JUDGMENT OF THE COURT (Second Chamber)

1 December 2005 *

In Case C-14/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (France), made by decision of 3 December 2003, received at the Court on 15 January 2004, in the proceedings

Abdelkader Dellas,

Confédération générale du travail,

Fédération nationale des syndicats des services de santé et des services sociaux CFDT,

Fédération nationale de l'action sociale Force ouvrière

v

Premier ministre,

Ministre des Affaires sociales, du Travail et de la Solidarité,

* Language of the case: French.

in the presence of:

Union des fédérations et syndicats nationaux d'employeurs sans but lucratif du secteur sanitaire, social et médico-social,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 May 2005,

after considering the observations submitted on behalf of:

— Mr Dellas, by A. Monod, avocat,

— Fédération nationale des syndicats des services de santé et des services sociaux CFDT, by H. Masse-Dessen and G. Thouvenin, avocats,

— Union des fédérations et syndicats nationaux d'employeurs sans but lucratif du secteur sanitaire, social et médico-social, by J. Barthelemy, avocat,

— the French Government, by G. de Bergues, C. Bergeot-Nunes and A. de Maulmont, acting as Agents,

— the Belgian Government, by A. Goldman, acting as Agent,

— the German Government, by W.-D. Plessing, acting as Agent,

— the Netherlands Government, by H.G. Sevenster, J. van Bakel and D.J.M. de Grave, acting as Agents,

— the Commission of the European Communities, by G. Rozet and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 July 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

2 The reference was made in proceedings brought by Mr Dellas and Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT and Fédération nationale de l'action sociale Force ouvrière seeking the annulment, for misuse of powers, of Decree No 2001-1384 of 31 December 2001 applying Article L. 212-4 of the Code du travail (Labour Code) and introducing a period equivalent to statutory working time in social and medico-social establishments run by private persons on a non-profit-making basis (JORF, 3 January 2002, p. 149).

Legal context

Community legislation

3 Directive 93/104 was adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC).

4 As stated in Article 1, 'Purpose and scope', Directive 93/104 lays down minimum safety and health requirements for the organisation of working time and applies to all sectors of activity, both public and private, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.

5 Article 2 of Directive 93/104, 'Definitions', provides:

'For the purposes of this Directive, the following definitions shall apply:

1. *working time* shall mean 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* shall mean any period which is not working time;

3. *night time* shall mean any period of not less than seven hours, as defined by national law, and which must include in any case the period between midnight and 5 a.m.;

4. *night worker* shall mean:

(a) on the one hand, any worker, who, during night time, works at least three hours of his daily working time as a normal course; and

(b) on the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned:

(i) by national legislation, following consultation with the two sides of industry; or

(ii) by collective agreements or agreements concluded between the two sides of industry at national or regional level;

5. *shift work* shall mean any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks;

6. *shift worker* shall mean any worker whose work schedule is part of shift work.'

6 Section II of the directive lays down the measures which the Member States are required to take to ensure that every worker is entitled inter alia to minimum daily and weekly rest periods and breaks, and also regulates the maximum weekly working time.

7 As regards daily rest, Article 3 of Directive 93/104 reads as follows:

'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.'

8 Article 4 of the directive, 'Breaks', provides:

'Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation.'

9 The weekly rest period is the subject of Article 5 of the directive, which 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.

The minimum rest period referred to in the first subparagraph shall in principle include Sunday.

If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.'

10 With respect to the maximum weekly working time, Article 6 of Directive 93/104 provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

1. 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;

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

11 Articles 8 to 13, which form Section III of the directive, set out the measures which the Member States are required to take concerning night work, shift work and patterns of work.

12 With respect more particularly to the length of night work, Article 8 of Directive 93/104 provides:

'Member States shall take the measures necessary to ensure that:

1. normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period;

2. night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work.

For the purposes of the aforementioned, work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work.'

