ORDER OF THE COURT (Fifth Chamber)

11 January 2007 *

In Case C-437/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Okresní soud v Českém Krumlově (Czech Republic), made by decision of 28 November 2005, and received at the Court on 5 December 2005, in the proceedings

Jan Vorel

v

Nemocnice Český Krumlov,

THE COURT (Fifth Chamber),

composed of R. Schintgen (Rapporteur), President of the Chamber, A. Borg Barthet and M. Ilešič, Judges,

* Language of the case: Czech.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

the Court, proposing to give its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Directive 93/104/EC of the Council of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41, hereinafter 'Directive 93/104'), and Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9), which repeals and replaces Directive 93/104 with effect from 2 August 2004.

2 This reference has been presented in the context of proceedings between Mr Jan Vorel and his employer, Nemocnice Český Krumlov (Český Krumlov Hospital, hereinafter 'NČK') concerning the definition of the concept of 'working time' within the meaning of Directives 93/104 and 2003/88 relating to on-call duties provided by a doctor in a hospital and the remuneration due in respect of those duties.

Legal context

Community legislation

3 Directive 93/104 was adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 to 143 EC), whilst Directive 2003/88 refers to Article 137 EC as its legal basis.

4 In accordance with its first article, entitled 'Purpose and scope', Directive 93/104 lays down minimum safety and health requirements for the organisation of working time and shall apply to all sectors of activity, both public and private, except seamen.

5 Under the heading 'Definitions', Article 2 of Directive 93/104 provides:

'For the purposes of this Directive, the following definitions shall apply:

(1) "working time" shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

(2) "rest period" shall mean any period which is not working time;

...'

6 The said Directive envisages in Articles 3 to 6 that Member States shall take the measures necessary to ensure that every worker is, inter alia, entitled to a minimum daily rest period, a minimum weekly rest period and breaks, and it also regulates the maximum weekly working time.

7 In accordance with Article 18(1)(a) of Directive 93/104, in its original version, the Member States were to adopt the laws, regulations and administrative provisions necessary to comply with that directive by 23 November 1996, or to ensure by that date that the two sides of industry established the necessary measures by agreement, Member States being obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by that directive were fulfilled.

8 It is apparent from its first recital that Directive 2003/88 aims, in the interests of clarity, to codify the provisions of Directive 93/104.

9 In accordance with its Article 28 thereof, Directive 2003/88 entered into force on 2 August 2004

10 According to the table which appears in Annex II of the same directive, Articles 1 to 6 of Directive 93/104 correspond to Articles 1 to 6 of Directive 2003/88, those provisions moreover being drafted in substantially the same terms.

National legislation

11 In the Czech Republic, Article 83 of Law No 65/1965 concerning the Employment Code, in the version in force on 1 May 2004, defines working time as 'the period

during which the employee is required to perform work for the employer', the rest period as 'the period which is not working time', and on-call duty as 'the period during which the employee is available to work pursuant to a contract of employment which has to be performed, in an emergency, outside normal working hours'.

12 Under the heading 'On-call duty', Article 95 of Law No 65/1965 reads as follows:

'(1) On-call duty is designed to deal with the likelihood of urgent work needing to be performed outside the working time of the employee. On-call duty may be performed at the normal workplace or at another place agreed with the employer.

(2) The employer may agree on-call duty with the employee for a maximum of 400 hours per calendar year. The employer may also agree on-call duty with the employee which will be performed in another place. Where an on-call duty agreement exists, the employer may require the employee to perform on-call duty. A collective agreement concluded within an undertaking may limit the scope of on-call duty at the place of work or, where appropriate, at another place agreed with the employee.

(3) Where work is performed in the course of on-call duty, the employee is entitled to a remuneration; work performed in the context of on-call duty in excess of the established weekly working time is overtime and is included in overtime limits.

(4) On-call duty which does not lead to performance of work is not included in working time; for this period the employee has the right to remuneration in accordance with special provisions (Law No 1/1992 on salaries and remuneration of on-call duty and average salaries, as amended, and Law No 143/1992 on salaries and remuneration of on-call duty performed in organisations and public bodies and some other organisations and bodies, as amended).'

13 Article 15 of Law No 1/1992, entitled 'Remuneration of on-call duty'; states:

'Where remuneration of on-call duty (Article 95 of the Labour Code) is not set by a collective agreement or in an employment contract, the employee is entitled to a minimum of 20% of the average hourly salary for every hour of on-call duty at the workplace and 10% of the average hourly salary for every hour of on-call duty outside the workplace.'

