EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

6 February 2004

Collective Complaint No. 16/2003
CFE-CGC v. France

Case Document No. 4

OBSERVATIONS FROM THE CFE-CGC ON THE MERITS

registered at the Secretariat on 12 December 2003

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Paris, 12 December 2003

Case: CFE-CGC
v French State

Our ref.: Complaint No 16-2003 JJG/fy
(please quote in all correspondence)
Your ref.: Complaint No 16/2003

RECORDED DELIVERY

Dear Sir,

Please find enclosed my reply to the French Government's observations in this case.

Yours faithfully,

[signed]

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

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REPLY TO THE FRENCH GOVERNMENT'S OBSERVATIONS

ON COMPLAINT No 16/2003

BY THE CONFEDERATION FRANCAISE DE L'ENCADREMENT

(FRENCH MANAGERIAL STAFF TRADE UNION CONFEDERATION)

BEFORE THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

I. In this document the Confédération Française de l'Encadrement (CFE-CGC), complainant, will reply to the observations submitted by the French Government on the complaint concerning Act No 2003-47 of 17 January 2003, which was lodged with the European Committee of Social Rights on 14 May 2003.

In a decision dated 16 June 2003 the European Committee of Social Rights declared the complaint lodged by the complainant trade union to be admissible.

The French Government then put forward objections seeking dismissal of the complaint on the merits, objections which, as the complainant will show, are far from convincing.

II. First of all, with regard to the preliminary observations concerning Complaint No 9/2000 relating to the "Aubry II" Act of 19 January 2000, which the European Committee of Social Rights has already examined, the French Government has no choice but to admit that the Committee found that complaint to be partly well founded, particularly since the annual days worked provisions did not place any reasonable limit on the daily or weekly working time (see the decision of 11 December 2001).

On that occasion, the European Committee of Social Rights agreed that the disputed provision could affect a significant number of employees and therefore had to meet the requirements of the Charter.

The Committee of Ministers, however, chose not to follow this decision, claiming that the annual days worked provisions would probably affect only 5% of employees.

However questionable that view might be, it cannot in any case apply in the present complaint.

As the complainant has explained in detail, the main effect of the new statutory provisions introduced by the reform of 17 January 2003 has been to widen the scope of the annual days worked system substantially by allowing it to be used almost on a discretionary basis through the conclusion of branch agreements, with the law no longer laying down any specific safeguards or any real criteria.

The Government cannot therefore seriously claim that the provisions of the Act of 17 January 2003 have not in any way affected the rules relating to the annual days worked system, even though it acknowledges that the Act has changed the criteria for defining the managers likely to be involved in the system, a change which has obviously substantially increased the number of employees concerned.

Contrary to the Government's observations, the Act of 17 January 2003 indisputably extends the scope for using the annual days worked system and further reduces the already inadequate safeguards attached to the use of the system and the use of collective bargaining to determine rules for this.

At the same time the new Act has made no attempt to rectify the shortcomings of the earlier text, which violated the European Social Charter, as the Committee held in its decision of 11 December 2001; the Act of 17 January 2003, like the Act of 19 January 2000, has failed to impose any reasonable limits on the daily or weekly working time allowed under the annual days worked system.

III. Particularly sterile here is the Government's reference to the need for a branch agreement to determine the categories of managers who should be covered by the annual days worked provisions (see the French Government's observations, section 2.1.1, p. 5).

First of all, as we will discuss later, parliament was wrong to try to "retrospectively legalise" branch agreements concluded under the previous Act and annulled as not complying with that Act by decisions which became *res judicata*.

The Government cannot therefore claim that the need for a branch agreement constitutes, in its view, a specific safeguard attached to the use of the annual working days system, when the mere requirement for such an agreement does not constitute any sort of safeguard, and the reference to a branch agreement is in itself vitiated by the retrospective validation of unlawful agreements in defiance of judicial decisions which became *res judicata*.

