EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

30 March 2005

Collective Complaint No. 24/2004 **Case Document No. 5**
Syndicat SUD Travail Affaires Sociales v. France

OBSERVATIONS OF THE FRENCH GOVERNMENT ON THE MERITS

registered at the Secretariat on 11 March 2005

OBSERVATIONS OF THE FRENCH GOVERNMENT ON THE MERITS OF COLLECTIVE COMPLAINT NO. 24/2004, SYNDICAT SUD TRAVAIL AFFAIRES SOCIALES, BEFORE THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

In a decision of 7 December 2004, the European Committee of Social Rights declared admissible the complaint lodged on 5 January 2004 by the trade union SUD Travail Affaires Sociales, concerning the French legislation on discrimination in employment.

The union considers that the French legislation outlawing discrimination in employment is incompatible with Article 1§2 of the Revised Charter firstly because certain categories of workers are excluded from the scope of Article L.122-45 of the Labour Code, which prohibits discrimination and reverses the burden of proof, and secondly because certain non-established public service employees are not sufficiently protected against discrimination by the legislation and regulations governing their employment.

The French government wishes to make the following observations.

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I – DOMESTIC LAW

Discrimination in employment is prohibited under Article L.122-45 of the Labour Code, which in its current version states that:

"*No individual may be excluded from a recruitment process or from a placement or training in an undertaking, and no employee may be penalised, dismissed or discriminated against in terms of remuneration, training, re-employment following redundancy, appointment to a post, qualification, job classification, promotion, transfer or contract renewal on account of origin, sex, customs, sexual orientation, age, family situation, genetic characteristics, real or supposed membership or non-membership of an ethnic group, nation or race, political opinions, trade union or mutual society activities, religious beliefs, physical appearance, family name, state of health or disability.*

No employee may be penalised, dismissed or discriminated against in any of the ways referred to in the previous paragraph on account of the normal exercise of the right to strike.

No employee may be penalised, dismissed or discriminated against for having witnessed actions described in the previous paragraphs or for reporting them.

In the event of judicial proceedings concerning the application of the previous paragraphs, the employee concerned or the applicant for a placement or training in the undertaking must bring forward preliminary factual evidence from which the existence of direct or indirect discrimination may be inferred. In the light of this evidence, the respondent must show that his or her decision was based on objective considerations entirely unconnected with discrimination. The court shall reach a decision, after ordering any investigations it may deem necessary.

Any provisions or actions concerning employees contrary to these provisions are automatically null and void."

The current version of this article reflects a number of changes, the most recent being in Acts No. 2001-1066 of 16 November 2001, No. 2002-73 of 17 January 2002, No. 2002-303 of 4 March 2002 and, finally, No. 2005-102 of 11 February 2005.

Section 19 of Act No. 2004-1486 of 30 December 2004, establishing a high authority to combat discrimination and promote equality, transposes into French law Directive No. 2000/43/EC of 29 June 2000. It states:

"Everyone is entitled to equal treatment, irrespective of national origin or real or supposed membership or non-membership of an ethnic group or race, with regard to social protection, health, social benefits, education, access to goods and services, supplies of goods and services, membership of and participation in trade unions or trade associations, including benefits deriving from them, and access to employment, self-employment and unpaid work.

Persons considering themselves to be the victims of direct or indirect discrimination in these areas shall present the relevant courts with factual evidence from which such discrimination may be inferred. In the light of this evidence, the respondent must show that the measure in question is based on objective considerations entirely unconnected with discrimination.

The previous paragraph shall not apply in the criminal courts."

II – THE COMPLAINTS

The complainant alleges that the French legislation outlawing discrimination in employment is incompatible with Article 1§2 of the Revised Charter, firstly because certain categories of worker are excluded from the scope of the Labour Code, in particular Article L. 122-45, which prohibits discrimination and reverses the burden of proof, and secondly because certain non-established public service employees are not sufficiently protected against discrimination by the legislation and regulations governing their employment.

The complainant trade union considers that the following categories of employee are excluded from the scope of Article L. 122-45 of the Labour Code:

1. Certain private sector employees:
- Porters and caretakers of residential buildings
- Domestic employees
- Mother's helps working in the home (childminders).

2. Public employees

- In the case of established public employees, Sud Travail Affaires Sociales notes that Act No. 2001-1066 introduced a ban on discrimination into Act No. 83-634 establishing the general civil service regulations.

However, it considers that there is no statutory provision to ease the burden of proof for public officials, whether in connection with recruitment, career development or dismissal. According to the union, public officials are inadequately protected against discrimination.

