

Decision n° 2009-588 – August 6th 2009

Act reaffirming the principle of Sunday rest and designed to provide for exceptions to this principle for employees volunteering to work on Sundays in touristic and thermal Communes and areas and certain conurbations

On July 27th 2009, the Constitutional 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 from Mr Jean-Pierre BEL et al, Senators, for review of the constitutionality of the Act reaffirming the principle of Sunday rest and designed to provide for exceptions to this principle for employees volunteering to work on Sundays in touristic and thermal Communes and areas and certain conurbations

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 Employment Code;

Having regard to the observations of the Government registered on Jul 31st 2009;

After having heard the Rapporteur :

ON THE FOLLOWING GROUNDS :

1. The Members of the National Assembly and Senators have referred for review by the Constitutional Council the Act reaffirming the principle of Sunday rest and designed to provide for exceptions to this principle for employees volunteering to work on Sundays in touristic and thermal Communes and areas and certain conurbations on the grounds that section 2 thereof is unconstitutional

WITH RESPECT TO APPLICABLE CONSTITUTIONAL NORMS

2. Firstly, under paragraph 11 of the Preamble to the Constitution of 1946, the Nation “shall guarantee to all..... protection of their health, material security, rest and leisure”; the principle of Sunday rest is one of the guarantees of the right to rest vested in employees.

3. Secondly, when providing that the right to rest should be exercised in principle on Sundays, Parliament, competent under Article 34 of the Constitution to determine the fundamental principles of Employment Law intended, in accordance with the task incumbent upon it, to reconcile freedom of enterprise, which derives from Article 4 of the Declaration of the Rights of Man and the Citizen of 1789 and paragraph 10 of the Preamble of 1946 which provides : “The Nation shall provide the individual and the family with the conditions necessary for their development”.

4. Thirdly, although Parliament is at all times free to amend or repeal previous statutory provisions by replacing them with other provisions, this is on condition that the exercising of this power does not result in depriving requirements of a constitutional nature of statutory guarantees.

WITH RESPECT TO EXCEPTIONS TO THE PRINCIPLE OF SUNDAY REST IN TOURISTIC COMMUNES AND AREAS

5. The first paragraph of Article L 132-25 of the Employment Code, as worded pursuant to section 2 of the statute referred for review, provides: “Without prejudice to the provisions of Article L3132-20, retail shops situated in thermal Communes or Communes of touristic interest much frequented by tourists or offering permanent cultural animation may automatically introduce a system of rotation for Sunday rest for all or part of staff employed by them“. Under paragraph 2 of the same Article the list of Communes of thermal or touristic interest and the perimeter of areas much frequented by tourists or offering permanent exceptional cultural animation shall be drawn up by the Prefect.

6. The parties making the referral contend that these provisions, which fail to comply with the objective that the law be intelligible and accessible, “would create an automatic exception of too general and absolute scope”. They argue that this exception to existing principles, without meeting the need to satisfy the essential requirements of the public, firstly concerns all retail shops, including those unconnected with the touristic nature of the Commune or area defined by the Prefect, and secondly applies throughout the year, including outside the tourist season. They argue that such an exception would concern all Communes likely to benefit from the provisions of Articles L 133-11 and L 133-12 of the Tourism Code pertaining to Touristic Communes.

7. Firstly, under the very provisions of the Code cited hereinabove touristic Communes and areas shall be determined on the basis of the sole provisions of the Employment Code which lay down the rules governing the exception to the principle of Sunday rest. The abovementioned provisions of the Tourism Code, which enable certain communes to be labelled touristic Communes, have a different purpose. The argument based on the failure to comply with the constitutional requirement of intelligibility and accessibility of the law must thus be dismissed.

8. Secondly, by extending the exceptions to all shops situated in these communes and areas, Parliament sought to put an end to the difficulties encountered in applying existing criteria of “retail sales establishments which make available to the public goods or services designed to enhance the welcoming of said public or facilitate its leisure, sporting, recreational or cultural activities”. By extending this exception to cover the entire year, Parliament took into account changing lifestyles and leisure activities. When transforming this ad hoc exception into a statutory departure from existing principles it merely drew the consequences of these changes. Parliament thus used its power of appraisal without depriving the constitutional requirements deriving from paragraphs 10 and 11 of the Preamble of 1946 of the requisite statutory guarantees.

