

Anonymised version

Translation

C-367/23 – 1

Case C-367/23

Request for a preliminary ruling

Date lodged:

9 June 2023

Referring court or tribunal:

Cour de cassation (France)

Date of the decision to refer:

7 June 2023

Appellant in cassation:

EA

Respondent in cassation:

Artemis security SAS

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JUDGMENT OF THE COUR DE CASSATION, CHAMBRE SOCIALE
(COURT OF CASSATION, SOCIAL CHAMBER), 7 JUNE 2023

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Facts and proceedings

- 1 According to the judgment under appeal (Amiens, 2 September 2021), EA was recruited as a SSIAP 1 (fire safety and personal assistance service) officer on 1 April 2017 by Artémis security.
- 2 By application of 25 April 2019, the employee brought an action before the [Conseil de prud'hommes de Compiègne (Labour Tribunal, Compiègne)] seeking judicial termination of his employment contract and payment of various claims for

compensation and salary, including a claim for damages for unilateral amendment of the employment contract to night work and a lack of enhanced medical monitoring.

- 3 On 1 July 2019, he was dismissed from his position.
- 4 By judgment of 4 December 2019, the Labour Tribunal, Compiègne, dismissed the employee's claim for damages for unilateral amendment of the employment contract [from day work] to night work and a lack of enhanced medical monitoring.
- 5 By judgment of 2 September 2021, the Cour d'appel d'Amiens (Court of Appeal, Amiens) upheld the judgment on this point.
- 6 In so ruling, the Court of Appeal held, first, that the employee claimed that the change from day work to night work constituted an amendment of his employment contract which could not be imposed on him ... [the employer relied on a contractual clause stipulating that he could be required to work both days and nights, which was found to be unlawful by the Court of Appeal].
- 7 The Court of Appeal then held that the employee, who claimed that his daytime working hours were frequently changed to night-time working hours and that the employer was under an obligation to provide him with enhanced medical monitoring for night work, was seeking damages for this lack of monitoring. It found, on that head of claim, that the employee had not established the existence and nature of the damage suffered by him.
- 8 The employee lodged an appeal against that judgment.

Wording of the ground of appeal

- 9 ... the employee criticises the judgment for dismissing his claim for damages for amendment of the employment contract to a night work contract and lack of enhanced medical monitoring on the grounds that 'the mere finding of a failure to comply with the protective provisions on enhanced medical monitoring for night work gives rise to a right to compensation; by dismissing the employee's claim for compensation for the damage resulting from the lack of enhanced medical monitoring, on the ground that he did not demonstrate the reality and the nature of the damage suffered, the Court of Appeal infringed Articles L. 3122-1 and L. 3122-11 of the French Labour Code, in conjunction with Article 9 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003.'

Summary of the applicable legislation

European Union law

- 10 According to 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, Member States are to take the necessary measures to ensure that night workers are entitled to a free health assessment before their assignment and thereafter at regular intervals.

National law

- 11 Under Article L. 3122-11 of the French Labour Code, every night worker is to receive regular individual monitoring of their state of health under the conditions laid down in Article L. 4624-1.

12 ...

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Grounds for the reference for a preliminary ruling

- 15 According to the settled case-law of the Court of Cassation, Social Chamber, the existence of damage and its assessment fall within the exclusive discretion of the court ruling on the substance (Soc., 13 April 2016, Appeal No 14-28.293, Bull. (Bulletin Social) 2016, V, No 72).

16 ...

- 17 It follows from 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 that night workers must be given a free health assessment before their assignment and thereafter at regular intervals.

- 18 According to the settled case-law of the Court of Justice of the European Union, 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 (judgments of 26 February 1986, *Marshall*, C-152/84, paragraphs 46 and 49, and of 14 October 2010, *Fuß*, C-243/09, paragraph 56 ('the *Fuß* judgment')).

- 19 The Court of Justice of the European Union has thus held that Article 6(b) of Directive 2003/88/EC 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, and that it thus fulfils all of the conditions necessary for it to produce direct effect (the *Fuß* judgment, paragraphs 57 and 59).

- 20 It is also settled case-law of the Court of Justice of the European Union that the purpose of Directive 2003/88/EC 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 (the *Fuß* judgment, paragraph 32, and judgment of 11 November 2021, *Dublin City Council*, C-214/20, paragraph 37).
- 21 The Court of Justice of the European Union has thus held that, in order to ensure that Directive 2003/88/EC is fully effective, the Member States must prevent the maximum weekly working time laid down in Article 6(b) of Directive 2003/88/EC from being exceeded (the *Fuß* judgment, paragraph 51). It added that exceeding the maximum average weekly working time laid down in Article 6(b) of Directive 2003/88/EC 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) (the *Fuß* judgment, paragraph 53). It has also held that, since the purpose of Directive 2003/88/EC 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/EC in itself causes workers to suffer detriment since their safety and health are thus adversely affected (the *Fuß* judgment, paragraph 54).
- 22 Relying in particular on those grounds, the Court of Cassation, Social Chamber, now rules that simply finding that the maximum working time has been exceeded gives rise to a right to compensation (Soc., 26 January 2022, Appeal No 20-21:636, published).
- 23 In his additional written statement, the employee argues that the case-law arising from the judgment of the Court of Justice of the European Union of 14 October 2010 (*Fuß*) must be transposed in the event of infringement of the protective provisions on enhanced medical monitoring for night work, guaranteed by Directive 2003/88/EC, in so far as they have the same purpose, namely the protection of the employee’s health.
- 24 With regard to night work, Directive 2003/88/EC provides for two sets of measures, first, in Article 8 ‘Length of night work’, which contains measures limiting the duration of night work, which appear to be of the same kind as those in Article 6 of that directive, which is the subject of the judgment of the Court of Justice of the European Union of 14 October 2010 referred to above, and, second, in Article 9 ‘Health assessment and transfer of night workers to day work’.

- 25 However, the obligations laid down in relation to night work are set out differently in the explanatory memorandum to Directive 2003/88/EC depending on whether they relate to the limitation of working hours or the medical monitoring of the worker. Thus, recital 8 states that ‘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’. Recital 9 appears less precise or compelling in that it states that ‘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.’ Recital 10 adds that ‘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.’
- 26 In a judgment of 22 December 2022 (*JP*, C-61/21, paragraphs 55 and 65), the Court of Justice of the European Union relied, *inter alia*, on recital 2 of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe to hold that Articles 13(1) and 23(1) of that directive pursued a general objective of protecting human health and the environment as a whole and that they did not confer individual rights on individuals, the infringement of which could give rise to liability on the part of a Member State for damage caused to individuals. That recital states ‘in order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore, emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organisation standards, guidelines and programmes’. Like recital 2 of Directive 2008/50/EC, recital 9 of Directive 2003/88/EC presents the measures which it lays down as important, meaning that the question may arise as to whether that recital also sets a general objective.
- 27 It is therefore necessary, first, to consider whether the provisions of Article 9(1)(a) of Directive 2003/88/EC appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, meaning that individuals would be entitled to rely on them as against the State, including in its capacity as employer, in particular where it has transposed them incorrectly.
- 28 In the event that the Court of Justice of the European Union finds that the answer to the above question is in the affirmative, given the lack of direct effect of directives in disputes between individuals, the Court of Cassation would be required to take the whole body of domestic law into consideration for the purposes of a consistent interpretation (judgment of 24 January 2012, *M. Dominguez*, C-282/10, paragraph 31). However, ensuring a consistent interpretation of the [relevant] articles of the French Labour Code in the light of

Directive 2003/88/EC could fail due to the impossibility of making a *contra legem* interpretation.

- 29 Second, it is necessary to ask the Court of Justice of the European Union whether the failure to comply with the measures adopted in domestic law to ensure the assessment of the health of night workers itself constitutes an infringement of Article 9(1)(a) of Directive 2003/88/EC, without it being necessary, in order to obtain compensation, to demonstrate also the existence of specific damage resulting therefrom.

ON THOSE GROUNDS, the Court:

Having regard to Article 267 of the Treaty on the Functioning of the European Union;

REFERS the following questions to the Court of Justice of the European Union:

— ‘Does 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 fulfil the conditions for it to have direct effect and be relied on by a worker in a dispute concerning that worker?’;

— ‘Must Article 9(1)(a) of Directive 2003/88/EC 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?’;

...