14 Under the heading 'Remuneration of on-call duty', Article 19 of Law No 143/1992 provides:

'(1) For every hour of on-call duty (Article 95 of the Labour Code) performed at the workplace in addition to working time, the employer shall pay the employee a remuneration equal to 50% and, in the case of a non-work day, to 100% of the proportional part of the salary, the personal supplement and special supplement for an hour of work without overtime in the calendar month in which the on-call duty falls.

(2) For every hour of on-call duty performed outside the workplace in addition to the working time, the employer shall pay the employee a remuneration equal to 15% and, in the case of a non-work day, 25% of the proportional part of the salary and of the personal supplement for an hour of work without overtime in the calendar month in which the on-call duty falls.

(3) For work performed during on-call duty, the employee is entitled to remuneration. In that case, remuneration for the on-call duty is not due.'

The dispute in the main proceedings and the question referred for a preliminary ruling

15 The reference for preliminary ruling shows that Mr Vorel is employed as a doctor by the NČK on the basis of a permanent contract.

16 During the period from 1 May to 31 October 2004, the NČK required him to perform on-call duty at his workplace by virtue of which it paid him a remuneration corresponding to that specifically provided for by the national legislation on on-call duty.

17 Mr Vorel is challenging the basis on which that remuneration was calculated before the Okresní soud v Českém Krumlově (District Court, Český Krumlov) and claims that NČK should be ordered to pay him a supplement to his salary of CZK 29 151 plus interest, representing the difference between the remuneration which was due to him for the on-call duty which he performed over the said period and the salary which would have been paid to him if the said services had been recognised as a normal performance of work.

18 Mr Vorel bases his claim on the judgement of the Court in Case C-151/02 *Jaeger* [2003] ECR I-8389, according to which all of the period of on-call duty performed by a doctor under a system where he is expected to be physically present in the hospital constitutes working time within the meaning of Directive 93/104, even though the party concerned is authorised to rest at his workplace during the period that his services are not called upon. Mr Vorel concludes from the said judgment that the entire period of on-call duty which he performed should be classified as 'working time' within in the meaning of Directives 93/104 and 2003/88, which would mean that, in accordance with those directives, that period should be remunerated by the NČK the same way that it would if work had really been performed, even though a part of that period was spent waiting for actual work.

19 The NČK replies, first, that in calculating the remuneration due to Mr Vorel it acted in accordance with the national legislation in force according to which on-call duty during which no work is performed is not considered to be actual working time, but nevertheless does give rise to some financial compensation. Secondly, it maintains that the *Jaeger* case is limited to the finding that on-call duty during which a doctor performs no actual activity cannot be classified as rest time within the meaning of Directive 93/104. Lastly, it argues that discussion is currently underway with a view to amending Directive 2003/88 in connection with, inter alia, the concept of working time in Community law.

20 Taking the view that in those circumstances an interpretation of Community law was necessary to enable it to reach a decision in the case before it, the Okresní soud in Český Krumlov decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'From the point of view of conformity with Directive 93/104 and the judgment ... in *Jaeger*, is a doctor's waiting for work when on call at his place of work in the hospital to be regarded as the performance of work?'

The question referred for preliminary ruling

21 In accordance with the first subparagraph of Article 104(3) of the Rules of Procedure, when the answer to a question asked by way of reference for a preliminary ruling can be clearly deduced from the existing case-law, the Court can at any moment after hearing the Advocate General rule by way of a reasoned order which includes a reference to the relevant case-law. The Court considers that that is so in the present case.

22 The essence of the national court's question is whether Directives 93/104 and 2003/88 should be interpreted as precluding national legislation under which on-call duty performed by a doctor under a system where he is expected to be physically present at the place of work, but in the course of which he does no actual work, is first not treated as 'working time' within the meaning of the said directives and second gives rise to a remuneration calculated at a lower rate than that which applies to actual work done.

23 It is settled case-law that the purpose of Directive 93/104 is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national legislation concerning, in particular, the duration of working time. This harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods — particularly daily and weekly — and adequate breaks and by providing for a ceiling of 48 hours on the average duration of the working week, a maximum limit which is expressly stated to include overtime. The different requirements that the said

directive lays down concerning maximum working time and minimum rest periods constitute rules of Community social law of particular importance from which every worker must benefit (see Case C-10/04 *Dellas and Others* [2005] ECR I-10253, paragraphs 40, 41 and 49, and the case-law cited).

24 With regard more specifically to the concept of 'working time' within the meaning of Directive 93/104, the Court has repeatedly held that the directive defines that concept as any period during which the worker is at work, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices, and that that concept is placed in opposition to rest periods, the two being mutually exclusive (see *Dellas and Others*, paragraph 42 and case-law cited).

