

Decision n° 2008-568 of August 7th 2008

Act renovating social democracy and reforming working hours

On July 25th 2008, the Constitution Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, from Mr Jean-Marc AYRAUT et al.... Members of the National Assembly, and the same day from Messrs Jean-Pierre BEL et al, Senators.

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution ;

Having regard to Ordinance n° 58-1067 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the observations of the Government registered on July 30th 2008;

Having regard to the Employment Code;

Having regard to Act n° 2004-391 of May 4th 2004 pertaining to professional training throughout a person's working life and social dialogue

Having heard the Rapporteur;

ON THE FOLLOWING GROUNDS

1. The Members of the National Assembly and the Senators making the referral contend that sections 3 and 18 of the Act renovating social democracy and reforming working hours are unconstitutional.

WITH RESPECT TO SECTION 3 :

2. VII of section 3 of the statute referred for review amends Article L 1111-2 of the Employment Code to provide that, for the implementation of said Code, employees assigned to a business or company by an external business or company shall be taken into account when determining the number of employees of the business to which they are sub-contracted when they are present on the premises of said business and have worked there for not less than one year. VIII of said section inserts into the same Code Article L 2314-18-1 which provides that, for the election of workers' representatives, persons wishing to vote in said elections shall be required to have been continuously present in the business for a period of one year, a period extended to two years for those wishing to stand in such elections. Employees assigned to one business or company by another business or

company choose whether to exercise their right to vote in the business or company which employs them or the one in which they actually work. IX inserts into the Employment Code Article L2324-17-1 which requires that employees contracted out to a business or company must have been continuously present in said business or company for twelve months to be able to vote for workers' representatives on the Works' committee. These employees, who are not eligible for election, also choose whether to cast their vote in the business or company which employs them or in the business or company where they actually work.

3. The persons making the referral contest the restrictions laid down by Parliament as regards the right to vote and stand in elections of employees assigned to work in one business or company by another business or company. They contend that this provision discriminates against workers who are closely and permanently connected with the work community which this business or company comprises and thus fails to comply with the principle of participation in the management of the workplace. They also argue that these provisions will entail different treatment of employees working in one and the same business or company depending on whether or not they have signed a contract of service directly with said business or company.

4. Firstly, although paragraph 8 of the Preamble to the Constitution of October 27th 1946 provides "All workers shall, through their representatives, participate in the collective determination of their working conditions and in the management of the workplace", Article 34 of the Constitution makes the determination of the fundamental principles of Employment law the preserve of statute law. It is therefore incumbent upon Parliament to determine, having due respect for the principle set forth in paragraph 8 of the Preamble, the conditions and guarantees of the implementation thereof.

5. The Constitution does not vest the Constitutional Council with any general power of appraisal and decision-making similar to that vested in Parliament.

6. The right to participate through their delegates in "the collective determination of their working conditions and the management of workplace" vests, if not in all workers employed at any given time by a business or company, at least in all those workers who are closely and permanently connected with the work community which this business or company comprises, even if they are not employees thereof.

Parliament intended to specify this concept of persons closely connected with the work community in order to reinforce the legal certainty as regards businesses or companies employing sub-contractors and workers assigned to them by the latter. To this effect Parliament has provided for conditions as to continuous presence on the premises of a business, fixed respectively at 12 and 24 months, in order to enable workers assigned to a business or company by sub-contractors to vote or stand in elections held in the business or company in which they are working. These provisions are not flawed by any manifest error of appraisal. If Parliament

has provided that these workers must cast their vote in the business or company which employs them or the business or company which avails itself of their services, this is in order to limit situations in which a person may vote twice. The objective and rational criteria laid down by Parliament do not fail to comply with the requirements of paragraph 8 of the Preamble of 1946.

7. Secondly, the principle of equality does not preclude Parliament from treating different situations in different ways, nor from departing from the principle of equality for reasons of general interest provided that, in each case, the resulting different treatment is directly connected with the purpose sought to be achieved by the statute which introduces said different treatment.

