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Report of the Director-General

Eighth supplementary report: Report of the Committee set up to examine the representation alleging non-observance by Lesotho of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26)

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▶ I. Introduction

1. By a communication received by the Office on 12 February 2019, the United Textile Employees (UNITE), the National Clothing Textile and Allied Workers Union (NACTWU) and Lentsoe La Sechaba (LSWU) made a representation to the International Labour Office under article 24 of the ILO Constitution alleging non-observance by the Government of Lesotho of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), ratified by Lesotho on 31 October 1966. The Convention remains in force in the country.
2. The provisions of the ILO Constitution concerning the submission of representations are as follows:

Article 24

Representations of non-observance of Conventions

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

Publication of representation

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

3. In accordance with article 1 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, as revised by the Governing Body at its 291st Session (November 2004), the Director-General acknowledged receipt of the representation, informed the Government of Lesotho and brought it before the Officers of the Governing Body.
4. At its 336th Session (June 2019), the Governing Body found the representation to be receivable and appointed a Committee to examine it. The Committee is composed of Mr Bro-Matthew Shinguadja (Government member, Namibia), Mr Hamidou Diop (Employer member, Senegal) and Ms Annette Mpundu Chipemele (Worker member, Zambia).
5. The Government of Lesotho sent its observations concerning the representation by communication received by the Office on 2 December 2019.
6. The Committee met virtually on 17 September 2020 to examine the representation and adopt its report.

▶ II. Examination of the representation

A. The complainants' allegations

7. In their communication, the complainant organizations refer to the fixing of the statutory minimum wage rates in 2018. In particular, they indicate that while these rates are normally approved and published in April each year, the Government had failed to do so in 2018, which led workers in Lesotho's textile industry to start demonstrations. According to the complainant organizations, while the Government eventually published revised minimum wage rates in August 2018, the new rates did not apply to all textile workers equally and they did not apply retroactively to 1 April of that year.
8. The complainant organizations note that the fixing of the statutory minimum wage rates is a long-standing issue in Lesotho. They refer in particular to the absence of follow-up given by the Government and the tripartite Wages Advisory Board to the recommendations issued in the context of technical assistance received from the ILO in 1999 and subsequently in 2012–13, notably on the issue of the criteria to be used when fixing minimum wage rates. The complainant organizations call for ILO technical assistance to support the social dialogue process on minimum wage-fixing in the country.
9. The complainant organizations allege that, given the lack of effective consultation with workers' representatives and their effective association in the operation of the minimum wage-fixing machinery, the Government has failed to comply with Article 3 of the Convention. They consider that workers' demands regarding wage-fixing are rarely addressed, which would show that workers' representatives are denied the opportunity to meaningfully participate. The complainant organizations also consider that, while there are tripartite negotiations in the Wages Advisory Board, this body is inoperative and subject to interests other than those of the workers. The delayed adoption of the minimum wage in 2018 following important demonstrations proved the lack of efficiency of the minimum wage-fixing machinery in Lesotho.

B. The Government's reply

10. In its reply, the Government provides detailed information on the legislative framework establishing the minimum wage-fixing machinery in Lesotho, in particular sections 47 to 52 of the Labour Code. Minimum wage rates may be fixed by wages orders adopted by the Minister of Labour and Employment, upon recommendations or proposals formulated by the Wages Advisory Board (sections 50 and 51 of the Labour Code). The Board is mandated to review the minimum wage rates every calendar year and provide recommendations to the Minister accordingly (section 52 of the Labour Code). Equal representation of workers and employers is ensured in the composition of the Board (paragraphs 1 and 3 of the First Schedule of the Labour Code).
11. The Government also provides information on the composition of the Wages Advisory Board which was inaugurated in 2018, and on the Board meetings held that year (seven meetings in the period January–May and three meetings in the period July–September), including on the concrete wage increase proposals made by the workers' and employers' representatives respectively over the various meetings. Moreover, the Government indicates that:

- during the second meeting (25 January 2018), the workers' representatives proposed to change the Board's working arrangements (which used to follow a sectoral approach in the examination of the minimum wage rates) so that the review would be done in plenary and cover all sectors. While the employers' representatives were against this proposal, it was adopted;
 - during the third meeting (20 February 2018), the possible delay in the adoption of the revised rates for that year was flagged in light of the ongoing discussions and the need for more time to reach agreement; no dissenting views were expressed;
 - during the fifth meeting (15 March 2018), the negotiations stalled and the Board informed the Minister of the absence of consensus.
- 12.** The Government further indicates that in April 2018, the Minister encouraged the social partners to resume the negotiations. Two additional meetings of the Wages Advisory Board took place, without leading to consensus. On 15 June 2018, the Minister gazetted a notice of intention inviting comments from the public. The Wages Advisory Board met in July to discuss the recommendations from the public. Given that no consensus could be reached on the minimum wage increase, the Minister informed the social partners of her decision to adjust minimum wages by 9 per cent in the manufacturing sector and 7 per cent for all other sectors with effect from 1 April 2018. Textile workers objected to that decision and went on strike and riot for nine days that led to damaging of properties, including government and textile employers' vehicles. With this state of affairs, a Cabinet sub-committee was established to work on the workers' grievances. The subcommittee held four meetings in July 2018 in consultation with members of the Board at bipartite and tripartite levels. The ensuing minimum wage rates proposed by the Government were then published in the *Gazette* for public consideration. The 2018 Wages Order was published on 23 August 2018 and became effective on 1 September 2018.
- 13.** Moreover, the Government indicates that the retroactive effect of the minimum wage increases in previous years had been possible as there was agreement between the social partners, which was not the case in 2018. Section 51(2) of the Labour Code provides that the wages order shall specify an effective date subsequent to the date of the wages order, and that where the date so specified does not correspond to the commencement of the period for which wages are paid the order shall, in respect of any employees affected, become operative from the commencement of the next such period following the date specified in the order.
- 14.** The Government also indicates that it is fully cognizant of the 2012 study prepared by the ILO, including on the issue of the criteria to be used for the determination of the minimum wage rates. At the same time, it recalls that Lesotho is not bound by the Minimum Wage Fixing Convention, 1970 (No. 131).
- 15.** Finally, regarding the claim that workers are denied representation on the Board, the Government categorically denies this assertion and states that there are equal numbers of employers (12) and workers (12) on the Board. Both have spokespersons. Moreover, each member is given an opportunity to address the meeting if they so wish. The Government regrets that the workers' approach did not allow mutual gains. It acknowledges that workers are not properly resourced to participate on the Board and considers that they use the Board as a collective bargaining forum whereas it is a minimum wage platform.

C. The possibility to engage in national conciliation

16. The Committee observes that both the complainant organizations (communications received by the Office on 26 August 2019 and 9 October 2019) and the Government (communication received by the Office on 2 December 2019) have provided information on their attempts to engage in voluntary conciliation at the national level, in application of the new arrangements concerning the operation of the representations procedure under article 24 of the ILO Constitution, adopted by the ILO Governing Body at its 334th Session (October–November 2018). However, the Committee notes that these attempts were unsuccessful, the parties having failed to agree on the appropriate institutional framework within which the national conciliation would have taken place.

▶ III. The Committee's conclusions

17. The Committee's conclusions are based on its examination of the allegations made by the complainant organizations and of the reply sent by the Government.
18. The Committee observes that the complainants' allegations concern: (1) the delayed adoption of the minimum wage rates in 2018; and (2) the lack of effective consultation with workers' representatives and their effective association in the operation of the minimum wage-fixing machinery, in violation of the obligation under Article 3 of Convention No. 26.
19. Regarding the first issue, the Committee takes note of the information provided by both parties on the proceedings and sequence of events leading to the adoption of the new minimum wage rates in 2018. It recalls that Convention No. 26 does not contain specific provisions on the process to be followed for the review of the minimum wage rates at the national level, nor on the frequency at which such review should be undertaken. Neither does it address the timing of the entry into effect of the revised rates, once adopted. **Consequently, the Committee will not proceed to examine these issues.**
20. With regard to the alleged lack of effective consultation with workers' representatives and their effective association in the operation of the minimum wage-fixing machinery, in violation of the obligation under Article 3 of Convention No. 26, the Committee recalls that Article 3 of Convention No. 26 reads as follows:

Article 3

1. Each Member which ratifies this Convention shall be free to decide the nature and form of the minimum wage-fixing machinery, and the methods to be followed in its operation:
2. Provided that--
 - (1) before the machinery is applied in a trade or part of trade, representatives of the employers and workers concerned, including representatives of their respective organisations, if any, shall be consulted as well as any other persons, being specially qualified for the purpose by their trade or functions, whom the competent authority deems it expedient to consult;
 - (2) the employers and workers concerned shall be associated in the operation of the machinery, in such manner and to such extent, but in any case in equal numbers

and on equal terms, as may be determined by national laws or regulations;

(3) minimum rates of wages which have been fixed shall be binding on the employers and workers concerned so as not to be subject to abatement by them by individual agreement, nor, except with general or particular authorisation of the competent authority, by collective agreement.

