**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**
**COMITE EUROPEEN DES DROITS SOCIAUX**

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

11 June 2003

# COMPLAINT No. 16/2003

## La Confédération Française de l'Encadrement – « CFE CGC »

## c. France

## registered at the Secretariat on 14 May 2003

**COMPLAINT OF VIOLATION OF THE REVISED EUROPEAN SOCIAL CHARTER**

**SECRETARIAT OF THE EUROPEAN SOCIAL CHARTER**

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**

## I. THE PARTIES

**THE COMPLAINANT ORGANISATION:**

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**THE HIGH CONTRACTING PARTY:** France.

## II. BACKGROUND TO THE COMPLAINT AND ARGUMENTS IN SUPPORT

Following the change of political majority resulting from the French presidential and parliamentary elections in May and June 2002, new legislation - the so-called Fillon II Act - was enacted on 17 January 2003, altering certain aspects of the Aubry I and II Acts on the reduction and reorganisation of working hours.

Certain provisions of the new Act, No. 2003-47 on wages and salaries, working time and employment promotion, were submitted to the Constitutional Council for review and approved by it in a decision of 13 January 2003 ( CC, 13 January 2003, dec. No. 2002-45 DC, JO 18 January p. 1084).

Since part of the new Act has been explicitly approved by the Constitutional Council and its remaining sections, which are not subject to Council review, cannot be ruled unconstitutional, the Act of 17 January 2003 can no longer be challenged in any domestic courts.

Nevertheless, certain of the Act's provisions are in breach of the revised European Social Charter (hereafter "revised Charter"), since they amount to discrimination against numerous employees that is unjustified and incompatible with the preambular paragraphs to the revised Charter, particularly articles 2, 4, 6 and 27, concerned respectively with the right to just conditions of work, the right to a fair remuneration, the right to bargain collectively and to strike and the right to equal treatment for workers with family responsibilities.

The first main consequence of the Act of 17 January 2003 was to extend the scope of the annual days worked (*forfait-jours*) provisions, under which certain employees' working time is defined in terms of days worked during the year rather than hours worked, either in the week or spread out over the year.

Moreover the Act has not only removed any real criteria for determining which employees might be concerned by the annual days worked provisions, with just a vague reference to autonomy of work scheduling, but has also made such decisions a matter for collective agreements, thus opening the way, with no real statutory control, to a substantial and arbitrary increase in the number of employees on whom these arrangements can be imposed.

This initial consequence of the Act is reinforced by the statutory approval and force it gives to agreements reached under previous legislation, by prohibiting any challenges to agreements concluded in breach of the law in force at the time if they would have been compatible with the new provisions. This would automatically be the case since under the new Act the categories of employee covered by the annual days worked provisions are determined by collective agreement.

This legalisation of previous agreements is not subject to any exceptions concerning judicial proceedings currently under way or where the courts have already reached a final decision.

Finally, under the Act periods spent by employees on call when they are not actually required to work are included in daily and weekly hours of rest and once more any

compensation has to be negotiated by collective bargaining. In the absence of any such agreement therefore on-call periods can be treated as hours of rest without any financial or other consideration.

## III. THE ADMISSIBILITY OF THE APPLICATION

France ratified the revised version of the European Social Charter on 7 May 1999 and it came into force on 1 July 1999. In doing so France ratified all the articles of the Charter, by which it is therefore bound without exception.

It has also ratified without reservations the Additional Protocol to the European Social Charter, which came into force on 1 July 1999, and the Rules of Procedure adopted by the European Committee of Social Rights (hereafter "the Committee") on 9 September 1999.

The Protocol instituted a system of collective complaints based on the European Social Charter, thereby extending the Charter's supervisory machinery.

It is therefore now possible to lodge collective complaints before the Committee.

Under Article 1c of the Protocol, Contracting Parties recognise the right of representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint to submit complaints alleging unsatisfactory application of the Charter.

This principle allows trade unions to bring actions relating to the Charter before the Committee.

The CFE CGC, which has lodged this complaint, is undoubtedly a nationally representative trade union, and therefore satisfies the conditions in Article 1c of the Protocol.

It is therefore entitled to lodge complaints of breaches of the Charter before the Committee.

Moreover in a previous decision dated 6 November 2000 the Committee ruled that a previous application by the complainant organisation against the Aubry II Act was clearly admissible and that for the purposes of this procedure the organisation was undoubtedly representative (see Appendix 1, p. 4 paragraph 6).

