



# Economic and Social Council

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## Committee on the Economic, Social and Cultural Rights

### Decision adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 20/2017\*

<i>Communication submitted by:</i>	M.L.B. (represented by counsel, Frédéric Fabre)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Luxembourg
<i>Date of communication:</i>	28 November 2016 (initial submission)
<i>Date of adoption of the decision:</i>	11 October 2019
<i>Subject matter:</i>	Dismissal of a trade union delegate
<i>Procedural issues:</i>	Exhaustion of domestic remedies; jurisdiction <i>ratione temporis</i> ; jurisdiction <i>ratione materiae</i> ; evaluation of facts and evidence; manifestly groundless communication and lack of substantiation of claims; jurisdiction <i>ratione loci</i>
<i>Substantive issues:</i>	Right to work and employment
<i>Articles of the Covenant:</i>	8 (1) (a) and (3)
<i>Articles of the Optional Protocol:</i>	2 and 3 (1) and (2) (b)

1.1 The author of the communication, submitted on 28 November 2016, is M.L.B., a French citizen born on 27 November 1960. He alleges that Luxembourg has violated his rights under article 8 (1) (a) and (3) of the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol entered into force for the State party on 3 May 2015. The author is represented by counsel, Frédéric Fabre.

1.2 The Committee registered the communication on 20 February 2017.

1.3 In the present decision, the Committee first summarizes the information and the arguments submitted by the parties, without reflecting the position of the Committee. It then considers the admissibility of the communication.

\* Adopted by the Committee at its sixty-sixth session (30 September–18 October 2019).



## A. Summary of the information and arguments submitted by the parties

### The facts as submitted by the author

2.1 From 15 July 2002, the author was employed by a Luxembourg-based company<sup>1</sup> as head of alternative energies, supervising sites both in Luxembourg and in France. He was elected as staff representative, and subsequently as a trade union delegate.

2.2 With the agreement of the company management,<sup>2</sup> the author had set up a slush fund using the proceeds from the resale of surplus materials, in particular, copper, left over after projects had been completed. These resales, which were made on the author's orders by employees working under his direction, took place over the course of several years in both France and Luxembourg. Subsequently, the resales on the author's orders were made only in Luxembourg, after traceability measures had been strengthened in France to discourage the theft of materials from project sites. According to the author, this slush fund was used mostly to purchase items to improve employees' comfort on site (such as microwave ovens and coffee machines), to pay any traffic fines incurred by employees on work-related travel and to finance end-of-project celebratory meals and staff parties.

2.3 On 3 December 2013, the company management and a bailiff entered the author's office, where they found a cash box containing around €3,000 in cash.

2.4 On 5 December 2013, the company sent a letter to the author, by registered post, in which he was notified of his immediate dismissal for serious misconduct, under article L 415-11 (2) of the Labour Code in force at the time.

2.5 On 13 December 2013, following submission of an application by the company for a court order to terminate his contract of employment, the author received a summons from the Labour Court in Esch-sur-Alzette, Luxembourg.

2.6 On 7 February 2014, in line with article L 415-11 (3) of the Labour Code in force at the time, the labour court decided in favour of temporary salary continuance, pending final settlement of the dispute.

2.7 Hearings took place on 8 July and 16 September 2014. On 14 October 2014, the Labour Court ordered the termination of the author's contract on grounds of serious misconduct, effective 5 December 2013 – the date of his dismissal.

2.8 The author appealed the decision, maintaining that the company management had been aware that the copper was being sold on, and that it accepted the practice.

2.9 On 9 June 2016, the Court of Appeal of Luxembourg upheld the decision to terminate the author's contract on grounds of serious misconduct.

### The complaint

3.1 The author contests his dismissal, stating that the company management was aware of the activity that he was accused of and that the proceeds thereof were used "for the company and for there to be a good atmosphere in a particularly difficult job". The author states that the complaints made by his former employer are not specific, that the accusations levelled against him are vague, and that the "most absurd" accusation is that he was "hated by the other staff".<sup>3</sup>

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<sup>1</sup> The company is a specialist service provider of network infrastructures for electricity, telecommunications and transport.

<sup>2</sup> The communication does not, however, give any specific information on this alleged agreement, which the company denies; it simply points out that members of the company management were invited to, and took part in, parties funded by the department that the author managed.