- 21.** The Committee notes the complainants' allegation that workers' demands regarding wage-fixing are rarely addressed, which would show that workers' representatives are denied the opportunity to meaningfully participate. The complainant organizations also consider that, while there are tripartite negotiations in the Wages Advisory Board, this body is inoperative and subject to interests other than those of the workers.
- 22.** In this respect, the Committee notes the Government's reply providing detailed information on the proceedings of the Wages Advisory Board in 2018 and stating that: (a) there are equal numbers of employers (12) and workers (12) on the Board; (b) both have spokespersons; (c) each member is given an opportunity to address the meeting if they so wish. The Government also acknowledges that workers are not properly resourced to participate on the Board and considers that they use the Board as a collective bargaining forum whereas it is a minimum wage platform.
- 23.** The Committee observes that Article 3(2)(2) of the Convention provides that "the employers and workers concerned shall be associated in the operation of the machinery, in such manner and to such extent, but in any case in equal numbers and on equal terms, as may be determined by national laws or regulations". This provision contains two important elements, "equal numbers" and "equal terms". The Committee observes that the Wages Advisory Board is composed of an equal number of representatives of workers and employers, both in law (paragraphs 1 and 3 of the First Schedule of the Labour Code) and in practice (12 representatives each). The Committee notes that the parties' participation in "equal terms" is more difficult to evaluate. In its 1992 General Survey, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) noted that the participation of workers' and employers' representatives in the minimum wage-fixing machinery must take place on an equal footing, which should not be interpreted as implying strict numerical equality between employers and workers but the attribution of equal weight to the opinions and interests of either side (General Survey on Minimum Wages, 1992, paragraph 239). As the CEACR also indicated in its 2014 General Survey on Minimum Wage Systems (paragraph 391), the obligation to carry out full consultations should not be understood as implying an obligation to reach a negotiated agreement. The decision lies ultimately with the Government, which should nonetheless show that in taking its decision, all the different proposals have been duly considered and every effort has been made to meet divergent expectations. In the present case, the complainant organizations consider that workers' participation is not meaningful, which would be evidenced by the fact that their demands regarding wage-fixing are rarely addressed. For its part, the Government considers that the workers' approach in the Wages Advisory Board did not allow mutual gains and that they use the Board as a collective bargaining forum whereas it is a minimum wage platform. The Committee considers that the detailed information provided by the Government on the proceedings of the Board in 2018 tends to demonstrate that the parties had ample space for discussion on the minimum wage rates and for the presentation of their respective opinions. Consultations appear to have been extensive and were not limited to a formal exchange of information devoid of any intention to

engage in meaningful dialogue or explore consensual solutions. **In these circumstances, the Committee considers that the minimum wage-fixing machinery in Lesotho is compliant with Article 3 of the Convention.**

24. Finally, the Committee notes the Government's acknowledgment that workers are not properly resourced to participate on the Board. It also notes that, while the complainant organizations did not raise the question of resources as an issue, they did call for ILO technical assistance to support the social dialogue process on minimum wage-fixing in the country. **The Committee therefore invites the parties to avail themselves of ILO technical assistance over the next 12 months, building on the assistance provided in the late 1990s and more recently in 2012–13, with a view to further supporting the participation of the social partners in, and the effective functioning of, the minimum wage-fixing machinery in the country.**

▶ IV. The Committee's recommendations

25. In the light of the conclusions set out in paragraphs 19, 23 and 24 of document GB.340/INS/18/8 with regard to the matters raised in the representation, the Committee recommends that the Governing Body:
- (a) approve the report contained in document GB.340/INS/18/8;
 - (b) invite the parties to avail themselves of ILO technical assistance over the next 12 months, building on the assistance provided in the late 1990s and more recently in 2012–13, with a view to further supporting the participation of the social partners in, and the effective functioning of, the minimum wage-fixing machinery in the country;
 - (c) invite the Government to send in its next report to the Committee of Experts on the Application of Conventions and Recommendations information related to its conclusions; and
 - (d) make the report of the Committee publicly available and close the procedure initiated by the representation.

Geneva, 22 September 2020

(signed) Bro-Matthew Shinguadja

(signed) Hamidou Diop

(signed) Annette Mpundu Chipeleme