

## Case No. 3398

### Definitive report

#### Complaint against the Government of Netherlands presented by

- the Trade Union Federation for Professionals (VCP)
- the Dutch Airline Pilots Association (VNV)
- the Dutch Association of Aviation Technicians (NFLT)

#### supported by

- the International Federation of Air Line Pilots' Association (IFALPA) and
- the European Cockpit Association (ECA)

**Allegations: The complainant organizations allege that the Government interfered with the collective bargaining process between a national airline and workers' organizations by obliging the parties to modify freely concluded collective agreements and agree to coerced employment conditions for an extensive period of time**

- 601.** The complaint is contained in a communication dated 22 December 2020 submitted by the Trade Union Federation for Professionals (VCP), the Dutch Airline Pilots Association (VNV) and the Dutch Association of Aviation Technicians (NFLT). The International Federation of Air Line Pilots' Association (IFALPA) and the European Cockpit Association (ECA) supported the complaint by communications also dated 22 December 2020.
- 602.** The Government of the Netherlands transmitted its observations on the allegations in a communication dated 28 January 2022.
- 603.** The Netherlands has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

### A. The complainant's allegations

- 604.** In their communication dated 22 December 2020, the complainant organizations set out six areas where they consider that the Dutch Government has violated Conventions Nos 87 and 98. The complainants note that the COVID-19 crisis had serious consequences for the airline KLM (hereinafter, the airline) as it had to cease a substantial part of its operations for an indefinite period. As a direct result of this crisis, the airline needed financial support and state aid was provided, coupled with conditions which, in the complainants' view are contrary to the principles of collective bargaining as follows:
- (a) The State did not consult the social partners, at least not the workers' organizations VNV and the NFLT, prior to setting conditions that have consequences for the current, still applicable, collective agreements. The State did not promote the social dialogue and

effective consultation and cooperation between public authorities, the employers' and workers' organization(s).

- (b) The State obliges the airline and the workers' organizations like the VNV and NVLT to modify the content of the current freely concluded collective agreements.
  - (c) The State stipulates boundaries for the airlines and the workers' organizations like the VNV and the NVLT regarding the content of future collective agreements.
  - (d) The State pursued political goals in setting specific state-aid conditions that apply to the modification of employment conditions laid down in collective agreements, while it should have informed the airline and the workers' organizations of its goals, and should have let them decide if and how these goals could be taken into consideration.
  - (e) The State did not promote effective collective bargaining between the employers' and workers' organizations like the VNV and NVLT by not providing the actual state-aid conditions relating to the employment conditions to the workers' organizations (but only to the employer). The complainants consider this discriminatory. It is harmful for good industrial relations between the employers' and workers' organizations like the VNV and NVLT.
  - (f) The State effectively blocked the outcome of the collective bargaining process between the airline and the workers' organizations, and it stipulated and coerced conditions that the workers' organizations needed to agree to for an extensive period of time.
- 605.** By way of background, the complainants recall their status as representative organizations at the airline, which operates long-haul (intercontinental) flights and short-haul (European) flights. At the beginning of 2020, the airline employed around 33,000 employees, approximately 3,250 of these were pilots. Until the outbreak of the COVID-19 crisis, the airline was a successful and profitable company, reporting a profit of €449 million over the 2019 calendar year.
- 606.** The complainant organizations recall that they have negotiated with the airlines over time on the terms and conditions of the airline employees. The current collective agreement for pilots has a starting date of 1 June 2019 and an expiry date of 28 February 2022, while other staff members are covered by additional collective agreements such as those for technicians working at the airline and ground staff working in the Netherlands, which are also applicable until February 2022.
- 607.** The complainants acknowledge that the COVID-19 pandemic had severe consequences for the airline. As a result of decisions taken by governments around the globe to restrict travelling, most of its operations had ceased and the airlines had almost no revenues, while it still had to pay costs, such as the wages of approximately 33,000 employees. The Dutch Government provided a general subsidy to all companies with employees in the Netherlands that were struck by the COVID-19 pandemic. Considerable parts of the wages were reimbursed (but with restrictions and limitations). However, it was clear that the airline would need additional financial assistance and on 24 April 2020, the Minister of Finance, informed the airline and parliament that the State would be prepared to provide financial assistance to the airline by means of a loan and specific guarantees. From the start, the Government made clear that it wanted to stipulate several conditions in this regard, also in relation to the employment conditions of the employees.
- 608.** While it was unclear whether the conditions for the loan could be negotiated by the airline, it was clear that the Government had no intention to include workers' organizations, like the VNV

and/or NVLT, in the discussions relating to the possible modification of employment conditions. At the same time, the workers' organizations that usually negotiate with the airline had already made a first significant contribution, by negotiating an agreement to, among other things, postpone parts of variable income, give up on entitled leave days and give waivers on roster and flight and resting-time Collective Labour Agreement (CLA) rules.

