JUDGMENT OF THE COURT (Second Chamber)

25 November 2010 *

In Case C-429/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Halle (Germany), made by decision of 30 September 2009, received at the Court on 30 October 2009, in the proceedings

Günter Fuß

v

Stadt Halle,

* Language of the case: German.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 2 September 2010,

after considering the observations submitted on behalf of:

— Mr Fuß, by M. Geißler, Rechtsanwalt,

— Stadt Halle, by T. Brümmer, Rechtsanwalt,

— the German Government, by J. Möller and C. Blaschke, acting as Agents,

— the European Commission, by V. Kreuschitz and M. van Beek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 93/104/EC 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) 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).

2 The reference was made in proceedings between Mr Fuß and his employer, the Stadt Halle (town of Halle), concerning his claim for reparation brought on the ground of the excessive duration of working time completed while in service for that employer as a fireman.

Legal context

European Union legislation

Directive 93/104

3 Article 1(1) and 1(2)(a) of Directive 93/104, under the heading 'Purpose and scope', provide:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time.'

4 Article 2 of Directive 93/104, headed 'Definitions' 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;

…'

5 Under the heading 'Maximum weekly working time', Article 6 of Directive 93/104 provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

6 Under point 2 of Article 16 of Directive 93/104, Member States may lay down for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months, subject to the derogations provided for under Article 17 of the directive. Under Article 17(4) of the directive, that option to derogate from Article 16, point 2, may not result in the establishment of a reference period exceeding six months or, where those reference periods are laid down in collective agreements or agreements concluded between the two sides of industry, 12 months.

7 Article 18(1) of Directive 93/104 provides:

'1. (a) Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 23 November 1996, or shall ensure by that date that the two sides of industry establish the necessary measures by agreement, with Member States being obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by this Directive are fulfilled.

(b) (i) However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

— no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

— no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

— the employer keeps up-to-date records of all workers who carry out such work,

— the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

— the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

…'

Directive 2003/88

8 As is apparent from recital 1 in its preamble, Directive 2003/88, in order to clarify matters, codifies the provisions of Directive 93/104.

9 Article 1 of Directive 2003/88, headed 'Purpose and scope', provides:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

…'

10 Article 2(1) of Directive 2003/88, headed 'Definitions', states:

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

1. "working time" means 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.'

11 Under the heading 'Maximum weekly working time', Article 6 of the directive provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

(a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

12 Under Article 16 of Directive 2003/88, Member States may lay down, for the application of the maximum weekly working time provided for in Article 6 of that directive, a reference period not exceeding four months, subject to the derogations in Articles 17 and 18 of the directive. Under the first and second paragraphs of Article 19 of the directive, that option to derogate from Article 16 may not however result in the establishment of a reference period exceeding six months or, where those reference periods are laid down in collective agreements or agreements concluded between the two sides of industry, 12 months.

13 Under the first subparagraph of Article 22(1) of Directive 2003/88:

'A Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

(a) no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in Article 16(b), unless he 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;

(c) the employer keeps up-to-date records of all workers who carry out such work;

(d) the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours;

(e) the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in Article 16(b).'

14 Pursuant to Article 27(1) of Directive 2003/88, Directive 93/104 is repealed, without prejudice to the obligations of the Member States in respect of the deadlines for transposition.

15 In accordance with Article 28 of Directive 2003/88, that directive entered into force on 2 August 2004.

National legislation

16 Paragraph 2(1) of the Regulation on the working time of officials in the urban and municipal fire services of *Land* Saxony-Anhalt (Verordnung über die Arbeitszeit der Beamtinnen und Beamten im feuerwehrtechnischen Dienst der Städte und Gemeinden des Landes Sachsen-Anhalt; 'ArbZVO-FW 1998') of 7 October 1998, which was in force until 31 December 2007, provided as follows:

'The normal working period of officials engaged in shift work and whose weekly activities take place essentially in a stand-by service shall be, on average, 54 hours ….'

17 With effect from 1 January 2008, the ArbZVO-FW 1998 was replaced by the ArbZVO-FW 2007 of 5 July 2007 ('the ArbZVO-FW 2007').

18 Paragraph 2(1) of the ArbZVO-FW 2007 provides:

'The normal weekly working period of officials shall be 48 hours, averaged over the entire year and including overtime.'

19 Paragraph 4 of the ArbZVO-FW 2007, headed 'Individual arrangements', is worded as follows:

'1. Subject to the general principles of safety and protection of health, the duration of shift work may exceed the average normal weekly duration referred to in Paragraph 2(1) if the employer can prove that the persons concerned have given their consent.

