Order of the Court (Sixth Chamber) of 3 July 2001

Confederación Intersindical Galega (CIG) v Servicio Galego de Saúde (Sergas)

Reference for a preliminary ruling: Tribunal Superior de Justicia de Galicia – Spain

Article 104(3) of the Rules of Procedure - Social policy - Protection of the health and safety of workers - Directives 89/391/EEC and 93/104/EC - Scope - Primary care services personnel - Average period of work - Inclusion of time on call

Case C-241/99

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In Case C-241/99,

REFERENCE to the Court under Article 234 EC by the Tribunal Superior de Justicia de Galicia (Spain) for a preliminary ruling in the proceedings pending before that court between

Confederación Intersindical Galega (CIG)

and

Servicio Galego de Saúde (Sergas),

on the interpretation 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 (OJ 1989 L 183, p. 1) and Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, R. Schintgen, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

the referring court having been informed that the Court proposes to rule by reasoned order in accordance with Article 104(3) of its Rules of Procedure,

the interested parties under Article 20 of the EC Statute of the Court of Justice having been invited to submit their observations on that proposal,

after hearing the views of the Advocate General,

makes the following

Order

Grounds

1 By order of 14 June 1999, received at the Court on 25 June 1999, the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia) submitted for a preliminary ruling under Article 234 EC three questions on the interpretation 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 (OJ 1989 L 183, p. 1) (hereinafter the basic Directive) and 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 three questions have been raised in proceedings brought by Confederación Intersindical Galega (hereinafter CIG) against Servicio Galego de Saúde (hereinafter Sergas), concerning the working hours of personnel providing outside emergency services in the area of the Autonomous Community of Galicia.

Relevant provisions

Community legislation

The basic Directive

3 The basic Directive provides the background to this case. It lays down general principles which have been developed by a series of specific directives, including Directive 93/104.

4 Article 2 of the basic Directive defines its scope as follows:

1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable 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.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.

Directive 93/104

5 Directive 93/104 aims to encourage improvements in the safety, hygiene and health of workers at work. It was adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

6 The first two articles of Directive 93/104 define its purpose and ambit and the scope and meaning of the terms used in it.

7 Article 1 of that directive, entitled Purpose and scope, states:

1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time;

and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, 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;

4. The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.

8 Under the heading Definitions, Article 2 of the directive 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;

....

9 Directive 93/104 lays down a set of rules concerning the maximum duration of the working week, minimum daily and weekly rest periods, annual leave and the duration and conditions of night work.

10 As regards daily rest periods, Article 3 of Directive 93/104 provides:

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.

11 As regards the maximum duration of the working week, 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.

12 With regard to the length of night work, Article 8 of Directive 93/104 states:

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;

....

13 Article 16 of Directive 93/104 lays down the reference periods to be taken into account for application of the rules mentioned in points 9 to 12 of this order. It reads as follows:

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.

14 Directive 93/104 also provides for a number of derogations from its basic rules, having regard to particular features of certain activities, and imposes certain conditions. Thus, Article 17 provides:

...

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:

(a) in the case of activities where the worker's place of work and his place of residence are distant from one another or where the worker's different places of work are distant from one another;

(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

(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;

...

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.

...

15 Article 18 of Directive 93/104 provides:

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 national legislation

16 Decree No 172/1995 of the Xunta de Galicia of 18 May 1995 (Diario Oficial de Galicia No 121 of 26 June 1995), which came into force on the day following its publication, lays down the plan for dealing with outside emergencies in the Autonomous Community of Galicia. Article 1(1) of that Decree provides:

Emergency health care in the sphere of primary care in Galicia shall be provided at Continuous Care Centres (Puntos de atención continuada, hereinafter PACs).

17 Article 4 of Decree No 172/1995 provides:

Timetable

1. The timetable for the opening and operation of the PACs shall be from 15.00 hrs until 08.00 hrs the following day, on weekdays, without prejudice to the present arrangements which apply on Saturdays and 24 hours a day on Sundays and public holidays.

2. On-call assistance shall be provided by means of the physical presence of staff.

...

18 Article 5(3) of the same Decree provides:

Once the creation of a PAC has been approved, all the health professionals in its districts shall work their duty shifts there, providing primary care on a permanent basis under a physical presence roster, whatever their system of remuneration and their employment arrangements and whatever system they voluntarily agree at the relevant time, in accordance with the second transitional provision of Decree No 200/93 of 29 July 1993.