- 609.** After having read the intentions in the press, the VNV almost immediately (on 27 April 2020) wrote a letter to the Finance Minister recalling that employment conditions were discussed and agreed between the VNV and the airline and that modifications in this regard would have to be discussed and agreed at this level, on a voluntary basis. The letter included the request to be associated with any discussions relating to employment conditions that might be considered in relation to the state aid. This request was denied in replies dated 11 and 28 May 2020 (a translation of the Ministry letter of 28 May was provided by the complainants).
- 610.** In the complainants' view, the government's reply was very ambiguous as on the one hand it seemed to acknowledge that it should not interfere with employment conditions while on the other hand, it claimed the authority to impose conditions – by setting "boundaries" – relating to the modification of employment conditions that had been agreed between the airline and the VNV and laid down in a collective labour agreement. While the VNV explained once again its concerns in this regard to the Ministry, the complainants remained excluded from all discussions and negotiations between the State and the airline as regards the state-aid conditions that would affect the employment conditions laid down in collective agreements. The complainants state that the sole reason provided for the exclusion of the VNV was the explanation that the State "is not a party in relation to the specific implementation of employment conditions", even when it acknowledged, at the same time, that it was setting "boundaries" in relation to the content of the collective agreement. The State did not invoke any confidentiality issues, nor any issues relating to time restraints as a reason to refuse to involve the VNV in discussions.
- 611.** While the airline did share different parts and variants of information regarding the conditions during the process, in the complainants' view this was not done in an open and transparent way. The airline refused to provide a copy unconditionally, stating that the conditions would be confidential. In the beginning of August 2020, the airline was willing to allow a board member of the workers' organization to read the conditions relating to the employment conditions at the offices of the airline, but would not provide a copy or allow any notes to be taken. In addition, the board member would have to agree to a confidentiality clause, which included a penalty fine. The board member would not be allowed to discuss the conditions with other board members of the workers' organization, share the conditions with its members or to say anything about those conditions to anyone at all. These conditions were not acceptable for the NVLT and the VNV and therefore they rejected to sign the confidentiality agreement.
- 612.** The complainants consider that, if it is expected that workers' organizations would negotiate about the implementation of government-imposed conditions (that they had never agreed to), it may be expected and demanded that – at the very least – the conditions themselves are provided, so that all negotiating parties have the same information to serve as a starting point for any further discussions, even though those discussions cannot be considered as genuine and constructive, because the Government imposed a predetermined outcome. The complainants stress that the conditions for the loan did not concern a request to consider pay cuts, but rather an obligation. In this regard, the complainants indicate that the airline provided the employees with a simple Q and A to explain the situation. The information provided therein demonstrated clearly that any negotiation is predetermined to the extent that the demands from the Government in relation to employment conditions must be met, thus

excluding the possibility for free and genuine negotiations. The VNV stressed that this was shown during current negotiations to modify the existing collective agreement where the airline was taking the position that the percentage to be sacrificed is determined and non-negotiable and simply demands the implementation of fixed percentages. According to the complainants, in predetermining the negotiations, the State did not create a climate of trust based on respect for business and labour organizations or promote stable and solid industrial relations.

- 613.** The state-aid conditions obliged the VNV, inter alia, to agree to pay cuts of at least 20 per cent, or general cuts in employment conditions representing at least 20 per cent of the value of the total remuneration of pilots, for pilots earning at least three times the average wage. Additional financial aid to the airline would not be made available if the employees did not comply with this condition, which could mean that the airline would go bankrupt.
- 614.** The complainants consider these state-aid conditions to be contrary to the principles of free collective bargaining, because the desired outcome of the negotiations (minimum pay cuts, and/or general cuts in employment conditions representing at least 20 per cent of the value of the total remuneration of pilots) is predetermined. It is no longer up to the airline and the VNV to decide and agree if and which specific cuts are necessary, but their negotiations are restricted to how this would be done. The complainants emphasize that there is no legal basis for the State to intervene and to stipulate that the content of a freely concluded collective agreement should be amended. No state of emergency was declared, neither in general, nor for the airline. The Government never invoked any (inter)national regulation that would give it the authority to intervene to alter the content of a freely concluded collective agreement.
- 615.** According to the complainants, the pay cuts were required, because this would be considered "politically sensible" by, inter alia, the Cabinet; but there was no business economical reason to require the specific pay cuts, or at least, this was never explained. In the view of the complainants, the statements provided by the Government confirm that the demanded wage reductions are politically motivated. Even before conversations between the airline and the Government had started, the Finance Minister had already declared that a salary cut was expected from the employees.
- 616.** According to the complainants, the workers' organizations, including the VNV and the NVLT, should have been invited in the discussions relating to future modifications of employment conditions and the Minister should have tried to persuade the parties to take account voluntarily of the Government's considerations, without imposing on them the renegotiation of collective agreements in force. The complainants highlight that to their understanding, in other similar situations (for instance German and French state aid for respective airlines in their countries), the governments did not impose unilateral pay cuts, but left it to the social partners to discuss and agree the extent of any modifications of employment conditions. According to the complainants, it is important to note this, because it shows that the COVID-19 crisis did not force governments to intervene in the way that the Dutch Government did.
- 617.** Although the VNV did not agree with the state-aid conditions that would mean wage cuts of up to 20 per cent, it had no other choice then to agree and incorporate this for the remaining period of the current collective agreement until 28 February 2022. The airline and the VNV came to an agreement on 1 October 2020, and sent the modifications to the collective agreement to the Government, however, this did not satisfy the Finance Minister and the airline was ordered to renegotiate. While surprised by this position, the union agreed to meet with the airline again and agreed to additional modifications on 23 October 2020, but the Minister was still not satisfied and decided to intervene for a third time. On this occasion, his



