Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 July 2017*

(Reference for a preliminary ruling — Directive 2003/88/EC — Article 17 — Protection of the safety and health of workers — Organisation of working time — Additional payments — Child protection association — 'Children's village parents' — Temporary absence of 'foster parents' — Workers employed as 'relief parents' — Definition)

In Case C-175/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein oikeus (Supreme Court, Finland), made by decision of 24 March 2016, received at the Court on 29 March 2016, in the proceedings

Hannele Hälvä,

Sari Naukkarinen,

Pirjo Paajanen,

Satu Piik

v

SOS-Lapsikylä ry,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fourth Chamber, E. Juhász, K. Jürimäe and C. Lycourgos (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 2 March 2017,

after considering the observations submitted on behalf of:

– Ms Hälvä, Ms Naukkarinen, Ms Paajanen and Ms Piik, represented initially by P. Ahonen and, subsequently, by P. Ahonen, acting as Agent, and T. Lehtinen, asianajaja,

– SOS-Lapsikylä ry, represented initially by J. Syrjänen and, subsequently, by J. Syrjänen and J. Nevala, asianajajat,

* Language of the case: Finnish.

– the Finnish Government, by H. Leppo, acting as Agent,

– the German Government, by J. Möller and T. Henze, acting as Agents,

– the European Commission, by I. Koskinen and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 17(1) 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).

2 The request has been made in proceedings between Ms Hannele Hälvä, Ms Sari Naukkarinen, Ms Pirjo Paajanen and Ms Satu Piik and their employer SOS-Lapsikylä ry concerning the latter's refusal to pay them for overtime and compensation for evening and night work and Saturday and Sunday work in the years 2006 to 2009.

Legal context

EU law

3 Article 2 of Directive 2003/88 provides:

'For the purpose of this Directive:

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.

2. "rest period" means any period which is not working time;

…'

4 Article 7(1) of the Directive provides:

'Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.'

5 Article 17(1) of that directive provides:

'With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities.'

Finnish law

6 Paragraph 2(1) of the työaikalaki (605/1996) (Law 605/1996 on working time, 'the Law on Working Time'), provides:

'With the exception of Paragraph 15(3), those laws shall not apply:

…

(3) to work performed by an employee or otherwise in conditions where it cannot be considered a duty of the employer to monitor the arrangement of the time spent on that work;

…'

Facts of the main proceedings and the questions referred for a preliminary ruling

7 SOS-Lapsikylä ry, a child protection association, provides accommodation for the children for which it cares which is as close as possible to a family environment in seven children's villages, each with several houses for children. The personnel at the children's villages consists of a director, 'foster parents', 'relief parents' and other professionals. The children's houses are home to the children in care and house three to six children and one or two 'foster parents' (or 'relief parents' when the 'foster parents' are absent).

8 The appellants in the main proceedings were employed by SOS-Lapsikylä ry as 'relief parents' until 2009 or, in some cases, until 2010. As 'relief parents' relieving the 'foster parents' while the latter were absent (justified by days off, annual leave or sick leave), the appellants in the main proceedings lived with the children and attended singlehandedly to that house and the upbringing and care of the resident children. They did the shopping and accompanied the children on trips outside.

9 The appellants in the main proceedings brought an action before the Etelä-Savon käräjäoikeus (District Court, South Savo, Finland) seeking a declaration that their work for SOS-Lapsikylä ry constituted 'work' within the meaning of Paragraph 1 of the Law on working time, and an order for a compensation payment in respect of overtime and work in the evening, at night and at weekends from 2006 to 2009, in accordance with that law and the collective agreement for the sector concerned.

10 By judgment of 4 May 2012, the Etelä-Savon käräjäoikeus (District Court, South Savo) dismissed the action, holding that the work of the appellants in the main proceedings was not subject to the Law on working time. Following the dismissal of their action by the Etelä-Savon käräjäoikeus (District Court, South Savo) they brought an appeal against the judgment of that court before the Itä-Suomen hovioikeus (Court of Appeal, Eastern Finland) which upheld the judgment of 4 July 2013. The appellants in the main proceedings appealed against that judgment before the referring court.

11 The referring court states that the employer's representatives do not control the day-to-day work of the 'relief parents' and that the employer does not issue orders in respect of the working periods and rest periods during working days. Within the limits imposed by the needs of the children, a 'relief parent' may himself decide on the organisation and content of his work. However, a care and education programme is prepared for each child, to be followed by the 'relief parent' in caring for the child, and

with respect to which he writes a report. Furthermore, the 'relief parent' consults with the 'foster parent' regarding the running of the children's home for which he is responsible, together with practical matters related to it.

