EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COMITE EUROPEEN DES DROITS SOCIAUX

3 November 2003

COMPLAINT N° 16/2003

Confédération Française de l'Encadrement – "CFE CGC" v. France

Observations from the French Government on the merits

registered on 24 October 2003

(TRANSLATION)

FRENCH REPUBLIC

PERMANENT DELEGATION OF FRANCE
TO THE COUNCIL OF EUROPE

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European Committee of Social Rights

NOTE VERBALE

The Permanent Delegation of France to the Council of Europe presents its compliments to the Council of Europe Secretariat and is honoured to submit, further to its letter of 22 September 2003, the French Government's observations on the merits of the complaint lodged with the European Committee of Social Rights by the *Confédération française de l'Encadrement* (French Managerial Staff Trade Union Confederation).

The Permanent Delegation of France to the Council of Europe avails itself of this opportunity to renew to the Council of Europe Secretariat the assurance of its highest consideration.

Strasbourg, 23 October 2003

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Observations of the French Government on the merits of complaint No. 16/2003 from the *Confédération française de l'Encadrement* (French Managerial Staff Trade Union Confederation) before the European Committee of Social Rights

In a decision of 16 June 2003, the European Committee of Social Rights declared admissible the complaint submitted on 14 May 2003 by the *Confédération Française de l'Encadrement* (French Managerial Staff Trade Union Confederation - CFE-CGC) against France concerning Act No. 2003-47 of 17 January 2003 on wages and salaries, working time and employment promotion, particular on the grounds that "*the present complaint is directed against a new legislation (Act n° 2003-47 of 17 January 2003) which repeats only in part the provisions complained of in Collective Complaint No. 9/2000 – CFE-CGC v. France*".

In the complaint, the Confederation asks the Committee to rule that certain provisions of Act No. 2003-47 of 17 January 2003 on wages and salaries, working time and employment promotion are incompatible with articles 2, 4, 6 and 27 of the revised European Social Charter and to order France to pay EUR 9 000 for non-recurring expenses incurred in connection with this complaint.

The French Government wishes to make the following observations on the merits of the complaint.

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I. THE SUBJECT OF THE COMPLAINT

The complainant maintains that certain provisions of Act No. 2003-47 of 17 January 2003 breach articles 2, 4, 6 and 27 of the revised European Social Charter, concerned with, respectively, 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 Federation argues, firstly, that the Act of 17 January 2003 extends the scope of the annual days worked (*forfait-jours*) system.

Secondly, it is maintained, the Act gives statutory approval and force to agreements reached under previous legislation, despite the absence of adequate grounds of public interest to justify such parliamentary validation.

Finally, the CFE-CGC criticises the Act's provisions relating to on-call periods, which allegedly violate the right to reasonable work time by stipulating that on-

call periods will count as part of the minimum rest period unless those concerned are actually working.

II. THE MERITS OF THE COMPLAINT

1. Complaint No. 9/2000 of the CFE-CGC

It should first be noted that the CFE-CGC lodged an initial complaint, No. 9/2000, regarding certain provisions of Act no 2000-37 of 19 January 2000 on the negotiated reduction of working time (known as the Aubry II Act), particularly the annual days worked (*forfait-jours*) provisions applicable to certain categories of managers.

The complaint led to a report of the European Committee of Social Rights of 11 December 2001, which found that as regards certain aspects of the annual days worked system for certain categories of manager, the Act of 19 January 2000 was in breach of Charter requirements, particularly because it failed to provide a precise legal framework.

The report was followed by a Council of Europe Committee of Ministers Resolution of 26 March 2002. The Resolution did not refer to any violations of the European Social Charter arising from the aforementioned arrangements for certain categories of manager under the annual days worked provisions of the Act of 19 January 2000.

