EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

9 February 2009

Case document No. 1

Confédération générale du travail (CGT) v. France
Complaint No. 55/2009

COMPLAINT

Registered at the Secretariat on 21 January 2009

Montreuil, 14 January 2009

Council of Europe
Secretariat General
Directorate General of Human Rights
F – STRASBOURG CEDEX

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

Dear Sir,

The CGT, a representative national organisation of employees and a member of the European Trade Union Confederation, wishes to submit a collective complaint under the additional Protocol to the European Social Charter of 9 November 1995, which entered into force on July 1998 and has been ratified by France, against the Government of France concerning the Working Hours Act, No. 2008-789 of 20 August 2008.

Part II of this legislation, which concerns working hours, is in breach of several provisions of the revised Social Charter:

1. Breach of the right to rest periods (Article 2§1) and the right to health (Article 11§1 and 3);
2. Excessive working hours (Article 2§1);
3. Breach of the right to fair pay (Article 4§2).

In the absence of any other domestic remedies for individuals and organisations, our organisation refers this matter to the relevant supervisory body of the Council of Europe and asks it to find that France is in violation of the revised Charter and to draft a recommendation urging it come into compliance.

Yours etc.

Bernard Thibault
Secretary General of the CGT

Attachment: collective complaint

Collective complaint brought by the CGT against the Government of France
relating in particular to Working Hours Act No. 2008-789 of 20 August 2008 (Official Gazette of the French Republic of 21 August 2008)

General background

1. Reminder

The CGT and the CGC have each already lodged collective complaints (Nos. 22/2003 and 16/2003) against the French Government with regard to its legislation on working hours (in connection with the annual working days system and the rules on on-call service).

The European Committee of Social Rights concluded that the situation of managerial staff in the annual working days system and the assimilation of periods on call ("périodes d'astreinte") to rest periods constituted violations of the revised European Social Charter (decisions of 12 October and 7 December 2004).

The Committee of Ministers took note of these decisions (Resolutions Nos. 2005/7 and 2005/8 of 4 May 2005).

2. The French Government's response

The French Government has taken absolutely no account of these decisions. It has deliberately ignored them.

There has been no change to the incompatible French legislation on on-call service (Article L.3121-6 of the Labour Code, as recodified on 1 May 2008).

There has, however, been a change to the incompatible French legislation on annual working days, but only in the form of a major extension of the system to cover non-managerial employees (Article L.3121-51-2 of the Labour Code, as recodified on 1 May 2008).

3. Latest developments

Through Act No. 2008-789 of 20 August 2008, the French Government continued:

- to ignore the decisions of the European Committee of Social Rights of the Council of Europe; and
- to exacerbate the problems of employees covered by the annual working days system.

Under the new Act:

1. there was no change to the incompatible rules on on-call service;
2. the annual working days system was extended still further:
   - annual working time may now exceed 218 days (as no limit is set by the Act, it can now reach up to 275 days or, in extreme cases, 282 days, after deduction of compulsory weekly and annual rest periods, and there is no limit on daily working hours) (Article L.3121-45 of the new Labour Code);

- collective guarantees have been substantially reduced (for instance, the arrangements for monitoring work loads are no longer determined by collective agreement but simply negotiated at a face-to-face interview with the employee by the employer, with mere consultation with the works council if there is one) (Articles L.2323-29 and L.3121-46 of the new Labour Code).

4. Complaints

The collective complaints procedure has to be credible. Decisions by the European Committee of Social Rights must prompt governments to amend their legislation and practice where these have been found to be incompatible with the revised European Social Charter.

In its 2007 report, the Committee highlighted these repeated failings of French legislation.

The revised European Social Charter must be implemented by all the states, and all workers must enjoy its benefits.

Accordingly, the CGT asks:

- for the European Committee of Social Rights to find again that the French Government has infringed the Charter;
- for the Committee of Ministers to address a recommendation to the French Government calling on it to bring its legislation on working hours into line with the Charter.

The annual working days system infringes the right to reasonable working hours

The revised European Social Charter provides:

Article 2 – The right to just conditions of work

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

1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase in productivity and other relevant factors permit;

The (previous) relevant legislation provided for:

A system for calculating working time that made no reference to actual hours worked and placed no limit on weekly working time, but did set a limit on working days per year (218 days) for employees with managerial status (Article L.212-15-3 of the Labour Code).

