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CEACR: Individual Observation concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Germany (ratification: 1961) Published: 1996

Description:(CEACR Individual Observation)
Convention:C111
Country:(Germany)
Subject: **Equality** of **Opportunity** and **Treatment**
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Subject classification: Women

1. The Committee takes note of the Government's report and its annexed Länder higher court decisions and legal texts.

2. Discrimination on the ground of sex. The Committee notes with satisfaction the adoption, and entry into force on 1 September 1994, of the Act on the advancement of women and the compatibility of marriage and occupation in the federal administration and in the federal courts (known as the Second Equality Act). In particular, the Committee notes that federal administrative bodies and public undertakings must: issue a plan for the advancement of women every three years; compile annual statistics on the numbers of men and women in a number of areas for submission to the supreme federal authorities; draft vacancy advertisements in gender-neutral terms unless one or the other sex is an indispensable precondition for the job advertised; increase the proportion of women in under-represented areas subject to the precedence of suitability, capability and occupational performance; encourage women's further training to facilitate career advancement; where there is a regular staff of at least 200 persons, have women's representatives (or a "confidential adviser" if no such representative) to promote and supervise the application of the new Act, including the lodging of complaints with the directorate. The Act also amends certain legislation applicable to both the public and the private sectors: it clarifies the extent of monetary compensation in civil actions based on sex discrimination; and introduces protection against sexual harassment at the workplace including a complaints procedure and the need to include sexual harassment sensitization in vocational and further training courses offered to public servants.

3. Noting that section 14 of the Act provides that the Government shall submit to Parliament every three years a progress report on the situation of women in these administrations and the courts covering the implementation of the Act, the Committee requests the Government to supply a copy of the first report when due in 1997. In the meantime, the Committee requests the Government to inform it, in its next report, of the impact of this legislation on the promotion of equality between the sexes in access to vocational training, access to employment, and terms and conditions of employment in the federal public sector, and of any cases reported under the sexual harassment provisions.

4. The Committee also notes the decision, on 17 October 1995, of the European

Court of Justice in the case of *Kalanke v. City of Bremen*, in which the Court found that national rules which automatically give women priority for promotion where candidates of different sexes are equally qualified go beyond promoting equal opportunities and overstep the limits of the exception in article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion. The Committee notes that the relevant legislation contained an automatic and rigid quota of 50 per cent to be applied across all occupations including all educational and qualification levels. The Committee also notes that, in that case, the man and woman concerned had equal qualifications. Please indicate how this ruling has affected the Government's policies in this field and any action which may be proposed in respect of it.

5. Discrimination on the ground of political opinion. The Committee recalls the recommendations of the 1987 Commission of Inquiry that the measures relating to the civil service's duty of faithfulness to the free democratic basic order be re-examined, so that only such restrictions on employment in the public service are maintained as correspond to the inherent requirements of particular jobs within the meaning of Article 1, paragraph 2, of the Convention or can be justified under Article 4. In its most recent observation on this point, the Committee asked the Government to supply information on any cases in which a public official had been dismissed or an applicant denied employment based on breach of the duty of faithfulness; and given that certain Länder had abolished systematic inquiries into the loyalty of applicants for public service jobs but still required public officials to sign the declaration of loyalty, the Committee asked for copies of any directives showing the criteria used. The Government reports that the inquiries have now been abolished in all the old Länder and at the federal level, but that applicants are instructed on the principle concerning loyalty to the Constitution and must sign the declaration. In Bavaria, the Land Government's Announcement of 3 December 1991 contains guidelines on service loyalty requirements with the declaration as an annex and in that Land, between 1 July 1990 and 30 June 1994, nine applicants were rejected for insufficient loyalty, five legal trainees who were refused the status of civil servant were nevertheless allowed to complete their training, and there were no dismissal cases.

6. Moreover, it takes note of the decision of 26 September 1995 of the European Court of Human Rights in the case of *Vogt v. Germany* which held that the Land of Lower Saxony had breached the European Convention on Human Rights when it dismissed a permanent civil servant (who was mentioned in the ILO 1987 Commission of Inquiry report on this Convention) from a teaching post in the 1980s because she was a Communist Party member. In that case, following the 1990 repeal of the Land legislation in question (Decree on the employment of extremists in the Lower Saxony civil service) and the issuing of regulations to deal with earlier cases of political discrimination, Ms. Vogt was reinstated in her post as a teacher for that Land's education authority. The Committee requests the Government to inform it of the repercussions of this decision on the employment or re-employment opportunities of dismissed civil servants, provided that they satisfy the recruitment and qualification requirements.

