JUDGMENT OF THE COURT (First Chamber)

18 December 2008 *

In Case C-306/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Højesteret (Denmark), made by decision of 29 June 2007, received at the Court on 3 July 2007, in the proceedings

Ruben Andersen

v

Kommunernes Landsforening, acting on behalf of Slagelse Kommune (formerly Skælskør Kommune),

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Borg Barthet, E. Levits and J.-J. Kasel (Rapporteur), Judges,

* Language of the case: Danish.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2008,

after considering the observations submitted on behalf of:

— Mr Andersen, by H. Nielsen and P. Olsen, advokater,

— Kommunernes Landsforening, acting on behalf of Slagelse Kommune (formerly Skælskør Kommune), by J. Mosbek and J. Vinding, advokater,

— the Danish Government, by J. Bering Liisberg, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by W. Ferrante, avvocato dello Stato,

— the Swedish Government, by A. Falk, acting as Agent,

— the Commission of the European Communities, by J. Enegren and S. Schønberg, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 June 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 8(1) and (2) of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32).

2 The reference was made in the course of proceedings between Mr Andersen and Kommunernes Landsforening (National Association of Municipalities), acting on

behalf of Slagelse Kommune (formerly Skælskør Kommune) (Denmark), which was Mr Andersen's employer, concerning the applicability to him of a collective agreement governing employment in Danish municipalities.

Legal context

Community rules

3 The second recital in Directive 91/533 states the following:

'… certain Member States have considered it necessary to subject employment relationships to formal requirements; … these provisions are designed to provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market.'

4 According to the seventh recital in the directive:

'… it is necessary to establish at Community level the general requirement that every employee must be provided with a document containing information on the essential elements of his contract or employment relationship.'

5 The 11th, 12th and 13th recitals in the directive are worded as follows:

'… in order to protect the interests of employees with regard to obtaining a document, any change in the main terms of the contract or employment relationship must be communicated to them in writing;

… it is necessary for Member States to guarantee that employees can claim the rights conferred on them by this Directive;

… Member States are to adopt the laws, regulations and legislative provisions necessary to comply with this Directive or are to ensure that both sides of industry set up the necessary provisions by agreement, with Member States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive.'

6 Article 1 of Directive 91/533, entitled 'Scope', provides as follows:

'1. This Directive shall apply to every paid employee having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State.

2. Member States may provide that this Directive shall not apply to employees having a contract or employment relationship:

(a) — with a total duration not exceeding one month, and/or

— with a working week not exceeding eight hours; or

(b) of a casual and/or specific nature provided, in these cases, that its non-application is justified by objective considerations.'

7 According to Article 2 of the directive, entitled 'Obligation to provide information':

'1. An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as "the employee", of the essential aspects of the contract or employment relationship.

2. The information referred to in paragraph 1 shall cover at least the following:

…

(d) the date of commencement of the contract or employment relationship;

(e) in the case of a temporary contract or employment relationship, the expected duration thereof;

(f) the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;

(g) the length of the periods of notice to be observed by the employer and the employee should their contract or employment relationship be terminated or, where this cannot be indicated when the information is given, the method for determining such periods of notice;

…

3. The information referred to in paragraph 2(f), (g), (h) and (i) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those particular points.'

8 Article 3(1) of the directive provides that:

'The information referred to in Article 2(2) [of the directive] may be given to the employee, not later than two months after the commencement of employment, in the form of:

(a) a written contract of employment; and/or

(b) a letter of engagement; and/or

(c) one or more other written documents, where one of these documents contains at least all the information referred to in Article 2(2)(a), (b), (c), (d), (h) and (i).'

9 Article 3(2) and (3) of Directive 91/533 provides as follows:

'2. Where none of the documents referred to in paragraph 1 is handed over to the employee within the prescribed period, the employer shall be obliged to give the employee, not later than two months after the commencement of employment, a written declaration signed by the employer and containing at least the information referred to in Article 2(2).

Where the document(s) referred to in paragraph 1 contain only part of the information required, the written declaration provided for in the first subparagraph of this paragraph shall cover the remaining information.

