZZ „Solidarność", a trade union representing 586.909 members and operating since 1980, would like to file a complaint concerning the lack of proper implementation by the Polish Government of ILO Conventions No 87 and 151 into the Polish legislation.

Poland ratified ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise in 1957 and ILO Convention No. 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service in 1982. Provisions of these conventions are implemented into Polish law primarily by the standards contained in the Act on Trade Unions of 23 May 1991 and the Act of 23 May 1991 on Solving Collective Labour Disputes.

Polish government violates:

1. ILO Convention No. 87 by limiting the parties of a collective dispute and of the strike to the employer within the meaning of Polish Labour Code,
2. ILO Convention No. 151 through the lack of provisions that would recognize "public authorities" as a party of the dispute for civil servants,
3. ILO Convention No. 87 through the lack of legal regulations allowing trade unions to organise strikes on socio-economic issues,
4. ILO Convention No. 87 through lack the of legal regulations allowing trade unions to organise general strikes,
5. ILO Convention No. 151 through depriving some of the employees in the state governing bodies and local government, courts and prosecutor's offices of the right to strike.

We extend a kind request to you, Mr. Director General, to transmit the contents of this letter to the attention of the Committee on Freedom of Association.

Yours sincerely,

Piotr Duda
President

JUSTIFICATION

ILO Committee on Freedom of Association recognizes the right to strike used to defend economic interests as a fundamental right of workers and their organisations (*Freedom of Association, Digest of: decision and Principles of the freedom of association Committee of Governing Body of the ILO, Geneva, 2006*, para. 520). Furthermore, the Committee recognizes that the right to strike is an intrinsic corollary protected by Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise (*Freedom ...*, para. 523).

In accordance with Art. 59 para. 3 of the Constitution of the Republic of Poland, trade unions have the right to organise strikes and other forms of protest within the limits specified in the Act on Trade Unions. Trade union organisations in Poland may conduct collective disputes based on the provisions of the Act of 23 May 1991 on Solving Collective Labour Disputes (Law Gazette of 1991, No. 55, item 236). In accordance with the provisions of this Act collective labour dispute of workers **with an employer or employers** may concern working conditions, wages or social benefits as well as workers' rights and freedoms of employees or other groups who have the right to organise in trade unions (Article 1 of the Act). **An employer within the meaning of this Act is an entity referred to in Art. 3 of the Labour Code (Article 5 of the Act).** If the parties fail to reach agreement the final stage of the industrial dispute is a strike. A strike is a collective work stoppage by workers and is the last resort (Article 17 items 1 and 2). **A warning strike** can be organised but only once and for a period not longer than two hours (Article 12). In defense of the rights and interests of workers who do not have the right to strike, the union of another establishment can organise **a solidarity strike** not exceeding one half of a working day (Article 22). Any work stoppage due to a strike **that affects positions, equipment and machinery, where interruption of work would constitute a danger to human lives or health or to the security of the state** is prohibited. It is unacceptable to organise a strike in the Agency of Internal Security, the Intelligence Agency, Military Counterintelligence Service, Military Intelligence Service, the Central Anti-Corruption Bureau in units of the Police, Armed Forces of the Republic of Poland, Prison Service, Frontier Guard, Custom Service as well as units of the fire brigades. **The right to strike is not granted to the employees in the state governing bodies and local government, courts and prosecutor's offices** (Article 19, items 1-3). **A strike affecting one establishment** is announced by the trade union organisation with the consent of the majority of voting employees if the vote was attended by at least 50% of employees at the workplace. **A strike affecting more than one establishment** is declared by the trade union body indicated in the by-laws after having been approved by the majority of those workers voting in the establishments in which the strike is to take place, as long as in each of these establishments at least 50 % of workers attended the vote. Notice of the strike must be given at least five days in advance (Article 20 items 1-3).

The National Commission of NSZZ „Solidarność" indicates the inadequacy of national regulations to the standards of the International Labour Organisation in respect of:

1. **Violation of ILO Convention No. 87 by limiting the parties of a collective dispute and of the strike to the employer within the meaning of Polish Labour Code.**
2. **Violation of ILO Convention No 151 through the lack of provisions that would recognize "public authorities" as a party of the dispute for civil servants.**

The main plea relates to a breach of ILO Conventions No. 87 and 151 through restricting collective bargaining rights and the right to strike solely to the employer within the meaning of the Labour Code. Referring the Act on Solving Collective Labour Disputes to the definition contained in the Labour Code means that in Poland a party to a collective dispute can only be an employer, that is an

organisational unit or a natural person, who employs workers (Art. 3 of the Labour Code). In accordance with Art. 1 of Convention No. 151 it is applicable to all persons employed by public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to them. In the literature of labour law the view that in the light of international law a strike in the public sector against local or state government is considered legal is presented by dr M. Kurzynoga (see: M. Kurzynoga, *Warunki legalności strajku*, Conditions for the legality of a strike, Warsaw 2011, p. 126 et seq.).

