EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

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Case document no. 2

Confédération générale du Travail (CGT) v. France
Complaint no. 55/2008

OBSERVATIONS FROM THE GOVERNMENT ON THE MERITS

(TRANSLATION)

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**MINISTRY
OF
FOREIGN AND EUROPEAN
AFFAIRS**

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The Ministry of Foreign Affairs

to

The Executive Secretary of the European Social Charter

Council of Europe
Directorate General of Human Rights

No. DJ/DDL

Subject: Collective complaint no. 55/2009 Confédération Générale du Travail v. France

1. In a letter of 13 February 2009, the European Committee of Social Rights notified the French Government of its admissibility decision concerning Collective Complaint no. 55/2008 by the Confédération Générale du Travail (CGT), as lodged in accordance with Article 5 of the Additional Protocol to the Charter, and asked the Government to submit observations on the merits of the complaint.

2. These observations constitute the French Government's reply to the CGT's allegations, seeking to show that its arguments should be dismissed.

I. Context

3. There have been several recent reforms of the working hours regulations, in particular:

- order 2007-329 of 12 March 2007, ratified by section 1 of Act 2008-67 of 21 January 2008, in which the government revised the Labour Code;

- Act 2008-351 of 16 April 2008 on the so-called "solidarity day";

- the Reform of Social Democracy and Working Hours Act (no. 2008-789 of 20 August 2008), amending the legislation on overtime and annual hours or weeks, working hours adjustment, paid holidays and leave savings accounts agreements.

II. The complainant's allegations

4. Relying on articles 2 and 4 of Part II of the revised European Social Charter, the CGT alleges beaches of:

   - the right to reasonable working hours by the annual working days and assimilation of on-call periods systems;

   - the right to rest periods by the on-call periods system;

   - the right to fair remuneration by the "solidarity day" and annual working days systems.

III. The French Government's reply to the complainant's allegations

A. The allegation that the annual working days system contravenes the right to reasonable working hours and rest periods.

5. The CGT considers that French legislation on annual working days agreements, particularly since the enactment of the Reform of Social Democracy and Working Hours Act, no. 2008-789 of 20 August 2008, is in breach of several provisions of the revised Social Charter, in particular Article 2§1 on reasonable daily and weekly working hours. Indeed, it argues that by bringing this bill before Parliament, the Government has made the annual working days legislation still more undesirable.

6. Under the legislation prior to the Act of 20 August 2008, certain categories of employee subject to an annual working days system were not covered by the maximum weekly

working hours requirements because their working hours could not be determined in advance, but they were nevertheless guaranteed daily rest periods under Article L. 3131-1 and weekly rest periods under articles L. 3132-1 and L. 3132-2. These employees could not have fewer than 11 consecutive hours of daily rest periods (or 9, if provided for in a collective agreement) or fewer than 35 consecutive hours of weekly rest periods, in the form of a 24 hour weekly rest period plus 11 hours of daily rest. These minimum periods of rest ensured that employees could not be required to work an unreasonable number of hours. They provided safeguards and protection which no employer could waive and as such limited the length of the working day.

7. Three points are made about the changes in the August 2008 legislation:

8. Firstly, it authorised individual agreements to exceed the figure of 218 annual days worked. This allegedly failed to offer employees sufficient safeguards, since the annual days worked could be raised to 282 days by collective agreements. In fact, there was not previously any maximum period by which the period specified in the annual working days agreement could be exceeded. The former Article L. 212-15-3 III stated that:

> "When the number of days worked exceeds the annual maximum laid down in the agreement, after deducting, where appropriate, the number of days allocated to a leave savings account or which the employee has waived ... and paid leave deferred ..., the employee must benefit, in the first three months of the following year, to a number of days equal to the excess days worked."

9. It was therefore already possible under the Act of 19 January 2000 establishing the annual days worked system to exceed the number of days specified in the relevant agreement, and while there were various forms of compensation for these extra days there was no ceiling on them. The Act of 20 August 2008 therefore introduced greater protection by specifying that an absolute maximum could be negotiated under a collective agreement, while continuing to comply with paid holiday, rest period and public holiday requirements. If no such figure was agreed, under the legislation it could be no more than 235 days.

