Judgment of the Court of Justice, Jaeger, Case C-151/02 (9 September 2003)

Caption: According to the Court of Justice, in its judgment of 9 September 2003, in Case C-151/02, Jaeger, the Directive concerning certain aspects of the organisation of working time must be interpreted as meaning that on-call duty performed by a doctor where he is required to be physically present in the hospital must be regarded as constituting in its totality working time for the purposes of that Directive even where the person concerned is permitted to rest at his place of work during the periods when his services are not required, with the result that that Directive precludes legislation of a Member State which classifies as rest periods an employee's periods of inactivity in the context of such on-call duty.

Source: CVRIA. Case-law: Numerical access to the case-law. [ON-LINE]. [Luxembourg]: Court of Justice of the European Communities, [07.06.2006]. C-151/02. Disponible sur http://curia.eu.int/en/content/juris/index.htm.

URL: http://www.cvce.eu/obj/judgment_of_the_court_of_justice_jaeger_case_c_151_02_9_september_2003-en-03d0bfbf-032c-4cfd-b72e-51b08d3439d8.html

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Judgment of the Court of 9 September 2003 (1)
Landeshauptstadt Kiel v Norbert Jaeger

Case C-151/02

(Social policy - Protection of the safety and health of workers - Directive 93/104/EC - Concepts of working time and rest period - On-call service (Bereitschaftsdienst) provided by doctors in hospitals)

In Case C-151/02,

REFERENCE to the Court under Article 234 EC by the Landesarbeitsgericht Schleswig-Holstein (Germany) for a preliminary ruling in the proceedings pending before that court between

Landeshauptstadt Kiel

and

Norbert Jaeger,

on the interpretation 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) and, in particular, Articles 2(1) and (3) thereof,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, M. Wathelet, R. Schintgen (Rapporteur) and C.W.A. Timmermans, Presidents of Chambers, C. Gulmann, D.A.O. Edward, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Landeshauptstadt Kiel, by W. Weißleder, Rechtsanwalt,

- Mr Jaeger, by F. Schramm, Rechtsanwalt,

- the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,

- the Danish Government, by J. Molde, acting as Agent,

- the Netherlands Government, by H.G. Sevenster, acting as Agent,

- the United Kingdom Government, by P. Ormond, acting as Agent, assisted by K. Smith, Barrister,

- Commission of the European Communities, by A. Aresu and H. Kreppel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Landeshauptstadt Kiel, represented by W. Weißleder, M. Bechtold and D. Seckler, Rechtsanwälte, of Mr Jaeger, represented by F. Schramm, of the German Government, represented by W.-D. Plessing, of the French Government, represented by C. Lemaire, acting as Agent, of the Netherlands Government, represented by N.A.J. Bel, acting as Agent, of the United Kingdom

Government, represented by P. Ormond, and K. Smith, and of the Commission, represented by H. Kreppel and F. Hoffmeister, acting as Agent, at the hearing on 25 February 2003,

after hearing the Opinion of the Advocate General at the sitting on 8 April 2003,

gives the following

Judgment

1. By an order of 12 March 2002, and an amended order of 25 March 2002, which were received at the Court on 26 April 2002, the Landesarbeitsgericht (Higher Labour Court) Schleswig-Holstein referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation 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) and, in particular, Articles 2(1) and (3) thereof.

2. Those questions were raised in proceedings between Landeshauptstadt Kiel (hereinafter the City of Kiel) and Mr Jaeger concerning the definition of the concepts of working time and rest period within the meaning of Directive 93/104 in the context of the on-call service (Bereitschaftsdienst) provided by doctors in hospitals.

Legal background

Community legislation

3. Article 1 of Directive 93/104 lays down minimum health and safety requirements concerning the organisation of working time and applies to all sectors of activity, both public and private, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.

4. Under the heading Definitions Article 2 of Directive 93/104 provides:

For the purposes of this Directive, the following definitions shall apply:

1. working time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. rest period shall mean any period which is not working time;

....

5. Section II of Directive 93/104 lays down the measures which the Member States are required to adopt in order to enable every worker to benefit, inter alia, from minimum daily rest periods and weekly rest and it also regulates the maximum weekly duration of work.

6. Under Article 3 of that directive, entitled daily rest:

Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.

7. As regards maximum weekly working time Article 6 of Directive 93/104 provides:

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

...

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.

8. Article 15 of Directive 93/104 provides:

This Directive shall not affect 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.

9. Article 16 of Directive 93/104 is worded as follows:

Member States may lay down:

...

2. for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

...

10. Directive 93/104 also sets out a series of derogations from several of its basic rules, regard being had to the specific nature of certain activities and subject to fulfilment of certain conditions. In that regard Article 17 provides:

1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Article 3, 4, 5, 6, 8 or 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, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities.

2. Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection:

2.1. from Articles 3, 4, 5, 8 and 16:

...

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

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;

...

(iii) press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;

...

3. Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

...

The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

...

11. Article 18 of Directive 93/104 is worded as follows:

1. (a) Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 23 November 1996, or shall ensure by that date that the two sides of industry establish the necessary measures by agreement, with Member States being obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by this Directive are fulfilled.