<sup>3</sup> In the application for judicial annulment of the author's contract of employment, several reasons are mentioned for his dismissal: disrespectful and inappropriate behaviour towards his superior (denigration and questioning of their competence), other staff members (insulting the head of Human Resources), and those working for him; failure to respect internal procedures (including those relating to time sheets and the ban on smoking on company premises, and encouraging others to break the no-

3.2 The author also asserts that the Court of Appeal did not take account of evidence presented in support of his arguments, which had been dismissed as “lacking relevance” and because it was said to be contradicted by other information in the case file.<sup>4</sup>

3.3 The author therefore alleges violations of article 8 (1) (a) and (3) of the Covenant, in view of the State party courts’ failure to recognize his status as a protected employee. Underscoring that the protected status of trade union delegates is one of the fundamental principles of the International Labour Organization, he considers that the domestic courts should have conducted a more thorough examination of the application for termination of his contract of employment and that due diligence requires the court not to consider, or to restrict the scope of, statements made by the employer against a worker who has been dismissed. The author maintains that in the State party, a trade union delegate is an employee with underprotected status, since the courts in the State party that considered his dismissal “make no distinction between the serious misconduct of an ordinary worker and that of a protected union delegate” and “the misconduct of a delegate certainly cannot be more serious than that of an ordinary colleague; the opposite could at best be argued if it is acknowledged that a delegate should set an example to other staff members”. The communication also mentions that following the author’s dismissal, other employees were also dismissed, although it does not provide any more specific information in that regard.

3.4 The author considers that he has exhausted all effective domestic remedies. He also believes that an appeal to the Court of Cassation would be ineffectual, because he is raising not an error of law, but rather a misinterpretation of the facts, and that only an error of law or of procedure could be appealed before the Court of Cassation. The author also points out that an analysis of the jurisprudence of the Court of Cassation from 2014 to 2016, with respect to labour law shows that an employee who has lost a case before the Court of Appeal cannot be successful before the Court of Cassation. In his view, this is because a judge from the Court of Appeal will be present at the proceedings in the Court of Cassation. Knowing the case intimately, that judge will explain it to his or her colleagues in the Court of Cassation, and sway them in the direction of the appeal court’s findings. As a result, the author thinks he really has no chance of success before the Court of Cassation.

#### **Additional information submitted by the author**

4.1 On 1 June 2018, the author informed the Committee of a new development that took place on 10 April 2018, when the Court of Appeal of Metz, France, ordered that he pay back the salary paid to him between December 2013 (the date of his dismissal) and June 2016 (the date of the judgment of the Court of Appeal of Luxembourg) with interest, amounting to a total of €174,000. According to the author, these are not professional judges, but rather former police or gendarme officers who impose their ethos on the law. The author also states that his former employer, from Luxembourg, considers France to be a colony of Luxembourg, by turning to the French courts to get salary repayment orders.

4.2 On 30 August and 3 December 2018, the author submitted further information in connection with the decision of the Metz Court of Appeal, including the payment instruction received from his former employer.

#### **State party’s observations on admissibility and the merits**

5.1 On 16 January 2019, the State party submitted its observations on the admissibility and merits of the communication.

5.2 Regarding admissibility, the State party considers first of all that the author has not exhausted all domestic remedies, since he has not submitted his case to the Court of

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smoking rules); and organizing large-scale dealings in copper stolen from project sites without the employer’s knowledge, and setting up a slush fund with the proceeds.

<sup>4</sup> The communication does not give any more specific information. The decision of the Court of Appeal annexed to the communication, however, states that six of the statements presented by the author do not address the copper deals, and that seven others “are too vague and do not contain any specific information from which the court could establish that the employer was aware of and had authorized [the deals]”.

Cassation, which he could have done, had he felt that the decision of the Court of Appeal was based on an erroneous interpretation of the law.

5.3 Secondly, the State party considers the communication inadmissible by reason of the Committee's lack of jurisdiction *ratione temporis*, given that the facts of the case took place before the Optional Protocol had entered into force for the State party. The communication would thus be inadmissible under article 3 (2) (b) of the Optional Protocol.

5.4 With regard to the merits, the State party considers that the author's rights under the Covenant, and under national law, have been duly respected.

#### **Author's comments on the State party's observations**

6.1 The author responded to the State party's observations on 14 March 2019. Regarding the statement that he could have appealed his case before the Court of Cassation, he argues that the State party does not provide any jurisprudence to demonstrate that he would have any chance of winning a case before the Court of Cassation. He reiterates that the error is not one of law or procedure, but rather one of interpretation of the facts of the case.

6.2 Regarding the question of the Committee's jurisdiction *ratione temporis*, the author quotes the case of *Arellano Medina v. Ecuador*<sup>5</sup> in support of the argument that the Committee has jurisdiction, since the decision of the Court of Appeal, which was handed down after the Optional Protocol had entered into force in the State party, is part of the facts of the case.

6.3 On the merits, the author points out that, since the State party does not put forward any arguments against his allegations, the Committee should find a violation.

