

[PDF udgave \(109 KB\)](#)

Modtaget via elektronisk post. Der tages forbehold for evt.
fejl.

Arbejdsmarkedsudvalget
(Alm. del - bilag 328)
EU
(Offentligt)

Folketingets Arbejdsmarkedsudvalg
Christiansborg
1240 København K

Ved Stranden 8
1061 København K
Tlf. 33 92 59 00
Fax 33 12 13 78
bm@bm.dk
www.bm.dk
SE-nr. 10 17 27 48

Besvarelser til Kommissionen vedrørende arbejdstidsdirektivet

Under henvisning til udvalgets spørgsmål nr. 60 og 61 af 21. januar 2004 og besvarelserne heraf vedlægges den danske regerings besvarelse af Kommissionens spørgsmål om virkningerne af SIMAP og Jaegerdommene og den danske regerings svar på Kommissionens meddelelse Kom (2003) 843 af 30. december 2003. En dansk oversættelse er under udarbejdelse og vil blive eftersendt.

Vores sag
6309-0001

Bilag
2

Claus Hjort Frederiksen

/

Einar Edelberg

The Danish Government's comments to the Communication from the Commission concerning the Re-exam of the Directive 93/104/EC concerning certain Aspects of the organization of working time

March 29, 2004

Our ref.

6309-0001

Introduction

Denmark welcomes the Commission's initiative which on the one hand aims to consider and solve the difficulties the 2 ECJ rulings (the Simap and Jaeger cases) have caused in the member states, and on the other hand fulfils its revision's obligations according to article 17 and article 18 of the Working Time Directive 93/104/CEE (WTD).

Seen from a Danish perspective it is imperative that a sustainable solution on working time in general is found that respects the employee's health and safety, society's need for a well-functioning labour market, and the employer's interest in flexible and definite legislation.

The Danish Government welcomes the Commission's initiative including the use of Article 138. The Communication in itself, and the Commission's handling of the question at the Employment Council at the 4 March indicate that the Commission is fully aware of the substantial problems the present legal situation creates for the member states, and is committed to find a legislative solution to the problem.

The five issues listed in the Communication

Re.: Reference periods

Even though the majority of the labour force is covered by collective agreements in Denmark thus having the possibility to prolong the reference period up till 12 months cf. art. 17, the Danish Government believes it could be useful to allow for a legislative possibility to prolong the reference period for up till 12 months. Part of the labour market requires more flexibility than the existing legislation permits. Extending the reference period up to 12 months will facilitate the work organization in general. This is i.a. the case for employees who are not covered by a collective agreement.

Re.: The Court of Justice's interpretation of the concept of working time in the SIMAP and JAEGER cases

The 2 cases have an impact on the future work organization on the Danish labour market in relation to on-call duty and compensatory rest.

On-call duty in the health sector

The Health sector is affected because of the frequent use of on-call duty on the work place. This concerns mainly doctors because of their work organization. Bringing doctors' working time in line with the rulings would require a reorganization of their working time, and estimated up 80 additional doctors, mostly senior doctors. However, the hiring of doctors is difficult, since Denmark suffers from a shortage of doctors.

On-call duty in other sectors

Approximately 3000 teachers at continuations schools are affected. A reorganization of their working time is not sufficient to solve the impact of the rulings. Hiring of additional staff is therefore necessary, but will cause difficulties.

According to the Kriminalforsorgen 655 employees working in Danish prisons will be affected. The impact of the 2 rulings might be eliminated by reorganizing their schedules. However, a reorganization of the working time will create problems in the sector.

According to the Government's information sectors operating in the field of IT-surveillance, telecommunication, guard and security are facing problems. Also the service industry and production industry in general have special functions where on call duty is a part of the working time schedule.

Finally, the Danish Government finds it relevant to add that some employees find on-call duty as a work organizing instrument very attractive. This is due to the fact that the full time employee's *presence* at the work place with on call duty in reality is limited. The reason for this is the fact that the employee that can spread his/her working time over a limited number of days per week. If a reorganization of the working time is required as a result of the ECJ's rulings, some employees will feel that they lose an important work benefit that until now has giving them flexibility in their daily life.

The Danish Proposal for solving the problems related to on call duty

The Danish Government believes that it is necessary to find a legal solution to the problems related to the ECJ's interpretation of the working time concept. The Danish Government suggests amending the working time definition e.g. by introducing a new time concept in the directive "in-active time".

This should permit a certain period of time where the employee's presence at the work place do not count as neither working time nor as resting time, if the employee is not required to carry out his/her activities or duties, and is free to sleep/rest.

