SUMMARY

2011/28 No derogation is possible in relation to daily 11 hour rest period (FR)

<p>The daily rest period of 11 consecutive hours set by Directive 93/104, as amended by Directive 2000/34/EC1 is interpreted as prohibiting all derogations.</p>

Summary

The daily rest period of 11 consecutive hours set by Directive 93/104, as amended by Directive 2000/34/EC[1] is interpreted as prohibiting all derogations.

Facts

Mr Burckel was an educator hired by a non-profit association for the mentally ill. His employment was governed by a collective agreement ("branch Agreement"). This agreement allowed non-profit institutions to reduce their minimum daily rest period in respect of employees responsible for putting to bed and waking patients, from the statutory 11 hours to 9 hours, provided the employees in question were granted two hours of compensatory leave. Mr Burckel regularly had less than 11 but more than 9 hours of rest between two working days. His employer argued that in such cases the compensatory time-off had to be proportional to the reduction of the daily rest period. By way of a purely hypothetical example, suppose Mr Burckel's weekly work pattern involved him working from Monday to Friday between 7 and 11am (4 hours) and between 5 and 9pm (4 hours) each day. Consequently, on four days per week (Monday Ð Thursday) the period between going home (9 pm) and beginning work the next day (7 am) was 10 hours i.e. one hour (50%) less than the statutory minimum. The employer interpreted the collective agreement as entitling Mr Burckel to (no more than) 2 hours x 50% = 1 hour of compensatory leave for each of these four days. Mr Burckel disagreed with his employer's interpretation of the collective agreement. He pointed to article 6 of the collective agreement, which provided that, by derogation to national French law, "the minimum rest period of 11 hours between two working days may be reduced to 9 hours for

those employees who are in charge of putting to bed and awakening the patients. Employees covered by the preceding paragraph are afforded two-hours' compensatory time-off". Mr Burckel's interpretation of this text was that the two-hour compensatory time-off was a flat-rate penalty for the employer, regardless of the extent of the daily rest time reduction. In the hypothetical example given above, Mr Burckel would be entitled to two hours of compensatory leave for each of four days per week = 8 hours (one whole day) of compensatory time-off each week.

Court of Appeal

By a decision handed down on 14 January 2009, the Court of Appeal followed the employee's interpretation of the branch Agreement, holding that since it did not refer to any pro-rated calculation, the two-hour compensatory time-off was a flat-rate penalty which had to be borne by the employer regardless of the number of rest hours reduced. Disagreeing with the interpretation given by the Appeal judges, the Association appealed the decision before the Supreme Court.

Supreme Court

The French Supreme Court (Cour de Cassation) overruled the Court of Appeal's decision, holding that "since the threshold of the daily rest period resulting from Directive 93/104/EC of 23 November 1993, as amended by Directive 2000/34/EC of 22 June 2000 is set at 11 consecutive hours, it follows that, under domestic law, exceeding the daily range of 13 working hours is prohibited".

The Cour de Cassation held that, since the employee was not afforded the minimum daily rest period of 11 consecutive hours between workdays, he was entitled to receive the claimed compensation and that the employer could not oppose this on the basis of the branch Agreement, as its provisions were contrary to the threshold set by EU law.

Commentary

The question put to the Cour de Cassation related to the interpretation of the two-hour compensatory time-off provided by the branch Agreement. Was it a flat rate or a proportional consideration? However, the Supreme Court did not opine on how the branch Agreement should be interpreted but instead, rather surprisingly, rendered its decision on grounds of incompatibility between French domestic law and European Union law.

Its reasoning is striking Ð the Cour de Cassation inferred from the text of Article 3² of Directive 93/104, which sets the daily rest period at 11 consecutive hours, that the daily

working period is capped at 13 hours without any possible derogation.

We all know that national courts are bound to interpret their domestic law in light of EU Directives, but what if the derogation is provided by the Directive itself? Article 17 (2) of Directive 93/104 expressly provides that "Derogations [to the daily rest period] may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between labour unions provided that the employees concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection". Such derogation is also possible under French domestic law. In fact, Article L. 3131-2 of the Labor Code[3] expressly allows for reduction of the daily rest period under certain conditions. It is precisely in accordance with this article that the branch Agreement in the health, social and medico-social sector, which derogates in this way, was set up.

So how could the Cour de Cassation possibly rule as it did, where exceptions to the daily rest period existing under both Directive 93/104 and domestic law clearly provide that the employee should be granted equivalent compensatory rest? Normally, in such circumstances, the Cour de Cassation would check whether the employees were granted proper compensatory rest by the branch Agreement and then take a position on the interpretation of the two-hour compensatory time-off.

What prompted the Cour de Cassation to rule as it did is not clear. Perhaps its position can be attributed to insufficient knowledge of the contents of the Directive, especially ss 17-2 and 17-3, given that in its ruling the Cour de Cassation does not even refer to those sections. In any event, should the Cour de Cassation maintain its position in future decisions, this could have dire consequences for activities where derogation is necessary due to the need to ensure continuity of service.

Comments from other jurisdictions

Austria (Martin Risak): Issues like the ones reported in this case are not very likely to be raised in Austria as the working time law is very explicit about possible deviations from the 11 hour rest-period. It states, for example, that the applicable collective bargaining agreement may reduce the rest period down to eight hours provided this is compensated with an adequately extended rest period within the next ten days. A shortening to less than ten hours is only allowed if the collective bargaining agreement provides for additional measures to ensure the employees have adequate rest. Collective bargaining agreements, which cover about 95% of the employees in the private sector, therefore often include provisions to shorten the daily rest

periods along with measures to compensate for the shortfall.

The Netherlands (Peter Vas Nunes): if the French Supreme Court's judgment really is based on insufficient knowledge of the content of the Working Time Directive (since 2 August 2001: Directive 2003/88) all I can do is be amazed.

Footnotes

1 Replaced in 2004 by Directive 2003/88

2 Article 3 "Member States shall take the measures necessary to ensure that every employee is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period".

3 By Article L. 3131-2: "An agreement, extended collective bargaining agreement, enterprise or establishment agreement may allow exceptions to the minimum daily rest, under conditions determined by Decree, particularly for activities involving the need to ensure continuity of service or services requiring fractioned intervention periods. Such Decree also provides the conditions under which such derogation is possible where there is no collective agreement and, in cases of emergency work because of an accident or threat of injury, or an exceptional increase in business activity."

Subject: Working time

Parties: AFDAIM Foyer Joulia Đ v Đ Burckel

Court: Cour de cassation (Supreme Court)

Date: 28 September 2010

Case number: Cass soc. No 09-41511

Internet publication: www.legifrance_gouv.fr

Creator: Cour de cassation (French Supreme Court)
Verdict at: 2010-09-28
Case number: 09-41511