

DECISION ON THE MERITS

COMPLAINT N^o. 9/2000

By *Confédération Française de l'Encadrement CFE-CGC*
v. France

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (hereafter referred to as "the Committee"), during its 181st session in the following composition:

Messrs Stein EVJU, President
Nikitas ALIPRANTIS, Vice- President
Matti MIKKOLA, General rapporteur
Rolf BIRK
Ms Micheline JAMOULLE
Messrs Tekin AKILLIOĞLU
Jean-Michel BELORGEY
Ms Csilla KOLLONAY LEHOCZKY

Assisted by Mr Régis BRILLAT, Executive Secretary of the European Social Charter

After having deliberated on the 12 June, 11 and 13 September, 15 and 16 November 2001,

On the basis of the report presented by Mr Matti MIKKOLA,

Delivers the following decision adopted on this last date:

PROCEDURE

1. On 6 November 2000, the Committee declared the complaint admissible.

2. In accordance with Article 7 para. 1 and para. 2 of the Protocol providing for a system of collective complaints and with the Committee's decision on the admissibility of the complaint, the Executive Secretary communicated, on 13 November 2000, the text of the admissibility decision to the French Government, the trade union *CFE-CGC*, to the Contracting Parties to Protocol, to the states that have made a declaration in accordance with Article D para. 2 of the revised European Social Charter, as well as to the European Trade Union Confederation (ETUC), the Union of the Confederations of Industry and Employers of Europe (UNICE) and the International Organisation of Employers (IOE), inviting them to submit their observations on the merits of the complaint. In accordance with Article 25 para. 2 of the Committee's Rules of Procedure, the President set a date-limit of 31 January 2001 for the presentation of observations.

3. On 5 February 2001, the French Government presented its observations on the merits of the complaint.

4. In accordance with Article 25 para. 2 of the Committee's Rules of Procedure, the President extended until 15 February 2001 the date-limit for the presentation of the observations of the ETUC, at the latter's request. These observations were registered on 23 February 2001.

5. The President set 30 April 2001 as the deadline for the *CFE-CGC* to present its observations in response to the Government. These observations were registered on 2 April 2001. Supplementary observations were registered on 24 April 2001.

6. On 4 April 2001, Mr Jean-Jacques GATINEAU, made a written request on behalf of the *CFE-CGC*, for a hearing in accordance with Article 7 of the Protocol. In accordance with Article 29 para. 1 of its Rules of Procedure, the Committee decided on 26 April 2001 to organise a hearing.

7. The hearing took place in public at the Human Rights Building in Strasbourg on 11 June 2001. Mr Jean-Jacques GATINEAU represented the *CFE-CGC*. The Government was represented by Mr Pierre BOUSSAROQUE, judge seconded to the Direction of Legal Affairs of the Ministry of Foreign Affairs and Mr MOREL of the Ministry of Social Affairs and Solidarity.

In accordance with Article 29 para. 2 of its Rules of Procedure, the Committee invited the ETUC to participate in the hearing. It was represented by Mr Jean LAPEYRE, deputy Secretary-General and by Mr ROUSSELOT of Eurocadres.

8. By letter registered on 28 August 2001, Mr GATINEAU communicated to the Committee supplementary observations in writing concerning the results of a survey on the working time of managers. The Government was invited to comment on the document if it considered this useful, but did not do so.

SUBMISSIONS OF THE PARTICIPANTS IN THE PROCEDURE

a) The Complainant Organisation

9. The CFE-CGC asks the Committee:

– to state that the provisions of the Aubry II Act of 19 January 2000 infringe the provisions of Articles 2 para. 1, 4 para. 2, 6 para. 4 and Article 27 of the revised European Social Charter and therefore give rise to a discrimination contrary to the revised European Social Charter, to the detriment of the entire managerial profession.

– to order France to pay to the CFE-CGC damages of 78 billion French francs for damage suffered by the whole profession.

b) The French Government

10. The Government asks the Committee to reject the complaint as unfounded in each respect and to reject the claim for damages also, as under the Protocol the Committee is not competent to examine such a request, which in any event appears to be unfounded.

c) The European Trade Union Confederation

11. The ETUC considers that the situation does not infringe any of the provisions relied on by the CFE-CGC.

RELEVANT DOMESTIC LAW

12. Act n° 2000-37 of 19 January 2000 on the negotiated reduction of working time (known as the Aubry II Act) provides for the reduction of statutory working time to 35 hours per week.