Compensatory rest periods in the health sector

The most serious impact of the 2 cases, seen from a Danish perspective, is the limitations the ECJ sets up in the Jaeger-case regarding the postponing of compensatory rest periods. The guidelines for the handling of compensatory rest is set up in item 94, which states the following: "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."

According to the relevant health authorities the ruling will create problems, because the different occupational groups according to their collective agreements to a large extent postpone a part (up to 3 hours) of their resting time to some later point in time, thus not meeting the criteria of the ruling. In the health sector such occupational groups as doctors, nurses, midwives and care assistants are concerned.

Depending on the occupational group the problem can only partly be solved by reorganization and will in any case require hiring of additional staff. According to the relevant authorities the rulings cause even greater problems in relation to compensatory rest than on-call duty where the estimate was up to 80 additional doctors. It is unfortunately not possible to give a more precise estimate. As mentioned above the hiring of additional doctors is problematic, since there is a shortage of doctors.

The recruitment situation is also critical for nurses and midwives who also will be affected if the present work organization cannot be upheld.

Compensatory rest periods in other sectors

Even though the 2 ECJ's rulings concerns doctors, and thus the focus of the implications of the 2 rulings has been on the health sector, the Danish Government is deeply concerned of the impacts the rulings may/will have in other sectors, where employees work in shifts with on call duty and where presence is required 24 hours.

The examples in the text below show how far reaching the rulings are for society in general. For some sectors it is possible to solve the problems caused by the strict interpretation of the working time concept, for others it is not possible because of recruitment problems or the need for human contact with the same employee for the longest period possible.

Firefighters: estimate 1200 workers and autonomous workers will be affected.

Educationalist in kindergartens etc. and teachers in the county schools (55,000 teachers) will to some extent be affected because of various activities e.g. meetings with parents, annual camps and excursions which are a normal and important part of their employment, and the education of the children.

Educationalists working with people with special needs: As a starting point a reorganization of their schedule is possible. However, from an educational and emotional point of view a reorganization of the working time could have a negative effect on the individual, because the individual would have to be confronted with more staff members during a week. Depending on the individual this could have serious impact for his or her well-being.

The care sector: Staff helping and participating in excursions with elder citizens living in residential homes will be affected.

The Danish proposal for solving the problem with compensatory rest

It is the Danish Government's opinion that there is an evident need for preserving the existing working time organization thus allowing work places to continue using on-call duty combined with ordinary shifts. An amendment of the directive permitting a postponing of the compensatory rest period within e.g. 72 hours of the missed daily break would solve the problem.

An amendment in this direction could ensure flexibility in general and limit the main impacts of the rulings namely recruitment problems and the economic consequences.

Re.: The conditions of application of Article 18.1 (b) (i) (opt out)

The opt out clause has not been implemented in Danish legislation; however, the Danish Government fully recognizes other member states' need for this provision, and with the ECJ's strict interpretation of the (WTD), Denmark cannot exclude that the opt out clause might be interesting for the social partners.

The opt out clause provides flexibility for the benefit of both the employee and the employer. The provision is far reaching in that respect that the employee renounces his/her weekly working time protection. The reasons for this renunciation can be various, but it is up to the individual to take that decision. The important thing in this respect is to ensure that the employee is secured an adequate protection, when he or she decides to activate the opt out clause. The present wording of the opt out does not qualify conditions which have to be observed in order to conclude an opt out clause.

The Danish Government proposes the following amendments/clarifications to the opt out provision:

1. The conclusion of an opt out agreement has to be in writing and separated from the conclusion of the employment contract.
2. An opt out should be limited in time.
3. The opt out agreement has to include a paragraph allowing the employee to withdraw his/her consent to opt out. The notice period should not exceed the notice period in the employment contract.
4. Taken into account that the collective agreements - especially in the health sector - are used in a substantial number by the member states, the Danish Government believes it would be a useful possibility to link an opt out agreement to the conclusion of a collective agreement.

Re.: Measures aiming at improving the reconciliation between work and family life

The social partners have a long tradition for negotiating solutions that respect the 2 sides of industry's different interests. On a European level this is illustrated with the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, which was transposed to directive 96/34/EC of 3 June 1996. the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, which was transposed to directive 97/81/EC of 15 December 1997, and the framework agreement on telework.

On a national level the social partners also take on the responsibility for improving the reconciliation between work and family life. The examples are various, but just to illustrate the initiatives the social partners have taken the following examples should be mentioned:

The first day your child is ill the employee is entitled to be absent from work.

In case of serious illness in the family absence from work is allowed for 8 days.

Care days depending on the collective agreement between 2 days up till 10 days. Care days entitle an employee to stay at home with out prior notice and gives thus flexibility especially for employees with minor children.

