OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 26 October 2000 [1]

1. The Arbeitsgericht (Labour Court) Bremen, Germany, seeks from the Court under Article 234 EC a ruling on the interpretation of Article 2(2)(i) and Article 6 of Directive 91/533/EEC on an employer's obligation to inform employees of the conditions of their employment. [2]

The main proceedings concern the legitimacy of an employee's dismissal on the ground of refusal to work overtime, whether it would be appropriate to reinstate the employee and the legality of the employer's cancellation of a salary bonus by reason of the employee's aforementioned refusal to work overtime.

I — The facts of the main proceedings

2. In June 1998, Mr Lange began working as a lathe operator for Georg Schünemann GmbH, a company which employs around 50 workers, has entered into no collective wage-bargaining agreement, has no staff committee and is not a member of an employers' association.

The legal basis for the employment relationship is a contract of employment dated 23 April 1998. The contract stipulated that employment would commence on 1 June 1998, that the working week would comprise 40 hours and that the employer would pay a gross monthly salary of DEM 4 350 (made up of the basic monthly salary appropriate to his category of DEM 3 285.24, a performance bonus of DEM 525 and a bonus above the collectively agreed rate of DEM 539.76, subject to cancellation at any time). With regard to all other matters, the contract provided that the sectoral operational agreements (Ständiger Ausschuss für Beschäftigungsfragen — SAB) would apply, together with the umbrella collective agreement for the metal working industry in the Unterweser region of Bremen.

3. A circular to all employees dated 26 September 1998 informed them of the need for overtime, which would be compensated for by paid leave up to a maximum of 40 hours and thereafter remunerated. A notice posted on the notice board on 22 April 1998 stated that the arrangements for overtime were to remain unchanged and

1 — Original language: Spanish.

2 — Council Directive 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).

another notice, posted on 6 May 1999, mentioned the rules governing overtime. These arrangements had been approved by the workforce at meetings of the defendant's employees.

4. The national court states that the parties are in dispute as to what specific terms were agreed regarding overtime and have produced witness evidence in support of their respective versions of events. While the defendant asserts that the plaintiff declared he would always be available to work overtime and that this was the basis for the contractually agreed remuneration, the plaintiff maintains that he only undertook to work additional hours in an emergency and that the bonuses were in recognition of the fact that the working day exceeded the norm laid down for the rest of the sector in the collective agreement.

5. The conflict between the parties came to a head in December 1998 when the plaintiff was instructed to turn four valve housings, one of which was not properly completed and had to be rejected.

The defendant asserts that the plaintiff was partly to blame for this. The deadline for delivery of the housings, originally fixed for 21 December, had to be postponed until 11 January owing, in the defendant's opinion, to the plaintiff's refusal to work overtime.

6. As a result, the defendant terminated the contract of employment. In a letter dated 15 December 1998, the defendant accused the plaintiff of refusing to work overtime, an attitude which, it claimed, amounted to disloyalty. At the same time, the defendant cancelled the bonus in the amount of DEM 539.76.

7. The plaintiff lodged an appeal against his dismissal on 18 December 1998, seeking reinstatement and a declaration that the cancellation of his bonus was invalid. The company, for its part, contended that the action should be dismissed.

II — The questions referred to the Court for a preliminary ruling

8. To enable it to reach a decision in the proceedings before it, the Arbeitsgericht Bremen has made a reference to the Court for a preliminary ruling 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 pursuant to 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 invalid from a substantive point of view as well, where they not only lack the precision required thereby but also confer on the employer vaguely formulated unilateral rights?

(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 its obligations to provide documentation is deemed to have frustrated the production 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?'

III — The relevant Community legislation

9. Directive 91/533 was adopted with the aim of, *inter alia*, establishing at Community level the general requirement that every employee must be provided with a document containing information on the essential elements of his contract, a requirement which can be met by means of a written contract, a letter of appointment or one or more other documents or, if these are lacking, a written statement signed by the employer. [3]

The Directive applies to paid employees who have a contract of employment or an employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State.

10. The national court has asked for guidance on the interpretation of Article 2(2)(i). Article 2 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.