There can therefore be no doubts concerning the complaint's admissibility.

## IV. THE CHARTER VIOLATIONS UNDERLYING THE COMPLAINT

The Aubry II Act of 19 January 2000 introduced into French legislation the notion of annual days worked (*forfait-jours*), applicable to so-called "intermediate" managers.

The CFE-CGC referred these provisions to the Committee in Complaint No. 9/2000, on grounds of incompatibility with articles 2, 4, 6 and 27 of the Charter.

In its decision on the merits of 11 December 2001, the Committee found that certain of these rights had been violated, thereby recognising that the annual days worked system was incompatible with the Charter

In opposing the complaint the French Government unsuccessfully claimed that the annual days worked system only affected a very limited number of employees, which under Article 1.2 of the Charter would have automatically precluded any violation of the Charter.

In his partially dissenting opinion Mr Stein Evju disagreed with the Committee majority view of what constituted "workers concerned" for the purposes of Article 1.

Apart from the fact that these objections were not justified and in any case were not upheld by the Committee, which found that the annual days worked system would affect a very substantial number of managerial staff, the wording of the current legislation is conclusive since its aim, or at all events its effect, is to permit a considerable extension of annual days worked to more and more categories of employees, while leaving such decisions entirely to the social partners (employers' and employees' representatives), with no real statutory control.

The provisions of the Act of 17 January 2003 therefore simply exacerbate the incompatibility, recognised by the Committee in its previous decision, between the relevant French legislation and the Charter.

Nevertheless, the violations on which this complaint is based need to be considered in detail.

**1. Violation of Article 2 of the Charter: the right to just conditions of work**

a. Article 2 of the Charter provides that the parties shall ensure the effective exercise of the right to just conditions of work.

In particular, they must "provide for reasonable daily and weekly working hours, the working week to be progressively reduced".

By establishing the notion of annual days worked, the provisions of the Aubry II Act previously challenged before the Committee were already totally incompatible with this obligation.

By establishing a maximum limit of 217 days worked in the year, the Act effectively made it possible for the managerial staff concerned to be required to work 13 hours per day and 6 days out of 7, in other words 78 hours per week.

Admittedly the Act stipulated that Articles L 220-1, L 221-2 and L 221-4 of the Labour Code should apply to this category of workers. However this meant that these staff would only be entitled to a daily rest period of 11 hours, and a weekly rest period of 24 hours, the statutory minima.

The only limit applicable to employees subject to this system is in terms of days worked per year. There is no provision for maximum daily or weekly hours worked.

To the extent that the only limits that apply are those set down in Articles L 220-1, L 221-2 and L 221-4 these managers cannot be required to work more than 13 hours per day or more than 6 days out of 7.

However this equally implies that they can be legally required to work 13 hours per day and 6 days out of 7, so long as they do not work more than 217 days in the year. In theory, therefore, so long as they do not exceed these 217 days, managers on the annual days worked system may work 78 hours per week.

The legislation instituting this annual days worked system therefore discriminates unacceptably against these managers, for whom the Act's consequences are not to reduce weekly working hours, as in the case of all other employees, but rather to raise them beyond the 39 hours per week laid down in the previous legislation.

Although the Aubry II Act set out to reduce the working week for everyone, thus offering employees more time to spend with their families and on leisure pursuits, it has clearly been shown to have the opposite effect on managerial staff, despite the pious wishes expressed by the Minister of Employment and Solidarity in parliament (see National Assembly debates, second session, 30 November 1999, p. 10299).

In practice, the annual days worked provisions allow employers to impose extremely onerous work schedules on managers that bear no resemblance to those of other employees since, as has been seen, these staff can be required to work 13 hour days and 6 day weeks.

These provisions are undoubtedly in breach of Article 2 of the European Social Charter, which requires reasonable daily and weekly working hours, whereas the aim and consequence of the annual days worked provisions are precisely to abolish any restrictions on the daily and weekly working hours of a single category of employees when those of the rest are being strengthened.

Finally one of the preambular paragraphs of the revised Charter states that workers should benefit from social rights without discrimination.

As has been seen, as well as violating the Charter provisions requiring limits to daily and weekly hours worked, the annual days worked system clearly discriminates against the "intermediate" managers concerned since it makes it possible for these employees to be required to work 50 or 60, or even up to 78, hours per week when other employees' weekly working hours have been reduced to 35.

