JUDGMENT OF THE COURT (Second Chamber)

14 October 2010 *

In Case C-243/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Halle (Germany), made by decision of 25 March 2009, received at the Court on 3 July 2009, in the proceedings

Günter Fuß

v

Stadt Halle,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Fuß, by M. Geißler, Rechtsanwalt,

— Stadt Halle, by Mr Willecke, acting as Agent,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Commission of the European Communities, by V. Kreuschitz and M. van Beek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 22(1)(b) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The reference has been made in the course of proceedings between Mr Fuß and his employer, Stadt Halle (City of Halle), concerning his compulsory transfer to a service other than that to which he was previously assigned as a fire fighter.

Legal context

European Union legislation

3 According to recital 1 in its preamble, Directive 2003/88 codifies, in the interests of clarity, the provisions 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), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41), ('Directive 93/104'). Member States were required to transpose Directives 93/104 and 2000/34 into their national law by no later than 23 November 1996 and 1 August 2003 respectively.

4 According to Article 1 of Directive 2003/88, entitled 'Purpose and scope':

'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

...'

5 Under the title 'Maximum weekly working time', Article 6 of Directive 2003/88 provides:

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

(a) 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;

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

6 Article 15 of Directive 2003/88, entitled 'More favourable provisions', states:

'This Directive shall not affect the 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.'

7 Article 17 of Directive 2003/88, entitled 'Derogations', provides:

'1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 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, …

…

3. In accordance with paragraph 2 of this Article, derogations may be made from Articles 3, 4, 5, 8 and 16:

…

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

…

(iii) … fire and civil protection services.'

8 The first subparagraph of Article 22(1) of Directive 2003/88 is worded as follows:

'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:

(a) 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 Article 16(b), unless he has first obtained the worker's agreement to perform such work;

(b) no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work;

(c) the employer keeps up-to-date records of all workers who carry out such work;

(d) 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;

(e) 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 Article 16(b).'

9 In accordance with Article 28 thereof, Directive 2003/88 entered into force on 2 August 2004.

National legislation

10 Paragraph 2(1) of the Verordnung über die Arbeitszeit der Beamtinnen und Beamten im feuerwehrtechnischen Dienst der Städte und Gemeinden des Landes Sachsen-Anhalt (Regulation on the working time of officials in the urban and municipal fire services of *Land* Sachsen-Anhalt) ('ArbZVO-FW 1998') of 7 October 1998, which was in force until 31 December 2007, provided as follows:

'The normal working period of officials engaged in shift work and whose weekly activities take place essentially in an on-call service shall be, on average, 54 hours …'

11 With effect from 1 January 2008, the ArbZVO-FW 1998 was replaced by the ArbZVO-FW 2007 of 5 July 2007 ('the ArbZVO-FW 2007').

12 Paragraph 2(1) of the ArbZVO-FW 2007 provides:

'The normal weekly working period of officials shall be 48 hours, averaged over the entire year and including overtime.'

13 Paragraph 4 of the ArbZVO-FW 2007, entitled 'Individual arrangements', is worded as follows:

'1. Subject to the general principles of safety and protection of health, the duration of shift work may exceed the average normal weekly duration referred to in Paragraph 2(1) if the employer can prove that the persons concerned have given their consent.

2. The consent referred to in subparagraph 1 may be withdrawn subject to six months' notice. The persons concerned must be informed thereof in writing.'

14 Paragraph 612a of the Bürgerliches Gesetzbuch (German Civil Code) provides that, in the agreements reached with a worker or the measures adopted in regard to that worker, an employer cannot place that worker at a disadvantage by reason of the fact that the worker has lawfully exercised his rights.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Mr Fuß has been employed by Stadt Halle since 10 May 1982. He was appointed as an official during 1998 in the grade of '*Oberbrandmeister*' (Sub Fire Officer) and has been a '*Hauptbrandmeister*' (Station Fire Officer) since 15 December 2005.

16 Until 4 January 2007, Mr Fuß was employed on operational duties in the fire prevention and protection section of the Stadt Halle fire service as a vehicle driver. He was rostered to work an average of 54 hours per week.

17 At a staff meeting held at the beginning of 2006, Stadt Halle managers informed members of the operational service that there would have to be transfers to the fire service control room if compliance with Directive 2003/88 was required.

