ECJ 20 November 2018, case C-147/17 (Sindicatul Familia), Working time and leave, Health and safety

Sindicatul Familia Constanța, Ustinia Cvas and Others – v – Direcția Generală de Asistență Socială și Protecția Copilului Constanța, Romanian case

Summary

Foster parents under an employment contract with a public authority do not fall within the scope of (Working Time) Directive 2003/88/EC.

Legal background

Directive 89/391/EEC introduced measures to encourage improvements in the safety and health of workers at work. Article 2(1) stipulates that it applies to all sectors of activity, both public and private. However, Article 2(2) states that it does not apply where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

Directive 2003/88/EC concerns the organisation of working time. It contains several provisions on working time and annual leave. Article 1(3) states that it applies to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391, without prejudice to several articles of Directive 2003/88. Article 17 of Directive 2003/88 provides for various derogation possibilities as regards the articles about working time, but not from Article 7 on annual leave.

The Romanian law on the protection and promotion of the rights of minors contains various articles about foster parents. To the extent relevant here, foster parents have an employment agreement with the Directorate-General for Social Assistance and the Protection of Minors ('Directorate-General'), under which they perform their job as foster parents. The employment contract contains several clauses typical for foster parents. In particular, it requires the work to be continuous, which implies that 'normal' regulations on working time and leave do not apply. Only when authorised by the Directorate-General, is it possible to take leave while being separated from the minor which the foster parents are taking care of.

Facts

Several foster parents and their union (Sindicatul Familia) brought an action against the Directorate-General before the Regional Court in Constanța, Romania. They claimed additional payments equal to a 100% increase of the base salary for work on weekly rest days, public holidays and other non-working days. They also claimed compensation equivalent to an allowance in lieu of paid annual leave for the years 2012–2015. The Regional Court dismissed their claim and they appealed.

The Court of Appeal noted that the use of foster parents is intended for the upbringing, care and education of the minor placed in their home. Continuity of that work must be ensured, including during weekly rest days, public holidays and non-working days, with the working hours also being determined on the basis of the needs of the child. The employment contract contains clauses to that extent, so that foster parents perform their duties on a continuous basis, except when the child is at school. This also applies during periods of annual leave. While it is possible to enjoy annual leave without the foster child – after approval of the Directorate-General – this happens very rarely.

In fact, it is very difficult to observe working time and leave regulations in this situation. Consequently, the referring court wanted to know whether these applied and therefore put preliminary questions to the ECJ.

Question

Must Article 1(3) of Directive 2003/88, read in conjunction with Article 2(2) of Directive 89/391, be interpreted as meaning that the work of a foster parent, which consists, in the context of an employment contract with a public authority, in receiving and integrating a child into their home and providing on a continuous basis for the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88?

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Consideration

As a preliminary observation, it must be held that the applicants in the main proceedings are workers within the scope of Directive 2003/88. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (*Union syndicale Solidaires Isère*, C-428/09). This implies the existence of a hierarchical relationship. All of these criteria are met in this situation. This is not called into question by the fact that foster parents have broad discretion as to the daily performance of their duties. Moreover, the fact that their work is largely comparable to the responsibilities of parents does not prevent foster parents from being workers within the meaning of Directive 2003/88.

As regards the question, first, it should be noted that Article 1(3) of Directive 2003/88 defines its scope by reference to Article 2 of Directive 89/391. The exception in Article 2(2) to its scope must be interpreted in a way that its scope is restricted to what is strictly necessary to safeguard the interests which it allows the Member States to protect.

Secondly, the concept of public service should be interpreted uniformly throughout the EU. In that regard, the exception in Article 2(2) is based on the specific nature of certain particular tasks, which justify exception to the general protection of safety and health, as the community at large must be effectively protected (*Commission – v – Spain*, C-132/04). The expression 'public service' covers persons performing tasks in the public interest forming part of the essential functions of the State, either directly attached to the State or a public authority, or through a private person under their control. This is the case with foster parents, as their work contributes to the protection of minors, which is a task in the public interest forming part of the essential functions of the State. Compared to other child protection-related activities, the specific nature results from the fact that it aims to integrate the foster child on a continuous and long-term basis into the home and family of their foster parent. Consequently, the activities are covered by the exception in the first subparagraph of Article 2(2) of Directive 89/391.

Thirdly, the ECJ has already held that such activities do not lend themselves to planning as regards working time (*Pfeiffer and Others*, C-397/01 to C-403/01). The first subparagraph of Article 2(2) of Directive 89/391 thus safeguards the efficiency of specific public service activities which must be continuous in order to ensure the effective performance of essential functions of the State (*Personalrat der Feuerwehr Hamburg*, C-52/04). The continuity requirement must be assessed by considering the specific nature of the activities.

