EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

5 February 2004 **Case Document No. 1**

COLLECTIVE COMPLAINT No. 22/2003

Confédération Générale du Travail (CGT) v. France

registered at the Secretariat on 24 October 2003

(TRANSLATION)

Montreuil, 20 October 2003

Council of Europe
General Secretariat
DG II -- Human Rights
67075 Strasbourg CEDEX

For the attention of Mr Régis Brillat
Executive Secretary of the European Social Charter

Sir,

The *Confédération Générale du Travail* (General Confederation of Labour, hereinafter CGT) and its managerial staff organisation, the UGICT, a national workers' representative organisation and a member of the European Trade Union Confederation, is bringing a collective complaint (Additional Protocol to the European Social Charter of 9.11.1995 which came into force on 1 July 1998 and has been ratified by France) against the French government in connection with Act No 2003-47 of 17 January 2003 on wages, working time and employment development (the "Fillon II" Act).

This Act prepared by the French government violates (see Title II, provisions on working hours) several provisions of the Revised European Social Charter:

1. Violation of the right to rest (Article 2.1, Article 3.1 and Article 11.1 and 3)
2. Excessive working hours (Article 2.1)
3. Increase in weekly working time (Article 2.1).

As regards internal review of the Act, the matter has been referred to the Constitutional Council but not on the above points (only Members of Parliament can refer matters to this body). Under French law, the constitutionality of the Act cannot be reviewed after it has been promulgated.

In the absence of any other domestic remedy open to private individuals and legal persons, our organisation appeals to the Council of Europe's supervising bodies and requests that France be condemned for violating the Charter and that a recommendation be drawn up calling for its compliance.

Yours faithfully,

Bernard THIBAULT
General Secretary of the CGT

Enclosure: collective complaint

Collective complaint brought by the CGT
against the French government
in connection with Act No 2003-47 of 17 January 2003
on wages, working hours and employment development
(Official Journal of the French Republic of 18 January 2003)

Contents

Introduction

1. Fundamental nature of the right to reasonable working hours

Working hours have been regulated right from the early stages of the drafting of international labour standards. It will be remembered that the first ILO Convention on Working Hours (Industry)(No1) was adopted in 1919.

Via, for example, the European Social Charter, this trend has recently culminated in the inclusion of the above right in the European Union's Charter of Fundamental Rights (which is due to become legally binding in the future European Constitution).

Reasonably limited working hours constitute an aspect of the dignity of the worker, who is entitled to a private life and who, as an individual, must not be subject to the interests of the employer.

The European Committee of Social Rights (hereafter known as "the Committee") has defined the objective of Article 2.1 as being to "protect workers' health and safety - hence their lives -- without neglecting more general interests…"[1]

2. The present trend

On the other hand, the demand for working hours to be made more flexible has been increasing for some 20 years as a result of calls from:

- employers (mainly)
- workers of both sexes (as regards specific points).

The Act concerned is part of a process of reducing limitations on working hours (flexible working) in the exclusive interest of employers.

3. Details of the complaint

The complaint covers two levels:

- reasonable working hours (Article 2.1) and rest (Article 2.1)
- no steps backwards: reduction of working hours in particular (Article 2.1) and in general (Article G).

To some extent it is a continuation of complaint 9/2001, which dealt with the working hours of managerial staff.

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[1] *Lenia Samuel*: Fundamental Social Rights – Case Law of the European Social Charter, 2nd Edition, Strasbourg 2002, p 45 (referring to the Third Report on Certain Provisions of the Charter Which Have Not Been Accepted, p.11).

The French government is failing to ensure the satisfactory application of several provisions of the European Social Charter (revised). The collective complaint covers three points (the Act's provisions on working hours).

1. Violation of the right to rest

1.1 The European Social Charter (revised) (Strasbourg, 3 May 1996) provides:

- **Article 2 -- The right to just conditions of work**

With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:

1 -- to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;

5 -- to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest.

This article should be interpreted in the light of the following Articles 3 and 11 of the Charter:

- **Article 3 -- The right to safe and healthy working conditions**

With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:

1 -- to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injuries to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment.

- ***Article 11 -- The right to protection of health***

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:
1 to remove as far as possible the causes of ill-health;
3 to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

1.2 Act No 2003-47 of 17 January 2003 provides:

- ***Section 3***

The following sentence shall be added to the first paragraph of Article L.212-4bis of the Labour Code:

"Excluding the period of activity, the on-call period is deducted from the minimum periods referred to in Articles L. 220-1 and L.221-4."