Due to the narrowing of the definition of a party to a collective dispute and strike to the employer within the meaning of the Labour Code, it often happens that trade unions cannot initiate a dispute (e.g. for a wage increase) with the entity actually deciding on the financial issues of the profession. For example, an employer of persons employed at the university is the university and at the school – the school, although financial issues of public institutions such as universities and schools are decided by, depending on the subject, the Minister of Science and Higher Education, the Minister of Education and the Minister of Finance. Incidentally, until recently, the Minister of Science and Higher Education could be a party to a supra-company collective agreement of public universities. This solution was included in Art. 152 of the Act of 27 July 2005 on Higher Education (Legal Gazette of 2012 item 572, consolidated text). This provision stipulated that multi-establishment collective labour agreement for civilian employees of public schools, military schools, state services, artistic, medical, and marine universities was concluded by the appropriate Minister. However, national legislature repealed the commented provision at the end of 2014 (by the repealing Act of 11 July 2014 on the principles of implementation of cohesion policy programs in the 2014-2020 financial perspective, Legal Gazette item 1146). Therefore, currently it is not possible to initiate a collective dispute or even to negotiate a collective agreement with the appropriate minister, as the legislature shifts the burden of decision in all employment matters including financial matters to the university (the employer within the meaning of the Labour Code). On the issues concerning employment law on behalf of the employer /university the speaker is the vice-chancellor of the university and on behalf of the employer /school the speaker is the headmaster, but they both work within the financial limits set by the Ministry of Science and Higher Education and the Ministry of Finance (or in case of a public school by the Minister of Education and the Minister of Finance). Directing economic demands of workers to the vice-chancellor of the university or to the school principal is pointless, because they have no real power over financial decisions.

Another controversial issue connected with the definition of the parties to an industrial dispute, is the fact that it is often impossible to conduct a collective dispute in the private sector with the entity economically responsible in practice, e.g. against the actual employer or parent company. This is a problem referred to as the problem of the management formula of the employing entity. The legal solution adopted in the Act on Solving Collective Labour Disputes was created for the needs of the individual employment relationship and does not correspond to the specificity of collective labour relations. In Poland, there are many companies that merge in order to concentrate the capital. However, it is not always the employer within the meaning of the Labour Code (entity employing) that is the actual employer or the employer deciding on the financial situation of the persons working in a particular branch of a company. The doctrine of national labour law several times criticized such a solution of the Act on Solving Collective Labour Disputes where requests concerning the interests of workers are addressed to employers with no decision-making powers (see: e.g.: J. Stelina, *Spory zbiorowe* (in) *System prawa pracy (*Industrial action (in) The labour law system) Volume V, ed. by K. Baran, Warsaw 2014, 564, 566 and J. Stelina, *Przydatność kodeksowej koncepcji pracodawcy w zbiorowym prawie pracy* (Usefulness of the Labour Code

concept of employer in collective labour law), Gdanskie Studia Prawnicze Volume XXX 2013 pp. 137-151.)

In other words, the objections of this complaint in Sections 1 and 2 come down to the fact that public authorities cannot constitute a party to a collective dispute and strike in Poland: neither the Government nor the Minister or the local government. Just as such a party cannot be other entities economically responsible or granting entitlements to certain professions. According to NSZZ "Solidarność" a party to a labour dispute and strike should always be the actual financially responsible entity or the entity actually conferring powers on certain professions, e.g. public authority such as the government, competent minister, local or provincial government, etc., or other responsible entity, e.g. the mother company. The above plea appears to be consistent with ILO standards, in particular, with the recommendation of the Committee on Freedom of Association that the Government may be a party to the dispute (*Freedom* ..., 629).

3. **Violation ILO Convention No. 87 through the lack of legal regulations allowing trade unions to organise strikes on socio-economic issues.**

Specified in Sections 1 and 2 the problem of the competent (real) parties to a collective dispute and strike is of great practical importance. Recognizing only the employer within the meaning of the Labour Code as a party to a collective dispute causes consequences in the form of reducing labour dispute matters only to issues concerning the enterprise level, to which we refer in Section 3 of this complaint. In accordance with Art. 1 of the Act on Solving Collective Labour Disputes, collective dispute of workers with the employer or employers may relate to **working conditions, wages and social benefits, rights and freedoms of employees or other groups**, who have the right to organise in trade unions. Given this statutory record the unions cannot within the limits of a collective dispute express their dissatisfaction at socio-economic issues towards the entity really responsible for workers' professional, social and economic situation. The employer in the narrow sense as the "employing entity" does not determine socio-economic situation affecting working conditions and social conditions of the workers. The provisions of the Act on Solving Collective Labour Disputes or any other act do not provide for the situation where unions may start disputes and carry out strikes against a public authority in socio-economic issues. Persons employed (workers) and their organisations should be able to express in a broader context – if need be – their discontent about socio-economic issues affecting the interests of their members (*Freedom* ..., 531). Consequently, we must acknowledge that the lack of adequate regulations concerning organisation of strikes on socio-economic issues is in fact a ban on strike against the economic policy of the state and is a serious violation of the freedom of association (*Freedom* ..., 542).

