New ECJ case: the interpretation of the Working time Directive

To date, the Court of Justice of the European Communities has given only one ruling on Directive 93/104 concerning certain aspects of the organization of working time - the judgement of 12 November 1996 on the United Kingdom's application to have it quashed (*TUTB Newsletter* No. 5, February 1997). That case turned mainly on policy issues about article 118A (incorporated as amended by the Amsterdam Treaty into the current article 137 EC). There, the actual wording was less important to the decision on the challenge. But it is one of the most complex Directives to have been adopted under article 118A, and some national implementing rules have put conflicting interpretations on it. This is because of its woolly drafting and bending over backwards to accommodate deregulationist pressures from employers and some governments. It has created enormous uncertainty in the law. It is reasonable to query whether the Directive can deliver its aims unless its provisions are at least clarified.

The ECJ is being asked to interpret the Directive on a reference for a preliminary ruling in a case between the Spanish public health service doctors' trade union (SIMAP) and the public health authority of the Autonomous Community of Valencia.
The main provisions of the Directive at issue are:

- Do casualty department doctors come within the scope of the Directive ?
- Does time spent on-call by duty doctors count as working time within the meaning of the Directive ?
- Can the individual exemptions provided for in article 18.1 be implemented by collective agreement ?
- Does the work done by on-call doctors count as night work and shift work within the meaning of the Directive ?

Advocate General Mr Antonio Saggio submitted his opinion on 16 December 1999[1].

The Advocate General broadly endorses the SIMAP's submissions, and rejects the Commission's proposed narrow interpretation on the key issue of what constitutes working time. The real interest of his opinion lies in his approach to interpreting Directives designed to achieve upward harmonization which takes account of national legislation and international labour law.

The scope

The Advocate General argues that casualty doctors fall firmly within the scope of the Directive.

- He dismisses the Generalidad Valenciana's Health and Consumer Protection Board's claim that public hospital casualty departments are covered by the Framework Directive exemption which states that it is not applicable "where characteristics peculiar to certain specific public service activities… inevitably conflict with it" (article 2.2). The Advocate General is categorical that the Framework Directive envisages only public service activities related to exceptional circumstances (war, natural disaster, maintaining public safety). Here, the Advocate General endorses the Commission's position that only public service activities which, due to their nature or purpose, are carried out in situations where it impossible to eliminate all risks to the health and safety of workers can be equated to exceptions to the Framework Directive.
- He sees no justification for extending the Directive 93/104 exemption relating to doctors in training to casualty doctors.

The notion of working time

The issue of working time is central to this case. The question is : is working time within the meaning of the Directive limited to the period when the worker is working in the workplace, at the employer's disposal and carrying out his activity or duties ? The Commission, United Kingdom and other States who intervened on this issue (Finland and Spain) all argue that it is. If so, then all time spent on-call without actually carrying out activities could be classed as a rest period.

It is a crucial issue. The history of labour law is riven with disputes over what constitutes working time. Employers want to limit it only to time which they see as directly productive, excluding periods recovering from physical or mental fatigue, other non-directly production-related time spent at work, etc. Workers see it differently: actual production is a side-issue, and any period in which the individual is not free to dispose of his time as he wishes should be recognized as working time. Labour law has tended to develop along a compromise path, by which an employer's work organization rights include cutting out "slack" or "idle" time, covering all the periods in which a worker should be effectively available to perform specific work regardless of whether every moment within his prescribed working hours is productive or not[2]. And while workers have won concessions on total working hours (daily, weekly, annual), pressure of work has been largely ignored in labour law.

Following the Commission or United Kingdom's interpretation would have opened up a Pandora's

[1] The Advocate General's opinion is available (in French, Spanish and Italian only) on the Court of Justice website (http://europa.eu.int/cj/index.htm). Reference: Case C-303/98 Simap v Consellera de Sanidad y Consumo de la Generalidad Valenciana.