1.3 International regulatory framework:

This provision also conflicts with:

- the Universal Declaration of Human Rights of 10 December 1948 (Article 24);
- the 1966 International Covenant on Economic, Social and Cultural Rights (Article 7).

1.4 Assessment

This provision has the effect of keeping the employee in a situation of extreme dependence on his employer even during rest periods.

These rest periods are:

- the daily rest period (11 hours between two working days, Article L. 220-1 of the French Labour Code);
- the weekly rest period (35 hours at weekends, Article L. 221-4 of the French Labour Code).

These minimum rest periods are laid down in Community Directive 93/104/EC of 23 November 1993.

An employee who is on call (Article L. 212-4bis of the French Labour Code) must hold himself in readiness for work in the firm or at another workplace as required by the employer.

The Court of Cassation has ruled that the on-call period cannot fall within the statutory minimum rest periods (Judgement of 10 July 2002 No 2498, SLEC v. Sté Dalkia; the rest period is defined as the time during which the employee is "totally exempted, either directly or indirectly, save in exceptional cases, from performing any work, whether prospective or occasional, on behalf of his employer".).

The French Constitutional Council has held that "the right to a rest period" ranks as constitutional law (DC No 2002-465 of 13 January 2002, preamble to the 1946 French Constitution ranking as constitutional law, paragraph 11; the Constitutional Council was not requested to consider the question of being on call during the rest period in the application made to it by Members of Parliament).

The provision objected to:

- results in unreasonable working hours caused by an increase in compulsory availability for work (Article 2.1 of the Charter);
- infringes the weekly rest period (Article 2.5 of the Charter). The new legislation allows the employer to require the employee to be on call during his weekly rest period.

  The provision conflicts on this point with the aforementioned Community Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJEC No L 307, 31.12.1993, pp. 18 to 24),

which states that an employee must have an uninterrupted weekly rest period (*Article 5, "Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to an uninterrupted rest period of 24 hours plus the 11 hours of daily rest referred to in Article 3.")*

- damages health (Articles 3.1, 11. 1 and 3 of the Charter). This provision prevents the employee from having a rest period. It makes no distinction between on-call time and rest time. Even during his rest period, an employee can therefore be disturbed by his employer at any moment. Even where no activity actually takes place, this situation of permanent pressure seriously damages the restorative nature of a true rest period.

  [At Community level, this provision conflicts with the provisions on rest periods in Directive 93/104/EC. The Court of Justice of the European Communities held that: "During such periods the worker is not subject to any obligation vis-à-vis his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health". (CJEC, 9 September 2003, case C-151, paragraph 94]

  Where he is called upon to work, an employee does so after a working day, without having meanwhile enjoyed the minimum rest necessary for his health. Such a situation is likely to cause accidents (at the workplace and on the outward and return journeys).

  [This situation also conflicts with the provisions concerning rest periods in Directive 93/104/EC. In this connection, the Court of Justice of European Communities held that: "The increase in daily working time… must in principle be offset by the grant of equivalent periods of compensatory rest made up of a number of consecutive hours corresponding to the reduction applied and from which the worker must benefit before commencing the following period of work." (CJEC 9 September 2003 already mentioned, paragraph 97 and “The Court hereby rules”, 2) subparagraph 2)]

  This provision constitutes a particularly marked step backwards in workers’ rights regarding working conditions.

1.5 The Committee's case law

Several aspects must therefore be examined:

- the worker's increased dependence
- the right to a daily rest period (not respected)
- the right to a weekly rest period (not respected)
- the right to an uninterrupted rest period (not respected).

In examining national situations under Article 2.1, the Committee included the question of daily[2] and weekly [3] rest periods. It explicitly noted *"Therefore, managerial staff cannot work for more than 13 hours on any day within the maximum of 217 working days in the year, no matter what the circumstances."*

On-call time (availability) without doing any actual work must not be regarded as rest. The arguments based on Directive 93/104/EC are of a general nature and can therefore be applied to the situation in question.

The Committee did not express any specific opinion on the question of uninterrupted daily rest. However, for the weekly rest period, it called, on the basis of Article 2.5, for a "complete day"[4], ie one without any interruption.

The statutory provision concerned results in an extension of working hours. Even if it were decided to count only actual activity as working time, it is quite clear that the way activities are spaced can easily extend working hours (with a few interruptions).

