Key Issues: **Social Policy – Working Time**

Case: **Coca-Cola European Partners GmbH v L.B. & R.G.**

Reference: **Case C-257/21 and C-258/21, CJEU (Seventh Chamber), 7 July 2022**

Legislation: **Directive 2003/88/EC**

Background

L.B. and R.G. performed night shift work for Coca-Cola, which had concluded a company-level collective agreement with the Food, Beverages and Catering Union, under which Coca-Cola is bound by provisions of a German national collective agreement ('the MTV').

During the period from December 2018 to June 2019, L.B. performed regular night work within the meaning of the MTV, for which she received a supplementary allowance of 20% per hour. In December 2018 and January 2019, as well as during the period from March to July 2019, R.G. performed regular night work within the meaning of the MTV, for which his remuneration was supplemented by 25% per hour.

L.B. and R.G. each brought an action before the appropriate Labour Court, Germany in order to obtain, for the relevant periods, payment of an amount equivalent to the difference between the remuneration they received and that payable in accordance with the supplementary rates prescribed by the MTV for irregular night work. In that regard, they maintained that persons who regularly perform night work were exposed to significantly greater health risks and disruptions to their social environment than those who perform night work only on an irregular basis.

Coca-Cola contended, on the contrary, that irregular night work occurred much less frequently than regular night work and that the higher supplementary allowance applicable to irregular night work was justified, inter alia, by the fact that it generally involved additional work. Furthermore, regular night work gives rise to an entitlement to additional benefits, particularly in terms of leave. The higher supplementary allowance for irregular night work is intended not only to compensate for the difficulty of such work, but also to deter an employer from resorting to it and spontaneously encroaching on its employees' leisure time and social lives.

As the actions brought by the interested parties were dismissed by the Labour Court, those parties brought appeals against the judgments of that court before the Higher Labour Court, Berlin-Brandenburg, Germany, which acknowledged their entitlements in respect of part of the relevant periods but declared them time-barred as to the remainder. Coca-Cola brought appeals on a point of law against those judgments

before the Federal Labour Court, Germany which decided to stay the proceedings and to refer a number of questions to the Court of Justice (CJEU) for a preliminary ruling.

Consideration by CJEU

By its first question, the referring court asks, in essence, whether a provision of a collective agreement which provides for a higher supplementary allowance for irregular night work than that established for regular night work is implementing Directive 2003/88.

Under Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), its provisions are addressed to the Member States only when they are implementing Union law and, in accordance with settled case-law, the concept of 'implementing Union law' referred to in that provision presupposes a degree of connection between an act of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other, having regard to the assessment criteria laid down by the CJEU.

In that context, the CJEU has found, inter alia, that EU fundamental rights could not be applied in relation to national legislation because the provisions of EU law in the area concerned did not impose any specific obligation on Member States with regard to the situation at issue in the main proceedings. Consequently, the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law and, therefore, cannot render the Charter applicable.

Furthermore, it is also apparent from the CJEU's case-law that, where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on Member States with regard thereto, the provision of a collective agreement concluded between the two sides of industry as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter.

It is therefore necessary to ascertain whether Directive 2003/88 governs the supplementing of workers' pay for night work at issue in the main proceedings and imposes a specific obligation with regard to such situations. In this instance, the referring court considers, in essence, that the MTV is capable of being covered by Articles 8 to 13 of Directive 2003/88, read in conjunction with recital 6 of that directive.

In the first place, the CJEU noted that, save in the special case covered by Article 7(1) of Directive 2003/88 concerning paid annual leave, that directive is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers, with the result that, in principle, it does not apply to the remuneration of workers. It follows both from Article 137 EC (now Article 153 TFEU), which is the legal basis of Directive 2003/88, and from the wording of Article 1(1) of that directive itself, read in the light of recitals 1, 2, 4 and 5 thereof, that the purpose

of the directive is to lay down minimum requirements intended to improve the living and working conditions of workers through the approximation of national provisions concerning, in particular, the duration of working time.

Furthermore, pursuant to paragraph 5 thereof, Article 153 TFEU does not apply to pay, the right of association, the right to strike or the right to impose lock-outs. That exception is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at national level and within the relevant competence of Member States. In those circumstances, in the present state of EU law, it was considered appropriate to exclude determination of the level of pay from harmonisation under Article 136 EC et seq..

It is true that Articles 8 to 13 of Directive 2003/88 relate to night work. However, those articles concern only the length and pattern of night work (Articles 8 and 13 of that directive, respectively), the protection of night workers' health and safety (Articles 9, 10 and 12 of that directive) and the notification of the competent authorities (Article 11 of that directive). Those articles do not therefore govern workers' pay for night work and, consequently, do not impose any specific obligation on Member States with regard to the situations at issue in the main proceedings.

The CJEU held that:

A provision of a collective agreement which provides for a higher supplementary allowance for irregular night work than that established for regular night work is not implementing Directive 2003/88/EC.

Why is this decision important?

This is a useful clarification that, under EU law, the adoption by an employer of a collective agreement relating to night work does not, of itself, constitute implementation of the relevant EU legislation.

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