[2] For a historical approach, see F. Meyer, Travail effectif et effectivité du travail: une histoire conflictuelle, *Le Droit ouvrier*, October 1999, pp. 385-389.

box. Many types of work include periods when the worker is at work and at the employer's disposal although not carrying out his productive activity or duties. A shop sales assistant may be "unproductive" from the employer's view if not assigned to other duties like shelf-stacking or bookkeeping between serving two customers. A switchboard operator is strictly-speaking "productive" only when putting a telephone call through. But it is long-established (especially under International Labour Organization Conventions) that waiting time associated with the intermittent character of work cannot be deducted from working hours. Indeed, one of the Directive's own recitals expressly requires account to be taken of International Labour Organization Conventions - a fact so rare in Community Directives that it cannot go unremarked.

The Advocate General notes that the Directive is not clearly worded. For a start, it refers back to national practices. Also, it lays down three conditions two of which are self-contradictory ("being at the employer's disposal" and "carrying out his activity or duties"). But beyond the dangers of interpreting unclear provisions literally, the Advocate General points out that "the combined application of the three requirements is not easily accommodated by the aims and hence the essential purpose of the Directive, which is nothing if not to ensure workers a reasonable rest period. The fact is that to require the worker to be at work (an ambiguous wording which, in the light of the other requirements, seems to require that the worker should be physically present in the workplace), carrying out his activity or duties and be at the employer's disposal when calculating working hours would mean that the working hours did not include all those periods in which the worker is carrying out his activity or duties although not present in the workplace, and all the periods in which - and this is what concerns us here - the worker is present in the workplace but not carrying out his activity or duties, but is at the employer's disposal" (point 34). This interpretation, which I endorse, is also borne out by a rapid comparative examination of the legislation of some Member States and ILO Convention No 30[3]. The Advocate General stresses that equating the time spent at work at the employer's disposal with rest periods would be to admit that "the Council had deliberately decided to downgrade Community social policy compared to developments in the Member States' domestic policies".

The Advocate General argues that the Directive's three conditions are disjunctive, not cumulative.

The Advocate General suggests that "being at the employer's disposal" (where there is work in the workplace) be distinguished from merely being accessible (contactable and at the employer's disposal for work away from the workplace). But he accepts that even just accessibility cannot be simply equated with a rest period and must at least be taken into account when calculating rest periods. On this point, the Advocate General goes beyond the Directive's rigid view that any period which is not working time is a rest period.

The interpretation upheld by the Advocate General is also important to clarify the requirement of reference back to "national laws and/or practices" frequently found in the health at work Directives. This does not mean any national law or practice which is compliant with Community law. It must also be one which does not emasculate the Directive. That is the case with the Spanish legislation at issue in the present instance, which regards the on-call work of public health service doctors neither as normal work nor unsocial hours work, but special work paid at a flat-rate regardless of the volume of work done. While the pay implications of such a rule are not challenged, it is unacceptable from the health protection viewpoint, which is the point of the Directive. This interpretation is based on employment law precedents like the rulings in the two cases of Commission v United Kingdom of 8 June 1994 on collective redundancies and transfers of undertakings[4]. In both judgements, the Court used the same form of words to set the limits to a Member State's discretion where a Directive refers to national laws and practices: "national legislation which makes it possible to impede protection unconditionally guaranteed to employees by a directive is contrary to Community law".

Derogations

Directive 93/104 contains a complicated and dangerous set of derogations. Articles 17 and 18 are particularly poorly drafted. Article 17 allows derogates to be made to the Directive's provisions by laws, regulations or agreements. Article 18 allows Member States not to apply article 6 of the Directive (maximum weekly working time not more than forty eight hours, including overtime) by individual derogations. Only the United Kingdom has availed itself of individual derogations, which do not guarantee workers sufficient freedom of choice to work in conditions which are not damaging to their health. Above all, however, it is a massive step back from the principle on the order of priority of labour law rules as accepted in most Member States, by which an individual contractual agreement between a worker and his employer can only exclude public rules if it contains provisions that are more favourable to the worker.

The preliminary ruling referral did not require the Advocate General to look at the derogation arrangements in depth. He therefore simply concluded that the procedures and conditions laid down by article 17 (for sectoral derogations) were not complied with and that for the application of article 18, agreement

[3] ILO C30 Hours of Work (Commerce and Offices) Convention. It defines hours of work as "the time during which the persons employed are at the disposal of the employer; it does not include rest periods during which the persons employed are not at the disposal of the employer".