Such unequal treatment undoubtedly constitutes unjustified discrimination, with regard to both the organisation of work schedules and working conditions, including the right to safe and healthy working conditions and to the protection of health, enshrined respectively in articles 3 and 11 of the Charter.

There are no any real differences in situation to justify such separate treatment. Even when the relative autonomy of intermediate mangers is taken into account this cannot sufficiently justify different treatment that is patently disproportionate to any differences in situation, and thus discriminatory.

In its decision of 11 December 2001 the Committee heeded the objective and convincing arguments submitted to it and clearly acknowledged that as the annual days worked system initiated by the Aubry II Act affected a significant number of employees it came within the scope of the Charter, and that it was in breach of Article 2 because it failed to impose any reasonable limit on daily and weekly working hours (decision of 11 December 2003, Appendix 4, p. 9, i).

Moreover, in finding that there had been a violation of Article 2, the Committee rightly observed that that although the law referred to collective agreements it did not require that such agreements provide for a maximum daily or weekly limit. It concluded that "the guarantees afforded by collective bargaining are not sufficient to comply with Article 2
para. 1" (p. 10, paragraph 34).

The Committee further noted that the collective agreements provided for in the legislation could be reached at enterprise level, with no specific guarantees since the procedure for contesting collective agreements was too random.

b. All these arguments pertaining to the Aubry II Act apply, *mutatis mutandis*, with equal if not greater force to the Fillon II Act.

Far from bringing the annual days worked arrangements into line with the Charter and drawing the necessary conclusions from the Committee's finding of a breach of the Charter, this Act has further aggravated the situation.

Firstly, as noted, the Fillon II Act has considerably extended the very notion of which managerial staff are eligible for the annual days worked system by deleting all reference to the impossibility of predetermining working time, which was formerly the main criterion for identifying the categories concerned, and confining itself to a vague reference to autonomy of work scheduling, (section 2 VIII of the Act of 17 January 2003, Appendix 3).

Moreover, the law now leaves it entirely to the social partners to decide which categories of employees might "benefit" from the annual days worked system, by stipulating that the categories of management staff concerned shall be determined by collective agreement, with reference to their autonomy in organising their work schedule, (section 2, referred to above).

Since the Committee found that under the Aubry II Act the safeguards applied to collective bargaining were inadequate it has all the more reason to reach the same conclusion in the current case.

As legal specialists have demonstrated (see, for example, F. Favennec-Hery: *Mutations dans le droit de la durée du travail*, Droit social, January 2003 p. 33 ff. and especially p. 35 b), the main effect of the Fillon II Act is to increase the number of

persons covered by the annual days worked arrangements, while at the same time granting the social partners full authority to extend these provisions to more and more employees, simply by reference to their autonomy in organising their work schedule, with no statutory restriction on daily or weekly working hours.

As the previously cited author notes, the definition becomes so broad that it removes any distinction between managers on the weekly hours system and those subject to annual days worked. The author concludes that the latter arrangement is becoming standard (Droit social, January 2003 p. 36 c).

Given the largely unregulated authority transferred to the social partners, right down to the level of individual firms, decisions about which categories of employees should be affected are inevitably subject to arbitrary factors and the relative strength of the various interests concerned in each enterprise.

This can only lead to discrimination, since employees in similar situations may be subject to totally different arrangements depending on whether or not the social partners consider they have autonomy in organising their work schedule.

The Act's simple and extremely vague reference to "autonomy in organising their work schedule" certainly fails to provide an adequate safeguard or statutory basis for the power delegated to the social partners since the notion has no real legal meaning and can apply indiscriminately to all managerial staff, or even to manual workers in modern production systems.

This is precisely the point made by the complainant trade union in its additional observations to the Council of Europe in support of its previous complaint, based on the difference of treatment resulting from a decision of the *Conseil d'Etat* of 28 March 2001, concerning overtime payments.

The outcome of this decision was that management staff on the weekly hours system were entitled to overtime payments whereas by definition those on the annual days worked system, whose total hours worked were not calculated, were not eligible.

The union argued that this would inevitably encourage employers to make maximum use of the annual days worked system to avoid paying overtime.