18 By a letter of 13 December 2006, Mr Fuß, citing the order of the Court in Case C-52/04 *Personalrat der Feuerwehr Hamburg* [2005] ECR I-7111, requested that, in future, his weekly working time should no longer exceed the maximum average limit of 48 hours laid down in Article 6(b) of Directive 2003/88. In that letter Mr Fuß also claimed entitlement to compensation in respect of overtime unlawfully performed during the period between 1 January 2004 and 31 December 2006.

19 By decision of 18 December 2006, Stadt Halle introduced a staff rostering plan under which a job-rotation post that had become vacant in the fire service control room had to be filled with effect from 1 April 2007 in order to avoid any qualitative shortcomings in departmental organisation.

20 On 21 December 2006, Mr Fuß was interviewed by his employer in connection with the latter's plan to transfer him to that post. During that interview, Mr Fuß stated that he wished to continue working in the operational service.

21 By decision of 2 January 2007, Stadt Halle transferred Mr Fuß to the fire service control room for a limited period, namely from 5 January 2007 to 31 March 2009, on the ground that such a transfer was necessary for reasons of departmental organisation ('the transfer decision'). According to Stadt Halle, the post in question required qualification as an *Oberbrandmeister*, several years' experience driving a fire engine and paramedic training. In addition, that transfer would allow Mr Fuß, inter alia, to work in compliance with the maximum weekly working time of 48 hours.

22 Since his transfer, Mr Fuß has been working a 40-hour week and is no longer required to work 24-hour on-call shifts. Furthermore, as he works a smaller number of unsocial hours (nights, Sundays and public holidays), he receives a smaller hardship allowance for working such hours.

23 On 4 January 2007, Mr Fuß lodged an administrative objection to the transfer decision with Stadt Halle, essentially submitting that he did not wish to work a different shift pattern.

24 By decision of 23 January 2007, Stadt Halle rejected that objection on the ground, essentially, that the transfer decision was a personnel issue based on the employer's authority in staff matters, which it was entitled to exercise as it saw fit.

25 On 28 February 2007, Mr Fuß brought an action before the Verwaltungsgericht (Administrative Court) Halle for annulment of the transfer decision and for his reinstatement in the post which he had occupied prior to the measure adopted in his regard. He argues essentially that his transfer was decided on solely because he had asked for a reduction in his working time in accordance with Directive 2003/88. Stadt Halle, by contrast, argues that the decision at issue was not in any way intended to punish Mr Fuß but was designed to meet his request for observance of a 48-hour working week, without having to amend the shift pattern prematurely and for his sole benefit, something which would have given rise to organisational problems. Bringing the shift pattern into line with Directive 2003/88, it argued, had to be done on a uniform basis for all service employees.

26 In its order for reference, the national court finds that the transfer decision is in accordance with national law. First, Mr Fuß was transferred to a post at the same grade and in the same salary group. Secondly, even if one were to take the view that it could not be justified on grounds of departmental organisation, Mr Fuß's transfer was based on a relevant ground, namely, the desire to put an end to an infringement of Article 6(b) of Directive 2003/88 in his regard, without amending the shift pattern or bringing into line with the directive either that shift pattern or the working time of other fire fighters.

27 However, the national court is unsure whether or not the transfer decision is contrary to Article 22(1)(b) of Directive 2003/88.

28 It points out that, at the material time, Paragraph 2(1) of the ArbZVO-FW 1998 was, admittedly, not intended as a derogation from Article 6(b) of Directive 2003/88, within the meaning of Article 22(1) thereof, and no other provision of national law provided for the possibility of such a derogation in compliance with all of the conditions laid down in the latter provision, in particular that laid down in Article 22(1)(b), which provides that no worker is to be subjected to any detriment because he is not willing to give his agreement to perform work in excess of the 48-hour average maximum working week. However, unless it is to be accepted that the rights under Directive 2003/88 may be circumvented and that the directive may fail to achieve its purpose, the prohibition on causing detriment to employees must apply *a fortiori* if the employer, notwithstanding the absence of an express provision of national law authorising it to do so, requires an employee to perform work in excess of the maximum limit laid down in the abovementioned Article 6(b) and the employee insists that that provision must be observed.

