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Breach of working time provisions and automatic harm sustained by an employee (FR)

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Summary

The French Supreme Court has held that exceeding the maximum weekly working time causes automatic harm to the employee which should be repaired.

Facts

A delivery driver, after the termination of his trial period by his employer, claimed damages before the for exceeding the maximum weekly working time of 48 hours. He claimed to have worked 50.45 hours during the week of 6 to 11 July 2015.

Judgment

The employee's claim was dismissed by the Court of Appeals which held that he had to demonstrate in which way working more than 48 hours had caused him harm. Since the proof of harm produced by the employee was deemed insufficient, his claim was dismissed by the Court.
The French Supreme Court did not uphold the Court of Appeals' ruling and held that:

> Given Article L. 3121-35, paragraph 1, of the Labour Code, interpreted in light of Article 6(b) of the European Directive No. 2003/88/EC of November 4, 2003: during the same week, working time may not exceed 48 hours. It follows from the case law of the Court of Justice of the European Union that exceeding the maximum average weekly working time provided in Article 6(b) of Directive 2003/88 constitutes, as such, a breach of said provision, without it being necessary to further demonstrate the existence of a specific harm (CJEU, 14 October 2010, C-243/09, Fuß – v – Stadt Halle, point 53). This Directive pursues the objective of guaranteeing the health and safety of workers by taking sufficient rest, the EU legislator considered that exceeding the average maximum weekly working time, deprives the worker of such rest, causing him harm, by that fact alone, by impairing his health and safety (CJEU, 14 October 2010, C-243/09, Fuß – v – Stadt Halle, point 54). The Court of Justice of the European Union has clarified that it is the national law of the Member States that should, in accordance with the principles of equivalence and effectiveness, on the one hand, determine whether compensation for the harm caused to an individual for breach of the provisions of Directive 2003/88 must be effected by granting additional time off or a financial compensation and, on the other hand, define the rules relating to the method of calculating this compensation (CJEU, 25 November 2010, Fuß – v – Stadt Halle, C-429/09, paragraph 94). To dismiss the employee's claim for damages for breach of the maximum weekly working time, the [Court of Appeals'] decision, after having found that the employee had worked 50.45 hours during the week of July 6 to 11, 2015, holds that he must demonstrate very exactly how these extra working hours have caused him harm and that, in light of the evidence submitted, this harm was not sufficiently demonstrated. Whereas by ruling as it did, while the sole breach of the maximum working time gives rise to the right to be compensated, the Court of Appeals has violated the above-mentioned text.

Commentary

The solution adopted by the Supreme Court in this case parts with its established case law since 2016 according to which, in order to obtain compensation, the employee should prove the alleged harm incurred (Cass. Soc., 13 April 2016, No. 14-28.293).
Indeed, back in 2016 the Supreme Court abandoned the notion of 'automatic harm' previously used by judges to grant damages, where no such damages were provided by law, without asking the employee to prove the exis-

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tence of an actual harm. In its 2016 ruling, the Supreme Court held that "the existence of a harm and its assessment fall within the sovereign assessment power of judges".

Since the 2016 case law, the social chamber of the Supreme Court has mainly adhered to this position and has excluded the recognition of automatic harm in various cases where prior to 2016 it had applied the notion of automatic harm (e.g. failure to mention the name of a collective bargaining agreement on payslips, nullity of a non-compete clause, delay in providing end-of-employment documents, failure to arrange for the employee to undergo a medical examination, etc.).

However, in a few cases, the Supreme Court has maintained the concept of automatic harm, in line with the 2018 observations made by the president of its social chamber who held that it can be applied as an exception "on a case-by-case basis" in the event of "serious breach of a fundamental duty". Given the variety of the existing exceptions (e.g. breach of the employee's private life, failure to hold elections to put in place a staff representation, breach of the employee's right to image), it has become quite difficult to understand the Supreme Court's rulings.