2. The consent referred to in subparagraph 1 may be withdrawn subject to six months' notice. The persons concerned must be informed thereof in writing.'

20 Paragraph 72(3) of the Law governing the civil service in *Land* Saxony-Anhalt (Beamtengesetz Land Sachsen-Anhalt), in the version applicable at the material time in the main proceedings, provides that, where the work involves being on stand-by, the working time may be extended according to the needs of the service but may not however exceed 54 hours per week.

The main proceedings and the questions referred for a preliminary ruling

21 Mr Fuß has been employed by Stadt Halle since 10 May 1982. He was appointed a civil servant in the year 1998, in the grade of Sub-Fire Officer ('Oberbrandmeister') and has held the grade of Station Fire Officer ('Hauptbrandmeister') since 15 December 2005.

22 Until 4 January 2007, Mr Fuß was employed on operational duties in the 'fire prevention and protection' section of the Stadt Halle fire service as a vehicle driver. He was rostered to work an average of 54 hours per week, including 24-hour shifts. Each of those periods, during which the fire-fighter must be present at the fire station, is made up of a time on active service and time on stand-by which may be interrupted by operational duties.

23 By letter of 13 December 2006, Mr Fuß, citing the order of the Court in Case C-52/04 *Personalrat der Feuerwehr Hamburg* [2005] ECR I-7111, requested that, in future, his weekly working time should no longer exceed the maximum average limit of 48 hours laid down in Article 6(b) of Directive 2003/88. In that letter, Mr Fuß also claimed reparation for overtime unlawfully worked during the period between 1 January 2004 and 31 December 2006, such reparation being possible either in the form of time off in lieu or financial compensation for the overtime worked.

24 By decision of 2 January 2007, Stadt Halle moved Mr Fuß by compulsory transfer to the control room for a period of approximately two years, on the ground that such a transfer was necessary for reasons of departmental organisation. That decision was the subject of the judgment of the Court in Case C-243/09 *Fuß* [2010] ECR I-9849.

25 By decision of 20 March 2007, Stadt Halle rejected Mr Fuß's claim for reparation in respect of the period between 1 January 2004 and 31 December 2006, relying on a decision of the Oberverwaltungsgericht des Landes Sachsen-Anhalt (Higher Administrative Court, *Land* Saxony-Anhalt) of 17 October 2006, according to which a right to time off in lieu did not arise until a relevant application was made. The Stadt Halle, by contrast, agreed to Mr Fuß's claim for reparation in the form of time off in lieu in respect of the overtime worked since January 2007. However, since the maximum period of weekly working time to be worked by Mr Fuß had been complied with since his transfer to another service, no financial compensation could be granted to him in respect of that period, either as compensatory damages or as a 'claim to remedial action'.

26 By decision of 25 April 2007, the Stadt Halle rejected the objection brought by Mr Fuß against the rejection decision of 20 March 2007, considering that, while Mr Fuß was entitled to claim that the infringement of European Union (EU) law resulting from the exceeding of the average weekly working time should cease, that held good only for the period beginning at the end of the month in which the application was made, since a civil servant must first complain to the employer of unlawful action by that employer.

27 In the appeal made to it against the rejection decisions of 20 March and 25 April 2007, the Verwaltungsgericht Halle (Administrative Court, Halle) considers that, under national law, Mr Fuß does not have a right to reparation either in the form of time off in lieu or financial compensation for the overtime worked by him. In national law there is no legal basis to claim time off in lieu in proportion to the total amount of overtime worked. In addition, Mr Fuß also had no right to financial compensation in respect of overtime since he had not been required to work hours designated as overtime.

28 According to that court, national law confers a right to claim time off in lieu only on the basis of the principle of good faith within the meaning of Paragraph 242 of the Civil Code (Bürgerliches Gesetzbuch; 'BGB'). However, such a right presupposes that the civil servant concerned has submitted an application to his employer that he be employed only for the period of working time provided for by law. In such a case, reparation may be made only in respect of working time imposed unlawfully after the making of the request.

29 The referring court nevertheless enquires whether there might be a right to reparation under Directive 2003/88. The requirement of a prior application to the employer limits the practical effectiveness of EU law to cases where civil servants call for compliance with such law, encouraging conduct such as that at issue in the main proceedings which is characterised by compliance with EU law only when its application is requested. In addition, in the present case, Stadt Halle had announced that it would transfer, from the operational service to another service, persons who relied on the rights conferred by the directive and it did in fact transfer Mr Fuß following his application to work in future no more hours than the maximum weekly average. The question also arises whether there is a right to reparation in the form of time off in lieu on the basis of the provisions concerning the periods of reference provided for under the directive.