12 According to the contracts of employment of the appellants in the main proceedings, they were to work 190 periods of 24 hours annually, except for one of them, who was to work 170 periods of 24 hours, from which 30 to 33 days of annual leave had to be deducted. In practice, the length of periods of employment varied between a few days and several weeks.

13 The referring court also points out that the director prepares, in advance, lists indicating day by day the house in which the 'relief parent' is to work. The latter agrees with the 'foster parent' the time at which the relief period begins. The daily schedules must also be drawn up so that each worker has, on average, two free weekends per month. During the relief period, the worker is also entitled to one day off per week. The remuneration of the 'relief parents' is determined on a fixed monthly basis, it being understood, however, that if a 'relief parent' has worked more than 190 periods, he is entitled to an additional payment.

14 The referring court is asked to determine whether the Law on working time is applicable to 'relief parents', which would have the result that SOS-Lapsikylä ry would be obliged to pay the appellants in the main proceedings the compensation they claim. More specifically, it must be determined whether the activities of the 'relief parents' are excluded from the scope of that law by virtue of Paragraph 2(1)(3) thereof. The referring court points out that, according to that provision, work which the worker does at home or otherwise in conditions where it cannot be considered a duty of the employer to monitor the arrangement of the time spent on that work does not fall within the provisions on the organisation of working time, with the exception of Paragraph 15(3) of the Law on working time which is not relevant in the present case.

15 According to the referring court, the Law on working time transposes Directive 2003/88, certain provisions of which, in particular Article 17(1) thereof, authorise the national legislature to derogate from the rules on working time and rest periods laid down by that directive under certain circumstances.

16 The referring court also observes that the Law on working time governs not only working time, the duration of statutory working time, overtime, night work, shift work, and also rest periods and Sunday work, but also fixes the compensation payable for different reasons, such as payment for overtime and Sunday work.

17 Although the referring court is aware that Directive 2003/88 does not apply to a worker's remuneration, except in relation to annual paid leave, it considers, however, that the interpretation of that directive is essential to the outcome of the action pending before it. In fact, the right to additional payments fixed by the Law on working time depends on whether that law, which also governs working time and rest time, is applicable in the present case.

18 More particularly, the referring court considers that it is primarily the derogation in Article 17(1) of Directive 2003/88 that is relevant for the purpose of interpreting the exception provided for in Article 2(1)(3) of the Law on working time.

19 According to the referring court, it follows from the judgment of 14 October 2010, *Union syndicale Solidaires Isère* (C-428/09, EU:C:2010:612), that, where it is not established, first, that the workers may decide the number of hours they work and, second, that they are not required to be present at their place of work at fixed times, the derogation in Article 17(1) of Directive 2003/88 does not apply.

20 However, the referring court considers that the facts of the case giving rise to that judgment show significant differences from the case before it, in particular regarding the nature of the work and the conditions under which it is carried out.

21 Thus, it states that, in the present case, the work performed by the appellants in the main proceedings is, because of its content, like work done in a family by one of its members, which is expressly covered by Article 17(1)(b) of Directive 2003/88. That court also notes that that provision must be interpreted restrictively, but that the list of activities which are set out therein is not exhaustive. Therefore, it considers that it is possible that that derogation applies to the work of 'relief parents', even though it is not family work within the meaning of Article 17(1)(b) of that directive.

22 The referring court also indicates that, in the present case, the opportunities for the employer to control the use of the time of the appellants in the main proceedings are limited as such control might affect the opportunities for a 'relief parent' to behave like a real parent and create a relationship of trust with the children. That court adds that there does not appear to be such control. The 'relief parents' are free to decide on their tasks, their rest periods and their movements outside the home within the limits imposed by the needs of the children. However, those needs affect the possibility for the 'relief parents' to take care of personal matters or to be free to organise their lives.

23 In those circumstances, the Korkein oikeus (Supreme Court, Finland) decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Must Article 17(1) of Directive 2003/88 be interpreted as including within its scope an activity, as described above, performed in a children's home in which the worker acts as the replacement for foster parents of children in care on the parents' days off, lives during this period with the children in a family-like setting and during this time independently attends equally to the children's and family's needs, as parents generally do?'

