JUDGMENT OF THE COURT
16 December 2015*

(Directive 2003/88/EC – Working time – Protection of the safety and health of workers – Organisation of working time – Rest periods – Maximum weekly working time – Derogations from minimum rest periods – Workers' consent – Detriment)

In Case E-5/15,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Eidsivating Court of Appeal (*Eidsivating lagmannsrett*), in the case between

Matja Kumba T M'bye and Others

and

Stiftelsen Fossumkollektivet,

concerning the interpretation of Article 6 and Article 22(1)(a) and (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 (OJ 2003 L 299, p. 9),

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Matja Kumba T M'bye and Others ("the appellants"), represented by Lornts N. Nagelhus, advokat;

- Stiftelsen Fossumkollektivet ("the respondent"), represented by Vegard Lien, advokat, and Helene Wegner, advokat;

* Language of the request: Norwegian.

- the European Commission ("the Commission"), represented by Michel van Beek, member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of the appellants, represented by Lornts N. Nagelhus; the respondent, represented by Vegard Lien, advokat, and Merete Furesund, advokat; the EFTA Surveillance Authority ("ESA"), represented by Maria Moustakali, Senior Officer, and Øyvind Bø, Officer, acting as Agents; the Commission, represented by Manuel Kellerbauer, acting as Agent; the Government of Norway, represented by Ida Thue, attorney, acting as Agent, at the hearing on 29 September 2015,

gives the following

Judgment

I Legal background

EEA law

1 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 ("the Directive") was incorporated into Annex XVIII to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") at point 32h by Decision of the EEA Joint Committee No 45/2004 of 23 April 2004 (OJ 2004 L 277, p. 12, and EEA Supplement 2004 No 43, p. 11).

2 The preamble to the Directive contains, inter alia, the following recitals:

> *(1) Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time, which lays down minimum safety and health requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work, has been significantly amended. In order to clarify matters, a codification of the provisions in question should be drawn up.*
>
> *(2) Article 137 of the Treaty provides that the Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety. Directives adopted on the basis of that Article are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.*

(3) The provisions of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work remain fully applicable to the areas covered by this Directive without prejudice to more stringent and/or specific provisions contained herein.

(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. The concept of 'rest' must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.

...

(11) Specific working conditions may have detrimental effects on the safety and health of workers. The organisation of work according to a certain pattern must take account of the general principle of adapting work to the worker.

...

(15) In view of the question likely to be raised by the organisation of working time within an undertaking, it appears desirable to provide for flexibility in the application of certain provisions of this Directive, whilst ensuring compliance with the principles of protecting the safety and health of workers.

3 Article 2 of the Directive sets out the relevant definitions, including the following:

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 3 of the Directive reads:

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.

5 Article 5 of the Directive reads:

> *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.*
>
> *If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.*

6 Article 6 of the Directive provides as follows:

> *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.*

7 Article 17 of the Directive reads:

> ...
>
> *2. Derogations provided for in paragraphs 3, 4 and 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.*
>
> *3. In accordance with paragraph 2 of this Article derogations may be made from Articles 3, 4, 5, 8 and 16:*
>
> ...
>
> *(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;*
>
> *(c) in the case of activities involving the need for continuity of service or production, particularly:*
>
> > *(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, including the activities of doctors in training, residential institutions and prisons;*

...

8 Article 22 of the Directive reads:

> *1. 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;*
>
> *...*
>
> *3. If Member States avail themselves of the options provided for in this Article, they shall forthwith inform the Commission thereof.*

National law

9 In Norway, the Directive has been implemented by Act of 17 June 2005 No 62 on the working environment, working hours and employment protection etc. (lov 17, juni 2005 om arbeidsmiljø, arbeidstid og stillingsvern mv.) ("the Act").