19 Article 8 of the Decree provides:

The number of hours' continuous care to be worked by each of the PAC professionals shall be 1 188 hours per year, subject to a maximum of 108 actual hours per month (an initial guarantee of maximum periods), although it is intended that the Galician Health Service will progressively reduce that figure to 850 hours per year within a period of three years.

20 Also, under Article 9 of Decree No 172/1995:

SERGAS shall facilitate the adoption of appropriate measures to ensure that free time is granted on the day following a shift involving personal presence, without there being any question of the person or persons concerned being replaced.

The main proceedings and the questions submitted for preliminary ruling

21 On 23 March 1999, CIG instituted proceedings against Sergas before the Tribunal Superior de Justicia de Galicia on the ground that Sergas had imposed a system of on-duty shifts which exceeded the maximum hours provided for by Community legislation and did not uphold the right to compensatory free time. All the established medical and nursing staff providing services for Sergas at the PACs, in primary care teams (equipos de atención primaria) and in other services which treat outside emergencies in the area of the Autonomous Community of Galicia are involved in those proceedings.

22 The action was for a declaration that the staff concerned were entitled:

(1) to a work schedule such that not more than 48 hours, including time on call, are worked in each period of seven days within a maximum reference period of four months or, alternatively, six months;

(2) to a rest day on the day after each on-call shift involving physical attendance for a period of 24 hours, without loss of pay, and in any event after 24 hours' continuous on-call duty.

23 The national court states that, from June 1995, the following conditions have been imposed at the PACs concerned:

- normal working day of 08.00 hrs to 15.00 hrs (Monday to Friday);

- in addition, compulsory on-call duty following the ordinary working day, as follows:

- 17 hours without interruption on weekdays (from 15.00 hrs to 08.00 hrs the next day);

- 24 hours without interruption on Sundays and public holidays (from 08.00 hrs to 08.00 hrs the next day).

24 In those circumstances, and taking account of the fact that CIG is invoking the direct effect of Directive 93/104, the Tribunal Superior de Justicia de Galicia considered that there were some doubts as to the interpretation of that directive and therefore decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) In view of Article 1(3) of Council Directive 93/104/EC, must it be concluded that the work of the professional persons to which this dispute relates falls within the scope of that directive?

(2) In view of Article 118 of the Treaty and the reference to Directive 89/391/EEC in the preamble to, and Article 1(4) of, Directive 93/104/EC, is it appropriate to conclude that the work of the professional persons at issue in this dispute falls within the scope of the exceptions or exclusions referred to in Article 2 of the last-mentioned directive and in Article 17 of Directive 93/104/EC?

(3) In view of the fact that Article 4.2 of Decree No 172/1995 of the Xunta de Galicia of 18 May 1995 provides that "On-call assistance shall be provided by the physical presence of staff", must the whole period of an on-call shift be regarded as ordinary working time or may that period be regarded as overtime?

25 It must be noted from the outset that on 3 October 2000 the Court gave judgment in the Simap case (Case C-303/98 [2000] ECR I-7963), which dealt with questions similar to those raised in the present proceedings. By letter of the same date, the Court invited the Tribunal Superior de Justicia de Galicia to state whether, in view of that judgment, it was still requesting a preliminary ruling. By letter of 14 December 2000, the referring court informed the Court that, since inter alia the two actions concern disputes affecting different staff, the request for a preliminary ruling would be maintained.

Findings of the Court

26 As regards the first question, concerning the scope of Directive 93/104, it must be stated that in Simap the Court ruled, at paragraph 38, that the activity of primary care teams fell within the scope of the basic Directive and, at paragraph 40, that only the activities of doctors in training came within the exceptions set out in Article 1(3) of Directive 93/104. At paragraph 1 of the operative part of the judgment, the Court therefore ruled that an activity such as that of doctors in primary health care teams fell within the scope of the basic Directive and of Directive 93/104.

27 Unlike the Simap case, the present case concerns not only doctors but also emergency service nursing personnel. However, at paragraphs 37 and 38 of the judgment in Simap, the Court considered the activity of

primary care teams without distinguishing between doctors and nursing personnel. Furthermore, neither the context nor the nature of the respective activities of doctors and nurses serving in primary care teams entails any material difference in the light of the analysis of the two directives in question made in that judgment. It follows that the reasoning of the Court in its judgment in the Simap case concerning the scope of the basic directive and Directive 93/104 also applies to both categories of personnel.

