EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

22 September 2009

Case document No. 3

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

RESPONSE FROM CGT TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

(TRANSLATION)

registered at the Secretariat on 17 September 2009

CGT reply
to the government's submissions

These submissions in reply answer the government's arguments, concludes that these should be dismissed and confirms the validity of the arguments presented in the collective complaint.

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

The French government confirms that under this system "certain categories of employee .... [are] not covered by the maximum weekly working hours requirements" (paragraph 6 of the government memorial).

For example, the absolute maximum of 48 hours a week is not applicable to them.

According to the government, "they [are] nevertheless guaranteed daily rest ... and weekly rest periods" (paragraph 6).

This statement does not stand up to examination.

In fact, as has already been amply demonstrated on a number of occasions, these minimum rest periods allow the employees concerned to work 78 (seventy-eight) hours a week (24 hours – 11 hours of rest = 13 hours x 6 days worked = 78 hours, leaving the employee with a minimum weekly rest period of 35 hours).

This situation, which entails excessive periods of work and has already been censured by the Committee (Decisions of 16 November 2001, 12 October 2004, in particular §§ 34 and 41, and 7 December 2004, see complaints nos 16/2003 and 22/2003), is still in force.
The most recent legislation (20 August 2008 – appendix 1, 2 August 2005) has not changed the situation (or has actually made it worse rather than better).

In the alternative, the government claims that the legislation has been improved in certain other specific respects:

- **the annual maximum days worked (set at 218 days)**
  - before the Act of 20 August 2008, it was possible to exceed the limit in practice but a regulatory mechanism, the former Article L.212-15-III, allowed employees to recover days worked over the limit by taking compensatory rest days the following year. The French Constitutional Council accepted the extension of the annual working days system to non-managerial employees on condition, in particular, that the "number of days worked may not exceed the maximum of two hundred and eighteen days per year" (§ 7, decision 2005-523 of 29 July 2005, appendix 2);
  - the Act of 20 August 2008 (appendix 1) now explicitly authorises this limit to be exceeded, even by simple individual agreement (up to 235 days), and there is no longer any regulatory mechanism. Up to 282 days a year may be worked, subject to collective agreement (see the National Assembly debate of 23 July 2008 – 2nd sitting, record of Assembly debates p. 4881). The figure of 282 days is obtained as follows:

    365 days a year.

    - 52 days of weekly leave

    - 30 days paid holiday (5 weeks x 6 working days)

    - 1 day's public holiday (the 1 May is the only public holiday that may not be worked)

    = 282 days;
  - employees may now work 282 days x 13 hours a day or 3 866 hours worked per year, which cannot be considered to be reasonable working hours.
    The government's claims in §§ 8 and 9 do not stand up to analysis.

    These excessive periods of work are harmful to employees, particularly their health (such as stress and premature wear and tear) and personal and family lives, and to social cohesion.
    The situation of employees has therefore significantly deteriorated.

- **Collective safeguards**
  The government confirms that the previous collective safeguards no longer exist (§ 6).
  Before the Act of 20 August 2008, employers could negotiate collective agreements with representative trade unions including "arrangements for counting days and half days worked and days and half-days of rest", "conditions for monitoring the application of the collective agreement" and "arrangements for monitoring the organisation of the work of the employees concerned, the length of their working day and the resulting workload" (former Article L.212-15-3-III of the abridged Labour Code). The validity of such agreements was conditional on the inclusion of these clauses.
  These collective safeguards, which the French government relies on to argue that employees enjoy sufficient guarantees (Decision of 12 October 2004, § 28 ii), but which the ECSR considered to be inadequate (same Decision, §§ 36-37), no longer exist.
  Simply interviewing employees (Article L.3121-46 of the Act of 20 August 2008 – appendix 1) or consulting works committees on the arrangements for monitoring workloads (Article 19-II of the Act) clearly does not offer the same guarantees as collective bargaining, particularly as, under French law, opinions issued by works committees are not binding on employers. The situation has therefore deteriorated significantly.

- **The personal scope of the annual working days system:**
  The annual working days system has been extended to non-managerial staff (by Act 2005-882 of 2 August 2005, Article L.212-15-3-III, now Article L.3121-51).
  As a result, since France was censured in Resolutions Res Ch S 2005/7 and Res Ch S 2005/8 of 4 May 2005, French legislation has increased the number of employees concerned.
  The government's denial that there has been this extension to non-managerial employees (§§ 11 and 12) is quite unconvincing.
  The situation of employees has therefore significantly deteriorated.

