Judgment of the Court (First Chamber) of 4 October 2001

J.R. Bowden, J.L. Chapman and J.J. Doyle v Tuffnells Parcels Express Ltd

Reference for a preliminary ruling: Employment Appeal Tribunal - United Kingdom

Organisation of working time - Directive 93/104/EC - Article 1(3) - Scope - Road transport

Case C-133/00

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In Case C-133/00,

REFERENCE to the Court under Article 234 EC by the Employment Appeal Tribunal, London (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

J.R. Bowden,

J.L. Chapman,

J.J. Doyle

and

Tuffnells Parcels Express Ltd,

on the interpretation of Article 1(3) 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),

THE COURT (First Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, P. Jann and L. Sevón, Judges,

Advocate General: A. Tizzano,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mrs Bowden, Mrs Chapman and Mrs Doyle, by T. Linden, Barrister, instructed by Pattinson & Brewer, Solicitors,

- Tuffnells Parcels Express Ltd, by D. Brown, Barrister, instructed by Chapman & Chubb, Solicitors,

- the United Kingdom Government, by G. Amodeo, of the Treasury Solicitor's Department, and C. Lewis, Barrister,

- Commission of the European Communities, by J. Sack and N. Yerrell, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Bowden, Mrs Chapman and Mrs Doyle, Tuffnells Parcels Express Ltd, the United Kingdom Government and the Commission at the hearing on 15 February 2001,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2001,

gives the following

Judgment

Grounds

1 By order of 6 April 2000, received at the Court Registry on 10 April 2000, the Employment Appeal Tribunal, London, referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 1(3) 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, hereinafter the Directive).

2 Those questions arose in proceedings brought by Mrs Bowden, Mrs Chapman and Mrs Doyle against Tuffnells Parcels Express Ltd (Tuffnells), which employs them on a part-time basis, concerning the latter's refusal to grant them paid annual leave.

Legal background

Community law

3 The purpose of the Directive is, according to Article 1 thereof, to lay down minimum requirements concerning the organisation of working time in order to ensure the health and safety of workers.

4 Thus, with regard to annual leave, Article 7 of the Directive provides:

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

5 By virtue of Article 1(3),

This Directive shall apply to all sectors of activity, both public and private, within the meaning of 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 (OJ 1989 L 183, p. 1)], 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.

6 Article 2 of Directive 89/391 refers generally to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

7 Article 17(1) of the Directive authorises Member States to derogate from several provisions of the Directive 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. Article 17(2.1)(c)(ii) relates in particular to dock or airport workers. The option of derogation does not, however, extend to the entitlement to annual leave provided for in Article 7.

8 Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Directive 93/104 (OJ 2000 L 195, p. 41) replaced Article 1(3) of the Directive by the following:

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 Articles 14 and 17 of this Directive.

9 According to the third recital in the preamble to Directive 2000/34,

Road ... transport ... [is] excluded from the scope of Council Directive 93/104/EC.

10 According to the fifth recital,

The health and safety of workers should be protected at the workplace not because they work in a particular sector or carry out a particular activity, but because they are workers.

11 Among other things, the 11th recital states that all workers should have adequate rest periods.

12 Article 17a of the Directive, as amended by Directive 2000/34, contains special derogating provisions applicable to mobile workers. Under Article 2(7) of the Directive, as amended, mobile workers are defined as anyone employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road, air or inland waterway.

13 Pursuant to Article 5, Directive 2000/34 entered into force on the date of its publication in the Official Journal of the European Communities, namely 1 August 2000. Article 2(1) of the Directive requires the Member States to bring into force the laws, regulations and administrative provisions necessary to comply with it no later than 1 August 2003, that time-limit being extended to 1 August 2004 in the case of doctors in training.

National law

14 The Working Time Regulations 1998 (the Regulations), designed to incorporate the Directive into the domestic law of the United Kingdom of Great Britain and Northern Ireland, entered into force on 1 October 1998.

15 Regulations 13 and 16 thereof guarantee entitlement to paid annual leave and lay down detailed provisions for that purpose.

