Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

9 July 2015 *

(Failure of a Member State to fulfil obligations — Directive 2003/88/EC — Organisation of working time — Organisation of working time of doctors in training)

In Case C-87/14,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 18 February 2014,

European Commission, represented by M. van Beek and J. Enegren, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by E. Creedon and E. Mc Phillips and by A. Joyce and B. Counihan, acting as Agents, assisted by D. Fennelly, Barrister,

defendant,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe, J. Malenovský, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 March 2015,

after hearing the Opinion of the Advocate General at the sitting on 19 March 2015,

gives the following

* Language of the case: English.

Judgment

1 By its application the European Commission requests the Court to declare that, by failing to apply the provisions 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 (OJ 2003 L 299, p. 9) to the organisation of the working time of junior doctors (non-consultant hospital doctors ('NCHD')), Ireland has failed to fulfil its obligations under Articles 3, 5, 6, 17(2) and (5) of that directive.

Legal context

EU law

2 Article 2 of Directive 2003/88, entitled 'Definitions', provides:

'For the purpose 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;

…'

3 Article 3 of that directive, entitled 'Daily rest', provides:

'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.'

4 Under the heading 'Weekly rest period', Article 5 of that directive provides in the first subparagraph:

'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.'

5 Under Article 6 of Directive 2003/88, entitled 'Maximum weekly working time':

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

…

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

6 Article 16 of that directive entitled 'Reference periods', sets out the circumstances in which Member States may lay down reference periods for the application, in particular, of Articles 5 and 6 of the directive.

7 Article 17 of Directive 2003/88 provides in paragraph 2 and 5:

‘2. Derogations provided for (at paragraph 5) may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry 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.

…

5. In accordance with paragraph 2 of this Article, derogations may be made from Article 6 and Article 16(b), in the case of doctors in training, in accordance with the provisions set out in the second to the seventh subparagraphs of this paragraph.

With respect to Article 6 derogations referred to in the first subparagraph shall be permitted for a transitional period of five years from 1 August 2004.

Member States may have up to two more years, if necessary, to take account of difficulties in meeting the working time provisions with respect to their responsibilities for the organisation and delivery of health services and medical care. …

Member States may have an additional period of up to one year, if necessary, to take account of special difficulties in meeting the responsibilities referred to in the third subparagraph. …

Member States shall ensure that in no case will the number of weekly working hours exceed an average of 58 during the first three years of the transitional period, an average of 56 for the following two years and an average of 52 for any remaining period.

…

With respect to Article 16(b) derogations referred to in the first subparagraph shall be permitted provided that the reference period does not exceed 12 months, during the first part of the transitional period specified in the fifth subparagraph, and six months thereafter.’

8 Article 19 of that directive entitled ‘Limitations to derogations from reference periods’, provides:

‘The option to derogate from Article 16(b), … may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.

…’

Irish law

9 The European Communities (Organisation of Working Time) (Activities of Doctors In Training) Regulations 2004, SI No 494 of 2004, as amended by the 2010 Regulation (SI No 533 of 2010) (‘the 2004 Regulation’) is intended to transposes into Irish Law Directive 2003/88 with regard to NCHD.

Pre-litigation procedure

10 Taking the view that, in relation to NCHD, Ireland has failed to fulfil its obligations under Articles 3, 5 and 17 of Directive 2003/88 concerning minimum rest periods and Articles 6 and 17(5) of that directive in relation to the limits to weekly working time, the Commission sent that Member State on 23 November 2009 a letter of formal notice to which that Member State replied on 25 January 2010.

11 On 30 September 2011 the Commission issued a reasoned opinion inviting Ireland to take the necessary measures to comply with the directive within two months from receipt of that opinion. That Member State replied by letter on 13 January 2012.

12 Still not being satisfied, after an additional exchange of correspondence, with the explanations furnished by Ireland, the Commission decided to bring the present action.

The action

Initial observations

13 The Commission states that in the context of the present action it does not challenge the transposition of Directive 2003/88 by the 2004 Regulation. That institution does, however, contend that the Irish public authorities do not apply that regulation, which constitutes a failure on the part of that Member State to fulfil its obligations under Articles 3, 5, 6 and 17(2) and (5) of that directive.

14 In support of its application, the Commission refers to the fact that, in order to settle a disagreement concerning the working time of NCHD, the Irish Medical Organisation ('IMO'), which represents all doctors practising in Ireland, and the Health Service Executive ('the HSE'), the public body which represents the health authorities, signed a settlement agreement on 22 January 2010, to which a collective agreement between those parties ('the Collective Agreement') and a standard contract of employment for NCHD ('Standard Contract of Employment') are annexed.