This is precisely the purpose, or at all events the effect, of the Fillon II Act, which makes any distinction between various categories of managerial staff meaningless. All managers are now liable to come under the annual days worked umbrella since they can be considered to enjoy autonomy in organising their work schedule. As such they are deprived of any assurance that they will be subject to reasonable limits on their daily and weekly working hours.

The Act clearly breaches Article 2 of the revised Charter as its effect is to extend considerably, with no safeguards or restrictions and in a way that encourages arbitrariness and discrimination, a system that makes it perfectly legal for some employees to work between 60 and 78 hours per week while others only work 35 hours.

The patent abuses observed since the introduction of the system in such varied sectors as distribution, catering and aviation, where certain staff have been forced to work more than 60 hours in a week, are enough to show that far from being illusory the large-scale switch of managerial work to an annual days worked basis, requiring those concerned to accept excessively long working weeks, is very much a reality.

Moreover a survey of management staff after the introduction of the annual days worked system clearly shows that they have experienced a considerable increase in their workload. Eighty-one percent of the managers interviewed thought the workload was greater, and of these 43% thought it was much greater (statistical survey of management staff perceptions of the statutory reduction in working hours, Appendix 5).

Of the managers interviewed, 44.73% thought that the introduction of the statutory reduction in working hours, and thus essentially of the annual days worked system, had served to increase their workload and 45.27% had experienced a higher level of stress. However this is not all.

c. The Fillon II Act has not only extended the use of the annual days worked system and given the social partners total authority to apply it to all management staff without any safeguards, but also confirmed and legalised agreements reached under the Aubry II Act that were not compatible with the law in force at the time, with no exceptions even for cases currently before the courts or where a final judicial decision has been handed down.

In other words the law's effect is to give retroactive legal force to unlawful collective agreements on annual days worked even if those agreements have been ruled unlawful by the courts, which can only lead to still more dubious but legally-sanctioned arrangements, to the detriment of the basic principle of certainty of law, which applies to all citizens.

Although Parliament is certainly not prevented from passing explicitly retroactive legislation of from legalising contracts retrospectively, in other words interfering with contracts lawfully entered into, such interference must at the very least, as the Constitutional Council has stated, be justified by adequate grounds of the general interest.

Admittedly in this case the Constitutional Council has ruled that the contested provision is constitutional but it has to be acknowledged that this parliamentary validation inevitably affects the right of appeal and the courts' discretionary powers, in other words a constitutionally enshrined human rights safeguards and the separation of powers (see X. Pretot: "*Le Conseil constitutionnel and les sources du droit du travail: l'articulation de la loi and de la négociation collective"* (the Constitutional Council and sources of labour law: the relationship between the law and collective bargaining): Dr. soc. March 2003 pp. 263 and 264).

The European Court of Human Rights, which is quite prepared to rule that certain laws to legalise existing practices, even if approved by the Constitutional Council, are incompatible with fundamental principles, only accepts the validity of such

legislation in the civil law field if it is justified by "compelling grounds of the general interest" (Judgment of 28 Oct. 1999 application nos. 24846/94, 34165/96, 34173/96 v. France).

According to the Court: "the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute".

Based on these principles, the Constitutional Council generally makes it a condition of its approval for laws to legalise existing practices that they are not intended to legalise actions or decisions set aside by the courts and that they do not infringe the authority of final court decisions (see X. Pretot: "*Les validations législatives, de la Constitution à la Convention européenne des droits de l'Homme*" (statutory legalisation of existing practices: from the Constitution to the European Convention of Human Rights): Rev. Droit Public 1998 p. 11 ff.).

The Constitutional Council stated quite explicitly in its decision no. 97-393 of 18 December 1997 (Rec. 1997 p. 320) that "while Parliament may, as it is empowered to do, legalise an administrative action or decision on grounds of the general interest or for constitutional reasons, this is conditional on respect for final court decisions".

The *Conseil d'Etat* has also ruled that a law to legalise existing practice could not alter the substance of a final court decision (see CE, Ass. 27 Oct. 1995, min. Log. v . Mattio, AJDA 1996, p. 57).

Mr Bergeal, a law officer at the *Conseil d'Etat*, recently stated that the rulings of the various upper courts are all tending to take a stricter attitude towards laws to legalise existing practices (see C. Bergeal, conclusions before the *Conseil d'Etat*, Combined Court 11 July 2001, Ministry of Defence, application 219312, RFDA 2001, p. 1047).