13. Chapter III of the Act establishes several specific conditions applying to the reduction of the working hours of managers. These are grouped into three distinct categories:

a) Senior managers (Article L 212-15-1 of the Labour Code)

14. These managers are excluded from the scope of the legislation on the length of working time:

“The term “senior managers” shall be understood as meaning managers whose responsibilities are such that they are allowed a significant level of autonomy in organising their work schedule, who have a broad degree of independence in taking decisions and who are among the most highly paid in their firm or establishment.”

b) *Integrated Managers* (Article L 212-15-2 of the Labour Code)

15. These are managers who are subject to the ordinary regime, i.e. the same rules pertaining to hours and working time as the non-managerial employees with whom they work.

c) *Intermediary Managers* (Article L 212-15-3 of the Labour Code)

16. These are managers who are not part of either of the two previous categories. To allow them to benefit from an effective reduction in working time, the Act allows for the conclusion of collective agreements that determine the duration of working time, (Article L. 211-15-3-I).

17. The system applicable to this third category of managers is either the working hours (Article L. 212-15-4) or the annual working days system (Article L. 212-15-3). It is the system of annual working days alone which is the subject of the complaint. The Act states that the number of working days may not exceed 217.

18. Articles L. 212-15-3 and L. 212-15-4 of the Labour Code read as follows:

“Article L. 212-15-3 – I. Employees classified as managers within the meaning of the sectoral collective agreements or the first paragraph of Article 4 of the national managerial staff retirement and welfare agreement of 14 March 1947 and who are not governed by the provisions of Articles L. 212-15-1 and L. 212-15-2 must benefit from an actual reduction in their overall working hours. Their working hours may be laid down by individual “package” agreements and calculated on a weekly, monthly or annual basis. The conclusion of such package agreements must be provided for in an extended collective agreement or a staff or company agreement setting out the managerial categories eligible to benefit from such individual package agreements and the arrangements for and main characteristics of the package agreements that may be concluded. In the absence of any extended collective agreement or staff or company agreement, such package agreements on working hours may be concluded only on a weekly or monthly basis.

II. Where the agreement provides for the possibility of concluding a package agreement on working hours calculated on a yearly basis, the collective agreement must stipulate the annual total of working time on which

the package is based, without prejudice to the provisions of Articles L. 212-1-1 and L. 611-9 relating to the documents for calculating the number of hours worked by each employee. The agreement, provided that it complies with the provisions of Articles L. 220-1, L. 221-2 and L. 221-4, may stipulate daily and weekly limits in place of those laid down in the second paragraph of L. 212-1 and L. 212-7, provided that arrangements are put in place to verify the application of these new agreed maxima and that rules are laid down for monitoring the organisation of work and the workload of the employees concerned, and provided that no objection to such an agreement has been raised in pursuance of Article L. 132-26.

“The agreement may also stipulate that package agreements on working hours calculated on a yearly basis shall apply to itinerant non-executive staff whose working hours cannot be determined in advance and who have an effective degree of independence in organising their work schedule in order to perform the duties entrusted to them.”

“III. A collective agreement or arrangement providing for the conclusion of agreements on annual working days must not have been objected to under the terms of Article L 132-26. The agreement or arrangement shall fix the number of days worked, which may not exceed the maximum of two hundred and seventeen days. The agreement or arrangement shall specify the categories of employees concerned, whose working time cannot be determined in advance owing to the nature of their functions, the responsibilities held, and the degree of autonomy allowed them in organising their work schedule. The agreement or arrangement shall further specify the method of calculating days and half-days worked or taken as rest. It shall determine the conditions governing the supervision of its application and shall lay down procedures to monitor, for the employees concerned, the organisation of their work, variation in the length of the working day, and the resultant workload. The agreement may further provide for days of rest to be entered in a leave-banking account as prescribed by Article L 227-1.

“Employees concerned are not subject to the provisions of Article L 212-1 and Article L 212-7, second indent. The provisions of Articles L 220-1, L 221-2 and L 221-4 shall apply to them. The agreement or arrangement shall determine the specific procedures for applying the foregoing provisions.