II. Excessive working hours

2.1 The Revised Social Charter states:

- ***Article 2 -- The right to just conditions of work***

With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:

1 -- to provide for reasonable daily and weekly at working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit

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2.2 Act No 2003-47 of 17 January 2003 states:

- **Section 2, A, VIII**

A. -- The Labour Code shall be amended as follows

VIII. – in Article L. 212-15-3:

2. The fourth sentence in the first paragraph of III shall read as follows:
"The convention or agreement shall define the categories of managerial staff concerned on the basis of their independence as regards the organisation of their time."

2.3 Assessment

a) Criteria: this statutory provision concerns managerial staff on “flat rate" arrangements.

The other previous statutory conditions that limited access to these special arrangements disappear: "The duration of working time may not be predetermined by the nature of their functions, the responsibilities they exercise and the degree of

[2] *ibid.* p.47 (Finland)
[3] *ibid.* p.47 (Spain)
[4] Report to the Committee of Ministers -- Complaint 9/2000, paragraph 30.

independence they enjoy in the organisation of their time" (4th sentence of the first paragraph of III, L. 212-15-3, before legislative amendment).

This new statutory provision is designed to increase substantially the number of employees coming under the special "flat rate" arrangements. These employees are excluded on this score from many protective provisions of the Labour Code.

Because of the Act, such employees are not covered by the rule on maximum working hours (absolute weekly maximum: 48 hours, Article L. 212-7 of the Labour Code; daily maximum: 10 hours, Article L. 212-1 of the Labour Code). They are entitled only to the minimum rest periods (11 hours per day, 35 hours per week).

We have here a negative effect additional to the violation of the right to rest (see 1. above).

b) Number of workers concerned: under collective complaint No 9/2000 (CFE CGC v France), the European Committee of Social Rights (ECSR) concluded on 11 December 2001 that Article 2.1 of the Revised Social Charter had been infringed. However, in its Resolution ResChs(2002)4 of 26 March 2002, the Committee of Ministers noted: "2(…) these managerial staff represent only a minority of salaried workers (approximately 5%)".

This figure provided by the French government is an extreme under-estimate and is not based on any reliable statistics (no source is given in support of this fanciful allegation). Fundamentally, however, the European Social Charter was designed for the protection of human rights. Even a minority of persons should enjoy its protection.

On this point regarding the number of employees concerned, the situation is now altered by the new Act.

c) Purpose and effect

Under the former legislation ("Aubry II" Act No 2000-37 of 19 January 2000), employers made use of collective agreements to classify as "independent flat rate staff" managerial staff who did not come under the statutory provisions. The purpose of these employers was and is to subject such employees to excessive working hours.

On several occasions, the courts have annulled collective agreements concluded in large enterprises which had unreasonably excluded from the protective rules of the Labour Code on working hours managerial staff who had been improperly placed in the "flat rate" category (see, in particular, the Paris Court of Appeal, 1st chamber, section s, 18 December 2002, SA Hachette; Lyon Court of Appeal, 2 May 2002, SA Aventis Pasteur; CA Versailles, February 2002; TGI Nanterre, 12 October 2001 OTIS; TGI Paris, 19 December 2000, Sté Diac-Renault; TGI Lyon, 23 October 2001; TGI Nanterre, 4 May 2001, SA Renault).

This recent case law shows in particular that the current French system of collective bargaining (which enables minority trade unions in an enterprise or branch to

conclude collective agreements covering all employees) does not provide adequate guarantees ensuring compliance with Article 2.1 of the Charter (points 31, 34 and 35 of the ECSR decision; for the opposing argument, see points 3 and 4 of the aforementioned Committee of Ministers Resolution).

The purpose of this new statutory provision is to challenge this case law.

The French government's aim is therefore to subject a majority of managerial staff to exceptional provisions requiring excessive working hours, and above all, in changing from three cumulative criteria to a single criterion, to make the nature of this exception unfair. The exclusion of managerial staff from the protective rules is henceforth even less justifiable.

The day-based flat-rate system allows employees to be made to work hours that may go as high as 78 hours per week (24 hours-11 hours of daily rest = 13 hours x 6 hours of weekly work).

This extreme situation could therefore now affect not just a minority but a majority of managerial staff as a result of Parliament's relaxation of the rules governing access to these arrangements.

With this statutory provision, the exception becomes the rule. Since the ECSR report of 11 December 2001 and the Committee of Ministers Resolution of 26 March 2002, the situation has therefore not changed for the better but, on the contrary, has seriously deteriorated. As a result of the French government's action, there is thus a serious violation of Article 2.1 of the Charter.