This has subsequently been confirmed. For example in a recent decision (24 January 2003), the Court of Cassation, sitting as a full court and confirming the approach adopted by its social and employment division, laid down very strict conditions for such legalisation. Although in the particular cases under consideration it found that the conditions had been met it nevertheless maintained, like the European Court, that parliament must have compelling grounds of the general interest before it can legalise retrospectively a collective agreement and make its legislation applicable to cases currently before the courts (Full Court, 24 January 2003, RJS 3/03 no. 355).

Moreover, the legislation at issue in these cases had taken care to explicitly exclude final court decisions, in other words not to challenge the authority of such decisions.

Yet Section 16 of the Fillon II Act establishes in very general terms the rule that under the Act extended branch collective agreements or individual enterprise or establishment-based agreements reached in application of the Guidelines and Incentives for a Reduction in Working Hours Act of 13 June 1998 and the Negotiated Reduction of Working Time Act of 19 January 2000 are deemed to have been properly executed.

There is not the slightest trace in the Act of any exceptions for cases currently before the courts or, above all, court decisions setting aside collective agreements introducing annual days worked systems that were unlawful under the legislation in force at the time.

What makes this total absence of exceptions regarding final court decisions all the more surprising is the fact that in its attempts to reverse the Court of Cassation's case-law on negotiated wage and salary supplements in medical and social establishments (Section 8 of the Act), parliament carefully exempted final court decisions and also stated explicitly that this provision would not apply to court cases outstanding on 18 September 2002.

It is clear therefore that the absence of exceptions regarding the legalisation of collective agreements on the annual days worked system concluded under the previous legislation is not a parliamentary oversight but a deliberate attempt to give these agreements legal force, notwithstanding any outstanding court actions or even court decisions overruling such agreements.

This is incompatible with the case-law of the European Court of Human Rights, the Constitutional Council, the *Conseil d'Etat* and the Court of Cassation, since it is difficult to discern any compelling grounds of the general interest in cases where retrospective legalisation flouts final court decisions. The result is clearly to prevent any challenges to unlawful annual days worked agreements, particularly as they impose no weekly or daily limits on working hours.

The effect of this retrospective legalisation of agreements in disregard of court decisions is to "secure" the introduction of annual days worked systems that are incompatible with the Charter's preambular paragraphs and as such it is in violation of the Charter.

d. From another standpoint the Fillon II Act also infringes the right to reasonable work time by counting on-call periods as periods of rest.

Section 3 of the Fillon II Act amends Article 212-4 b of the Labour Code, which now provides that with the exception of periods actually spent working on-call periods shall be reckoned part of the daily and weekly rest periods referred to in articles L 220-1 and L 221-4.

Counting on-call periods as periods of rest, in other words treating the two as the same, is directly contrary to all the relevant principles laid down by the Court of Justice of the European Communities or the highest French courts.

The CJEC considers that although only time linked to the actual provision of services must be regarded as working time, on-call periods cannot be deemed to be rest periods, which require employees to be totally exempt, directly or indirectly, from undertaking duties for their employers, even if these are specific or occasional (see CJEC, 3 Oct. 2000, case C-303/98).

Similarly, in accordance with European case-law the Court of Cassation has recently ruled that time spent on call is not rest time (Soc. 2002, TPS 2002, comm. 297).

In certain cases it has even ruled that time spent in attendance for supervisory purposes constituted real work time, because employees had to remain at their employers' disposal and follow their instructions, and were therefore unable to go about their own affairs (Soc. 26 June 2002).

In line with the aforementioned case-law, established legal theory holds that on-call duty and rest periods cannot be equated since employees on call are not entirely free to use their time as they wish (see E. Ray: "*Les astreintes, un temps du troisième type"* (on-call duty, a third type of employee time), Dr. soc. March 1999 p. 253; P. Waquet, Dr soc. 1998, p. 969).

In an authoritative opinion, Mr Pierre Lyon-Caen, Advocate-General at the Court of Cassation, has stated unambiguously that rest periods are irreducible and are incompatible with any obligation to be available for duty, in other words on-call periods cannot be deemed part of a rest period (RJS 12/02 p. 997).

The Fillon II Act therefore patently violates the right to reasonable work time by stipulating that on-call periods will count as part of the minimum rest period, thus once again challenging the authority of the courts.