25 The Court has stated, first, that Directive 93/104 does not provide for any intermediate category between working time and rest periods and, second, that the intensity of the work done by the employee and his output are not amongst the defining characteristics of 'working time' within the meaning of that directive. (see *Dellas and Others*, paragraph 43).

26 The Court has also held that the concepts of 'working time' and 'rest period' within the meaning of Directive 93/104 constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive, intended to improve workers' living and working conditions. Only such an autonomous interpretation is capable of securing full effectiveness for that directive and uniform application of those concepts in all the Member States (see *Dellas and Others*, paragraphs 44 and 45, and the case-law cited).

27 The Court infers from this that on-call duty performed by a worker where he is required to be physically present on the employer's premises must be regarded in its entirety as 'working time' within the meaning of Directive 93/104, regardless of the work actually done by the person concerned during that on-call duty (see *Dellas and Others*, paragraph 46 and the case-law cited).

28 The fact that on-call duty includes some periods of inactivity is thus completely irrelevant in this connection. The decisive factor in considering that the characteristic features of 'working time' within the meaning of Directive 93/104 are present in the case of the on-call duty performed by a worker at his actual workplace is that he is required to be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need. Those obligations must therefore be regarded as coming within the ambit of the performance of that worker's duties (see *Dellas and Others*, paragraphs 47 and 48 and the case-law cited).

29 Since Articles 1 to 6 of Directive 2003/88 are drafted in essentially identical terms to Articles 1 to 6 of Directive 93/104, the interpretation of the latter as outlined in paragraphs 24 to 28 of the present order is fully transposable to Directive 2003/88.

30 The fact that work is currently underway within the Council of the European Union on the possible amendment of Directive 2003/88 has no relevance in this connection, especially as the on-call duty at issue in the main proceedings took place in 2004.

31 It must therefore be concluded that where a doctor performs on-call duty at his place of work, the entire period of waiting for actual work should be treated as

working time and, where appropriate, as overtime within the meaning of Directives 93/104 and 2003/88, in order to ensure that all minimum requirements concerning the length of work and rest periods of employees laid down in these directives and intended to protect effectively the safety and health of workers are respected.

32 Concerning the effect that a system such as that at issue in the main proceedings may have on the level of remuneration received by the employees concerned, it follows from the case-law of the Court that, save in a special case such as that envisaged by Article 7(1) of Directive 93/104 concerning annual paid holidays (see Case C-173/99 *BECTU* [2001] ECR I-4881, Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531 and Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3423), the said directive is limited to regulating certain aspects of the organisation of working time so that, generally, it does not apply to the remuneration of workers (see *Dellas and Others*, paragraph 38).

33 It is relevant to add here that in *Jaeger*, to which the national court referred in its question, the Court stated at paragraph 26 that the action in those proceedings concerned only aspects of labour law in connection with on-call periods, and not the conditions for remunerating those periods.

34 Furthermore, the interpretation stated at paragraph 32 above is transposable to Directive 2003/88, since it is based on identical grounds.

35 In those circumstances, Directives 93/104 et 2003/88 do not prevent a Member State applying legislation on the remuneration of workers and concerning on-call duties performed by them at the workplace which makes a distinction between the treatment of periods in the course of which work is actually done and those during

which no actual work is done, provided that such a system wholly guarantees the practical effect of the rights conferred on workers by the said directives in order to ensure the effective protection of their health and safety.

36 In the light of the foregoing, the answer to the question asked must be that Directives 93/104 and 2003/88 should be interpreted as:

— precluding national legislation under which on-call duty performed by a doctor under a system where he is expected to be physically present at the place of work, but in the course of which he does no actual work, is not treated as wholly constituting 'working time' within the meaning of the said directives;

— not preventing a Member State from applying legislation on the remuneration of workers and concerning on-call duties performed by them at the workplace which makes a distinction between the treatment of periods in the course of which work is actually done and those during which no actual work is done, provided that such a system wholly guarantees the practical effect of the rights conferred on workers by the said directives in order to ensure the effective protection of their health and safety.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber), hereby rules:

Directive 93/104/EC of the Council of 23 November 1993 concerning certain aspects of the organisation of working time, as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000, and Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003, concerning certain aspects of the organisation of working time should be interpreted as:

— **precluding national legislation under which on-call duty performed by a doctor under a system where he is expected to be physically present at the place of work, but in the course of which he does no actual work, is not treated as wholly constituting 'working time' within the meaning of the said directives;**

— **not preventing a Member State from applying legislation on the remuneration of workers and concerning on-call duties performed by them at the workplace which makes a distinction between the treatment of periods in the course of which work is actually done and those during which no actual work is done, provided that such a system wholly guarantees the practical effect of the rights conferred on workers by the said directives in order to ensure the effective protection of their health and safety.**

[Signatures]