EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

6 May 2004

Collective Complaint No. 22/2003
Confédération Générale du Travail (CGT)
v. France

Case Document No. 3

OBSERVATIONS FROM THE FRENCH GOVERNMENT ON THE MERITS

(Translation)

registered at the Secretariat on 6 April 2004

French Government's observations on the admissibility of complaint No. 22/2003 submitted by the Confédération Générale du Travail (CGT) to the European Committee of Social Rights

In a decision of 9 February 2004, the European Committee of Social Rights declared admissible the complaint submitted on 24 October 2003 by the Confédération Générale du Travail (CGT) against France, which asked the Committee to rule that Act No. 2003-47 of 17 January 2003 on wages, working time and employment development infringed articles 2§1, 3§1, 11§1 and 11§3 of the Revised European Social Charter, concerned respectively with the right to just conditions of work, the right to health and safety at work and the right to protection of health.

According to the complainant trade union, the legislation in question firstly violates the right to rest, because it changes the regulations on on-call periods. Secondly, it claims that the Act considerably increases the number of managers who could be required to work an excessive number of hours in the week by extending the scope of the annual working days (*forfait-jours*) arrangements. Thirdly the complainant argues that the new overtime arrangements will lead to an increase in the working week. Finally it maintains that these new measures breach the principle of equal treatment for all employees and constitute discrimination against female employees.

The complaint calls for the following comments from the French Government.

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A. The relationship with complaints Nos. 9/2000 and 16/2003 of the CFE-CFC

1. It should be noted that another trade union, the CFE-CFC, has also presented a collective complaint, No. 16/2003, which is currently being examined on the merits by the Committee and like this complaint challenges certain provisions of the Act of 17 January 2003. The two complaints therefore have certain aspects in common.

2. Moreover, Act No. 2003-47 of 17 January 2003 on wages, working time and employment development, some of whose provisions are challenged in the

CGT complaint, clarifies and amends certain provisions of Act No. 2000-37 of 19 January 2000 on the negotiated reduction in working hours, namely those relating to the increase in overtime, the annual overtime quota, compulsory compensatory rest time, spreading working hours over the year and the application of reduced working hours to managers.

The present complaint, No. 22/2003, must also be partly seen in the context of a previous complaint, No. 9/2000, presented by the CFE-CGC and concerned with Act No. 2000-37 of 19 January 2000, which the Committee has already ruled on and which led to a Committee of Ministers Resolution of 11 December 2001 (see below).

B. The alleged violation of the right to rest arising from the on-call arrangements

3. The complainant trade union argues that for several reasons the provisions of the Act of 17 January 2003 modifying on-call arrangements are incompatible with certain articles of the Social Charter, particularly articles 2, 3 and 11, concerned respectively with the right to just conditions of work, the right to safe and healthy working conditions and the right to protection of health.

4. Firstly, it considers that the effect of the new arrangements will be to keep employees in a situation of extreme dependence on their employer during rest periods. This will then damage employees' health because they will be unable to benefit fully from their rest periods, in breach of articles 3 and 11 of the Social Charter.

In reality, and in contrast to what the complainant maintains, the only obligation placed on employees who are on call is to remain at home or close to it so as to be available for work if needed by the enterprise, with the period spent at work to be considered as actual time worked (Article L 212-4 b of the Labour Code).

Employees are not therefore "in a situation of extreme dependence on their employer", because they are not at their place of work and are free to devote themselves to their personal and leisure activities.

Naturally, the law requires employees' on-call time actually spent at work to be classified, where appropriate, as actual working time.

The complainant trade union's first complaint must therefore be rejected.

5. Secondly, the complainant argues that the change to the legislation breaches Article 2§1 of the Charter because it represents an "unreasonable" increase in working hours and also breaches the right to a weekly rest period in Article 2§5 of the Charter.

In fact the sole aim of the changes in the Act of 17 January 2003 was to specify that when employees were not required to work during on-call periods, the latter were to be included in daily and weekly rest periods.