In this decision, the Supreme Court explained the new exception to its 2016 case law by making reference to the CJEU's case law. Indeed, it appears that the Supreme Court wants to demonstrate that the source of automatic harm in this case does not result from domestic law but from EU law. The Supreme Court is applying the CJEU's case law which, interpreting Directive 2003/88 concerning the organisation of working time, ruled that:

> Exceeding the maximum average weekly working time set out in Article 6(b) of Directive 2003/88 constitutes, as such, a breach of this provision, without it being necessary to demonstrate the existence of a specific harm […]; exceeding the maximum average weekly working time provided in Article 6(b), deprives the worker of rest time, causing him harm by this fact alone, as his health and safety are thereby jeopardized.

The same solution could accordingly be extended to other requirements resulting from Directive 2003/88, for example in terms of annual leave and night work or shift work, which also aim to protect the health and safety of workers. In this context, violation of other provisions of Directive 2003/88 could give rise to similar decisions.

More generally, this raises the question of whether the concept of automatic harm could also be extended to most of the French employment law provisions as they are usually viewed as imperative for the protection of employees, thus opening a new era of uncertainty for law practitioners.

Comment from other jurisdiction

Germany (Niklas Stöckl, Luther Rechtsanwaltsgesellschaft mbH): Article 6(b) of the Working Time Directive (Directive 2003/88/EC) has been transposed into German law by Sections 3 and 9 of the Working Hours Act (*Arbeitszeitgesetz*, 'ArbZG'). Unlike the Directive, however, Section 3 of the ArbZG does not refer to the maximum weekly working time, but to the working day, which in principle may not exceed eight hours. In conjunction with Section 9 ArbZG, however, it is clear that German law also provides for a maximum weekly working time of 48 hours. Furthermore, according to Section 3 sentence 2 ArbZG, German law provides for the possibility of extending the working day to a maximum of 10 hours if, within the specified compensation period, an average of eight hours per working day is not exceeded.

German working time law, on the other hand, does not recognize the concept of automatic damage, so that exceeding the maximum working time does not necessarily mean that the employer must compensate the employee. In German labour law, a distinction must be made in this respect: if – with the employer's consent – the working day's working time of eight hours is exceeded, but the absolutely permissible maximum working time of up to 10 hours per working day pursuant to Section 3 sentence 2 ArbZG is observed, the employee must be granted a compensation period and hours worked must be remunerated. If an employee voluntarily works overtime (without being required or approved by the employer) and thus works more than the legally permissible absolute maximum working time pursuant to Section 3 ArbZG, however, there is no entitlement to remuneration or to time off in lieu.

If the employer has requested or approved overtime work and there is no (effective) agreement on the remuneration of overtime work, there is a statutory rule interpretation: pursuant to Section 612(1) of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB') the employee has a right to remuneration, if, according to the circumstances, the work can only be expected in return for remuneration. The expectation of remuneration shall be determined on the basis of an objective standard taking into account the traffic site, the type, scope and duration of the service as well as the position of the parties involved among each other. Earlier case law denied employees with higher remuneration a claim to payment of overtime with reference to the fact that they are not remunerated on an hourly basis but for the performance of their work tasks as a whole, and thus cannot expect separate remuneration for overtime.

The Regional Labour Court of Düsseldorf ruled (judgment of 23 September 2020 – ref. 14 Sa 296/20) that even an employee who is generally considered to be a 'higher earner', may expect that the consideration for the agreed remuneration is at most the legally permissi-

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ble maximum working time according to Section 3 ArbZG, because the employer can only demand work performance within the scope of what is legally permissible. Although exceeding the permissible maximum working time therefore constitutes an activity that is impermissible under labour protection law, the protective purpose of Section 3 ArbZG does not require that the employee be denied remuneration for the work performed by them despite the employment ban. Work in excess of the maximum permissible working hours would then – if this was not prevented by the employer through fault – be remunerated according to the employee's expectations.

The case report of the French decision commented on here has already referred to the decision of the Court of Justice of the European Union in the case *Fuß – v – Stadt Halle*, which concerned the exceeding of working hours by a firefighter in the public sector.

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