29 According to the national court, the question arises, however, as to whether the concept of 'detriment' in Article 22(1)(b) of Directive 2003/88 is to be interpreted subjectively or objectively. From a subjective point of view, Mr Fuß would suffer detriment if he were to perceive the transfer as punishment. By contrast, from an objective point of view, Mr Fuß has not suffered any detriment since his new post is less dangerous than his previous one and he has the opportunity of obtaining further professional qualifications. It is, admittedly, true that Mr Fuß has suffered a loss of salary by reason of the reduction in his hardship allowance paid for working unsocial hours. However, that reduction is justified by the fact that he works fewer unsocial hours and is compensated by having more free time. Furthermore, the fact that the transfer was for a limited period is irrelevant inasmuch as, in accordance with the ArbZVO-FW 2007, in the version in force since 1 January 2008, Mr Fuß could be kept in a post outside the operational service if he is unwilling to work hours in excess of the maximum weekly limit of 48 hours.

30 In those circumstances, the Verwaltungsgericht Halle decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the concept of detriment in Article 22(1)(b) of Directive 2003/88 … to be construed objectively or subjectively?

(2) Is there detriment within the meaning of Article 22(1)(b) of Directive 2003/88 … if, as a result of having requested that the maximum working time in future be complied with, an employee in an on-call service is transferred, against his will, to a different post that largely involves office duties?

(3) Is a fall in remuneration to be construed as detriment within the meaning of Article 22(1)(b) of Directive 2003/88 … if, as a result of the transfer, fewer unsocial hours (nights, Sundays and public holidays) are worked and the amount of the hardship allowance paid in respect of such hours is therefore also reduced?

(4) In the event that the second or third questions are answered in the affirmative: can detriment resulting from a transfer be offset by other advantages inherent in the new post, such as shorter working hours or further training?'

The questions referred

31 By its questions, which it is appropriate to consider together, the national court asks, in essence, whether the concept of 'detriment' in Article 22(1)(b) of Directive 2003/88 must be interpreted as precluding national rules, such as those at issue in the main proceedings, which allow a public-sector employer to transfer compulsorily a worker employed as a fire fighter in an operational service on the ground that that worker has requested compliance, within that operational service, with the maximum average weekly working time laid down in Article 6(b) of Directive 2003/88.

32 It must be pointed out in this regard that it follows from settled case-law that the purpose of Directive 2003/88 is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national rules concerning, in particular, the duration of working time. That harmonisation at European Union 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 on the average duration of the working week (see, inter alia, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 76; Case C-14/04 *Dellas and Others* [2005] ECR I-10253, paragraphs 40 and 41; and Case C-484/04 *Commission* v *United Kingdom* [2006] ECR I-7471, paragraphs 35 and 36).

33 Article 6(b) of Directive 2003/88 therefore requires the Member States to take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers, the average working time for each seven-day period, including overtime, does not exceed 48 hours. That maximum limit on average weekly working time constitutes a rule of European Union social law of particular importance from

which every worker must benefit as a minimum requirement intended to ensure protection of his safety and health (see *Pfeiffer and Others*, paragraph 100; *Dellas and Others*, paragraph 49; and *Commission* v *United Kingdom*, paragraph 38).

34 Under the system established by Directive 2003/88, although Article 15 thereof allows generally for the application or introduction of national provisions more favourable to the protection of the safety and health of workers, only some of its provisions, which are exhaustively listed, may form the subject-matter of derogations by the Member States or the two sides of industry. Furthermore, the implementation of such derogations is subject to strict conditions intended to secure effective protection for the safety and health of workers (see *Pfeiffer and Others*, paragraphs 77 and 96).

35 Thus, the first subparagraph of Article 22(1) of Directive 2003/88, which is the subject of the questions referred to the Court, provides the Member States with the option not to apply Article 6 on condition that they observe the general principles of the protection of the safety and health of workers and that they satisfy a number of conditions set out cumulatively in that provision, in particular the provision laid down in Article 22(1)(b), according to which measures must be taken to ensure that no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform work the average weekly duration of which exceeds the maximum limit laid down in Article 6(b) of Directive 2003/88.

36 In the present case, however, it is common ground that neither the Federal Republic of Germany, as the Court has already held in paragraph 85 of the judgment in Case C-151/02 *Jaeger* [2003] ECR I-8389 and in paragraph 98 of the judgment in *Pfeiffer*

and Others, nor *Land* Sachsen-Anhalt, as was established by the national court in its order for reference and confirmed in the present proceedings both by the German Government and by Stadt Halle in their written observations, had, at the time of the facts in the main proceedings, availed itself of that possibility of derogation inasmuch as the provisions of national law in force at that time contained no measure complying with the first subparagraph of Article 22(1) of Directive 2003/88 or intended to transpose that provision. In reply to a written question from the Court on that point, Stadt Halle repeated that finding, while Mr Fuβ and the Austrian Government also expressed the same view.

