JUDGMENT OF THE COURT (Fifth Chamber)

8 February 2001 *

In Case C-350/99,

REFERENCE to the Court under Article 234 EC by the Arbeitsgericht Bremen, Germany, for a preliminary ruling in the proceedings pending before that court between

Wolfgang Lange

and

Georg Schünemann GmbH,

on the interpretation of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288 p. 32),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: A. La Pergola (Rapporteur), President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann and L. Sevón, Judges,

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

after considering the written observations submitted on behalf of:

— Georg Schünemann GmbH, by M. von Foerster, Rechtsanwalt,

— the German Government, by W.-D. Plessing, and C.-D. Quassowski, acting as Agents,

— the Austrian Government, by W. Okresek, acting as Agent,

— the Commission of the European Communities, by D. Gouloussis and C. Ladenburger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Lange, represented by R. Buschmann, Assessor, of the German Government, represented by W.-D. Plessing, and of the Commission, represented by C. Ladenburger, at the hearing on 21 September 2000,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2000,

gives the following

Judgment

1 By order of 25 August 1999, received at the Court on 22 September 1999, the Arbeitsgericht Bremen referred to the Court of Justice for a preliminary ruling under Article 234 EC three questions on the interpretation of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288 p. 32, hereinafter 'the Directive').

2 Those questions were raised in proceedings between Wolfgang Lange and Georg Schünemann GmbH ('Georg Schünemann') concerning the validity of Mr Lange's dismissal by Georg Schünemann on the ground that Mr Lange refused to work overtime.

The Directive

3 According to the second recital in its preamble, the Directive is designed to provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market. According to the seventh recital, 'it is necessary to establish at Community level the general

requirement that every employee must be provided with a document containing information on the essential elements of his contract or employment relationship'.

4 Article 2 of the Directive provides:

'1. An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as "the employee", of the essential aspects of the contract or employment relationship.

2. The information referred to in paragraph 1 shall cover at least the following:

...

(i) the length of the employee's normal working day or week;

...

3. The information referred to in paragraph 2(f), (g), (h) and (i) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those particular points.'

5 According to Article 6 of the Directive;

'This Directive shall be without prejudice to national law and practice concerning:

— the form of the contract or employment relationship,

— proof as regards the existence and content of a contract or employment relationship,

— the relevant procedural rules.'

6 Article 8(1) of the Directive provides:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.'

German law

7 The Directive was transposed into German law by means of the Nachweisgesetz der für ein Arbeitsverhältnis geltenden wesentlichen Bedingungen of 20 July 1995 (Law on notification of conditions governing an employment relationship, BGBl. 1995 I, p. 946).

8 Article 2(1) of that Law provides:

'No later than one month after the agreed date of commencement of the employment relationship, the employer shall record in writing the essential conditions of the contract of employment, sign the document and deliver it to the worker. That document shall state at least:

...

7. the agreed working hours,

...'

The main proceedings

9 Mr Lange was employed as from 1 June 1998 as a lathe operator by Georg Schünemann under a contract of employment dating from 23 April 1998. Article 1 of that contract provides *inter alia* that the length of the working week is to be 40 hours. The contract gives no details concerning overtime.

10 Mr Lange refused to work overtime at the request of his employer in order to fulfil orders within time-limits agreed with a customer, for which reason Georg Schünemann, by letter of 15 December 1998, terminated his contract with effect from 15 January 1999.

11 On 18 December 1998 Mr Lange brought an action against his dismissal before the Arbeitsgericht Bremen, requesting that he keep his job in the event of his action being successful. Georg Schünemann contended that the action should be dismissed.

12 Before the national court, the parties are at odds as to what was agreed between them, when Mr Lange was recruited, with regard to overtime. According to Georg Schünemann, Mr Lange agreed to work overtime at the request of the company in the event of sudden increases in workload. Mr Lange contends that he agreed to work overtime only in emergencies.

13 According to the Arbeitsgericht, the issue in the proceedings before it is whether Mr Lange has breached his obligations towards his employer by refusing to work overtime and it is therefore necessary to determine what they agreed in relation to overtime.

14 Considering that the outcome of the action depended on the interpretation of the Directive, the Arbeitsgericht Bremen stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1 Does Article 2(2)(i) of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship ... also apply to agreements by the employee by which he undertakes in general terms to work overtime?