13 Article 15 of Directive 93/104 provides:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective

agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

14 Under Article 16 of the directive:

'Member States may lay down:

1. for the application of Article 5 (weekly rest period), a reference period not exceeding 14 days;

2. for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average;

3. for the application of Article 8 (length of night work), a reference period defined after consultation of the two sides of industry or by collective agreements or agreements concluded between the two sides of industry at national or regional level.

If the minimum weekly rest period of 24 hours required by Article 5 falls within that reference period, it shall not be included in the calculation of the average.'

15 Directive 93/104 sets out a number of derogations from several of its basic rules, taking account of the particular features of certain activities and subject to certain conditions being satisfied. Article 17 states:

'1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities.

2. Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection:

2.1. from Articles 3, 4, 5, 8 and 16:

...

(c) in the case of activities involving the need for continuity of service or production, particularly:

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;

...

3. Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

...

The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

...

4. The option to derogate from point 2 of Article 16, provided in paragraph 2, points 2.1. and 2.2. and in paragraph 3 of this Article, may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.

...'

16 Article 18 of Directive 93/104 reads as follows:

'1. (a) Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 23 November 1996, or shall ensure by that date that the two sides of industry establish the

necessary measures by agreement, with Member States being obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by this Directive are fulfilled.

(b) (i) However, 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:

— 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 point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

— no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

— the employer keeps up-to-date records of all workers who carry out such work,

— 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,

— 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 point 2 of Article 16.

...'

National legislation

17 In France the statutory duration of the working time of employees is governed by the Code du travail, the material version of which for the main proceedings is that resulting from Loi n° 2000-37 relative à la réduction négociée du temps de travail (Law No 2000-37 on negotiated reduction of working time) of 19 January 2000 (JORF, 20 January 2000, p. 975). The first paragraph of Article L. 212-1 of that code provides:

'In the establishments or occupations mentioned in Article L. 200-1 and in craft and cooperative establishments and their dependencies the statutory duration of the actual working time of employees is fixed at 35 hours a week.'

18 The second paragraph of that article states:

'In those establishments and occupations the actual daily working time per employee may not exceed 10 hours, except for derogations under conditions laid down by decree.'

19 The first and second paragraphs of Article L. 212-2 of the Code du travail provide:

'Decrees made in the Council of Ministers shall determine the conditions of application of Article L. 212-1 for all sectors of activity or professions or for a particular sector or profession. The decrees shall fix in particular the organisation and distribution of working time, rest periods, conditions of recourse to stand-by duty, permanent or temporary derogations applicable in certain cases and to certain posts, rules for recovery of lost hours of work, and measures for monitoring these various provisions.

These decrees shall be made and revised after consulting the employers' and employees' organisations concerned and, if appropriate, in the light of the results of negotiations between those organisations.'

20 Under the first and second paragraphs of Article L. 212-4 of the code:

'Actual working time is the time during which the employee is at the employer's disposal and must comply with his instructions without being able to attend freely to his personal affairs.

The time necessary for meal breaks and the time used for breaks are regarded as actual working time where the criteria defined in the first paragraph are satisfied. Even if they are not recognised as working time, they may be the subject of remuneration under a collective agreement or a contract.'

21 The fifth paragraph of Article L. 212-4 of the code reads as follows:

'A period equivalent to the statutory working time may be introduced in occupations and for specific posts involving periods of inactivity, either by decree made after the conclusion of a collective or sectoral agreement or by decree in the Conseil d'État. Those periods shall be remunerated in accordance with practice or with collective agreements.'

22 Under the first paragraph of Article L. 212-4 *bis* of the code:

'A period of stand-by duty means a period during which the employee, without being at the permanent and immediate disposal of the employer, is obliged to stay at home or nearby so as to be in a position to intervene to perform work for the undertaking, the duration of that intervention being regarded as actual working time ...'.

