SUMMARY

ECJ 21 October 2010, case C-227/09 (Antonino Accardo and others – v – Comune di Torino), Working time

<p>The fact that a profession is not listed in Article 17(2) of the Directive does not mean that it may not be covered by the derogation provided in Article 17(3). In circumstances such as those in the case of Mr Accardo, the optional derogations provided in Article 17 of the Directive cannot be relied on against Accardo at all. They cannot be interpreted as permitting or precluding the application of collective agreements such as the one in question, since whether such collective agreements apply is a matter for domestic law.</p>

Facts

Mr Accardo and his 64 co-plaintiffs were police officers in the employment of the city of Turin. In the period 1998 to 2007 they worked in shifts, which involved working seven consecutive days once every five weeks. This shift system was based on a collective agreement. The plaintiffs brought proceedings against their employer seeking compensation for psychological and physical harm suffered as a result of failure to comply with Article 36(3) of the Italian Constitution and Article 2109(1) of the Civil Code, both of which grant employees at least one day of rest per week and which override the collective agreement in question.

National proceedings

The court decided to ask the ECJ for clarification on Article 17(3) of Directive 93/104, which is one of the directives implementing Framework Directive 89/391 on occupational safety and

health. Directive 93/104 was amended by Directive 2000/34 and was later, with effect from 2 August 2004, replaced by Directive 2000/88. Directive 93/104, amended Directive 93/104 and Directive 2000/88 are referred to below as "the Directive". The court asked four questions. The first three questions had to do with the fact that Article 17 of the Directive permits Member States to do something that is prohibited by Italian law (i.e. to derogate from the weekly day of rest), namely by its Constitution and Civil Code. Could the city of Turin nonetheless rely on Article 17 of the Directive against the plaintiffs? The fourth question addressed the relationship between Articles 17(2) and 17(3) of the Directive.

ECJ's ruling

1. The ECJ begins by answering the fourth question. Article 17(2) allows the Member States to derogate from certain working time rules, provided the workers concerned are afforded equivalent periods of compensatory rest or appropriate protection. This applies to cases of security and surveillance activities (item b) and activities involving the need for continuity of service, such as those of ambulance, fire and civil protection services (item c). Article 17(3) allows derogation, with the same proviso as paragraph 2, by means of collective agreements. The plaintiffs concluded that Article 17(3) does not permit derogations that are broader in scope than those permitted under Article 17(2). The ECJ disagrees, given that there is nothing in the wording or the history of the Directive in support of this contention (§ 30-36).

2. As for question 1, the ECJ observes that a Member State that has not transposed the Directive's derogation provisions cannot rely on its own failure to do so in order to refuse individuals' entitlement to a weekly rest period to which domestic law entitles them. Therefore, the city of Turin cannot rely directly on the Directive against the plaintiffs (§ 44-47).

3. Although national courts must interpret their domestic law in line with EU law, since the derogation provisions of the Directive are optional, the Directive cannot be interpreted as precluding the applicability of domestic law (in this case, the collective agreement) (§ 48-54).

4. Where EU law gives Member States the option to derogate from certain provisions of a directive, those Member States must exercise their discretion in a manner that is consistent with the principles of EU law, including the principle of legal certainty. To that end, provisions that permit optional derogations from the rules laid down by a directive must be implemented with the requisite precision and clarity to satisfy the requirements flowing from that principle (§ 55).

5. This means that the referring court is faced with two alternatives: either (i) the collective agreement does not comply with the principle of legal certainty or the requirements under

Italian law for implementing the derogating provisions or (ii) it constitutes the correct implementation of the Directive's derogating provisions. In the first case, if Italian law precludes application of the collective agreement, the Directive cannot be relied on against the plaintiffs. In the second case, the Directive does not preclude the referring court form interpreting Italian law to the effect that the city of Turin may rely on the collective agreement (§ 56-58).

Ruling

The fact that a profession is not listed in Article 17(2) of the Directive does not mean that it may not be covered by the derogation provided in Article 17(3). In circumstances such as those in the case of Mr Accardo, the optional derogations provided in Article 17 of the Directive cannot be relied on against Accardo at all. They cannot be interpreted as permitting or precluding the application of collective agreements such as the one in question, since whether such collective agreements apply is a matter for domestic law.

Creator: European Court of Justice (ECJ)
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