In contrast, it noted that:

- the aim of the measures in question was to enable autonomous managerial staff to benefit from a real reduction in their working time;

- the managerial staff likely to be involved in annual days worked agreements represented only a minority of employees (approximately 5%);

- under French law, such working time schemes had to be the subject of collective agreements between the social partners;

- the provisions of ordinary law on working time had been brought into line with the annual days worked system, by establishing a maximum annual number of days worked and leaving it to employees and employers to monitor actual working time;

- the pay of the managerial staff concerned was commensurate with their workload and working time.

In the light of all these factors, it has to be said that the Act of 17 January 2003 has not altered any of the safeguards attached to the annual days worked arrangements. The same logic applies.

The only change concerns the criteria for defining these managerial staff in collective agreements.

Formerly there were three cumulative criteria for defining managerial staff qualifying for annual days worked agreements. They were staff whose working hours could not be predetermined because of the nature of their duties and the responsibilities they exercised and their degree of autonomy in organising their work schedule.

The new definition only takes account of the really critical criterion for deciding to which managerial staff annual days worked arrangements should apply, namely that of autonomy. The Act of 17 January 2003 therefore amends Article 212-15-3 III of the Labour Code to read "*the agreement shall define the categories of managerial staff concerned, having regard to their degree of autonomy in organising their work schedule*" (the remainder of the Article is unchanged).

2. The alleged violation of Article 2 of the Charter concerning the right to just conditions of work

2.1 The complainant considers firstly that the annual days worked system for managerial staff prevents the establishment of reasonable limits on daily and weekly working hours or a gradual reduction in the working week and that the Act of 17 January 2003 aggravates the situation by extending the scope of these arrangements to all autonomous managers.

2.1.1 The complaint repeats the arguments deployed in complaint 9/2000. As already shown in the past, these arguments are without foundation.

In practice, the legislation establishes conditions for the application of the annual days worked system.

The first concerns the obligation to conclude a branch or enterprise agreement. The complainant trade union maintains that this does not constitute a specific safeguard. This is not the case. Many branch agreements have specified the categories of managerial staff that qualify for annual days worked agreements and enterprise agreements are bound by these provisions.

Moreover, and as has already been indicated, the other mandatory clauses remain in force, particularly those concerned with monitoring the organisation of work, the number of days worked and the resulting workload.

In addition, the practical arrangements governing daily and weekly rest periods must still be determined by collective agreement.

Finally, the general principle that managerial staff "must benefit from a real reduction in their working time" still remains valid.

In this context, it should be noted that following the Act of 17 January 2003 branch negotiations have led to numerous agreements setting out the arrangements for monitoring the workload of managerial staff on the annual days worked system, for example through half-yearly or yearly meetings between those concerned and their superiors. Such agreements are to be found in the branches of the import-export sector, wholesaling, the wood industry and the fish trade. Others provide for a maximum ten hours per day, as in the book printing sector, or specify the hours at which half days must start and finish, as in the do-it-yourself sector.

The complainant's arguments must therefore be rejected.

2.1.2 The complainant also maintains that the changes in the Act of 17 January 2003 will considerably increase the number of managerial staff on the annual days worked system.

In fact the only change instituted by the Act concerns the definition of which managerial staff can conclude annual days worked agreements. This now concerns "categories of managerial staff …, having regard to their degree of autonomy in organising their work schedule" (Section 3 of the Act of 17 January 2003 and Article 212-15-3 III of the Labour Code).

The complainant also argues that this change entails such a broadening of the range of managerial staff concerned that employers will be encouraged to make maximum use of the annual days worked provisions, and to conclude agreements with all their managerial staff employees.

In fact the Act of 17 January 2003 refers to the sole really critical criterion applicable in such cases, that of the autonomy of the staff concerned to organise their work schedules.