### **B. The Committee's consideration of admissibility**

7.1 Before considering any claim contained in a communication, the Committee must decide whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the State party considers that it does not have jurisdiction *ratione temporis* to consider the present communication, since the facts of the case took place in 2013, i.e. before the Optional Protocol's entry into force for the State party on 3 May 2015. However, the Committee notes that the decision of the Court of Appeal against the author was handed down on 9 June 2016. The Committee recalls that judicial decisions of the national authorities shall be considered as part of the facts of the case when they are the result of procedures directly connected with the initial facts, actions or omissions that gave rise to the violation, provided they are capable of remedying the alleged violation. If such decisions are adopted after the Optional Protocol's entry into force for the State party concerned, the criterion provided for in article 3 (2) (b) shall not affect the admissibility of the communication, since, when these remedies are exercised, the national courts have the possibility of considering the complaints, put an end to the alleged violations and potentially provide redress.<sup>6</sup> In this case, the violation claimed by the author does not result from his dismissal in December 2013, but rather from the judicial decision to terminate his contract of employment, which was upheld by the Court of Appeal on 9 June 2016. In this instance, the appeal allowed the national courts to examine in detail the evidence submitted by the author and consider the alleged violations, with a view to providing redress if appropriate. In the light of the foregoing, the Committee cannot therefore declare the communication inadmissible under article 3 (2) (b) of the Optional Protocol.

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<sup>5</sup> E/C.12/63/D/7/2015 para. 8.3.

<sup>6</sup> In this connection, see *S.C. and G.P. v. Italy* (E/C.12/65/D/22/2017), para. 6.6; *Arellano Medina v. Ecuador*, para. 8.3; *Trujillo Calero v. Ecuador* (E/C.12/63/D/10/2015), para. 9.5; *Alarcón Flores et al. v. Ecuador* (E/C.12/62/D/14/2016), para. 9.8; *Martins Coelho v. Portugal* (E/C.12/61/D/21/2017), para. 4.2; *C.A.P.M. v. Ecuador* (E/C.12/58/D/3/2014), para. 7.4; and *I.D.G. v. Spain* (E/C.12/55/D/2/2014), para. 9.3.

7.3 The Committee also takes note of the State party's argument that the communication is inadmissible under article 3 (1) of the Optional Protocol, given that the author has not exhausted all domestic remedies, having not taken his case to the Court of Cassation, which he could have done if he considered that the Court of Appeal had misinterpreted the applicable law. The Committee also notes the author's argument that applying to the Court of Cassation would be ineffectual as the Court only deals with errors of law or legal procedure, whereas the issue in this case is one of interpretation of the facts. The Committee also notes that, according to the author, when an employee has lost a case before the Court of Appeal, he or she has no chance of being successful before the Court of Cassation, a position that the author backs up by stating the State party does not provide any jurisprudence to demonstrate that he would have any chance of winning a case before the Court of Cassation.

7.4 The Committee recalls that, in line with international legal standards, mere doubts about the chances of success of a particular remedy do not excuse the author from exercising it.<sup>7</sup> In this regard, it observes that the author has not substantiated his argument regarding the allegedly futile nature of the case he could have brought before the Court of Cassation. The Committee is aware that by virtue of the law of 18 February 1885 on cassation appeals and procedure and the law of 7 March 1980 on the organization of the courts, a cassation appeal in the State party constitutes a special remedy exercised before the Court of Cassation against a last-instance judicial decision, aimed at verifying that the trial judges have applied the law correctly and shown due respect for the rules of procedure. The Committee is however not convinced that, should it have been requested to intervene, the Court of Cassation would not have been able to examine the arguments of the author concerning the protection of workers' representatives, or the interpretation of the notion of serious misconduct (*faute grave*) included in article L 415-11 (2) of the Labour Code in force at the time. It would not seem, in any case, that the author has invoked before the domestic courts, even in substance, the rights he seeks to invoke in the present communication on the basis of articles 8 (1) (a) and (3) of the Covenant. The Committee therefore concludes that the communication is inadmissible under article 3 (1) of the Optional Protocol.

7.5 Lastly, the Committee notes that the author's complaints with regard to the decision handed down by the Metz Court of Appeal are inadmissible under article 2 of the Optional Protocol, since the present communication is directed against Luxembourg, which is not responsible for the actions of the Metz Court of Appeal.

## C. Conclusion

8. In the light of all the information provided, the Committee, acting under the Optional Protocol, considers that the communication is inadmissible under article 3 (1) thereof.

9. This decision shall be communicated to the author and to the State party under article 9 (1) of the Optional Protocol.

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<sup>7</sup> *Faurisson v. France* (CCPR/C/58/D/550/1993), para. 6.1.