23 The second paragraph of Article L. 212-7 of the code states:

'Weekly working time calculated over any period of 12 consecutive weeks may not exceed 44 hours ... During a single week, working time may not exceed 48 hours.'

24 The first paragraph of Article L. 220-1 of the Code du travail provides:

'Every employee shall enjoy a daily rest period of at least 11 consecutive hours.'

25 The first paragraph of Article L. 221-4 of the code provides:

'The minimum duration of weekly rest must be 24 consecutive hours, to which are added the consecutive hours of daily rest provided for in Article L. 220-1.'

26 Articles 1 to 3 of Decree No 2001-1384 read as follows:

'Article 1

The provisions of this decree apply:

(a) to establishments run by private persons on a non-profit-making basis and providing accommodation, listed in paragraphs 1, 2, 4, 5 and 8 of Article L. 312-1 of the Code de l'action sociale et des familles (Code of Social Action and Families);

(b) to full-time posts of teaching staff, nurses, nursing auxiliaries or staff of the same level of qualifications replacing them, the holders of which posts carry out night duty on call in a room provided within the establishment.

Article 2

For calculating the statutory working time in the establishments and for the posts referred to in Article 1 of this decree, each period of night duty on call in a room provided is counted as three hours of actual work for the first nine hours and half an hour for each hour in excess of nine hours.

Article 3

The period of presence on call in a room provided extends from the time when the residents retire until the time when they rise as fixed by the rosters, but may not exceed 12 hours.'

27 According to the Conseil d'État, the legal basis of Decree No 2001-1384 is the last paragraph of Article L. 212-4 of the Code du travail, in which the legislature intended to lay down special rules on jurisdiction and procedure for establishing systems of equivalence to statutory working time, thus displacing the general rules laid down in Article L. 212-2 of that code.

The main proceedings and the questions referred for a preliminary ruling

28 According to the case-file transmitted to the Court by the national court, Mr Dellas, a special needs teacher in residential establishments for handicapped young people and adults, was dismissed by his employer as a result of disagreements between them relating in particular to the definition of actual work and the remuneration due for hours of night work on call in a 'watch' room by teachers in medico-social establishments and departments for maladjusted and handicapped persons.

29 In early 2002 Mr Dellas and the trade union organisations Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, and Fédération nationale de l'action sociale Force ouvrière brought proceedings in the Conseil d'État for the annulment, for misuse of powers, of Decree No 2001-1384.

30 The Conseil d'État decided to join those proceedings, and gave Union des fédérations et syndicats nationaux d'employeurs sans but lucrative du secteur sanitaire leave to intervene in support of the defendants in the main proceedings, the Premier ministre (Prime Minister) and the Ministre des Affaires sociales, du Travail et de la Solidarité (Minister for Social Affairs, Labour and Solidarity).

31 In support of their applications, the applicants in the main proceedings put forward various pleas in law to challenge the lawfulness of Decree No 2001-1384. They submit in particular that the system of equivalence to statutory working time introduced by that decree is incompatible with the aims of Directive 93/104 and with that directive's provisions on the definition of working time and the determination of breaks, maximum weekly working time and maximum daily length of night work.

32 According to the order for reference, the system of equivalence, which establishes a 3 to 1 ratio for the first nine hours followed by a 2 to 1 ratio for subsequent hours between the hours of presence and the working hours actually counted, and applies to the employees covered by the decree solely in respect of night duty during which the staff are not continually called on to work, is intended to create a special method of calculating actual work within the meaning of Article L. 212-4 of the Code du travail for the purpose inter alia of assessing the rules on remuneration and overtime, to take account of the intermittent nature of the activity which includes periods of non-activity during the hours in question.