The Act not only authorises the widespread use of the annual days worked system with no daily or weekly restrictions on working hours but also sanctions non-compliance with minimum, mandatory safeguards governing the daily and weekly hours worked by all employees by allowing on-call periods in which employees are unable freely to pursue their own personal activities to be included in minimum rest periods.

The foregoing points demonstrate that sections 2 VIII and 16 of the Fillon II Act, even more than the Aubry II Act, whose undesirable effects it reinforces, are in breach of Article 2 of the European Social Charter.

However the Act also violates Article 4 of the revised Charter, which embodies the right to a fair remuneration.

**2. Violation of Article 4 of the Charter: the right to a fair remuneration**

a. As the trade union noted in its previous complaint, No. 9/2000, the Court of Cassation has stated clearly that management status is not sufficient to exclude entitlement to overtime payments (Soc. 14 June 1990, Bull. V, no. 285), a right that is also explicitly recognised by the Charter in connection with the right to a fair remuneration.

Yet by its very nature the annual days worked system directly deprives many employees of higher overtime payments because the system precludes any calculation of daily or weekly hours worked.

This exclusion is in direct breach of the right to a fair remuneration enshrined in Article 4 of the Charter and now in Article 9 of the Charter of Fundamental Social Rights.

The Committee also recognised this unambiguously in its decision of 11 December 2001.

It noted that the French Government acknowledged that "the law institutes a system which is not subject to the obligation to pay for overtime work" (decision of 11 December 2001, p. 11 paragraph 44).

The Committee stated that "the number hours of work performed by managers who come under the annual working days system and which, under the flexible working time system, are not paid at a higher rate is abnormally high. In such circumstances, a reference period of one year is excessive. The situation is therefore contrary to Article 4 para. 2 of the Revised Charter" (decision of 11 December 2001, p. 12 paragraph 45).

It also concluded that, contrary to what the government maintained, employees' right to bring legal proceedings in response to employer abuses was certainly not by itself an adequate safeguard.

Moreover as the complainant pointed out, this exclusion from entitlement to overtime payments necessarily discriminates against managers on the annual days worked system compared with those still working a weekly number of hours, whose entitlement to overtime payments has been confirmed by the courts, in particular the *Conseil d'Etat*.

In its additional observations in support of complaint No. 9/2000, the union also argued that the unjustified difference of treatment between managers on the two systems was not only discriminatory with regard to overtime payments but also had the undesirable effect of encouraging employers to minimise the use of the weekly hours system in favour of annual days worked, to avoid paying overtime.

The result can only be a large-scale transfer of work to managers on the annual days worked system, with the real risk that they will be required to work 50-75 hours per week.

Far from correcting this situation and the resulting violation of Article 4 of the Charter the Fillon II Act has actually made it worse, by authorising an unrestricted and arbitrary expansion of the annual days worked system.

Henceforth under this legislation the exception will become the rule and more and more managers will lose their eligibility for overtime, while the diminishing numbers who continue to work a fixed number of weekly hours will continue to receive overtime payments.

In other words the Fillon II Act has led to a major breach of the right to a fair remuneration, together with widespread discrimination as to eligibility.

Since the Committee found that the Aubry II Act violated Article 4 of the revised Charter the same must apply with even more force to the Fillon II Act.

b. The Fillon II Act also entails a further violation of Article 4 by adding on-call time to rest time. As noted such a process is contrary to all principles of equity and breaches the right to reasonable work time.

However it also infringes the right to a fair remuneration. Even when it cannot be counted as time worked, on-call time is not the same as rest time and cannot be equated with it. In accordance with the right to a fair remuneration, if on-call time is not paid according to the work undertaken there must at least be some form of compensation (see Soc. 30 June 1998, RJS 6/1998, no. 867).

Until the advent of the new Act, the legislation in force took account of the particular nature of on-call duties and respected the right to a fair remuneration, whereby employers could not require their staff to be available without compensation, be it financial remuneration or additional time off.

Although the legislation left it to the social partners to agree the precise form of this compensation, which might seem to be inadequate in terms of employee safeguards, the principle of such compensation at least offered a clear minimum level of protection.

The Fillon II Act poses a direct and radical challenge to all these principles.

Once it becomes possible to count on-call time as rest time it becomes difficult to arrange compensation in the form of additional time off because the distinction between on-call and rest time, and thus the possibility of receiving compensatory time off, disappears.