On the other hand, as is made very clear in Circular DRT No. 6 of 14 April 2003 on working hours and the statutory minimum wage, if an employee is required to work during an on-call period, the full rest period has to be taken as starting from the end of the period worked, unless the employee has already benefited from the minimum period of continuous rest (11 consecutive hours daily, 35 consecutive hours weekly) before the start of the work period.

This means that employees who are required to work during on-call periods are not deprived of their right to rest, be it daily or weekly, and that these hours of rest must be consecutive.

6. Similarly, and despite the complainant's assertion, neither is this provision in breach of Community Directive 93/104/EC of 23 November 1993, in particular Article 5, which grants workers "*an uninterrupted rest period of 24 hours plus ... 11 hours of daily rest*", since as has been noted if employees are required to work during on-call periods they must be granted their full rest period once their period of work is completed.

7. The complainant's interpretation of the case-law of the Court of Justice of the European Communities is also incorrect. Paragraph 94 of the Jaeger judgment (CJCE, 9 September 2003) concerns the equivalent compensating rest periods that must be granted in the case of exceptions to the minimum rest period. During such compensating periods "*the worker is not subject to any obligation vis-à-vis his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health*" (paragraph 94). This case-law is not concerned with statutory daily or weekly rest periods.

Moreover, on-call duties away from the place of work (*astreinte*, under French law) must be considered separately from on-call duty at the place of work (*garde*, in French), which is the subject of the case cited by the complainant. In the Jaeger case, the point at issue was whether periods spent by a doctor on call at his place of work during which he was not required to provide his professional services and could rest in a specially fitted-out room in the clinic counted as rest periods or working time. According to paragraph 94 of the judgment, "*in order to be able to rest effectively, the worker must be able to remove himself from his working environment*". This is indeed the case with on-call duties away from the place of work.

This complaint must therefore also be rejected.

C. The alleged violation of Article 2§1 arising from excessive hours worked by managers under the annual working days system

8. The complainant trade union maintains firstly that the new legislation governing the annual working days system will considerably increase the number of employees covered by these working time arrangements.

9. In this context attention should be drawn to what has already been decided in connection with Complaint No. 9/2000 lodged by the CFE-CGC against certain provisions of the so-called Aubry II Act, No. 2000-37 of 19 January 2000 on the negotiated reduction in working hours, and in particular those establishing an annual working days system for certain categories of managerial staff.

The European Committee of Social Rights ruled on the complaint in a report of 11 December 2001, in which it found that with regard to certain aspects of the annual working days system for certain categories of manager, in particular the absence of an adequate legal framework, the Act of 19 January 2000 failed to satisfy Charter requirements.

The report was followed by a Resolution of the Council of Europe's Committee of Ministers of 26 March 2002.

In the resolution, the Committee of Ministers did not find that the annual working days arrangements for certain categories of managerial staff introduced by the Act of 19 January 2000 infringed the European Social Charter.

Indeed, it noted that:

- the annual working days system was designed to offer autonomous managerial staff a real reduction in their working time;
- the managerial staff who could conclude annual working days agreements represented only a minority of salaried workers (approximately 5 %);
- the rules governing the working time of the workers in question had to be laid down in an agreement drawn up between the social partners;
- the provisions of ordinary law on working time had been brought into line with the system based on the number of days and the law established a maximum annual number of days and left it to employees and employers to monitor actual working time;
- the pay awarded to the managerial staff was commensurate with their workload and working time.

The complainant's arguments must therefore be rejected for the same reasons.

9bis. Despite the complainant's claims to the contrary, the Act of 17 January 2003 has not affected any of the safeguards attached to the annual working days system. The same reasoning applies.

10. The only change concerns the criterion for identifying the managerial staff concerned. The other safeguards and conditions attached to these exceptional arrangements remain in force, in particular the requirement for a collective agreement to apply the scheme.

Formerly, there were three cumulative criteria for determining which managers qualified for annual working days agreements. They applied to managers for whom the length of their working week could not predetermined because of the nature of their duties, the responsibilities exercised and the level of autonomy they enjoyed in scheduling their work.