“The employer shall retain for consultation by the labour inspector, for a period of three years, any document or documents held by the undertaking or establishment recording the number of days worked by those employees coming under agreements on annual working days. Where the number of days worked exceeds the yearly maximum stipulated by such agreements or arrangements, after subtracting as appropriate the number of days entered in a leave-banking account and the days of paid leave carried forward as prescribed by Article L 223-9, the employee shall be credited, during the first three months of the following year, with a number of days equivalent to the excess thus calculated. The maximum number of working days for the year in which these days are taken as rest shall be reduced accordingly.”

“Article L. 212-15-4. Where a package agreement on working hours has been concluded with an employee governed by the provisions of Article L. 212-15-2 or L. 212-15-3, the corresponding remuneration must be at least equal to that which the employee would receive having regard to the minimum agreed wage level applicable in the company and any bonuses or supplements provided for under Article L. 212-5.

“An employee having entered into an agreement on annual working days under the provisions of paragraph 3 of Article L 212-15-3 who does not benefit from an effective reduction in working time or receives remuneration which is manifestly incommensurate with the constraints imposed may, notwithstanding any stipulation to the contrary, apply to the court for the award of compensation calculated according to the prejudice incurred, having regard in particular to the minimum agreed wage level applicable, or otherwise to the level of the salary which applies in the firm, and corresponding to his/her classification.”

19. Articles L. 220-1, L. 221-2 and L. 221-4 of the Labour Code read as follows:

“Article L. 220-1 – All employees shall have a daily rest period of at least eleven consecutive hours.

An extended collective agreement may depart from the provisions of the above paragraph, in accordance with conditions laid down by decree, for example for activities requiring a continuous service or where total working time is split into separate periods.

The decree shall also specify the conditions under which the provisions of the first paragraph may be departed from where there is no extended collective agreement and in the event of urgent work occasioned by an accident or risk of accident or exceptional pressure of work.”

“Article L. 221-2 – No employee shall be required to work for more than six days in any one week.”

“Article L. 221-4 – The weekly rest period must be of at least 24 consecutive hours in addition to the daily consecutive rest period provided for under Article L. 220-1.

Young workers under 18 years of age and young people under the age of 18 on work familiarisation or work experience placements as part of a sandwich course or the school curriculum shall have two consecutive rest days.

Where justified by the particular nature of the activity, an extended collective agreement may lay down the conditions under which the provisions of the preceding paragraph may be departed from in respect of young people over the school-leaving age, provided that they are allowed a minimum rest period of 36 consecutive hours. Where no such agreement exists, a decree from the

Conseil d'Etat shall lay down the conditions under which this dispensation can be granted by the labour inspectorate.”

20. Article L. 132-26 of the Labour Code reads as follows :

“Within a deadline of eight days from the signature of a collective agreement or an enterprise or works agreement, or a supplementary agreement or an appendix, containing clauses that derogate either from statutory or regulatory provisions, where permitted by such provisions, or, in accordance with Article L. 132-24, from provisions on remuneration agreed at professional or inter-professional level, the organisation(s) not having signed one of these texts in question may object to its entry into force, subject to their having obtained the votes of more than half of the voters registered for the previous elections for the works council, or, in its absence, staff representatives. Where the text at issue only concerns one distinct professional category, coming within an electoral college as defined in Article L. 433-2, the organisations that may object to its entry into force are those having received the votes of more than half of the voters registered with the college.

An objection must be in writing and give reasons. It must be notified to the signatories. Texts that have been objected to are considered non-existent.”

AS TO THE LAW

I ON THE ALLEGED VIOLATION OF ARTICLE 2 PARA. 1 OF THE REVISED SOCIAL CHARTER

21. Article 2 para. 1 reads as follows:

“With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake: (..) 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.”

A – Arguments of the parties

22. The CFE-CGC contends that the provisions of the Act of 19 January 2000 instituting the system of annual working days are a direct negation of the obligation set out in Article 2 para. 1. The scheme fails to provide for any limit to daily and weekly working time as long as the maximum number of 217 working days per year is not exceeded. The only limits are those laid down in Articles L. 220-1, L. 221-2 and L. 221-4 of the Labour Code, which provide for the right of managerial staff to a daily rest period of 11 hours and a weekly rest period of 24 hours.