10 Under Chapter 10 on working time, Section 10-4 of the Act sets out the main rule that normal working hours must not exceed nine hours per 24 hours and 40 hours per seven days. The subsequent paragraphs in Section 10-4, as well as Section 10-5, provide various exceptions from this rule, but none of the exceptions allow for daily working time exceeding 13 hours or weekly working time exceeding 48 hours. Moreover, Section 10-8(1) and (2) prescribes that the worker is entitled to consecutive rest periods of 11 hours per day and 35 hours per week. Section 10-12(8) provides that if the work is of such a special nature that it would be difficult to adapt it to the provisions of that chapter, special rules may be issued. On the basis of that provision, the Ministry of Labour and Social Affairs has adopted the Temporary Regulation of 24 June 2005 No 686 on working time at institutions offering cohabitant care arrangements (*midlertidig forskrift om arbeidstid i institusioner som har medleverordninger*) ("the Cohabitant Care Regulation"). Section 15-7 of the Act provides that employees may not be dismissed unless this is objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee. In the event of a dispute concerning the legality of the dismissal, Section 15-11 provides that the employee is entitled to remain in post until the dispute has been settled.

11 Section 2 of the Cohabitant Care Regulation reads:

> *(1) The total weekly working time must not exceed 48 hours over a seven-day period. The limit of 48 hours may be calculated as the average over a six-week period.*
>
> *(2) The individual employee may consent in writing to a weekly working time of more than 48 hours; limited, however, to a maximum of 60 hours a week. The agreed weekly working time may be calculated as the average over a six-week period. Employees who have housing in or attached to an institution may give their written consent to being present for more than 60 hours a week.*
>
> *(3) Employees who do not have housing in or attached to the institution may revoke any previous consent they may have given to a working time of more than 48 hours. In such cases, the employer is obliged to offer the employee an alternative working time arrangement within the limit set in the first paragraph.*
>
> *...*

12 Section 3 of the Cohabitant Care Regulation provides that employees are entitled to at least two consecutive rest periods within a period of 24 hours. During this period the employee is exempted from work, except for unforeseen or short-term interruptions. The rest periods are for 2 hours and 8 hours, and the longest must be between 2200 hrs and 0800 hrs. If the rest periods are disrupted, employees are entitled to equivalent compensatory rest. If the nightly rest period is disrupted, the employer must ensure that the worker may sleep undisturbed the following night in addition to the compensatory rest periods.

II Facts and procedure

13 The respondent, Stiftelsen Fossumkollektivet, was established in 1983. It offers treatment for young people with drug and/or alcohol problems. The respondent has the legal form of a foundation without economic purpose. Having the capacity to treat 60 patients at a time, divided across six branches, the respondent's work is based on a collective approach. This entails that the therapists live together with their patients – a situation of cohabitation care.

14 The respondent's Solvold branch, the branch at issue in the dispute before the national court, is a treatment facility for girls with various forms of psychological difficulties in addition to drug and alcohol problems. The workers at the branch are responsible for the administration of medication to the patients and for planning the major part of the treatment and activities offered. The working day starts at 0700 hrs and silence must be maintained from 2300 hrs. In addition to the period between 2300 hrs and 0700 hrs, workers receive two hours of rest each day. Since several of the patients have mental disorders, the workers sleep in apartments at

the premises and are available at night, if required. The workers are moreover entitled to three months of paid leave every three years.

15 The treatment given to the patients at the Solvold branch differs from the treatment given in most of its other branches due to the patients' combined problems. The only other branch providing the same treatment is one for boys within the same age group.

16 The working time arrangement at the Solvold branch currently consists of three days' work followed by seven days off, then four days' work followed by seven days off ("3-7-4-7 rotation"), with 56 working hours per week on average.

17 In 2012, due to financial losses at the Solvold branch in 2009, 2011 and 2012, the respondent proposed a change in the working time arrangement to a "7-7 rotation", that is seven days of work followed by a rest period of seven days. According to the respondent, this change will enable it to reduce costs substantially. The number of workers will change from nine workers in three teams to six workers in two teams. As part of the new terms, the staff were offered an increase in annual salary of NOK 50 000, in addition to a period of three months' paid leave every third year (taking effect after two years for the Solvold branch).

18 In addition to the increase in annual salary and the three months of paid leave every third year, Fossumkollektivet would also have to invest in housing with a living room, kitchen, bedroom and bathroom, for each worker. Housing in or attached to the institution is a requirement that follows from Section 2 of the Cohabitant Care Regulation.