What is significant here is the Government's reference to the fact that "*many branch agreements have specified the categories of managerial staff that qualify for annual days worked agreements*", yet many of those agreements were rightly declared unlawful under the previous Act, and have been validated by the Act of 17 January 2003 in breach of the principles laid down by the European Court of Human Rights in particular.

Above all, the Government certainly cannot rely on the conclusion of branch agreements in order to claim that there are adequate specific safeguards within the meaning of the European Social Charter, stating that <u>enterprise agreements are bound by these branch agreements</u> (see the Government's observations, 2.1.1, para. 3, p. 5).

It would be almost comical if the matter were not so serious, and it is in any event strange for the complainant to have to remind the French Government that **the Government itself tabled a draft law on "lifelong training and social dialogue", the central plank of which was to overhaul the hierarchy of rules in the field of social law and ultimately to do away with the "principle of favour" (according to which the rule which is most favourable to the employee must apply) by allowing enterprise agreements in particular to make general derogations from branch agreements to the disadvantage of employees, except where such derogations are specifically excluded in the branch agreement.**

It is therefore clear that there is no substance whatsoever in the Government's objection that, because it establishes the need for branch agreements which would then be binding on enterprise agreements, the new Act satisfies the requirement for specific safeguards concerning the determination by collective bargaining of the rules for using the annual days worked system and the categories of managerial staff concerned.

On the contrary, as the complainant has already stressed in its complaint, the Act considerably extends the scope for using the annual days worked system, but does not impose any reasonable limit on working time; moreover, the categories of staff concerned are determined by collective bargaining, with only the vague criterion that they should be autonomous, which opens the door to a highly arbitrary approach, and also to discrimination, since the determination of the categories of managerial staff covered by the annual days worked system will ultimately depend on the balance of power within each enterprise rather than on any objective criteria that could be effectively monitored by the courts.

The impending introduction of a general right for enterprise agreements to derogate from branch agreements merely highlights the failings of the Act of 17 January 2003 and the resulting risk of abuse and arbitrary treatment.

It should also be emphasised that unlawful branch agreements concluded under the previous Act and which the Act of 17 January 2003 has sought to validate obviously could not reasonably prohibit derogations for enterprise agreements, since when they were concluded there was not yet any question of allowing such derogations on a general basis, except where otherwise stipulated.

Thus the Government's reference to the conclusion of branch agreements which are then binding on enterprise agreements as constituting a safeguard appears particularly specious, since it is not only currently ensuring that branch agreements are no longer binding on enterprise agreements, but it has also validated branch agreements which, at the time when they were concluded, could not have anticipated this revision of the hierarchy of agreements and therefore could not have limited possible derogations by enterprise agreements.

Far from showing that the Act does nothing to violate the principles laid down by the European Social Charter, the Government's observations actually underline the violations complained of.

IV. As regards the vague nature of the autonomy criterion, the complainant can only confirm its earlier arguments.

The Government's explanations on this point are, moreover, far from convincing, since they essentially consist of stressing the fact that the Act clarifies the notion of integrated managers, who work normal hours (see section 2.1.3, p. 6).

But this precisely illustrates how, as the complainant has complained, extrapolations are being made from the annual days worked system, since the issue is not the distinction between autonomous managers covered by the annual days worked system and integrated managers working normal hours, but between autonomous managers covered by the annual days worked system and managers who are not sufficiently integrated to work normal hours or sufficiently autonomous to come under the annual days worked system, and who should therefore be able to conclude hourly agreements.

Clearly, the Act will actually have the effect of gradually abolishing the category of "middle" managers who are covered by hourly agreements.

This means that any manager who is not senior or integrated, which in reality means the vast majority, will come under the annual days worked system, with hourly agreements becoming obsolete since non-integrated managers will be regarded as sufficiently "autonomous" to come under the annual days worked system.