ministry prepared a text (the so-called "commitment-clause") to be signed by the workers' organizations. This text was sent to the airline to present to the workers' organizations. The airline ordered the workers' organizations to come to the airline headquarters on 30 October for an explanation of this new demand where the unions were explicitly informed that the "commitment-clause" was non-negotiable and had to be accepted. This additional provision had to be signed within less than 24 hours (by Saturday, 31 October, before 12 noon). The "commitment-clause" concerned the Parties' recognition that conditions have to be agreed in the three collective bargaining sectors in relation to the return to employment covering the period for which the state aid applies (which was expected to last for five years). The Parties were thus asked to declare to take their responsibility to comply with this concern in all three collective bargaining sectors equally. While most workers' organizations decided to sign the "commitment-clause" because the airline and the Finance Minister stated that the additional funding from the state-aid programme would not otherwise be provided, the FNV and the VNV, refused to sign the "commitment-clause" at such short notice. The enterprise declared the "commitment-clause" to be non-negotiable because the Government demanded this specific clause with this specific text. For the VNV it was, inter alia, not acceptable that it would have to declare to comply with conditions included in the term sheet that remained confidential and that were not disclosed to its members.

- 618.** The VNV's position was communicated in writing to the airline and the Minister was subsequently informed. On this basis however, the Minister informed the Parliament that the state aid could not be approved given that there was a union that had refused to sign the commitment clause and therefore it could not be assured that the necessary efforts would be made throughout the period of its application. While the VNV made a public statement on 31 October, before the deadline passed, that it would always take its responsibility and offered to discuss the situation with the Minister, he refused to meet them and decided to disapprove the restructuring programme. The VNV was then subject to strong pressure as being held responsible for the holding up of the very dearly needed state aid to the airline and ultimately signed on to the clause. The complainants emphasize however that this "agreement" was coerced and not voluntary, and considered that the Finance Minister presented no argument as to why the commitment of employees to accept cuts on their employment conditions would be essential for the restructuring programme and thus that this condition was only made for political reasons.
- 619.** For the complainants it is not acceptable that they were coerced to sign the "commitment-clause". The consequence of the clause is that, for a period of at least five years, the workers' organizations are obliged to agree to specific further wage cuts, as laid down in state-aid conditions that were not discussed and agreed with the workers' organizations, because they had to declare to be "committed" to this demand from the Government.
- 620.** The complainants reiterate their full acknowledgement that the consequences of the COVID-19 crisis are severe for the airline and that it is necessary to review and discuss employment conditions, also those of the pilots and technicians. The complainants stress however that the workers' organizations VNV and NVLT would like to negotiate freely with the airline, without any predetermined outcome. There should be genuine negotiations and it should be entirely up to the airline and the workers' organizations to discuss and agree specific modified conditions, taking into account the needs of the airline and the interests of the employees.

## **B. The Government's reply**

- 621.** In a communication dated 28 January 2022, the Government emphasizes that this complaint needs to be considered within the following context. Since March 2020, the Dutch Government

has provided substantial financial aid in the public interest due to the COVID-19 crisis. In most cases, the aid was general in nature, but in some cases it was directed towards sectors that were barred from opening or provided to rescue a specific company, such as the airline. As in every other country, this aid was necessary to shield companies from going bankrupt as a result of the lockdown measures imposed by the Government in the interests of public health. One of the general assistance packages introduced by the Dutch Government in that period is the Temporary Emergency Scheme for Job Retention (NOW), a contribution towards payroll costs aimed at preserving employment. The scheme was (and remains) open to all companies. Besides the general support packages, to prevent bankruptcy and mass job losses, the airline needed an additional individual support package in the form of a loan to be repaid and a guarantee on a credit facility granted by a consortium of banks. To achieve a proper balance between preventing job losses and ensuring the company's long-term health and continuity, the State attached conditions to the aid package, in the same way that other Member States have done in similar situations. It was necessary for the airline to reduce certain structural costs, including payroll costs, in order to achieve a future-proof and economically balanced situation within the company. This was the only way to avoid bankruptcy in the long run after the COVID-19 crisis in light of the sharp decrease in the airline's operations. In comparison with the forecast in the airline's budget for 2020, the number of flights fell by around 50 per cent, 90 per cent and 80 per cent in March, April and May respectively, while a return to the pre-crisis level of flight movements cannot be expected in the short term. While the airline tried to cut spending as much as possible by, for example, making use of the general financial schemes and reducing its variable expenditure, the ongoing fixed costs weighed heavily on the company. Together with external, independent advisers and the company, the Government assessed the extent of the airline's liquidity requirements and in what form this need could best be met. This scenario formed the basis for working out the details of the selected support measures.