(b) (i) However, 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:

- 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 point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

- no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

- the employer keeps up-to-date records of all workers who carry out such work,

- 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,

- 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 point 2 of Article 16.

... .

National legislation

12. German labour law distinguishes between readiness for work (Arbeitsbereitschaft), on-call service (Bereitschaftsdienst) and stand-by (Rufbereitschaft).

13. Those three concepts are not defined in the national legislation at issue but stem from case-law.

14. Readiness for work (Arbeitsbereitschaft) covers the situation in which the worker must make himself

available to his employer at the place of employment and is, moreover, obliged to remain continuously attentive in order to be able to intervene immediately in case of need.

15. While an employee is on call (Bereitschaftsdienst) he is obliged to be present at a place determined by the employer, on or outside the latter's premises, and to keep himself available to answer his employer's call, but he is authorised to rest or to occupy himself as he sees fit as long as his services are not required.

16. The stand-by service (Rufbereitschaft) is characterised by the fact that the employee is not obliged to remain waiting in a place designated by the employer but it is sufficient for him to be reachable at any time so that he may be called upon at short notice to perform his professional tasks.

17. Under German law only readiness for work (Arbeitsbereitschaft) is as a general rule deemed to constitute full working time. Conversely, both on-call service (Bereitschaftsdienst) and stand-by (Rufbereitschaft) are categorised as rest time, save for the part of the service during which the employee has in fact performed his professional tasks.

18. In Germany the legislation on working time and rest periods is contained in the Arbeitszeitgesetz (Law on working time) of 6 June 1994 (BGBl. 1994 I, p. 1170, hereinafter the ArbZG), which was enacted to transpose Directive 93/104.

19. Paragraph 2(1) of the ArbZG defines working time as the period between the beginning and end of work, with the exception of breaks.

20. Under Paragraph 3 of the ArbZG:

Employees' daily working time must not exceed eight hours. It may be increased to a maximum of 10 hours only on condition that an average eight-hour working day is not exceeded over six calendar months or 24 weeks.

21. Under Paragraph 5 of the ArbZG:

(1) Employees must have a minimum rest time of 11 consecutive hours after their daily working time comes to an end.

(2) The length of rest time referred to in paragraph 1 above may be reduced by a maximum of one hour in hospitals and other establishments for the treatment, care and supervision of persons, hotels, restaurants and other establishments providing hospitality and accommodation, the transport industry, broadcasting, and agriculture and husbandry provided that each reduction in rest time is made up by an increase in other rest time to at least 12 hours within any calendar month or period of four weeks.

(3) By way of derogation from paragraph 1, reductions in rest time owing to an intervention during time spent on call (Bereitschaftsdienst) or on stand-by (Rufbereitschaft) may, in hospitals and other establishments for the treatment, care and supervision of persons, be made up at other times, where those interventions do not exceed one half of the rest time.

...

22. Paragraph 7 of the ArbZG is worded as follows:

(1) Under a collective agreement or a works agreement based on a collective agreement, provision may be made:

1. by way of derogation from Paragraph 3,

(a) to extend working time beyond 10 hours per day even without offset where working time regularly and

appreciably includes periods of readiness for work (Arbeitsbereitschaft),

(b) to determine a different period of offset,

(c) to extend working time until 10 hours per day without offset for a maximum period of 60 days per year,

...

(2) Provided that the health of employees is safeguarded by an equivalent period of compensatory rest, it is permissible to make provision in a collective agreement or a works agreement based on a collective agreement:

1. notwithstanding paragraph 5(1), for rest times where time is spent on call (Bereitschaftsdienst) and stand-by (Rufbereitschaft) to be adapted to the special circumstances of such duties, including, in particular, reductions in rest time due to work actually being carried out, with these periods of duty being made up at other times,

...

3. where persons are provided with treatment, care and supervision, for the rules in paragraphs 3, 4, 5(1) and 6(2) to be adapted in line with the particular features of that activity and the well-being of those persons;

4. in the case of Federal, State and municipal administrative authorities and other public corporations, institutions and foundations and in the case of other employers who are bound by collective agreements governing the public service or collective agreements with essentially the same content, for the rules in Paragraphs 3, 4, 5(1) and 6(2) to be adapted to the particular features of the activity at those locations;

....

23. Paragraph 25 of the ArbZG provides:

Where, on the date of entry into force hereof, an existing collective agreement or one continuing to produce effects after that date, contains derogating rules under Paragraph 7(1) or (2) ..., which exceed the maximum limits laid down in the provisions cited, those rules shall not be affected. Works agreements based on collective agreements shall be deemed equivalent to collective agreements such as those mentioned in the first sentence....

24. The Bundesangestelltentarifvertrag (collective agreement for public sector employees in Germany, hereinafter the BAT) specifically provides:

Paragraph 15 Normal working time

(1) Normal working time shall comprise on average 38 and a half hours per week (excluding breaks). As a general rule average normal weekly working time shall be calculated over a period of 8 weeks. ...

(2) Normal working time may be extended

(a) to 10 hours per day (49 hours per week on average) if it regularly includes readiness for work (Arbeitsbereitschaft) of at least two hours per day on average,

(b) to 11 hours per day (54 hours per week on average) if it regularly includes readiness for work (Arbeitsbereitschaft) of at least three hours per day on average,

(c) to 12 hours per day (60 hours per week on average) if the employee merely has to be present at the place of work in order in case of need to perform the work required.