33 According to the Conseil d'État, this system of equivalence to statutory working time is not in principle incompatible with Directive 93/104, as interpreted by the Court, in so far as — unlike the situations at issue in Case C-303/98 *Simap* [2000] ECR I-7963 and Case C-151/02 *Jaeger* [2003] ECR I-8389 — it does not have the effect of treating as rest periods the periods of inactivity during on-call duty when workers have to be present at their workplace, nor of preventing the hours which are calculated in a special way under the system of equivalence from being regarded in their entirety as actual working time in order to assess compliance by employers with their obligations concerning rest periods and breaks.

34 Nevertheless, it says, the system of equivalence established by the French legislation provides that periods of night duty in a 'watch' room are the object of a special method of calculating actual work intended to take account of the lower intensity of work during those periods, within a legal framework with stricter rules than those laid down by Community law, in particular with respect to maximum weekly working time, which is 44 hours on average over 12 consecutive weeks under the Code du travail as opposed to 48 hours over 4 consecutive months under Directive 93/104.

35 Since it considered that, in those circumstances, the outcome of the disputes before it depended on the interpretation of Community law, the Conseil d'État decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. In the light of the purpose of Directive 93/104 ... , namely to lay down minimum safety and health requirements for the organisation of working time, as stated in Article 1(1), must the definition of working time in the directive be considered to apply exclusively to the Community thresholds established by the directive or must it be considered to have general scope, applying also to the thresholds laid down in national legal systems, in particular with a view to transposing the directive, even where those thresholds may, as in France, in the interests of protection of employees, have been set at a level affording greater protection than the thresholds in the directive?

2. To what extent could a strictly proportional system of equivalence, which consists in taking into account the total number of hours of presence but applying a weighting mechanism to them which reflects the lower intensity of work done during periods of inactivity, be regarded as compatible with the objectives of Directive 93/104 ...?'

The questions referred for a preliminary ruling

36 By its two questions, which should be examined together, the national court asks essentially whether Directive 93/104 must be interpreted as precluding legislation of a Member State which, with respect to periods of on-call duty performed by workers in certain social and medico-social establishments where they are required to be physically present at the actual place of work, provides, for calculating actual working time, a system of equivalence such as that at issue in the main proceedings,

if national law lays down, inter alia for maximum weekly working time, a ceiling that is more favourable to workers than that prescribed by the directive.

37 Both the decision making the reference and the majority of the observations submitted to the Court refer to the effect which such a system of equivalence may have not only on the working hours of the employees concerned but also on their level of pay.

38 However, as regards the latter aspect, it must be pointed out at the outset that, as follows from both the purpose and the actual wording of its provisions, Directive 93/104 does not apply to the remuneration of workers.

39 Moreover, that interpretation now follows unambiguously from Article 137(6) EC, which states that the minimum requirements the Council of the European Union may adopt by means of directives, intended in particular, as in the case in the main proceedings, to ensure protection of the health and safety of workers, cannot apply to pay.

40 As regards the effect of a system of equivalence such as that at issue in the main proceedings on the working time and rest periods of the workers concerned, on the other hand, it is apparent from Article 118a of the Treaty, which is the legal basis for Directive 93/104, from the first, fourth, seventh and eighth recitals in the preamble to that directive, from the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, point 8 and the first subparagraph of point 19 of which are referred to in the fourth recital in the preamble to the directive, and also from the actual wording of Article 1(1) of the directive that the latter's purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national legislation concerning, in particular, the duration of working time (see Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 37; *Jaeger*, paragraphs 45 and 47; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 91).

41 According to those provisions, this harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods — particularly daily and weekly — and adequate breaks and by providing for a ceiling of 48 hours on the average duration of the working week, a maximum limit which is expressly stated to include overtime (see *Simap*, paragraph 49, *BECTU*, paragraph 38, *Jaeger*, paragraph 46, *Pfeiffer and Others*, paragraph 92, and Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 47).

42 With regard more specifically to the concept of 'working time' within the meaning of Directive 93/104, it has already been held that the directive defines that concept 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 practices, and that that concept is placed in opposition to rest periods, the two being mutually exclusive (*Simap*, paragraph 47, and *Jaeger*, paragraph 48).