3. Where the contract or employment relationship comes to an end before expiry of a period of two months as from the date of the start of work, the information provided for in Article 2 and in this Article must be made available to the employee by the end of this period at the latest.'

10 Article 8 of the directive, entitled 'Defence of rights', is worded as follows:

'1. Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

2. Member States may provide that access to the means of redress referred to in paragraph 1 are subject to the notification of the employer by the employee and the failure by the employer to reply within 15 days of notification.

However, the formality of prior notification may in no case be required in the cases [of expatriate workers], neither for workers with a temporary contract or employment relationship, nor for employees not covered by a collective agreement or by collective agreements relating to the employment relationship.'

11 Pursuant to Article 9(1) of Directive 91/533, Member States were to adopt the laws, regulations and administrative provisions necessary to comply with the directive no later than 30 June 1993 or to ensure by that date that the employers' and workers' representatives introduced the required provisions by way of agreement, the Member

States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by the directive.

National legislation

12 Directive 91/533 was transposed into Danish law, on the one hand, by Consolidating Law No 385 of 11 May 1994 concerning the employer's obligation to inform employees of the conditions applicable to the employment relationship ('Law on proof of appointment') and, on the other, by collective agreements, among which is the collective agreement concerning the employer's obligation to inform employees of the conditions applicable to the employment relationship (letter of engagement) of 9 June 1993 between the Amtsrådsforeningen (Federation of Provincial Councils), the Kommunernes Landsforening, the municipal councils of Copenhagen and Frederiksberg, and the Kommunale Tjenestemænd og Overenskomstansatte (Union of Public Employees and Municipal Contractual Workers) ('the KTO Agreement').

The Law on proof of appointment

13 According to Paragraph 1(3) of the Law on proof of appointment, that law 'shall not apply in so far as an employer's duty to provide the wage earner with information on the employment relationship is covered by a collective agreement and that agreement contains rules which correspond at least to the provisions in Directive 91/533'.

14 It is apparent from the order for reference that the Law on proof of employment does not make the exercise of the employee's right of action, where the employer has failed to fulfil his obligations in regard to information to be provided to employees, subject to the condition that the employee called on the employer to transmit to him, within 15 days, a letter of engagement which fulfils the requirements of Directive 91/533.

The KTO Agreement

15 It is apparent from the order for reference that Danish municipalities apply the provisions of the KTO Agreement to all the workers they employ, regardless of whether or not they are union members.

16 In accordance with the KTO Agreement, if a local authority fails to draw up a letter of engagement or if the letter contains errors, the local authority may draw up such a letter or correct it within 15 days of having been notified of such failure or errors by the employee. If the employer fails to respond within that time-limit, the employee may take action in the courts to enforce his rights under the law. This right of action under the KTO Agreement is available to both unionised and non-unionised workers and may also be exercised, in both cases, by trade unions.

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

17 In the period from 1999 to 2001, Mr Andersen had five individual job training contracts with Skælskør Kommune pursuant to the Danish legislation relating to social policy. Those contracts were social aid measures and concerned only work which would not otherwise be performed as normal paid work. Holders of such contracts are covered by the legislation applicable to salaried persons, although not as regards entitlement to holidays, daily benefits in the event of illness or childbirth and reimbursement by the employer of the cost of training.

18 The contracts were concluded for a term of between one and twelve months. However, the courses in fact lasted less than one month, due to Mr Andersen's absences.

19 In regard to each of the contracts, Mr Andersen received a letter of engagement which did not fulfil the requirements of Article 2(2) of Directive 91/533. It is apparent from the file that, within 15 days of Mr Andersen informing his employer of that fact, the latter provided him with new letters of engagement which complied in every respect with those requirements.

20 Since Mr Andersen considered that the provisions of the KTO Agreement did not apply to him since he was not a member of any union, he brought an action for damages before the national court on the basis of the Law on proof of appointment, which provides for payment of compensation to employees where the employer has failed to fulfil his obligations to provide employees with information. Since the action was dismissed at first instance, Mr Andersen appealed to the court making the reference.