Consideration of the question referred

24 By its first question, the referring court asks essentially whether Article 17(1) of Directive 2003/88 must be interpreted as meaning that it can apply to paid employment, such as that at issue in the main proceedings, which consists in looking after children in a family environment, relieving the person principally responsible for them.

25 As a preliminary point, it must be observed that, save in the special case envisaged by Article 7(1) of Directive 2003/88 concerning annual paid holidays, that directive is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers so that, generally, it does not apply to the remuneration of workers (see, to that effect, judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C-266/14, EU:C:2015:578, paragraph 48 and the case-law cited).

26 However, that finding does not mean that there is no need to reply to the question referred to the Court for a preliminary ruling in this case.

27 As the Advocate General observed, in point 45 of his Opinion, the dispute before the referring court concerns whether the Law on working time applies to 'relief parents' and whether on that basis the latter are entitled to the remuneration they claim.

28 It is in those circumstances that the national court made a reference for a preliminary ruling for an interpretation of Article 17(1) of Directive 2003/88 which, according to that court, was transposed into national law by Paragraph 2(1)(3) of the Law on working time.

29 Therefore, it must be determined whether the activities performed by the appellants in the main proceedings in their capacity as 'relief parents' may fall within the scope of Article 17(1) of Directive 2003/88, which allows the Member States to derogate, under certain conditions, from Articles 3 to 6, 8 and 16 thereof, where the length of the working time, on account of the characteristics of the activity carried out, is not measured or predetermined or may be determined by the workers themselves.

30 In that connection, it must be observed that, as stated by the referring court, the 'relief parents' who are employees of SOS-Lapsikylä ry are, during the absence of the 'foster parents' who are themselves employees of the same employers, responsible for the daily running of a children's home and the care and upbringing of the children who are in care for continuous 24 hour periods which may last several days, with the right to one day off per week and, on average, two weekends off per month.

31 According to settled case-law, the derogation laid down in Article 17(1) of Directive 2003/88 must be interpreted in such a way so as to limit its scope to what is strictly necessary to safeguard the interests whose protection the derogation permits (judgments of 9 September 2003, *Jaeger*, C-151/02, EU:C:2003:437, paragraph 89, and of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 40).

32 The Court has also held that Article 17(1) applies to workers whose working time, as a whole, is not measured or predetermined, or can be determined by the workers themselves on account of the specific characteristics of the activity carried out (judgments of 7 September 2006, *Commission* v *United Kingdom*, C-484/04, EU:C:2006:526, paragraph 20, and of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 41).

33 In that connection, when determining the specific circumstances of the case, the referring court must, as the Advocate General noted in point 68 of his Opinion, take account of the fact that the working time of a 'relief parent' is largely predetermined by the contract of employment and by the employer, since the number of 24 hour periods he must work every year is fixed by contract. Furthermore, that court must also take account of the fact that, at regular intervals, that employer draws up in advance lists indicating the 24 hour periods during which the 'relief parent' is responsible for running a children's home.

34 Having regard to those factors, it cannot be argued that the working time of the 'relief parents' as a whole is not measured or predetermined or that it can be determined by the 'relief parent' himself, by reason of the specific characteristics of the activity performed, which is for the referring court to ascertain.

35 That finding is not called into question, having regard to the information before the court, by the fact that, in the periods during which they are responsible for running a children's home, the 'relief parents' have a certain degree of autonomy in the organisation of their time and, more specifically, in the organisation of their daily duties, their movements and their periods of inactivity, without there appearing to be any supervision by their employer.

36 First, it must be stated that the difficulties that an employer may face, regarding the supervision of the daily exercise of the activities of its employees are not, in general, sufficient for a finding that their working time as a whole is not measured or predetermined or may be determined by the worker himself, since the employer stipulates in advance both the beginning and the end of the working time.

37 Next, in the present case, it is apparent from the order for reference that the employer does not control the way in which the 'relief parent' carries out his activities in the 24 hour period in which he is responsible for the children's home. However, the employer prepares in advance the lists setting out, day by day, the house in which the 'relief parent' is require to work. The 'relief parent' agrees with the 'foster parent' the time at which the substitution period starts. The daily schedules must also be organised so that each worker has on average two weekends free per month. Thus, there is no

indication in the order for reference that the employer is unable to control whether the 'relief parent' is in fact responsible for the children's home on the day on which he agreed with the 'foster parent' that the replacement would start and whether he assumed that responsibility until the end of the 24 hour period assigned to him.