The European Committee of Social Rights decided that the situation of managerial staff in the annual working days system constituted a violation of the revised Charter, in particular because of the excessive length of weekly working time permitted (decisions of 12 October (§§ 31 to 41) and 7 December 2004 (§§ 56 and 57), as confirmed by the Committee of Ministers in Resolutions 2005/7 and 2005/8 of 4 May 2005, following collective complaints No. 16/2003 by the CGC and No. 22/2003 by the CGT).

The (new) relevant legislation provides:

Personal scope:

"Article L.3121-43

An agreement on an annual number of working days not exceeding the limit on annual working time set by the collective agreement provided for in Article L. 3121-39 may be negotiated by the following persons:

1. Managers who have a degree of control over their own work schedules and whose duties do not require them to work the standard working hours applicable to their individual work place, department or team;

2. Employees whose working hours cannot be determined in advance and who have complete independence to organise their work schedules in performing the duties entrusted to them."

Maximum annual working time:

Article L.3121-44

"The number of annual working days set by the collective agreement provided for in Article L.3121-39 may not exceed two hundred and eighteen days."

Article L.3121-45

"Employees who so wish may, with the consent of their employers, forfeit some of their rest days in exchange for an increase in their salaries. The agreement between the employee and the employer shall be set down in writing. The number of annual working days may not exceed a

maximum set by the collective agreement provided for in Article L.3121-39. If there is no such agreement, the maximum shall be two hundred and thirty five days.

The upper limit on annual working days shall be compatible with the provisions under part III on daily and weekly rest periods and non-working public holidays, and part IV on paid leave.

A rider to the agreement between the employee and the employer shall determine the percentage of the increase in pay for this overtime, which may not be less than 10%."

Maximum daily and weekly working time:

Article L3121-48

"Employees who have negotiated an agreement on annual working days shall not be covered by the provisions relating to:

1. Statutory weekly working hours under Article L. 3121-10;

2. Maximum daily working hours under Article L. 3121-34;

3. Maximum weekly working hours under the first paragraph of Article L. 3121-35 and the first and second paragraphs of Article L. 3121-36."

Assessment

a. The French Government has deliberately ignored the decisions of the ECSR cited above. It has failed to amend the impugned provisions of the Labour Code arising from Act No. 2003-47 of 17 January 2003 (the "Fillon II" Act) to bring the situation into conformity with the revised Charter.

   In its 6th report to the Council of Europe under the revised Charter, the French Government failed to mention that the French law on the annual working days system had been found to be incompatible by the ECSR (decision of 7 December 2004, following the collective complaint by the CGT).

   Since then, the Government has made the situation considerably worse. It has tabled several bills in parliament, which were passed and have extended the scope of the impugned system. The system now covers all employees who have some control over the organisation of their own work schedule (Act No. 2005-882 of 2 August 2005, section 95, Article L.212-15-3 § III of the Labour Code, which has now become Article 3121-51, paragraph 2) and, more specifically, employees of children's villages (Act No. 2005-32 of 18 January 2005, Article 67, Article L.774-1 of the Labour Code, not reproduced in the new code).

   The ECSR has confirmed its finding of non-conformity (ESC – 2007 Report; Part II – B. Renewed non-conformity decisions, CSR 2§1 France).

   The repeated failure of France to remedy the violation of the revised Charter has been duly noted (Governmental Committee – Conclusions 2007 of 30 November).

The current French legislation (arising from Act No. 789-2008 of 20 August 2008) includes the previous provisions that were incompatible with the revised Charter but, once again, makes them considerably worse.

The scope of the annual working days system has been considerably extended to encompass non-managerial staff (new L.3121-43, cited above).

Annual working time may now exceed 218 days.

Firstly, through a simple individual agreement between employee and employer it can be set at up to 235 days (L.3121-45, new Labour Code, paragraph 1, cited above), and this individual "negotiation" does not provide adequate safeguards for employees (who are in a subordinate legal position).