...

(6a) The employee shall be required, on the instructions of his employer, to keep himself available outside normal working time at a certain place determined by the employer where he can be called upon to work if need be (on call (Bereitschaftsdienst)). The employer may require an employee to be on call (Bereitschaftsdienst) only where a certain workload may be expected but experience has shown that the length of time during which no work will be required is likely to be longer than that during which work will be required.

In order to calculate remuneration presence on call (Bereitschaftsdienst) including interventions shall be converted into hours worked on the basis of the percentage representing in practice the average duration of work required; working hours so determined shall be paid as overtime. ...

In lieu of payment, working hours calculated in such circumstances may, before the end of the third calendar month, be offset by the grant of an equivalent period of free time (compensatory rest) ....

25. In tandem with Paragraph 15(6a) of the BAT, the social partners have agreed special provisions (Sonderregelungen) for the staff of hospitals and medical centres, care-home and maternity establishments and other homes and medical establishments (SR 2a). The specific provisions for doctors and dental surgeons employed by the centres and establishments referred to in SR 2a (SR 2c) are worded as follows:

No 8

With regard to Paragraph 15(6a)

On call (Bereitschaftsdienst) and stand-by (Rufbereitschaft)

...

(2) in order to calculate remuneration, presence on call (Bereitschaftsdienst), including interventions, shall be converted as follows into hours of service:

(a) presence on call (Bereitschaftsdienst), including interventions, shall be converted as follows into working hours on the basis of the average duration of work actually required to be performed:

Category Work required during Conversion to working time

on-call service

(Bereitschaftsdienst)

A From 0 to 10% 15%

B More than 10% to 25% 25%

C More than 25% to 40% 40%

D More than 40% to 49% 55%

On-call service (Bereitschaftsdienst) under Category A shall be reclassified in Category B if experience proves that whilst on call the person concerned is required to intervene more than three times on average between 22.00 hrs and 06.00 hrs.

(b) the duration of presence on call (Bereitschaftsdienst) required on each occasion shall be converted as

follows in accordance with the number of on-call periods performed by the person concerned during the calendar month:

Number of on-call periods Conversion into working time

(Bereitschaftsdienst)

during the calendar month

1 to 8 on-call periods 25%

9 to 12 on-call periods 35%

13 on-call periods or more 45%

...

(7) In one calendar month

no more than seven on-call periods (Bereitschaftsdienste) may be required in Categories A and B,

no more than six on-call periods (Bereitschaftsdienste) in Categories C and D.

Those figures may be temporarily exceeded if to observe them would result in care of patients not being guaranteed. ...

...

Main proceedings and questions referred

26. It is apparent from the order for reference that the parties to the main proceedings are at variance concerning the question whether time spent in the provision of the on-call service (Bereitschaftsdienst) organised by the city of Kiel in the hospital operated by it must be deemed to be working time or a rest period. The dispute before the referring court solely concerns aspects of labour law in connection with on-call periods and not the conditions under which those periods are remunerated.

27. Mr Jaeger has worked as a doctor in the surgical department of a hospital in Kiel since 1 May 1992. He spends three quarters of his normal working hours on call (that is to say 28.875 hours). Under an ancillary arrangement, he is also required to carry out on-call duty under scale D in No 8(2) of SR 2c. In the contract of employment the parties to the main proceedings agreed that the BAT applies.

28. Generally, Mr Jaeger carries out six periods of on-call duty each month, offset in part by the grant of free time and in part by the payment of supplementary remuneration.

29. On-call duty begins at the end of a normal working day and the length of each period is 16 hours in the week, 25 hours on Saturdays (from 08.30 hrs to 09.30 hrs on Sunday morning), and 22 hours 45 minutes on Sundays (from 08.30 hrs to 07.15 hrs on Monday morning).

30. On-call duty is organised in the following manner. Mr Jaeger stays at the clinic and is called upon to carry out his professional duties as the need arises. He is allocated a room with a bed in the hospital, where he may sleep when his services are not required. The appropriateness of that accommodation is in dispute. However, it is common ground that the average time during which Mr Jaeger is called upon to carry out a professional task does not exceed 49% of the time spent on call.

31. Mr Jaeger is of the view that the on-call duty performed by him as a junior or emergency doctor in the

context of the emergency service must in its entirety be deemed to constitute working time within the meaning of the ArbZG owing to the direct application of Directive 93/104. The interpretation by the Court of the concept of working time in its judgment in Case C-303/98 Simap [2000] ECR I-7963 may be transposed to the present case which concerns an essentially similar situation. In particular, the constraints of the on-call service in Spain, which were at issue in the case which gave rise to the judgment in Simap, are comparable to those to which he is subject. Consequently, Paragraph 5(3) of the ArbZG runs counter to Directive 93/104 and is therefore inapplicable. Mr Jaeger adds that the city of Kiel is not entitled to rely on the derogating provisions of Article 17 of that directive, which provides for exceptions concerning only the duration of rest periods, independently of the concept of work.

