EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

6 September 2018

Case Document No. 1

***Confédération Générale du Travail* (CGT) v. France**
Complaint No.154/2017

COMPLAINT

Registered at the Secretariat on 28 July 2018

Collective complaint brought by the CGT against the Government of France, with regard to the provisions on adjustments to working hours under Law No. 2016-1088 of 8 August 2016 on labour, modernisation of social dialogue and career path protection (Official Gazette of the French Republic No. 0184 of 9 August 2016), for violation of Article 4§2 of the Revised European Social Charter ("the Charter")

I. General background to the complaint

I-A The applicant trade union's entitlement to lodge a complaint

1. The Confédération Générale du Travail (the "CGT"), a representative trade union affiliated with the European Trade Union Confederation, is entitled to lodge a collective complaint under Article 1c of the Additional Protocol to the Charter of 9 November 1995, ratified by France. In accordance with Article 38 of the CGT's statutes, the complaint is presented by its Secretary General.

I-B Summary of the complaint

2. Law No. 2016-1088 authorises adjustments in working hours for a period longer than a week and lasting up to three years. It also seriously infringes the right of workers to conditions of fair remuneration, in breach of Article 4§2. The possibility of introducing working time adjustments for a period longer than a week and up to three years, thus making it possible for overtime to be spread over three years, deprives workers of the right to an increased rate of remuneration for overtime work, in breach of Article 4§2.

3. This fresh violation of Article 4§2 creates an unacceptable situation, depriving a very large number of workers of the guarantees provided by the Charter despite the fact that the French Government formally undertook to apply them. For this reason, the CGT requests:

- that the Committee finds that the French Government is in violation of the above-mentioned article of the Charter and there is an urgent need to remedy the situation;
- that the French Government is strongly recommended by the Committee of Ministers of the Council of Europe to align its legislation on adjustments to working hours with the provisions of the Charter.

II. The violations of the Charter by the legislation allowing adjustments to working hours over periods of up to three years

II-A Domestic law applicable to working time adjustments after the promulgation of the Law of 8 August 2016

4. Law No. 2016-1088 of 8 August 2016 amended the arrangements for adjustments to working hours for a period longer than a week as follows.

5. The new Articles L.3121-41 to L.3121-47 make it possible, as before, to adjust working hours for a period longer than a week, in principle by negotiating a collective agreement. However, the period over which working hours can be adjusted, which was already one year, can now be up to three years if authorised by a sectoral agreement. In the absence of a collective agreement, the period may only be four or nine weeks, depending on the number of employees in the company.

6. In principle, a flexible system such as working time adjustment makes it possible to vary working hours over a reference period made up of "high-activity periods" and "low-activity periods", without overtime pay whenever the employee is working over the statutory thirty-five hours, as long as the statutory working hours are not exceeded for the whole reference period. Consequently, for example, if working time is adjusted over one year, working hours may be set at 46 hours from 1 January to 30 June and 24 hours from 1 July to 31 December. In this case, the average working hours over the year match the statutory 35 working hours and the employer does not have to pay any overtime or related supplements. Each month, the worker is paid a salary corresponding to the hours worked or, if provided for in arrangements set by an agreement, a constant salary for a 35-hour week.

7. According to the impact assessment on the draft law extending the time span of working hour adjustments to three years, one study by the French Government stated as follows:

"the purpose of this measure is to allow companies that are able to anticipate their workload more than a year in advance to adjust employees' working hours to match the predicted changes in workload as closely as possible. It is particularly aimed at industrial companies whose activities naturally involve projects spanning several years (car and plane construction, shipbuilding, transport, etc.). It may also be useful for tertiary sector companies which win a contract meaning that they can anticipate their workload over a year in advance. For these companies, being limited to one-year arrangements can prove to be obstructive or even detrimental when they know in advance that there will be periods of high and low activity. A one-year timeframe also prevents working time arrangements from being adjusted in line with unforeseen changes to projects. Companies' performances may be adversely affected in comparison to their competitors because their hourly pay rate is not competitive" (impact assessment on the draft law for the introduction of new freedoms and protections for companies and workers, pp. 30-31). The main thing to emerge here is that the aim of the measure is to allow businesses "to adjust employees' working hours to match the predicted

changes in workload as closely as possible" and to guarantee them a "competitive" "hourly pay rate", so that, in the end, companies' performances are not adversely affected in comparison to "competitors".