Secondly, through a collective agreement, annual working time may now be extended to 282 days (new Article L.3121-45, paragraphs 2 and 3, cited above; statement by the Minister of Labour during a debate in the National Assembly in July 2008).

Employees working under the annual working days system will still not be covered by the rules on maximum weekly working hours, including the upper limit of 48 hours per week (L.3121-48-3, cited above).

According to surveys by the Ministry of Labour, the annual working days system covers about one third of managers (the ACEMO survey of collective annual working time, 13 June 2008). For 10.2% of full-time employees (or 8.6% of all employees), working time is calculated in terms of annual working days (according to the June 2008 issue of the newsletter "*Premières synthèses*", published by the French Ministry of Labour's Directorate of Research, Studies and Statistics).

Consequently, France's domestic legislation, which applies to an ever-increasing number of employees, continues to violate the revised Charter. In view of the attitude of the Government, which has not just failed to take any steps to conform but has actually made the infringement of the Charter worse, there is a clear need for the Committee of Ministers to issue a recommendation on this subject.

The rules on on-call service infringe the right to reasonable working hours and the right to rest periods

The revised European Social Charter provides:

Article 2 – The right to just conditions of work

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

1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;
5 to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest;

The (previous) relevant legislation provided:

Article L.212-4 bis (paragraph 1, last sentence): *"With the exception of periods actually spent working, periods on call (*"périodes d'astreinte") *shall be reckoned part of the daily and weekly rest periods referred to in articles L. 220-1 and L. 221-4.*"

Article L.220-1 relates to the daily rest period of eleven hours between two working days and Article L.221-4 relates to the weekly rest period of 35 hours.

The European Committee of Social Rights decided that the assimilation of periods on call ("périodes d'astreinte") to rest periods constituted a violation of the revised Charter (decisions of 12 October (§§ 50 to 53) and 7 December 2004 (§§ 34 and 39), as confirmed by the Committee of Ministers in Resolutions 2005/7 and 2005/8 of 4 May 2005, following collective complaints No. 16/2003 by the CGC and No. 22/2003 by the CGT).

The (new) relevant legislation provides:

Article L3121-6

"With the exception of periods actually spent working, periods on call shall be taken into account when calculating the minimum length of daily rest provided for in Article L.3131-1 and the lengths of the weekly rest periods provided for in Articles L.3132-2 and L. 3164-2."

Article L.3131-1 relates to the daily rest period of eleven hours between two working days and Articles L.3132-2 and L.3164-2 relate to the weekly rest period.

Assessment

The current French legislation reproduces the previous provisions that were incompatible with the revised Charter.

The French Government has deliberately ignored the decisions of the European Committee of Social Rights cited above.

Although a number of new pieces of legislation containing provisions on working time have been introduced (in particular, Act No. 2005-882 of 2 August 2005, Act No. 2005-296 of 31 March 2005, Act No. 2005-32 of 18 January 2005 and Act No. 2004-391 of 4 May 2004), the French Government has failed to amend the impugned provisions of the Labour Code arising from Act No.

2003-47 of 17 January 2007 (the “Fillon II” Act) to bring domestic legislation into conformity with the revised Charter.

It did not take the opportunity to bring the rules into line when recodifying the Labour Code on 1 May 2008 (the provisions infringing the revised Charter were renumbered but no change was made to their content).

Neither did the recently passed Working Hours Act (No. 789-2000 of 20 August 2008) make the requisite changes.

In its 6th report to the Council of Europe under the revised Charter, the French Government failed to mention that the French legislation (Act No. 2003-47 of 17 January 2003) on on-call service during rest periods had been found to be incompatible by the ECSR (decision of 7 December 2004, following the collective complaint by the CGT). Since then, the Government has not tabled any draft legislation in parliament to bring the law into line. Consequently, under the relevant domestic legislation, which infringes the Charter, many employees are forced to be on call during rest periods.

The ECSR has confirmed its finding of non-conformity (ESC – 2007 Report; Part II – A. Conclusions of non-conformity for the first time, CSR 2§1 France).

The repeated failure of France to remedy the violation of the revised Charter was duly noted (Governmental Committee – Conclusions 2007 of 30 November).