10. Finally, the French Government has allegedly reduced collective safeguards because the arrangements for monitoring workloads are no longer determined by collective agreement but are simply the subject of individual discussions between employees and their employer. In fact, it is no longer obligatory for the arrangements for monitoring workloads to be determined by collective bargaining but the matter may still be the subject of a collective agreement under Article L. 3121-39, which specifies that the agreement shall lay down the

main features of annual working days agreements. Moreover, the legislation to reform working hours arrangements modifies Article L. 2323-29 to require works councils to be consulted each year on the use of annual working days agreements and the arrangements for monitoring the workloads of the staff concerned. These arrangements are therefore considered by a body representing the undertaking's employees, which as such is in close contact with the employees concerned.

11. Finally, the CGT claims, incorrectly, that under the new Article L. 3121-43 the annual working days arrangements now apply to a significant number of non-managerial staff. In fact, although the August 2008 law has simplified and clarified the provisions on annual working days agreements, it has not changed their substance. Before the legislation to reform working hours arrangements, the Labour Code stated that non-managerial staff who could be covered by the annual working days system were ones "whose working hours cannot be determined in advance and who have complete independence to organise their work schedules so that they can perform the duties entrusted to them" (former Article L. 3121-51). The Act of 20 August 2008 uses the same language:

"employees whose working hours cannot be determined in advance and who have complete independence to organise their work schedules so that they can perform the duties entrusted to them.".

12. It is quite wrong, therefore, to argue that the annual working days system now extends to far more non-managerial employees.

13. Finally, it should be noted that the annual working days arrangements are fully consistent with Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Article 17§1 of which allows member states to derogate from certain requirements, particularly those relating to maximum weekly working hours, when "on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of ... managing executives or other persons with autonomous decision-taking powers".

B. The allegation that the on-call periods system contravenes the right to reasonable working hours and rest periods

14. The CGT believes that treating on-call periods as part of the daily rest periods, as defined in Article L. 3131-1 of the Labour Code, and the weekly rest periods defined in articles L. 3132-2 and L. 3164-2 is incompatible with Article 2 of the revised Social Charter, which states that:

"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".

15. The CGT maintains that the French Government failed to satisfy these requirements in the changes to the Labour Code that came into force on 1 May 2008 or in the Working Hours Act of 20 August 2008.

16. First, it should be noted that under Article L. 3121-1 of the Labour Code, actual working time is the time in which employees are at their employers' disposal and must comply with their orders, without being free to go about their personal business.

17. Moreover, Article L. 3121-5 of the Labour Code defines on-call periods as periods in which employees, without being permanently and immediately at their employers' disposal, must remain at home or close by so that they can be called on to carry out work on the latter's behalf. The periods for which such call-outs last are deemed to be working time.

18. Under Article L. 3121-6, other than actual periods of call-out, on-call periods are taken into account in calculating daily and weekly rest periods. Act 2003-47 of 17 January 2003 was the first to count on-call periods as rest periods, on the grounds that except when they were actually called out employees could devote such periods to their personal activities so such periods could not, therefore, be counted, as actually working time.

19. In its judgment of 3 October 2000 in the case of *Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, the Court of Justice of the European Communities ruled that doctors who are on call by being contactable at all times without having to be at the health establishment are undoubtedly at the disposal of their employer, in that it must be possible to contact them, but can nevertheless manage their time with fewer constraints and pursue their own interests. The Court found that only time linked to the actual provision of primary care services must be regarded as working

time within the meaning of Directive 93/104/CE of 23 November 1993 concerning certain aspects of the organisation of working time, as modified in 2000.

20. Since they are not deemed to be actual working time, on-call periods cannot be included in the calculation of daily and weekly working hours.

21. Nevertheless, the Ministry of Labour has taken further steps to structure these arrangements:

- in circular DRT 2000-03 of 3 March 2000, the ministry states that treating on-call periods as rest periods should not lead to the same employees being systematically placed on call during compulsory rest periods and that if such practices are observed they should be reported to the central authorities.

- employees who are subject to on-call arrangements can continue to go about their personal business in their private sphere of activity while receiving compensation for the limited restrictions on their freedom of movement. Such compensation, provided for in Article L. 3121-7 of the Labour Code, takes the form of a financial payment or a rest period, determined by collective agreement or, in its absence, the employer.

- according to circular DRT 06 of 14 April 2003, when employees are called out during on-call periods and they have not yet benefited from the minimum rest periods specified in the Labour Code (11 consecutive hours in the day, 35 consecutive hours in the week), these must be allocated in their entirety when the call-out ends. Since in most cases employees are called out before they have benefited from the minimum daily or weekly rest periods specified in the Code, the on-call arrangements are particularly favourable to those concerned.