If there is no provision in collective agreements for financial compensation for on-call time, which the law does not require, those concerned will not be eligible for any form of compensation, since in practice the Fillon II Act allows on-call time to be considered purely as part of minimum rest time.

In every respect the Fillon II Act is in violation of the right to a fair remuneration embodied in Article 4 of the revised Charter.

### 3. Violation of Article 6 of the Charter: the right to bargain collectively and the right to strike

Article 6 of the European Social Charter establishes the right to bargain collectively. The contracting parties also undertake to promote joint consultation and negotiation between workers and employers.

The Charter also expressly states that the parties "*recognise the right of workers and employers to collective action in cases of conflicts of interest,* ***including the right to strike****, subject to obligations that might arise out of collective agreements previously entered into*".

What makes this explicit recognition of the right to strike all the more noteworthy is that it is very rare at international level.

The annual days worked system's method of counting work and rest periods in days or half-days discriminates against the mangers concerned with regard to their right to strike.

The Fillon II Act extended the scope of the annual days worked provisions and left unchanged the Aubry II Act's provisions regarding full and half-day units of measurement for the employees concerned.

It can therefore be inferred that under the annual days worked system the work or rest time of managers can still not be calculated in hours but only in days, or at best half days.

This is the logical consequence of the disappearance of any reference to daily or weekly hours for measuring managers' working time. The effect on employment rights and the right to strike could be very serious.

If managers' work or rest time is only counted in days or half-days, any hour not worked will clearly be counted as a half day's rest. The first hour not worked is therefore the equivalent of a half day of rest since more detailed calculations by the hour are not possible.

It follows that if all the employees concerned withdraw their labour and exercise their right to strike for an hour or an hour and a half, those on the weekly hours system will be debited with the exact time they spent on strike whereas managers on the annual days worked system will lose a full half-day.

Similarly if employees simply strike for two hours of a working day - the first hour of the morning and the last of the afternoon - annual days worked managers will be deemed to have been on strike all day. This is a real impediment to these managers' right to strike and as such is an effective deterrent.

Once again managers on annual days worked suffer unacceptable discrimination regarding a critical and hard-won employment right.

Discrimination arises from the fact that whereas an hour's strike will be counted precisely as such for ordinary employees, for managers on annual days worked it will equate with a half day's work, leading to a totally unfair loss of earnings. It therefore acts as a deterrent and thus effectively discriminates in that it interferes with these managers' right to strike.

These statutory provisions are therefore in breach of Article 6 of the European Social Charter.

The union is well aware that the Committee dismissed this complaint in its decision of 11 December 2001, on the grounds that it had received no concrete examples of cases where the problem had arisen and that there was insufficient evidence that

striking employees on the annual days worked system would lose more pay than was strictly justified by the length of stoppage.

However this assessment should be re-evaluated since, as the complainant has shown, employees on the annual days worked system will necessarily be affected in the manner described and by definition it is impossible to calculate their period of work in terms of hours.

In these circumstances it is difficult to see how employers can withhold pay equivalent to just a few hours of strike for employees whose work cannot be measured in hours.

Since the introduction of the annual days worked system certain strike movements, particularly in the civil aviation field, have confirmed the complainant's fears.

Moreover as the complainant noted in reply to the Government's observations on complaint No. 9/2000, the French Government's position on this point is totally contradictory.

It is illogical to state that, as a matter of principle and by its very nature, counting the number of hours worked by employees on the annual days worked system is impossible in the case of overtime payments, and then to claim that such a calculation would be possible to enable these employees to exercise their right to strike without discrimination in the withholding of pay.

It is clear therefore that exercising their right to strike exposes employees on the annual days worked system to an excessively dissuasive and discriminatory loss of pay, in breach of a fundamental right embodied in Article 6 of the revised Charter.

As well as extending the annual days worked system without establishing any limits or safeguards and legalising previously unlawful agreements with no exceptions even for cases already decided in the courts, the Fillon II Act is therefore also in violation of Article 6 of the revised Social Charter.

**4. Violation of Article 27 of the Charter: the right of workers with family responsibilities to equal opportunities and equal treatment**

a. The complainant is aware that the Committee found that there had been no violation when it examined complaint No. 9/2000 on the effects of the Aubry II Act.

However, apart from the fact that the Committee's assessment may changed, the Fillon II Act significantly worsens the situation of workers with family responsibilities, particularly by counting on-call time as rest time.