Consequently, the domestic legislation still constitutes a violation of the revised Charter. In view of the Government’s total lack of effort to bring the situation into conformity with the revised Charter, there is a clear need for the Committee of Ministers to issue a recommendation on this subject.

The rules on the "Solidarity Day" and on the annual working days system infringe the right to a fair remuneration

The revised European Social Charter provides:

Article 4 – The right to a fair remuneration

With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

1. to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;
2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;

1. Annual working days system:

The (previous) relevant legislation provided:

Article L.212-15-3 – part III, paragraph 2: *"Employees concerned are not subject to the provisions of Article L 212-1 …"*. Article L.212-1, paragraph 1, sets the statutory weekly working hours. These employees are not covered by the rules associated with statutory working hours, including, in particular, the requirement for overtime (i.e. hours exceeding the statutory limit) to be paid at a higher rate.

Following the recodification of the Labour Code on 1 May 2008, this provision was simply reproduced without any substantive changes under a different number. The new Article L.3121-48-1 reads "*Employees who have negotiated an agreement on annual working days shall not be covered by the provisions relating to: 1 Statutory weekly working hours under Article L. 3121-10; …".*

The (new) relevant legislation provides:

Article L.3121-48 1°: *Employees who have negotiated an agreement on annual working days shall not be covered by the provisions relating to: 1. Statutory weekly working hours under Article L. 3121-10; …".*

The new Article L.3121-45, paragraph 3, reads: *"A rider to the agreement between the employee and the employer shall determine the percentage of the increase in the pay for this overtime, which may not be less than 10%".*

Assessment

There are two distinct situations to be considered.

- On the one hand, where employees do not work more than the limit of 218 days per year, there has been no change to the legislation: in this case, they are not entitled to increased pay for overtime.

The current French legislation precisely duplicates the previous provisions that were incompatible with the revised Charter.

The French Government has deliberately ignored the decision of the ECSR cited above.

Neither did the recently passed Working Hours Act (No. 789-2000 of 20 August 2008) bring domestic legislation into line with the revised Charter.

Consequently, the domestic legislation still constitutes a violation of the revised Charter. In view of the Government's persistent lack of effort to bring the situation into conformity with the revised Charter, there is a clear need for the Committee of Ministers to issue a recommendation on this subject.

- On the other hand, if an employee works more than 218 days per year, the pay for the additional working hours is now increased by a percentage which may not be less than 10%.

2. "Solidarity Day"

The relevant legislation provides as follows:

Act No. 2004-626 of 30 June 2004 added a new Article L.212-16 to the Labour Code, the first paragraph of which states: *"A Solidarity Day shall be set up to fund measures to enable elderly or disabled persons to live independently. It shall take the form, for employees, of an additional day of unpaid work and, for employers, of the contribution specified in sub-paragraph 1 of section 11 of Act No. 2004-626 of 30 June 2004 on collective responsibility for the independence of elderly and disabled persons."*

Assessment

This law requires employees to do "unpaid work".

It infringes the "right to a fair remuneration" as employees do not receive any remuneration in exchange for this additional "work" (equivalent to one day, or seven hours).

Employees work "overtime" (seven hours per year), for which they receive no remuneration.

This law far exceeds the exceptions in special cases allowed by the ECSR as it covers all employees.

Consequently, this law infringes the fundamental right to a wage (and the principle that "the labourer is worthy of his hire").

Act No. 2008-351 of 16 April 2008 amended the arrangements for this "unpaid overtime" (several ways of working Solidarity Day are proposed in Article 3133-8 of the Labour Code). However, this new law does not change the impugned rule. Employees must still work "unpaid overtime".

The recodified Labour Code of 1 May 2008 changed the initial wording and now talks (in Article L.3133-7-1°) of "an unpaid day of overtime".

This new wording is confusing. Under the domestic legislation on monthly salaries (Act No. 78-49 of 19 January 1978 and the national interprofessional agreement of 10 December 1977), employees are paid the same whether or not they are required to work on a public holiday such as Whit Monday. However, under the Act of 30 June 2004 cited above, they are not paid for any "overtime" they are required to work on such a day.

Consequently, by requiring employees to perform unpaid work, the domestic legislation on "Solidarity Day" constitutes a violation of the revised Charter.