- 622.** The Government then examined with external lenders to what extent the necessary financing could be provided by the market, and to what extent government support might be required. The financing facilities were worked out in detail and the entire support package was approved by the board of managing directors and supervisory board. Pre-notification contacts with the European Commission were completed in order to test whether the intended support was in line with EU state-aid rules. The support package, totalling €3.4 billion, comprised a state guarantee for a €2.4 billion loan to be issued by a consortium of banks and a €1 billion state loan with the State acting as guarantor for 90 per cent of the bank loan. The airline is obliged to repay the aid within 5.5 years. The formal notification was submitted on 26 June 2020 and the support package was approved by the European Commission. This constructive solution enabled the State to stabilize the airline's acute financial problems caused by the COVID-19 pandemic and mass job losses were averted in the longer term. This also prevented economic harm to companies whose operations are related to the airline and aviation and preserved employment in the broader sector. The airline is responsible for a significant share of the network of intercontinental destinations served by Schiphol, the Netherlands' largest airport. This network is of immense importance to the Dutch economy and employment. In this respect, the airline has an important position in society.
- 623.** On 19 May 2021, the General Court of the Court of Justice of the European Union annulled the Commission's decision approving the Netherlands' financial aid for the airline amid the COVID-19 pandemic on the grounds of inadequate reasoning. However, in view of the particularly damaging consequences of the pandemic for the Dutch economy, the General Court suspended the effects of the annulment pending the adoption of a new decision by the European Commission. On 19 July 2021, the Commission issued a decision re-approving the

€3.4 billion in state aid for the airline and provided further reasoning in the light of the General Court's judgment of 19 May 2021.

- 624.** As regards the support package conditions, the Government indicates that it can attach certain conditions to financial support, including requirements relating to conditions of employment, without which there was a considerable chance that the company would have gone bankrupt and the support provided ineffectual. The conditions, intended to ensure effective use of taxpayer money, make the company more competitive and achieve sustainability and quality-of-life goals, were announced to parliament in a letter of 26 June 2020. For the airline: (i) no dividends paid to shareholders during the term of the support; (ii) in addition to the agreed premiums and interest, the airline will pay an extra amount to the State upon repayment of the aid (i.e. repayment of the direct loan and termination of the bank credit facility guaranteed by the State) and when its financial position is sufficiently healthy; (iii) this amount will increase over the term of the aid in order to provide an incentive for repayment at the earliest possible opportunity (if this is a responsible course of action). Another condition is that the airline's profitability and competitiveness must improve, including through the airline drawing up a restructuring plan, together with external advisers, by 1 October 2020, that examines ways of improving its competitive position, for example by cutting costs. The airline must achieve a 15 per cent reduction in influenceable costs and it is for the airline itself to decide how to meet this requirement. This plan also examines the role that the airline's partners in the aviation industry can play in this.
- 625.** The Government affirms that improving the airline's competitiveness will also require a substantial contribution from the staff through changes to the employment conditions, based on the principle that the strongest shoulders should bear the heaviest burden. This means that employees who earn at least three times the modal income must relinquish at least 20 per cent of the value of their employment conditions. Lower percentages apply to income from modal level upwards, rising linearly to 20 per cent. How this condition is met is a matter for the company and the trade unions. One consequence is that bonuses for the board of managing directors and senior management are suspended during the term of the aid.
- 626.** That this graduated reduction was a proposal and not a hard requirement is demonstrated by the fact that the airline and the trade unions did not apply a graduated salary reduction for cockpit staff but instead, at the unions' request according to the airline, agreed to an equal contribution of more than 19 per cent across the board. The State had no involvement with the conflict between the employer and the employees as it is not a party to negotiations on the content of collective agreements.
- 627.** Given the threat of bankruptcy and the desire for certainty that all parties contribute to efforts to avert it with the help of the state-aid package, the Government is of the opinion that the condition set, with regard to changes in employment conditions, was justified. In the Government's view, a review of the collective agreements in force was unavoidable. If the collective agreements from before the COVID-19 outbreak, including the agreed salary increases, had been maintained in full, this would have made it more difficult for the airline to meet the Government's conditions aimed at saving the company in the period ahead and preserving employment.
- 628.** The State recognises as essential and does not question the importance of the right of parties involved in the collective bargaining process to negotiate freely, as guaranteed by ILO Conventions Nos 87 and 98. As stated above, however, this is an exceptional situation in which state aid was needed to avert the bankruptcy of an essential company. The airline is important for the network of intercontinental destinations served by Schiphol Airport and, by extension,

for employment in the Netherlands, which is a public interest. The Government believes that the conditions that the state aid is subject to do not conflict with the freedom of collective bargaining laid down in the ILO Conventions and emphasizes that the employer and the unions were free to decide how a contribution could be made to achieving the required structural cost reduction through changes to the employment conditions.