30 In those circumstances, the Verwaltungsgericht Halle decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a right to reparation arise from Directive 2003/88 where a (public sector) employer has determined a working time which exceeds the limit laid down in Article 6(b) of Directive 2003/88?

(2) In the event that the first question is to be answered in the affirmative, does the right in question result from an infringement of Directive 2003/88 alone, or does [EU] law establish further requirements for the claim, for example, an application to the employer for a reduction in working time, or fault in determining the working time?

(3) In the event that a right to reparation exists, the question then arises whether the remedy should be time off in lieu or financial compensation, and what requirements exist under [EU] law for calculating the level of reparation?

(4) Are the reference periods laid down in Article 16(b) and/or the second paragraph of Article 19 of Directive 2003/88 directly applicable in a case such as the present one, in which national law merely determines a working time which exceeds the maximum working time laid down in Article 6(b) of Directive 2003/88, without providing for reparation? Should direct applicability be affirmed, the question then arises whether, and if necessary how, the reparation should be effected, if the employer does not grant reparation by the end of the reference period.

(5) How must questions one to four be answered during the period when Directive 93/104 was in force?'

Questions referred for a preliminary ruling

Preliminary considerations

31 By its questions, the referring court enquires, first, as to the conditions for the existence of a right to reparation for loss or damage suffered in a situation such as that in the main proceedings where a worker, employed as fire-fighter in an operational service falling within the public sector, has completed a period of average weekly working time exceeding that provided for under Directives 93/104 and 2003/88 and, second, as to the procedural rules and criteria for the grant of such a right to reparation.

32 For the purpose of responding to those questions, it must at the outset be observed that the claim for reparation brought in the main proceedings concerning the period between 1 January 2004 and 31 December 2006 falls, as the referring court rightly held, partly under the provisions of Directive 93/104, which was in force until 1 August 2004, and partly under those of Directive 2003/88 which, from 2 August 2004, codified the provisions of Directive 93/104. However, since the relevant provisions of those directives are drafted in terms which are in substance identical and since, for that reason, the answers to be given to the questions referred by the referring court are the same no matter which directive applies, reference need only be made, for the purposes of answering those questions, to the provisions of Directive 2003/88.

33 As a preliminary point it should be noted that Article 6(b) of Directive 2003/88 constitutes a rule of EU 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, which requires the Member States to fix a 48-hour limit for average weekly working time, a maximum which is expressly stated to include overtime, and from which, in the absence of the implementation in national law of the option provided for in Article 22(1) of the directive, no derogation whatsoever may be made concerning activities such as those of the fire-fighters at issue in the main proceedings, even with the consent of the worker concerned (see, to that effect, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraphs 98 and 100, and *Fuß*, paragraphs 33 to 35 and 38).

34 As the Court has already held, the Member States cannot therefore unilaterally determine the scope of Article 6(b) of Directive 2003/88 by attaching conditions or restrictions to the implementation of the workers' right not to work more per week, on average, than that maximum period (*Pfeiffer and Others*, paragraph 99, and *Fuß*, paragraph 52).

35 In addition, the Court has also held that Article 6(b) of Directive 2003/88 has direct effect in the sense that it confers on individuals rights upon which they are entitled to rely directly before the national courts (*Pfeiffer and Others*, paragraphs 103 to 106, and *Fuß*, paragraphs 56 to 59).

36 As the Court stated in paragraph 60 of *Fuß*, it is common ground that, during the period which is covered by the claim for reparation at issue in the main proceedings, the period for transposing Directive 93/104, which is codified by Directive 2003/88, had expired and *Land* Saxony-Anhalt had not transposed it into its internal law in regard to fire-fighters employed in an operational service.

37 In particular, it is established that the ArbZVO-FW 1998, applicable during the aforementioned period to fire-fighters, allowed the average weekly working time to exceed the maximum of 48 hours laid down in Article 6(b) of Directive 2003/88 and that that *Land* had not, during that period, transposed into its internal law the derogation option provided for under Article 22(1) of that directive; the application of that option requires, inter alia, the agreement of the worker concerned, transposition of the various provisions of that directive having been carried out only with effect from 1 January 2008 by adoption of the ArbZVO-FW 2007 (see *Fuß*, paragraphs 36, 37 and 45).

38 In those circumstances, a worker such as Mr Fuß, employed by the Stadt Halle in an operational service, is therefore entitled to rely directly on the provisions of Article 6(b) of Directive 2003/88 against such a public employer in order to secure compliance with the right to an average weekly working time of not more than 48 hours which derives from that provision (*Fuß*, paragraph 60).