8. Firstly, pitting companies against one another where it comes to labour issues, which tends to reduce salaries and cause working conditions to deteriorate, is fundamentally incompatible with the objectives of the Charter, which states in its preamble that its aim is to help its signatories to facilitate "their economic and social progress" and "to improve their standard of living and their social well-being".

9. The legislation specifies that if the reference period is longer than a year, the agreement must set a weekly limit of more than 35 hours, above which working hours carried out during the same week are regarded as overtime (Article L.3121-44). This weekly limit is subject to negotiation but no binding limit is imposed on negotiators. This means that a worker whose working hours have been adjusted over a period longer than a year may work up to 11 additional hours per week for months without receiving any extra pay. For example, a worker could work 44 hours per week for 122 weeks (approximately 28 months, which would include 12 weeks of paid leave) then not work at all for 34 weeks (approximately 8 months). In this case, depending on the terms of the collective agreement, the worker could receive either a constant wage for a 35-hour week over the whole period or a salary corresponding to a 44-hour week for 122 weeks then no pay for 34 weeks. He/she would not receive any increase in remuneration or compensation for overtime.

10. If the reference period is shorter than or equal to a year, the agreement may set the same weekly limit, but it is not compulsory (Article L. 3121-44). In this case, a worker may work, for example, 46 hours for many successive weeks (see paragraph 6) without receiving any increase in remuneration or compensation.

11. We would also like to point out that the dates of high- and low-activity periods are not necessarily predetermined as in the example presented in paragraph 9. The legislation provides only that "workers must be informed within a reasonable time of any changes to the distribution of their working hours" (Article L. 3121-42). In the absence of clarification on this point, in the collective agreement, the "advance notice to workers in the event of changes to the duration or schedule of working hours is set at seven days" (Article L. 3121-47). Therefore this system for the adjustment of working hours does not allow workers to know their working hours in advance.

II-B The violation of Article 4§2 of the Charter

12. Article 4 of the Charter (right to a fair remuneration) states:
"With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

(...)

2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;

(...)"

13. In its Case Law Digest (p. 44), the Committee states that "in a number of countries, working hours are calculated on the basis of average weekly hours worked over a period of several months. Over such periods, weekly working hours may vary between specified maximum and minimum figures without any of them counting as overtime, and thus qualifying for a higher rate of pay. Arrangements of this kind do not, as such, constitute a violation of Article 4§2". It states that a working time arrangement "over a period of several months" is permitted by the Committee, but that this allowance cannot be without limits, particularly with regard to the length of the arrangement.

14. The CGT would point out firstly that the reference period established by the Law of 8 August 2016, which may be up to three years, well exceeds several months. Such a flexible system allows an employer to make an employee work a certain number of hours above the statutory thirty-five hour week and over long periods without the employer having to pay overtime or an increased rate, in direct conflict with the right to a fair remuneration guaranteed by the Charter and, in particular, with the right to an increased rate of remuneration for overtime work guaranteed by Article 4§2.

15. Workers make the extra efforts and undergo the constraints linked with increased working hours during high-activity periods, which can be long, but do not receive any compensation in the form of extra pay or leave. Low-activity periods may occur several months or even one or two years later and in no way can they be considered as compensation since they merely correspond to the arithmetical difference between the hours worked during the high-activity period and the statutory working hours.

16. The CGT would like to point out firstly that employers are not obliged to offer any operational, economic or social justification for adjusting working hours for a period longer than a week; secondly, procedures for establishing collective agreements set out in the new legislation provide employers with a wide range of possibilities to negotiate, including provision for the absence of a trade union organisation and lenient conditions for the validation of agreements, which place them in a strong position to establish agreements with disadvantageous terms for workers (see paragraphs 40-42 of Complaint 149/2017 CGT and CFE-CGT v. France); lastly, this type of arrangement is imposed on full-time workers without the latter giving their consent or being able to refuse (see Article L. 3121-43).

17. It should also be noted that these measures, which deprive workers of the right to an increased rate of remuneration for overtime work, have been taken in an adverse legal context in which recent legislation has authorised then facilitated negotiation through collective bargaining of an exceptional increased rate of remuneration for overtime with a new lower limit of 10% (Article L. 3121-33 of the French Labour Code).

18. For these reasons, the CGT maintains that adjustments to working hours for periods longer than a week, which can last months, a year or up to three years, are incompatible with the Charter as they deny workers their right to fair remuneration and, in particular, an increased rate of remuneration for overtime work. It therefore asks the Committee to find that this is a further violation of Article 4§2 of the Charter.