[4] *ECR* 1994, I., p. 2435 and p. 2479.

by a trade union could not replace the worker's own expression of his individual will. The Advocate General also said that article 18 should be regarded as "making Member States' option not to apply article 6 conditional on taking the measures needed to ensure that various conditions are met, including the employer's duty to seek and get the worker's agreement, and measures to ensure that no worker incurs detriment by refusing to accept the conditions imposed by his employer". In fact, he could have simply concluded that Spain's implementing rules did not intend to take up the option offered by article 18, in common with all the EU States, apart from the United Kingdom.

Night work and shift work

The Advocate General specifies that on-call time must be taken into account in deciding whether a doctor is a night worker within the meaning of the Directive. On the same basis, he argues that Spanish on-call doctors are shift workers because they work to a rota system.

Conclusions

While endorsing the Advocate General's reasoning and most of the conclusions he draws from it, it has to be said that once again the Commission's inertia has undermined certainty in the law. So far, there have been no irregularity proceedings leading to a ECJ ruling on an article 118A Directive other than for a Member State's failure to notify national incorporating measures. For many reasons, references for preliminary rulings cannot address all the issues of interpretation which would ensure that Directives were better applied. So much was made clear in the ECJ ruling on the Italian legislation incorporating the VDU Directive (*TUTB Newsletter* No 5). In 1999, the Commission announced a series of default procedures against Member States relating to article 118A Directives.

To the best of my knowledge, no default procedure has been started in relation to Directive 93/104. On the other hand, two other referrals for preliminary rulings will shortly be coming up in the ECJ. One again concerns the definition of working hours for casualty doctors (case C-241/99 Confederacíón Intersindical Galega (C.I.G) v Servicio Galego de Saude (SERGAS). The other relates to the thirteen weeks length of service requirement for paid annual leave in the United Kingdom (C-173/99 The Queen v Secretary of State for Trade and Industry).
Hopefully, the Commission will get its act together (belatedly - the first series of article 118A Directives came into force in 1992) and apply consistent criteria based on the upwards harmonization concept to ensure compliance with Community law.

Also, the Commission's control duties should not be completely separated from its legislative duties. It should bring forward proposed amendments based on an analysis of the ambiguous, ineffective or inadequate provisions of existing Directives. In this respect, the current revision of the Working Time Directive has been a missed opportunity to review some of its woolliest and most questionable provisions[5]. Essentially, it covers only the sectors excluded by the Council. It is also time to face up to the hard fact that adopting article 18 was a dangerous give-in to the British Conservative government's demands for an opt-out of a social Directive. Article 18 has not been used by any other Member State and several came out firmly against these derogations in a declaration annexed to the Council minutes. It is a mystery why it should take until November 2003 to review the terms of a compromise already thrown into question on the excluded sectors issue. Likewise, article 17 is a confused rag-bag of derogations by a mix of procedures for many categories of workers. The legal uncertainty created by this article is heightened by preceding the list of categories cited for the widest set of derogations (which also refers to the weekly working hours) by the adverb "particularly", indicating that other categories may be added to the list on the basis of very unclear criteria.

Finally, the issue of trade unions bringing proceedings in the Court of Justice in their own name to enforce compliance with Community social law remains unresolved. Should the forthcoming Intergovernmental Conference finally write fundamental social rights into the Treaty, then logically, it ought also to look at ways of making them exercisable. ■

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[5] The proposal for a directive amending Directive 93/104 published on 18 November 1998 covers only excluded sectors and activities but does not address other contentious aspects of the Directive. It applies the common rules to non mobile workers in transport undertakings and doctors in training, but introduces new derogations and exemptions. The new provisions are very limited for mobile workers (except railway workers) and are supplemented by other proposals for particular Directives (road transport, seafarers). The European Parliament gave its opinion on the Council's common position on the amendment of Directive 93/104 on 16 November 1999. It proposed a series of amendments. Parliament and the Council are currently locked in co-decision procedure negotiations. On 24 January 2000, the Council rejected the European Parliament's amendments and decided to launch the conciliation procedure.