38 Finally, it is apparent from the order for reference that the 'relief parent' is required to write a report on how he implemented the case and care programme prepared for each child. That report, thus, appears to be a means of control available to the employer which may be used by it in order to determine the manner in which its employees carry out their activities and, therefore, to measure their working time.

39 Second, as described by the referring court, the choice that the 'relief parents' have to decide, to a certain extent, their rest periods within the 24 hours during which they are responsible for a children's home, does not allow them to freely determine the number of hours they work during those periods.

40 On one hand, as the referring court states, it must be noted that the 'relief parents' must consult with the 'foster parents' as to how to run the children's home and it appears contrary to the general scheme of the foster system put in place by the children's villages to all the 'relief parents' to substantially change the routines, in particular regarding times, of the house for which they are temporarily responsible, and which have been set up by the 'foster parents'. Following those routines therefore appears to indicate that the 'relief parents' cannot themselves freely determine their hours of work.

41 On the other hand, it must be observed that any period during which the worker is at work, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices must be considered to be 'working time' within the meaning of Article 2(1) of Directive 2003/88 (judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C-266/14, EU:C:2015:578, paragraph 25).

42 Thus, the periods of inactivity within the 24 hour periods during which the 'relief parent' is in charge of the children's home are part of the performance of that worker's duties and are working hours where the 'relief parent' 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 (see, to that effect, judgment of 1 December 2005, *Dellas and Others*, C-14/04, EU:C:2005:728, paragraph 48, and order of 11 January 2007, *Vorel*, C-437/05, EU:C:2007:23, paragraph 28).

43 Since such periods of inactivity are part of the working time of 'relief parents', the option they have to determine when those periods begin and end is therefore not equivalent to the opportunity for those workers to freely determine when their working time begins and ends.

44 Furthermore, and even assuming that certain phases of inactivity, within the 24 hour periods during which the 'relief parents' are responsible for the children's home may be regarded not as working time but as rest periods, within the meaning of Article 2(2) of Directive 2003/88, in so far as, as indicated by SOS-Lapsikylä ry at the hearing without being contradicted on that point, the 'relief parents', although they must remain contactable at all times, are authorised to leave their place of work where the children they are responsible for are occupied outdoors the house, the possibility to leave their place of work concerns only part of their daily schedule and appears to be determined not by the 'relief parents' themselves but by the hours when the children are absent. Thus, that particularity of the working time of 'relief parents' cannot lead to the conclusion that their working time as a whole is not measured or pre-determined or that it is entirely determined by the 'relief parents' themselves.

45 It follows from the foregoing that, having regard to the information before the Court, in circumstances such as those in the main proceedings, there is no evidence that the paid work of 'relief parents' may fall within the scope of application of Article 17(1) of directive 2003/88. Therefore, it does not appear

necessary to determine also whether the activity of the 'relief parents' may be treated, from other points of view, to one of the three activities cited as examples in that article and, more specifically, to 'family work' referred to in Article 17(1)(b) thereof.

46 In any event, as the Advocate General observes in points 72 to 80 of his Opinion, the 'relief parents' cannot be regarded as 'family workers' as they are not covered by the exception referred to in Article 17(1)(b) of Directive 2003/88.

47 Such a derogation which must be strictly interpreted, as stated in paragraph 31 of the present judgment, refers exclusively to work carried out in a context in which the employment relationship between the employer and its employees is a family relationship. In such a context, characterised by a personal relationship of trust and confidence between the parties, it must be acknowledged that the working time as a whole is not measured or predetermined, or that it is determined by the family member employed.

48 However, the mere fact that the activity concerned is similar, in principle, to the care provided and personal relationships fostered by parents with regard to their children does not bring that activity within the exception laid down by Article 17(1)(b) of Directive 2003/88.

49 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 17(1) of Directive 2003/88 must be interpreted as meaning that it cannot apply to paid work, such as that at issue in the main proceedings, which consists in caring for children in a family-like environment, relieving the person principally responsible for that task, where it is not established that the working time as a whole is not measured or predetermined or it may be determined by the worker himself, which is for the national court to ascertain.

Costs

50 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 (Fourth Chamber) hereby rules:

Article 17(1) 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 must be interpreted as meaning that it cannot apply to paid work, such as that at issue in the main proceedings, which consists in caring for children in a family-like environment, relieving the person principally responsible for that task, where it is not established that the working time as a whole is not measured or predetermined or it may be determined by the worker himself, which is for the national court to ascertain.

[Signatures]