This criterion is also compatible with Community law. Article 17 (Derogations) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time authorises member states to derogate from the Directive's provisions (particularly concerning daily rests, breaks and weekly rest periods) in the case of managing executives or other persons with autonomous decision-taking powers. Admittedly the autonomy criterion may appear to be more flexible but the aim is to secure the most appropriate application of this criterion by the occupational branches. Besides, the three categories of

managerial staff remain unaltered and the criterion of autonomy in organising their work schedule only applies to the third category.

As a result, only a certain proportion of managerial staff can conclude annual days worked agreements; statistically speaking far fewer than 10% of employees since managerial staff themselves only represent about 10% of the active population.

Finally, since this definition of managerial staff is compatible with Community law, accepting the complainant's argument would quite unjustifiably place that Community legislation in conflict with the Social Charter, moreover in connection with national legislation that offers managerial staff appropriate compensation.

2.1.3. The complainant argues further that the autonomy criterion is "vague" and that it will now be possible to conclude annual days worked agreements with all managerial staff.

This is incorrect. The Act of 17 January 2003 has never cast doubt on the distinction between the three previous categories of managerial staff, namely:

- senior managers
- integrated managers subject to normal working hours
- other managers, who may conclude either hourly agreements or, if they are autonomous, annual days worked agreements.

Managers who do not have sufficient autonomy to organise their own working hours, for example because their responsibilities do not allow them to determine the hours or days they work in the enterprise, cannot therefore conclude annual days worked agreements.

The Act has even clarified the notion of integrated managers, who are now defined as those whose duties are such as to require them to work the normal hours applicable to their particular shop floor, department or team. If the only flexibility permitted is to be present at the place of work every day, but a little in advance of or later than the other members of the team or department, this is not deemed to represent sufficient autonomy to qualify for an annual days worked agreement.

The Act of 17 January 2003 has not modified any of the clauses that define which managerial staff are affected by annual days worked. The arguments concerning possible abuses or the incentive to avoid paying overtime must therefore be rejected.

Finally Article L.212-15-4 of the Labour Code offers the managerial staff concerned adequate safeguards concerning their level of pay.

2.2 Secondly, the complainant considers that the retrospective legalisation of agreements in the Act of 17 January 2003 breaches the Social Charter, because there are no grounds of general interest

The provisions in question, in particular Section 16 of the Act, stipulate that extended branch or enterprise collective agreements signed under Acts No. 98-461 of 13 June 1998 and No. 2000-37 of 19 January 2000 are deemed to have been properly executed under the Act of 17 January 2003. Section 16 is intended to avoid challenges to the provisions of branch and enterprise agreements concluded under the 1998 and 2000 legislation, which had no legal basis at the time of their signature but are given one by the new Act.

Section 16 thus gives certain clauses of these agreements a statutory basis in the new law, provided of course that they are compatible with it. On the other hand, it certainly does not validate unlawful provisions, which therefore have no legal basis under the new legislation, or give retrospective validity to provisions that were unlawful when they were signed. These will only be deemed valid from the date that the new legislation came into force.

This was the finding of the Constitutional Council, to which Sections 2b and 16 of the Act of 17 January 2003 had been referred, in decision No. 2002-465 of 13 January 2003:

> "*it is clear from the parliamentary debates that preceded the adoption of this provision that its sole purpose was to avoid future challenges before the relevant courts to prior agreements that were not compatible with the legislation in force at the time of their signature but would be compatible with the new legislation; that Section 16 cannot therefore be interpreted as endowing these prior agreements with effects other than those that the signatories intended them to have; that, subject to this proviso, the complaint is unfounded".*

This aspect of the complainant's argument cannot therefore be accepted.

2.3 Finally the complainant maintains that the Act of 17 January 2003 also violates the right to reasonable work time by stipulating that on-call periods will count as part of minimum rest periods.

The complainant's interpretation of the case-law of the Court of Justice of the European Communities is incorrect. In its SIMAP judgment (in particular paragraphs 50 and 52), in connection with hospital on-call duty, the equivalent of other forms of on-call duty, the Court ruled that:

> "*only time linked to the actual provision of services must be regarded as working time*".