8. Parliament was thus at liberty, for the reasons set forth hereinabove, not to confer on all workers placed at the disposal of a business or company by sub-contractors the right to vote or stand in elections for workers delegates or representatives on the Works' Committee. The difference in treatment thus introduced has a direct connection with the purpose it is sought to achieve.

9. In view of the foregoing, the arguments raised against section 3 of the statute referred for review should be dismissed.

WITH RESPECT TO SECTION 18

10. Section 18 of the statute referred for review concerns the determination of the amount of overtime, the means of exceeding said amount and the compensatory rest break due by reason thereof. I of this section rewords Article L 3121-11 of the Employment Code and inserts Article L 3121-11-1. II repeals Articles L 3121-12 to L 3121-14, L 3121-17 to L 3121-19 and Article L 3121-26 to L 3121-32 which deal with the "compulsory compensatory rest break". III rewords the first two paragraphs of Article L 3121-24 of this Code. Lastly IV organises the conditions in which these new rules affect previous collective bargaining agreements concerning overtime and compensatory rest breaks.

11. These provisions are designed firstly to leave it to works or business agreements or, failing that, to branch agreements, or failing that to a Decree, to determine the yearly allocation of overtime and the length, nature and manner of taking of the compulsory compensatory rest break for every hour of overtime worked beyond the yearly allocation. Secondly they do away, for businesses with more than twenty employees, with the compensatory rest break provided for overtime worked within the yearly allocation. Thirdly, they make it possible for a collective bargaining agreement at the level of a company or business, or alternatively, at branch level, firstly to provide for such compensation and secondly to authorise the replacement of all or part of the payment of overtime and additional payments by an equivalent compensatory rest break. Lastly, they do away with the requirement to inform the Employment Inspector of the

working of overtime within the limit of the yearly allocation and to obtain his permission for overtime worked beyond this allocation.

12. The parties making the referral contend that, by leaving to agreements at company, business or branch level "the task of fixing all conditions governing the working of overtime beyond the yearly allocation and the taking of the compensatory rest break for every hour worked beyond the yearly allocation" and "by doing away with all the Articles of the Employment Code dealing with the compulsory compensatory rest break" section 18 of the statute fails to comply with Article 34 of the Constitution. They stress that it is the preserve of statute law to determine the fundamental principles of employment law and to precisely define "the scope left to collective bargaining". They argue in particular that, as regards paragraph 11 of the Preamble of 1946, the doing away with of the compulsory compensatory rest break "constitutes a fundamental calling into question of social public policy" and that leaving it to collective bargaining or, failing that, to a Decree to determine such issues deprives the constitutional requirements as to the protection of health of all statutory guarantees.

As regards the compensatory rest break for overtime worked beyond the yearly allocation:

13. Paragraph 2 of Article L 3121-11 of the Employment Code as worded pursuant to I of section 18 provides : " A collective bargaining agreement at company or business level or, failing that, an agreement at branch level shall determine the conditions governing the working of overtime beyond the yearly allocation together with the duration, nature and the manner of taking the compulsory compensatory rest break for every hour of overtime worked beyond the yearly allocation. Furthermore II of section 18 repeals Articles L 3121-26 to L 3121-32 of the Employment Code concerning "compulsory compensatory rest breaks".

14. Under Article 34 of the Constitution " Statutes shall lay down the basic principles of .. Employment law". The Preamble of 1946 provides in paragraph 8 that "All workers shall, through their representatives, participate in the collective determination of their working conditions and in the management of the workplace". These provisions thus imply that although Parliament is at liberty to leave to collective bargaining agreements the task of specifying the practical methods of application of the fundamental principles of employment law and providing that in the absence of any collective bargaining agreement said methods are to be determined by a Decree, it is incumbent upon it to exercise fully the powers vested in it by Article 34 of the Constitution.

