SUMMARY

ECJ 14 October 2010, case C-243/09 (Günter Fuss – v – Stadt Halle), Working time

<p>Article 6 of Directive 2003/88 precludes national rules, which allow a public-sector employer to transfer a worker compulsorily to another service on the ground that the worker has requested compliance with that provision, even if he or she suffers no specific detriment other than that resulting from the infringement of that provision.</p>

Facts

Fuss was a Fire Officer employed by the city of Halle in the German province of Sachsen-Anhalt. On the roster he was scheduled to work on average 54 hours per week. This was in accordance with the provincial rules but in excess of the 48 hour per week maximum provided in Article 6 of the Working Time Directive 2003/88 ("the Directive"). In early 2006, Fuss and his colleagues were informed that, if any one of them insisted on compliance with the Directive, they would be transferred to a desk job. In December 2006, Fuss requested (i) a reduction of his weekly working time to 48 hours per week and (ii) compensation for overtime unlawfully performed between 2004 and 2006. A few days later, management announced that a vacancy for a non-shift 40 hour per week position would arise on 1 April 2007, and shortly afterwards Fuss was transferred to that position "for organisational reasons". His base salary remained unchanged but his hardship allowance was reduced. Fuss objected, stating that he wished to retain his position of Fire Officer, including shift work, but for no more than 48 hours per week. His objection was turned down and he brought legal proceedings before the local administrative court.

National proceedings

Fuss claimed that he had been transferred solely because he had requested compliance with the Directive. The city of Halle replied that its decision to transfer Fuss to another position was in no way intended to punish him but was merely designed to accommodate his request for reduced working hours without having to amend its shift-roster for Fuss' sole benefit. The court, finding that the transfer was in accordance with German and provincial law as it stood at the time of the transfer (the law was replaced in 2008), referred to the ECJ a question regarding Article 22 of the Directive. Subsection (a) of this Article allows Member States not to apply Article 6 providing they take the necessary measures to ensure that no employer requires a worker to work on average more than 48 hours per week "unless he has first obtained the worker's agreement to perform such work". Subsection (b) provides that "no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work". The referring court wished to know whether the concept of "detriment" in Article 22(1)(b) of the Directive is to be interpreted subjectively (Fuss perceives his transfer as a punishment) or objectively (despite his reduced headship allowance, Fuss did not, on balance, suffer any detriment since his new post was less dangerous than his previous one, it involved less hardship and it offered him career advancement opportunities).

ECJ's ruling

1. Article 22 of the Directive is not relevant, because neither Germany nor the province of Sachsen-Anhalt had made use of the possibility afforded in Article 22 to derogate from Article 6 (see case C-151/02, *Jaeger*) (§ 32-38).

2. Given the irrelevance of Article 22 and the fact that the referring court limited its questions to the interpretation of Article 22, that court has in effect asked the wrong question, which the ECJ therefore reformulates as asking whether Article 6 is to be interpreted as precluding national rules that allow a public-sector employer to transfer compulsorily to another service a worker employed as a fire fighter in operational service on the ground that that worker has requested compliance, within the latter service, with the maximum average working week laid down in Article 6(b), in a situation in which that worker suffers no detriment by reason of such a transfer (§ 39-43).

3. In order to reply to this question it is necessary (1) to examine whether Article 6 is

infringed only when a worker suffers detriment and (2) to determine the consequences of an infringement of Article 6 (§ 44-46).

4. Article 6(b) of the Directive constitutes "a particularly important rule of EU social Law". There is no provision in the Directive that allows derogation from Article 6 other than Article 22 (which, as mentioned above, is not applicable in this case). Therefore, exceeding the maximum of 48 hours of work per week constitutes, in itself, an infringement of Article 6, without it being necessary to show that a specific detriment has been suffered. In fact, the EU legislature took the view that infringement of Article 6 in itself causes workers to suffer a detriment (§ 47-55).

5. Article 6(b) of the Directive is unconditional and sufficiently precise to allow it to have (vertical) direct effect notwithstanding the fact that Article 22 allows Member States to derogate from it. Given that the period for transposing the Directive has expired and that the province of Sachsen-Anhalt had not transposed it on the date Fuss was transferred, he was entitled to rely directly on Article 6(b) against the city of Halle (§ 56-61).

6. The city of Halle takes the view that its decision to transfer Fuss to a position that respected the upper limit of 48 hours per week ensured the implementation of Article 6. The ECJ disagrees, since the effect of his involuntary transfer is "to deprive of all substance" the right to a maximum working week of 48 hours. In addition, Article 47 of the Charter of Fundamental Freedoms of the EU, which guarantees the fundamental right to effective judicial protection, would be substantially affected if an employer, in reaction to a request for compliance with a directive, were allowed to adopt a measure such as transferring the employee to another position (§ 62-66).

Ruling

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