19 The appellants did not accept the proposed change in working time. The respondent therefore gave notice of dismissal, combined with an offer of re-engagement on different terms (a procedure known as "*endringsoppsigelse*" in Norwegian). Prior to issue of the notice, a formal discussion took place between the respondent's management, the safety representative and the local worker representative at Solvold. The workers concerned were informed about the change at a joint meeting and in individual conversations. The workers are continuing to work the "3-7-4-7 rotation" and on existing terms until the dispute regarding the legality of the notice has been settled.

20 On 6 June 2013, the appellants brought an action against the respondent claiming that the notice of dismissal with an offer of re-engagement on new terms should be declared invalid. Hedmarken tingrett (Hedmarken District Court) ruled in favour of the respondent in a judgment of 7 January 2014. The case was appealed to Eidsivating Court of Appeal which decided to request an Advisory Opinion from the Court on the interpretation of Article 6 and Article 22(1)(a) and (b) of the Directive.

21 The following questions were submitted to the Court:

1. *Is an average weekly working time of 84 hours ('7-7 rotation') in a cohabitant care arrangement in breach of Article 6, see also Article 22(1)(a), of the Working Time Directive (Directive 2003/88/EC)?*

2. *Is a national provision, under which an employee's consent to working more than 60 hours per week in a cohabitant care arrangement cannot be revoked, compatible with the rights that employees have under Article 6, see also Article 22, of the Working Time Directive?*

3. *Is dismissal following a failure to consent to a working time arrangement of more than 48 hours over a seven-day period a sanction or 'detriment' within the meaning of Article 22(1)(a), see also (b), of the Working Time Directive?*

22 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

The first question

23 By its first question, the national court asks whether, having regard to Article 22(1)(a) of the Directive, an average weekly working time of 84 hours (7-7 rotation) in a cohabitant care arrangement is in breach of Article 6 of the Directive.

Observations submitted to the Court

24 In the appellants' view, a 7-7 rotation where the employees are available for the employer in their periods of rest with no system to ensure compensatory periods of rest contravenes the Directive.

25 The appellants refer to a statement made by the Commission in its Working Paper, according to which, "even in general terms, it may be questioned, for example, whether allowing opted-out workers to work up to 78 hours per week, on average, for a prolonged period could be compatible with the health and safety principles underlying the Directive" (Commission Staff Working Paper of 21 December 2010, Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time ('The Working Time Directive') SEC(2010) 1611 final, p. 87).

26 The appellants submit that the Directive is a protective directive and that no deviation may apply to its universal and general minimum standards. Accordingly, the working time arrangements employees may consent to are limited. Furthermore, the appellants submit that an assessment to the same effect has been made by the European Committee of Social Rights (reference is made to the

European Committee of Social Rights reports for 2005 and 2006 concerning the compatibility of Norwegian legislation with the European Social Charter of 3 May 1996).

27 The appellants contend that a working time arrangement that does not ensure necessary rest periods is, in principle, incompatible with the Directive. In that regard, they rely on the judgment of the Court of Justice of the European Union ("ECJ") in Case C-428/09 *Union syndicale Solidaires Isère* [2010] ECR I-9961. The appellants argue that a "7-7 rotation" working arrangement, without ensuring a compensatory rest period, is incompatible with the Directive. The maximum hours of work over a seven-day period must be limited on the basis of health and safety considerations. Assessing this limit in relation to cohabitant staff, emphasis must be placed on the fact that their work is demanding and that they are often interrupted during their rest periods.

28 The respondent argues that a "7-7 rotation" in a cohabitant care arrangement is in conformity with Article 22(1)(a) of the Directive, taking into account the national regulation applicable and the extensive safeguards adopted to protect the health and safety of the employees. In that regard, the respondent maintains that the Cohabitant Care Regulation provides for adequate safeguards to protect the safety and health of the worker. In addition, general rules of Sections 3-1(1) and 4-1(1) of the Working Environment Act apply to ensure the workers' health and safety and the Labour Inspection Authority has found the working environment provided to be in accordance with the strict legal requirements.

29 The Commission submits that while the "individual opt-out" of Article 22 of the Directive does not set an overall limit on average weekly working time, the derogation does not allow for the non-application of the other provisions of the Directive, especially as regards minimum rest periods. The minimum daily and weekly rest periods required by the Directive add up to 90 rest hours on average of the 168 hours contained in each week. In the Commission's view, working hours cannot therefore exceed an average of 78 hours per week.