11. The new definition is based on the only really critical criterion for determining which managers annual working days agreements might apply to, namely that of autonomy.

The Act of 17 January 2003 therefore amended Article L 212-15-3 III of the Labour Code to read "*the convention or agreement shall define the categories of managerial staff [concerned] .... on the basis of their independence as regards the organisation of their time* [remainder unaltered]". For information, the previous wording was "*the convention or agreement shall define the categories of managerial staff whose working hours cannot be predetermined with reference to the nature of their duties, the responsibilities exercised and the level of autonomy they enjoy in scheduling their work*".

12. This criterion is also consistent with Community law since Article 17 ("derogations") of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time authorises member states to derogate from the directive's provisions, particularly those concerned with daily and weekly rest periods and breaks, in the case of managing executives or other persons with autonomous decision-taking powers.

13. The Act's criterion of autonomy may admittedly seem more flexible, but the aim is for different branches of activity to apply the criterion in accordance with their own particular circumstances.

14. Moreover, there has been no change to the three categories of manager identified in the previous legislation, namely senior managers, integrated managers subject to normal working hours and other managers, who may conclude ordinary working hours or annual working days agreements.

The autonomous work scheduling criterion only applies to the third category.

15. As a result, only a limited proportion of managers are eligible for annual working days agreements: statistically speaking well under 10% of employees, since managers as a whole represent about 10% of the active population.

16. Since this definition of autonomous managers is consistent with Community law, this ground for complaint cannot be accepted without a quite unjustified finding that the Social Charter is incompatible with Community legislation, in connection moreover with national legislation that offers the managers concerned appropriate compensation.

17. The complainant also argues that the existing French collective bargaining system does not offer sufficient safeguards to ensure that the right to a reasonable working day and week will be respected. This is not the case.

18. As already noted, the Act of 17 January 2003 only altered the criterion for identifying managers who might qualify for annual working days arrangements, while all the other clauses remained unchanged.

19. The Act therefore lays down legal conditions for the application of the annual working days system.

The first concerns the obligation to conclude a branch or enterprise collective agreement. The complainant trade union maintains that this does not offer any specific safeguards, but this is incorrect. In practice, many branch agreements have specified the categories of manager eligible for annual working days agreements and enterprise agreements are bound by these provisions.

The draft legislation on vocational training and industrial consultation provides for changes, though these will only apply in the future. For example enterprise agreements, even ones concluded in the future, will not be able to claim exemption from branch agreements already concluded. Moreover, the draft legislation expressly grants branches unfettered power to decide whether or not to authorise derogations in enterprise agreements, and on which subjects. It also lays down new conditions for signing branch or enterprise collective agreements by introducing the principle of majority agreement, which offers a further safeguard.

The other obligatory clauses remain, particularly those concerning the monitoring of the work scheduling of the employees concerned, the length of their working days and the resulting workload. Moreover, the practical arrangements governing daily and weekly rest periods must always be laid down by collective agreement.

20. Finally the general principle whereby managerial staff must benefit from a genuine reduction in their working hours (Article L 212-15-3 I of the Labour Code) is still operative.

In this context, many branch agreements since the Act of 19 January 2000 have specified arrangements for monitoring the workload of managers on the annual working days system, for example through requirements for six-monthly or annual meetings between individual managers and their superiors. This applies in such sectors as imports-exports, wholesaling and wood processing. Others, such as book printing, have specified maximum working days of ten hours or, as in the case of the do-it-yourself sector, the times when half days worked must start and finish.

21. Finally the complainant maintains that the fact that there is only one criterion could lead to abuses, which would then allow a majority of managers to work 78 hours per week.

This is not so. The Act of 17 January 2003 has never tried to blur the distinction between the three existing categories of manager.

This means that managers who are not sufficiently autonomous in scheduling their work time, so that for example they are free to decide which days and hours they need to be present in the enterprise in accordance with their responsibilities, cannot conclude annual working days agreements.