43 The conclusion must be in this context, first, that Directive 93/104 does not provide for any intermediate category between working time and rest periods and, second, that the intensity of the work done by the employee and his output are not among the characteristic elements of the concept of 'working time' within the meaning of that directive.

44 The Court has also held that the concepts of 'working time' and 'rest period' within the meaning of Directive 93/104 may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive, intended to

improve workers' living and working conditions. Only such an autonomous interpretation is capable of securing full effectiveness for that directive and uniform application of those concepts in all the Member States (see *Jaeger*, paragraph 58).

45 The Court concluded that the Member States cannot unilaterally determine the scope of those concepts and of the other provisions of Directive 93/104 by imposing any condition or restriction on the right granted to workers by that directive to have working periods and corresponding rest periods duly taken into account. Any other interpretation would frustrate the effectiveness of the directive and disregard its objective of guaranteeing effective protection of the safety and health of workers by means of minimum requirements (see *Jaeger*, paragraphs 59, 70 and 82, and *Pfeiffer and Others*, paragraph 99).

46 In the first place, it is settled case-law that on-call duty performed by a worker where he is required to be physically present on the employer's premises must be regarded in its entirety as working time within the meaning of Directive 93/104, regardless of the work actually done by the person concerned during that on-call duty (see *Simap*, paragraph 52; *Jaeger*, paragraphs 71, 75 and 103; *Pfeiffer and Others*, paragraph 93; and the order in Case C-241/99 *CIG* [2001] ECR I-5139, paragraph 34).

47 The fact that on-call duty includes some periods of inactivity is thus completely irrelevant in this connection.

48 According to that case-law, although periods of professional inactivity are inherent in on-call duty performed by workers where they are required to be physically present on the employer's premises, given that, unlike during normal working hours, the need for urgent interventions during such duty cannot be planned in advance and the activity actually performed depends on the circumstances, the decisive

factor in considering that the characteristic features of the concept of 'working time' within the meaning of Directive 93/104 are present in the case of such on-call duty performed by a worker at his actual workplace is that he is required to be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need. Those obligations must therefore be regarded as coming within the ambit of the performance of that worker's duties (see *Simap*, paragraph 48, and *Jaeger*, paragraphs 49 and 63).

49 In the second place, the Court has already repeatedly held that, in view of both the wording of Directive 93/104 and its purpose and scheme, the various requirements it lays down concerning maximum working time and minimum rest periods constitute rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health (see *BECTU*, paragraphs 43 and 47, *Pfeiffer and Others*, paragraph 100, and *Wippel*, paragraph 47).

50 As regards the case at issue in the main proceedings, it follows from paragraphs 40 to 49 above that compliance with all the thresholds and ceilings provided for by Directive 93/104 with the aim of protecting effectively the safety and health of workers must be ensured by the Member States, and that to that end the periods of on-call duty performed by a worker such as Mr Dellas at the workplace itself must be taken into account in their entirety in the calculation of the maximum daily and weekly working time permitted by Community law — which includes overtime — irrespective of the fact that, during those periods, the person concerned is not continuously carrying on any professional activity (see *Pfeiffer and Others*, paragraphs 93 and 95).

51 It is true that Article 15 of Directive 93/104 expressly allows the application or introduction of national provisions more favourable to the protection of the safety and health of workers.

52 Where a Member State makes use of that option, as the French Republic has done, since the national legislation lays down maximum weekly working time of 44 hours over 12 consecutive weeks, whereas the directive imposes a limit of 48 hours over 4 consecutive months, compliance with the rules laid down by that directive must be ascertained by reference solely to the limits fixed by the directive, to the exclusion of the national provisions that provide greater protection for workers.

53 However, independently of the application of such national provisions, it is necessary for the effectiveness of the rights conferred on workers by Directive 93/104 to be ensured in full, which necessarily implies an obligation on the Member States to guarantee that each of the minimum requirements laid down by the directive is observed.

