EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2010/71: Provision limiting Member States’ right to derogate from Working Time Directive in respect of public transport has direct (vertical) effect (FR)

<p>Article 17 of the Working Time Directive allows Member States to exclude certain activities, such as passenger transport, from the obligation to grant employees a rest break after six hours of work. However, Member States that do this must afford the employees concerned equivalent periods of compensatory rest or, if that is not possible, with appropriate protection. An exempted public body, in this case the Paris metro, that fails to afford its employees such equivalent compensation or appropriate protection cannot rely on its exempted status and must therefore apply the normal national rules.</p>

Summary

Article 17 of the Working Time Directive allows Member States to exclude certain activities, such as passenger transport, from the obligation to grant employees a rest break after six hours of work. However, Member States that do this must afford the employees concerned equivalent periods of compensatory rest or, if that is not possible, with appropriate protection. An exempted public body, in this case the Paris metro, that fails to afford its employees such equivalent compensation or appropriate protection cannot rely on its exempted status and must therefore apply the normal national rules.

Facts

This case deals with Directive 2003/88/EC on working time (the 'Directive'). Article 4 of the Directive requires Member States to take 'the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in [...] national legislation'. It is up to the Member States to determine the duration of the rest break and its terms (e.g. whether the break time counts towards determining salary). France transposed (the predecessor of) the Directive by means of Article L.3121-33 of the Labour Code (*Code du travail*). This provision entitles workers with a working day that exceeds six hours to a rest break of at least 20 minutes.

The Labour Code does not apply to the Parisian public transportation company RATP, as this is a publicly owned organisation (*entreprise à statut*). This is in conformity with Article 17(3)(c)(viii) of the Directive, which provides: 'In accordance with paragraph 2 of this Article derogations may be made from Articles 3, 4, 5, 8 and 16 [...] in case of activities involving the need for continuity of service or production, particularly [...] workers concerned with the carriage of passengers on regular urban transport services'. Instead, there are rules, laid down by the government in a decree (*décret*), that regulate the working conditions of RATP's staff, including a rest break that is less favourable than that provided in the Labour Code.[1]

A bus driver employed by RATP claimed a 20 minute rest break as per the Labour Code, arguing that the special rules for RATP were incompatible with the Directive, and that therefore the Labour Code was applicable. The court of first instance and, on appeal, the Parisian Court of Appeal, turned down his application. The Court of Appeal based its decision on two arguments. First, it held that Directive 2003/88 lacks direct effect. Secondly, it invoked said Article 17 of the Directive, which allows urban transport companies to derogate from Article 4 of the Directive. The bus driver appealed to the Supreme Court ("*Cour de Cassation*").

Judgment

The Supreme Court, taking a cue from the ECJ's *Pfeiffer* ruling[2], began by reaffirming that '*the various requirements set out in the above-mentioned Directive regarding the minimum rest break time constitute a rule of social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health*".

The Supreme Court went on to agree with the Court of Appeal's finding that Article 4 of the Directive lacks direct effect, given that it specifies neither the duration nor the conditions of the rest break. However, the Supreme Court made reference to Article 17 (2) of the Directive, which provides that the Member States may exempt certain organisations, such as RATP, from

Article 4, "*provided that the workers 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*". The Supreme Court criticised the Court of Appeal for not "*verifying whether the provisions of national law that grant an exception in the case of RATP employees from the regime of rest time provided by French labour law allow these employees either equivalent compensatory rest periods or an appropriate protection for the exceptional cases where the granting of such equivalent periods is not possible for objective reasons*". The Supreme Court remitted the matter back to the same Court of Appeal (but differently composed), which must now, presumably, determine whether the rules on the rest breaks of RATP's employees provide 'equivalent' compensatory rest breaks, i.e. rest breaks that are no less favourable than those of the Labour Code, or, alternatively, whether those rules afford those employees 'appropriate protection'.

Commentary

In this judgment the French Supreme Court implicitly found a provision of an EU directive to have direct vertical effect. This is consistent with the ECJ's case law according to which individuals can invoke clear, precise and unconditional provisions of a poorly transposed or untransposed European directive against "*organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals*", whether this relates to a public corporation[3] or to a private company to which a public service has been entrusted[4]. The judgment reported above is fully in line with this European case law given that RATP "*is by virtue of being an instrument of public authority charged with carrying out, under the control of the latter, a public service and for this purposes has special powers that go beyond the rules applicable in relations between individuals*".

A more interesting aspect of the judgment is that the Supreme Court seems to have found Article 17 (2) of the Directive to be 'sufficiently clear and precise' to give it direct effect. This is significant. Many, if not all, Member States have made use of Article 17 (3) of the Directive to exempt large segments of their working population, not only from Article 4 (daily breaks) but also from Articles 3 (daily rest periods), 5 (weekly rest period), 6 (maximum weekly working time) and 16 (reference periods). Article 17 (2) applies to all of these exemptions. If the courts in other European jurisdictions follow this French example, that could lead to many of the exemptions being challenged.

On a more fundamental level, this decision is noteworthy in that it emphasises the intention of the French Supreme Court to transcend the segmentation, from an employment law perspective, in which work relations are evolving under French law (companies under private

law, statute workers, public corporations, etc.) in creating a common legal basis. This case reminds us that Directive 2003/88 applies '*to all business sectors, whether private or public within the meaning of Article 2 of Directive 89/391*" (the basic directive on safety and health). Whatever the particularity of the rules which may apply to its workers, RATP must also comply with European labour law.

Comments from other jurisdictions

Germany (Paul Schreiner): A comparable case was adjudicated in Germany a short time ago by the *Bundesarbeitsgericht*, the 'BAG', (Federal Court for Employment law Matters, 13 October 2009, 9 AZR 139/08). A tramway driver felt that the breaks he was allowed to take were too short to constitute a break in the sense of the German *Arbeitszeitgesetz* (Act on working time regulation). Generally, this law provides for a break of 45 minutes in total for employees who need to work between six and nine hours. A break must last for at least 15 minutes. However, section 7 of the Act allows deviations from this general rule if a collective bargaining agreement for companies providing public transport provides different break time regulations. In this case the minimum break time was set at 8 minutes by the applicable collective bargaining agreement. In its decision the BAG clarified that even in a situation in which the parties to a collective bargaining agreement set a special regulation for shorter breaks than those provided by law, such breaks must still qualify as breaks in the meaning of the law. This requires that a break is not reduced to a mere sit down breather, but has a significant minimum duration. Since the main recreational effect occurs in the first 3 to 5 minutes of a break, the BAG concluded that 8 minutes is sufficient to create a break in the meaning of the law. Summarising, the BAG checked the issues that the French court believes necessary, without reference to the European law background.

Footnotes

1 In 2006 the government replaced the old décret with a new one, but on 25 June 2007 the Conseil dÉtat annulled the new décret, as a result of which the old rules automatically revived.

2 ECJ 5 October 2004, case C-397/01 (Pfeiffer), see ¤ 101.

3 ECJ 12 July 1990, case C-188/89 (Foster).

4 ECJ 14 September 2000, case C-343/98 (Collino).

Subject: Working time

Parties: Cots – v – RATP

Court: Supreme Court (*Cour de Cassation*)

Date: 17 February 2010

Case number: 08-43.212

Internet publication: www.legifrance.gouv.fr

Creator: Cour de cassation (French Supreme Court)
Verdict at: 2010-02-17
Case number: 08-43.212