While the continuity requirement does not prevent all activities from being planned, some activities are by nature absolutely incompatible with the planning of working time in a way that respects the requirements of Directive 2003/88. This is the case with foster parents, as they perform their activities continuously, except when the child is at school or when the Directorate-General allows them to take paid leave without the child. The work of the foster parents aims to integrate a minor, continuously and on a long-term basis, into their home and family, so that the child can develop harmoniously. This integration constitutes an appropriate measure to safeguard the best interests of the child, as enshrined in Article 24 of the Charter of Fundamental Rights of the European Union (the rights of the child). In these circumstances, regularly granting foster parents the right to be separated from their foster child (either by weekly or annual rest days) would go directly against the objective of integrating foster children. This cannot be solved by a rotation system as this undermines the special link between foster parent and foster child. Limiting working hours in accordance with Directive 2003/88 would be incompatible with the activity and, while Article 17 provides for several derogations, this is impossible as regards annual leave (Article 7). Therefore, the work of foster parents at issue in the main proceedings must be regarded as strictly precluding the application of Directive 2003/88 to such foster parents.

It should be noted that the task of foster parents is different from the task of relief parents, which was at issue in *Hälvä and Others* (C-175/16), as – in short – their working time can be planned much better (e.g. by fixing the number of 24-hour intervals that they had to work).

Fourthly, Article 2(2) of Directive 89/391 still requires authorities to ensure the safety and health of workers 'as far as possible'. In that regard, foster parents still enjoy free time, e.g. when the child is at school. Moreover, they are free to move, particularly for leisure purposes, as long as their foster children accompany them. Also, Romanian law offers the possibility of taking annual leave without the child, albeit after approval. In this way, the Romanian authorities have ensured the safety and health of the foster parents as far as is possible, in accordance with Article 2(2) of Directive 89/391. It is also important to note that these limitations respect the conditions of Article 52(1) of the Charter.

Ruling

Article 1(3) 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, read in conjunction with Article 2(2) 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, must be interpreted as meaning that the work performed by a foster parent under an employment contract with a public authority, which consists in taking in a child, integrating that child into his or her household and ensuring, on a continuous basis, the harmonious upbringing and edu-

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cation of that child, does not come within the scope of Directive 2003/88.

ECJ 4 December 2018, case C-378/17 (Minister for Justice and Equality and Commissioner of the Garda Síochána), Discrimination, General

Minister for Justice and Equality, Commissioner of An Garda Síochána – v – Workplace Relations Commission, Irish case

Summary

A national body established by law in order to ensure enforcement of EU law in a particular area must have jurisdiction to disapply a rule of national law that is contrary to EU law.

Legal background

Directive 2000/78/EC (the Framework Directive for equal treatment) aims to combat discrimination in employment. Article 9(1) stipulates that Member States shall ensure that judicial and/or administrative procedures are available to enforce the Directive.
The Constitution of Ireland provides that justice shall be administered by the courts. The High Court, the Court of Appeal and the Supreme Court have sole jurisdiction to the question of validity of any law having regard to the provisions in the Constitution.
The Constitution also stipulates that limited functions and powers of a judicial nature can be exercised by any person of body of persons authorised by law. This is the case for the Irish Equality Acts, which transpose Directive 2000/78. The Workplace Relations Commission (formerly the Equality Tribunal) has jurisdiction in such cases and may order various forms of redress.

Facts

Mr Boyle and two other persons applied for the position of police officer. However, they were excluded from the procedure as the applicable Admissions and Appointment Regulations – which were measures of national law – provided that persons younger than 18 and older than 35 years of age were not eligible (all three applicants were too old).
They then brought complaints before the Equality Tribunal (now the Workplace Relations Commission), asserting that the maximum age constitutes discrimination both under Directive 2000/78 and the Equality Acts.
The Minister for Justice and Equality pleaded that the Equality Tribunal lacked jurisdiction as the contested provision was a measure of national law. Consequently, not the Equality Tribunal but the High Court would have jurisdiction to decide, if necessary, to disapply such a provision. However, the Equality Tribunal decided that it would proceed to consider the complaints and stated that it would consider and decide the constitutional issue raised by the Minister.
The Minister then brought an action before the High Court for an order prohibiting the Equality Tribunal from acting in a manner contrary to law, which was upheld. The Equality Tribunal appealed to the Supreme Court. The Supreme Court stated that the Equality Tribunal, which meanwhile had become the Workplace Relations Commission, lacked jurisdiction to disapply provisions of national law. Only the High Court had such jurisdiction. Moreover, the jurisdiction to hear cases relating to equality in employment was divided between the Workplace Relations Commission and the High Court (the latter only if the upholding of the application would require, *inter alia*, disapplication of rules). According to the Supreme Court, this division of jurisdiction complied with the principles of equivalence and effectiveness. As the Workplace Relations Commission asserted that it should have all powers necessary to ensure that national and EU law relating to equality in employment are complied with, the Supreme Court decided to ask preliminary questions.

Question

Must EU law, in particular the principle of primacy of EU law, be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law?

Consideration

First, it should be pointed out that there is a difference between disapplying a provision in a specific case and striking down a provision. The Member States have the task of designating a system (i.e. courts/institutions, legal remedies and procedures) as regards the latter. On the other hand, the primacy of EU law means that national courts must give full effect to provisions of EU

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