

DECISION ON THE MERITS

Adoption: 2 December 2010

Notification: 3 December 2010

Publicity : 19 January 2011

**European Council of Police Trade Unions (CESP)
v. France**

Complaint No. 54/2008

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 247th session attended by:

Mrs Polonca KONČAR, President
Mssrs Andrzej SWIATKOWSKI, Vice-President
Colm O'CONNOR, Vice-President
Jean-Michel BELORGEY, General Rapporteur
Mrs Csilla KOLLONAY LEHOCZKY
Mr Lauri LEPPIK
Mrs Monika SCHLACHTER
Mssrs Rüçhan IŞIK
Petros STANGOS
Alexandru ATHANASIU
Luis JIMENA QUESADA
Mrs Jarna PETMAN

Assisted by Mr Régis BRILLAT, Executive Secretary

After having deliberated on 1 and 2 December 2010

On the basis of the report presented by Mr Andrzej SWIATKOWSKI

Delivers the following decision adopted on the last date:

PROCEDURE

1. The complaint submitted by the European Council of Police Trade Unions (“the CESP”) was registered on 3 December 2008. It covers the period of work of the command corps of the police and the compensation of overtime. It claims that the new regulations introduced by the French Government on 15 April 2008 on the organisation of working hours in the National Police Service are in breach of Article 2§1 on the grounds that it is impossible to ascertain whether daily and weekly police working hours are reasonable because such working hours are not recorded. The CESP also contends that the flat, ie non-increased, rate of remuneration for overtime work provided for in the new regulations of 17 April 2008 infringes Article 4§2 because the remuneration for overtime work, where the latter is taken into consideration, is based on a rate below the hourly rate for police officers, and where compensation is available in the form of rest periods, such compensation is ineffective.

2. The Committee declared the complaint admissible on 17 February 2009.

3. Pursuant to Article 7§§1 and 2 of the protocol providing for a collective complaints system (“the Protocol”) and the Committee decision on the admissibility of the complaint, the Executive Secretariat sent the text of the decision on 23 February 2009 to the French Government (“the Government”), the CESP, the States Parties to the protocol, the states that have ratified the Revised Charter and made a declaration under Article D§2 and to the organisations referred to in Article 27§2 of the Charter.

4. In accordance with Rule 31§1 of the Committee’s Rules of Procedure, the Committee set 17 April 2009 as the deadline for the Government to make its submissions on the merits. At the request of the Government and in accordance with Rule 28§2, the deadline was extended first to 4 May 2009. The submissions were registered on 4 May 2009.

5. In accordance with Rule 31§2 of the Committee’s Rules of Procedure, the President set 6 July 2009 as the deadline for the CESP to present its response to the Government’s submissions. The response was registered on 3 July 2009.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

6. The CESP alleges that the new regulations introduced by the French Government on 15 April 2008 (General Regulations on Employment in the National Police Service and General Instruction on the organisation of working hours in the National Police Service) are in breach of Article 2§1 on the grounds that it is impossible to ascertain whether daily and weekly police working hours are reasonable because such working hours are not recorded.

7. The CESP also alleges that the flat, ie non-increased, rate of remuneration for overtime work provided for in the new regulations of 17 April 2008 infringes Article 4§2

because the rate of remuneration for overtime work, where the latter is taken into consideration, is based on a rate below the hourly rate for police officers, and where compensation is available in the form of rest periods, such compensation is ineffective.

B- The Government

8. The Government asks the Committee to find the complaint unfounded in all respects.

RELEVANT DOMESTIC LAW

In their submissions the parties refer to the following provisions of domestic law.

The legislation relating to working hours

9. Decree No. 2000-815 of 25 August 2000 on the adjustment and reduction of working hours (ARTT) in the national public service:

Article 1:

"Effective working hours shall be 35 per week in state departments and public administrative establishments and in local public education establishments.

Working hours shall be calculated on the basis of a maximum effective annual working time of 1,607 hours, excluding any overtime that may be worked.