23. The CFE-CGC further considers that this system leads to an increase in the weekly working time of the managerial staff concerned, in violation of Article 2 para. 1, which provides for a progressive reduction of the working week.

24. Lastly, the complainant contends that the situation amounts to discrimination because the weekly working time of managerial staff has not been reduced, unlike that of other workers. This difference in treatment is not justified by a difference in situation and is manifestly disproportionate in any event.

25. The Government indicates first of all that the aim of the law is to reduce working time, which is in keeping with France's obligations under Article 2 of the revised Charter.

26. The Government contends on the contrary that the proportion of persons concerned by agreements on annual working days is less than 5% of the total number of employees. It therefore considers that France has fulfilled its obligations under Article 2 para. 1, given the application of Article I of the revised Social Charter.

27. Moreover, the contested provisions are in no way contrary to Article 2 para. 1 of the revised Charter because:

- i. Article L 212-15-3 provides that the managerial staff concerned must benefit from an effective reduction in their working time
- ii. the particular situation of managerial staff provides justification for the reduction of their working time by particular means which afford fair and realistic treatment compared to other workers
- iii. Annual working days systems are instituted through the collective bargaining process, in relation to which the law has set precise obligations for the social partners, especially as regards monitoring. Furthermore, the obligatory rest periods of eleven hours per day and 35 consecutive hours per week apply to the annual working days system.

B – Assessment of the Committee

a) On the conformity with Article 2 para. 1

28. The Committee agrees with the Government that the objective of reducing working time is appropriate in implementing Article 2 para.1. From the examination of the case, it is clear that the law provides for an effective reduction of working time for a large number of workers and thus contributes to the effective implementation of Article 2 para.1.

29. The Committee recalls that it has considered that flexibility measures regarding working time are not as such in breach of the Charter (see in particular General Introduction, Conclusions XIV-2, p. 33). In order to be found in conformity with the revised Social Charter, national laws or regulations must fulfil three criteria:

- (i) they must prevent unreasonable daily and weekly working time
- (ii) they must operate within a legal framework providing adequate guarantees
- (iii) they must provide for reasonable reference periods for the calculation of average working time.

(i) Length of daily and weekly working time

30. The Committee observes that the system of annual working days does not set any limit to the daily working time of managerial staff. Consequently, the right to a daily rest period of 11 hours provided for by Article L 220-1 of the Labour Code applies. No derogation is permitted. Therefore, managerial staff cannot work for more than 13 hours on any day within the maximum of 217 working days in the year, no matter what the circumstances. This daily limit is in conformity with Article 2 para. 1 of the revised Social Charter.

31. There is no specific limit to weekly working time either in the annual working days system. Here again it is the minimum rest period provided for in Article L 221-4 of the Labour Code which sets a limit to weekly working time. The weekly rest period must be for 35 consecutive hours, meaning that, no matter what the circumstances, the managerial staff concerned cannot work for more than 78 hours per week. The Committee is of the view that this length of working time is manifestly excessive and therefore cannot be considered reasonable within the meaning of Article 2 para. 1 of the revised Social Charter.

(ii) a legal framework providing adequate guarantees

32. In order to be deemed in conformity with the revised Social Charter, a flexible working time system must operate within a precise legal framework which clearly circumscribes the discretion left to employers and employees to vary, by means of a collective agreement, working time.

33. In the present case, the annual working days system can only be adopted on the basis of collective agreements. Furthermore, such agreements are required by law to lay down the procedures to monitor the working time of the managerial staff concerned, especially their daily working time and their workload.

34. The Committee observes that the law does not require that collective agreements provide for a maximum daily or weekly limit, although the social partners are clearly free to do so. It accordingly considers that the guarantees afforded by collective bargaining are not sufficient to comply with Article 2 para. 1.

35. The Committee further observes that collective agreements may be reached at enterprise level. The possibility to do so is not in conformity with Article 2 para. 1 unless specific guarantees are provided for. It observes in this respect that the procedure for contesting collective agreements under Article L. 132-26 of the Labour Code does not constitute such a guarantee since its implementation is of a random nature. Consequently, the Committee concludes that the situation is not in conformity with Article 2 para. 1 of the revised Charter.

(iii) a reasonable period for the calculation of average working time.

36. When determining the conformity of flexible working time systems with the revised Social Charter, the Committee takes account of the length of the reference period which is used to calculate average working time (see in particular General Introduction, Conclusions XIV-2, p. 34).

37. In light of the findings above on the first two criteria, the Committee considers that it is not necessary in the present case to pronounce on the third criterion.

(iv) conclusion

38. In conclusion, the Committee holds that the situation of managerial staff in the annual working days system constitutes a violation of Article 2 para. 1 of the revised Social Charter given the excessive length of weekly working time permitted and the absence of adequate guarantees.

b) As to the application of Article I of the revised Social Charter

39. Article I of the revised Social Charter reads as follows:

“1 Without prejudice to the methods of implementation foreseen in these articles the relevant provisions of Articles 1 to 31 of Part II of this Charter shall be implemented by:

a laws or regulations;

b agreements between employers or employers’ organisations and workers’ organisations;

c a combination of those two methods;

d other appropriate means.

2 *Compliance with the undertakings deriving from the provisions of paragraphs 1, 2, 3, 4, 5 and 7 of Article 2, paragraphs 4, 6 and 7 of Article 7, paragraphs 1, 2, 3 and 5 of Article 10 and Articles 21 and 22 of Part II of this Charter shall be regarded as effective if the provisions are applied, in accordance with paragraph 1 of this article, to the great majority of the workers concerned."*

40. The Committee considers that, in view of the reference made in its very wording to the workers concerned, the application of Article I of the revised Social Charter cannot give rise to a situation in which a large number of persons forming a specific category are deliberately excluded from the scope of a legal provision.

41. There is, therefore, no need to vary the conclusion reached at paragraph 38 above.

II ON THE ALLEGED VIOLATION OF ARTICLE 4. PARA. 2 OF THE REVISED SOCIAL CHARTER

42. Article 4 para. 2 reads as follows:

"With a view to ensuring the effective exercise of the right to fair remuneration, the Parties undertake: (...) to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;"

A – Arguments of the parties

43. The CFE-CGC considers that the annual working days system confirms the abolition in practice of any reasonable limit to daily or weekly working time. The law thus eliminates any possibility for managerial staff to be paid for overtime work. It concludes that the situation is contrary to Article 4 para. 2, and is discriminatory.

44. The Government acknowledges that the law institutes a system which is not subject to the obligation to pay for overtime work. It considers, however, that this exception, which applies only to very few workers, comes within the derogations allowed by the Committee in its interpretation of Article 4 para. 2. Moreover, this exception is justified by the particular situation of managerial staff, and is reasonable. Lastly, the possibility of bringing legal proceedings under Article L 212-15-4 of the Labour Code guarantees respect for the right of those concerned to fair remuneration.

B.- Assessment of the Committee

45. The Committee considers that the number hours of work performed by managers who come under the annual working days system and which, under the flexible working time system, are not paid at a higher rate is abnormally high. In such circumstances, a reference period of one year is excessive. The situation is therefore contrary to Article 4 para. 2 of the revised Charter.

III ON THE ALLEGED VIOLATION OF ARTICLE 6.4 OF THE REVISED SOCIAL CHARTER

46. Article 6 para. 4 reads as follows:

“With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: (...) to recognise the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”

A – Arguments of the parties

47. The CFE-CGC maintains that the provisions on the annual working days system “constitute a real, though indirect, discrimination as regards the right to strike”. It considers that since the working time of managerial staff is calculated in days and half-days only, a strike lasting for one hour would entail a reduction in remuneration equivalent to half of one day’s pay for managerial staff in the annual working days system. This is due to the impossibility of calculating working time, and any work stoppage, in hours. It infers that this situation represents a limitation on the right of managerial staff to strike, and discrimination against them in relation to other employees.

48. The Government considers that this assertion is ill-founded. In its view, the provisions on the annual working days system do not in themselves affect the exercise of the right to strike. It refers to the consistent case law of the Court of Cassation which holds that a salary deduction must correspond to the duration of the work stoppage.

B – Assessment of the Committee

49. The Committee recalls that Article 6 para. 4 requires that deductions to the salaries of strikers be in proportion to the duration of the strike. The complainant organisation does not instance any dispute giving rise to a strike in which managerial staff in the annual working days system were in fact subject to restrictions of this nature. Moreover, it does not appear to the Committee that the complainant organisation has adduced any proof in its observations that such may be the case in practice. On the contrary, the

Committee takes note of the assertion of the Government that a salary deduction in excess of the actual duration of the strike for managerial staff in the annual working days system would not be permissible in French law.

50. In view of the Government's undertaking regarding the manner in which the legislation will be applied, the Committee considers that the situation is in conformity with Article 6 para. 4 of the revised Charter. However, it reserves the right to supervise the situation in practice through the reporting procedure and the collective complaints procedure, as appropriate.

IV ON THE ALLEGED VIOLATION OF ARTICLE 27 OF THE REVISED SOCIAL CHARTER

51. Article 27 reads as follows:

“With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake:

- 1 *to take appropriate measures:*
 - a *to enable workers with family responsibilities to enter and remain in employment, as well as to re-enter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training;*
 - b *to take account of their needs in terms of conditions of employment and social security;*
 - c *to develop or promote services, public or private, in particular child day care services and other childcare arrangements;*
- 2 *to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice;*
- 3 *to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.”*

A – Arguments of the parties

52. The CFE-CGC submits that the absence of a maximum weekly limit denies to managerial staff in the annual working days system a reduction in working time that would allow them to reconcile family and professional life. They are thus excluded from the main objective of the Act, which is to provide for a better organisation of working life, permitting more free time for

employees to spend with their families and children. All the more so given that actual average weekly working time of managerial staff in the annual working days system has increased with the implementation of the Act.

53. The Government considers that the annual working days system does not interfere, either directly or indirectly, with the exercise of the rights that states undertake to respect under Article 27. Moreover, the conclusion of an agreement on annual working days entails a reduction in the number of working days of those concerned, helping them to reconcile their professional and family lives. In addition, the managerial staff concerned have the possibility of organising their working time so as to reconcile their professional and family life.

B – Assessment of the Committee

54. Article 27 of the revised Social Charter requires states to take measures in favour of workers with family responsibilities. This is manifestly not the direct purpose of the Act. Furthermore, the ground relied on by the complainant trade union is not that the Government failed to take positive measures. Accordingly, the argument advanced is irrelevant.

55. The Committee therefore concludes that the situation complained of is not contrary to Article 27 of the revised Social Charter.

V ON THE REQUEST FOR COMPENSATION

A – Arguments of the parties

56. The CFE-CGC requests the Committee to order France to pay it the sum of 78 billion Francs (11.891 billion Euros) to compensate for the damage suffered by all managerial staff in the annual working days system. This sum constitutes pay for three hours of non-remunerated work (from the eighth to the eleventh hour) for each actual day of work (217 days per year) for one million managerial staff in the annual working days system with an average salary of 119.50 Francs (18.22 Euros)¹.

57. The Government invites the Committee to reject this claim for compensation which, it maintains, the CFE-CGC cannot base on any article of the Protocol. It further considers that there is no reliable or valid statistical basis for the calculation of the damages sought and that the claim must be dismissed.

B – Assessment of the Committee

58. The Committee rejects this request.

¹ i.e $3 \times 217 \times 100000 \times 119,50 = 77\,794\,500\,000$ FF = 11 859 700 000 Euros

CONCLUSION

For these reasons, the Committee concludes

1. i) by 5 votes to 3 that the situation of managerial staff in the annual working days system constitutes a violation of Article 2 para. 1 of the revised Social Charter;

ii) by 5 votes to 3 that there is no need to vary this conclusion on account of Article I of the revised Social Charter;
2. by 5 votes to 3 that the situation of managerial staff in the annual working days system constitutes a violation of Article 4 para. 2 of the revised Social Charter;
3. unanimously that the situation of managerial staff in the annual working days system does not constitute a violation of Article 6 para. 4 of the revised Social Charter
4. unanimously that the situation of managerial staff in the annual working days system does not constitute a violation of Article 27 of the revised Charter
5. unanimously that the claim for damages is rejected.

Matti MIKKOLA
Rapporteur

Stein EVJU
President

Régis BRILLAT
Executive Secretary

In accordance with Rule 30 of the Committee's Rules of Procedure, a partial dissenting opinion of Mr Stein EVJU joined by Mr Rolf BIRK is appended to this decision.

Collective complaint No. 9/2000

Partial Dissenting Opinion of Mr Stein EVJU, joined by Mr Rolf BIRK

Where the Committee finds the situation complained of to be a violation of Article 2 para. 1 and Article 4 para. 2 of the revised Charter, I reach a different conclusion.

With regard to Article 2 para. 1, I consider that an assessment of compliance or non-compliance cannot be made on the basis of that provision alone. Whether a state party can be found to be in breach of its obligations under the revised Charter turns also on Article I of the revised Charter. Though I agree that, at the outset, the statutory working time regime at issue in the present case allows weekly working time in excess of what may be considered “reasonable” within the meaning of Article 2 para. 1, I cannot concur with item I.B.a) of the Committee’s decision.

It is not necessary for me to comment on the majority’s generalisation in para. 29 of the report of the criteria to be employed in assessing compliance with Article 2 para. 1, nor on the elaboration on those criteria in the majority’s analysis in paras. 30 – 38.

As I have already stated, what is decisive in the present case is the application of Article I of the revised Charter. Here, I am unable to agree with the majority on its construction of this provision. I find the stance expressed in para. 40 of the report in want of reasoning and untenable.

It follows explicitly from para. 2 of Article I that compliance shall be regarded as effective if Article 2 para. 1 of the revised Charter is applied to “the great majority of workers concerned”. It is equally clear from the wording of Article I that the provisions accepted by states may be implemented by laws or regulations, by collective agreements, or by a combination of such methods. At the outset, as far as Article 2 para. 1 is concerned, the notion of “workers concerned” must be taken to refer to the workforce as a whole, i.e. to all “workers” within the meaning of Article 2 para. 1. There is nothing in the wording of Article I to suggest that if legislation is employed as a means of implementation, a contracting party is barred from not extending the protection otherwise afforded to a category of workers, or to a part of the workforce. On the contrary, it clearly follows from the wording of Article I that compliance shall be regarded as effective once “the great majority of the workers concerned” is covered. Moreover, as I see it there is nothing in the drafting history of the provisions concerned to suggest a different interpretation of Article I. Further, I note that in substance, Article I of the revised Charter corresponds to Article 33 of the 1961 Charter, para. 1 and para. 2 of Article 33 taken together. The construction of Article I that I have set out above corresponds, also, to how Article 33 of the 1961 Charter has been construed and applied in the Committee’s case law. In my opinion, not only does the majority’s construction of Article I depart from this legal basis; it amounts in

effect to fundamentally restricting and undermining the scope and purpose of Article I.

In the present case, the Government has submitted that the proportion of persons concerned by the impugned working time regime is less than 5 per cent of the total number of workers. The applicant has not contested this, either in written submissions or at the hearing. Further, there is nothing in the file to suggest that alongside the category of managers in question there are other groups of workers not enjoying protection as prescribed by Article 2 para. 1 such as would on the whole amount to a significant proportion of the total number of “workers” to be considered under that provision. Hence, even if the category of managers at issue here does not enjoy protection such as otherwise required by Article 2 para. 1, taking due account of Article I, there is no basis in the present case for a conclusion that the great majority of the workers concerned within the scope of Article 2 para. 1 is not covered by requisite protection.

Consequently, I am unable to conclude that on this point France is in breach of its undertakings under the revised Charter.

Turning to the issue under Article 4 para. 2 of the revised Charter, here Article I does not apply. Nor is there necessarily an immediate link between Article 4 para. 2 and Article 2 para. 1. However, the text of Article 4 para. 2 itself contemplates exceptions. Even if the discretion given to states here is limited and not generally comparable to the latitude permitted under Article I, the scope of Article 2 para. 1 as determined by Article I cannot be wholly overlooked when it comes to the exception clause of Article 4 para. 2. In my view, Article 4 para. 2 cannot be so construed as to impose a requirement on contracting parties to lay down a definition on “overtime work” and rules on overtime remuneration for workers not covered by general working time protection where such lack of coverage is not in violation of Article 2 para. 1 taken together with Article I. Hence, in the present case I consider the absence of an obligation to pay for overtime work not to be at variance with Article 4 para. 2 of the revised Charter.

Concerning the other issues raised by the complainant organisation, I concur in essence with the assessments made in the report and agree with its conclusions.

For the reasons set out above, I dissent in part and concur in part.