REPORT FOR THE HEARING

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 lagmannsrett (Eidsivating Court of Appeal), in the case of

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.[1]

I Introduction

1. By a letter of 11 February 2015, registered at the Court on 13 February 2015, Eidsivating lagmannsrett (Eidsivating Court of Appeal) made a request for an Advisory Opinion in a case pending before it between Matja Kumba T M'bye and Others ("the appellants") and Stiftelsen Fossumkollektivet ("the respondent").

2. The case before Eidsivating lagmannsrett concerns the validity of four dismissals with offers of re-engagement on new terms by the Solvold branch of the respondent. The appellants seek a ruling by the Court of Appeal that the dismissals were invalid.

[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, OJ 2003 L 299, p. 9, as incorporated into the EEA Agreement at point 32h of Annex XVIII.

II Legal background

EEA law

3. 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 Working Time Directive" or "the Directive"), is incorporated into the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") at point 32h of Annex XVIII to the Agreement.

4. The preamble to the Working Time 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. Article 2 of the Working Time 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;*

6. Article 3 of the Working Time 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.

7. Article 5 of the Working Time 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.

8. Article 6 of the Working Time 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.

9. Article 22 of the Working Time 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;

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

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

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

...

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

National law

10. In Norway, the Working Time Directive has been implemented by Act of 17 June 2005 No 62 on the working environment, working hours and employment protection etc.[2] ("the Working Environment Act") and by a temporary Regulation of 24 June 2005 No 686 on working time at institutions offering cohabitant care arrangements[3] ("the Cohabitant Care Regulation").

11. Section 3-1(1) of the Working Environment Act reads:

In order to safeguard the employees' health, environment and safety, the employer shall ensure that systematic health, environment and safety work is performed at all levels of the undertaking. This shall be carried out in cooperation with the employees and their elected representatives.

12. Section 4-1(1) of the Working Environment Act provides as follows:

The working environment in the undertaking shall be fully satisfactory when the factors in the working environment that may influence the employees' physical and mental health and welfare are judged separately and collectively. The standard of safety, health and working environment shall be continuously developed and improved in accordance with developments in society.

13. Section 10-4(1) of the Working Environment Act sets out the main rule regarding maximum working hours per week. The provision reads as follows:

Normal working hours must not exceed nine hours per 24 hours and 40 hours per seven days.

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2 *Lov om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven)*, LOV-2005-06-17-62.

3 *Midlertidig forskrift om arbeidstid i institusjoner som har medleverordninger*, FOR-2005-06-24-686.

14. Section 10-5(1) of the Working Environment Act reads:

The employer and the employee may in writing agree that normal working hours may be arranged in such a way that, on average, during a period not exceeding 52 weeks, they are no longer than prescribed by section 10-4, but that the total working hours do not exceed nine hours per 24 hours and 48 hours per seven days. ...

15. Section 10-12(8) of the Working Environment Act reads as follows:

If the work is of such a special nature that it would be difficult to adapt it to the provisions of this chapter, the Ministry may by regulation issue special rules providing exceptions from these provisions.

16. Section 15-7(1) of the Working Environment Act provides as follows:

Employees may not be dismissed unless this is objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee.

17. Section 15-11(1) of the Working Environment Act reads:

In the event of a dispute concerning whether an employment relationship has been legally terminated pursuant to the provisions of section 15-7, an employee may remain in the post as long as negotiations are in progress pursuant to section 17-3.

18. 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.

III Facts and procedure

19. The respondent, which was established in 1983, offers treatment for young people with drug and/or alcohol problems. It is organized as a trust or foundation without an

economic purpose. Having the capacity to treat 60 patients at a time, divided across six branches, the respondent's work is based on the "collective" approach, which means that the therapists live together with their patients (a situation of cohabitation care).

20. At the time of dismissal, the appellants were employed at the respondent's Solvold branch. The Solvold branch is a treatment facility for girls with drug and alcohol problems combined with various forms of psychological problems. It has the capacity to treat seven patients between the age of 15 and 25. The employees at the branch are responsible for administering medication to the patients and for planning and organising the major part of the treatment and activities offered. The working day starts at 7:00 and silence must be maintained as of 23:00. Within that framework the employees are allowed two hours off each day. Since several of the patients have mental disorders, the employees sleep in the same buildings as the patients and are available to work at night if required. The employees are entitled to three months of paid leave every three years.