39 In that regard, it should be recalled that the Member States' obligation, pursuant to a directive, to achieve the result envisaged by that directive, and their duty, under Article 4(3) TEU, to take all appropriate measures, whether general or particular, to

ensure the fulfilment of that obligation, is binding on all the authorities of the Member States. Such obligations devolve on those authorities, also, as the case may be, in their capacity as a public employer (C-268/06 *Impact* [2008] ECR I-2483, paragraph 85).

40 It follows that, according to the Court's case-law, where they are unable to interpret and apply national law in compliance with the requirements of EU law, it is for the national courts and administrative bodies to apply EU law in its entirety and to protect rights which the latter confers on individuals, disapplying, if necessary, any contrary provision of domestic law (see, to that effect, Case 103/88 *Costanzo* [1989] ECR 1839, paragraph 33; and Case C-208/05 *ITC* [2007] ECR I-181, paragraphs 68 and 69; and *Fuß*, paragraph 63).

41 It is in the light of those preliminary considerations that the questions asked by the referring court should be answered.

First question

42 By its first question, the referring court asks in essence whether EU law, in particular Directive 2003/88, confers on a worker who, like Mr Fuß in the main proceedings, has completed, as a fire-fighter employed in an operational service in the public sector, a period of average weekly working time exceeding the 48-hour limit provided for under Article 6(b) of that directive, a right to reparation for the damage suffered.

43 It must be pointed out that the purpose of Directive 2003/88 is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national rules concerning, in particular, the duration of working time. That harmonisation at EU 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 on the average duration of the working week (see, inter alia, *Pfeiffer and Others*, paragraph 76, and *Fuß*, paragraph 32).

44 By contrast, Directive 2003/88 does not, as the European Commission has correctly pointed out, contain any provision regarding the sanctions applicable where the minimum requirements laid down by it are infringed, for example regarding the duration of working time, and therefore it contains no specific rule regarding the reparation for the loss or damage which may have been suffered by workers as a result of such an infringement.

45 It must however be pointed out that, in accordance with settled case-law, the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based (see, to that effect, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; and Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 29).

46 It follows from that case-law that that obligation holds good for any case in which a Member State breaches EU law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation (see, to that effect, *Brasserie du Pêcheur and Factortame*, paragraph 32; C-302/97 *Konle* [1999] ECR I-3099, paragraph 62; Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 27; and Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 31).

47 Thus, the Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals (see, to that effect, *Transportes Urbanos y Servicios Generales*, paragraph 30).

48 It is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of EU law, in accordance with the guidelines laid down by the Court for the application of those criteria (see Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 210 and case-law cited).

49 In that regard, concerning the main proceedings, it should be pointed out that it is already apparent from paragraphs 33 to 35 of the present judgment that Article 6(b) of Directive 2003/88, in so far as it imposes on Member States a maximum limit for the average working week from which every worker must benefit, because it is a minimum requirement, constitutes a rule of EU social law of particular importance,

the scope of which may not be subject to any conditions or restrictions whatsoever and which confers on individuals rights upon which they are entitled to rely directly before the national courts.

50 In those circumstances, it appears obvious that Article 6(b) of Directive 2003/88 constitutes a rule of EU law intended to confer rights on individuals and that, therefore, the first condition for the existence of a right to reparation is met in the main proceedings.

51 With regard to the second condition, it should be noted that, according to the case-law of the Court, the existence of a sufficiently serious breach of EU law implies manifest and grave disregard by the Member State for the limits set on its discretion, the factors to be taken into consideration in this connection being, inter alia, the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities (see, inter alia, *Brasserie du Pêcheur and Factortame*, paragraphs 55 and 56, and Case C-278/05 *Robins and Others* [2007] ECR I-1053, paragraph 70).

52 In any event, an infringement of EU law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see, inter alia, to that effect *Brasserie du Pêcheur and Factortame*, paragraph 57; Case C-118/00 *Larsy* [2001] ECR I-5063, paragraph 44; and *Köbler*, paragraph 56).

53 While, as stated in paragraph 48 of the present case, it is in principle for national courts to determine whether the conditions for State liability for breach of EU law are met, it must be held that, in the case in the main proceedings, the Court has all the information necessary in order to judge whether the facts presented are to be characterised as a sufficiently serious breach of EU law (see, by analogy, Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 41; and Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, paragraph 49).

54 As the Commission has correctly stated, during the period covered by the reparation claim at issue in the main proceedings, that is between 1 January 2004 and 31 December 2006, when Mr Fuß was obliged, under the ArbZVO-FW 1998, to work an average of 54 hours per week, including 24-hour shifts made up of a period of time on active service and a period on stand-by, the Court had already delivered the judgment in Case C-303/98 *Simap* [2000] ECR I-7963, the order in Case C-241/99 *CIG* [2001] ECR I-5139, and the judgment in Case C-151/02 *Jaeger* [2003] ECR I-8389.