37 At the very most, the national court notes in this regard that *Land* Sachsen-Anhalt subsequently took advantage of the derogation provided for in Article 22(1)(b) of Directive 2003/88 in legislation adopted later for the transposition of that directive in regard, specifically, to fire fighters employed by the urban and municipal authorities in Sachsen-Anhalt. However, those rules did not enter into force until 1 January 2008, that is to say, after the transfer decision had been taken.

38 It follows that, in the absence of measures of national law giving effect to the derogation available to Member States under the first subparagraph of Article 22(1) of Directive 2003/88, that provision is irrelevant to the resolution of the dispute in the main proceedings and, consequently, only Article 6(b) of that directive, in so far as it lays down the principle that Member States must ensure that the average working time for each seven-day period, including overtime, does not exceed 48 hours, must be taken into consideration.

39 It must be recalled in this regard that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for

the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of European Union law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts (see, to that effect, inter alia, Case C-45/06 *Campina* [2007] ECR I-2089, paragraphs 30 and 31; Joined Cases C-329/06 and C-343/06 *Wiedemann and Funk* [2008] ECR I-4635, paragraph 45; and Case C-66/09 *Kirin Amgen* [2010] ECR I-7943, paragraph 27).

40 Consequently, even if, formally, the referring court has limited its questions to the interpretation of Article 22(1)(b) of Directive 2003/88, that does not prevent the Court from providing the referring court with all the elements of interpretation of European Union law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of European Union law which require interpretation in view of the subject-matter of the dispute (see Case C-229/08 *Wolf* [2010] ECR I-1, paragraph 32 and the case-law cited).

41 In the present case, it is apparent from the order for reference that the court before which the dispute in the main proceedings has been brought takes the view that, since the condition concerning the absence of detriment to the employee, laid down in Article 22(1)(b) of Directive 2003/88, applies where, in the case in which there are national measures implementing that provision, the employer has not obtained the employee's consent to derogate from Article 6(b) of the directive, that condition must apply *a fortiori* where, as in the circumstances of the present case, an employer imposes such a derogation, notwithstanding the absence of provisions of national law

authorising it to do so, and the employee concerned objects to the derogation and insists on compliance with Article 6(b).

42 The national court therefore suggests that, if the worker concerned does not suffer any detriment by reason of the fact that he did not agree to the exceeding of the upper limit of 48 hours laid down in Article 6(b) of Directive 2003/88 for the average maximum working week, it would not be contrary to that directive for his employer to be able to decide, on the basis of national law, to transfer him against his will to another service which does comply with the upper limit laid down in that provision, inasmuch as such a transfer puts an end to the infringement of that provision in regard to that employee.

43 In those circumstances, in order to provide a useful reply to the national court, the questions referred must be reformulated in such a way as to mean that the national court is asking, essentially, whether Article 6(b) of Directive 2088/97 must be interpreted as precluding national rules, such as those at issue in the main proceedings, which allow a public-sector employer to transfer compulsorily to another service a worker employed as a fire fighter in an operational service on the ground that that worker has requested compliance, within the latter service, with the maximum average working week laid down in that provision, in a situation in which that worker suffers no detriment by reason of such a transfer.

44 It must be recalled in that regard that, as was held in paragraph 61 of the order in *Personalrat der Feuerwehr Hamburg*, the activities carried out by the operational crews of a public fire service – apart from exceptional circumstances of such gravity and scale that the aim of ensuring the proper functioning of services essential for the protection of public interests, such as public order, health and safety, must temporarily prevail over the aim of guaranteeing the health and safety of workers assigned to intervention and rescue teams, circumstances which do not obtain in the main proceedings in the present case – come within the scope of Directive 2003/88, with the

result that, in principle, Article 6(b) thereof precludes exceeding the 48-hour ceiling prescribed as the maximum weekly working time, including time on call.

45 In the present case, however, it is common ground that the rules applicable in *Land* Sachsen-Anhalt at the time of the facts in the main proceedings imposed on fire fighters who, like Mr Fuß, were employed in the urban and municipal operational services of that *Land* a working period which exceeded the maximum weekly upper limit laid down in Article 6(b) of Directive 2003/88.

