EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

2 April 2004

Collective Complaint No. 16/2003 **Case Document No. 5**
CFE-CGC v. France

SUPPLEMENTARY OBSERVATIONS FROM THE FRENCH GOVERNMENT ON THE MERITS

registered at the Secretariat on 24 March 2004

(TRANSLATION)

ADDITIONAL OBSERVATIONS BY THE FRENCH GOVERNMENT ON THE MERITS OF COLLECTIVE COMPLAINT NO. 16/2003 LODGED AGAINST FRANCE BY THE CONFEDERATION CFE-CGC WITH THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

By letter of 19 December 2003, the Executive Secretary of the European Social Charter forwarded to the government the CFE-CGC's reply to the French government's observations on the merits dated 24 October 2003.

The complainant's reply to the memorial produced by the government calls for the following additional observations:

I On the draft law on vocational training and social dialogue currently before Parliament:

1. The complainant maintains that this draft law will render obsolete the government's observations about the need for a collective agreement to determine the categories of managerial staff that qualify for annual days worked agreements.

2. The compulsory use of collective bargaining to determine the categories of managerial staff concerned, together with the existence of a number of mandatory clauses, are in themselves a safeguard.

In its original memorial, moreover, the government referred not only to branch agreements but also to enterprises agreements as constituting a specific safeguard, contrary to what the complainant maintains.

We must reiterate, therefore, that apart from the change in the criteria for defining the categories of managerial staff that qualify for annual days worked agreements, all the other requirements still apply.

3. With regard to the draft law on vocational training and social dialogue in particular, its provisions apply only to the future. This means that enterprise agreements, including even future enterprise agreements, will not be able to derogate from any branch agreements that have already been concluded.

The government is therefore justified in stipulating that enterprise agreements must comply with the branch agreements that specified which categories of managerial staff qualify for annual days worked agreements.

4. The draft law, moreover, expressly states that in future, branches will have the final say on whether or not to allow derogations by enterprise agreements and if so, in what subject areas. The complainant has no reason, therefore, to suppose that the draft law will lead to abuses and arbitrary decisions.

5. The draft law also lays down new conditions for signing collective branch and enterprise agreements.

It introduces the notion of majority agreements, effectively providing a new safeguard. The complainant's arguments must be rejected therefore.

II On the criterion of autonomy of certain managerial staff in organising their work schedules:

6. The complainant then returns once again to the one really critical criterion for deciding which managerial staff may conclude annual days worked agreements, namely the degree of autonomy afforded certain managerial staff in organising their work schedules.

The complainant maintains that the autonomy criterion is "vague", but that is not the case. It is, rather, critical in determining which managerial staff are sufficiently autonomous to be covered by annual days worked arrangements.

7. It is important to remind ourselves firstly that the other safeguards and mandatory clauses have not been altered by the Act of 17 January 2003 and secondly, that the notion of autonomy is expressly referred to in Council Directive 93/104/EC of 23 November 1993 on working time.

6. Contrary to what the complaintant maintains, this new criterion does not signify either the end of other categories of managerial staff – whether integrated managers working normal hours or managers covered by hourly agreements – as they are not sufficiently autonomous to qualify for annual days worked agreements.

The "integrated managers" category remains unchanged and would include, for example, foremen who work the normal hours applicable to their staff, while being permitted to arrive a little earlier and leave a little later. Such staff could, incidentally, conclude, say, a weekly hours worked agreement.

Within the category of "middle" managers, ie those who are neither senior managers nor integrated managers, not everyone is autonomous moreover. This applies in particular to managerial staff whose hours are set by their employer or, for example, sales managers who are required to be present for the entire period that the shop is open. These are precisely the kind of staff who would qualify for annual hours worked arrangements.

9. While it is true that the working time of a manager on the annual days worked system is no longer counted in hours, a manager who has concluded an annual hours worked agreement with a high number of hours could, in total, work a greater number of hours than a manager on the annual days worked system, who is free to organise his working days in a more flexible manner, according to his workload and not some pre-defined schedule set by his employer.

10. Lastly, since the amendment introduced by the Act of 17 January 2003, there has been no general review of branch agreements as regards the annual days worked system.

To the government's knowledge, only one rider to a branch agreement has been concluded on this subject to date and that does not contain any major changes.

III On the retrospective legalisation of agreements in the Act of 17 January 2003:

11. The complainant refers once again to the retrospective legalisation of agreements in the Act of 17 January 2003. The complainant rightly points out that the French Constitutional Council has ruled only on French constitutional principles.

The fact is, however, that these principles correspond, at least in part, to those adopted by the Council of Europe. This is especially true of the principle of equality.

IV On the alleged breach of the right to a fair remuneration:

The applicant goes on to refer to an alleged breach of the right to a fair remuneration, maintaining firstly that managerial staff on the annual days worked system are being deprived of their entitlement to additional pay because overtime hours no longer count and secondly, that widening the scope of the annual days worked system will mean the end of annual hours worked arrangements.

As has already been stated, the complainant's arguments cannot be regarded as tenable.

It is incorrect to claim that all managerial staff will have annual days work agreements invoked against them (cf. point 2).

The two types of systems are hardly comparable, moreover, in that the autonomy afforded a manager on the annual days worked system could lead him to work fewer hours than a manager on the annual hours worked system who has a large number of hours.

V On the alleged breach of the right to strike:

Lastly, as regards the alleged breach of the right to strike, the government has already explained at length why the complainant's arguments must be rejected.

For the record, it will be recalled that the solution proposed by the Ministry is based on a system whereby the manager himself states the number of hours he had planned to work the day on which he was strike. The example cited by the complainant is very much an aberration in that here, it is the employer who decides how many hours would have been worked by the manager in question, which is hardly an accurate reflection of the situation as it stands in the relevant legislation. The instances referred to are in fact isolated examples. The local agencies of the Ministry of Social Affairs, Labour and Solidarity have not, at any rate, reported any major problems in this area.

To sum up, the fact is that, contrary to what the complainant maintains, neither the provisions of Article 2 of the Charter guaranteeing just conditions of work, nor those of Article 4 guaranteeing a fair remuneration, nor those of Article 6 recognising the right to bargain collectively and the right to strike, nor lastly those of Article 27 guaranteeing the right to equal opportunities and equal treatment for workers with family responsibilities, have been disregarded.

The complaint lodged by the trade union must therefore be rejected in its entirety, as there has been no breach of the fundamental rights enshrined in the revised Social Charter.