  Nor is the annual working days system compatible with Community law. The great majority of employees covered by this system do not fall within the derogation category specified in Directive 2003/88/EC (article 17: managing executives; see below – according to ministry of labour statistics in 2008 and 2009 the system covered more than 10% of full-time employees in France - 8% in 2006 according to INSEE - who were not managing executives: Appendix 2). This derogation for managing executives is also applicable under the Labour Code (Article L.3111-2, Appendix 3).
  As a subsidiary argument, it should be noted that the fact that legislation is based on a Community directive does not exempt it from the scope of the Charter (see *mutatis mutandis* ECHR 15 November 1996, Cantoni v. France, § 30, Rec. 1996-V).
  Once more, the government's statement (§ 13) is incorrect.

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

The government confirms that the French legislation that treats on-call periods as rest periods has not been altered (§ 22), despite the Council of Europe's adverse findings (see the Committee's decision of 7 December 2004, §§ 34-39, Complaint 22/2003, Resolution Res Ch S 2005/8). The government ignored these criticisms and continues to ignore them.

Several other government statements are also incorrect:

- according to the government (§ 18) "employees [can] devote such periods to their personal activities": yet employees who are on call must be able to reach their work place within a short time to carry out their duties. As such they are not free to rest, to travel outside a certain restricted area or to pursue any activities of their own choosing, which may have to

be interrupted rapidly at any time (see § 36 of the Committee's decision of 7 December 2004);

- the government refers to the CJEC judgment of 3 October 2000 SIMAP (C-303/98), which concerns the treatment of on-call periods as working time (§ 46 to 52 of the judgment). The reference in § 19 of its memorial is therefore inapplicable, since the Community court was not concerned with whether on-call time should be treated as rest time. On the other hand, the government fails to mention the decision of the Community court to censure the French system of equivalences in connection with excessive working hours (CJEC 1 December 2005, C-14/04, §§ 54-60, Appendix 5). It also fails to mention two other cases concerning the working hours system in which the European Court of Human Rights found against France (ECHR 9 January 2007, Arnolin and others v. France, Aubert and others v. France, no. 20127/03 and no. 3150/3);
- according to the government, "the Ministry of Labour has taken further steps to structure" the arrangements for on-call periods during rest periods (§ 21). This structuring merely takes the form of circulars, which in French law are not binding on private persons, and more specifically employers. In practice, these simple recommendations are not implemented. Why are they not given legal force? The government has nothing to say on the subject.

The government's reference to compensation makes no difference to this critique of the on-call arrangements during rest periods. Nor does the law specify any minimum level of such compensation, particularly in connection with rest periods.

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

3.1. Annual working days system

The government states that "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" (§ 23).

This does not stand up to examination.

Employees on this system do in fact work "overtime", whatever the legal definition given to it. The legislation does not make it possible to calculate overtime worked. For example, under Article L.3121-48-1 of the Labour Code (Appendix 1), the legal working week does not apply to them.

In a previous complaint, No. 16/2003, the government has already tried unsuccessfully to avoid a finding that it was in breach of the Charter (Committee decision of 12 October 2004 (§§ 55-59, Res Ch S 2005/7).

The situation remains unaltered.

The large number of employees (more than 10%) on the annual working days system goes well beyond the only exceptions – "in particular cases" – authorised by Article 4§2 of the revised Charter.

French legislation thus deprives them of "the right of workers to an increased rate of remuneration" (Article 4§2).

They are only entitled to increased pay if they waive their right, not only to a significant number of hours worked but also to rest days (see §§ 24-26 of the government memorial).

3.2. The "solidarity day"

Several points should be made in answer to the government:

- non-monthly paid employees are not affected by the non-payment of overtime (§ 35), but they form a very small part of the current French workforce;

- monthly paid employees work unpaid "overtime", which is incompatible with Article 4§2 of the Charter.

Under the provisions on monthly pay, these employees' remuneration is not reduced (L.3242-1, though the government makes an error in failing to refer in the text to the recodification of 1 May 2008: see § 36 of the government memorial). However, as well as having to do additional work for which they are not paid, the most vulnerable among them often suffer drops in their overall income, for example women and one-parent families who have to pay additional childcare costs when their employer chooses as the solidarity day a public holiday, such as Whit Monday, when day nurseries are closed. The government has nothing to say on this (§ 36).

In view of these additional comments, the CGT concludes that the breaches of the articles of the revised European Social Charter described in its collective complaint are well founded and asks the European Committee of Social Rights to find that France is in violation of the Charter.

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Appendices

1. Act of 20 August 2008, working time section - agreement on annual working days.
2. Constitutional Council decision of 29 July 2005.
3. Ministry of Labour statistics on number of employees on the annual working days system.
4. Article L.3111-2 of the Labour Code.
5. CJEC decision, 1 December 2005, C-14/04, Dellas, CGT and others.
6. Article L.3242-1 of the Labour Code.