30 The fact that Section 2 of the Cohabitant Care Regulation allows employees to consent to working time in excess of 60 hours per week is not in itself incompatible with the Directive. However, since the rights ensured in Articles 3 and 5 of the Directive must be correctly applied, the average weekly working time cannot exceed 78 hours.

31 The Commission also contends that Article 17 of the Directive does not allow for derogations from Article 6. With regard to Articles 3 and 5, however, the Commission asserts that Article 17(2) requires equivalent periods of compensatory rest and that, according to settled ECJ case law, such rest periods must follow immediately after the working period that they are supposed to compensate. In that regard, it relies on Case C-151/02 *Jaeger* [2003] ECR I-8389. Article 17(2) allows for exceptions to this requirement where it is not possible, for objective reasons, to grant equivalent periods of compensatory rest. However, such exceptions have to be justified by extraordinary circumstances.

32 On balance, the Commission is of the view that a working arrangement amounting to an average weekly working time of 84 hours is incompatible with the Directive.

33 ESA's written observations were untimely and thus rejected. At the oral hearing, ESA indicated its support for the arguments of the Commission and its proposed answer in this regard.

34 Also at the oral hearing, the Norwegian Government provided its views on the cohabitant care model, explaining that a 7-7 rotation arrangement is not common in cohabitant care in Norway. Furthermore, the Government submitted that the derogations provided for in Article 17 of the Directive should, in general, be applicable to cohabitant care institutions.

Findings of the Court

35 At the outset, the Court notes that, at the oral hearing, the parties appeared to disagree on the calculation of the number of hours considered working time within the meaning of the Directive. It is therefore appropriate to consider the concept of working time under the Directive.

36 The purpose of the Directive is to lay down minimum health and safety requirements for the organisation of working time. The Directive harmonises national rules concerning, in particular, the duration of working time. Its purpose is to ensure minimum daily and weekly rest periods, breaks and maximum weekly working time.

37 As can be seen from recital 15 thereto, the Directive recognises the need for flexibility in the application of certain provisions, whilst ensuring compliance with the principles of protecting the safety and health of workers. In other words, the Directive is adaptable to the needs of certain employers due to particular circumstances of the work provided. Accordingly, the Directive provides, *inter alia*, for derogations that apply to types of work involving a special need for continuity.

38 The term 'working time' is defined in Article 2(1) of the Directive as 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. Although the definition in Article 2(1) refers to national laws or practice, that does not mean that the EEA States may unilaterally determine the scope of that concept (see, for comparison, *Jaeger*, cited above, paragraph 59).

39 Rest periods are time which is not working time, the two being mutually exclusive. Article 3 of the Directive requires the EEA States to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period. Article 5 requires that, per each seven-day period, every worker should be entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3. Taken together, Articles 3 and 5 of the Directive set out a minimum total rest period of no less than 90 hours per week. Since a week consists

of 168 hours, Articles 3 and 5 thus preclude a weekly working time that exceeds the remaining 78 hours, as the Commission has pointed out.

40 Although mutually exclusive by definition, the distinction between the two concepts may be a fine one. It will depend on a case-by-case assessment considering several factors, some of which have already been addressed in case law.

41 For example, a distinction has to be made between situations where the workers are obliged to be present at the workplace and situations where they are not. Consequently, periods in which a doctor is on call at home, but can be contacted at all times, are generally to be qualified as rest periods. Workers on call at home are usually free to manage their time with fewer constraints and pursue their own interests, even if they are considered to be at the disposal of their employer (see, for comparison, *Jaeger*, cited above, paragraph 51). When workers are able to remove themselves from the working environment during the rest periods and pursue their own interests freely and uninterrupted, the rest periods may be considered effective (see, by analogy, *Union syndicale Solidaires Isère*, cited above, paragraphs 50 and 51).

42 In the case at hand, it is for the national court to assess the amount of working time. That determination must be based on the facts of the case, in particular the nature of the appellants' work and of the rest periods, and must take into account the factors clarified above.