28 Therefore, for the same reasons as those stated in paragraphs 30 to 40 of the judgment in Simap, the answer to be given to the first question must be that an activity such as that of the medical and nursing staff providing services for Sergas at the PACs, in primary care teams and in other services which treat outside emergencies in the area of the Autonomous Community of Galicia fall within the scope of Directive 93/104.

29 As regards the second question, concerning the exceptions or exclusions referred to in the basic directive and in Directive 93/104, the first part of that question, concerning the basic directive, must be examined first. At paragraph 35 of its judgment in Simap, the Court pointed out that the exceptions to the scope of the basic directive, including that provided for in Article 2(2), must be interpreted restrictively and stated, at paragraph 37, that under normal circumstances the activity of primary care teams cannot be assimilated to activities which come within the scope of those exceptions. The Court concluded, at paragraph 38, that the activity in question fell within the scope of the basic Directive.

30 Since the same reasoning can be applied in the present case, without having to distinguish in that respect between medical staff and nursing staff, the reply to be given to the first part of the second question is that, for the same reasons as those stated in paragraphs 32 to 38 of the judgment in Simap, an activity such as that of the medical and nursing staff providing services for Sergas at the PACs, in primary care teams and in other services which treat outside emergencies in the area of the Autonomous Community of Galicia does not fall within the scope of the exceptions or exclusions laid down in Article 2 of the basic Directive.

31 As regards the second part of the second question, which concerns the derogations laid down in Article 17 of Directive 93/104, it must be remembered that, at paragraph 45 of the judgment in Simap, the Court ruled that the national court may, in the absence of express measures transposing that directive, apply its domestic law to the extent to which, having regard to the characteristics of the activity of doctors in primary care teams, that law meets the conditions laid down in Article 17 of that directive. It must follow that the Court considered that the activity in question may fall under the derogations provided for in Article 17 of Directive 93/104, in so far as the conditions set out in that provision are fulfilled. Furthermore, such an interpretation is supported by the fact that at paragraphs 67 to 70 of its judgment in Simap, the Court ruled that, in the absence of national provisions expressly adopting one of the derogations provided for in Article 17(2), (3) and (4) of Directive 93/104, that provision may be interpreted as having direct effect.

32 The answer to be given to the second part of the second question must accordingly be that, by deduction from the reasons stated in paragraphs 43 to 45 of the judgment in Simap, the activity in question may fall under the derogations provided for in Article 17 of Directive 93/104, in so far as the conditions set out in that provision are fulfilled.

33 As regards the third question, enquiring how on-call shifts are to be defined in relation to working time, it must be noted that, at paragraph 48 of the judgment in Simap, the Court stated that the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams where their presence at the health centre is required. At paragraph 51 of that judgment, the Court observed that, although Directive 93/104 does not define overtime, overtime none the less falls within the concept of working time for the purposes of that directive. The Court therefore concluded, at paragraph 52 of that judgment, that time spent on call by doctors in primary care teams when their physical presence is required at health centres must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104.

34 Since that reasoning is applicable to both nursing staff and doctors, the answer to be given to the third question must be that, for the same reasons as those stated in paragraphs 47 to 51 of the judgment in Simap, time spent on call, when their physical presence is required, by the medical and nursing staff providing services for Sergas at the PACs, in primary care teams and in other services which treat outside emergencies in the area of the Autonomous Community of Galicia must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104.

Decision on costs

Costs

35 The costs incurred by the Spanish and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

Operative part

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions submitted to it by the Tribunal Superior de Justicia de Galicia by order of 14 June 1999, hereby rules:

1. An activity such as that of the medical and nursing staff providing services for Servicio Galego de Saúde in the on-call service, in primary care teams and in other services which treat outside emergencies in the area of the Autonomous Community of Galicia fall within the scope of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.

2. An activity such as that of the medical and nursing staff providing services for Servicio Galego de Saúde in the on-call service, in primary care teams and in other services which treat outside emergencies in the area of the Autonomous Community of Galicia does not come within the scope of the exception or exclusions laid down in Article 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. However, such an activity may come under the derogations provided for in Article 17 of Directive 93/104, in so far as the conditions set out in that provision are fulfilled.

3. Time spent on call, when their physical presence is required, by the medical and nursing staff providing services for Servicio Galego de Saúde in the on-call service, in primary care teams and in other services which treat outside emergencies in the area of the Autonomous Community of Galicia must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104.