This annual working time may be reduced by an order of the Minister concerned, the Minister responsible for the public service and the Minister responsible for the budget, issued after an opinion has been obtained from a ministerial joint technical committee, and if appropriate that of the health and safety committee, in order to take account of the constraints associated with the kind of work and with the definition of the corresponding work schedules, particularly in the case of night work, Sunday work, shift work, team work, a significant change to the work schedule, or arduous or dangerous work."

Article 3:

"I. The organisation of work shall offer the minimum guarantees set out hereunder.

Effective weekly working time, including overtime, shall not exceed 48 hours in any single week, or an average of 44 hours in any period of 12 consecutive weeks, and the weekly rest period, in principle including Sunday, shall not be less than 35 hours.

Daily working time shall not exceed 10 hours.

Staff shall benefit from a minimum daily rest period of 11 hours.

The maximum length of the working day shall be 12 hours.

Night work shall at least include the period from 10 p.m. to 5 a.m. or any other period of seven consecutive hours between 10 p.m. and 7 a.m.

II. There can be derogations to the rules set out in Point I except under the following cases and conditions:

a. When the very purpose of the public service concerned so requires on a permanent basis, particularly for the protection of persons and of goods, by decree in the Conseil d'Etat, adopted after an opinion has been obtained from the health and safety committee if applicable, from the ministerial joint technical committee and from the supreme council of the public service, which shall define the compensation granted to the categories of staff concerned. (...)"

Article 4:

"For those staff subject to a system under which hours of overtime are counted, these hours shall be taken into account as soon as the hours of work defined by the work schedule have been exceeded. They shall be the subject of compensatory time off within a time limit set by an order of the Minister concerned, the Minister responsible for the public service and the Minister responsible for the budget, after an opinion has been obtained from the ministerial joint technical committee. Failing which, payment shall be made for them."

10. Decree No. 2002-1279 of 23 October 2002 introducing exceptions to the minimum guarantees relating to working time and rest applicable to employees of the national police force:

Article 1:

"For the purposes of the organisation of the work of operational members of the national police force, there shall be exceptions to the minimum guarantees mentioned in section I of Article 3 of the aforementioned decree of 25 August 2000 when the tasks entrusted to them in relation to public safety and public order, policing, intelligence and investigation, so require."

Article 2:

"In compensation for the constraints resulting from Article 1, and irrespective of the specific advantages which they derive from their status, staff members shall benefit from a compensatory payment, from exemption to the effective annual working time of 1,607 hours, or from compensatory leave, equal or equivalent to the extra services performed, granted on an individual basis and in conditions laid down by an order of the Minister of the Interior. "

11. General Employment Regulations of the National Police, as amended by the order of 15 April 2008:

Article 113-37:

“ (...) On account, also, of the particular responsibilities which are theirs and the specific constraints inherent in the duties that they carry out, especially in terms of availability and attendance, officers of the national police command corps who come under the provisions of Article 10 of Decree No. 2000-815 of 25 August 2000, as amended, shall not be covered by the system of compensatory time off or financial recompense provided for in Article 113-34 above of these General Employment Regulations and relating to time spent on call or hours worked in excess of the legal working day. (...)”

12. Instruction NOR INTC0800092C of 17 April 2008 on the transition to managerial status of officers of the national police command corps as from 1 April 2008:

Arrangements for compensation or compensatory payments for extra services performed by officers of the national police command corps:

“In accordance with the provisions of Article 113-37 of the RGEPN, for officers of the national police command corps, irrespective of the working arrangements to which they are subject, no compensatory time off or specific payment may be claimed for overtime resulting from hours worked in excess of the legal working day or shift .”

The legislation relating to payment for overtime

13. Decree No. 95-654 of 9 May 1995 establishing general provisions applicable to members of the national police force :

Article 22:

“Under the conditions set by the employment regulations established by ministerial decree, members of the national police force may be asked to perform their duties, both during the day and at night, outside the limits of the standard working week.

