However, a dismissal decision may not be in breach of Article 10(1) if the employer can provide substantiated grounds for the dismissal (unconnected with the pregnancy) in writing and the dismissal is permitted under national legislation and/or practice. A dismissal which results from a collective redundancy procedure within the meaning of Directive 98/59 – and which is not related to the individual workers – is covered by the exceptional situations referred to in Article 10(1) of Directive 92/85.

As for the second (rephrased) question, Article 10(2) of Directive 92/85 requires employers to cite substantiated grounds for the dismissal of a pregnant worker and to inform the worker of the reasons, not related to that worker, for making collective redundancies within the meaning of Article 1(1)(a) of Directive 98/59. Those reasons can be, inter alia, economic, technical or relating to the undertaking's organisation or production. In addition, the employer must inform the pregnant worker of the objective criteria chosen to identify the workers to be made redundant.
Directive 92/85 precludes national legislation which does not prohibit the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding, as a preventative measure, but only provides for such a dismissal to be declared void when it is unlawful. Article 10 of Directive 92/85 makes an express distinction between protection against dismissal as a preventative measure and protection from the consequences of dismissal. Member States are required to establish such 'double protection'. Preventive protection is of particular importance in the context of Directive 92/85, because of the harmful effects which the risk of dismissal may have on the physical and mental state of pregnant workers, including the particularly serious risk that a pregnant worker may be prompted to terminate her pregnancy. This concern is addressed by the prohibition of dismissal. On that basis, the ECJ considered that protection by way of reparation, even if it leads to the reintegration of the dismissed worker and the payment of wages not received because of dismissal, cannot replace preventative protection. As a result, Member States cannot confine themselves to providing, by way of reparation, only for such a dismissal to be declared void when it is not justified.

Finally, Directive 92/85 does not preclude national legislation which in the context of a collective redundancy makes no provision for pregnant workers and workers who have recently given birth or who are breastfeeding to be afforded, prior to that dismissal, priority status in relation to either being retained or redeployed. Directive 92/85 does not require Member States to provide for such a priority status. Nevertheless, since the directive contains only minimum requirements, Member States are free to grant higher protection to pregnant workers and workers who have recently given birth or are breastfeeding.

Ruling

Article 10(1) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as not precluding national legislation which permits the dismissal of a pregnant worker because of a collective redundancy within the meaning of Article 1(1)(a) of Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

Article 10(2) of Directive 92/85 must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal, provided that the objective criteria chosen to identify the workers to be made redundant are cited.

Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which does not prohibit, in principle, the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful.

Article 10(1) of Directive 92/85 must be interpreted as not precluding national legislation which, in the context of a collective redundancy within the meaning of Directive 98/59, makes no provision for pregnant workers and workers who have recently given birth or who are breastfeeding to be afforded, prior to that dismissal, priority status in relation to being either retained or redeployed, but as not excluding the right of Member States to provide for a higher level of protection for such workers.

ECJ 21 February 2018, case C-518/15 (Matzak), Working time

Ville de Nivelles – v – Rudy Matzak, French case

Summary

The stand-by time of a volunteer firefighter at home who is obliged to respond to calls from his employer

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within eight minutes, must be regarded as 'working time'.

Legal framework

Article 2 of Directive 2003/88/EC (the 'Working Time Directive') defines 'working time' 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." Any period which is not working time, is considered a 'rest period' within the meaning of the Directive.

The Directive provides general principles for the organisation of working time (such as minimum rest periods). Member States are allowed to have more favourable provisions (Article 15). Further, Article 17 provides for certain derogation possibilities. The fire service is mentioned particularly (Article 17(3)(c)(iii)) as an activity involving the need for continuity of service, allowing derogation from certain articles of the Directive, but Article 2 – providing the definition of 'working time' is not one of the articles mentioned.

Facts

The fire service of the town of Nivelles (Belgium) groups together professional firefighters and volunteer firefighters. Volunteer firefighters are both on stand-by and on duty at the fire station. Mr Matzak became a volunteer firefighter in 1981. He was also employed in a private company. In 2009, Mr Matzak brought judicial proceedings against the Town of Nivelles in order to obtain, *inter alia*, compensation for his stand-by services, which according to Mr Matzak must be regarded as working time.

National proceedings

The Nivelles Labour court upheld Mr Matzak's action to a large extent. Hearing the case on appeal, the Brussels Higher Labour Court decided to refer the matter to the ECJ, as it was uncertain whether stand-by services at home could be considered as falling within the definition of working time within the meaning of the Working Time Directive.