43 If the situation is one where the workers may sleep throughout the night in individual housing with the possibility for family members to live there with them, such a situation would differ from a scenario where a worker is on call at the premises of the employer, and with a clear prospect of having to react immediately in case of emergencies. It would be more akin to a worker, such as a doctor, on call at home and contactable at all times. Consequently, the private sphere provided improves the quality of the worker's rest. This applies in particular if the workers are normally under no obligation to work during night and may only be called upon in unforeseen situations. Finally, it appears to follow from national law that, in the event of incidents happening during the night, the worker would be compensated by receiving additional rest the following day, as laid down in Section 3 of the Cohabitant Care Regulation.

44 On the basis of the preliminary observations made above, it appears that under such a 7-7 rotation working time arrangement, the workers would generally be working from 0700 hrs to 2300 hrs. During the day, the workers would be entitled to two hours break within that period and, at night, a break of eight hours. However, time linked to the actual provision of primary care services at night would have to be regarded as working time.

45 Notwithstanding its assessment of the material facts, the national court must take into account the minimum requirements set out in the Directive. Article 6 of the Directive provides for a maximum weekly working time, including a maximum

average weekly working time of 48 hours. However, pursuant to Article 22(1) of the Directive, EEA States may choose not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers. Therefore, it is required that, if an EEA State has made use of the option provided for in Article 22(1) of the Directive, the national legislature must take due account of the physical and mental well-being of workers. Moreover, it is necessary for the employer to obtain the worker's agreement to perform such work in advance. The worker's agreement must be given expressly and freely by each worker individually as opposed to consent through collective agreement (see, for comparison, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 86). Provided that these requirements are fulfilled, the parties must be able to exercise their right to freedom of contract.

46 Article 22 of the Directive contains no specific limit on the amount of working time to which a worker may consent. However, Article 22(1) does not permit any derogation from Articles 3 and 5 of the Directive concerning rest periods. For the purposes of the present case, a possible derogation from Articles 3 and 5 of the Directive may be found in Article 17(2) and (3) of the Directive.

47 Article 17(3)(c)(i) of the Directive applies if the activity involves a need for continuity of service or production, particularly services relating to the reception, treatment and care provided by hospitals or similar establishments, including residential institutions. Consequently, Fossumkollektivet might fall within the scope of this provision.

48 However, the derogation permitted under Article 17(3)(c)(i) is subject to further requirements. Pursuant to Article 17(2) of the Directive, workers concerned have to be afforded equivalent periods of compensatory rest; or, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, appropriate protection. It is for the national court to examine the facts, in particular the nature of the institution in question and of the appellants' work there.

49 In that respect, it is necessary that Article 17 is interpreted in light of the purpose of the Directive and the aims of the exceptions provided therein. Consequently, the rights of the workers and the special needs of hospitals or similar establishments, considering especially the necessity to provide adequate, and, in particular, medically indicated care for the patients, need to be balanced.

50 If the national court finds that Fossumkollektivet falls within Article 17(3)(c)(i), the question arises whether a working arrangement such as that provided for in the Cohabitant Care Regulation fulfils the requirements set out in Article 17(2). A rest period may count as compensatory rest only if the worker is not subject to any obligation vis-à-vis the employer during such periods which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health.

51 Generally, such rest periods must therefore follow on immediately from the working time which they are supposed to counteract in order to prevent the worker from experiencing a state of fatigue or overload owing to the accumulation of consecutive periods of work (see, for comparison, *Jaeger*, cited above, paragraph 94). However, Article 17(2) provides that an exception from the obligation to grant equivalent periods of compensatory rest is permitted in exceptional cases in which it is not possible, for objective reasons, to grant such periods of rest.

52 The underpinning principle of cohabitant care is that it is perceived as beneficial for the patients to have the same therapists around for longer periods of time, thus creating an environment meant to resemble everyday family life as much as possible. The possibility cannot be ruled out that, in a situation of cohabitant care, objective reasons make it impossible to grant such periods of rest (see, for comparison, *Union syndicale Solidaires Isère*, cited above, paragraph 57). That may particularly be so in cases concerning cohabitant care of patients in hospitals and similar institutions.

