SUMMARY

EFTA Court 16 December 2015, case E-5/15 (M'bye), working time

<p>An 84-hour working week imposed on resident therapists at a care home may in certain circumstances be compatible with Directive 2003/88.</p>

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Facts

The employer in this case was Stiftelsen Fossumkollektivet ('Stiftelsen'), a not-for-profit foundation that offers treatment for young people with drug and/or alcohol problems. It has the capacity to treat 60 patients at a time, divided across six branches. This entails that the therapists live together with their patients, in 'cohabitation care'.

The appellants are workers at the employer's Solvold branch, where girls with various forms of psychological difficulties in addition to drug and alcohol problems are treated. The working day in the Solvold branch starts at 0700 hrs and silence must be maintained from 2300 hrs. In addition to the period between 2300 hrs and 0700 hrs, workers receive two hours of rest each day. Since several of the patients have mental disorders, the workers sleep in apartments at the premises and are available at night, if required. The workers are also entitled to three months of paid leave every three years.

The working time arrangement at the Solvold branch consisted of three days' work followed by seven days off, then four days' work followed by seven days off ('3-7-4-7 rotation'), with 56 working hours per week on average. Due to financial losses at the Solvold branch, the employer proposed a change in the working time arrangement to a '7-7 rotation', that is seven days work followed by a rest period of seven days. This came down to an average of 84 hours

of work per week. As part of the new terms, the staff were offered an increase in salary. However, the appellants did not accept the proposed change in working time, which led to notices of dismissal with offers of re-engagement on new terms. The appellants brought an action against the employer claiming that the notices of dismissal should be declared invalid.

National proceedings

The court of first instance ruled in favour of the employer. The case was appealed to Eidsivating Court of Appeal, which decided to request an Advisory Opinion from the EFTA Court on the interpretation of Article 6 and Article 22(1)(a) and (b) of EU Directive 2003/88 (the 'Directive'). Article 6(b) provides that "the average working time for each seven-day period, including overtime, does not exceed 48 hours". Article 22 (1) allows a Member State to opt out of Article 6 provided:

"a. no employer requires a worker to work more than 48 hours over a seven-day period [...] unless it has first obtained the worker's agreement to perform such work;b. no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work".

The questions referred by the national court concern, firstly, whether an average weekly working time of 84 hours (7-7 rotation) in a cohabitant care arrangement constitutes a breach of Article 6 of the Directive. Secondly, whether a national provision, under which an employee's consent to working more than 60 hours per week in a cohabitant care arrangement cannot be revoked, is compatible with the rights that employees have under the Directive. Thirdly, whether a dismissal following a failure to consent to a working time arrangement of more than 48 hours over a seven-day period constitutes a 'detriment' within the meaning of the Directive.

EFTA Court findings (taken from the Court's press release)

With regard to the first question, the Court noted that it is for the national court to assess the amount of working time in the case at hand, taking into account the factors clarified by the Court. Working time amounting to an average of 84 hours per week in a cohabitant care arrangement is compatible with Article 6 of the Directive, in circumstances governed by Article 22(1)(a), provided that the worker has explicitly, freely and individually agreed to perform such work, and the general principles of the protection of the safety and health of the worker are observed. This entails that where an EEA State makes use of the option provided for in Article 22(1) of the Directive, the national legislature must take due account of the physical and mental well-being of workers. However, such a working time arrangement is only

compatible with Articles 3 and 5 of the Directive regarding rest periods if the conditions for the application of the derogation in Article 17(2) (legal basis), in conjunction with Article 17(3)(c)(i) (limitation to hospitals and other care institutions), are fulfilled.

With regard to the second question, the Court noted that the Directive does not contain a provision concerning revocation of consent. It is for national law to determine whether such revocation of consent is possible. However, a complete inability to revoke consent, even in exceptional and unforeseen circumstances, may prove incompatible with the Directive, since the option for a worker to consent to exceed the maximum weekly working time is expressly conditional on the EEA State respecting the general principles of protection of the health and safety of workers, pursuant to Article 22(1)(a) of the Directive. Therefore, where an EEA State makes use of the option provided for in Article 22(1) of the Directive, the national legislature must take due account of the physical and mental well-being of workers. This entails that a fair balance is struck between the interests of workers and employers even when the worker has given explicit, free and individual consent. Consequently, a provision of national law, according to which a worker's consent to work more than 60 hours per week in a cohabitant care arrangement cannot be revoked, is compatible with Articles 6 and 22 of the Directive, provided that the general principles of the protection of the health and safety of workers are observed.

With regard to the third question, the Court noted that, typically, a dismissal due to a failure to consent to a working time arrangement of more than 48 hours over a seven-day period constitutes a 'detriment'. However, a notice of dismissal and offer of re-engagement on new terms, following a refusal by a worker to agree to a working time arrangement of more than 48 hours over a seven-day period, is not to be considered a detriment if the termination of employment is based upon reasons that are fully independent of the worker's refusal to agree to perform such additional work.

Creator: European Court of Justice (ECJ)
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Case number: E-5/15