Questions put to the ECJ

1. Must Article 17(3)(c)(iii) of the Working Time Directive be interpreted as enabling Member States to exclude certain categories of firefighters recruited by the public fire services from all the provisions transposing that Directive, including the provision that defines working time and rest periods?
2. Inasmuch as the Working Time Directive provides for only minimum requirements, must it be interpreted as not preventing the national legislature from retaining or adopting a less restrictive definition of working time?
3. Taking account of Article 153[5] TFEU and of the objectives of the Working Time Directive must Article 2 of that Directive, insofar as it defines the principal concepts used in the Directive, in particular those of working time and rest periods, be interpreted to the effect that it is not applicable to the concept of working time which serves to determine the remuneration owed in the case of home-based on-call time?
4. Does the Working Time Directive prevent home-based on-call time from being regarded as working time when, although the on-call time is undertaken at the home of the worker, the constraints on him during the on-call time (such as the duty to respond to calls from his employer within eight minutes) very significantly restrict the opportunities to undertake other activities?'

ECJ's findings

The first question – is derogation possible, including from Article 2? – is answered in the negative. The very wording of Article 17 does not allow derogation from Article 2 (Article 17 lists some articles from which Member States can derogate, but Article 2 is not one of them).

The second question is also answered in the negative. Even though the Directive provides for the power of Member States to apply or introduce provisions more favourable to the protection of the safety and health of workers (Article 15), that power does not apply to the definition of the concept of 'working time'. That finding is borne out by the purpose of the Working Time Directive, which seeks to ensure that definitions provided therein may not be interpreted differently according to the law of Member States. However, Member States remain free to adopt in their national legislation provisions providing for periods of working time and rest periods which are more favourable to workers than those laid down in the Working Time Directive.

While answering the third question, the Court noted that the Directive does not deal with the question of worker's remuneration, as that falls outside the scope of the EU's competence by virtue of Article 153 under 5 TFEU. Thus, Member States may lay down in their national law that the remuneration of a worker during 'working time' differs from that of a worker in a 'rest period', even to the point of not granting any remuneration during that period.

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Lastly, the ECJ clarifies that stand-by must be regarded as 'working time'. The ECJ's reasoning is as follows. It was not the first time that ECJ had to rule on stand-by time and it was apparent from prior case law that the determining factor for the classification of 'working time' within the meaning of the Working Time Directive was the requirement that the worker was physically present at the place determined by the employer and available to the employer to provide services immediately in case of need. In the case at hand, Mr Matzak was not only to be contactable during his stand-by time, he was also obliged to respond to calls from his employer within eight minutes and required to be physically present at the place determined by the employer. The Court considers that even if that place was Mr Matzak's home and not his place of work, the obligation to remain physically present at the place determined by the employer and the geographical and temporal constraints resulting from the need to reach his place of work within eight minutes are such as to objectively limit the opportunities which a worker in Mr Matzak's circumstances had to devote himself to his personal and social interests. In the light of those constraints, Mr Matzak's situation differs from that of a worker who, during his stand-by duty, must simply be at his employer's disposal inasmuch as it must be possible to contact him.

Ruling

Article 17(3)(c)(iii) of the Working Time Directive must be interpreted as meaning that the Member States may not derogate, with regard to certain categories of firefighters recruited by the public fire services, from all the obligations arising from the provisions of that directive, including Article 2 thereof, which defines, in particular, the concepts of 'working time' and 'rest periods'.

Article 15 of the Working Time Directive must be interpreted as not permitting Member States to maintain or adopt a less restrictive definition of the concept of 'working time' than that laid down in Article 2 of that directive.

Article 2 of the Working Time Directive must be interpreted as not requiring Member States to determine the remuneration of periods of stand-by time such as those at issue in the main proceedings according to the prior classification of those periods as 'working time' or 'rest period'.

Article 2 of the Working Time Directive must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within eight minutes, very significantly restricting the opportunities for other activities, must be regarded as 'working time'.

ECJ 28 February 2018, case C-46/17 (John), Fixed-term work

Hubertus John – v – Freie Hansestadt Bremen, German case

Summary

The Framework Agreement on fixed-term work and the Equal Treatment (Framework) Directive do not forbid a provision that allows parties to postpone the operation of a retirement age clause in employment periods for fixed time, even if this means that they can be extended infinitely.

Legal background

The Framework Agreement on fixed-term work of 18 March 1999, which is an Annex to Council Directive 1999/70/EC contains certain provisions on fixed-term work. Clause 3 defines a fixed-term worker as an employee for whom the end of the employment contract end is based on objective conditions, such as a specific date, completing a specific task, or the occurrence of a specific event. Clause 4(1) provides that fixed-term workers shall not be treated unfavourably compared to permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds. Clause 5(1) provides that EU Member States shall take measures to limit the use of fixed-term contracts, such as having objective reasons for renewal, a maximum total duration of successive fixed-term contracts, or a maximum number of renewals. Following Clause 5(2), Member States must also determine under what conditions fixed-term contracts shall be regarded as "successive" and therefore be deemed contracts of indefinite duration.

Directive 2000/78/EC (the 'Equal Treatment Directive') establishes a general framework for equal treatment in employment and occupation. Articles 2(1) and 2(2) forbid direct and indirect discrimination, in the case of the latter, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Article 6(1) provides *inter alia* that Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including there being legitimate employment policy, labour market or vocational training objectives, and the means of achieving that aim are appropriate and

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