The complainant also refers to the legal theory concerning on-call duty. It has to be said that prior to the Act of 17 January 2003, the latter was neither clear nor unambiguous. The Act has helped to clarify the situation because it spells out employees' situation when they are not required to work during on-call duty. It is only in such cases that on-call duty time is reckoned as part of daily or weekly rest time.

Finally the arguments concerning the consequences of working during on-call duty are erroneous. If such work takes place during an on-call period, the time worked is counted as actual working time (Article L.212-4 bis of the Labour Code).

Moreover, in accordance with a labour relations directorate circular (No. 6 of 14 April 2003 on working time and the minimum guaranteed income, section 6 on on-call duty), persons who are required to work during on-call periods are entitled to the entire rest period after the period of work ends, unless they have already benefited from the full statutory minimum rest period before being called out.

The disputed provision does not therefore violate the right to reasonable work time.

3. The alleged violation of Article 4 of the Charter concerning the right to a fair remuneration

3.1 The complainant maintains firstly that one of the direct effects of the annual days worked system is to deprive many employees of their entitlement to overtime payments.

This is not a new argument. It is untenable, since in its Resolution of 26 March 2002, the Committee of Ministers noted that "*the provisions of ordinary law on pay have also been brought into line with the system based on the number of days and that the pay awarded to the managerial staff is commensurate with their workload and working time*".

This confirms the interpretation that must be given to Article 4 of the Charter, which requires parties to recognise "*the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases".* The Committee therefore accepts limited and justified exceptions. It confirmed in its decision of 26 March 2002 that the exception concerning managerial staff who had concluded annual days worked agreements satisfied these two criteria.

This argument must therefore be dismissed.

3.2 The complainant also maintains that imputing on-call time to rest time entails another violation of Article 4 of the Charter

Once again, the complainant's submission must be rejected on several grounds.

Firstly, when it passed the Act of 17 January 2003, Parliament did not alter the on-call system as a whole. The other rules governing on-call arrangements are unchanged, particularly the financial compensation or additional time-off for which those concerned are eligible. The collective agreements specifying these forms of compensation are not affected (Article L.212-4bis of the Labour Code).

Moreover, as already noted, the aim of the legislation was simply to establish that on-call duty that was not worked could form part of daily and weekly rest periods.

The provisions of the Act of 17 January 2003 relating to on-call duty and annual days worked are therefore not in breach of Article 4 of the Charter.

4. The alleged violation of Article 6 of the Charter concerning the right to bargain collectively and the right to strike

According to the complainant, the method used by the annual days worked system to count days and half days of work or rest results in discrimination regarding the right to strike.

This is not a new argument since it was also raised in the first complaint in 2000. As already noted in the previous memorial, the annual days worked system in no way infringes the right to strike and is fully compatible with Article 6, which recognises "*the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike*". In themselves, the annual days worked regulations have no effect on the right to strike. These regulations must be applied in accordance with the main principles governing the right to strike, in particular the one that forbids deductions from earnings that are disproportionate to the time spent not working. This principle has been reaffirmed on a number of occasions by the Court of Cassation (Cass. Soc., 27 June 1989 Causse Wallon; 8 July 1992, Sétra; 3 February 1993, Tadin; 19 May 1998, Sté Le Parisien).

Moreover, the complainant's statement that "any hour not worked will clearly be counted as a half day's rest" is without foundation. In practice, under the government's proposed interpretation, for the purposes of deducting pay the length of the strike will be calculated as a proportion of the hours the employee had planned to work that day.

Finally, it has to be said that nothing concrete has been adduced to show that this provision poses any real problems.

In its report on Complaint No. 9/2000, the European Committee of Social Rights expressly referred to the absence of examples to support the complainant's

contentions and found that it had produced no evidence to show that the annual days worked arrangements could cause France to be in breach of Article 6 of the Charter (paragraphs 49 and 50).