- 629.** The Government asserts that this is not a case of the Government unilaterally imposing a general measure that directly interferes with collective agreements that are in force. The support package is a two-way agreement between the State and the airline, which was discussed by the parties extensively and which the airline accepted voluntarily. To achieve the reduction in influenceable costs and increase its competitiveness, it was necessary to, *inter alia*, ask the staff to make a substantial contribution through changes to the employment conditions, on the basis of the principle that the strongest shoulders should bear the heaviest burden. It was up to the airline to decide how to fulfil the conditions and to consult with the trade unions. The Government adds that the unions are free to refuse to accept a salary reduction, for example.
- 630.** The highly unexpected COVID-19 crisis meant that immediate and far-reaching measures needed to be taken. Both the support measures and the conditions attached to them had to be drafted and approved as quickly as possible. The Government believes that in view of the aim of ensuring the company's long-term continuity, and the obligation to repay the loans, it was entitled to set strict requirements. The Government recalls, with reference to the Committee's consideration of a previous case (1758), that the Committee has considered it acceptable, in certain circumstances, for a state to set restrictions regarding the right to bargain collectively, for example, at times of economic urgency, comparable to the situation that arose during the COVID-19 crisis in connection with the pressing financial situation that unfolded at the airline. If the Committee would come to the conclusion that the situation involves a unilateral government-imposed salary measure, the Government is of the opinion that the condition for the aforementioned exception was met given the airline's acute financial problems caused by the COVID-19 pandemic.
- 631.** Where the effects of the aid allocated by the State have ramifications for the operation of the collective labour agreement concluded prior to the COVID-19 crisis and/or the possibility of concluding new agreements in a subsequent collective agreement, the Government believes that such effects are justified by the economic emergency. The time frame of these effects was/is limited and directly related to the economic situation resulting from the pandemic and the allocation of general public funds for the purpose of, for a limited period of time, mitigating the economic impact and protecting jobs at the airline and also in related sectors. In addition, the effects are limited in scope, and do not extend to all the matters that are normally addressed in the collective bargaining process. Furthermore, not only were there adequate safeguards to protect workers' living standards, the aid was allocated by the State precisely to provide this protection. It is also clear the effects of the support measures do not extend to those in the company whose income position is most vulnerable.
- 632.** As regards the complainant's allegation that there was no consultation on these matters, the Government indicates that the State may attach conditions to state aid and if this has consequences for the employment conditions, it is up to the collective agreement partners to determine how the conditions will be met, with due consideration for the crisis at hand and the threat of bankruptcy. The Government adds that it was not under any obligation to consult with the social partners, partly in view of the COVID-19 pandemic and the crisis situation that the airline was in. The cost-reduction condition was formulated in a way that allowed the enterprise and the employees' associations concerned to negotiate the contribution to be



made to achieving the required structural cost reduction. In this case too, the State did not interfere with collective agreements. Similarly, as regards the allegation that the Government should have provided information to the trade unions about the state aid being considered and its conditions, the Government reiterates that it discusses financial support and conditions with the recipient, in this case the company, which is also the employer. Then it is up to the employer and the employees' associations to discuss methods for and the feasibility of meeting the conditions attached to the support package. It is not the State's place to enter into negotiations on this matter with the employees' associations, nor to provide them with information about the support or the attached conditions.

- 633.** The Government has the authority to attach certain conditions to state aid and in exceptional cases, requirements affecting employment conditions may be set. The State's motivation for setting these conditions was to prevent bankruptcy and to avert job losses. In the Government's view, saving the company, and in doing so preventing repercussions that would have affected broader national economic interests, preserving employment, and ultimately protecting the income security of a large group of workers, was not a political goal but rather a very social goal. It is in that context too that an agreement needed to be reached by the State and the company, as well as by the employer and the employees' associations (under pressure of time).
- 634.** As regards the allegation that the conditions have a long timeline, the Government points out that the conditions for state aid are linked to the loan repayment obligations. In determining the repayment term, account was taken of the airline's viability, which is dependent on compliance with the conditions attached to the support package. In addition, the Government states that the complainants' assertion with respect to the "commitment-clause" is incorrect as the airline was required to draft a restructuring plan that included measures to achieve a 15 per cent reduction in costs. Reducing staff costs is one element of the plan.
- 635.** In conclusion, the Government requests that the complaint be deemed unfounded given that violation of Conventions Nos 87 and 98 has not been demonstrated or must be deemed acceptable given the exceptional circumstances described above.