55 It is clear from that case-law of the Court which pre-dates the facts of the main proceedings that working time spent on call or on stand-by where the worker concerned must be physically present at his place of work is included within the concept of 'working time' within the meaning of Directive 2003/88 and that, therefore, that concept precludes a period of average weekly working time which, since it includes such periods of time on call or on stand-by, exceeds the maximum weekly limit laid down in Article 6(b) of that directive (see *Simap*, paragraphs 46 to 52; the order in *CIG*, paragraphs 33 and 34; and *Jaeger*, paragraphs 68 to 71, 78 and 79).

56 In addition, in *Pfeiffer and Others* the Court, on 5 October 2004 — that is to say during the period at issue in the main proceedings — repeated the abovementioned case-law concerning periods of time on stand-by completed by workers who, as in the present case, worked in the civil protection sector.

57 In addition, also within that period, the Court, in the light of all the case-law referred to in paragraphs 53 to 55 of the present judgment, considering that the question of the concept of 'working time' within the meaning of Directive 2003/88 left no room for reasonable doubt, adopted on 14 July 2005, in accordance with Article 104(3) of its Rules of Procedure, the order in *Personalrat der Feuerwehr Hamburg*, by which it held that the activities carried out by the operational crews of a public fire service — apart from in exceptional circumstances not applicable to the main proceedings — fall within the scope of Directive 2003/88, with the result that, in principle, Article 6(b) thereof precludes the exceeding of the 48-hour ceiling prescribed as the maximum weekly working time, including time on call (see *Fuß*, paragraph 44).

58 In those circumstances, it must be held that, since the failure to comply with the requirements of Article 6(b) of Directive 2003/88 during the period at issue in the main proceedings occurred in obvious disregard of the Court's case-law, it must be regarded as a sufficiently serious breach of EU law, and therefore the second condition on which the grant of a right to reparation depends is also met in the main proceedings.

59 Finally, with regard to the third condition giving rise to State liability on account of a breach of EU law, it is for the referring court to establish whether, as seems to be apparent from the documents before the Court, there is a direct causal link between the aforementioned breach of Article 6(b) of Directive 2003/88 and the loss or damage suffered by Mr Fuß, resulting from the lost rest periods which he would have enjoyed had the maximum weekly working time provided for by the provision been respected.

60 Consequently, it appears that, subject to the review to be carried out by the referring court, the conditions laid down by the case-law of the Court for the grant of a right to reparation in the main proceedings are met, as the German Government itself accepted at the hearing.

61 In accordance with the case-law referred to in paragraph 46 of the present judgment, reparation for such damage caused to an individual may be ensured by a public-law body, such as, in the main proceedings, Stadt Halle or the *Land* Saxony-Anhalt, where that damage was caused by domestic measures taken by that body in breach of EU law. Moreover, EU law also does not preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss or damage caused to individuals as a result of such measures (see, to that effect, *Haim*, paragraphs 31 and 32).

62 In that regard, it must be noted that, subject to the right to reparation which flows directly from EU law, where those conditions are satisfied, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions for reparation of

loss or damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness) (*Köbler*, paragraph 58; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 123; and *Transportes Urbanos y Servicios Generales*, paragraph 31).

63 Therefore, the answer to the first question is that a worker such as Mr Fuß in the main proceedings who has completed, as a fire-fighter employed in an operational service in the public sector, a period of average weekly working time exceeding the 48-hour limit provided for under Article 6(b) of Directive 2003/88, may rely on European Union law to establish the liability of the authorities of the Member State concerned in order to obtain reparation for the loss or damage sustained as a result of the infringement of that provision.

The second question

64 By the first part of its second question, the referring court enquires whether EU law precludes national legislation, such as that at issue in the main proceedings, which makes a public sector worker's right to reparation for the loss or damage suffered as a result of the infringement by the authorities of the Member State concerned of a rule of EU law — in the present case Article 6(b) of Directive 2003/88 — subject to the supplementary condition of fault by the employer. By the second part of that

question, it asks whether that right to reparation may be made conditional on the obligation to submit a prior application to the employer in order to secure compliance with that provision.

Condition concerning fault committed by the employer

65 It should be noted that, according to the Court's case-law, the three conditions referred to in paragraph 47 of the present judgment are sufficient to give rise to a right to reparation for individuals (see *Brasserie du Pêcheur and Factortame*, paragraph 66, and *Köbler*, paragraph 57).