At all events, to date the Ministry has not received any information that would corroborate the complainant's allegations.

It must therefore be concluded that, notwithstanding the complainant's unsubstantiated claims, the situation in France is in conformity with Article 6 of the Charter.

5. The alleged violation of Article 27 of the Charter concerning the right to equal opportunities and treatment for workers with family responsibilities

5.1 The complainant maintains that by broadening the scope of the annual days worked system the Act of 17 January 2003 infringes Article 27 of the Revised Charter since it will increase "*the number of families who can no longer meet their family responsibilities satisfactorily*"

In practice, section 2 of this memorial has already shown that the Act does not extend the scope of the system and restricts it to managers with autonomy to organise their own work schedules.

As already stated in the previous memorial, the annual days worked system does not interfere either directly or indirectly with the Article 27 rights that states undertake to respect. Moreover, the conclusion of annual days worked agreements results in those concerned working fewer days, making it easier for them to reconcile work and family life.

According to a survey conducted by the research, studies and statistics directorate of the Ministry of Social Affairs, Labour and Solidarity, managerial staff (particularly women) were most likely to report that they had achieved a better balance with their social and family lives and improved working conditions (55% of men and 76% of women - first results No. 24.1, DARES, June 2003). The Cadroscope study, to which the complainant refers, is also revealing. It states that managers' level of satisfaction with their situation, which was already high, improved in 2000, and fewer of them reported excessive workloads. At the same time, 67% said that they were satisfied with the balance between their professional and family lives. It can therefore be concluded from these two surveys that two-thirds of managerial staff find this balance satisfactory.

Finally, in its report on Complaint No. 9/2000, the Committee considered the argument irrelevant.

It should therefore again be rejected as irrelevant.

5.2 The complainant considers that the provisions of the Act of 17 January 2003 governing on-call duty are incompatible with Article 27 of the Charter because the employees concerned will no longer be able to benefit from minimum daily and weekly rest periods.

This argument must be rejected. As already noted under section 1 of this memorial, the Act of 17 January 2003 simply establishes that on-call duty that is not worked can form part of daily and weekly rest periods. If employees are called out during such on-call periods and have to work, they are entitled to their 11 hours daily or 35 hours weekly rest periods when the on-call work ends. The new provision has no effect on Article 27 and does not in any respect contravene states' obligation to assist workers with family responsibilities.

For all these reasons and subject to any others that might be adduced I invite the Committee to reject the complaint as being totally without foundation.

III THE CFE-CGC'S REQUEST FOR NON-RECURRING EXPENSES

3.1 Although the complaint as such was declared admissible by the Committee on 16 June 2003, the Confederation's additional request for non-recurring expenses is inadmissible.

This request cannot be justified by any provision of the Additional Protocol to the Charter, Articles 9 and 10 of which simply refer to the Committee's power to issue recommendations concerning states whose legislation does not permit a satisfactory application of the Charter, with no reference to any machinery for granting compensation.

The Committee implicitly acknowledged this in its report of 11 December 2001 on the CFE-CGC's previous complaint (paragraph 58), when it rejected the complainant's request for compensation without any further examination.

At all events in the absence of any express provisions to the contrary in the texts applicable to the European Committee of Social Rights, Article 41 of the European Convention on Human Rights, which only concerns proceedings before the European Court of Human Rights, cannot be held to apply here.

3.2. As a very subsidiary argument, no evidence is adduced to show that the sum of EUR 9 000 claimed by the CFE-CGC for non-recurring expenses in proceedings before the Committee has actually been incurred.

3.3 As an even more subsidiary point, the sum of EUR 9 000 claimed by the CFE-CGC for non-recurring expenses in proceedings before the Committee is quite disproportionate and should be reduced.

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For all these reasons and subject to any others that might be adduced the French Government invites the European Committee of Social Rights to reject the complaint of the CFE-CGC as being totally without foundation.