21. The treatment given to the patients at the respondent's Solvold branch differs from the treatment given in most of its other branches since the patients have combined problems for which they need to be medicated. The only other branch providing the same treatment is a branch for boys within the same age group.

22. Before the dismissals with offers of re-engagement on new terms, the working time arrangement at the respondent's Solvold branch consisted 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. In 2012, due to extensive losses of the Solvold branch in 2009, 2011 and 2012, the respondent proposed a change in the working time arrangement to a so called "7-7 rotation" consisting of seven days of work followed by seven days off. According to the respondent, such a change would enable it to reduce the number of employees from three teams to two teams, each consisting of three persons. It is undisputed by the parties that a "7-7 rotation" entails an average working time of approximately 84 hours per week, and an active working time of more than 48 hours a week. In conjunction with the offer of re-engagement on new terms, the staff were also 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).

23. The appellants did not accept the proposed change in working time. They were therefore dismissed from their employment by the respondent, which offered them re-engagement subject to the aforementioned change in working time. Prior to the dismissals a formal discussion took place between the respondent's management and the relevant employee representatives. In addition, the employees were informed about the change at a joint meeting and in individual conversations.

24. On 6 June 2013, the appellants brought an action against the respondent to have the dismissals with offers of re-engagement on new terms 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 lagmannsrett which decided to seek an Advisory Opinion from the Court on the interpretation of Article 6 and Article 22(1)(a) and (b) of the Working Time Directive.

25. 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?

IV Written observations

26. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

– the appellants, Matja Kumba T M'bye and Others, represented by advokat Lornts N. Nagelhus;

– the respondent, Stiftelsen Fossumkollektivet, represented by advokat Vegard Lien and advokat Helene Wegner;

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

27. Written observations from the EFTA Surveillance Authority ("ESA") were registered at the Court on 5 May 2015, one day after the expiry of the time limit for doing so, without having previously either sought and obtained the extension of that time limit or stated any circumstances excusing its non-observance. Consequently, the observations were rejected as out of time.

V Summary of the arguments submitted

The first question

The appellants

28. In the appellants' view, the new working time arrangement at the respondent's Solvold branch is in breach of the requirements of both Norwegian and EEA law that working time arrangements must be justifiable and that the number of working hours must have an upper limit.

29. The appellants refer to the statement made by the European Commission in its Working Paper that "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".[4]

30. The appellants submit that the Working Time Directive is a protective directive and that its universal and general minimum standards cannot be deviated from under any circumstances. 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.[5]

31. With reference to case law of the Court of Justice of the European Union ("the ECJ"), the appellants contend that a working time arrangement that does not ensure necessary rest periods is, in principle, incompatible with the Working Time Directive.[6] Accordingly, a 7-7 rotation working arrangement without ensuring a compensatory rest period is incompatible with the Directive. The appellants point out that 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 they are often interrupted during their rest periods.

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[4] Reference is made to 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 – Accompanying document to the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time (the 'Working Time Directive'), COM(2010) 802 final, p. 87.

[5] 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.

[6] Reference is made to Case C-428/09 *Union syndicale Solidaires Isère* v *Premier ministre and Others* [2010] ECR I-9961.

32. Moreover, the appellants refer to the statement made by the European Commission in its Working Paper that, pursuant to Article 22(1)(a) of the Directive, consent must be "explicit, free and informed".[7] For that reason, the Working Time Directive protects employees against having to consent to working more than 48 hours over a seven-day period in order to remain in the employment relationship. The appellants submit that consent given under the circumstances of the present case cannot be regarded as "explicit, free and informed" and therefore it is not in accordance with Article 22(1)(a).