It was precisely this point that was clearly highlighted by a distinguished author commenting on the Act of 17 January 2003, who stressed that "*there will now be three categories of managers: senior managers, integrated managers (a slightly broader group), and autonomous managers who can conclude an annual days worked agreement.* ***The definition of the last category is so broad that it eliminates the distinction drawn in Article L 212-15-3 between managers covered by hourly agreements and managers covered by annual days worked agreements.*** *It is the latter solution that will become the most widespread."* (see: Françoise Favennec-Héry: Mutations dans le droit de la durée du travail, Dr. social N°1, January 2003, p. 36 c).

Tellingly, the Government maintains an embarrassed silence on this point in its observations, being very careful not to say anything about whether there will continue to be a distinction between managers on hourly agreements and managers on annual days worked agreements.

So the whole category of middle managers will qualify for the annual days worked system, as long as collective enterprise agreements, derogating from branch agreements where necessary, provide for this, with a simple formal reference to the managers' autonomy.

Here again, the Government's objections are without substance and the violation of the Charter is clearly proven, since if the Aubry II Act failed to attach sufficient specific safeguards to the use of collective bargaining to determine the categories of managers covered by the annual days worked system, this is undoubtedly even more true of the Fillon II Act.

It is equally indisputable that this Act substantially increases the number of employees qualifying for the annual days worked system, and that it will therefore affect a sufficiently significant number of employees and so have to comply with the requirements of the European Social Charter.

It should be noted here that other trade unions have decided to lodge complaints concerning the conflict between the Fillon II Act and the European Social Charter, stressing that things have changed since the Aubry II Act and the complainant's previous complaint, that practice shows that "*huge numbers of managers have been put on the annual days worked system*", and that in retaining only the criterion that managers must be autonomous the Fillon II Act has had the effect of subjecting "*the majority of managerial staff employees to derogations establishing excessively long working hours*" (see: Options N° 449, 12 May 2003, Annex 2).

The considerable broadening of the scope of the annual days worked system by the Fillon II Act, and the possibility which it allows of widening the scheme to all middle managers, are thus not a figment of the complainant's imagination or ideological posturing, but they are what all the social actors are observing in practice.

On all of these issues, therefore, the complainant confidently maintains its previous assertions, since the Government's objections merely serve to substantiate the complainant's allegations rather than to undermine them.

V. The Government's observations on the retrospective legalisation of unlawful agreements concluded under the earlier Act are also inaccurate.

The fact that the Constitutional Council validated Article 16 of the Act effecting this retrospective legalisation does not place the Act beyond reproach.

The European Court of Human Rights does not preclude the possibility that validating legislation for which there are no compelling grounds of general interest may be regarded as contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms, even though the Constitutional Council ruled that the act in question was consistent with the Constitution (see: 14 December 1999, Antonakopoulos v Greece; 28 March 2000, Georgiadis v Greece, cited in "Heures d'équivalence, loi de validation et motif impérieux d'ordre général - Rapport du Conseiller Doyen Jean Merlin", Droit social 2003, p. 376).

Furthermore, we know that when it has to consider whether an act is constitutional, the Constitutional Council does not examine whether the act is consistent with the provisions of international treaties and in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms.

There is therefore nothing to prevent an act from being found to be contrary to a supranational text, as the national courts, both judicial and administrative, have been able to do since the famous "Jacques Vabre" and "Nicolo" judgments.

So the fact that an act has been declared consistent with the Constitution by the Constitutional Council certainly does not mean that it cannot be tested for compliance with agreements and treaties.

This is why it is inappropriate for the French Government merely to rely on the Constitutional Council's decision of 13 January 2003 to claim that the complainant's argument that the retrospective legalisation of earlier unlawful agreements breaches the provisions of the Charter cannot be accepted.

On the contrary, there is nothing to stop the European Committee of Social Rights from finding that such legislative validation, formulated without any sort of proviso relating to ongoing disputes or decisions which became *res judicata,* has the effect of retrospectively legalising agreements which breached the European Social Charter and is therefore itself in breach of that Charter.