22. For these reasons, treating on-call periods as rest-periods is not in breach of the right to reasonable working hours, as specified in Article 2§1 of the revised Social Charter.

C. The allegation that the annual working days system and the "solidarity day" contravene the right to reasonable remuneration

<u>The annual working days system</u>

23. The CGT states that French legislation does not entitled employees subject to the annual working days arrangements to higher overtime pay. However, as these employees do not work overtime they are not, by definition, eligible for higher pay for a form of work they have not performed.

24. Since the Act of 31 March 2005 on the organisation of working hours in businesses, though, employees on the annual working days system who work more days than are specified in their individual working days agreement, because they waive their entitlement to additional days leave, receive an increased salary to compensate for the additional time worked. These provisions are repeated and expanded on in the Act of 20 August 2008, which provides for at least 10% higher pay for rest days that employees working this system are allowed to waive and that constitute overtime. The new Article L. 3121-45 introduced by the Act of 20 August 2008 specifies that:

> "Employees who so wish may, in agreement with their employers, forfeit some of their rest days in exchange for an increase in their salaries. The number of annual working days may not exceed a maximum set by the collective. 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 supplement to the package agreement between the employee and the employer shall determine the percentage of the increase in the pay for this additional working time, which may not be less than 10%."

25. There is thus a legal minimum higher rate of pay, which matches the 10% minimum for overtime that cannot be waived by either collective agreements or individual employers.

26. These provisions, which apply the principle of a higher rate of pay for all additional time worked, therefore guarantee the fair remuneration principle.

27. Finally, fair remuneration is also the subject of Article L. 3121-47 of the Labour Code, which offers those concerned a judicial remedy. Employees who have entered into an annual working days agreement and whose pay is manifestly out of line with the duties they are required to perform may, regardless of any contractual provisions to the contrary, apply to

the courts for compensation for any detriment suffered, having regard to the minimum applicable agreed salary or that normally applied in the undertaking concerned.

The "solidarity day"

28. The CGT considers that the institution of a solidarity day in the form of an additional unpaid day of work infringes Article 4 paragraphs 1 and 2 of the revised Social Charter, which read:

"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".

29. The CGT states that although Act 2008-351 of 16 April 2008 changed the arrangements governing the solidarity day it did not alter the actual principle of an additional unpaid day of work.

30. In support of its allegation, the CGT argues that:

- the law is in breach of a fundamental right, the right to be paid ("the labourer is worthy of his hire");
- employees are required to work seven hours of overtime for which, in breach of Article 4§2 of the revised Social Charter, they receive no remuneration, let alone a higher rate of overtime pay.

31. The principle of a solidarity day appeared in section 2 of Act 2004-626 of 30 June 2004 and was codified by Article L. 3133-7 of the Labour Code, which states that "it shall take the form, for employees, of an additional day of unpaid work .... to finance activities to promote the autonomy of elderly and disabled persons".

32. Firstly, as the *Conseil d'Etat* stated in its decision of 6 September 2006, having regard to the nature of and the additional burden imposed by the work provided for in the Act of 30 June 2004, there was no breach of Article 4 of the European Social Charter, which required states

party "to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living".

33. The European Committee of Social Rights decides whether or not any restrictions on Charter rights are disproportionate (collective complaint 8/2000, Quaker Council for European Affairs v. Greece). In this case, it is difficult to argue that the failure to remunerate employees for 7 hours' additional work, compared with 1600 worked annually, as a civic obligation of solidarity with elderly and disabled persons, can be deemed to be a disproportionate restriction on employees right to adequate pay.

34. Secondly, under Article L. 3133-10 of the Labour Code:

"Work performed, up to a limit of seven hours, during the solidarity day, shall not be remunerated:

1. In the case of monthly paid employees, up to the seven hour limit;
2. In the case of employees whose remuneration is based on an annual number of days of work, in accordance with article L. 3121-45, up to the value of one day's work."

35. It follows from this article that non-monthly paid employees are paid normally for work performed on this day, where appropriate having regard to increased overtime pay due.

36. The remuneration of monthly paid employees is not affected by the introduction of an additional day's work, compared with previous years. They do not lose any salary by working the extra day because under Article 3 of the national labour agreement of 10 December 1977, appended to the monthly pay legislation, their pay already incorporated payment for non-working public holidays.

In view of the foregoing comments, the French Government concludes that the complaints of breaches of the articles of the European Social Charter referred to by the complainant are unfounded and asks the European Committee of Social Rights to reject the CGT's complaint.

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