32. Conversely, the city of Kiel contends that, according to the consistent interpretation of the national courts and of the majority of academic writers, periods of inactivity during on-call duty must be regarded as rest periods and not as working time. Any other interpretation would render Paragraphs 5(3) and 7(2) of the ArbZG meaningless. Moreover, the judgment in Simap cannot be transposed to the present case. In fact, the Spanish doctors in question were engaged full-time in the provision of primary-care services, whereas the German doctors are called upon to perform professional tasks at most during 49% on average of the period of on-call duty. Finally, the national legislation introducing derogations from the duration of working time is covered by Article 17(2) of Directive 93/104 and the Member States have an extensive margin of discretion in the matter. It would have been superfluous to cite expressly Article 2 of the directive in Article 17 thereof since Article 2 contains definitions only.

33. At first instance the Arbeitsgericht (Labour Court) Kiel (Germany) by judgment of 8 November 2001 upheld Mr Jaeger's claim, taking the view that the on-call duty which he is required to perform at Kiel Hospital must be reckoned in its totality as working time within the meaning of Paragraph 2 of the ArbZG.

34. The city of Kiel thereupon brought the dispute before the Landesarbeitsgericht Schleswig-Holstein.

35. That court points out that the concept of on-call duty (Bereitschaftsdienst) is not expressly defined in the ArbZG. It concerns the obligation to be present in a place determined by the employer and to hold oneself in readiness to perform professional tasks without delay in case of need. Active attention (wache Achtsamkeit) is not required and, outside periods of actual activity, the employee may rest or occupy himself in any way. During on-call duty the employee does not have to provide his professional services on his own initiative but only on the instructions of his employer.

36. According to the Landesarbeitsgericht, Mr Jaeger is performing such on-call duty which under German law is reckoned as a rest period and not as working time, apart from that portion of such duty during which the employee actually carries on his professional activities. That conception follows from Paragraphs 5(3) and 7(2) of the ArbZG. Indeed the fact that the reduction in rest periods owing to performance of his tasks during the period of on-call duty may be offset at other times demonstrates that the on-call period counts as a rest period as long as the person concerned is not actually called upon to provide professional services. Such was the intention of the national legislature since it is plain from the preparatory documents to the ArbZG that periods of on-call duty may be followed by periods of working.

37. In the present case the referring court considers that it is important to determine whether periods of on-call duty must be deemed in their totality to constitute working time, even if the person concerned does not actually perform his professional tasks but, on the contrary, is permitted to sleep during those periods. That question was not raised and, consequently, the Court did not answer it in the Simap judgment, cited above.

38. In the event that it is not possible to provide a clear answer to that question, resolution of the dispute depends on whether Paragraph 5(3) of the ArbZG is contrary to Article 2(1) and (2) of Directive 93/104.

39. Finally, in view of the ancillary application (for a declaration that Mr Jaeger is not required, in the context of the obligations laid down in his contract, to work in the ordinary course and in the context of his on-call duty, including overtime, for more than 10 hours per day and more than 48 hours on average per week) and since in that regard the city of Kiel relies on Paragraphs 5(3) and 7(2) of the ArbZG, it is

necessary to decide whether those provisions are within the margin of discretion conferred by Directive 93/104 on the Member States and the social partners.

40. In fact, if periods of on-call duty should in their entirety be deemed to constitute working time and the organisation at national level of those services were adjudged to be contrary to Article 3 of Directive 93/104 owing to the fact that the rest period of 11 consecutive hours could be not only reduced but also interrupted, the German legislation could none the less be covered by Article 17(2) of that directive.

41. If national legislation or the applicable collective agreement secured for employees an adequate period of rest - notwithstanding the fact that the period of on-call duty is regarded by them as a rest period - it would be possible for the objectives of Directive 93/104, that is to say to ensure the safety and health of employees in the Community, to be safeguarded.

42. Taking the view that, under those circumstances, resolution of the dispute before it required an interpretation of Community law, the Landesarbeitsgericht Schleswig-Holstein decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Does time spent on call (Bereitschaftsdienst) by an employee in a hospital, in general, constitute working time within the meaning of Article 2(1) of Directive 93/104 ... even where the employee is permitted to sleep at times when he is not required to work?

2. Is it in breach of Article 3 of Directive 93/104/EC for a rule of national law to classify time spent on call (Bereitschaftsdienst) as a rest period unless work is actually carried out, where the employee stays in a room provided in a hospital and works as and when required to do so?

3. Is it in breach of Directive 93/104/EC for a rule of national law to permit a reduction in the daily rest period of 11 hours in hospitals and other establishments for the treatment, care and supervision of persons, where the amount of time actually worked during time spent on call (Bereitschaftsdienst) or stand-by (Rufbereitschaft), not exceeding one half of the rest period, is compensated for at other times?

4. Is it in breach of Directive 93/104/EC for a rule of national law to permit a collective agreement or a works agreement based on a collective agreement to allow rest periods, where time is spent on call (Bereitschaftsdienst) and stand-by (Rufbereitschaft), to be adapted to the special circumstances of such duties, including in particular reductions in rest periods as a result of work actually being carried out, with these periods of duty being compensated for at other times?