66 It follows that, while EU law does not at all rule out the possibility of a State being liable in less restrictive conditions on the basis of national law (see *Test Claimants in the Thin Cap Group Litigation*, paragraph 115 and case-law cited), it precludes, by contrast, additional conditions from being imposed under national law in that regard.

67 Thus, the Court has already held that, while certain objective and subjective factors connected with the concept of fault under a national legal system may be relevant, in the light of the case-law referred to in paragraph 51 of the present judgment, for

the purpose of determining whether or not a given breach of EU law is sufficiently serious, the fact remains that the obligation to make reparation for loss or damage caused to individuals cannot depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of EU law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the EU legal order (see *Brasserie du Pêcheur and Factortame*, paragraphs 78 to 80, and *Haim*, paragraph 39).

68 That would however be the case with regard to a condition which, in a case such as that in the main proceedings, made the right to reparation for an infringement of EU law dependent on proof of a specific form of fault, such as intentional fault or negligence, by the employer — in the present case Stadt Halle — because, as is clear from paragraphs 51 to 58, the ArbZVO-FW 1998 constitutes in itself a sufficiently serious breach of EU law.

69 It is however for the referring court to establish, in the case which has been brought before it, whether such a supplementary condition is actually provided for under national law, the German Government having stated, both in its written observations and at the hearing, that national law does not make the right to reparation at all conditional on fault by the employer.

70 The answer to the first part of the second question is therefore that EU law precludes national legislation, such as that at issue in the main proceedings, from making a public sector worker's right to reparation for loss or damage suffered as a result of

the infringement by the authorities of the Member State concerned of a rule of EU law — in the present case Article 6(b) of Directive 2003/88 — conditional on a concept of fault going beyond that of a sufficiently serious breach of EU law, it being for the referring court to establish whether such a condition exists.

Condition concerning the obligation to make a prior application to the employer

71 According to Stadt Halle and the German Government, the condition that a prior application be made to the employer, which is based on national case-law, is justified by the fact that the right for civil servants to reparation in the form of time off in lieu where their working time has exceeded that permitted by law is based on the principle of good faith contained in Paragraph 242 of the BGB and is thus an integral part of the relationship of trust and of service which exists between the civil servant and the public employer. That requirement is said to give the public employer the opportunity to organise itself so as to comply with that reparation obligation and to adjust the work roster accordingly. The Stadt Halle adds in that regard that that requirement reflects the national legislature's intention of avoiding the accumulation of a large amount of hours of time off in lieu as reparation, with a view to ensuring that the continuity of public service is guaranteed.

72 In that regard, it should be noted that, as is clear from the case-law referred to in paragraph 62 of the present judgment, it is for the Member States, in the absence of provisions of EU law on the matter, to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided

that those rules observe the principles of equivalence and effectiveness (see Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; *Impact*, paragraph 46; and Case C-63/08 *Pontin* [2009] ECR I-10467, paragraph 43).

73 In the present case, with regard to observance of the principle of equivalence, according to the evidence submitted to the Court, as the German Government maintains, the requirement of a prior application to the employer, since it is based on the principle of good faith provided for in Paragraph 242 of the BGB, appears to apply — that being a matter however for the referring court to establish — to all actions brought by civil servants against their employer seeking reparation for loss or damage suffered, whether resulting from an infringement of national law or EU law.

74 By contrast, the referring court enquires whether that condition does not conflict with the principle of effectiveness to the extent that it could make the application of EU law excessively difficult.

75 In that regard, it must be pointed out that, with regard to the utilisation of the available legal remedies in order to establish the liability of a Member State for breach of EU law, the Court has already held that national courts may enquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him (*Brasserie du Pêcheur and Factortame*, paragraph 84; *Test Claimants in the Thin Cap Group Litigation*, paragraph 124; and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 60).

76 Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the loss or damage himself (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33; *Brasserie du Pêcheur and Factortame*, paragraph 85; and *Danske Slagterier*, paragraph 61).

77 According to the Court's case-law it would be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all the legal remedies available to them even if that would give rise to excessive difficulties or could not reasonably be required of them (*Danske Slagterier*, paragraph 62).

78 Thus, the Court has already held that the exercise of rights conferred on private persons by directly applicable provisions of EU law would be rendered impossible or excessively difficult if their claims for compensation based on the infringement of EU law were rejected or reduced solely because the persons concerned did not apply for grant of the right which was conferred by EU law provisions, and which national law denied them, with a view to challenging the refusal of the Member State by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of EU law (see Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 106, and *Danske Slagterier*, paragraph 63).