It should be stressed here that the aim of this validation was clearly to rescue a number of agreements ruled unlawful under the Aubry II Act, by allowing them to benefit from the new provisions which do not establish any framework for or place any real limit on the social partners' power to determine which categories of managers should come under the annual days worked system.

There are a considerable number of decisions which became *res judicata* and which found that collective annual days worked agreements did not comply with the (fairly undemanding) requirements of the Aubry II Act (see: Paris Court of Appeal, 18 Dec. 2002, RJS 2/03 N° 204; Paris Regional Court, 3 July 2001, RJS 11/01 N° 1295; Lyon Court of Appeal, 2 May 2002: Annex 1; Paris Regional Court, 18 March 2003, RJS 6/03, N° 760; Versailles Court of Appeal, 27 Feb. 2002, RJS 5/02, N° 575 and 13 Feb. 2002, N° 576).

As the complainant stressed in its complaint, it was therefore neither an accident nor an oversight that the legislature did not formulate any reservations concerning the validation of agreements that were unlawful under the Aubry II Act, yet it took care to do so when it decided to reverse the effects of a ruling by the Court of Cassation on the allowance for reduced working time in the medical-social sector, making specific reservations for ongoing disputes and in particular decisions which had become *res judicata*.

By unreservedly validating unlawful agreements concluded under the Aubry II Act, the legislature deliberately set out to reverse their unlawfulness, if necessary by failing to observe the authority of decisions which had become *res judicata*.

In the absence of compelling grounds of general interest, which the legislature did not even attempt to define, this validation is contrary to the European Convention on Human Rights and the European Social Charter, as demonstrated in the complaint.

The French Government merely refers here to the decision of the Constitutional Council, which cannot in itself be taken to rule out the fact that the Act breaches the supranational texts referred to earlier, and it cannot therefore hope to convince the Committee on this point.

VI. On the subject of the stipulation that on-call periods will count as part of rest periods, the Government first of all claims that the complainant has incorrectly interpreted the case-law of the Court of Justice of the European Communities, which ruled, in connection with hospital on-call duty, that "*only time linked to the actual provision of services must be regarded as working time*".

This criticism has no factual basis whatever, since the complainant itself pointed out that the CJEC considers that only time linked to the actual provision of services must be regarded as working time (see Complaint, bottom of page 12).

However, this does not mean that on-call periods cannot be regarded as rest periods.

We know that on-call periods that are not worked are "grey" periods which are not actual working time, but also cannot be regarded as equivalent to rest periods and therefore counted as such.

The Government cannot claim that legal theory is uncertain on this point, or that before the Act came into force the position was neither clear nor unambiguous, or that the Act has had the effect of clarifying the situation for employees.

We would merely point out here that, before the legislature took action, the Court of Cassation established the completely unambiguous principle that on-call periods are not rest periods and cannot therefore be counted as such (Soc. 10 July 2002, P. N° 00-18. 452).

On the pretext of "clarifying" an already clear situation, therefore, the Act set out to deprive workers of the right to minimum rest periods outside on-call duty time, even though it is known that workers on on-call duty are not free to leave their home or workplace and may be called upon at any time by their employer; it is thus clear that these periods cannot be equated to proper rest periods.

Far from providing clarification, the legislature has undermined the fundamental right of employees to have minimum periods of proper rest.

The euphemism which the Government cleverly uses here should therefore not deceive the Committee on this point. The Act of 17 January 2003 enshrines an outright violation of the right to weekly rest periods.

As for granting employees an entire rest period if they have been required to work during on-call periods, this is the least that should be done for them.

But the Government is careful not to say anything about the situation of employees who have already "enjoyed" the minimum continuous rest period required

by the Labour Code before they started work, in other words who completed an on-call period equal to the minimum rest period without being required to work.

In such cases the Act states that the employees are no longer entitled to any rest time, even after they have finished work.

In other words, because the on-call period before being required to work was equal to the minimum rest period, it is all regarded as rest time.