The questions referred

43. It must be borne in mind at the outset that, although it is not for the Court, under Article 234 EC, to rule upon the compatibility of a provision of domestic law with Community law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, for example, Case C-292/92 Hünermund and Others [1993] ECR I-6787, paragraph 8; Case C-28/99 Verdonck and Others [2001] ECR I-3399, paragraph 28; Joined Cases C-285/99 and C-286/99 Lombardini and Mantovani [2001] ECR I-9233, paragraph 27).

First and second questions

44. In light of the matters pointed out in the preceding paragraph, the first two questions, which it is appropriate to examine together, must be understood as essentially asking whether Directive 93/104 must be interpreted as meaning that a period of duty spent by a doctor on call (Bereitschaftsdienst), where presence in the hospital is required, must be regarded as constituting in its entirety working time for the purposes of that directive, even though the person concerned is permitted to rest at his place of work during the periods when his services are not required, with the result that that directive precludes a Member State's legislation which classifies as a rest period an employee's periods of inactivity in the context of such on-call duty.

45. In replying to those questions as reformulated, it should be stated at the outset that it is clear both from Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), which is the legal basis of Directive 93/104, and from the first, fourth, seventh and eighth recitals in its preamble as well as the wording of Article 1(1) itself, that the purpose of the directive is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time (Case C-173/99 BECTU [2001] ECR I-4881, paragraph 37).

46. According to those same provisions, such harmonisation at Community 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 duration of the working week (see judgments in Simap, paragraph 49, and BECTU, paragraph 38).

47. In that context it is clear from the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, and in particular points 8 and 19, first subparagraph, thereof, which are referred to in the fourth recital in the preamble to Directive 93/104, that every worker in the European Community must enjoy satisfactory health and safety conditions in his working environment and must have a right, inter alia, to a weekly rest period, the duration of which in the Member States must be progressively harmonised in accordance with national practices.

48. With regard more specifically to the concept of working time for the purposes of Directive 93/104, it is important to point out that at paragraph 47 of the judgment in Simap, the Court noted that the directive defines that concept as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices, and that that concept is placed in opposition to rest periods, the two being mutually exclusive.

49. At paragraph 48 of the judgment in Simap the Court held that the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams in Valencia (Spain) where their presence at the health centre is required. The Court found, in the case which resulted in that judgment, that it was not disputed that during periods of duty on call under those rules, the first two conditions set out in the definition of the concept of working time were fulfilled and, further, that, even if the activity actually performed varied according to the circumstances, the fact that such doctors were obliged to be present and available at the workplace with a view to providing their professional services had to be regarded as coming within the ambit of the performance of their duties.

50. The Court added, at paragraph 49 of the judgment in Simap, that that interpretation was in conformity with the objective of Directive 93/104, which is to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks, whereas to exclude duty on call from working time within the meaning of the directive if physical presence is required would seriously undermine that objective.

51. At paragraph 50 of the judgment in Simap, the Court went on to state that the situation is different where doctors in primary care teams are on call by being contactable at all times without having to be at the health centre. In fact, even if they are at the disposal of their employer, in that it must be possible to contact them, the fact remains that in that situation doctors may manage their time with fewer constraints and pursue their own interests, so that only time linked to the actual provision of primary care services must be regarded as working time within the meaning of Directive 93/104.

52. After pointing out at paragraph 51 of the judgment in Simap that overtime comes within the concept of working time for the purposes of Directive 93/104, the Court concluded at paragraph 52 thereof that time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of the directive if they are required to be present at the health centre, whereas if they must merely be contactable at all times when on call, only time linked to the actual provision of primary care services must be regarded as working time (see to the same effect the order

in Case C-241/99 CIG [2001] ECR I-5139, paragraphs 33 and 34).

53. First, it is not disputed that a doctor performing duties such as those at issue in the main proceedings performs his on-call duty under a regime requiring presence in the health centre.

54. Secondly, neither the context nor the nature of the activities of such a doctor are materially different from those in the case which gave rise to the judgment in Simap in such a way as to call in question the Court's interpretation of Directive 93/104 in that judgment.

55. In that regard those activities cannot be validly distinguished on the basis that in the case which gave rise to the judgment in Simap the doctors assigned to a primary care team were subject to uninterrupted working time which could extend for up to 31 hours without night rest, whereas in the case of on-call duty such as that at issue in the main proceedings, the relevant national legislation ensures that the periods during which the person concerned may be called upon to perform a professional task do not exceed 49% of the totality of the period of on-call duty with the result that he could be inactive during more than half of that period.

56. In fact, as the Advocate General pointed out in footnote 3 of his Opinion, it is not apparent from the Spanish legislation at issue in the case which resulted in the Simap judgment that the doctors performing on-call duty at the hospital must remain alert and active for the whole duration of such period. The same conclusion may also be drawn from paragraphs 15, 31 and 33 of the Advocate General's Opinion in that case.

57. Moreover, even though the figure of 49% appearing in the national legislation at issue in the main proceedings relates to the average time calculated over a certain period linked to the actual performance of services during the period of on-call duty, it is none the less the case that, during that period, a doctor may be required to provide his services as often and as long as proves to be necessary without there being any limitation in that regard under the legislation.