33. The appellants propose that the Court should answer the first question as follows:

> *Article 6, cf. Article 22(1)(a), 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 precludes a working time arrangement amounting to an average of 84 hours, where the arrangement entails working for 168 hours during a seven-day period followed by a period of seven days off, and where the employees are also available to the employer in the workplace during their rest periods.*

The respondent

34. The respondent argues that the scope of application of the Cohabitant Care Regulation is narrow and that there are very few cases where exceptions from the working time rules set out in the Working Environment Act are applicable. In such situations the interests of the patients prevail and justify longer shifts. The respondent submits that it has met the conditions on written consent and adequate housing set out in Section 2 of the Cohabitant Care Regulation.

35. The respondent maintains that the Cohabitant Care Regulation provides for adequate safeguards to protect the safety and health of the worker. In addition, the respondent points out that the 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 that the Labour Inspection Authority has found the working environment provided to be in accordance with the strict legal requirements.

36. The respondent refers to a study commissioned by the Norwegian Government evaluating the Cohabitant Care Regulation stating that employees are, in general, content working long shifts and believe that cohabitant care improves the therapeutic work provided, in addition to giving longer periods of time off and a higher salary.[8]

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[7] Reference is made to Commission Staff Working Paper of 21 December 2010, cited above.

[8] Report published on 29 December 2014 by the independent research foundation Fafo and authored by Dag Olberg and Karen-Sofie Pettersen. Norwegian title: Arbeidstid i barneverninstitusjonene. Praktisering og regulering. Accessible in Norwegian on Fafo's website at: http://www.fafo.no/images/pub/2015/20406.pdf

37. In the respondent's view, a 7-7 rotation in a cohabitant care arrangement is in conformity with Article 22(1)(a) of the Working Time Directive, taking into account the national regulation applicable and the extensive safeguards adopted to protect the health and safety of the employees.

38. The respondent proposes that the Court should answer the first question as follows:

> *Provided that the safety and health of the workers are protected and that the conditions of the Working Time Directive Article 22(1)(a) to (e) are fulfilled, an average weekly working time of 84 hours in a cohabitant care arrangement is not in breach of Article 22, cf. Article 6 of the Working Time Directive.*

The Commission

39. The Commission submits that while the "individual opt-out" of Article 22 of the Working Time 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 can therefore not exceed an average of 78 hours per week.

40. In the Commission's view, the fact that Section 2 of the Cohabitant Care Regulation allows employees to consent to working time in excess of 60 hours a week is not in itself incompatible with the Working Time Directive. However, since the rights ensured in Article 3 and Article 5 of the Working Time Directive must be correctly applied, the average weekly working time cannot exceed 78 hours.

41. In accordance with the above, the Commission is of the view that a working arrangement amounting to an average weekly working time of 84 hours is incompatible with the Working Time Directive.

42. Therefore, the Commission proposes that the Court should answer the first question as follows:

> *An average weekly working time of 84 hours ("7-7 rotation") is not compatible with Article 6 juncto Article 22(1)(a) of the Working Time Directive.*

The second question

The appellants

43. The appellants submit that, according to the case law of the ECJ, an employee's consent to work more than 48 hours per week, as provided for in Article 22(1) of the

Working Time Directive, must be explicit, free and informed.[9] Furthermore, it would be incompatible with the Directive for the employer to respond to an employee's claim for compliance with Article 6(b) of the Directive by placing the employee at a disadvantage.

44. In the appellants' view, the protective element of the Directive would be severely undermined if an employee could waive indefinitely the protection afforded by Article 6(b) of the Working Time Directive, without any possibility of withdrawing such consent. An irrevocable consent cannot be considered to have been given freely, as required by EEA law.

45. In light of the above, the appellants maintain that Article 22(1)(a) and (b), cf. Article 6, of the Working Time Directive requires an employee's consent to be revocable and that such revocation may not result in unfavourable treatment of the employee.

46. The appellants therefore propose the following answer to the second question:

> *Article 6, cf. Article 22(1)(a), 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 shall be interpreted to mean that it precludes making consent to work more than the maximum number of hours provided for in Article 6(b) irrevocable.*
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> *Article 6, cf. Article 22(1)(a), also precludes a national provision under which an employee who has agreed to work more than an average of 48 hours over a seven-day period is denied the option of subsequently invoking his/her rights under Article 6(b).*

The respondent

47. In the respondent's view, the Cohabitant Care Regulation fully implements the consent requirement set out in Article 22(1)(a) of the Working Time Directive. Section 2(2) of the 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 Working Time Directive does not require that an approval can be revoked at any time.