## C. The Committee's conclusions

- 636.** *The Committee notes that, in the present case, the complainants allege that the Government has interfered in its collective bargaining agreement with the airline by imposing changes to the established conditions of employment as part of the requirements established for providing state aid to the airline, leaving little to no space for autonomous collective bargaining thereon and further impacting on future agreements. The complainants add that the conditions agreed for the state aid were done without prior consultation or the provision of basic information, despite their significant consequences for the current, still applicable, collective agreements.*
- 637.** *Both the complainants and the Government acknowledge that, in light of the COVID-19 pandemic and restrictions on travel, the conditions of the airline were dire and that it is in this context that the Government proposed on 24 April 2020 an additional loan through a support package to the airline of €3.4 billion in order to avert bankruptcy and protect employment. The Committee notes however the complainants' contention that, given that the support package contained requirements for changes to the employment conditions of their members, impacting upon applicable collective agreements, the Government should have consulted with the unions on this aspect prior to the finalization of the support package. While the VNV almost immediately expressed its desire to be associated with any discussions relating to employment conditions, its request was denied by the Finance Minister in May 2020. According to the complainant, the Government justified this refusal*

by indicating that it was not a party in relation to the specific implementation of employment conditions, even while it acknowledged that it was setting “boundaries” in relation to the content of the collective agreement. The complainants further allege that no confidentiality issues were raised, nor any issues relating to time restraints as a reason to refuse to involve the VNV in discussions, while the conditions placed by the airline on the sharing of information with a worker representative were excessively restrictive and would not enable the unions to effectively defend their members’ interests.

- 638.** As regards the allegations of lack of consultation and/or information relating to the conditions in the support package affecting employment conditions, the Committee takes due note of the Government’s indication that: (i) it discusses financial support and conditions with the recipient, in this case the company, which is also the employer; (ii) the State may attach conditions to state aid and if this has consequences for the employment conditions, it is up to the collective agreement partners to determine how the conditions will be met, with due consideration for the crisis at hand and the threat of bankruptcy; (iii) it was not under any obligation to consult with the social partners, partly in view of the COVID-19 pandemic and the crisis situation that the airline was in; (iv) the cost-reduction condition was formulated in a way that allowed the enterprise and the employees’ associations concerned to negotiate the contribution to be made to achieving the required structural cost reduction; and (v) it is not the State’s place to enter into negotiations on this matter with the employees’ associations, nor to provide them with information about the support or the attached conditions.
- 639.** The Committee recalls that the question of whether serious economic problems of enterprises may, in certain cases, call for the modification of collective agreements must be addressed, and, since it can be handled in various ways, the way to proceed should be determined within the framework of social dialogue [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, para. 1451]. Moreover, any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers’ and employers’ organizations in an effort to obtain their agreement [see **Compilation**, para. 1421]. While the Committee notes that the elaboration of the support package concerns a number of elements unrelated to the employment conditions at the airline and observes that there was some subsequent degree of latitude in the negotiations over the manner to apply the employment conditions relevant to matters set out in applicable collective agreements, the Committee considers that the workers’ organizations concerned should have been consulted.
- 640.** The Committee notes the complainants’ further allegations that the conditions set out in the state aid interfered with collective agreements in force and were contrary to principles of free collective bargaining. The complainants allege in particular that: (i) the state-aid conditions obliged the VNV to agree to pay cuts of at least 20 per cent, or general cuts in employment conditions representing at least 20 per cent of the value of the total remuneration of pilots, for pilots earning at least three times the average wage; (ii) additional financial aid to the airline would not be made available if the employees did not comply with this condition, which could mean that the airline would go bankrupt; (iii) it is no longer up to the airline and the VNV to decide and agree if and which specific cuts are necessary, but their negotiations are restricted to how this would be done; (iv) there is no legal basis (no declared state of emergency, either generally or for the airline) for the State to intervene and to stipulate that the content of a freely concluded collective agreement should be amended; (v) the statements provided by the Government confirm that the demanded wage reductions were politically motivated; and (vi) in predetermining the negotiations, the State did not create a climate of trust based on respect for business and labour organizations or promote stable and solid industrial relations. In the complainants’ view, the unions should have been invited to the discussions relating to future modifications of employment conditions and the Minister should have tried to persuade

*the parties to take account voluntarily of the government considerations, without imposing on them the renegotiation of collective agreements in force. The complainants reiterate their full acknowledgement that the consequences of the COVID-19 crisis are severe for the airline and that it is necessary to review and discuss employment conditions, including those of the pilots and technicians. They stress however that the workers' organizations VNV and NVLT would like to negotiate freely with the airline, without any predetermined outcome.*