16 Regulation 18 provides, however, that regulations 13 and 16 are not to apply:

(a) To the following sectors of activity:

(i) Air, rail, road, sea, inland waterways and lake transport.

17 The term sector of activity is not defined in the Regulations. However, regulation 2 states:

In the absence of a definition in these Regulations, words and expressions used in particular provisions which are also used in corresponding provisions of the Working Time Directive ... have the same meaning as they have in those corresponding provisions.

The dispute before the national court and the questions on which a ruling is sought

18 Tuffnells operates a major parcel delivery service, delivering goods by road in the United Kingdom. The appellants in the main proceedings are part-time clerical workers in one of its many depots: Mrs Bowden receives and sorts consignment notes in an office above a loading bay; Mrs Chapman and Mrs Doyle put information from

the consignment notes into the computer. The van drivers are not allowed into the offices and the appellants have no contact with them. Under their contracts, they cannot be asked to work in actual transport operations.

19 By contrast with their full-time colleagues, the appellants have no contractual entitlement to paid holidays. However, they may, if they choose, take unpaid holidays.

20 Following the entry into force of the Regulations, the appellants asked to be granted paid annual leave but were told by Tuffnells that they were not entitled to it. They then commenced proceedings before the Employment Tribunal (United Kingdom) which, by decision notified to them on 31 March 1999, held that they were not entitled to the annual leave provided for by regulation 13 of the Regulations since they worked in the road transport sector, which was excluded from the scope of regulation 13 by regulation 18.

21 The appellants appealed to the Employment Appeal Tribunal.

22 In its order for reference, the Employment Appeal Tribunal, London, draws attention to the difficulties involved in determining the meaning of sector of activity for the purposes of Article 1(3) of the Directive, especially in the field of transport.

23 It observes, in particular, that according to the 16th recital in the preamble to the Directive, it may be necessary to adopt separate measures with regard to the organisation of working time in certain sectors or activities, a statement which in its view provides no useful guidance for the interpretation of Article 1(3) of the Directive. It considers that a literal interpretation of that provision may lead to exclusion of all workers in the sector in question from the benefit of the Directive, with the result that a considerable number of workers will be deprived of, inter alia, the right to paid annual leave granted by it. That exclusion would run counter to the general objective pursued by the Directive, as reflected by the reference in the fourth recital in its preamble to the Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989, and in particular to paragraph 8 and the first subparagraph of paragraph 19 thereof, which state:

8. Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonised in accordance with national practices.

...

19. Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonisation of conditions in this area while maintaining the improvements made.

24 The national court considers that such exclusion has no economic, scientific, political or social basis.

25 The Employment Appeal Tribunal, London, refers however to the existence of various documents postdating the adoption of the Directive - in particular the Commission's White Paper of 15 July 1997 on sectors and activities excluded from the Working Time Directive (COM(97) 334 final), an opinion of the Economic and Social Committee of 26 March 1998 and a resolution of the European Parliament of 2 July 1998 - which unanimously deplore the exclusion from the scope of the Directive of all workers in the road transport sector. The national court observes that, in the sixth recital in the preamble to its proposal for a Council directive - 1999/C 43/01 - amending Directive 93/104 (OJ 1999 C 43, p. 1), which led to the adoption of Directive 2000/34, the Commission proposed extending the Directive to non-mobile workers in the sectors and activities currently excluded and that, in its Common Position (EC) No 33/1999 adopted on 12 July 1999 with a view to the adoption of Directive 2000/34 (OJ 1999 C 249, p. 17), the Council omitted from Article 1(3) of the Directive all reference to the transport sector of activity.

26 Those various documents suggest that non-mobile workers in the road transport sector were, at the material time, excluded from the benefit of the Directive and that formal amendment of the Directive was necessary to bring them within its scope.