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[9] Reference is made to Joined Cases C-397/01 to C-403/01 *Bernard Pfeiffer and Others* v *Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835 and Case C-243/09 *Günter Fuß* v *Stadt Halle* [2010] ECR I-9849.

48. In light of the above, the respondent proposes that the Court should answer the second question as follows:

> *The Working Time Directive Article 22(1)(a) cannot be interpreted as precluding legislation of a Member State which lays down that an employee's consent to working more than 48 hours per week in cohabitant care arrangement cannot be revoked.*

The Commission

49. 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 consent previously given. In the Commission's view, this would be incompatible with the Working Time Directive.

50. Furthermore, the Commission points out that the "individual opt-out" of the Working Time Directive has to be interpreted restrictively, in light of the health and safety objectives of the Directive. It would be contrary to those objectives to interpret Article 22 of the Working Time 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 provided in Article 6 of the Directive. 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.

51. In light of the above, the Commission proposes that the Court should answer the second question as follows:

> *A provision of national law under which a worker's consent to work in excess of 60 hours per week cannot be revoked is not compatible with Article 6 juncto 22 of the Working Time Directive.*

The third question

The appellants

52. In the appellants' view, the judgment of the ECJ in *Günter Fuß*[10] clearly established that an employee must not be subjected to any detriment by his employer as a result of not

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[10] Reference is made to *Günter Fuß*, cited above, and Commission Staff Working Paper of 21 December 2010, cited above, p. 86.

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 Working Time Directive than a sanction by way of compulsory transfer, as was the case in *Günter Fuß*.

53. The appellants contend 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, it clearly violates Article 22(1)(b) of the Working Time Directive, when the consequence of not consenting to a new working time arrangement is to be given notice of termination of the employment relationship.

54. The appellants propose that the Court should answer the third question as follows:

> *Article 22(1)(a), cf. (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 shall be interpreted to mean that it precludes an employer from responding to an employee who does not consent to working more than the maximum number of hours provided for in Article 6(b) by terminating the employment relationship. In this connection, it is of no consequence that the dismissal is accompanied by an offer of re-engagement in the same position as long as the terms of the offer are less attractive as regards working hours.*

The respondent

55. 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 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 Working Time Directive. Furthermore, the respondent argues that it is for the national courts to decide whether a dismissal may be effected due to financial circumstances.

56. In that regard, the respondent submits 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.

57. As regards the appellants’ reference to *Günter Fuß*, the respondent observes that in that case whether the applicant had suffered a detriment by his transfer to a different job was not an issue.

58. 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 Working Time 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.

59. Therefore, the respondent proposes the following answer to the third question:

> *The Working Time Directive Article 22(1)(b) cannot be interpreted as precluding a dismissal due to the economic situation of the employer, following unsuccessful consultations between the parties regarding a change of rotation leading to an increase of weekly working time exceeding 48 hours.*

The Commission

60. The Commission submits that Article 22(1)(b) of the Working Time Directive clearly provides that 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. In the Commission's view, it is not compatible with the Directive for a worker to be dismissed following such a refusal. It is irrelevant whether the worker has previously worked under an "individual opt-out", since the worker is entitled to revoke this consent at any time on the basis of Article 22 of the Directive.

61. The Commission is of the view that this conclusion is fully 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 Working Time Directive.[11] The Commission considers that the same must apply where the sanction is even worse, i.e. dismissal, as in the present case.

62. The Commission proposes that the third question should be answered as follows:

> *Dismissal following a failure to consent to a working time arrangement of more than 48 hours over a seven-day period is a "detriment" within the meaning of Article 22(1) of the Working Time Directive. It is therefore not compatible with the Working Time Directive.*

Páll Hreinsson
Judge-Rapporteur

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[11] Reference is made to *Günter Fuß*, cited above, paragraphs 66 and 67.