79 In the present case, it should be noted that, as is clear from paragraph 33 of the present judgment, Article 6(b) of Directive 2003/88, which seeks to guarantee the effective protection of the safety and health of workers by ensuring that they actually

have the benefit of a maximum weekly working time and minimum rest periods, constitutes a rule of EU social law of particular importance from which, in the absence of the implementation of Article 22(1) of that directive, an employer may not in any circumstances derogate with regard to a worker such as Mr Fuß.

80 As the Court has already held, the worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer being in a position to impose on him a restriction of his rights (see, to that effect, *Pfeiffer and Others*, paragraph 82).

81 On account of that position of weakness, such a worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where doing so may expose him to measures taken by the employer which are likely to affect the employment relationship in a manner detrimental to that worker.

82 Thus, in the main proceedings, it is not contested that, as is apparent from the order for reference, Stadt Halle informed its employees from the outset that it would transfer workers who relied on the rights arising from Directive 2003/88 and, when Mr Fuß requested his employer, in reliance on the abovementioned order in *Personalrat der Feuerwehr Hamburg,* to observe the maximum weekly working time provided for in Article 6(b) of that directive in the operational service in which he was employed, he was transferred against his will and with immediate effect to another service.

83 In addition, it must be noted that, in a case such as that in the main proceedings, which concerns the infringement by a public sector employer of a provision of EU law having direct effect, the obligation for the workers concerned to make a prior application to their employer in order to obtain reparation for the loss or damage suffered as a result of the infringement of such a provision has the effect of enabling the authorities of the Member State concerned to shift to individuals the burden of ensuring compliance with such norms, while giving those authorities, as the case may be, the possibility of avoiding compliance with those provisions where such an application has not been made.

84 Thus, as Mr Fuß and the Commission have correctly pointed out, Article 6(b) of Directive 2003/88, far from requiring the workers concerned to request their employers to comply with the minimum requirements provided for by that provision, in fact imposes on employers, where internal law applies the derogation provided for in Article 22 of that directive, the obligation to obtain the individual, explicit and free consent of that worker to the relinquishing of the rights conferred by Article 6(b) (see *Pfeiffer and Others*, paragraphs 82 and 84).

85 In addition, it must be pointed out that, according to that case-law, and in accordance with paragraphs 39 and 40 of the present judgment, when the conditions to be fulfilled so that individuals may rely on the provisions of a directive before the national courts are met, all Member State authorities, including decentralised authorities such as the *Länder*, cities and towns or municipalities, as the case may be, in their capacity as public employers, are obliged by that fact alone to apply those provisions (see, to that effect, *Costanzo*, paragraphs 30 to 33, and *Fuß*, paragraphs 61 and 63).

86 In those circumstances, it must be held that it cannot be reasonable to require a worker who, like Mr Fuß, has suffered loss or damage as a result of the infringement by his employer of the rights conferred by Article 6(b) of Directive 2003/88, to make a prior application to that employer in order to be entitled to reparation for that loss or damage.

87 It follows that a requirement to make such a prior application is contrary to the principle of effectiveness.

88 In that regard, Stadt Halle cannot justify that requirement by invoking a concern to avoid the accumulation of a large amount of time off in lieu as reparation, since full compliance with the provisions of Article 6(b) of Directive 2003/88 would suffice to preclude such an accumulation.

89 In addition, the German Government is incorrect in seeking to establish an analogy between the national law at issue in the main proceedings and the first indent of Article 91(2) of the Staff Regulations of Officials of the European Union. The requirement to lodge a prior complaint with the appointing authority provided for in that provision as a condition for the admissibility of an appeal brought by an official of the European Union concerns the exercise of a remedy against an individual act adversely affecting that person adopted by the same authority and not, as in the present case, a challenge to a national law which infringes EU law and has caused loss or damage to individuals. It is for the Member States — as is apparent from paragraphs 83 to 85 of the present judgment — themselves to ensure compliance with EU law and they may not shift that burden on to individuals.

90 Consequently, the answer to the second part of the second question is that EU law precludes national legislation, such as that at issue in the main proceedings, which makes a public sector worker's right to reparation for the loss or damage suffered as a result of the infringement by the authorities of the Member State concerned of Article 6(b) of Directive 2003/88 conditional on a prior application having been made to his employer in order to secure compliance with that provision.

Third and fourth questions

91 By its third and fourth questions, which should be examined together, the referring court raises the issue of the form of a right to reparation and the method of calculation of such reparation.

92 With regard to the form and method of calculation of reparation for loss or damage, it must be pointed out that reparation for loss or damage caused to individuals as a result of breaches of EU law must be commensurate with the loss or damage sustained so as to ensure the effective protection of their rights (*Brasserie du Pêcheur and Factortame*, paragraph 82).