The Act has even clarified the notion of integrated managers, who are now defined as those whose responsibilities require them to work the normal hours applicable to the workshop, department or team to which they are attached. If the only freedom enjoyed by such managers is to be present every day in the enterprise, but a little before or a little after the other members of their team or department, they cannot be considered sufficiently autonomous to conclude an annual working days agreement.

Finally, Article L 212-15-4 of the Labour Code offers the managers concerned safeguards regarding their level of remuneration.

This argument must therefore be rejected.

22. Finally, a number of surveys of employee satisfaction carried out after the introduction of the 35 hour week throw some light on the situation in practice. Concluding an annual working days agreement in fact reduces the number of hours worked for those concerned, enabling them to achieve a better balance between their private and working lives.

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 between work and family lives and improved working conditions (55% of men and 76% of women - first results No. 24.1, DARES, June 2003). A

"Cadroscope" study is also revealing from this standpoint. 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.

D. The alleged increase in working hours

23. The complainant argues that the new provisions on the quota of overtime hours will in practice lead to a longer working week, in breach of Article 2§1 of the Revised Charter, which states that "the working week [must] be progressively reduced to the extent that the increase of productivity and other relevant factors permit".

24. Decree No. 2002-1257 of 15 October 2002 did indeed increase the statutorily permitted number of hours of overtime from 130 to 180 per employee per year. This quota was confirmed, in application of the Act of 17 January 2003, in Decree No. 2003-258 of 20 March 2003.

The aim of the changes to the overtime quota in the Act was to simplify the legislation in force.

Before the new Act came into force the level of authorised hours was set down by decree. Extended branch agreements could set levels above or below the statutory quota. However in such cases the quotas in the agreement only applied to the referral of cases to the labour inspectorate, while the statutory quota was still applicable for calculating entitlement to compensatory rest time.

The law now makes the determination of the overtime quota entirely a matter for branch negotiation and it is this quota that serves as the trigger for the various consequences, such as referral to the labour inspectorate and entitlement to compensatory rest time. The statutory quota remains in existence but only applies if there is no quota laid down in a branch agreement. Finally there is now a single statutory quota since it applies to all enterprises, irrespective of size.

25. Use of the quota is free and the increase in its size does not, in itself, affect the legally defined working week, which in France is still 35 hours.

In practice, moreover, since the Act of 17 January 2003 came into force, few branch agreements have been renegotiated with a view to increasing overtime quotas. Moreover the Decree of 15 October 2002 requires the minister responsible for employment to present a report on collective bargaining on overtime quotas and the use of overtime to the national collective bargaining commission by 1 July 2004 at the latest.

In the light of this report and after the Economic and Social Council has been consulted, the regulations on overtime quotas will be reviewed.

26. Finally, the average annual number of hours worked in France has been declining steadily: 1722 by late 1999, 1651 by late 2000 and 1626 by late 2001, in enterprises with ten or more employees. It was 1728 hours in enterprises that had not reduced working hours, compared with 1596 in the others (annual survey on manpower activity and employment conditions, first analyses, DARES, August 2003 No. 33-1). The survey also looked at overtime use by sector of activity and size of enterprise. It is clear that overtime practice varies from one sector to another and does not extend to all of firms' employees.

In contrast to what the complainant argues, it cannot be concluded from these surveys that the increase in the quota and the simplifications introduced in the Act of 17 January 2003 will automatically raise the average number of weekly hours worked in France. This argument must therefore be rejected.

E. The alleged discrimination against female employees

27. The Act of 17 January 2003, which the CGT challenges, contains no direct discrimination against women. The complaint of unequal treatment, as envisaged in Article 20 of the Charter, could only be upheld if it were shown that the law was more disadvantageous to women than to men, that is that it discriminated indirectly. There is no reason to argue that the application of the Act will place women at a disadvantage. The argument is therefore unacceptable.

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For all these reasons and subject to any others that might be adduced the French Government asks the Committee to reject the request of the complainant trade union as being totally without foundation.