15 According to the Commission, Clause 3(a) and (b) of the Collective Agreement and certain provisions of Clause 5 of the Standard Contract of Employment infringe the provisions of Directive 2003/88. Various reports concerning the implementation of that directive and a declaration by the IMO confirmed that there was a failure to fulfil obligations stemming from its implementation in practice.

The first ground of complaint, alleging infringement of Directive 2003/88 by Clause 3(a) of the Collective Agreement

16 In its first ground of complaint, the Commission maintains that Clause 3(a) of the Collective Agreement, in accordance with which certain training time for NCHD is not to be considered as 'working time', infringes Directive 2003/88. According to that institution, in so far as the training activities concerned are required by the training programme and take place in a place determined by that programme, they must be counted as 'working time' for the purpose of that directive.

17 Ireland notes that, first, the training hours concerned represent a 'protected' training period during which NCHD are not available to pursue their professional activities. Second, according to that Member State, the relationship between NCHD and their training organisation is separate from that which exists between NCHD and their employer. The training requirements for NCHD do not form an integral part of their employment. The employer does not direct the conduct of such training, does not determine the activities which NCHD must undertake under that training, nor the progression of NCHD within that training, and it does not determine the place.

18 In that regard, it is common ground that the training time mentioned in paragraph 1 of Annex 1 to the Collective Agreement is not considered working time, as provided in Clause 3(c) of the Collective Agreement:

'Three categories of training time can be identified:

A) scheduled and protected time off-site attending training as required by the training programme;

B) on site regular weekly/fortnightly scheduled educational and training activities including conferences, grand rounds, morbidity and mortality conferences;

C) research, study and so on.'

19 At the hearing it was explained that the length of that training time varied between 2 h 30 and 17 h per month, depending on the training phase of the NCHD and the activities concerned. In its reply, the Commission stated that the training time mentioned at (A) and (B) in paragraph 1 of Annex 1 to the Collective Agreement ('training times A and B'), unlike the category set out at paragraph 1C), is to be regarded as 'working time' within the meaning of Article 2(1) of Directive 2003/88.

20 It is settled case-law, first, that the classification of 'working time' within the meaning of Directive 2003/88 as a period when the worker is present results from his obligation to be at the disposal of his employer (judgment in *Dellas and Others*, C-14/04, EU:C:2005:728, paragraph 58 and order in *Grigore*, C-258/10, EU:C:2011:122, paragraph 53).

21 The determining factor 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 (judgment in *Dellas and Others*, C-14/04, EU:C:2005:728, paragraph 48, and orders in *Vorel*, C-437/05, EU:C:2007:23, paragraph 28, and *Grigore*, C-258/10, EU:C:2011:122, paragraph 53).

22 Secondly, in proceedings for failure to fulfil obligations, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see, in particular, judgment in *Commission* v *Pologne*, C-356/13, EU:C:2014:2386, paragraph 104 and the case-law cited).

23 In addition, with regard, in particular, to a complaint concerning the implementation of a national provision, proof of a Member State's failure to fulfil its obligations requires production of evidence different from that usually taken into account in an action for failure to fulfil obligations concerning solely the terms of a national provision and, in those circumstances, failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration for which the Member State concerned is answerable (see judgments in *Commission* v *Belgium*, C-287/03, EU:C:2005:282, paragraph 28 and *Commission* v *Germany* C-441/02, EU:C:2006:253, paragraph 49).

24 It should be noted, first, that the Commission does not dispute the explanations provided by Ireland, to the effect that the training time concerned represents a 'protected' period of training during which NCHD are not available to provide medical care to patients. On the other hand, the Commission maintains that the training activities of NCHD are an integral part of their employment in that they must carry out those activities under the terms of their employment contracts.

25 In that regard it must be observed that, as Ireland argued without being contradicted, the relationship between NCHD and their training organisation is different from that which exists between NCHD and their employer. In particular, at the hearing, the Commission was unable to substantiate its argument that the training organisations concerned and the employers of NCHD must all be identified with the State, which is the only employer of NCHD, within the meaning of Directive 2003/88.

26 In those circumstances, the fact, referred to by the Commission, that training times A and B are required 'by the training programme' and take place in a place determined 'by that programme', does not justify the conclusion that NCHD are required to be physically present at the place determined by the employer and to remain there at the disposal of that employer so as immediately to be able to provide appropriate services as the need arises, in the sense of the case-law referred to in paragraph 21 of the present judgment.