The French Act here conflicts with other European legislation. For example, the European Union's Charter of Fundamental Rights stipulates that every worker is entitled to the limitation of maximum working hours (Article 31.2).

III. Increase in weekly working hours

3.1 The Revised Social Charter stipulates:

- ***Article 2 -- The right to just conditions of work***

With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:
1 -- to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit.

3.2 Act No 2003-47 of 17 January 2003 states inter alia:

- Annual overtime quota:

- Section 2,A, III:

A. -- The Labour Code shall be amended as follows:
III.-- The second paragraph of Article L. 212-6 shall be amended as follows:
"The overtime quota that may be worked after notification of the labour inspector may be fixed, by convention or extended collective branch agreement, at a figure higher or lower than that laid down in the decree provided for in the first paragraph."

- Section 2,A, II:

A. -- The Labour Code shall be amended as follows:
II. –In Article L. 212-5-1:
1. The first paragraph shall read as follows:
"The hours of overtime mentioned in Article L. 212-5 and worked within the agreed quota set according to the terms and conditions laid down in the second paragraph of Article L. 212-6 where such quota exists, or, in its absence, the quota set by the decree laid down in the first paragraph of Article L. 212-6, shall confer entitlement to a compulsory compensatory rest period whose duration shall be equal to 50% of the time worked as overtime over and above 41 hours in enterprises employing over 20 persons.";
2. The third paragraph shall read as follows:
"Overtime worked over and above the agreed quota set according to the terms and conditions laid down in the second paragraph of Article L. 212-6 where it exists, or, in its absence, the quota set by the decree provided for in the first paragraph of Article L. 212-6, shall confer entitlement to a compulsory compensatory rest period whose duration shall be equal to 50% of that overtime, in the case of enterprises employing not more than 20 persons, and 100% for enterprises employing over 20 persons."

Decree No 2002-1257 of 15 October 2002 raises the annual overtime quota per employee to 180 hours.

3.3 Assessment

This statutory provision (and provisional regulation) has the aim and effect of increasing the real duration of weekly work. Under the former legislation (Act No 2000-37 of 19 January 2000 and Decree No 2000-82 of 31 January 2000 replaced by Decree No 2001-941 of 15 October 2001), the statutory working week was 35 hours. The employer could require his employees to work for 35 hours + 2,77 hours (130 additional hours per year per employee/47 weeks of work per year), ie a real weekly duration of 37,46 hours at maximum.

Under the new legislation, the statutory working week is still 35 hours. However, the average number of overtime hours per week is raised to 3,83 hours (180 additional hours per year per employee/47 weeks work per year).

The employer can now therefore impose a real working week of 38,49 hours.

However, an extended collective agreement can now allow an annual overtime quota of over 180 hours and therefore a much longer real working week.

Accordingly, this new statutory provision substantially increases the real work duration while the Revised Social Charter stipulates that the working week must be gradually reduced.

Bearing in mind current trends in applying the Act, another collective complaint could later be brought by our organisation on the grounds of discrimination against female employees (see Article 20 of the Revised European Social Charter). The new statutory provisions have the effect of:

- creating unequal treatment over a long period in respect of increases for overtime for the first four hours worked over the statutory period between the employees of enterprises employing no more than 20 persons (statutory rate 10%) and employees of enterprises employing over 20 persons (statutory rate 25%);
- abolishing the right to a compensatory rest period for employees of enterprises having a staff of 11 to 20 employees.

These provisions violate the principle of equal treatment and constitute sex- based discrimination detrimental to female employees. They have a disproportionately unfavourable effect on the employment and working conditions of female employees (Article 20c of the Revised Social Charter). A greater proportion of women than men work in small firms, for example in enterprises employing 20 persons or fewer, and in sectors which tend to have no trade-union organisation. These provisions were not and are not justified because of their discriminatory effect on female employees.

Conclusion

By its provisions on working hours in Act No 2003-47 of 17 January 2003, the French government has violated several provisions of the Revised European Social Charter and dealt a grave blow to employees' basic acquired rights, which were tending towards the increased effectiveness of the fundamental social rights included in the letter and spirit of the provisions of this international treaty.

In conclusion, we denounce the serious steps backwards described above and ask the Committee responsible for monitoring and supervising the Charter to accept our complaint as admissible under the Revised Social Charter, to examine it and refer its conclusions to the Committee of Ministers so that the latter may take the appropriate decisions against the French government with the aim of encouraging social progress and the improvement of living and working conditions whose continued promotion is guaranteed by the Revised Social Charter.

Montreuil, 20 October 2003