4. **Violation of ILO Convention No 87 through lack the of legal regulations allowing trade unions to organise general strikes.**

Directly connected with the implementation of ILO Convention 87 and the ensuing right to strike is, indicated in Section 4 of the complaint, the issue of a general strike. In accordance with the Act on Solving Collective Labour Disputes, trade unions can initiate strikes including a warning, solidarity, enterprise and multi-employer strike. Polish legislation does not use in any of the laws the term "general strike". The institution of a general strike is understood as a strike involving in particular different employers of a certain industry, region or even entire country in order to support or defend favorable legislative solutions, or to protest against plans and decisions taken by public authorities which bring about adverse social consequences or consequences for certain professions. Freedom of Association Committee acknowledges that a 24-hour general strike seeking an increase in the minimum wage, respect of collective agreements in force and a change in economic policy (to

decrease prices and unemployment) is legitimate and within the normal field of activity of trade union organisations (*Freedom* ..., para. 543).

5. **Violation of ILO Convention No. 151 through depriving some employees in state governing bodies and local government, courts and prosecutor's offices of the right to strike.**

Questions arise also with reference to compliance with ILO standards restrictions on the right to strike in relation to certain employees in public administration. Plea from Section 5 of this complaint refers to the fact that the national legislature excludes this freedom with regard to a wide range of people with the status of an employee, including those who have been employed not in civil servants positions but under contracts of employment for auxiliary and servicing activities in state governing bodies, local government, courts and prosecutor's offices.

Against this backdrop as incompatible with ILO Convention 151 indicated should be Art. 19 para. 1 through 3 of the Act on Solving Collective Labour Disputes. These regulations deem as unacceptable **any work stoppage because of the strike that affects positions, equipment and installations where the interruption of work constitutes a hazard to human lives or health or to security of the State** (Art. 19, para. 1). The right to strike **is not granted to persons employed in State authorities, government and self-government administration, courts and public prosecutor's offices** (art. 19, para. 3). At the same time the legislature does not specify a particular position or even a procedure that would be helpful in determining the list of positions on which the interruption of work would be a threat to life, health or safety of the state. The legislator considers as prohibited organizing a strike in the Agency of Internal Security, the Intelligence Agency, Military Counterintelligence Service, Military Intelligence Service, the Central Anti-Corruption Bureau, in units of the Police, Armed Forces of the Republic of Poland, Prison Service, Frontier Guard, Custom Service as well as units of the fire brigades (art. 19, para. 2 of the Act on Solving Collective Labour Disputes).

The exclusion in Art. 19 para. 1 and 3 of the Act on Solving Collective Labour Disputes must be regarded as excessive. According to Art. 59 para. 4 of the Polish Constitution the scope of freedom of association in trade unions and employers' organisations and other trade union freedoms may be subject only to such statutory limitations as are permitted by binding on the Republic of Poland international agreements.

Polish legislator decided not to clarify the categories of workers who, due to the conditions set out in the Convention, would be excluded from the right to strike, and treated all of the employees equally. ILO Convention No. 151 allows the national legislature to introduce exemptions for persons employed by public authorities in so far as it does not apply to them more favorable provisions of international labour conventions. Convention 151 includes in this category of workers high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature (Art. 1, para. 2).

The right to strike should be guaranteed to a wide group of employees and limitations on this right can only be exceptional. Committee on Freedom of Association states that the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population (*Freedom* ..., para. 541). However, Art. 19 para. 3 of the Act on Solving Collective Labour Disputes denies the right to strike to all employees in state governing bodies and local government, courts and prosecutor's offices.

Conclusions

NSZZ „Solidarność" complains about national regulations that do not implement standards of the ILO on the fundamental freedom of association – the right to strike. Domestic or local regulations do not provide for:

1. collective labour disputes with the government, minister, local government, or entity responsible for economic affairs, social or professional other than the direct employer,
2. strikes against the Government, minister, local government, or entity responsible for economic, social or professional issues other than the direct employer,
3. strikes on socio-economic issues,
4. general strikes,
5. the right to strike for some employees in state governing bodies and local government, courts and prosecutor's offices.

Finally, we would also like to note that some of the problems with the right to strike mentioned here were presented to an ILO expert mission visiting Poland between 14 and 16 May 2014, the member of which was among others Ms. Karen Curtis, the Head of the Unit on Freedom of Association of the International Labour Standards Department in the Interrnational Labour Office. The final report of the mission included critical observations on the inadequate definition of the parties to a collective dispute and excessive exclusion from the right to strike of some employees of civil service. In addition, we would like to take this opportunity to emphasize that Polish legislature has still not prepared appropriate amendments in terms of the observations from the report of the International Labour Organisation from 313 ILO session, Geneva, 15-30 March 2012, (Case No. 2888 Polish, GB.313/INS/9). Persons performing work under civil law contracts and the self-employed still cannot join trade unions or establish them. Polish trade union legislation still differs from the standards of the ILO and the necessary changes in the law have still not taken place.

Therefore, once again we are asking for preparing appropriate recommendations to the Polish Government, this time in order to comply with the provisions of ILO Conventions 87 and 151 in the context of the right to strike.