21 Since it considered that an interpretation of Article 8(1) and (2) of Directive 91/533 was necessary to enable it to give judgment in the main proceedings and had doubts as to the precise interpretation to be given to those provisions, the Højesteret (Supreme Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 8(1) of … Directive 91/533 … to be interpreted as meaning that a collective agreement which is intended to implement the provisions of the directive cannot be applied to an employee who is not a member of an organisation party to that agreement?

(2) If Question 1 is answered in the negative, are the words in [the second subparagraph of] Article 8(2) of the directive, "employees not covered by a collective agreement or by collective agreements relating to the employment relationship", to be interpreted as meaning that provisions in a collective agreement or the obligation of prior notification of the employer cannot be applied to an employee who is not a member of an organisation party to that agreement?

(3) Do the words "temporary contract" and "temporary … employment relationship" in [the second subparagraph of] Article 8(2) of the directive refer to short-term employment relationships or to something else, such as all fixed-term employment relationships? If the former, which criteria should be used to determine whether an employment relationship is temporary (short-term)?'

The questions referred to the Court

The first question

22 By its first question, the national court asks, essentially, whether Article 8(1) of Directive 91/533 is to be interpreted as meaning that it prohibits national rules which provide that a collective agreement transposing the provisions of that directive into national law applies to an employee even if he is not a member of any union which is a party to the collective agreement.

23 Clearly, the terms of Article 8(1) of Directive 91/533 do not provide a useful answer to that question.

24 On the other hand, it is unambiguously apparent from Article 9(1) of Directive 91/533, read in the light of the 13th recital therein, that the Member States may permit employers' and workers' representatives to introduce the provisions required to transpose the directive as long as the Member States are able to take the necessary steps at all times to guarantee the results imposed by the directive.

25 It must be added that the power thus granted to the Member States by the directive is in accordance with the Court's case-law that Member States may leave the implementa-

tion of the social policy objectives envisaged by a directive in this area in the first instance to management and labour (see, in particular, Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paragraph 8; Case 235/84 *Commission* v *Italy* [1986] ECR 2291, paragraph 20; and Case C-187/98 *Commission* v *Greece* [1999] ECR I-7713, paragraph 46).

26 It must be pointed out in that regard, however, that that possibility does not discharge the Member States from the obligation of ensuring, by appropriate laws, regulations or administrative measures, that all workers are afforded the full protection provided for in Directive 91/533; that State guarantee must cover all cases where protection is not ensured by other means, and, in particular, where the workers in question are not protected because they are not union members.

27 It follows that Directive 91/533 does not, in itself, prohibit national rules which provide that a worker who is not a member of a union which is a party to a collective agreement implementing the provisions of that directive is not, for that reason alone, prevented from enjoying under that collective agreement the full extent of the protection provided for in the directive.

28 In the main proceedings, it is not disputed that the Danish rules permit all workers coming within the scope of the KTO Agreement, regardless of whether or not they are union members, to rely on the provisions of the collective agreement before the national courts, with the result that all workers enjoy the same protection.

29 However, it is for the national court to consider whether that finding corresponds to the reality and to satisfy itself that the KTO Agreement is such as to guarantee workers coming within its scope effective protection of the rights conferred on them under Directive 91/533.

30 In the light of those considerations, the answer to the first question is that Article 8(1) of Council Directive 91/533 must be interpreted as meaning that it does not prohibit national rules which provide that a collective agreement which is intended to transpose the provisions of the directive into national law are to apply to an employee even though he is not a member of an organisation which is a party to that agreement.

The second question

31 By its second question, the national court asks, essentially, whether the second subparagraph of Article 8(2) of Directive 91/533 is to be interpreted as meaning that it prevents an employee who is not a member of a union which is a party to a collective agreement governing his employment relationship being regarded as 'covered by' that agreement within the meaning of the abovementioned provision.

32 It must be noted in that regard that the use in the second subparagraph of Article 8(2) of Directive 91/533 of the words 'not covered by a collective agreement or by collective agreements' suggests that the Community legislature intended to refer to situations in which the employees concerned did not enjoy the protection which a collective agreement is meant to afford to the workers to which it applies.