2 Under Article 2 thereof, is a national law transposing Directive 91/533 to be interpreted so as to render agreements inapplicable from a substantive point of view as well, where they not only lack the precision required by that provision but also confer on the employer certain unilateral rights the substance of which is imprecisely defined?

3 (a) In order to ensure an interpretation in conformity with EC law, does Directive 91/533 require national principles, under which a party not complying with legal obligations to provide documentation is deemed to have obstructed the taking of evidence, to be applied also where an employer has failed to provide information pursuant to Directive 91/533?

(b) If Question 3(a) is answered in the negative, are national principles of law precluded under the third indent of Article 6 of Directive 91/533 from being applied in the manner described at (a) above?'

15 By its first question the national court seeks essentially to ascertain whether by virtue of the Directive, more particularly Article 2(2)(i) thereof, there is an obligation on the part of an employer to bring to the notice of an employee, under the conditions laid down by the Directive, any term whereby the employee is obliged to work overtime whenever requested to do so by the employer.

16 It should be observed that it is clear from its very wording that Article 2(2)(i) of the Directive, referring as it does to normal working hours, is not concerned with overtime. The characteristic feature of overtime, as the word indicates, is that it is performed outside normal working hours and is additional thereto.

17 The Commission contends that, although normal working hours do not in principle include overtime, the position is different where, in practice, overtime is habitually worked in the undertaking and is thus a feature of the employee's ordinary working day.

18 That interpretation cannot be accepted since, first, it is contrary to the wording of Article 2(2)(i) of the Directive, which does not refer to habitual working hours and, second, the purpose of the obligation to provide information imposed by the Directive is to apprise employees of their rights and obligations vis-à-vis their employers, not to give an indication of the practices observed as a general rule in the undertaking in the period preceding their recruitment.

19 It follows that Article 2(2)(i) of the Directive must be interpreted as not relating to overtime.

20 It must however be observed that an obligation to inform employees whether, and if so under what conditions, they may be required to work overtime may arise from another provision of the Directive.

21 Article 2(1) of the Directive lays down the principle that the employer is obliged to notify employees of the essential aspects of the contract or employment relationship. That obligation, which is described in the seventh recital in the preamble to the Directive as a general requirement, concerns all the aspects of the contract or employment relationship which are, by virtue of their nature, essential elements.

22 Article 2(2) of the Directive does not reduce the scope of that general requirement. It is clear from the wording of that provision that the elements listed in it do not constitute an exhaustive enumeration of the essential elements referred to in Article 2(1).

23 Accordingly, apart from the elements mentioned in Article 2(2) of the Directive, any element which, in view of its importance, must be considered an essential element of the contract or employment relationship of which it forms part must be notified to the employee. That applies in particular to a term under which an employee is obliged to work overtime whenever requested to do so by his employer.

24 Consequently, the employer is required to give written notice to an employee of any term under which the latter is obliged to work overtime whenever requested to do so by his employer under the same conditions as those imposed by the Directive for the elements expressly mentioned in Article 2(2). It should be noted in that connection that the information to be given to the employee may in such circumstances, by analogy with the rule which applies, in particular, to normal working hours under Article 2(3) of the Directive, be given, where appropriate, in the form of a reference to the relevant laws, regulations and administrative or statutory provisions or collective agreements.

25 The answer to the first question must therefore be that Article 2(2)(i) of the Directive must be interpreted as not relating to overtime. However, it is clear from Article 2(1) of the Directive that the employer is obliged to notify the employee of any term having the nature of an essential element of the contract or employment relationship and requiring the employee to work overtime whenever requested to do so by his employer. That information must be notified under the same conditions as those laid down by the Directive for the elements expressly mentioned in Article 2(2) thereof. It may, where appropriate, by analogy with the rule which applies, in particular, to normal working hours by virtue of Article 2(3) of the Directive, take the form of a reference to the relevant laws, regulations and administrative or statutory provisions or collective agreements.

The second question

26 By its second question the national court seeks essentially to ascertain whether, where an essential element of the contract or employment relationship within the

meaning of Article 2 of the Directive has not been mentioned in a written document delivered to the employee or has not been mentioned with sufficient precision, that element must as a result be regarded as inapplicable.