27 That finding is not called into question by the reference made by the Commission to Clauses 6 and 8 of the Standard Contract of Employment.

28 Regarding Clause 6, which lists the obligations and tasks incumbent upon NCHDs in relation to their employment contracts, the Commission has not shown that NCHDs have, by virtue of that clause, a training obligation.

29 Similarly, in relation to Clause 8 of the Standard Contract of Employment, under which the employer 'shall, in line with the requirements of the Medical Practitioner's Act 2007, facilitate as appropriate the training/competence assurance requirements of NCHD posts' and under which the NCHD participate in the training 'in accordance with the requirements (of that law)', the Commission has not shown that that clause has a different meaning from that put forward by Ireland, whereby that clause is limited to reproducing the requirements imposed by that law and does not introduce or impose specific employment obligations in relation to training.

30 Lastly, the Commission does not provide any evidence in support of its contention, opposed by Ireland, that the NCHD risk being dismissed by their employer if they do not complete the training under training times A and B.

31 It follows from the foregoing that in those circumstances the Commission has not demonstrated that training times A and B constitute 'working time' within the meaning of Directive 2003/88. Consequently, in relation to Clause 3(a) of the Collective Agreement, it has not established the existence of a practice that contravenes that directive. In those circumstances, the first ground of complaint must be rejected.

The second ground of complaint, alleging infringement of Directive 2003/88 by Clause 3(b) of the Collective Agreement

32 By its second complaint, the Commission argues that Clause 3(b) of the Collective Agreement under which 'the reference period of NCHD whose employment contracts are 12 months or greater shall be extended from 6 to 12 months' infringes the provisions of Directive 2003/88. It acknowledges that Article 19 of that directive allows the reference period for the calculation of the maximum weekly working time to be extended to 12 months in accordance with collective agreements. That institution, however, points out that under that provision such an extension is possible only subject to observance of the general principles relating to the protection of the health and safety of workers and only for objective or technical reasons or reasons concerning the organisation of work.

33 In reply, Ireland submits that the extension of the reference period, from 6 to 12 months for NCHD whose employment contracts are longer than 12 months, is compatible with that directive and, in particular, Article 19 thereof. It notes that the Collective Agreement refers to the objective reason

concerning organisation of work which necessitates an extension of the reference period, namely, the concern of the HSE as to its ability to roster the NCHD flexibly in order to implement fully its statutory obligations.

34 In that regard, it should be noted that the Commission, while acknowledging that the reference period may be extended to 12 months pursuant to Article 19 of Directive 2003/88, merely points out the conditions for such an extension without in any way explaining how, contrary to what Ireland maintains, those conditions are not met in the present case.

35 Consequently, the Commission has not established, in relation to Clause 3(b) of the Collective Agreement, the existence of a practice which infringes Directive 2003/88. For that reason, the second ground of complaint should be rejected.

The third ground of complaint, alleging infringement of Directive 2003/88 by certain provisions of Clause 5 of the Standard Contract of Employment

36 By its third complaint, the Commission takes the view that certain provisions of Clause 5 of the Standard Contract of Employment infringe Directive 2003/88. Accordingly, first, it refers to Clause 5(a) of that Standard Contract of Employment, in accordance with which the basic working week is 39 hours and to Clause 5(e) and (f) of that contract which prohibits NCHD from being asked to work for more than 24 consecutive hours on site and provides that the employer should ensure that the NCHD are not on call for a work period of 24 hours on more than a 1 in 5 basis, save in exceptional circumstances. According to the Commission, there is nothing to show that doctors are entitled to the minimum daily and weekly rest periods prescribed in Directive 2003/88 and to the equivalent compensatory rest periods.

37 Secondly, the Commission refers to Clause 5(i) of the Standard Contract of Employment under which NCHD may be required to provide overtime services (on-call on-site services) in addition to their 39 working hours, to provide on-call off-site services outside core and/or overtime hours as determined by the Clinical Director/the Employer and to work beyond the rostered period in line with the exigencies of the service, even though the employer will endeavour to ensure that this will be an exceptional rather than a standard requirement. However, according to the Commission, there is no clear limit to the total length of the working week.