3 — Seventh and ninth recitals in the preamble to Directive 91/533.

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.'

11. Article 6 of the Directive, which covers the form and proof of the existence of a contract or employment relationship, provides:

'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.'

IV — The proceedings before the Court of Justice

12. The defendant in the main proceedings, the German Government, the Austrian Government and the Commission submitted written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice. At the hearing on 21 September 2000, Mr

Lange's representative, the German Government's Agent and the Commission's Agent presented oral argument.

13. Mr Lange's representative asserted that the requirement to work overtime affects an employee's normal working hours and that overtime should be deemed to be part of an employee's working day. The plaintiff therefore considers that Article 2(2)(i) of Directive 91/533 covers information relating to agreements under which an employee undertakes to work overtime. An employer is not allowed the benefit of vaguely formulated unilateral rights and all the important conditions governing the employment relationship, which include working hours and overtime, should be clearly set out in the contract of employment. The plaintiff asserts that, notwithstanding the provisions of Article 8 of the Directive, it is unrealistic for an employee, whose right to information has been infringed, to apply to the courts for an order requiring his or her employer to comply with that obligation and submits that a penalty for employers who are in default can be implied from the Directive.

14. The defendant in the main proceedings asserts that Article 2(2)(i), the provisions of which are reiterated in Article 2(1)(7) of the Gesetz über den Nachweis der für ein Arbeitsverhältnis geltenden Bedingungen, [4] applies only to the length of the normal working day, which is an essential aspect of the contract, and that it does not apply to overtime, which is a secondary obligation forming part of an employee's duty of loyalty to his or her employer.

The defendant considers that notifying an employee in writing of the essential aspects of the contract makes it easier to prove what conditions were agreed but, since that information is declaratory rather than constitutive, it does not preclude the use of other methods to establish the remaining conditions in the event of a dispute. Furthermore, the defendant feels that the lack of written information concerning overtime does not have the effect of reversing the burden of proof. Finally, the defendant argues that, pursuant to Article 2(2)(j) of Directive 91/533, clause 6 of the contract of employment refers to chapter 4 of the umbrella collective agreement of the metal working industry in the Unterweser region of Bremen which governs overtime (Paragraph 4, Mehrarbeit).

15. In the German Government's view, an employer's duty to inform employees of the circumstances in which they will be required to work overtime cannot be inferred from Article 2(2)(i) but is instead implied by Article 2(1). The Austrian Government shares that view.

4 — This is the statute transposing Directive 91/533 into German law.

The German Government considers that an employer's failure to comply with the requirements as to form imposed by the national law transposing Directive 91/533 will not render an agreement invalid from the substantive point of view. The Austrian Government put forward the same view in its observations.

Finally, the German Government submits that Directive 91/533 does not provide for reversal of the burden of proof in the employee's favour where the employer fails to comply with his obligation to provide information about the essential aspects of the employment relationship. The burden of proof is governed by the general principles of civil law in each Member State. The Austrian Government expressed a similar view. The Commission adds, in this regard, that the Directive gives no indication as to whether the principles governing the rules of evidence in force in German law also apply where an employer has failed to comply with the obligation to provide the employee with written information.

16. With regard to the first question referred for a preliminary ruling, the Commission argues that the difference between overtime and the normal working day is that overtime is only worked in exceptional circumstances which arise with varying frequency and cannot be foreseen. Additional hours can only be deemed to form part of the normal working day where the business activity of the employer requires them to be performed regularly, in which case they become part of the employee's normal working day.

Furthermore, the Commission considers that it cannot be inferred from Directive 91/533 that an employer's failure to comply with it will render invalid agreements entered into in the context of the employment relationship. In the event that an employer does not provide an employee with the required information, the employee may use any other evidence available to establish the existence of an employment relationship and the conditions applying to it, and the admissibility of such evidence will be governed by national law.

V — Analysis of the questions referred to the Court for a preliminary ruling

A. *The first question*

17. By its first question, the national court asks whether Article 2(2)(i) of Directive 91/533, which provides that the length of the normal working week or day is an essential aspect of the employment relationship about which an employee should receive written information, covers agreements relating to overtime.