Duty performed beyond the standard working week shall be compensated by equal or equivalent rest periods, which must be granted at the earliest opportunity, subject to the needs of the service, or, under conditions established by decree, by a suitable overtime payment system”

14. Decree No. 2000-194 of 3 March 2000 on the conditions for the payment of overtime to national police officers:

Article 1:

“National police officers other than officers in the senior planning and management corps (*corps de conception et de direction*) may be granted overtime payments when required to perform additional services not eligible for compensatory time off”.

Article 2:

“The decision to make such payments shall be taken by the Minister of the Interior, within the limits of the relevant budgetary appropriations.”

Article 3:

"The hourly rate of this payment shall be calculated on the basis of the gross annual salary subject to pension deductions corresponding to gross salary point 342, divided by 1 900.

In every case, the relevant salary corresponds to the salary point in force when the additional services were performed."

Article 4:

"The overtime payments granted to police officers exclude them from eligibility for any other allowances of the same type."

15. The arrangements for compensation of overtime by police officers constitute an exception to the rules set out in Decree No. 2002-60 of 14 January 2002 on hourly overtime payments, which apply to civil servants and read as follows :

Article 1:

"Civilian employees of the state and other state bodies of an administrative nature may be awarded hourly payments for overtime under the conditions and according to the procedures set by this decree".

Article 2:

"Hourly payments for overtime may be awarded to category C officials and category B officials whose pay is no higher than that corresponding to gross salary point 380, if their duties or their corps, grades or posts require them to work overtime....."

Article 5:

"The hourly payments for overtime provided for in this decree shall not include flat-rate payments for overtime, payments received by teaching staff covered by special overtime rules or any other payment of a similar nature".

Article 7:

"If compensation is not provided in the form of a rest period, overtime payments shall be made as follows.

Hourly rates shall be determined solely on the basis of the gross annual salary of the employee concerned at the time when the work was carried out, plus any residence allowance paid. The amount thus obtained shall be divided by 1820.

This hourly rate shall be multiplied by 1.07 for the first fourteen hours of overtime and by 1.27 for all subsequent hours".

Article 8:

"Overtime payments shall be increased by 100% when extra work is carried out at night and by two-thirds when it is carried out on a Sunday or public holiday." The two increases may not be combined."

16. Order of 15 April 2008 amending the order of 3 May 2002, as amended, adopted for the purpose of implementing in the national police force Articles 1, 4, 5 and 10 of Decree No. 2000-815 of 25 August 2000 on the adjustment and reduction of working hours in the national public service:

Article 3 :

Paragraph 3 of Article 4 has been replaced by the following provisions:

“Subject to the needs of the service and without prejudice to the provisions relating to leave savings accounts in the national police, compensatory leave for overtime worked by members of the national police, other than those who are members of the command corps, shall be taken in the calendar year during which it was granted.

In the same article, a fifth paragraph has been added, worded as follows:

“Compensatory leave for overtime worked by officers of the national police command corps shall, subject to the needs of the service, be taken within seven days of the end of the extra service in respect of which it was granted. If the needs of the service prevent this time from being taken by the stipulated time limit, that time limit shall be increased to eight weeks. If this time off has not been taken, for any reason whatsoever, by the end of this maximum time limit of eight weeks, the said compensatory leave shall be forfeited. The provisions of this paragraph shall nevertheless apply without prejudice to those relating to leave savings accounts in the national police.”

17. Decree No. 2008-199 of 27 February 2008 amending Article 3 of Decree No. 2000-194 of 3 March 2000, coming into force on 1 January 2008 and setting the conditions for the payment of overtime to operational members of the national police force:

Article 3 :

“The hourly rate of this payment shall be calculated on the basis of the gross annual pensionable income corresponding to gross salary point 342, divided by 1 820. This hourly remuneration shall be multiplied by 1.25.