- 641.** *The Committee notes the Government's reply to these allegations that: (i) to achieve a proper balance between preventing job losses and ensuring the airline's long-term health and continuity, it was necessary for it to reduce certain structural costs, including payroll costs, in order to achieve a future-proof and economically balanced situation; (ii) this was the only way to avoid bankruptcy in the long run after the COVID-19 crisis in light of the sharp decrease in the airline's operations; (iii) together with external, independent advisers and the company, the Government assessed the extent of the airline's liquidity requirements and in what form this need could best be met; (iv) the conditions, intended to ensure effective use of taxpayer money, make the company more competitive and achieve sustainability and quality-of-life goals; (v) this would also require a substantial contribution from the staff through changes to the employment conditions, based on the principle that the strongest shoulders should bear the heaviest burden; and (vi) the conditions in the support package also prevented economic harm to companies whose operations are related to the airline and aviation and preserved employment in the broader sector. The Government adds that the conditions for the airline also include: (i) non-payment of dividends to shareholders during the term of the support; (ii) the airline will pay an extra amount to the State upon repayment of the aid (i.e. repayment of the direct loan and termination of the bank credit facility guaranteed by the State); and (iii) this amount will increase over the term of the aid in order to provide an incentive for repayment at the earliest possible opportunity. Another condition was that the airline's profitability and competitiveness must improve, including through the airline drawing up a restructuring plan, together with external advisers, by 1 October 2020, that examines ways of improving its competitive position. More specifically, the airline must achieve a 15 per cent reduction in influenceable costs and it is for the airline itself to decide how to meet this requirement. The Government adds that this means that employees who earn at least three times the modal income must relinquish at least 20 per cent of the value of their employment conditions. Lower percentages apply to income from modal level upwards, rising linearly to 20 per cent. How this condition is met is a matter for the company and the trade unions. One consequence is that bonuses for the board of managing directors and senior management are suspended during the term of the aid. That this graduated reduction was a proposal and not a hard requirement is demonstrated by the fact that the airline and the trade unions, without any involvement of the Government, did not apply a graduated salary reduction for cockpit staff but instead, at the unions' request according to the airline, agreed to an equal contribution of more than 19 per cent across the board. Given the threat of bankruptcy and the desire for certainty that all parties contribute to efforts to avert it with the help of the state-aid package, the Government is of the opinion that the condition set with regard to changes in employment conditions was justified and a review of the collective agreements in force was unavoidable. If the collective agreements from before the COVID-19 outbreak, including the agreed salary increases, had been maintained in full, this would have made it more difficult for the airline to meet the Government's conditions aimed at saving the company in the period ahead and preserving employment.*
- 642.** *Finally, the Committee notes the Government's assertion that the State attached conditions to the aid package, in the same way that other Member States have done in similar situations, while the complainants express their understanding that, in other similar situations, the governments did not impose unilateral pay cuts, but left it to the social partners to discuss and agree the extent of any modifications of employment conditions.*



- 643.** *At the outset, the Committee wishes to assure of its full cognizance of the very disruptive consequences of the COVID-19 pandemic on businesses and workers alike and the necessity of taking exceptional measures to preserve employment and livelihoods and mitigate the economic and social effects of the resulting crisis. While the Government maintains that it did not unilaterally impose conditions, leaving for the parties the manner of incorporating the conditions into the collective agreements, the Committee notes that, in the absence of changes to the previously agreed pay conditions, the support package would not be approved and the solvency of the airline would be seriously called into question, thus leaving little scope for the unions to negotiate solutions. The Committee recalls that, as a general matter, state bodies should refrain from intervening to alter the content of freely concluded collective agreements [see **Compilation**, para. 1424]. Noting further the Government's reference to the exceptional circumstances of economic urgency that would justify the restrictions set to the right to bargain collectively, the Committee indeed recalls, as noted by the Government, that in similar cases concerning limitations on the right to collective bargaining related to economic stabilization measures, the Committee has recognized that when, for urgent reasons relating to national economic interests and, in the framework of a stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards, in particular those who are likely to be the most affected [see 297th Report, Case No. 1758, para. 255]. The Committee trusts that the Government will ensure that any such exceptional measures that may need to be taken in the future are restricted to the extent necessary, engage the social partners to the full extent possible and ensure adequate safeguards to protect workers' living standards.*
- 644.** *Finally, the Committee notes the complainants' allegation relating to the "commitment-clause", which all representative unions had to sign. The consequence of the clause is that, for a period of at least five years, the workers' organizations are obliged to agree to specific further wage cuts, as laid down in state-aid conditions that were not discussed and agreed with the workers' organizations. The complainants consider that this "agreement" was coerced and not voluntary and assert that no argument was presented as to why the commitment of employees to accept further cuts on their employment conditions would be essential for the restructuring programme. The complainants add that they had twice agreed with the airline to the necessary cuts to respond to the employment conditions in the support package but these agreements were refused by the Finance Minister and only accepted once the commitment clause was signed. According to the complainants, this demonstrates that this condition was only made for political reasons.*
- 645.** *As regards the allegation that the conditions have a long timeline, the Government points out that the conditions for state aid are linked to the loan repayment obligations. In determining the repayment term, account was taken of the airline's viability, which is dependent on compliance with the conditions attached to the support package. In addition, the Government states that the complainants' assertion with respect to the commitment clause is incorrect as the airline was required to draft a restructuring plan that included measures to achieve a 15 per cent reduction in costs. Reducing staff costs is one element of the plan. The Government considers that, saving the company, and in doing so preventing repercussions that would have affected broader national economic interests, preserving employment, and ultimately protecting the income security of a large group of workers, was not a political goal but rather a very social goal. It is in that context too that an agreement needed to be reached by the State and the company, as well as by the employer and the employees' associations (under pressure of time).*
- 646.** *The Committee takes due note of the Government's commitment and recognition of the importance of the right of parties involved in the collective bargaining process to negotiate freely, as guaranteed*