38 The Commission maintains that Member States are required, following the transposition and the bringing into effect of a directive, to set up a clear legal framework enabling individuals to be aware of their rights. Clause 5 of the Standard Contract of Employment does not provide such a legal framework. That finding is, moreover, confirmed by Clause 5(m) of the Standard Contract of Employment, in accordance with which 'Work outside the confines of this contract is not permissible if the combined working time associated with this employment taken together with any other employment exceeds the maximum weekly working hours as set out in (the 2004 Regulation)'. According to that institution, that provision seems to state, to the contrary, that the limits provided by the 2004 Regulation do not apply to the Standard Contract of Employment.

39 Ireland maintains that, although it is not set out in the wording of the Standard Contract of Employment, the protection provided by the 2004 Regulation and by Directive 2003/88 is an integral part of that document because of the Settlement Agreement of 22 January 2010. In any event, those safeguards are binding on the employers of NCHD pursuant to the 2004 Regulation.

40 That Member State considers that for the Commission to rely on some provisions of Clause 5 of the Standard Contract of Employment in isolation fails to take into account the clear legal context of that contract in the general sense and, in particular, those provisions. In relation to Clause 5(m) of the Standard Contract of Employment, Ireland maintains that that provision provides express protection of the limits to working time as fixed by the 2004 Regulation.

41 In that regard, it should be borne in mind that provisions transposing a directive must allow individuals to refer to a clear, precise and unequivocal legal framework (see, to that effect, judgment in *Commission* v *Ireland*, C-282/02, EU:C:2005:334, paragraph 80).

42 In the present action the Commission does not, however, dispute the transposition of Directive 2003/88 by the 2004 Regulation. It merely argues, referring in particular, to certain provisions of Clause 5 of the Standard Contract of Employment, that that regulation is not applied in practice.

43 Further, it is not disputed by the parties that the legal framework, resulting from the legislation transposing Directive 2003/88, namely the 2004 Regulation, is clear and applicable in any event.

44 In those circumstances, by referring to certain provisions of Clause 5 of the Standard Contract of Employment in isolation, the scope of which is, moreover, subject to discussion between the parties, the Commission has not succeeded in establishing the existence of a practice contrary to Directive 2003/88. Consequently, the third ground of complaint must be rejected.

The various progress reports and the declaration of the IMO

45 The Commission also refers to the various progress reports on the implementation of Directive 2003/88, compiled during 2013 and 2014 by the Irish authorities and sent to the Commission, and to a declaration of the IMO which concludes that, even if progress has been made in the application of Directive 2003/88, Ireland still does not fully comply with its obligations resulting under that directive.

46 Ireland admits that it has not been possible in practice to achieve a situation of complete compliance with Directive 2003/88 in every instance, but it disputes that that is because of a failure on its part in its obligation to take the necessary measures to achieve such a situation. It maintains that it has made constant and concerted efforts to achieve total conformity in practice and that it continues to deal with all instances of non-compliance, including through the use of financial penalties.

47 According to that Member State, the Commission's argument is, in essence, tantamount to saying that the simple fact that the regulation transposing Directive 2003/88 is not respected in all instances is sufficient to justify a finding of failure to fulfil obligations by the Member State concerned under EU law.

48 In that regard, it should be noted that the Commission does not explain in its application whether it refers to the progress reports and the declaration only as an illustration of the problems which resulted from the alleged violation of Directive 2003/88 resulting from Clause 3(a) and (b) of the Collective Agreement and certain provisions of Clause 5 of the Standard Contract of Employment, or as an independent indication of the non-application of that directive in practice.

49 In any event, it does not suffice for the Commission to refer to the progress reports in question and to the declaration of the IMO to establish that Ireland has not applied Directive 2003/88. As is apparent from the case-law cited at paragraphs 22 and 23 of the present judgment, it is also incumbent on it to show, without being able to rely on any presumption whatsoever, that the practice alleged to be contrary to that directive can be attributed, in one way or another, to Ireland.

50 In that regard, the Commission merely states in the present case that HSE is an emanation of the State. It does not, however, explain the role of that authority other than that of having signed the Settlement Agreement, mentioned in paragraph 14 of the present judgment, to which is annexed the Collective Agreement and the Standard Contract of Employment. However, as is apparent from paragraphs 16 to 44 of the present judgment, it has not been established by the Commission that those two documents constitute practice contrary to Directive 2003/88.

51 It follows from all the foregoing that the Commission has not proved the existence, in relation to Ireland, of practice contrary to Articles 3, 5, 6 and 17(2) and (5) of Directive 2003/88 relating to the organisation of the working time of NCHD.

52 The action must therefore be dismissed.

Costs

53 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Ireland having applied for costs against the Commission and the latter having been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]