33 As the Commission of the European Communities rightly pointed out, that conclusion is borne out by comparison of the various language versions of Directive 91/533.

34 Where the category of persons who may be covered by a collective agreement — as, in particular, in the case of an agreement which has been declared to be of general application — can be completely independent of whether or not those persons are members of a union which is a party to that agreement, the fact that a person is not a member of such a union does not in itself deprive that person of the legal protection conferred by the agreement in question.

35 It must be added that the foregoing interpretation is in accordance with the will of the Community legislature which, as may be seen from paragraph 24 of the present judgment, has authorised the Member States to permit employers' and workers' representatives to introduce, in particular through collective agreements, the provisions required to attain the objectives of Directive 91/533.

36 Moreover, that interpretation makes it possible to attain the principal objective of the directive, which, as can be seen from the second, fifth and seventh recitals therein, is to improve worker protection by informing them of the essential elements of their contract or employment relationship, in so far as a collective agreement which correctly transposes the directive into national law may, in accordance with the provisions of national law, be relied upon by all workers to whom it applies, regardless of whether or not they are members of a union which is a party to the agreement.

37 In the main proceedings, it is for the national court to ascertain, on the one hand, whether, as the observations submitted to the Court suggest, a worker like Mr Andersen is covered by the KTO Agreement and, on the other, to assess whether the provisions of that collective agreement provide effective protection of the rights conferred on workers by Directive 91/533.

38 In the light of the foregoing, the answer to the second question is that the second subparagraph of Article 8(2) of Directive 91/533 must be interpreted as meaning that it does not prevent an employee who is not a member of a union which is a party to a collective agreement governing his employment relationship being regarded as 'covered by' that agreement within the meaning of the abovementioned provision.

The third question

39 By its third question, the national court asks, essentially, whether the words 'a temporary contract or employment relationship' in the second subparagraph of Article 8(2) of Directive 91/533 are to be interpreted as referring to all contracts and employment relationships that are limited in time or only to those entered into for a short period.

40 According to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (see, in particular, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12, and Case C-442/05 *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* [2008] ECR I-1817, paragraph 30).

41 With regard, first, to the wording of the second subparagraph of Article 8(2) of Directive 91/533, it must be pointed out that the expression 'a temporary contract or employment relationship' is not defined by Directive 91/533 and does not seem to appear in any other provision of secondary Community legislation.

42 On the other hand, the Community legislature has referred on several occasions to 'fixed-term work'. It did so, inter alia, in Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (OJ 1991 L 206, p. 19), adopted only four months before Directive 91/533, and in Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

43 It must therefore be deduced from that that by using the term 'temporary' in the second subparagraph of Article 8(2) of Directive 91/533 — rather than 'fixed-duration' as earlier in Directive 91/383 and 'fixed-term' later in Directive 1999/70 — the Community legislature intended not to cover all fixed-term contracts.

44 That interpretation of the will of the Community legislature meets the need to interpret Community law in a way which remains faithful to, and ensures, its internal consistency.

45 That interpretation is not affected by the use of the words 'temporary contract or employment relationship' in Article 2(2) of Directive 91/533, a provision which sets out the essential aspects of the contract or employment relationship that must be notified to an employee and which refers, in point (e), to the 'expected duration' of the contract or employment relationship. The expression 'expected duration' implies a temporal uncertainty which distinguishes it from the precision of the terms used in point 1 of clause 3 of the framework agreement on fixed-term work, which constitutes the annex to Directive 1999/70, to designate an element which is characteristic of a fixed-term contract, namely the fact that the end of such a contract is determined by 'objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event'. That difference of terminology cannot but raise a presumption of a difference of concept.

46 With regard, secondly, to the context in which the second subparagraph of Article 8(2) of Directive 91/533 occurs, it must be pointed out, as the Commission has done in its observations to the Court, that the first subparagraph of Article 8(2) of the directive states that Member States may provide that access to the means of redress against an employer who does not fulfil his obligations is subject to prior notification by the employee.