18. As those who have submitted observations in these proceedings have rightly pointed out, a straightforward reading of the provision that the Court has been asked to interpret would suggest that the answer to this question should be in the negative. The length of an employee's normal working day or week cannot include overtime since, as the name suggests, overtime is, by its nature, worked outside the normal working day, extending or adding to it.

That answer does not, however, preclude the circumstances in which an employer is entitled to expect employees to work overtime, together with the applicable conditions, from being deemed to be essential aspects of the employment relationship, nor does it remove the duty to provide employees with information in that regard.

19. Article 2(1) of Directive 91/533 establishes an employer's duty to notify the employee of the essential aspects of the employment relationship, although it does not define what these are, while Article 2(2) sets out a list of the minimum points which the written information should include.

As to the form the information should take, Article 3 contains several options: an employee may be given a written contract of employment, a letter of engagement, one or more other written documents or a written declaration signed by the employer.

The information relating to the amount of paid leave, the length of notice required for termination of the employment relationship, the basic remuneration, the frequency of payment of remuneration and the length of the normal working day or week may, pursuant to Article 2(3), be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing these particular points.

20. It is clear from the wording of Article 2(2) of Directive 91/533 that the list contained therein is not exhaustive, implying that there may be other essential aspects which are also covered by the employer's obligation to provide information.

One such essential aspect of the employment relationship might be the circumstances in which and the conditions under which an employer has the right to ask, and to expect, employees to work overtime.

21. Naturally, for the purposes of proving what was agreed by the parties, it is

advisable to set that information down in writing. However, none of the provisions of Directive 91/533 requires that the information be included in any of the written documents which, pursuant to Article 3, an employer must give an employee.

In any event, if an employer has the right to provide information concerning the length of an employee's normal working day or week, specifying the main hours of work he or she is obliged to perform, by reference to, *inter alia*, collective agreements, it follows *a fortiori* that an employer must be entitled to notify an employee of overtime working arrangements by reference to rules such as those contained in chapter 4 of the umbrella collective agreement of the metal working industry in the Unterweser region of Bremen, which govern overtime working in that sector.

22. For the reasons I have given, it is my view that Article 2(2)(i) of Directive 91/533 does not apply to agreements governing overtime. An employer's overtime working arrangements are, nevertheless, an essential aspect of the employment relationship about which an employee should receive information. That information may be given to the employee in the form of a reference to the laws, regulations and administrative or statutory provisions, or collective agreements, governing this particular area.

B. *The second question*

23. By its second question, the Arbeitsgericht Bremen seeks essentially to ascertain whether, pursuant to Article 2 of Directive 91/533, there is a requirement to interpret the national law transposing the Directive's provisions so as to render invalid agreements which lack the precision required thereunder and which confer on the employer vaguely formulated unilateral rights.

24. In my opinion, this question should also be answered in the negative. Directive 91/533 merely imposes an obligation on employers to provide information concerning a minimum number of essential aspects of the employment relationship but it does not seek to regulate the content of the contract of employment or, less still, to set out what penalties should attach to an employer's failure either to comply with that obligation or to provide information which is precise in nature. In both situations, these are questions which must be determined in accordance with national law.

The Directive merely requires Member States to adopt such measures as are necessary to enable employees who consider themselves wronged to pursue their claims by judicial process. Therefore, in these proceedings, the aim of which is to establish whether the requirements laid down in the Directive were observed, the national court must ascertain whether the employee was provided with the minimum amount of information required and whe-

ther that information was adequate. However, the consequences of any failure to comply with those requirements fall to be determined by national employment legislation.

25. Therefore, neither Article 2 nor any other provisions of Directive 91/533 permit an interpretation of German law along the lines proposed by the national court, with the result that agreements which lack the precision required by the Directive and which confer on the employer vaguely formulated unilateral rights are not rendered invalid.

C. *The third question*

26. By its third question, the Arbeitsgericht Bremen seeks to ascertain whether, where the employer has failed to comply with its obligation to provide information, Directive 91/533 requires the national court to apply the principles of national law under which a party not complying with its obligations to provide documentation is deemed to have frustrated the production of evidence and, if it does not, whether Article 6 of the Directive precludes the application of those principles.

The principles of German law governing the burden of proof where one party has failed to comply with its legal obligation to provide documentation, referred to by the national court, have been developed by German case-law and by virtue of those principles the effect of one party's breach is that the other is placed in a better position from the evidential point of view and may even be able to reverse the burden of proof

27. In answering this question, it should be recalled that, pursuant to the second indent of Article 6 of Directive 91/533, the Directive does not affect national law and practice concerning proof as regards the existence and content of a contract or employment relationship. The third indent of Article 6, about which the national court has specifically enquired, provides that the Directive likewise does not affect national law and practice concerning the relevant procedural rules.

28. This will be the second time that the Court has clarified the meaning of Directive 91/533 at the request of a national court. It is interesting to note that on the first occasion, in *Kampelmann*,[5] the Court was asked to give a ruling on the interpretation of Article 6 in response to a request from another German court, namely the Landesarbeitsgericht (Higher Labour Court) Hamm.

5 — Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* v *Landschaftsverband Westfalen-Lippe and Others* [1997] ECR I-6907.

29. In its judgment in *Kampelmann*, the Court held that the objectives set out in the second recital in the preamble to the Directive, namely the wish to afford in greater protection to employees against possible infringements of their rights and to create greater transparency in the labour market, would not be achieved if the employee were unable to use the information contained in the notification referred to in Article 2(1) as evidence before the national courts, particularly in disputes concerning essential aspects of the contract or employment relationship. [6]

30. In fact, noting that, pursuant to Article 6 of Directive 91/533, national rules concerning the burden of proof are not to be affected, as such, by the Directive, 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. [7]

6 — Ibido, paragraph 32.

7 — Ibido, paragraphs 30 and 33.

31. Nevertheless, it cannot be inferred from that case-law — as the national court purports to do by converse interpretation — that, under Directive 91/533, the failure to provide the information referred to therein is as important as a similar omission would be under national law.

The fact is that, as the Court stated in paragraph 34 of the *Kampelmann* judgment, since the Directive does not itself lay down any rules of evidence, proof of the essential aspects of the contract or employment relationship cannot depend solely on the employer's notification under Article 2(1). The employer must therefore be allowed to adduce any evidence to the contrary and to show either that the information in the notification is in fact incorrect or that it has been proved wrong by the facts.

32. I agree with the Commission's view that that judgment allows the information provided by the employer regarding the employment relationship to be used as proof in the national court but that it is the national rules of evidence that should always be applied. Community law has neither been called upon, in this area, to say

how national rules of evidence should be applied, nor has it established its own rules. The same must be said with regard to the applicable national rules of procedure.

33. I must therefore conclude that, since Article 6 of Directive 91/533 provides that the Directive does not affect national law and practice concerning the burden of proof as regards the existence and content of a contract of employment or the relevant procedural rules, the Directive must be construed as neither requiring nor prohibiting the application of the national rules governing such matters.

VI — Conclusion

34. In the light of the foregoing considerations, I propose that the Court of Justice reply to the questions referred to it for a preliminary ruling by the Arbeitsgericht Bremen as follows:

(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 construed as not applying to agreements regarding overtime working. An employer's overtime working arrangements are, however, an essential aspect of the employment relationship about which the employee should receive information. That information may be provided to the employee by, *inter alia*, reference to the relevant laws, regulations and administrative or statutory provisions, or collective agreements.

(2) Article 2 of Directive 91/533 does not require that the conditions of a contract of employment should be rendered invalid where they lack the precision required thereunder and confer on the employer vaguely formulated unilateral rights.

(3) Since Article 6 of Directive 91/533 states that the Directive is to be without prejudice to national law and practice concerning proof as regards the existence and content of a contract of employment, or the relevant procedural rules, the Directive must be construed as neither requiring nor prohibiting the application of the national rules governing such matters.