53 In light of the above, the answer to the first question must be that a working time amounting to an average of 84 hours per week in a cohabitant care arrangement is compatible with Article 6 of the Directive, in circumstances governed by Article 22(1)(a), provided that the worker has explicitly, freely and individually agreed to perform such work, and the general principles of the protection of the safety and health of the worker are observed. This entails that where an EEA State makes use of the option provided for in Article 22(1) of the Directive, the national legislature must take due account of the physical and mental well-being of workers. However, such a working time arrangement is only compatible with Articles 3 and 5 of the Directive if the conditions for the application of the derogation in Article 17(2), in conjunction with Article 17(3)(c)(i), are fulfilled.

The second question

54 By its second question, the national court asks whether a national provision under which a worker's consent to working more than 60 hours per week in a cohabitant care arrangement cannot be revoked is compatible with Articles 6 and 22 of the Directive.

Observations submitted to the Court

55 The appellants submit that, according to ECJ case law, an employee's consent to work more than 48 hours per week, as provided for in Article 22(1) of the Directive, must be explicit, free and informed. In that regard, the appellants rely on *Pfeiffer and Others*, cited above, and Case C-243/09 *Günter Fuß I* [2010] ECR I-9849. Further, they claim that it would be incompatible with the Directive for an employer to respond to an employee's claim to his rights under Article 6(b) of the Directive by placing the employee at a disadvantage.

56 In the appellants' view, the protective element of the Directive would be undermined if an employee could waive indefinitely the protection afforded by

Article 6(b) of the Directive, without any possibility of withdrawing such consent. An irrevocable consent cannot be considered to have been given freely, as required by EEA law.

57 The appellants maintain that, in relation to the rights established by Article 6 of the Directive, Article 22(1)(a) and (b) requires an employee's consent to be revocable and that such revocation may not result in unfavourable treatment of the employee.

58 In the respondent's view, the Cohabitant Care Regulation fully implements the consent requirement set out in Article 22(1)(a) of the Directive. Section 2(2) of the Cohabitant Care Regulation requires the employee to give written consent in order to work more than 48 hours per week. In addition, provided that employees are offered housing in or attached to the institution, written consent may be given to being present more than 60 hours a week. Furthermore, to secure the employer a minimum of predictability, such consent may not be revoked when housing is provided, given the substantial employer investment this involves. Finally, the respondent contends that the wording of the Directive does not require that an approval can be revoked at any time.

59 The Commission submits that a literal reading of Section 2 of the Cohabitant Care Regulation, which provides that "employees who do not have housing in or attached to the institution may revoke any previous consent they may have given to a working time of more than 48 hours", implies that the employees who do have housing in or attached to an institution might not be allowed to revoke their previous consent. In the Commission's view, this would be incompatible with the Directive.

60 Furthermore, the Commission contends that the "individual opt-out" of the Directive has to be interpreted restrictively, in light of the Directive's health and safety objectives. It would be contrary to those objectives to interpret Article 22 of the Directive such as to allow employers to have workers definitively and irrevocably forego their right to benefit from working conditions in accordance with the limit established in Article 6 of the Directive. In this regard, the Commission argues that a working relationship is a long-lasting relationship in which the circumstances of the worker, e.g. his health or family situation, may change. In the Commission's view, a worker should be able to invoke his right under Article 6 of the Directive as soon as his willingness to "opt out" is no longer present. The only possible limitation that could be placed on this right to revoke consent would be a reasonable notice period, to allow the employer enough time to reorganise work patterns.

61 At the oral hearing, ESA indicated its support for the arguments of the Commission and its proposed answer in this regard.

Findings of the Court

62 Article 22(1) of the Directive provides that an EEA State may avail itself of the option not to apply Article 6 of the Directive. In that situation, the general principles of the protection of the health and safety of workers must be respected. The concepts of health and safety should be interpreted widely as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment (compare *Jaeger*, cited above, paragraph 93 and case law cited). Moreover, the employer must in such a situation obtain the worker's agreement in advance to perform such work.

63 The Directive does not contain a provision concerning revocation of consent. It is for national law to determine whether revocation of consent is prohibited or permitted and, in the latter case, the conditions for revocation. However, a complete inability under national law to revoke consent, even in exceptional and unforeseen circumstances, may prove incompatible with the Directive, since the possibility for a worker to consent referred to in Article 22(1)(a) is expressly conditional on the EEA State respecting the general principles of the protection of the health and safety of workers. Therefore, where an EEA State makes use of the option provided for in Article 22(1) of the Directive, the national legislature must take due account of the physical and mental well-being of workers. This entails that a fair balance needs to be struck between the interests of workers and employers also when the worker has given his explicit, free and individual consent.