WITH RESPECT TO EXCEPTIONS TO THE PRINCIPLE OF SUNDAY REST IN CERTAIN CONURBATIONS

9. Article L 3132-25-1 of the Employment Code, as worded pursuant to section 2 of the statute referred for review, provides: “Without prejudice to the provisions of Article L 3132-20, in urban units of more than 1 000 000 inhabitants, Sunday rest may, after administrative authorisation, be given in rotation for all or part of staff employed in retail shops which supply goods or services within a perimeter of exceptional consumer activity characterised by habitual Sunday consumption, the substantial number of Sunday customers and the fact that said customers habitually reside outside said perimeter. Article L 3132-25-2 provides that the Prefect shall “determine the boundaries of the perimeter of exceptional consumer activity” at the request of the Town Council in view of “particular local circumstances” and “habitual Sunday consumption” within the meaning of Article L 3132-25-1 or “the immediate proximity of a border area where such Sunday consumption exists, taking into account the competition arising by reason of this habitual Sunday consumption”. Under Article L 3132-25-3 administrative authorisations for Sunday working shall be granted on the basis of a collective agreement or, failing that, a unilateral decision of the employer after consultation with bodies representing employees and approved by referendum by the employees involved. The collective agreement or the unilateral decision shall specify in particular the compensation given to employees. Lastly, Article L 33132-25-4 provides that administrative authorisation shall be given for a limited duration and shall stipulate the guarantees surrounding Sunday working within these perimeters. It provides in particular that solely those employees volunteering to work on Sundays who have given their agreement in writing shall be allowed to work on Sundays, and that refusal to work on Sundays shall not constitute a ground for refusing to hire a person nor the taking of any punitive measures or discriminatory action against an employee under his/her contract of employment.

10. The parties making the referral contend that these provisions are designed to validate certain illegal practices in certain commercial areas which have opened for Sunday trading for many years past and thus adversely affect the principle of the separation of powers. In the absence

of any rational and objective definition of the concepts which it employs, new Article L 3132-25-1 of the Employment Code fails to comply with the constitutional objective that the law be accessible and intelligible. They also argue that the definition given of “perimeters of exceptional consumer activity” in urban areas of more than 1 000 000 inhabitants would result in extending , beyond the limited exceptions allowed until now, the areas concerned to cover a very wide population area in such a manner that new Article L 3132-25-1 would reduce to an empty shell the right to Sunday rest. Lastly, they argue that by allowing a Commune to request the determining of a “perimeter of exceptional consumer activity” notwithstanding the objection of another Commune likely to be included in this same perimeter, Article L 3132-25-2 would enable the first Commune to exercise authority over the second.

11. Firstly the challenged provisions modify for the future the regulations applicable to Sunday working. They are not of a retrospective nature and therefore do not affect the outcome of any ongoing legal proceedings pertaining to failure to comply with existing legislation in such matters. The argument based on infringement of the separation of powers is therefore not supported by the facts.

12. Secondly, Parliamentary debate shows that by employing the terms “urban units” Parliament referred to a pre-existing concept, defined by the National Institute for Statistics and Economic Surveys. Although it will be up to the authorities entrusted with the task of implementing these new measures to assess, under the control of the relevant courts, factual situations corresponding to the conditions of “habitual Sunday consumption” and the “substantial number of customers involved” and the “fact that such customers habitually reside outside the perimeter”, these concepts are not ambiguous and are sufficiently precise to guarantee the absence of any arbitrary appraisals. The argument based on failure to comply with the constitutional objectives that the law be intelligible and accessible should thus be dismissed.

13. Thirdly, Parliament was at liberty to determine a new system of exceptions to the principle of Sunday rest when taking into account changing consumer habits in conurbations. When doing so, it did not

deprive the constitutional requirements deriving from paragraphs 10 and 11 of the Preamble of 1946 of statutory guarantees.

14. Lastly, under paragraph 2 of Article L 3132-25-2 of the Employment Code, a “perimeter of exceptional consumer activity” may only be created on the territory of a Commune “at the request” of the Town Council. This would not apply, pursuant to paragraph 6 of the same Article, if said perimeter belonged partly or wholly to a sole commercial entity within the meaning of Article L 752-3 of the Commercial Code. In this hypothesis designed to preserve the indivisible nature of this commercial entity, the Prefect shall give a ruling after consulting the Town Council of the Commune which did not make such a request once the latter does not belong to a public establishment of intercommunal cooperation consulted under paragraph 5 of the same Article. By entrusting the Prefect with the power to take such decisions, the challenged provisions do not vest any territorial community with authority over another. The argument should thus be dismissed.

WITH RESPECT TO THE PRINCIPLE OF EQUALITY

15. The parties making the referral argue that section 2 of the statute referred for review infringes both the principle of equality between employees and that between territorial communities.