46 Under those circumstances, in order to reply to the national court's question, it is necessary, first, to examine whether, as the national court suggests, the finding that there has been an infringement of Article 6(b) of Directive 2003/88 is subject to the condition that the worker concerned has suffered detriment and, secondly, to determine the consequences for national courts of a possible infringement of that provision.

47 With regard, first, to the relevance of the question whether the worker concerned must suffer detriment in order for there to be an infringement of Article 6(b) of Directive 2003/88, it must be recalled that, as will already be apparent from paragraph 33 of the present judgment, that provision constitutes a particularly important rule of European Union social law which requires the Member States to fix an upper limit of 48 hours for the maximum average weekly working time, including overtime, as is expressly laid down in that provision and from which, in the absence of implementation in national law of the first subparagraph of Article 22(1) of the directive, no derogation may be made in respect of activities such as those of fire fighters at issue in the main proceedings.

48 As has already been stated in paragraph 34 of the present judgment, only some of the provisions of Directive 2003/88, which are expressly referred to, may form the subject-matter of derogations by the Member States or the two sides of industry.

49 However, in the first place, Article 6 of Directive 2003/88 is referred to only in Article 17(1) thereof, even though it is common ground that the latter provision covers activities which bear no relation at all to those carried out by fire fighters. By contrast, although Article 17(3)(c)(iii) refers to 'activities involving the need for continuity of service', including in particular 'fire … services', that provision gives scope for derogating, not from Article 6 of the directive, but from other provisions thereof (see, by analogy, *Pfeiffer and Others*, paragraph 97).

50 In the second place, as is already apparent from paragraphs 35 and 36 of the present judgment, it is common ground that neither the Federal Republic of Germany nor *Land* Sachsen-Anhalt has availed itself of the derogation provided for in the first subparagraph of Article 22(1) of Directive 2003/88, which permits Member States not to apply Article 6 thereof provided that certain conditions, set out cumulatively, are satisfied (see, by analogy, *Pfeiffer and Others*, paragraph 98).

51 In those circumstances, in order to ensure that Directive 2003/88 is fully effective, the Member States must prevent the maximum weekly working time laid down in Article 6(b) of Directive 2003/88 from being exceeded (*Pfeiffer and Others*, paragraph 118).

52 As the Court has already held, the Member States cannot therefore unilaterally determine the scope of that provision by attaching conditions or restrictions to the implementation of the right of workers to an average weekly working period which does not exceed 48 hours (*Pfeiffer and Others*, paragraph 99).

53 Consequently, exceeding the maximum average weekly working time laid down in Article 6(b) of Directive 2003/88 constitutes, in itself, an infringement of that provision, without it also being necessary to show that a specific detriment has been suffered. In the absence of any national legal measure giving effect to the option to derogate provided for in the first subparagraph of Article 22(1) of the directive, the concept of 'detriment' in that provision is thus entirely irrelevant for purposes of the interpretation and application of Article 6(b).

54 In reality, as will be clear from paragraph 32 of the present judgment, since the purpose of Directive 2003/88 is to guarantee protection of the safety and health of workers by providing for adequate rest periods, the European Union legislature took the view that, inasmuch as it deprives workers of those rest periods, the exceeding of the maximum average weekly working time laid down in Article 6(b) of Directive 2003/88 in itself causes workers to suffer detriment since their safety and health are thus adversely affected.

55 It follows that national rules, such as those in the main proceedings, which provided, in regard to a worker employed as a fire fighter in an operational service, for working time which exceeds the maximum limit laid down by Article 6(b) of Directive 2003/88 constitute an infringement of that provision, without there being any need to establish, in addition, whether that worker has been subjected to a specific detriment.

56 With regard, secondly, to the consequences for national courts of such an infringement of Article 6(b) of Directive 2003/88, the Court has consistently held that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon by individuals as against the State, including in its capacity as an employer, in particular when it has failed to transpose that directive into national law within the time-limit or has transposed it incorrectly (see, to that effect, Case 152/84 *Marshall* [1986] ECR 723, paragraphs 46 and 49, and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraphs 193 and 194).

57 Article 6(b) of Directive 2003/88 satisfies those criteria, as it imposes on Member States, in unequivocal terms, a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it, which provides for a 48-hour maximum, including overtime, as regards average weekly working time (see, to that effect, *Pfeiffer and Others*, paragraph 104).