64 The answer to the second question must therefore be that a provision of national law, according to which a worker's consent to work more than 60 hours per week in a cohabitant care arrangement cannot be revoked, is compatible with Articles 6 and 22 of the Directive, provided that the general principles of the protection of the health and safety of workers are observed.

The third question

65 By its third question, the national court asks, in essence, whether dismissal following a failure to consent to a working time arrangement of more than 48 hours over a seven-day period constitutes a sanction or "detriment" within the meaning of Article 22(1)(b) of the Directive.

Observations submitted to the Court

66 In the appellants' view, the case law of the ECJ establishes that an employee must not be subjected to any detriment by his employer as a result of not consenting to "opt out". The appellants argue that termination of employment, as in the present case, is substantially more detrimental to an employee when invoking the right provided for in Article 6 of the Directive than a sanction by way of compulsory transfer, as was the case in *Günter Fuß I*, cited above.

67 The appellants contend further that a dismissal with an offer of re-engagement on new terms is a unilateral imposition by the employer of changed terms and

conditions of employment which contains clear elements of coercion. Consequently, Article 22(1)(b) of the Directive is violated when the consequence of not consenting to a new working time arrangement is notice of termination of the employment relationship.

68 The respondent maintains that in the present case the dismissals with offers of re-engagement were not based on the employees' refusal to accept the new working arrangement, but on the critical economic situation of the respondent's Solvold branch. Therefore, the appellants were not "subject to any detriment" within the meaning of Article 22(1)(b) of the Directive. Furthermore, the respondent argues that it is for the national court to decide whether a dismissal may be effected due to financial circumstances.

69 The respondent submits further that, irrespective of the appellants' willingness to consent to longer working hours, the employment contracts at its Solvold branch would have been changed due to its financial situation. As an attempt to save the jobs at the branch, the employees were offered re-engagement on new terms which they were at liberty to accept or refuse.

70 As regards the appellants' reference to *Günter Fuß I*, cited above, the respondent contends that that case did not concern the question whether the applicant had suffered a detriment by his transfer to a different job.

71 Finally, the respondent maintains that the appellants' position in the present case would damage the cooperation between the two sides of the industry, which generally seek to reach an amicable agreement before an employer resorts to unilateral changes. Were dismissals after unsuccessful consultations to be regarded automatically as a detriment to the worker and therefore incompatible with Article 22(1)(b) of the Directive, employers would be forced to move directly to dismissals without consultations. Moreover, in many cases, the only measure available to the employer would be to declare bankruptcy.

72 According to the Commission, it is clear from Article 22(1)(b) of the Directive that use of the "opt-out" is conditional on guaranteeing that a worker is not subjected to any detriment by his employer because he does not agree to perform the work. It therefore is not compatible with the Directive for a worker to be dismissed following such a refusal. Whether the worker has previously worked under an "individual opt-out" is irrelevant, since the worker is entitled to revoke this consent at any time on the basis of Article 22 of the Directive.

73 The Commission contends that this conclusion is supported by the case law of the ECJ, where it was found that a sanction consisting in the compulsory transfer of a worker refusing to work more than 48 hours a week was incompatible with the Directive. In that regard, it relies on *Günter Fuß I*, cited above, paragraphs 66 and 67. The Commission considers that the same must apply where the sanction is even worse, i.e. dismissal, as in the present case.

74 At the oral hearing, ESA indicated its support for the arguments of the Commission and its proposed answer in this regard.

Findings of the Court

75 If an EEA State has availed itself of its option not to apply Article 6 of the Directive, the worker's agreement to perform work in excess of 48 hours over a seven-day period must be obtained in advance. It follows from Article 22(1)(b) of the Directive that no worker should be subjected to any detriment by his employer because he is not willing to give his agreement to perform such work.