*by ILO Conventions Nos 87 and 98 and its emphasis that this was an exceptional situation in which state aid was needed to avert the bankruptcy of an essential company. While it is not its role to express a view on the soundness of the economic arguments invoked to justify government intervention to restrict collective bargaining, the Committee must recall that measures that might be taken to confront exceptional circumstances ought to be temporary in nature having regard to the severe negative consequences on workers terms and conditions of employment and their particular impact on vulnerable workers [see **Compilation**, para. 1434]. Moreover, the Committee emphasizes that the **Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205)**, underlines the importance of social dialogue in general and collective bargaining, in particular, in responding to crisis situations by encouraging the active participation of employers' and workers' organizations in planning, implementing and monitoring measures for recovery and resilience. The Committee, therefore, encourages the Government to engage in dialogue with the employers' and workers' organizations concerned with a view to ensuring that the duration and the impact of the above-mentioned measures is strictly limited to the exceptional circumstances faced and to ensure the full use of collective bargaining as a means of achieving balanced and sustainable solutions in times of crisis.*

## The Committee's recommendations

**647. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:**

- (a) The Committee encourages the Government to engage in dialogue with the employers' and workers' organizations concerned with a view to ensuring that the duration and the impact of the above-mentioned measures are strictly limited to the exceptional circumstances faced and to ensure the full use of collective bargaining as a means of achieving balanced and sustainable solutions in times of crisis.**
- (b) The Committee considers that this case does not call for further examination and is closed.**

## Case No. 3265

### Definitive report

### **Complaint against the Government of Peru presented by the Trade Union Confederation of Workers of Peru (CSP)**

**Allegations: The complainant alleges the anti-union dismissal of officials of the Trade Union of Workers of the Hotel Monasterio by that hotel**

**648.** The complaint is contained in a communication dated 25 November 2016 submitted by the Trade Union Confederation of Workers of Peru (CSP).

**649.** The Government sent its observations on the allegations in communications dated 4 and 8 August and 15 September 2017, 25 July 2018, 4 March and 5 April 2019, and 30 December 2021.

- 650.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## A. The complainant's allegations

- 651.** In its communication of 25 November 2016, the complainant organization alleges that an anti-union policy of the enterprise PERU OEH S.A. (hereinafter "the enterprise") led to the dismissal of officials of the Trade Union of Workers of the Hotel Monasterio. In particular, it alleges that the General Secretary of the trade union, Mr Justo Ccahua Llacta, was dismissed in response to the exercise of his trade union rights.
- 652.** The complainant informs the Committee that the above-mentioned dismissal occurred on 29 May 2013 in the context of the submission of a list of demands. It indicates that Mr Llacta was accused of gross misconduct, allegedly for having disrespected the General Manager of the enterprise with coarse words. According to the complainant, the accusation was based on Mr Llacta's activity and the complaints he submitted to the Ministry of Labour.
- 653.** The complainant affirms that the enterprise based its decision to dismiss Mr Llacta on events that occurred on 23 and 31 March and 28 April 2013, dates on which the trade union was conducting protest activities outside of working hours and outside the workplace, and that Mr Llacta's dismissal was in fact part of a systematic anti-union strategy of the enterprise.
- 654.** Furthermore, the complainant indicates that, after a labour inspection of the premises, the Regional Labour Directorate of the Cuzco Regional Government found that the enterprise had committed various serious offences. According to Decision No. 255-2013-GR-CUS/DRTPE-DPSCL-SDILSST, which was issued by the Regional Labour Directorate of the Cuzco Regional Government on 20 December 2013 and a copy of which was provided by the complainant, the enterprise was fined 9,842 new soles for acts affecting freedom of association, such as obstructing trade union representation. The complainant states that this charge is evidence of the true anti-union motive of the measures used by the enterprise against the trade union officials.
- 655.** The complainant also reports that legal proceedings were initiated in connection with Mr Llacta's dismissal and provides copies of the decisions handed down in the matter. According to the documents submitted alongside the complaint, an application by Mr Llacta seeking the annulment of his dismissal on the grounds of having submitted a complaint or participated in proceedings against the employer before the competent authorities, was declared founded in first instance on 13 January 2014. The above-mentioned documents also refer to the dismissal of another official of the Trade Union of Workers of the Hotel Monasterio, Mr Tito Loayza Porcel, whose application for reinstatement on the grounds of unfair dismissal was declared founded in first instance on 4 November 2015.
- 656.** Concerning the action brought by Mr Llacta, the complainant informs that the first instance ruling was overturned by the Constitutional and Social Chamber of Cuzco on 28 August 2014. It also refers to an application for judicial review that Mr Llacta filed, which the Standing Chamber of Constitutional and Social Law of the Supreme Court of Justice of the Republic found to be without merit. The complainant also indicates that it submitted an *amparo* action before the 11th Constitutional Chamber of the Lima High Court against the judges who had issued the ruling.