The salary on which this is calculated shall in all cases be that corresponding to the aforementioned index applicable when the additional services were performed.”

18. Decree No. 2008-340 of 15 April 2008 amending Article 1 of Decree No. 2000-194 of 3 March 2000 on the conditions for the payment of overtime to operational members of the national police force:

Article 1:

“Operational members of the national police force, with the exception of members of the senior planning and management corps and of the command corps, may, when they are required to perform extra services that cannot be recovered, benefit from a compensatory payment for extra services”.

19. Judgement of the *Conseil d'Etat*, combined 5th and 4th sub-sections, decision 317225, delivered on 19 March 2010

"Considering that (...) the contested decree of 15 April 2008 amends the decree of 3 March 2000 by removing, from 1 April 2008, entitlement of members of the police command corps to overtime payments; that two decrees issued on the same day stipulate that recalls to duty and hours worked in excess of the working day shall not be taken into account for the purposes of compensatory time off, provide for a flat-rate compensatory allowance and specific compensation for time spent on call and retain the principle of compensatory time off for stand-by duty. The latter must be taken within seven days of the end of the stand-by period or, if the requirements of the service prevent it from being taken within this period, within eight weeks; that these decrees introduce the same compensatory time-off arrangements for stand-by carried out by members of the corps performing the duties of heads of public security districts, departments or self-contained units; that, finally, another decree of 15 April 2008 increased the command bonus for senior police officers not exercising high-level responsibilities who are subject to special working time requirements; (...)

With regard to the contention in application no. 317229 that the order of 15 April 2008 amending the order of 3 May 2002 is in breach of article 4 of the decree of 25 August 2000:

Considering that, as stated above, article 4 of the decree of 25 August 2000 stipulates that hours worked that are officially deemed to be overtime shall be liable to compensatory time off within a period specified in a joint ministerial decree, failing which payment shall be made; considering that, since article 3 stipulates that overtime worked by senior police officers on on-call or stand-by duty may be recovered, if possible within seven days and at the latest within eight weeks, failing which such compensatory time off shall be lost, the contested order, which excludes the possibility of compensation for overtime worked for which it has not been possible to take compensatory time off within the specified period, is in breach of article 4 of the decree of 25 August 2000 and must therefore be declared void;

Considering that, as a consequence of the setting aside of the contested decree and orders, the national union of senior police officers asks for the circular of the director general of national police of 16 April 2008 on the application to declare void the protocol on the reform of national police corps and careers to the command corps and the instruction of the minister for the interior, overseas territories and local and regional authorities of 17 April 2008 supplementing and amending the general instruction of 18 October 2002 on the organisation of the work of operational members of the national police force following the transfer to managerial status of members of the national police command corps; considering that the contested circular and instruction simply comment on the contested decree and orders and that, in consequence of the voiding orders in this decision, they must be deemed to have lapsed, in so far as they apply to the entry into force on 1 April 2008 of the new compensatory arrangements for overtime worked and the removal of compensation for overtime worked by senior police officers on on-call or stand-by duty when compensatory time off could not be taken within eight weeks; that the request from the applicant trade union that the circular and instruction be declared void is therefore devoid of purpose and no ruling is necessary; considering that, additionally, since the other objections to the contested decree and orders have been dismissed, the argument that the contested circular and instruction must be declared void has to be dismissed, without the need to rule on the minister's objection.

Decides:

Article 2: Article 3 of the order of 15 April 2008 amending the order of 3 May 2002 applying to the national police articles 1, 4, 5 and 10 of decree 2000-815 of 25 August 2000 on the adjustment and reduction of working hours in the national public services is declared void, because it removes the compensation for overtime worked by senior police officers on on-call or stand-by duty when compensatory time-off could not be taken within eight weeks.

Article 3: It is unnecessary to rule on the application to set aside the circular of the director general of national police of 16 April 2008 and the instruction of the minister for the interior, overseas territories and local and regional authorities of 17 April 2008, in so far as they concern the application of the provisions declared void in articles 1 and 2 of this decision."