15. The disputed provisions provide for a compulsory compensatory rest break for every extra hour of overtime worked beyond the yearly allocation, but abolish any regulating of the minimum duration thereof or the conditions in which this rest break is to be taken, although the threshold triggering this entitlement to a rest

period is not itself regulated by the statute. Thus, without there being any need for the Constitutional Council to rule on the argument based on failure to comply with paragraph 11 of the Preamble of 1946, Parliament has failed to precisely specify the conditions of implementation of the principle of the compulsory compensatory rest break and thus failed to exercise fully the powers vested in it by Article 34 of the Constitution.

16. In the absence of any other statutory guarantee regulating the calculation of the compensatory rest break for overtime worked beyond the yearly allocation or the conditions in which it is to be taken, the reference to the "duration" of the compensatory rest break which is found in paragraphs 2 and 3 of Article L 3121-11 of the Employment Code as worded pursuant to I of section 18 of the statute referred for review, must be held to be unconstitutional. Consequently, the words "As a temporary measure and during this period" found in the second sentence of IV of section 18 should also be held to be unconstitutional.

As regards previous agreements :

17. The first sentence of IV of section 18 provides : "Contractual terms in agreements entered into on the basis of Articles LJ 3121-11 to L 3121-13 and L 3121-17 of the Employment Code or on the basis on paragraph 2 of Article L 713-11 of the Rural Code as worded prior to the publication of the present statute shall remain in force until December 31st 2009 at the latest".

18. Parliament cannot, on grounds other than the general interest, enact legislation adversely affecting contracts lawfully entered into without failing to comply with the requirements deriving from Articles 4 and 16 of the Declaration of the Rights of Man and the Citizen of 1789 and, in the case of the participation of workers in the collective determination of their working conditions, paragraph 8 of the Preamble of 1946

19. The first sentence of IV of section 18 of the statute results in doing away with, as from January 1st 2010, all the terms of previous collective bargaining agreements on overtime in order for new negotiations to take place either at company or business level or failing that at branch level.

This measure concerns several hundred collective bargaining agreements applicable to several million employees. It involves terms dealing with the amount of overtime which comply with the new statutory provisions. It affects firstly collective bargaining agreements at branch level which already authorize the negotiating of company agreements under 9° of section 43 of Act n° 2004-391 of May 4th 2004 and secondly company agreements entered into on the basis of this waiver.

As from the publication of the statute in question, parties to collective bargaining agreements at company or business and branch level may, after repudiating previous agreements, negotiate and enter into agreements without waiting until January 1st 2010 in the conditions and manner laid down by the new statute.

Lastly, doing away with the terms concerning overtime in existing agreements would alter the balance of said agreements and confer upon these previous agreements other effects than those which the signatories thereof intended them to have.

20. Thus, in view of the adverse effect on currently existing agreements, the first sentence of IV of section 18, which does away with previous provisions dealing with overtime, fails to comply with the constitutional requirements referred to above. Parliament intended, when enacting section 18, to modify the interaction between the various collective bargaining agreements in order to encourage negotiations at company or business level regarding overtime. In the absence of the first sentence of IV, the provisions of I apply immediately and allow for the negotiating of agreements at company level notwithstanding the existence of any contrary terms in agreements entered into at branch level.

21. The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

HELD

Article 1 - The following provisions of section 18 of the Act renovating social democracy and reforming working hours are unconstitutional :

- in I, the word "duration" found in paragraphs two and three of Article L 3121-11 of the Employment Code
- the first sentence of IV and, in the second sentence of IV, the words "as a temporary measure and during this period".

Article 2 - Section 3 and the rest of section 18 are not unconstitutional.

Article 3 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on August 7th 2008 and composed of Messrs Jean-Louis DEBRE, President, Guy CANIVET, Renaud DENOIX de SAINT MARC, Olivier DUTHEILLET de LAMOTHE, Valéry GISCARD d'ESTAING, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ.

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