27 In view of the foregoing considerations, the Employment Appeal Tribunal, London, stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

1. Given that the informed view of responsible bodies that amendment is needed if a legislative provision is to achieve a certain effect is likely to be consistent only with a view that the provision, before amendment, does not have that effect, and given also the previously expressed views of the Economic and Social Committee, the European Parliament, the Commission and the Council's Common Position Paper on the subject of the exceptions to Article 1(3) of Directive 93/104/EC suggesting that, as yet, there is an exception from the benefits of the Directive of all who work in the road transport sector of activity but that such an exception has been and is entirely unjustified, how far, if at all, are we enabled to infer from such non-legislative materials either that:

(a) as yet the proper construction of the wording of Article 1(3) is one which excludes all such persons, or

(b) that such a reading would not represent a just and purposive construction of the Article?

2. Whatever the conclusion is to Question 1, if, in the course of our task of interpreting our national laws in the light of the wording and purpose of the Directive, we encounter what we take to be a broad purpose ("every worker in the European Community will have a right to ... annual paid leave") but also, given no less prominence in the very same provision, a wording ("shall apply to all sectors of activity ... with the exception of ... road ... transport") which appears to be significantly destructive of that broad purpose, at all events on the facts before us, are we entitled (and if so, by reference to what principles) to apply our national laws to the facts of the particular case before us so as to give effect to that broad purpose notwithstanding the clarity of the wording appearing to exclude that purpose on such facts?

3. To raise similar issues in a less abstract way, are all workers employed in the road transport sector of activity referred to in Article 1(3) necessarily excluded from the scope of Directive 93/104?

4. If all such workers are not necessarily excluded, what test should the national court apply in order to determine which workers employed in the road transport sector of activity are excluded by Article 1(3) and which are not?

28 It is important to note at the outset that the questions submitted relate solely to the scope of the Directive. In particular, the national court does not seek guidance from the Court of Justice as to the extent of the prohibition of indirect discrimination between men and women as regards working conditions, as laid down in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), having regard to the difference of treatment referred to in the main proceedings regarding entitlement to paid annual leave as between part-time workers, who have no such entitlement, and full-time workers, who do, if it were the case that a much lower proportion of women than men worked full time (see, in that connection, Case C-457/93 Lewark [1996] ECR I-243, paragraph 28).

29 By the questions submitted, which it is appropriate to consider together, the national court asks, in essence, whether, on a proper construction of Article 1(3) of the Directive, all workers employed in the road transport sector, including office staff, are excluded from the scope of the Directive and, if not, what criteria must be applied to identify the category of workers who are excluded from the benefit of the Directive.

30 The appellants maintain that the Directive must be interpreted in the light of its social purpose, by virtue of which it is not permissible to deprive all workers in the road transport sector of the protection guaranteed by the Directive. The amendments to the Directive made after the material time by Directive 2000/34 and the travaux préparatoires for the latter Directive cannot be relevant to the construction of the Directive, since those amendments might reflect the wish of the Community legislature to clarify the scope of the applicable provisions rather than to recast them.

31 According to the appellants, in order to understand the scope of the exclusion of the road transport sector, account must be taken of the specific nature of the activities undertaken by the workers concerned rather than that of the employer. The wording of Article 1(3) of the Directive militates in favour of that interpretation since that provision uses the term sectors of activity and not sectors, which seems to place the emphasis on the activities performed rather than on the sector in which the employer operates.

32 In those circumstances, only workers whose activities are directly linked to transport operations are excluded from the scope of the Directive. Office workers do not fall into that category.

33 Moreover, in support of their interpretation, the appellants rely on Article 17(2) of the Directive, which allows the Member States to derogate from certain provisions of the Directive by reason of the specific characteristics of the activities concerned, provided that the workers concerned are afforded equivalent periods of compensatory rest or, in cases where that is not possible for objective reasons, appropriate protection. Article 17(2.1)(c)(ii) mentions among the activities concerned those involving the need to ensure continuity of service or production, particularly in the case of dock or airport workers. This means that the Directive covers persons working in docks or airports, even if they are employed in the sea or air transport sectors referred to Article 1(3) of the Directive. Consequently, a distinction should be drawn within the sector concerned, according to the specific activities of the staff concerned.

