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Judgment in Case E-5/15 *Matja Kumba T M'bye and Others* v *Stiftelsen Fossumkollektivet*

MINIMUM REST PERIODS AND MAXIMUM WEEKLY WORKING TIME

In a judgment delivered today, the Court answered the questions referred to it by Eidsivating Court of Appeal (*Eidsivating lagmannsrett*), on the interpretation 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 ("the Directive").

The respondent, Stiftelsen Fossumkollektivet, offers treatment for young people with drug and/or alcohol problems. The appellants are workers at its Solvold branch, where girls with various forms of psychological difficulties in addition to drug and alcohol problems are treated in a cohabitant care arrangement. The dispute before the national court concerns a proposed change in working time that the appellants did not accept, which led to notices of dismissal with offers of re-engagement on new terms. The appellants brought an action against the respondent claiming that the notices of dismissal should be declared invalid.

The questions referred by the national court concern, firstly, whether an average weekly working time of 84 hours (7-7 rotation) in a cohabitant care arrangement constitutes a breach of Article 6 of the Directive, secondly, whether 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, is compatible with the rights that employees have under the Directive, and thirdly, whether a dismissal following 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 the Directive.

With regard to the first question, the Court noted that it is for the national court to assess the amount of working time in the case at hand, taking into account the factors clarified by the Court. 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.

With regard to the second question, the Court noted that the Directive does not contain a provision concerning revocation of consent. It is for national law to determine whether such revocation of consent is possible. However, a complete inability to revoke consent, even in exceptional and unforeseen circumstances, may prove incompatible with the Directive, since the possibility for a worker to consent to exceeding the maximum weekly working time is expressly conditional on the EEA State respecting the general principles of the protection of the health and safety of workers, cf. Article 22(1)(a) of the Directive. 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. Consequently, 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.

With regard to the third question, the Court noted that, 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". However, 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" 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.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.