58. In any event the concepts of working time and rest period within the meaning of Directive 93/104 may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive, as the Court did at paragraphs 48 to 50 of the judgment in Simap. Only such an autonomous interpretation is capable of securing for that directive full efficacy and uniform application of those concepts in all the Member States.

59. Accordingly, the fact that the definition of the concept of working time refers to national law and/or practice does not mean that the Member States may unilaterally determine the scope of that concept. Thus, those States may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account since that right stems directly from the provisions of that directive. Any other interpretation would frustrate the objective of Directive 93/104 of harmonising the protection of the safety and health of workers by means of minimum requirements (see Case C-84/94 United Kingdom v Council [1996] ECR I-5755, paragraphs 45 and 75).

60. The fact that in the Simap judgment the Court did not expressly rule on the fact that doctors performing on-call duty where they are required to be present in the hospital can rest or sleep during the periods when their services are not required is in no way material in that connection.

61. Thus, such periods of professional inactivity are inherent in on-call duty performed by doctors where they are required to be present in the hospital given that, unlike during normal working hours, the need for urgent interventions depends on the circumstances and cannot be planned in advance.

62. Thus, in the last sentence of paragraph 48 of the judgment in Simap, the Court expressly referred to that characteristic from which it necessarily follows that it proceeded on the basis that doctors on call at the hospital do not actually perform their professional duties uninterruptedly during the whole period of on-call duty.

63. According to the Court, the decisive factor in considering that the characteristic features of the concept of working time within the meaning of Directive 93/104 are present in the case of time spent on call by doctors in the hospital itself is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. In fact, as may be inferred from paragraph 48 of the judgment in Simap, those obligations, which make it impossible for the doctors concerned to choose the place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties.

64. That conclusion is not altered by the mere fact that the employer makes available to the doctor a rest room in which he can stay for as long as his professional services are not required.

65. It should be added that, as the Court already held at paragraph 50 of the judgment in Simap, in contrast to a doctor on stand-by, where the doctor is required to be permanently accessible but not present in the health centre, a doctor who is required to keep himself available to his employer at the place determined by him for the whole duration of periods of on-call duty is subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required. Under those conditions an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity.

66. That interpretation cannot be called in question by the objections based on economic and organisational consequences which, according to the five Member States which submitted observations under Article 20 of the EC Statute of the Court of Justice, would result from the extension to a case such as that in the main proceedings of the solution adopted in the Simap judgment.

67. Moreover, it is clear from the fifth recital in the preamble to Directive 93/104 that the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

68. It follows from all the foregoing that the conclusion reached by the Court in the Simap judgment, according to which time spent on call by doctors in primary health care teams, where they are required to be physically present in the health centre, must be regarded in its entirety as working time within the meaning of Directive 93/104, irrespective of the work actually performed by the persons concerned, must also apply in regard to on-call duty performed under the same regime by a doctor such as Mr Jaeger in the hospital where he is employed.

69. Under those circumstances Directive 93/104 precludes national legislation such as that at issue in the main proceedings, which treats as periods of rest periods of on-call duty during which the doctor is not actually required to perform any professional task and may rest but must be present and remain available at the place determined by the employer with a view to performance of those services if need be or when he is requested to intervene.

70. In fact that is the only interpretation which accords with the objective of Directive 93/104 which is to secure effective protection of the safety and health of employees by allowing them to enjoy minimum periods of rest. That interpretation is all the more cogent in the case of doctors performing on-call duty in health centres, given that the periods during which their services are not required in order to cope with emergencies may, depending on the case, be of short duration and/or subject to frequent interruptions and where, moreover, it cannot be ruled out that the persons concerned may be prompted to intervene, apart from in emergencies, to monitor the condition of patients placed under their care or to perform tasks of an administrative nature.

71. In light of all the foregoing considerations the reply to the first and second questions must be that Directive 93/104 must be interpreted as meaning that on-call duty (Bereitschaftsdienst) performed by a doctor where he is required to be physically present in the hospital must be regarded as constituting in its

totality working time for the purposes of that directive even where the person concerned is permitted to rest at his place of work during the periods when his services are not required with the result that that directive precludes legislation of a Member State which classifies as rest periods an employee's periods of inactivity in the context of such on-call duty.

The third and fourth questions

72. By its third and fourth questions, which must be examined together, the referring court is essentially asking whether Directive 93/104 must be interpreted as precluding legislation of a Member State which, in the case of on-call duty where physical presence in the hospital is required, has the effect of enabling, in an appropriate case by means of a collective agreement or a works agreement based on a collective agreement, a reduction in the daily rest periods of 11 hours subject to offset at other times during the periods worked during on-call duty.

73. It appears from the context in which the third and fourth questions were raised that the referring court is questioning the compatibility with the requirements of Directive 93/104 of the matters prescribed in Paragraph 5(3) and the first subparagraph of Paragraph 7(2) of the ArbZG.

74. In that connection it appears at the outset that national provisions such as those alluded to by the referring court make a distinction according to whether the employee is or is not called upon actually to perform work during on-call duty since only the periods of actual activity during on-call duty may be offset whereas the periods of on-call duty during which the employee is not active are regarded as rest periods.

75. However, as may be inferred from the reply to the first two questions, on-call duty performed by a doctor in the hospital employing him must be regarded in its entirety as constituting work time, irrespective of the fact that, during that period of on-call duty, the employee is not continuously carrying on any activity. Consequently, Directive 93/104 precludes legislation of a Member State which treats as rest periods under that directive the employee's periods of inactivity whilst on call in the health centre and which thus provides only for periods during which the person concerned has actually performed any professional activity to be offset.

76. In order to give a useful reply to the referring court, it is also appropriate to state the requirements of Directive 93/104 in regard to rest periods and in particular to examine whether and, if so, to what extent national provisions such as Paragraph 5(3) and the first subparagraph of Paragraph 7(2) of the ArbZG may come within the possibilities for derogation under that directive.

77. In that context Article 3 of Directive 93/104 enshrines the right of every employee to benefit during each 24-hour period from a minimum rest period of 11 consecutive hours.

78. As to Article 6 of that directive it requires the Member States to adopt 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.

79. However, it is clear from the very wording of the two abovementioned provisions that they preclude in principle national legislation, such as that in issue in the main proceedings, which permits periods of work which may last for around 30 hours at a stretch where a period of on-call duty precedes or immediately follows a period of normal service, or more than 50 hours per week, including periods of on-call duty. It would be otherwise only if that legislation came within the possibilities for derogation provided for in Directive 93/104.

80. In that regard it follows from the system established by that directive that, although Article 15 allows generally for the application or introduction of national provisions more favourable to the protection of the safety and health of employees, the directive conversely provides in Article 17 that only certain of its provisions exhaustively enumerated may form the subject-matter of derogations provided for by the Member States or social partners.

81. However, first, it is significant that Article 2 of Directive 93/104 is not amongst the provisions in respect of which the directive expressly permits derogations.

82. That fact is such as to reinforce the finding at paragraphs 58 and 59 hereof according to which the definitions in Article 2 cannot be freely interpreted by the Member States.

83. Secondly, Article 6 of Directive 93/104 is mentioned only in Article 17(1) although it is undisputed that the latter provision covers activities which bear no relationship to those performed by a doctor during periods of on-call duty performed where physical presence in the hospital is required.

84. It is true that Article 18(1)(b)(i) of Directive 93/104 provides that the Member States have the right not to apply Article 6 provided that they observe the general principles of protection of safety and health of workers and that they satisfy a certain number of conditions set out cumulatively in that provision.

85. None the less, as the German Government expressly confirmed at the hearing, it is undisputed that the Federal Republic of Germany has not availed itself of that possibility of derogation.

86. Thirdly, Article 3 of Directive 93/104, on the other hand, is mentioned in several of the subparagraphs of Article 17 of that directive and in particular in Article 17(2), subparagraph 2.1, a provision that is relevant to the main proceedings since it refers, in subsubparagraph (c)(i), to activities involving the need for continuity of service ... , particularly ... services relating to the reception, treatment and/or care provided by hospitals or similar establishments ....

87. The particular characteristics of the organisation of teams of on-call services in hospitals and similar establishments are therefore recognised by Directive 93/104 inasmuch as it provides in Article 17 for possibilities of derogation in connection with them.

88. Thus the Court considered at paragraph 45 of the judgment in Simap that the activity of doctors in primary care teams may come within the derogations provided for in that article provided that the conditions laid down in that provision are satisfied (see order in CIG, cited above, paragraph 31).

89. In that regard it should be pointed out that, since they are exceptions to the Community system for the organisation of working time put in place by Directive 93/104, the derogations provided for in Article 17 must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected.

90. Moreover, under the terms of Article 17(2) of Directive 93/104, the implementation of such a derogation, with particular regard to the duration of the daily rest provided for in Article 3, is expressly subject to the condition that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, those workers are afforded appropriate protection. Under Article 17(3) the same conditions are applicable in the case of derogation from Article 3 by collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

91. However, on the one hand, as has already been noted at paragraph 81 hereof, Article 17 of Directive 93/104 does not allow derogations from the definitions of the concepts of working time and rest period in Article 2 of the directive by counting as rest periods the periods during which a doctor who is required to perform his on-call duty at the hospital itself is not active, whereas such periods must be regarded as forming an integral part of working time for the purposes of the directive.

92. Secondly, it should be pointed out that the purpose of Directive 93/104 is effectively to protect the safety and health of workers. In light of that essential objective each employee must in particular enjoy adequate

rest periods which must not only be effective in enabling the persons concerned to recover from the fatigue engendered by their work but are also preventive in nature so as to reduce as much as possible the risk of affecting the safety or health of employees which successive periods of work without the necessary rest are likely to produce.

93. In that regard it is clear from paragraph 15 of the judgment in United Kingdom v Council that the concepts of safety and health as used in Article 118a of the Treaty, on which Directive 93/104 is based, should be interpreted widely as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time. At the same paragraph of that judgment the Court further noted that such an interpretation derives support in particular from the preamble to the Constitution of the World Health Organisation to which all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.

94. It follows from the foregoing that equivalent compensating rest periods within the meaning of Article 17(2) and (3) of Directive 93/104 must, in order to comply with both those qualifications and the objective of the directive as described at paragraph 92 of this judgment, be characterised by the fact that during such periods the worker is not subject to any obligation vis-à-vis his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health. Such rest periods must therefore follow on immediately from the working time which they are supposed to counteract in order to prevent the worker from experiencing a state of fatigue or overload owing to the accumulation of consecutive periods of work.

95. In order to ensure the effective protection of the safety and health of the worker provision must as a general rule be made for a period of work regularly to alternate with a rest period. In order to be able to rest effectively, the worker must be able to remove himself from his working environment for a specific number of hours which must not only be consecutive but must also directly follow a period of work in order to enable him to relax and dispel the fatigue caused by the performance of his duties. That requirement appears all the more necessary where, by way of exception to the general rule, normal daily working time is extended by completion of a period of on-call duty.

96. Conversely, a series of periods of work completed without the interpolation of the necessary rest time may, in a given case, cause damage to the worker or at the very least threaten to overtax his physical capacities, thus endangering his health and safety with the result that a rest period granted subsequent to those periods is not such as correctly to ensure the protection of the interests at issue. As has been established at paragraph 70 hereof, that risk is yet more real in regard to on-call duty performed by a doctor in a health centre, a fortiori where that duty is additional to normal working time.

97. Under those circumstances the increase in daily working time which the Member States or social partners may effect under Article 17 of Directive 93/104 by reducing the rest period accorded to the worker during the course of a given working day, in particular in hospitals and similar establishments, must in principle be offset by the grant of equivalent periods of compensatory rest made up of a number of consecutive hours corresponding to the reduction applied and from which the worker must benefit before commencing the following period of work. As a general rule, to accord such periods of rest only at other times not directly linked with the period of work extended owing to the completion of overtime does not adequately take into account the need to observe the general principles of protection of the safety and health of workers which constitute the foundation of the Community regime for organisation of working time.

98. In fact it is only in entirely exceptional circumstances that Article 17 enables appropriate protection to be accorded to the worker where the grant of equivalent periods of compensatory rest is not possible on objective grounds.

99. However, in the present case, it is in no way argued or even alleged that legislation such as that at issue in the main proceedings may come within such a situation.

100. Furthermore, in no circumstances may a reduction in the daily rest period of 11 consecutive hours, as authorised by Directive 93/104 in certain circumstances and subject to compliance with various conditions, lead to the maximum weekly working time laid down in Article 6 of the directive being exceeded such that a worker is required to perform his activities for more than an average of 48 hours, including overtime, in any period of seven days, even if such time includes periods on call during which the employee, although available at his place of work, is not actually engaged in professional activities.

101. As was noted at paragraph 83 hereof, Article 17 does not permit derogation from Article 6 for activities such as those at issue in the main proceedings.

102. In view of the considerations set out herein, it must be concluded that national provisions such as those laid down in Paragraph 5(3) and the first subparagraph of Paragraph 7(2) of the ArbZG are not such as to come within the possible derogations provided for in Directive 93/104.

103. In those circumstances the reply to be given to the third and fourth questions is that Directive 93/104 must be interpreted as meaning that:

- in circumstances such as those in the main proceedings, that directive precludes legislation of a Member State which, in the case of on-call duty where physical presence in the hospital is required, has the effect of enabling, in an appropriate case by means of a collective agreement or a works agreement based on a collective agreement, an offset only in respect of periods of on-call duty during which the worker has actually been engaged in professional activities;

- in order to come within the derogating provisions set out in Article 17(2), subparagraph 2.1(c)(i) of the directive, a reduction in the daily rest periods of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked;

- furthermore, in no circumstances may such a reduction in the daily rest period lead to the maximum weekly working time laid down in Article 6 of the directive being exceeded.

Costs

104. The costs incurred by the German, Danish, French, Netherlands and United Kingdom Governments and 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,

in answer to the questions referred to it by the Landesarbeitsgericht Schleswig-Holstein by order of 12 March 2002, amended by order of 25 March 2002, hereby rules:

1. Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time must be interpreted as meaning that on-call duty (Bereitschaftsdienst) performed by a doctor where he is required to be physically present in the hospital must be regarded as constituting in its totality working time for the purposes of that directive even where the person concerned is permitted to rest at his place of work during the periods when his services are not required with the result that that directive precludes legislation of a Member State which classifies as rest periods an employee's periods of inactivity in the context of such on-call duty.

2. Directive 93/104 must also be interpreted as meaning that:

- in circumstances such as those in the main proceedings, that directive precludes legislation of a Member State which, in the case of on-call duty where physical presence in the hospital is required, has the effect of enabling, in an appropriate case by means of a collective agreement or a works agreement based on a collective agreement, an offset only in respect of periods of on-call duty during which the worker has actually been engaged in professional activities;

- in order to come within the derogating provisions set out in Article 17(2), subparagraph 2.1(c)(i) of the directive, a reduction in the daily rest period of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked;

- furthermore, in no circumstances may such a reduction in the daily rest period lead to the maximum weekly working time laid down in Article 6 of the directive being exceeded.

Rodríguez Iglesias
Wathelet
Schintgen
Timmermans
Gulmann
Edward
Jann
Skouris
Macken
Colneric
von Bahr
Cunha Rodrigues
Rosas

Delivered in open court in Luxembourg on 9 September 2003.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President

(1) Language of the case: German.