93 As is apparent from paragraph 62 of the present judgment, in the absence of relevant EU law provisions, it is for the domestic legal system of each Member State, subject to observance of the principles of equivalence and effectiveness, to set the criteria for determining the extent of reparation (*Brasserie du Pêcheur and Factortame*, paragraph 83).

94 It follows that it is for the national law of the Member States, while ensuring observance of the principles referred to in the two preceding paragraphs, first, to determine whether reparation for the loss or damage caused to an individual as a result of the infringement of the provisions of Directive 2003/88 must be granted as additional time off in lieu or as financial compensation and, second, to lay down the rules concerning how that reparation is to be calculated.

95 With regard more particularly to the form that the reparation of loss or damage should take, it must be noted that, since neither the grant of additional time in lieu or of a financial payment appears likely to make it, in practice, impossible or excessively difficult to obtain such reparation, the referring court must in particular satisfy itself that the method of reparation adopted observes the principle of equivalence, assessed in the light of the reparation granted by national courts in the context of similar domestic claims or actions based on national law.

96 It must be pointed out in that regard that, contrary to what is argued by Mr Fuß and the Commission, there being no provision in Directive 2003/88 concerning reparation for the loss or damage suffered as a result of the infringement of its provisions, it cannot be concluded that EU law favours one or other of those forms of reparation.

97 In any event, with regard to the reference periods provided for in Articles 16 to 19 of Directive 2003/88 for the application of Article 6(b) of that directive in order to determine the average weekly working time, they cannot have any relevance in a case such as that in the main proceedings because, even though those provisions have direct effect in that regard (*Simap*, paragraph 70), it is common ground that all the reference

periods in question had expired in relation to the period referred to in the claim for reparation brought by Mr Fuß in the main proceedings.

98 Consequently, the answer to the third and fourth questions is that the reparation, for which the authorities of the Member States are responsible, of the loss or damage caused by them to individuals as a result of breaches of EU law must be commensurate with the loss or damage sustained. In the absence of relevant EU law provisions, it is for the national law of the Member State concerned to determine, while ensuring observance of the principles of equivalence and effectiveness, first, whether reparation for the loss or damage suffered by a worker such as Mr Fuß in the main proceedings, as a result of the breach of a rule of EU law, should take the form of additional time off in lieu or financial compensation for the worker and, second, the rules concerning the method of calculation of that reparation. The reference periods provided for in Articles 16 to 19 of Directive 2003/88 are irrelevant in that regard.

Fifth question

99 In the light of what is stated in paragraph 32 of the present judgment, the answer to the fifth question is that the answers to the questions referred by the referring court are the same, irrespective of whether the facts of the main proceedings fall under the provisions of Directive 93/104 or those of Directive 2003/88.

Costs

100 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 (Second Chamber) hereby rules:

1. **A worker such as Mr Fuß in the main proceedings who has completed, as a fire-fighter employed in an operational service in the public sector, a period of average weekly working time exceeding that provided for in Article 6(b) of 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, may rely on European Union law to establish the liability of the authorities of the Member State concerned in order to obtain reparation for the loss or damage sustained as a result of the infringement of that provision.**

2. **European Union law precludes national legislation, such as that at issue in the main proceedings,**

   — **which makes a public sector worker's right to reparation for loss or damage suffered as a result of the infringement by the authorities of the Member State concerned of a rule of European Union law — in the present case Article 6(b) of Directive 2003/88 — conditional on a concept of fault going beyond that of a sufficiently serious breach of European Union law, it being for the referring court to establish whether such a condition exists, and**

— **which makes a public sector worker's right to reparation for the loss or damage suffered as a result of the infringement by the authorities of the Member State concerned of Article 6(b) of Directive 2003/88 conditional on a prior application having been made to his employer in order to secure compliance with that provision.**

3. **The reparation, for which the authorities of the Member States are responsible, of the loss or damage caused by them to individuals as a result of breaches of European Union law must be commensurate with the loss or damage sustained. In the absence of relevant European Union law provisions, it is for the national law of the Member State concerned to determine, while ensuring observance of the principles of equivalence and effectiveness, first, whether reparation for the loss or damage suffered by a worker such as Mr Fuß in the main proceedings, as a result of the breach of a rule of European Union law, should take the form of additional time off in lieu or financial compensation for the worker and, second, the rules concerning the method of calculation of that reparation. The reference periods provided for in Articles 16 to 19 of Directive 2003/88 are irrelevant in that regard.**

4. **The answers to the questions referred by the referring court are the same irrespective of whether the facts of the main proceedings fall under the provisions of Council Directive 93/104/EC 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, or those of Directive 2003/88.**

[Signatures]