It should first be noted that in Social Charter monograph No. 6 on employment conditions the Committee states quite clearly that the working time provision "seeks to secure respect for the private and family life of the worker, since working time should neither be too long nor so variable as to unduly disrupt the rest of the worker’s time" (Monograph No. 6, I, paragraph 6).

This highly practical consideration, coupled with a real concern for the situation of families with family responsibilities, needs to be borne firmly in mind.

Moreover, one of the main concerns of successive acts concerned with reducing and reorganising working time, including the Fillon II Act, has been to improve the balance between working and private, particularly family, lives.

In its previous complaint the trade union referred to the statement by the then minister that young managers wishing to reconcile professional and family lives could now do so, something that until then had been far from possible (Parliamentary debates, National Assembly, 2nd sitting of 30 Nov. 1999, JO p. 10298 and 10299).

We are therefore unable to agree with the Committee's argument in its decision of 11 December 2001 that Article 27 of the revised Social Charter required states to take measures in favour of workers with family responsibilities, which was not the direct purpose of the Act, and that the complainant trade union's complaint did not concern the Government's failure to take positive measures.

If, as the Committee acknowledged, Article 27 requires states to take measures in favour of workers with family responsibilities, it is even more incumbent on them not to take negative or discriminatory measures detrimental to them.

Clearly the first step is, at the very least, not to make it still more difficult to reconcile professional activities and family responsibilities.

Having found that the annual days worked system violated the right to reasonable working hours and opened up the possibility of 60 to 78 hour working weeks, the Committee could not at the same time find that such a situation did not infringe the same employees' right to measures to help them meet their family responsibilities or discriminate against them with regard to this right.

Since the effect of the Fillon II Act is to extend the annual days worked system, with no safeguards or restrictions, it must inevitably be in breach of Article 27 of the revised Charter, by increasing still further the number of families who can no longer meet their family responsibilities satisfactorily.

b. The Committee must also carefully re-examine this question in the light of the modifications introduced by the Fillon II Act, particularly concerning on-call duties.

By treating on-call time as rest time the Act will have a serious impact on all employees, who will not even be entitled to the minimum daily and weekly rest periods, the only time they can count on as being strictly set aside for their private and family lives.

This measure is therefore a flagrant infringement of employees' right to family life, since by definition on-call periods are ones in which employees cannot freely pursue their own personal activities, in particular their family lives and associated responsibilities.

In other words, the Fillon II Act directly contravenes Article 27 of the revised Charter and the requirement for states to takes steps to assist workers with family responsibilities.

## V. THE OBJECT OF THE COMPLAINT AND CLAIM FOR JUST SATISFACTION

Having regard to the foregoing arguments, the complainant trade union asks the European Committee of Social Rights to rule that the Fillon II Act, No. 2003-47 of 17 January 2003, in particular its sections 2 VIII, 3 and 16, are incompatible with articles 2, 4, 6 and 27 of the revised European Social Charter and as such discriminate unlawfully against the entire management profession.

Moreover, since the Additional Protocol to the Charter authorises representative national organisations to submit complaints these complainants are justified in seeking repayment of expenses thereby incurred.

Pursuant to Article 41 of the European Convention on Human Rights, such a payment is justified as a being a key aspect of the practical application of the principle of access to justice.

The complainant trade union therefore asks the Committee to order France to pay it the sum of EUR 9 000 for expenses incurred in preparing this complaint, being made up of counsel's fees and the expenses of the complainant's legal advisers, who have been required to devote much time to the matter.

**ON THESE GROUNDS**

The European Committee of Social Rights is asked:

- to rule that the Fillon II Act, No. 2003-47 of 17 January 2003, in particular its sections 2 VIII, 3 and 16, are incompatible with articles 2, 4, 6 and 27 of the revised European Social Charter and as such discriminate unlawfully against the entire management profession;

- to order France to pay the CFE-CGC trade union the sum of EUR 9 000 for non-recurring expenses incurred in connection with this complaint.

## VI. APPENDICES

1. Statute of the CFE-CGC

2. Constitutional Council decision of 13 January 2003

3. Act No. 2003-47 on wages and salaries, working time and employment promotion

4. Committee decision of 11 December 2001

5. Statistical survey on the reduction in working hours among management staff

6. Authority granted by the President of the CFE-CGC