The implications are clear. Employees in this situation will no longer have proper rest time, and their only rest will be while they are on call, when they are not allowed to leave their home or workplace and are required, even at a distance, to remain at their employer's disposal so that they can work at any time.

The Government nevertheless concludes that this provision does not infringe the right to just conditions of work.

It is to be hoped that the European Committee of Social Rights will wish to persuade it otherwise.

VII. On the breach of the right to a fair remuneration there is little to be said about the Government's observations.

The Charter does, admittedly, allow limited and justified exceptions to the right, which it clearly enshrines, to an increased rate of remuneration for overtime work.

However, the problem is that the Act of 17 January 2003 does not allow such limited and justified exceptions to be made, since it aims to allow the annual days worked system to be used not just on a large scale, but also in an arbitrary manner which varies from one undertaking to another.

The vast majority of managers will therefore be deprived of the right to increased remuneration for overtime work.

Furthermore, there will inevitably be discrimination compared with the admittedly declining number of managers who will continue to work under hourly agreements on the basis of far from objective criteria, and who will receive increased remuneration for overtime work.

The infringement of the right to a fair remuneration resulting from the imputing of on-call time to rest time cannot reasonably be disputed.

The Government states here that parliament did not alter the on-call system as a whole, but only intended to establish that on-call duty that was not worked could form part of daily and weekly rest periods (see section 3.2, p. 9).

But this necessarily alters the on-call system as a whole!

Making on-call time equivalent to rest time is clearly tantamount to a fundamental change to the concept of on-call duty, which requires some form of compensation precisely because, while it might not be actual work, it is not rest either.

For the rest, we would have liked the Government to explain exactly how on-call duty is now supposed to give rise to compensation in the form of additional time-off, when the aim of the Act is to have on-call periods counted as part of rest periods, thus relieving the employer of the need to allow additional time-off in compensation.

Even if agreements providing for compensatory rest concluded prior to the Act remain in force, and even if employers do not agree with the idea that the rest period has already been taken, there is still nothing to prevent new agreements from making no provision for compensation for on-call time.

At best, therefore, the legislation obviously allows for discrimination in respect of the right to a fair remuneration.

VIII. The infringement of the right to bargain collectively and the right to strike resulting from the legislation is more subtle, but real nonetheless.

There are two possibilities here.

Either the employer can count an hour not worked as a standard half day on strike, either a morning or an afternoon, and deduct pay accordingly, or else he can deduct pay exactly in proportion to the time on strike.

It is the second option which the Government prefers to emphasise, stating that under its 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*" (see p. 10, first paragraph).

This does not seem a realistic method, however.

First of all, how can anyone know how many hours the employee had planned to work, when a manager under the annual days worked system organises his work autonomously?

Does the employee himself, having decided to go on strike, have to tell his employer how many hours he would have worked if he had not been on strike? This is hardly sensible.

So is it the employer who, as part of his management powers, determines how many hours the employee had planned to work? But in that case it is difficult to see how the employee has any autonomy, which is the only criterion justifying the use of the annual days worked system.

Secondly, the proportional pay deduction recommended by the Government can only be calculated in terms of hours. So, the number of hours on strike must be set against the number of hours which the employee had planned to work in order to

obtain the deduction ratio applicable relative to a working day's pay for a manager on the annual days worked system.

But the fact that no reference is made to the number of hours worked is really just a legal fiction; the annual days worked system is, as we have shown in detail, an arrangement which simply allows payment for overtime and the fixing of any minimum reference number of hours, whether daily or weekly, to be abolished.

In other words, the annual days worked system precludes any relevant reference to hours worked where that might be in the employees' favour, but it does not prevent the number of hours worked in principle during a working day from being taken into account when deducting pay for hours spent on strike.

The injustice of the system is obvious, because if it is not impossible to determine the number of hours that an autonomous manager would have worked for the purposes of deducting pay for time on strike, it is difficult to see why it suddenly becomes impossible for the purposes of paying overtime relative to "the hours the employee had planned to work that day", to quote the Government.

There is an undeniable contradiction here, which clearly shows how flawed the system is with respect to the requirements of the Charter.

On the subject of the right to strike in particular, as we have said, either employers will try to deduct only the pay corresponding to the time on strike, which would involve determining the number of hours in the working day, but would thereby make it unlawful and unjustified to exclude managers under the annual days worked system from overtime on principle; or, more likely, employers will apply a standard deduction per day or per half-day, which will be tantamount to penalising the employees concerned financially for more than the time on strike and will therefore constitute an obstacle to their right to strike while also putting them at a disadvantage compared with other workers.

Furthermore, even with the first option, allowing the employer to determine the "hours the employee had planned to work that day" will open the door to all sorts of abuses, since it would then be in the employer's interest to decide on a minimum number of hours in order to increase the proportion of time on strike and therefore the pay deducted.

Thus, autonomous managers with no daily or weekly limit on the hours they work and who are therefore deprived of the benefit of overtime, will be allocated a number of hours for their working day by their employer so that he can deduct pay for time spent on strike.

Since the Government criticises the complainant for not adducing any concrete evidence to show that the disputed provision poses any real problems, the complainant intends to give the Committee a specific example provided by one of its members.

This example concerns a strike in an undertaking where all the managers are on the annual days worked system.

This already clearly shows just how widespread the system has become, and the growing tendency to identify managers with autonomous managers.

Following a strike, one manager had some of his pay deducted. To calculate the deduction, his employer counted the number of hours on strike, in this case four, even though the manager was on the annual days worked system.

However, if we compare the deduction made for four hours, EUR 98.15, with the pay for a day's work, EUR 171.77, as is shown on the manager's pay slip (see Annex 3, p. 2), we can see that the employer counted "the hours the employee had planned to work that day" as seven. This is not credible for an autonomous manager and also does not correspond to reality in this particular case, since the employee states that he had started work before 9 a.m. and finished work at around 6.45 p.m. (see Annex 3, p. 1).

So the employer calculated on the basis of a 7-hour working day, whereas it was really at least nine hours, which obviously enabled him to made a larger deduction.

Thus the working days of managers on the annual days worked system tend to change with the wind.

On the one hand, these managers can work without counting the hours, in the literal sense, since they have no daily limit and no additional pay for overtime. On the other hand, the length of their working day suddenly becomes extremely reasonable when it is a strike day and their employer has to deduct pay.

In all respects the violation of the Charter and the discrimination in relation to other employees are proven, and the Government's observations fail to persuade otherwise.

IX. Concerning the infringement of the right to equal opportunities and treatment for workers with family responsibilities, the complainant has no particular comments on the Government's observations, since they merely repeat the unfounded allegations (which we have already criticised) that the Act of 17 January 2003 does not broaden the scope of the annual days worked system and that counting on-call periods as part of rest time does not infringe the right to a minimum rest period.

The Government's observations are therefore without substance, for the reasons set out above.

X. Lastly, concerning the non-recurring expenses requested by the claimant, the Government's observations that the European Committee of Social Rights rejected the complainant's request for compensation in its decision of 11 December 2001, and that Article 41 of the European Convention on Human Rights does not apply before the European Committee of Social Rights, are sterile.

First of all, a request for compensation for injury caused, and thus the award of damages, must not be confused with the simple payment of non-recurring expenses.

Secondly, the complainant did not claim that Article 41 of the European Convention on Human Rights was binding on the European Committee of Social Rights, but only that, as provided for in that article, the expenses in question should be paid.

The payment of such expenses, which form part of the practical implementation of the principle of effective recourse to justice, is unquestionably a necessary consequence of the admission of complaints lodged by national representative organisations.

ON THESE GROUNDS:

The complainant is therefore confident in continuing with its complaint.

ANNEXES:

1- Lyon Court of Appeal, 2 May 2002
2- Options n° 449, 12 May 2003 (extracts)
3- Example of deduction for hours on strike for a manager under the annual days worked system