54 It must be concluded in this connection, as the French Government itself acknowledged at the hearing in response to a question put by the Court, that the method of calculation of on-call duty in the system of equivalence at issue in the main proceedings is such as to impose on the worker concerned an overall working time which can amount to or even exceed 60 hours a week.

55 Consequently, such a national system manifestly exceeds the maximum weekly working time which is fixed at 48 hours under Article 6(2) of that directive.

56 That assessment is not called into question either by the French Government's assertion that the system of equivalence in force in that Member State, which indeed consists in the application of a system of weighting designed to take account of the occurrence of periods of inactivity during on-call duty, nevertheless computes all the hours of presence of workers for the determination of their daily and weekly rest

entitlement, or by the national court's finding that the national legislation which is the subject of the appeals it is hearing differs from the legislation at issue in the *Simap* and *Jaeger* cases in that it does not assimilate to rest periods the periods during which an employee present at his workplace to perform on-call duty is not actually called on to work.

57 It is common ground that, under national legislation such as that at issue in the main proceedings, the worker's hours of presence in the employer's establishment during on-call duty, which include periods of inactivity, are taken into account only partially, according to coefficients of a flat-rate kind, for the calculation of overtime and hence for the determination of maximum working time, whereas Community law requires those hours of presence to be counted in their entirety as working time.

58 Moreover, under such national legislation, it is only the hours of presence that are deemed to correspond to actual work that are included in the calculation of working time. However, as already stated in paragraph 43 above, the classification as working time within the meaning of Directive 93/104 of a period during which the employee is present at his workplace cannot depend on the intensity of his work but follows solely from his obligation to be at his employer's disposal.

59 In any event, the mere fact that the hours of presence of employees at their workplace are taken into account in their entirety for implementing certain of the employees' rights under Directive 93/104, in the present case their rights to daily and weekly rest periods, is not capable of ensuring full compliance with the obligations which that directive imposes on Member States, given that they are obliged to guarantee all those rights, in particular the fixing of the maximum weekly working time at 48 hours.

60 It should be added that national provisions such as those laid down by Decree No 2001-1384 are not capable of falling within the possible derogations provided for by that directive.

61 First, Article 2 of Directive 93/104, which defines the principal terms used in the directive, including the concepts of working time and rest period, is not one of the provisions of the directive which may be the subject of a derogation.

62 Second, it is not even alleged in the present case that legislation such as that at issue in the main proceedings is capable of falling within one of the cases referred to in Articles 17(1) and (2) and 18(1)(b)(i) of Directive 93/104.

63 In the light of all the foregoing, the answer to the questions must be that Directive 93/104 must be interpreted:

— as precluding legislation of a Member State which, with respect to on-call duty performed by workers in certain social and medico-social establishments during which they are required to be physically present at their workplace, lays down, for the purpose of calculating the actual working time, a system of equivalence such as that at issue in the main proceedings, where compliance with all the minimum requirements laid down by that directive in order to protect effectively the safety and health of workers is not ensured;

— where national law fixes a ceiling more favourable to workers, in particular for maximum weekly working time, the relevant thresholds or ceilings for ascertaining whether the protective rules laid down by that directive are complied with are exclusively those set out in the directive.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time must be interpreted as precluding legislation of a Member State which, with respect to on-call duty performed by workers in certain social and medico-social establishments during which they are required to be physically present at their workplace, lays down, for the purpose of calculating the actual working time, a system of equivalence such as that at issue in the main proceedings, where compliance with all the minimum requirements laid down by that directive in order to protect effectively the safety and health of workers is not ensured.

Where national law fixes a ceiling more favourable to workers, in particular for maximum weekly working time, the relevant thresholds or ceilings for ascertaining whether the protective rules laid down by that directive are complied with are exclusively those set out in the directive.

[Signatures]