27 First, it must be borne in mind that, by virtue of the second indent of Article 6, the Directive is to be without prejudice to the rules on proof of the existence of a contract or employment relationship under national law. As the Commission has correctly pointed out, that provision implies that such proof may be produced in any form allowed by national law, and thus even in the absence of any written notification from the employer. The aim pursued by that provision would be frustrated if the Directive were interpreted as meaning that the existence and content of essential elements of the contract or employment relationship not notified in writing to the employee could never be established by reason of the fact that they had to be considered inapplicable.

28 Second, Article 8(1) of the Directive provides that Member States are to introduce such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from the Directive to pursue their claims by judicial process after possible recourse to other competent authorities. It follows from that provision that the Directive cannot be interpreted as meaning that a failure to give an employee the requisite information concerning an essential element of the contract or employment relationship will render that element inapplicable since the Directive leaves to the Member States the power to define the penalties appropriate to such circumstances, subject to the proviso that employees must be able to pursue their claims by judicial process.

29 The answer to be given to the second question must therefore be that no provision of the Directive requires an essential element of the contract or employment

relationship that has not been mentioned in a written document delivered to the employee or has not been mentioned therein with sufficient precision to be regarded as inapplicable.

The third question

30 By its third question the national court seeks essentially to ascertain whether, in the event of breach by the employer of his obligation under the Directive to provide information, the national court is required by the Directive to apply by analogy principles of national law under which the proper taking of evidence is deemed to have been obstructed where a party to the proceedings has not complied with his legal obligations to provide information, and, if that is not the case, whether Article 6 of the Directive precludes the national court from applying those principles.

31 The Court has already held that, under Article 6 of the Directive, national rules concerning the burden of proof are not to be affected, as such, by the Directive (Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-6907, paragraph 30).

32 It is true that, in paragraph 33 of its judgment in *Kampelmann*, the Court held that the national courts must apply and interpret their national rules on the burden of proof in the light of the purpose of the Directive, giving the notification referred to in Article 2(1) such evidential weight as to allow it to serve as factual proof of the essential aspects of the contract of employment or employment relationship, enjoying such presumption as to its correctness as would attach, in

domestic law, to any similar document drawn up by the employer and communicated to the employee. However, in paragraph 34 of the same judgment the Court stated that the Directive does not itself lay down any rules of evidence.

33 The question whether the rules applicable under national law to presumptions of obstruction of the proper taking of evidence must also be applied in the event of an employer's failing to comply with his obligation under the Directive to provide information is a question which pertains to the scope of those rules, which relate to the burden of proof, and thus concerns the rules of evidence applicable in that event.

34 Such a question, as observed in paragraphs 31 and 32 of this judgment, is not governed by the Directive, which leaves it to the Member States to apply their own rules of evidence as to the existence and content of contracts or employment relationships.

35 The answer to be given to the third question must therefore be that, where an employer fails to comply with his obligation under the Directive to provide information, the Directive does not require the national court to apply, or refrain from applying, principles of national law under which the proper taking of evidence is deemed to have been obstructed where a party to the proceedings has not complied with his legal obligations to provide information.

Costs

36 The costs incurred by the German and Austrian 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Arbeitsgericht Bremen by order of 25 August 1999, hereby rules:

1. Article 2(2)(i) of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship must be interpreted as not relating to the working of overtime. However, it is clear from Article 2(1) of that Directive that the employer is obliged to notify the employee of any term having the nature of an essential element of the contract or employment relationship and requiring the employee to work overtime whenever requested to do so by his employer. That information must be notified under the same conditions as those laid down by the Directive for the elements expressly mentioned in Article 2(2) thereof. It may, where appropriate, by analogy with the rule which applies, in particular, to normal working hours by virtue of Article 2(3) of the Directive, take the form of a reference to the relevant laws, regulations and administrative or statutory provisions or collective agreements.

2. No provision of Directive 91/533 requires an essential element of the contract or employment relationship that has not been mentioned in a written document delivered to the employee or has not been mentioned therein with sufficient precision to be regarded as inapplicable.

3. Where an employer fails to comply with his obligation under Directive 91/533 to provide information, that directive does not require the national court to apply, or refrain from applying, principles of national law under which the proper taking of evidence is deemed to have been obstructed where a party to the proceedings has not complied with his legal obligations to provide information.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 8 February 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber