Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

20 June 2024*

(Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Directive 2003/88/EC – Article 9(1)(a) – Obligation to assess the health of night workers – Employer's failure to comply with that obligation – Right to compensation – Need to establish the existence of specific harm)

In Case C-367/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 7 June 2023, received at the Court on 9 June 2023, in the proceedings

EA

v

Artemis security SAS,

THE COURT (Second Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, F. Biltgen, N. Wahl, J. Passer and M.L. Arastey Sahún, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– EA, by L. Boré and G. Mégret, avocats,

– Artemis security SAS, by J.-J. Gatineau, avocat,

– the French Government, by M. de Lisi, B. Fodda and M. Raux, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by M.F. Severi, avvocato dello Stato,

* Language of the case: French.

– the European Commission, by F. Clotuche-Duvieusart and D. Recchia, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 9(1)(a) 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 request has been made in proceedings between EA and Artemis security SAS ('Artemis') concerning a claim by EA for compensation for the failure, by Artemis, to comply with the obligations of employers as regards assessing the health of night workers.

Legal context

European Union law

3 As set out in recitals 5 and 7 to 10 of Directive 2003/88:

'(5) All workers should have adequate rest periods. … Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.

…

(7) Research has shown that the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms of work organisation and that long periods of night work can be detrimental to the health of workers and can endanger safety at the workplace.

(8) There is a need to limit the duration of periods of night work, including overtime, and to provide for employers who regularly use night workers to bring this information to the attention of the competent authorities if they so request.

(9) It is important that night workers should be entitled to a free health assessment prior to their assignment and thereafter at regular intervals and that whenever possible they should be transferred to day work for which they are suited if they suffer from health problems.

(10) The situation of night and shift workers requires that the level of safety and health protection should be adapted to the nature of their work and that the organisation and functioning of protection and prevention services and resources should be efficient.'

4 Article 6 of that directive, headed ‘Maximum weekly working time’, provides:

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

…

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

5 Article 8 of that directive, headed ‘Length of night work’, states:

‘Member States shall take the measures necessary to ensure that:

(a) normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period;

(b) night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work.

For the purposes of point (b), work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work.’

6 Article 9 of that directive, headed ‘Health assessment and transfer of night workers to day work’, provides in paragraph 1:

‘Member States shall take the measures necessary to ensure that:

(a) night workers are entitled to a free health assessment before their assignment and thereafter at regular intervals;

(b) night workers suffering from health problems recognised as being connected with the fact that they perform night work are transferred whenever possible to day work to which they are suited.’

French law

7 Article L. 3122-11 of the code du travail (Labour Code) provides:

‘Every night worker shall receive regular one-to-one medical check-ups in accordance with the conditions laid down in Article L. 4624-1.’

8 Article L. 4624-1 of that code provides:

‘Every worker shall receive, as part of the monitoring of workers’ health … medical check-ups to be conducted, on a one-to-one basis, by the occupational physician or, under the authority of that physician, by the associate physician …, the junior occupational health physician or the nurse.

…

Every night worker shall receive regular medical check-ups on a one-to-one basis. The frequency of those check-ups shall be determined by the occupational physician according to the particular features of the position held and the characteristics of the worker, in accordance with detailed rules laid down by decree of the Conseil d'État (Council of State).'

9 Article R. 3122-11 of that code provides:

'The purpose of monitoring night workers' health is to enable the occupational physician to assess the possible consequences of night work for their health and safety, in particular as a result of changes in chronobiological rhythms, and to understand the potential impact on their social life.'

10 As set out in Article R. 4624-11 of the Labour Code:

'The information and prevention appointment to which workers are entitled shall be carried out on a one-to-one basis. Its purpose shall be to:

1° ask the employee questions about his or her state of health;

2° inform the employee of the possible risks associated with his or her role;

3° make the employee aware of the preventive measures to be implemented;

4° identify whether the employee's state of health or the risks to which he or she is exposed require referral to the occupational physician;

5° inform the employee of the arrangements for his or her medical check-ups from the department and of the possibility for the employee to have, at any time and at his or her request, an appointment with the occupational physician.'

11 Article R. 4624-18 of that code states:

'Every night worker … shall be entitled to an information and prevention appointment carried out by a health professional referred to in the first paragraph of Article L. 4624-1 prior to his or her assignment to the post.'

12 Article R. 3124-15 of that code provides:

'Failure to comply with the provisions relating to night work laid down in Articles L. 3122-1 to L. 3122-24 … and with the provisions of the decrees implementing them shall be punishable by the fine laid down for summary offences in Class 5, imposed as many times as there are employees concerned by the infringement.

Repeat offences shall be punishable in accordance with Articles 132-11 and 132-15 of the [Criminal Code].'

13 Article R. 4745-3 of that code provides:

‘Failure to comply with the provisions relating to the activities of the occupational physician, laid down in Article L. 4624-1 and with the provisions of the decrees implementing them, shall be punishable by the fine laid down for summary offences in Class 5.’

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

14 On 1 April 2017, EA was recruited by Artemis as a fire safety and personal assistance service officer.

15 By application of 25 April 2019, EA brought an action before the conseil de prud’hommes de Compiègne (Labour Tribunal, Compiègne, France) seeking judicial termination of his employment contract and an order that Artemis pay him damages. In support of those claims, EA relied, first, on the fact that, by transferring him from day work to night work, Artemis had unilaterally amended his employment contract and, secondly, on the fact that he had not received the enhanced medical check-ups applicable for night work.

16 On 1 July 2019, EA was dismissed.

17 By decision of 4 December 2019, the conseil de prud’hommes de Compiègne (Labour Tribunal, Compiègne) dismissed EA’s claim for damages. Hearing an appeal against that decision, the cour d’appel d’Amiens (Court of Appeal, Amiens, France), by judgment of 2 September 2021, upheld the decision on that point of the operative part, on the ground that EA had not proved the existence and nature of the harm which he claimed to have suffered as a result of not being given the enhanced medical check-ups applicable for night work.

18 In support of his appeal against the judgment of the cour d’appel d’Amiens (Court of Appeal, Amiens) before the Cour de cassation (Court of Cassation, France), EA claims that the finding that the protective provisions on enhanced medical check-ups for night work have not been complied with in itself entitles the worker concerned to compensation and that, by dismissing his claim for compensation, the cour d’appel d’Amiens (Court of Appeal, Amiens) infringed, inter alia, Article L. 3122-11 of the Labour Code, read in conjunction with Article 9 of Directive 2003/88.

19 The Cour de cassation (Court of Cassation), which is the referring court, states that, in accordance with settled case-law, the existence and assessment of harm fall, in principle, within the exclusive discretion of the court ruling on the substance. Nevertheless, it recently held, in the light of what it considers to be the lessons to be learned from the judgment of 14 October 2010, *Fuß* (C-243/09, EU:C:2010:609), that the finding that the maximum average weekly working time laid down in Article 6(b) of Directive 2003/88 has been exceeded in itself gives rise to a right to compensation for the worker, having regard, first, to the direct effect of that provision of EU law and, secondly, to the fact that the exceeding *ipso facto* adversely affects the health of the worker.

20 However, that court is uncertain as to whether a similar approach should be adopted in the event of an infringement of Article 9(1)(a) of Directive 2003/88. In that regard, that court states, inter alia, that the wording of that provision, read in the light of recitals 9 and 10 of that directive, appears less precise than that of Article 6(b) of that directive.

21 In those circumstances, the Cour de cassation (Court of Cassation) considers, in the first place, that it is necessary to ask the Court whether Article 9(1)(a) of Directive 2003/88 must be regarded as having direct effect. According to the referring court, if the Court were to answer that question in the affirmative, it might, given the lack of horizontal direct effect of directives, find itself unable to interpret Articles L. 3122-11, L. 4624-1 and R 4624-18 of the Labour Code in conformity with Directive 2003/88, given that such an interpretation might be *contra legem* in nature.

22 In the second place, the referring court considers it necessary to obtain clarification from the Court as to whether the failure by an employer to comply with the national measures intended to implement the health assessment of night workers provided for by Article 9(1)(a) of Directive 2003/88 in itself gives rise to a right to compensation, without the need to prove the existence of specific harm on the part of the worker concerned as a result of that failure.

23 In those circumstances the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 9(1)(a) of Directive [2003/88] fulfil the conditions for it to have direct effect and be relied on by a worker in a dispute concerning that worker?

(2) Must Article 9(1)(a) of Directive [2003/88] be interpreted as precluding domestic legislation or practices under which, in the event of a failure to comply with the provisions adopted to implement the measures necessary for the free assessment of a worker’s health, the worker’s right to compensation is subject to proof of the damage which would have resulted from that breach?’

Consideration of the questions referred

The second question

24 By its second question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 9(1)(a) of Directive 2003/88 must be interpreted as precluding national legislation under which, in the event of an infringement by the employer of the national provisions implementing that provision of EU law and providing that night workers are entitled to a free health assessment before their assignment and thereafter at regular intervals, the right of the night worker concerned to compensation for that infringement is subject to the condition that the worker provides proof of the harm suffered by him or her as a result of the infringement.

25 In that connection, it must be recalled that, in accordance with settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not, in situations covered by EU law, less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 4 May 2023, *Österreichische Post (Non-material damage in connection with the processing of personal data)*, C-300/21, EU:C:2023:370, paragraph 53 and the case-law cited).

26 As the Court has previously held, Directive 2003/88 does not contain any provision regarding the sanctions applicable where the minimum requirements laid down by it are infringed, or any specific rule regarding the reparation for the loss or damage which may have been suffered by workers as a result of such an infringement (judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 44).

27 Therefore, in the absence of provisions of EU law intended to define the rules relating to any compensation which a worker assigned to night work may claim in the event of an infringement, by his or her employer, of the national rules relating to the health assessment provided for in the event of such an assignment intended to implement Article 9(1)(a) of Directive 2003/88, it is for the legal order of each Member State to lay down the detailed rules intended to safeguard the rights which individuals derive from that provision and, in particular, the conditions under which such a worker may obtain compensation for that infringement from the employer, subject to compliance with the principles of equivalence and effectiveness (see, to that effect, judgment of 4 May 2023, *Österreichische Post (Non-material damage in connection with the processing of personal data)*, C-300/21, EU:C:2023:370, paragraph 54 and the case-law cited).

28 As regards the principle of equivalence, there is nothing before the Court, in the present proceedings, that is capable of raising doubts as to the conformity with that principle of the legislation at issue in the main proceedings in so far as that legislation makes the night worker's right to any compensation subject to the obligation, on the part of that worker, to prove the existence of harm suffered as a result of an infringement of the national provisions implementing Article 9(1)(a) of Directive 2003/88.

29 As regards the principle of effectiveness, it will ultimately be for the referring court, which alone has jurisdiction to assess the facts of the case, to determine whether the detailed rules laid down in national law for the possible recognition of such a right to compensation and, in particular, the national rule relating to proof of the harm suffered, referred to in the preceding paragraph, make it impossible in practice or excessively difficult to exercise the rights conferred by Article 9(1)(a) of Directive 2003/88 (see, to that effect, judgment of 4 May 2023, *Österreichische Post (Non-material damage in connection with the processing of personal data)*, C-300/21, EU:C:2023:370, paragraph 56).

30 Indeed, it must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts of EU institutions. However, in accordance with settled case-law, the Court may, in the framework of the judicial cooperation provided for in Article 267 TFEU and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions (see, to that effect, judgment of 11 May 2023, *Inspecția Judiciară*, C-817/21, EU:C:2023:391, paragraph 58 and the case-law cited).

31 In the present case, it should be stated, first of all, that, in the event of a failure, by an employer, to comply with the obligations to assess the health of night workers laid down in Article 9(1)(a) of Directive 2003/88, which, as is apparent from the provisions of the Labour Code reproduced in paragraphs 7 to 10 above, have been transposed into national law, the worker concerned must be able to compel that employer to fulfil those obligations, if necessary by referring the matter to the national authority responsible for monitoring compliance with those obligations or, if necessary, by bringing proceedings for the proper performance of those obligations before the courts having jurisdiction in accordance with the requirements stemming from Article 47 of the Charter of

Fundamental Rights of the European Union. The exercise of the right to effective judicial protection which that provision guarantees to any person whose rights guaranteed by EU law have been infringed is thus such as to contribute to ensuring the effectiveness of the right to a health assessment enjoyed by a night worker under Article 9(1)(a) of Directive 2003/88.

32 Next, the fact that a night worker may, in the event of failures by the employer to comply with the obligations laid down in Article 9(1)(a) of Directive 2003/88, obtain compensation that is adequate, in that it must enable the loss and damage actually suffered as a result of those failures to be made good, also contributes to ensuring such effectiveness (see, to that effect, judgments of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 95, and of 14 September 2023, *TGSS (Refusal of the maternity supplement)*, C-113/22, EU:C:2023:665, paragraph 50 and the case-law cited).

33 The worker's right to seek compensation for loss or damage reinforces, inter alia, the operational nature of the protection rules laid down in Article 9(1)(a) and is likely to discourage the reoccurrence of unlawful conduct (see, by analogy, judgment of 4 May 2023, *Österreichische Post (Non-material damage in connection with the processing of personal data)*, C-300/21, EU:C:2023:370, paragraph 40). Payment to the person injured of compensation which covers in full the loss and damage sustained, in accordance with the detailed rules to be laid down by the Member States, is capable of ensuring that such loss or damage is effectively compensated or compensated in a way which is dissuasive and proportionate (see, to that effect, judgment of 14 September 2023, *TGSS (Refusal of the maternity supplement)*, C-113/22, EU:C:2023:665, paragraph 51 and the case-law cited).

34 On the other hand, it should be borne in mind that EU law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by EU law does not entail the unjust enrichment of those who enjoy them (see, to that effect, judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 94 and the case-law cited).

35 Thus, in view of the compensatory function of the right to compensation in the present case provided for by the national law applicable, it must be held that full compensation for the loss and damage actually suffered is sufficient for the purposes described in paragraph 33 above, without the need to require the employer to pay punitive damages (see, to that effect, judgments of 17 December 2015, *Arjona Camacho*, C-407/14, EU:C:2015:831, paragraph 37, and of 4 May 2023, *Österreichische Post (Non-material damage in connection with the processing of personal data)*, C-300/21, EU:C:2023:370, paragraph 58).

36 In that regard, it should be noted, lastly, that, as is clear from paragraphs 12 and 13 above and as the French and Italian Governments and the European Commission stated, the applicable national law contains specific rules for imposing fines in the event of an infringement, by the employer, of the national provisions transposing Article 9(1)(a) of Directive 2003/88. Those specific rules contribute to ensuring the effectiveness of the right to a health assessment enjoyed by night workers under that provision. Such rules, the purpose of which is essentially punitive, are not conditional on the existence of harm. Thus, although such punitive rules and those governing contractual or quasi-tortious liability, such as those at issue in the main proceedings, are complementary in that both require compliance with that provision of EU law, they nevertheless have quite distinct functions (see, to that effect, judgment of 4 May 2023, *Österreichische Post (Non-material damage in connection with the processing of personal data)*, C-300/21, EU:C:2023:370, paragraph 40).

37 In the light of all of the foregoing and subject to verification by the referring court, it is not apparent that national legislation such as that at issue in the main proceedings is capable of undermining the effectiveness of the rights deriving from Article 9(1)(a) of Directive 2003/88.

38 As the referring court states, it is true that the Court held, in paragraph 54 of its judgment of 14 October 2010, *Fuß* (C-243/09, EU:C:2010:609), that, in the light of the objective pursued by Directive 2003/88 of guaranteeing the safety and health of workers by providing for adequate periods of rest, the EU 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 that directive in itself causes workers to suffer detriment since their safety and health are thus adversely affected. In paragraph 59 of the judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717), the Court also referred, in that regard, to the loss or damage suffered by the worker, resulting from the loss of the rest period which the worker should have been granted had the maximum weekly working time laid down in that provision been observed.

39 Such considerations cannot, however, be transposed to the obligations relating to medical check-ups laid down in Article 9(1)(a) of Directive 2003/88.

40 While recital 5 of Directive 2003/88 states that all workers 'should have adequate rest periods' and recitals 7 and 8 of that directive state, inter alia, that 'research has shown … that long periods of night work can be detrimental to the health of workers' and that 'there is a need to limit the duration of periods of night work', recital 9 of that directive states that 'it is important' that night workers are entitled to a 'free health assessment' prior to their assignment and thereafter at regular intervals and that, 'if they suffer from health problems', they should be transferred 'whenever possible' to day work for which they are suited.

41 As the Commission rightly argued, the purpose of the health assessment measures introduced by Article 9(1)(a) of Directive 2003/88 is, in the light of the more demanding nature of night work and the specific health risks associated with it, to ensure that a worker is and remains able to carry out such work, to diagnose any medical condition in good time, to treat it and to prevent its development, in particular by encouraging the transfer of the worker to day work.

42 Accordingly, unlike the requirements relating to working time stemming from Article 6(b) and Article 8 of Directive 2003/88, failure to comply with which in itself causes detriment to the worker concerned, since his or her health will be adversely affected by the loss of rest time which he or she should have been granted or by the imposition of excessive hours of night work, it is not inevitable that not having a medical appointment which should have preceded the worker's assignment to night work or regular medical check-ups following that assignment, as provided for in Article 9(1)(a) of that directive, will adversely affect the health of the worker concerned or cause damage for which compensation may be awarded. Whether or not such damage occurs will depend on the individual health situation of each worker and how that situation develops. In that regard, it should also be borne in mind that, as the Court has previously stated, work performed at night may differ in terms of difficulty and stress (judgment of 24 February 2022, *Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'*, C-262/20, EU:C:2022:117, paragraph 52).

43 In the light of the foregoing, the answer to the second question is that Article 9(1)(a) of Directive 2003/88 must be interpreted as not precluding national legislation under which, in the event of an infringement by the employer of the national provisions implementing that provision of EU law and providing that night workers are entitled to a free health assessment before their assignment

and thereafter at regular intervals, the right of the night worker concerned to compensation for that infringement is subject to the condition that that worker provides proof of the harm caused to him or her as a result of the infringement.

The first question

44 In view of the answer given to the second question and in the absence of any apparent conflict between Article 9(1)(a) of Directive 2003/88 and the national legislation applicable in the main proceedings, there is no need to examine the first question.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 9(1)(a) 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 not precluding national legislation under which, in the event of an infringement by the employer of the national provisions implementing that provision of EU law and providing that night workers are entitled to a free health assessment before their assignment and thereafter at regular intervals, the right of the night worker concerned to compensation for that infringement is subject to the condition that that worker provides proof of the harm caused to him or her as a result of the infringement.

[Signatures]