THE LAW

PRELIMINARY OBSERVATION

20. The Government maintains firstly that the complainant organisation has not exhausted domestic remedies because its main allegations have not been examined in the French domestic courts. It points out that the conditions governing the admissibility of complaints should be based on the principles of international law. The requirement to exhaust domestic remedies is a recognised and established precondition of international customary law, as acknowledged in particular by the International Court of Justice and other international courts and committees that hear complaints of violations of international conventions.

21. The CESP observes that the complaint was declared admissible on 7 September 2009.

22. The Committee recalls that it has already ruled on the issue of the exhaustion of domestic remedies in a previous complaint (CESP v. France, complaint 38/2006, decision on the merits of 3 December 2007, §§12 and 13) on which occasion, it considered that the Additional Protocol to the Charter establishing the collective complaints system did not make the exhaustion of domestic remedies a condition of admissibility, which constitutes a well- established originality of the doctrine.

23. The Committee therefore rejects the Government's objection.

ON THE ALLEGED VIOLATION OF ARTICLE 2§1 OF THE REVISED CHARTER

24. Article 2§1 of the Revised Charter reads as follows:

“Article 2 -

Part I: "All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families."

Part II: " 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; (...)"

A. Arguments of the parties

a) The complainant organisation

25. The CESP claims that an indirect effect of the new employment arrangements introduced for senior officers in the national police force has been the cessation of the recording of hours of work, as the length of working time is not identified.

26. The CESP also points out that only the management jobs and posts of public servants of the state are generally subject to the particular employment rules, which allow derogations to the limits on working time and, in domestic law, to increased pay for overtime. This is not, however, the situation of senior national police officers, as they do not perform management jobs and can in no respect be considered “senior officials” or “senior managers”. The command corps to which senior police officers belong is not the highest-ranking corps in the national police force, being outranked by the police commissioners’ corps. Senior police officers are subject to a working regime which, given their hierarchical position, does not provide adequate legal safeguards on working time, and such a regime can not be regarded as complying with Article 2§1 of the Revised Charter.

27. In fact, although the provisions of Decrees Nos. 2000-815 of 25 August 2000 and 2002-1279 of 23 October 2002 introducing annual working time totalling 1,607 hours have not been repealed, the implementation of a number of provisions concerning the organisation of work in the National Police has entailed the cessation of the counting of hours, since overtime is no longer recorded.

28. The CESP further indicates that because of the unusual nature of their activities, police officers are subject to particular obligations regarding their availability, which justify exceptions to the rules on statutory working hours. Therefore, the failure to count these hours makes it impossible to know how many hours police officers work in total per year and hence to assess to what extent their working hours may be unreasonable.

b) The respondent Government

29. The Government submits that the new arrangements do not pose a threat to the legal working week. Decree No. 2000-815 of 25 August 2000 on the adjustment and reduction of working hours in the national public service and the judiciary, which serves as a reference in this respect, has not been repealed. It therefore continues to be applicable to members of the national police command corps. In practice, there is a dual restriction on the working hours of senior police officers, with annual and weekly limits of 1,607 and 35 hours respectively, irrespective of any additional duties that these officers may be required to perform.

30. The Government explains that members of the command corps are now treated as managers and as such are required to exercise greater responsibilities that justify changes in the organisation of their work time. Senior police officers are responsible for managing internal departments and individual units. They may be required to manage entities such as *département* police directorates, district offices, training units or other operational units such as regional intervention groups. In these cases, they have authority over all personnel attached or seconded to them. They may also act as deputy to a head of department.

B. Assessment of the Committee

31. The Committee recalls that Article 2§1 guarantees workers the right to reasonable limits on daily and weekly working hours, including overtime. This right must be guaranteed through legislation, regulations, collective agreements or any other binding means. In order to ensure that the limits are respected in practice, an appropriate authority must supervise whether the limits are being respected.

32. It recalls that only persons exercising management responsibilities, not including middle managers, can be excluded from such a guarantee.

33. The Committee notes that senior police officers are covered by Decree 2000-815 of 25 August 2000, which introduced a maximum legal thirty-five hour working week. According to Article 3 of this Decree, effective weekly working time, including overtime, shall not exceed 48 hours in any single week, or an average of 44 hours in any period of 12 consecutive weeks, and the weekly rest period, in principle including Sunday, shall not be less than 35 hours. Daily working time shall not exceed 10 hours and staff shall benefit from a minimum daily rest period of 11 hours. The Committee considers these figures reasonable under Article 2§1.

34. The Committee finds, in such conditions, that the CESP, whom bears the burden of proof of the alleged violations, if it argues that overtime work can no longer be counted, does not even allege that the increase the latter, whose ceiling is set by the decree 2000-815 of 2000, would be such that the amount exceeds what is foreseen by this decree and render the length of working time unreasonable under Article 2§1 of the Revised Charter.

35. The Committee therefore holds that there is no violation of Article 2§1 of the Revised Charter.

ON THE ALLEGED VIOLATION OF ARTICLE 4§2 OF THE REVISED CHARTER

36. Article 4§2 of the Revised Charter reads as follows:

“Article 4 - right to a fair remuneration

Part I: "All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families."

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

(...)

2. 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

a) The complainant organisation

37. The CESP considers that instruction NOR INTC0800092C of 17 April 2008 provides for the same flat-rate payment system for overtime worked by senior police officers as the one in decree 2000-194 of 3 March 2000, a system that the Committee had previously found to be in violation of Article 4§2 of the revised Charter in its decision of 3 December 2007 (CESP v. France, complaint 38/2006, decision on the merits of 3 December 2007).

38. The CESP also considers that the new wording of article 4 of the joint ministerial order of 3 May 2002, as amended by the joint ministerial order of 15 April 2008, has established stricter conditions governing the entitlement of senior police officers to compensatory time off. In practice, if a rest period has not been taken within eight weeks, even if this is because of the needs of the service, it is lost for the police officer concerned. Such a provision is contrary to the provisions of the European Social Charter, since overtime will not give rise to any remuneration in the event that compensatory rest periods are lost.

b) The respondent Government

39. The Government states that the fact that senior police officers effectively became part of a management corps “excludes them from the scope of Article 4§2 of the Revised Charter and means that they come within the categories of exceptions authorised by this article”. The complainants cannot therefore rely on the Committee's decision of 3 December 2007 in which it held that the system of flat-rate payments for overtime established by Article 3 of Decree 2000-194 had the effect of depriving senior police officers of the increased remuneration that Article 4§2 of the Revised Charter entitled them to.

B. Assessment of the Committee

40. The Committee notes that in its decision of 19 March 2010, the *Conseil d'Etat* set aside the order of 15 April 2008 contested by the CESP, because it removed the compensation for overtime worked by senior police officers on on-call or stand-by duty when compensatory time-off could not be taken within eight weeks. This ground is therefore devoid of purpose.

41. The Committee recalls that, in its decision on the merits of 1 December 2010 *CESP v. France*, (*CESP v. France*, complaint 57/2009 ; decision on the merits of 1 December 2010, §53), it has ruled that while legislation and its associated regulations have established a specific system for compensating members of the national police command corps for overtime cannot be regarded as being contrary to Article 4§2, particularly as they can be justified by the particular circumstances attached to the performance of intermediate management functions within the national police force.

42. The Committee therefore holds that there is no violation of Article 4§2 of the Revised Charter.

CONCLUSION

For these reasons, the Committee concludes :

- by 11 votes to 1 that there is no violation of Article 2§1 of the Revised Charter:
- unanimously that there is no violation of Article 4§2 of the Revised Charter:

Andrzej SWIATKOWSKI
Rapporteur

Polonca KONČAR
President

Régis BRILLAT
Executive Secretary