58 In that regard, even though the first subparagraph of Article 22(1) of Directive 2003/88 permits the Member States to derogate from Article 6 thereof, that fact does not alter the precise and unconditional nature of Article 6(b). The Member States' right not to apply Article 6 is subject to compliance with all of the conditions set out in the first subparagraph of Article 22(1) of that directive, with the result that it is possible to determine the minimum protection which must be provided in any event (see, to that effect, *Pfeiffer and Others*, paragraph 105).

59 Article 6(b) of Directive 2003/88 thus fulfils all of the conditions necessary for it to produce direct effect (see, to that effect, *Pfeiffer and Others*, paragraph 106).

60 As a result, since, at the time of the facts in the main proceedings, the period for transposing Directive 93/104 had expired and *Land* Sachsen-Anhalt had not, at that time, transposed it into its internal law in regard to fire fighters employed in an operational service, a worker such as Mr Fuß, employed by Stadt Halle in such a service, is entitled to rely directly on the provisions of Article 6(b) of Directive 2003/88 as against that public employer in order to secure respect for the right to an average weekly working time of not more than 48 hours guaranteed by that provision.

61 It must be stated in that regard that, since the abovementioned provision has direct effect, it is binding on all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralised authorities such as *Länder*, cities and towns or communes, and those authorities are required to apply it (see, to that effect, Case 103/88 *Costanzo* [1989] ECR 1839, paragraphs 30 to 33).

62 In the main proceedings in the present case, Stadt Halle takes the view that the compulsory transfer of Mr Fuß, after he had called on his employer to comply with the maximum weekly working time laid down in Article 6(b) of Directive 2003/88, to another service in which that upper limit is respected is such as to ensure full implementation of that directive in regard to Mr Fuß since that transfer put an end to the infringement of European Union law in his regard.

63 It must be recalled in that connection that, according to the Court's settled case-law, it is for the national courts and administrative bodies to apply European Union law in its entirety and to protect rights which the latter confers on individuals, disapplying, if necessary, any contrary provision of domestic law (see, to that effect, *Costanzo*, paragraph 33, and Case C-208/05 *ITC* [2007] ECR I-181, paragraphs 68 and 69 and the case-law cited).

64 In the present case, it is necessary that the rights conferred directly on workers by Article 6(b) of Directive 2003/88 be ensured in full in the national legal order (*Dellas and Others*, paragraph 53).

65 However, it must be stated that the effect of a compulsory transfer such as that in the main proceedings deprives of all substance, in regard to a fire fighter, such as Mr Fuß, employed in an operational service, the right to a maximum working week of 48 hours in that post, conferred by Article 6(b) and recognised by the Court in the order in *Personalrat der Feuerwehr Hamburg*. Consequently, such a measure destroys the useful effect of that provision in regard to that worker. It is evident, therefore, that that measure does not ensure either the implementation in full of Article 6(b) of Directive 2003/88 or the protection of the rights which that provision confers on workers in the Member State concerned.

66 In addition, as the Commission correctly pointed out, the fundamental right to effective judicial protection, guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, which, according to the first subparagraph of Article 6(1) EU, has 'the same legal value as the Treaties', would be substantially affected if an employer, in reaction to a complaint or to legal proceedings brought by an employee with a view to ensuring compliance with the provisions of a directive intended to protect his safety and health, were entitled to adopt a measure such as that at issue in the main proceedings. Fear of such a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of a measure taken by their employer from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive (see, by analogy, Case C-185/97 *Coote* [1998] ECR I-5199, paragraphs 24 and 27).

67 The answer to the questions referred is therefore that Article 6(b) of Directive 2003/88 must be interpreted as precluding national rules, such as those at issue in the main

proceedings, which allow a public-sector employer to transfer compulsorily to another service a worker employed as a fire fighter in an operational service on the ground that that worker has requested compliance, within the latter service, with the maximum average weekly working time laid down in that provision. The fact that such a worker suffers no specific detriment by reason of that transfer, other than that resulting from the infringement of Article 6(b) of Directive 2003/88, is irrelevant in that regard.

Costs

68 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:

Article 6(b) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national rules, such as those at issue in the main proceedings, which allow a public-sector employer to transfer compulsorily to another service a worker employed as a fire fighter in an operational service on the ground that that worker has requested compliance, within the latter service, with the maximum average weekly working time laid down in that provision. The fact that such a worker suffers no specific detriment by

reason of that transfer, other than that resulting from the infringement of Article 6(b) of Directive 2003/88, is irrelevant in that regard.

[Signatures]