76 A worker should typically be regarded as the weaker party in an employment relationship. It is therefore necessary to prevent the employer from imposing on him illegal restrictions on his rights (see, for comparison, *Pfeiffer and Others*, cited above, paragraph 82, and Case C-429/09 *Günter Fuß II* [2010] ECR I-12167, paragraph 80). On account of that position of weakness, a worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where to do 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 (see, for comparison, *Günter Fuß II*, cited above, paragraph 81).

77 Typically, a dismissal due to a failure to consent to a working time arrangement of more than 48 hours over a seven-day period constitutes a "detriment" within the meaning of Article 22(1)(b) of the Directive.

78 However, this is likely not to be the case if national law provides for a system of termination of employment contracts which permits the termination for reasons which are fully independent of a worker's refusal to agree to perform such additional work, within the meaning of Article 22(1)(b) of the Directive, or, alternatively, permits the employer – as a less intrusive measure – to provisionally declare the termination of the employment if the worker refuses to consent to a lawful amendment to the working arrangement. In the present case, the respondent appears to have made use of a kind of conditional dismissal provided for in national law (known as "*endringsoppsigelse*" in Norwegian). Under this procedure, an employer may notify a termination of the employment contract and offer to the worker re-engagement on new terms. It would appear that this unilateral legal procedure must respect the terms for dismissal, specifically that fair grounds for termination must be demonstrated. Prior to notification, the employer must engage in formal discussions with the worker, the safety representative and the worker's representative. The worker may challenge the legality of the notice before the courts. The worker is entitled to work under existing terms until the legality of the notice is finally settled.

79 In the present case, the workers apparently declined to accept the new terms offered. According to the respondent, the offer was a consequence of the financial losses in recent years. The respondent may have followed the national law procedures for consultation and negotiation, without managing to convince the workers to accept the new terms and rotation. In such a situation, an employer may

introduce the changes considered necessary by means of giving notice of dismissal combined with an offer of re-engagement on new terms. Whether the conditions for making use of such a procedure in order to introduce the new terms are satisfied is for the referring court to decide in accordance with national law.

80 If under national law the new terms can be justified on the basis of the financial situation of the Solvold branch, the terms are based on urgent operational requirements and therefore independent of the workers' refusal to agree to perform such additional work. In that instance, the new terms cannot be considered detrimental within the meaning of the Directive. Instead, the offer of new terms will then be a legal reflection of the employer's difficult financial situation. On the other hand, should the national court conclude that the conditions under national law are not fulfilled, the dismissal and offer of re-engagement on new terms would amount to a detriment for the purposes of Article 22(1)(b) of the Directive.

81 The answer to the third question must therefore be that a notice of dismissal and offer of re-engagement on new terms, following a refusal by a worker to agree to a working time arrangement of more than 48 hours over a seven-day period, is not to be considered a detriment within the meaning of Article 22(1)(b) of the Directive if the termination of the employment is based upon reasons that are fully independent of the worker's refusal to agree to perform such additional work.

IV Costs

82 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Eidsivating Court of Appeal hereby gives the following Advisory Opinion:

1. **A working time amounting to an average of 84 hours per week in a cohabitant care arrangement is compatible with Article 6 of Directive 2003/88/EC, in circumstances governed by Article 22(1)(a), provided that the worker has explicitly, freely and individually agreed to perform such work, and the general principles of the protection of the safety and health of the worker are observed. This entails that where an EEA State makes use of the option provided for in Article 22(1) of the Directive, the national legislature must take due account of the physical and mental well-being of workers. However, such a working time arrangement is only compatible with Articles 3 and 5 of the Directive if the**

conditions for the application of the derogation in Article 17(2), in conjunction with Article 17(3)(c)(i), are fulfilled.

2. **A provision of national law, according to which a worker's consent to work more than 60 hours per week in a cohabitant care arrangement cannot be revoked, is compatible with Articles 6 and 22 of the Directive, provided that the general principles of the protection of the safety and health of workers are observed.**

3. **A notice of dismissal and offer of re-engagement on new terms, following a refusal by a worker to agree to a working time arrangement of more than 48 hours over a seven-day period, is not to be considered a detriment within the meaning of Article 22(1)(b) of the Directive if the termination of the employment is based upon reasons that are fully independent of the worker's refusal to agree to perform such additional work.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 16 December 2015.

Gunnar Selvik
Registrar

Carl Baudenbacher
President