34 Tufnells, the United Kingdom Government and the Commission contend, on the other hand, that all workers in the road transport sector are excluded from the scope of the Directive.

35 In support of that interpretation they rely on the wording of Article 1(3) of the Directive, read in conjunction with the 16th recital in its preamble, which refers to the possible adoption of additional Community provisions which might prove necessary in certain sectors, and the travaux préparatoires preceding the adoption of the Directive. The Commission points out, in that connection, that its proposal for a Council directive 90/C 254/05 of 3 August 1990 (OJ 1990 C 254, p. 4) did not contemplate any sectoral exclusions but only derogations based on the specific nature of the activities concerned. When the Council examined that proposal it had been suggested that a distinction should be drawn between mobile workers in the transport sector, who would have been excluded from the scope of the Directive, and non-mobile workers, who would have enjoyed the safeguards provided by it. However, the Community legislature deliberately rejected the approach based on the nature of the activities by excluding entire sectors of activity from the scope of the Directive. In that connection, the Commission states that, in a declaration recorded in the minutes of the Council meeting of 23 November 1993, it expressed its intention to submit as soon as possible proposals for the various excluded sectors and activities, taking into account the characteristics of each of them. In its White Paper of 15 July 1997, particularly in paragraph 91, it repeated that intention after evaluating the characteristics and problems specific to each sector of activity.

36 The literal interpretation of Article 1(3) of the Directive is confirmed, in their view, by the fact that the protection it introduced was extended by Directive 2000/34 to all workers in the sectors previously excluded, subject to special provisions concerning mobile workers, within the meaning of Article 2(7) of the Directive, as amended by Directive 2000/34.

37 The Court recalls that, by virtue of Articles 1(1) and 15, the Directive confines itself to laying down minimum requirements concerning protection of health and safety in relation to the organisation of working time and does not prevent the Member States from adopting more favourable measures for the protection of workers.

38 Pursuant to Article 1(3), the Directive shall apply to all sectors of activity ... 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.

39 It is clear that, by referring to air, rail, road, sea, inland waterway and lake transport, the Community legislature indicated that it was taking account of those sectors of activity as a whole, whereas in the case of

other work at sea and the activities of doctors in training it chose to refer precisely to those specific activities as such. Thus, the exclusion of the road transport sector in particular extends to all workers in that sector.

40 Contrary to the appellants' contention, there is nothing in Article 17(2.1)(c)(ii) of the Directive to detract from that interpretation. As the Advocate General observes in point 38 of his Opinion, that provision, whose purpose is not to widen the scope of the Directive as defined by Article 1(3), is specifically concerned with workers who, although employed in ports or airports, do not fall within the sea or air transport sectors in the strict sense, such as catering workers, shop assistants, porters or dockers.

41 Furthermore, the Community legislature was aware of the limits of the protection provided for in 1993, since it considered it appropriate to make clear, in the 16th recital in the preamble to the Directive, that given the specific nature of the work concerned, it may be necessary to adopt separate measures with regard to the organisation of working time in certain sectors or activities which are excluded from the scope of this Directive.

42 The travaux préparatoires for the Directive, to which reference is made in paragraph 35 of this judgment, confirm that, in departing from the Commission's alternative proposals, the Council chose intentionally to exclude from the scope of the Directive all workers in the sectors concerned.

43 Consequently, as indeed is clear from the third recital in the preamble to Directive 2000/34, the amendments made by it to the Directive, in particular as to the scope of the Directive, are not, contrary to the appellants' contention, purely declaratory.

44 It follows that the answer to the questions submitted must be that, on a proper construction of Article 1(3) of the Directive, all workers employed in the road transport sector, including office staff, are excluded from the scope of the Directive.

Decision on costs

Costs

45 The costs incurred by the United Kingdom Government and 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 proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (First Chamber),

in reply to the questions submitted to it by the Employment Appeal Tribunal, London, by order of 6 April 2000, hereby rules:

On a proper construction of Article 1(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, all workers employed in the road transport sector, including office staff, are excluded from the scope of that Directive.