16. The principle of equality does not prevent Parliament from treating different situations in a different manner, nor from departing from the principle of equality for reasons of general interest, provided that in both cases the resulting difference of treatment is directly connected with the purpose of the statute which provides for the same.

- As regards equality between employees

17. The terms of IV of section 2 of the statute referred for review, which applies to employees working on Sunday in touristic Communes and areas provide : “ In branches covering retail shops or services and in retail shops or services, where administrative exceptions to Sunday rest are applicable, professional organisations or the employer on the one

hand and representative Trade Unions on the other hand shall enter into negotiations with a view to signing an agreement concerning the compensation given to employees deprived of their Sunday rest when the branch or the business is not already covered by an agreement". Article L 3132-25-3 of the Employment Code provides that exceptions introduced for "perimeters of exceptional consumer activity" are only possible if the compensation to which employees volunteering to work on Sundays are entitled have been determined beforehand, either by a collective agreement or by a unilateral decision of the employer approved by referendum. In the second hypothesis employees will be entitled to be paid double their normal salary.

18. The parties making the referral criticise the different treatment introduced by the statute to the detriment of employees in touristic areas insofar as they do not have the benefit of the statutory guarantees laid down for employees working in "perimeters of exceptional consumer activity" . This different treatment does not comply with any objective and rational requirement as regards the purpose of the statute.

19. Firstly, employees working on Sunday in touristic Communes or areas under an automatic exception connected with the characteristics of the touristic activities of such areas are, where the statute is concerned, in a different situation from employees working in "perimeters of exceptional consumer activity" under a temporary administrative exception. Parliament was thus free to provide for a statutory increase in pay for employees in the second category in the absence of a collective agreement .

20. The different treatment arising from the foregoing between automatic exceptions, where employees, in view of the nature of their activity, only have the benefit of contractual guarantees and individual and temporary exceptions for which, in view of their exceptional nature, employees have the benefit of statutory guarantees, is directly connected with the purpose of the statute.

- As regards equality between territorial communities

21. Paragraph 2 of Article L 3132-25 of the Employment Code as worded subsequent to section 2 of the statute referred for review provides : “ The list of thermal Communes or Communes of touristic interest and the perimeter of touristic areas much frequented by tourists or offering permanent cultural animation shall be drawn up by the Prefect on the recommendation of the administrative authority referred to in Article L 3132-26, after consultation of the Departmental Tourism Committee, professional bodies of employers and employees involved, together with Communities of Communes, Communities of Agglomerations and Urban Communities when they exist”. Under Article L 3132-26 “ In retail shops where the weekly rest day is normally Sunday, this rest day may be suppressed on the designated Sundays, for each retail shop, by a decision of the Mayor. Such Sundays shall not exceed five in number each year - In Paris this decision shall be taken by the Prefect of Paris”.

22. The parties making the referral contend that new Article L 3132-25, by referring to Article L 3132-26 gives the Prefect of Paris the possibility of making this city a touristic Commune or declaring certain areas of the city to be touristic areas without any recommendation of or consultation with the Paris Mayor or City Council. The fact that in Paris the Prefect alone takes such decisions, contrary to the other Communes of France, including Lyon and Marseille, creates a departure from the principle of equality which is not justified by any objective criteria connected with the purpose of the statute.

23. The city of Paris, which has a specific administrative system because of its status as the seat of government, constitutes in itself a category of territorial community. However in view of the purpose of new Article L 3132-25, namely the procedure of classing a touristic Commune or area within the meaning of the Employment Code, no difference in situation justifies a failure to entrust the Mayor of Paris with the powers to make recommendations, which current statutes vest in the City Council, as is the case in other Communes, including Lyon and Marseille. The 2nd paragraph of Article L 3132-25 is unconstitutional in that it refers to paragraph 2 of Article L 3132-26. The reference to Article L 3132-26 should thus be construed as referring to paragraph 1 of said Article.

24. As a consequence of the foregoing, section 2 of the statute referred for review is not unconstitutional with the exception of the provision found to be unconstitutional in paragraph 23 hereinabove.

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

HELD

Article 1 - Article 3132-25 of the Employment Code as worded pursuant to section 2 of the Act reaffirming the principle of Sunday rest and designed to provide for exceptions to this principle for employees volunteering to work on Sundays in touristic and thermal Communes and areas and certain conurbations is unconstitutional insofar as it refers, as regards the city of Paris, to paragraph 2 of Article L 3132-26 of the same Code. The words "in Article 3132-26" found in Article L 3132-25 must be replaced by the words "in paragraph 1 of Article 3132-26".

Article 2 - The other provisions of section 2 of said statute 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 6th 2009 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.