47 As the Advocate General pointed out in point 39 of his Opinion, the possibility left open to the Member States by the first subparagraph of Article 8(2) of Directive 91/533 to provide for such a prior formality has the aim of procedural economy and is intended to avoid litigation through the resolution of disputes using less expensive and less complex procedures than judicial ones.

48 However, the second subparagraph of Article 8(2) of Directive 91/533 sets out three categories of workers on whom that formality cannot be imposed, namely expatriate workers, employees not covered by a collective agreement and workers with a temporary contract or employment relationship. It must be concluded, as the Advocate General suggests in point 39 of his Opinion, that the exception thus provided for by the Community legislature seeks to prevent the obligation of notification from becoming an onerous formality which, in practice, hinders or renders impossible the worker's access to the judicial means of redress.

49 With regard to the scope of that exception, it is apparent from the list of the categories of workers exempt from the prior formality of notification that the Community legislature intended to protect the categories which, for substantive or legal reasons, seemed to it to be most vulnerable in regard to carrying out the required formality, such as expatriate workers, who could encounter difficulties related to their geographical isolation, and workers not covered by a collective agreement, who are legally isolated.

50 By mentioning workers with a temporary contract or employment relationship, the Community legislature had no particular reason to refer to all workers with a fixed-term contract, without distinction and regardless of its length. On the other hand, it is logical and justified for it to refer to workers with short-term contracts, since precisely the short term could constitute an obstacle in practice to effective access to judicial means of redress on their part.

51 With regard, thirdly, to the object of Article 8 of Directive 91/533, it is apparent from the 12th recital therein that it reflects the concern of the Community legislature to guarantee that employees can claim the rights conferred on them by the directive. Such a concern corroborates the interpretation in the preceding paragraph that the Community legislature, when it referred to workers with a 'temporary contract or employment relationship', intended to refer to workers whose contract is of such short duration that the obligation to notify the employer before taking legal proceedings could compromise effective access to judicial means of redress.

52 In the absence of any indication in Directive 91/533 concerning the manner of fixing that duration more precisely, it is, in principle, for the Member States to determine it. Where the rules of a Member State do not lay down such a duration, it is, as the Advocate General suggested in point 67 of his Opinion, for the national courts to determine it in each case in the light of the specific characteristics of certain sectors or certain occupations or activities.

53 However, that duration must be fixed so as not to prejudice the effectiveness of the second subparagraph of Article 8(2) of Directive 91/533, whose object, as can be seen from paragraph 51 of the present judgment, is to permit workers in a precarious situation to enforce directly, by judicial process, the rights conferred on them by the directive.

54 In the light of those considerations, the answer to the third question is that the words ‘a temporary contract or employment relationship’ in the second subparagraph of Article 8(2) of Directive 91/533 must be interpreted as referring to contracts and employment relationships entered into for a short period. If no norm has been laid down for that purpose in a Member State’s rules, it is for the national courts to determine the duration in each case in the light of the specific characteristics of certain sectors or certain occupations or activities. That duration must, however, be fixed so as to provide effective protection of the rights conferred on workers by the directive.

Costs

55 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 (First Chamber) hereby rules:

1. **Article 8(1) of Council Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship must be interpreted as meaning that it does not prohibit national rules which provide that a collective agreement which is intended to transpose the provisions of the directive into national law are to apply to an employee even though he is not a member of an organisation which is a party to that agreement.**

2. The second subparagraph of Article 8(2) of Council Directive 91/533 must be interpreted as meaning that it does not prevent an employee who is not a member of a union which is a party to a collective agreement governing his employment relationship being regarded as 'covered by' that agreement within the meaning of the abovementioned provision.

3. The words 'a temporary contract or employment relationship' in the second subparagraph of Article 8(2) of Directive 91/533 must be interpreted as referring to contracts and employment relationships entered into for a short period. If no norm has been laid down for that purpose in a Member State's rules, it is for the national courts to determine the duration in each case in the light of the specific characteristics of certain sectors or certain occupations or activities. That duration must, however, be fixed so as to provide effective protection of the rights conferred on workers by the directive.

[Signatures]