7. The Committee has also been examining for a number of years the discriminatory nature of paragraphs 4 and 5 of Annex I of the German Reunification Treaty, Chapter XIX, section III, which had allegedly been used to dismiss public servants - in

particular teachers - of the former GDR on the ground of their political opinion and activities. Paragraph 4 of the Treaty provides, inter alia, that ordinary termination of a work relationship in the public service is permissible if the worker does not meet the requirements, owing to inadequate specialist qualifications or personal unsuitability. Paragraph 5 provides that extraordinary termination of the work relationship is permissible based on serious reasons which exist when the worker: (1) has violated the principles of humanity or of the rule of law, especially the human rights guaranteed in the International Covenant on Civil and Political Rights or has violated the principles contained in the Universal Declaration of Human Rights; or (2) has been active for the former Ministry for State Security or the Department of National Security, and a continuation of the work relationship thereby appears unacceptable. The Committee notes with interest the Government's confirmation that paragraph 4 ceased to have effect as of 31 December 1993 and that there have been no dismissals under that provision subsequently.

8. The statistics supplied by the Government for paragraph 4 dismissals in the new Länder when it was in force show that: in Mecklenburg-Western Pomerania there were 1,090 notices of dismissal; in Saxony, there were about 4,800 notices of dismissal; in Brandenburg, 456 notices. It also notes from the copies of appeal court decisions supplied that, in some cases, dismissal under paragraph 4 was confirmed on the basis that a liberal constitutional state could not tolerate former Communist Party and state functionaries as its representatives unless they placed their dissent on record or relinquished their position of the time, thereby indicating that they had severed their links at that time with the former regime. In other cases the dismissal was revoked given that the facts proved the personal suitability of the public servant for the current post. The Committee would appreciate being kept informed of the number of appeals which succeed or fail in these, and in other new Länder.

9. Regarding paragraph 5's provision of extraordinary termination of the work relationship for serious reasons when the worker: (1) has violated the principles of humanity or of the rule of law; or (2) has been active for the former Ministry for State Security or the Department of National Security, the Committee recalls its hope that use would be made of this provision only in accordance with Article 1, paragraph 2, or Article 4, of the Convention. The Committee notes the Government's repeated assertion that this provision does not contravene the Convention and that the Government relies on Article 1, paragraph 2, of the Convention, arguing that persons who had supported the former unjust system are not suitable for employment in a state under the rule of law and the Convention should not be used to protect them. The statistics provided show that: in Mecklenburg-Western Pomerania there have been 512 dismissals; in Saxony, 860; in Brandenburg, 439. From the appeal court ruling supplied it appears that the paragraph 5 dismissal was upheld given the inherent requirements of the post. The Committee would again appreciate being informed of the outcome of any pending appeals.

10. The Committee recalls in this connection the Commission of Inquiry's recommendation that it is important not to attribute excessive importance to activities undertaken at a time when applicants were not bound by any public service relationship and to provide an opportunity for them to demonstrate, once they are in such a relationship, that they will respect the obligations attaching thereto.

11. With regard to its request for information on any programmes for vocational

training or retraining of officials who had been dismissed from public service as a result of paragraphs 4 or 5 of Annex I of the Reunification Treaty, the Committee notes that the Government provides a copy of the Land of Brandenburg's directives for the granting of "interim assistance" for training and for establishing a means of livelihood for such persons; whereas it states that three Länder (Mecklenburg-Western Pomerania, Saxony and Thuringia) have announced that such measures have not been introduced. The Committee asks the Government to inform it of any developments in the approach of these Länder to this issue.

12. Concerning the old Länder in the western part of the country where similar criteria to paragraph 5 of Annex I of the Reunification Treaty have been adopted in the form of announcements and guidelines for civil service employment, the Committee had requested more information on the application of the Bavarian Announcement of 3 December 1991 and examples of other recent texts of other Länder, including the questionnaires which civil servants or applicants were required to sign. The Committee notes from the various texts provided (Baden-Wurtemberg, Bavaria, Hesse, Mecklenburg-West Pomerania, Rhineland-Palatinate, Saxony, Schleswig-Holstein and Thuringia) that civil service applicants are to be informed in writing of the obligation of allegiance to the Constitution, and the authority responsible for appointments must proceed to establish the allegiance, failing which, based on the facts available or the applicant's refusal to sign the declaration of loyalty annexed to the written notice, the applicant shall be refused employment. According to some of the texts, for applicants from the new Länder, the examination of constitutional allegiance requires additional verification of: (1) whether they were involved in violations of the principles of humanity or the rule of law; (2) whether they carried out official or unofficial functions for the Ministry of State Security or the Department of National Security; and (3) whether they had held senior posts in the former GDR system in particular in the Socialist Unity Party (SED) and in mass organizations linked to political objectives.

13. The Committee would appreciate receiving information on how these various state-level texts are being implemented in practice so that discrimination on the basis of political opinion is not possible both in entry to the Länder public services and in the terms and conditions of employment of civil servants.

14. The Committee is addressing a request directly to the Government on other points.