- In the case of non-established public employees, whether they work for the state, local or regional authorities or the public hospital service, the complainant states that no specific legislation has been passed on this subject or regulations introduced.

- Finally, it argues that the regulations governing the National Employment Agency (ANPE) contain no general ban of discrimination in employment and do not ease the burden of proof in the event of disputes.

Article 1§2 of the Revised Charter states that:

"With a view to ensuring the effective exercise of the right to work, the Parties undertake:

.....

2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;"

III – THE MERITS OF THE COMPLAINT

3.1 Regarding porters and caretakers of residential buildings, domestic employees and childminders, the Committee should note that when the Discrimination Act of 16 November 2001 was drawn up, Parliament intended the protection instituted by Article L 122-45 of the Labour Code to apply to all categories of employee, without distinction as to status. This is how the Court of Cassation has always interpreted Article L 122-45, as shown by numerous judgments concerning, in particular, discrimination based on the state of health of porters and caretakers of residential buildings (see for example the

Court of Cassation's judgments of 4 June 2002, appeal No. 00-42873, and 19 February 2003, appeal No. 01-41677).

However, in the interests of clarity and certainty of the law, it is currently planned, as in the draft legislation on childminders, to include a specific reference to discrimination under each of the relevant occupational categories in Book VII of the Labour Code.

3.2 More generally, Act No. 2004-1486 of 30 December 2004, establishing a high authority to combat discrimination and promote equality, transposes into French law Directive No. 2000/43/EC of 29 June 2000. Section 19 of the Act states:

"Everyone is entitled to equal treatment, irrespective of national origin or real or supposed membership or non-membership of an ethnic group or race, with regard to social protection, health, social benefits, education, access to goods and services, supplies of goods and services, membership of and participation in trade unions or trade associations, including benefits deriving from them, and access to employment, employment matters in general, self-employment and unpaid work.

Persons considering themselves to be the victims of direct or indirect discrimination in these areas shall present the relevant courts with factual evidence from which such discrimination may be inferred. In the light of this evidence, the respondent must show that the measure in question is based on objective considerations entirely unconnected with discrimination.

The previous paragraph shall not apply in the criminal courts."

The principle of equal treatment, and thus a ban on all discrimination, therefore applies to any of the areas referred to in the first paragraph of Section 19, including access to employment and employment matters in general, whatever the individual's employment status: private law employee, established public employee, contractual public employee or employee with a special status. The same applies to the easing of the burden of proof, which is applicable **in both administrative and civil courts**, since the legislation only explicitly excludes the criminal courts from the scope of this provision.

The government therefore considers that following the enactment of the legislation of 30 December 2004, France is now in compliance with Article 1§2 of the Revised Charter.

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For all these reasons, and subject to any other information that might be required, the French government invites the European Committee of Social Rights to reject the complaint lodged by the trade union SUD Travail Affaires Sociales as ill-founded.

Court of Cassation
Social Division
Public hearing of 19 February 2003

Partial Cassation

Appeal No. 01-41677

Unpublished

President: Mr Le Roux-Cocheril, judge

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

ON BEHALF OF THE FRENCH PEOPLE

THE COURT OF CASSATION, SOCIAL DIVISION has delivered the following judgment:

On the sole grounds of appeal:

Having regard to Article L 122-45 of the Labour Code;

Mrs X...was recruited on 1 January 1997 as a caretaker by the association *Le Cercle de Bel Air*, and was dismissed on 16 April 1997 by registered letter, which stated: "as you are unable to fulfil all the terms of your contract owing to your state of health the association is compelled to terminate this contract prematurely, to take effect not less than 30 days and not more than three months from this date";

The employment tribunal (*conseil de prud'hommes*) rejected Mrs X's request for compensation for unfair dismissal, arguing that she had not started work until 27 January and then only until 28 February 1997, that because of sickness leave she had not worked after that date and that her dismissal was not unfair;

Since Article L 122-45 of the Labour Code prohibits the dismissal of an employee on grounds of his or her state of health or disability, unless an occupational physician has certified that he or she is unfit for work, pursuant to Part IV of Book II of the Code, the employment tribunal is in breach of Article L 122-45;

The Court therefore considers it appropriate to partially terminate the judicial proceedings, in accordance with Article 627 of the new Code of Civil Procedure;

FOR THESE REASONS:

THE COURT OVERTURNS AND SETS ASIDE the decision of the Saumur employment tribunal of 9 March 2001 to reject the applicant's request for compensation for unfair dismissal and to order her to pay the sum of two thousand francs to the *Cercle de Bel Air* association for pecuniary damage;

RULES that there shall be no reference back of the finding of unfair dismissal;

RULES that in accordance with Article L 122-45 of the Labour Code, Mrs X's dismissal by the *Cercle de Bel Air* on 16 April 1997 is null and void;

Refers the case back to the Angers employment tribunal for a ruling on the applicant's request for compensation;

Orders the *Cercle de Bel Air* to pay expenses;

Orders the state prosecutor at the Court of Cassation to transmit this judgment for publication of the summary;

Heard by the Court of Cassation, Social Division, and delivered by the President at the public hearing of 19 February 2003.

Decision appealed against: Saumur employment tribunal (various activities section) 2001-03-09
Headings and summaries: EMPLOYMENT CONTRACT, UNFAIR TERMINATION – dismissal – employee's sickness – conditions laid down – occupational physician.

Codes cited: Labour Code L 122-45

Court of Cassation
Social Division
Public hearing of 4 June 2002

Cassation

Appeal No. 00-42873

Published in the official report

President: Mr Sargos .
Rapporteur: Mrs Bourgeot.
Prosecutor: Mr Lyon-Caen.
Counsel: MM Foussard, Jacoupy.

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

On the sole grounds of appeal:

Having regard to Articles L 122-45 and R 241-51-1 of the Labour Code;

In accordance with Article R 241-51-1 of the Labour Code, unless employees' continued presence in their place of work poses an immediate threat to the health or safety of themselves or others, an occupational physician may only certify their incapacity for work after two medical examinations spaced over two weeks. It follows that an employee may only be declared unfit for work after a single examination if the occupational physician finds that there is such a threat. In accordance with Article L 122-45, a dismissal on grounds of incapacity for work following a single medical examination that makes no reference to an immediate threat is null and void.

Mrs de Araujo, employed by the company *Masure fils* as caretaker and, in addition, first as a warper then as a winder, was taken ill at her work station on 27 May 1992. When she resumed work on 3 June 1993, the occupational physician certified her as unsuitable for the post of winder on small and large bobbins, but suitable for lighter work in the firm. On the same day, the employer wrote to the employee to inform her that it could not take the risk of her resuming work. She was dismissed on 12 June 1993 for incapacity for work and took her case to the employment tribunal;

The Court of Appeal found that the occupational physician had lawfully certified Mrs de Araujo unfit for work and rejected her application for her dismissal to be ruled invalid;

In so doing, after finding that the employee had been dismissed for incapacity for work following a single medical examination at which the occupational physician had not identified a risk, the Court of Appeal was in breach of Articles L 122-45 and R 241-51-1 of the Labour Code;

For these reasons:

The Court overturns and sets aside all the provisions of the judgment of 31 March 2000 of the Douai Court of Appeal, restores the case and the parties to their position before this judgment and refers them back to the Douai Court of Appeal, with an alternative composition, for a fresh hearing.

Publication: Bulletin 2002 V No. 192 p. 188
Decision contested: Douai Court of Appeal, 2000-03-31
Headings and summaries: EMPLOYMENT CONTRACT, UNFAIR TERMINATION – Dismissal – Null and void - Case - Discrimination - Discrimination for reasons of health or disability – Occupational physician's finding of incapacity for work – Procedures – Failure to observe.

In accordance with Article R 241-51-1 of the Labour Code, unless employees' continued presence in their place of work poses an immediate threat to the health or safety of themselves or others, an occupational physician may only certify their incapacity for work after two medical examinations spaced over two weeks. It follows that an employee may only be declared unfit for work after a single examination if the occupational physician finds that there is such a threat. In accordance with Article L 122-45, a dismissal on grounds of incapacity for work following a single medical examination that makes no reference to an immediate threat is null and void.

EMPLOYMENT CONTRAT, EXECUTION – Employee's sickness – Non-occupational sickness or accident – Incapacity for work - Occupational physician's finding of incapacity for work – Procedures – Determination

REGULATORY WORK – Health and safety – Occupational medicine – Medical examinations – Employee's physical incapacity – Incapacity following illness – Occupational physician's finding of incapacity - Procedures – Determination

Case-law precedents: COMPARE WITH: Social division, 2001-10-09, Bulletin 2001, V, No. 307, p. 246 (partial cassation), and the judgment cited.

Codes cited: Labour Code R241-51-1, L122-45.