How the ECJ ruling may affect the United Kingdom

A Court of Justice ruling in line with the Advocate General's opinion could have much more impact in the United Kingdom even than in Spain[1]. This is because, after the ECJ had rebuffed its challenge to get the Directive quashed, Britain's Conservative government brought in regulations in December 1996 attempting to implement only the rock-bottom minimum of the Directive. On some aspects, it could point to the Directive's own real failings. On others, it offered questionable interpretations of the exemption and derogation rules which would leave the Directive all-but toothless. It did this mainly by leaving most of the Directive's vague and imprecise wording intact (e.g., the duration of working time which cannot be measured or predetermined). Also, making the annual leave entitlement dependent on thirteen weeks' consecutive service[2] clearly discriminates against fixed-contract workers and is at odds with the Directive's overall aim of alleviating the health effects of overwork independently of any other employment issues with a particular employer. It is a general failing of all national implementing rules, moreover, not to have addressed the multiple jobholding issue. Eurostat figures for 1997[3] estimate that over 5 million workers are in this situation in the European Union. In some countries, like Denmark, the Netherlands, Portugal and Sweden, it accounts for more than 5% of the employed labour force.

The new labour government improved matters to some extent, but did not throw into question the main thrust of Conservative plans to exclude as many activities and sectors as possible from full application of the common rules and to allow employers to derogate from the maximum weekly working hours through individual arrangements with their workers. Such individual arrangements could also change the definition of "night worker" in a clear breach of the Directive's provisions. Also, employers can negotiate exemptions by sidelining the trade union. To that end, the British regulations introduce the notion of "workforce agreements" concluded with workers' representatives elected by procedures set unilaterally by the employer. Where these agreements relate to a group of twenty or fewer workers, representatives do not even have to be elected.

Initial reports on the application of individual exemptions are quite alarming. Most of the workers who were working more than 48 hours a week before the working time regulations came in have been registered as individual exemptions. A survey for the BBC put the number affected at 2.7 million workers. 20% of those registered as exempted felt they were pressured into it[4].

The 1998 regulations were further watered down by two amendments which came into force in December 1999. One aims to make it even easier to make "individual agreements" excluding workers from the application of the 48 hour maximum weekly working time rule by allowing employers simply to keep of a list of workers covered by such agreements. The other further extends the categories of workers whose working time putatively cannot be measured.

The British regulations' definition of working time is based on a cumulative interpretation of the Directive's conditions. Three conditions have to be met - "working", "at the employer's disposal" and "carrying out his activity or duties". On top of this very narrow definition comes training time and any additional period considered as working time within the meaning of the regulations by a collective agreement (this final point was added to the initial draft by the Labour government).

The Department of Trade and Industry's guidance is categorical. For time to count as working time "all three elements must be satisfied". It goes on: "Time when a worker was "on call" but otherwise free to pursue their own activities would not be working time, as the worker would not be working. Similarly, if a worker is required to be at the place of work "on call" but was sleeping though available to work if necessary, a worker would not be working and so the time spent asleep would not count as working time"[5].

Public health unions have managed to limit the damage of this definition of working time. An agreement between the unions and the national health service provides that the time during which staff are "on call" in NHS premises will count as working time, but staff who are on-call away from the workplace are regarded as working only from when they are required to undertake any work-related activity.

If the Court of Justice rules in line with the Advocate General's proposed interpretation, the British definition would be over-restrictive under Community law, as, in my view, would the Irish requirement of the conjunctive application of at least two factors: being at the place of work or at the employer's disposal, and carrying out the activities or duties of his or her work (s. 2(1), Organisation of Working Time Act 1997).

Also, the Advocate General's suggestion that the application of article 18 (individual derogations) should be seen as contingent on the Member State's taking all necessary steps to protect the health of the

1 See J. Fairhurst, The Working Time Directive: A Spanish Inquisition, *Web Journal of Current Legal Issues*, No 3-1999.

2 The Conservative government's draft regulations put this requirement at 49 weeks. It was reduced to 13 weeks in the regulations enacted by the Labour government.

3 EUROSTAT, *Labour Force Survey, Results 1997*, Brussels, 1998.

4 See *The Safety and Health Practitioner*, October 1999, p. 3.

5 *DTI Guidance*, August 1998, paragraph 2.1.2.

workers concerned would appear to throw the present British regulations open to question, especially following the additional deregulatory measures which came into force in December 1999. On three points at least, the British regulations go beyond the limits set in articles 17 and 18 :

- it is questionable whether "workforce agreements" can count as "agreements between the two sides of industry", especially in light of the employer's freedom, where twenty or fewer workers are concerned, to send a list around and consider that an agreement has been concluded if a majority of the workers sign it;
- some of the British regulations' provisions mix up the scopes of articles 17 and 18 by allowing individually agreed derogations to the definition of "night worker" (the directive only allows individual derogations from the 48 hour maximum working week);
- in practice, the 1999 amendment extending the definition of work which cannot be measured to "hybrid" situations where work is partly measurable and partly performed "voluntarily" by the worker over and above what can be measured cancels out the few guarantees offered by article 18 for these categories of workers.

All these issues (along with others not addressed in this article) could well find their way into the courts, and be referred for a preliminary ruling to the ECJ. What is disturbing is the Commission's failure so far to fulfill its role as "guardian of the Treaties" by initiating a default procedure against the United Kingdom over Directive 93/104. ■

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