Salaried maternity leave between 14 and 26 weeks depending on the collective agreement.

5 days of extra holiday.

The examples above show that the social partners have taken initiatives which to a large extent reconcile work and family life.

It is the Danish Government's firm conviction that the reconciliation between work and family life to the largest extent possible should be handled by the social partners. However, the Danish Government is aware of its responsibility and do if it finds it necessary take legislative initiatives, improving the flexibility for employees on the labour market. The amendment to the law on part-time work from September 2002, where the employer and the employee can agree on part time work irrespective a prohibition of part time work in a collective agreement, illustrates this.

This spring the Danish Government has taken the initiative to set up a committee of ministers aiming at improving the conditions for reconciling family life and work life. The problems the families are facing differ of course, but a general need for flexibility in relation to work time organization, access to day care facilities and telework would be an improvement for a lot of people.

The examples described above show that the social partners are aware of their responsibility on both European and national level. The present wording of the directive allows for national differences. The Danish Government believes that the present directive should continue to focus on the regulation of the workers health and safety in relation to working time at the work place, and not expanding its scope to more general working conditions.

Re.: Whether an interrelated approach to these issues would allow for a balanced solution capable of meeting the criteria set above

Based on the Danish experience it is possible to establish a balanced solution which takes into account both health and safety of the concerned, and the demands for a well-functioning labour market including the safety of and the considerations to the patients and other groups.

The Danish Government believes that an amendment of the directive is necessary, which on the one hand respects/safeguards the employee's health and safety, and on the other hand enables a work organization that takes into account that some occupational sectors and professions are obliged to use on call duty, and to postpone compensatory rest periods. The reasons for this are both linked to the nature and purpose of the work concerned, to recruitment problems in various sectors and to the economic consequences. The Danish Government asks the Commission to recognize these facts. Compliance with the ECJ's rulings is simply not a possibility in some sectors. It is the Danish Government's opinion that an amendment of the directive should secure an adequate level of protection for the benefit of all parties involved.

Yours sincerely

Mr Einar Edelberg
Deputy Permanent Secretary
AIC/Labour Law Division
+45-3392 9959
eed@bm.dk

European Commission
Employment and Social Affairs DG

Responses to the questionnaire on the impact of the case law of the Court of Justice in cases SIMAP and Jaeger

March 15, 2004

Our ref.

6309-0001

On 26 February 2004 the Danish Government obtained a small respite responding to the questionnaire on SIMAP and Jaeger, since it was very difficult to collect precise information concerning the various sectors of the labour market.

The Danish Government appreciates the indulgence on behalf of the Commission and regrets that it has not been possible to forward more accurate information on the impact of SIMAP and Jaeger than the following:

1. Legal impact

1.1. Did the rulings in cases SIMAP and Jaeger lead to amendments of the legal rules or could this be the case in the future?

The cases SIMAP and Jaeger have not lead to amendments of the legal rules in Denmark up to now. Some amendments of the legal rules on working time in Denmark may be necessary in the future, if the impact of SIMAP and Jaeger is not neutralized by adjustments of the Working Time Directive.

1.2. Have the rulings of the Court in cases SIMAP and Jaeger had any impact on collective agreements or other agreements between social partners or on national practices concerning working time?

The cases SIMAP and Jaeger have not had any impact on collective agreements or other agreements between social partners up to now. If the cases have had any impact on national practices up to now it is only on workplace-level.

It can be foreseen, however, that quite a few collective agreements covering many workers in several sectors must be revised, especially with regard to the timing of rest periods, if the Working Time Directive is not adjusted ac-

cordingly. One such agreement between the public employers and a multitude of trade unions covers around 300.000 workers in *inter alia* the health and care sectors.

1.3. Do you consider that this case law of the Court will impact on sectors other than the health sector?

The cases SIMAP and Jaeger will affect various sectors other than the health sector if the Working Time Directive is not adjusted. In some sectors it may be possible to deal with the impact by rearranging, while it will be necessary to recruit additional personnel in other sectors. Some examples of sectors or jobs generally affected (with number of potentially affected workers in brackets where possible) are:

- Fire fighters
- Rescue services
- Care sector
- Animal husbandry
- Prison service (650 workers)
- Continuation schools (3000 teachers)

It must be underlined that this is not at all an exhaustive list of generally affected sectors or jobs.

Additionally it must be mentioned that some sectors or jobs will be partly affected, for instance longer school camps in the education sector seem virtually impossible to carry out unless the Working Time Directive is adjusted.

2. Impact on human resources

2.1. In order to maintain the same level of services, does this case law require the recruitment of additional staff?

In some sectors other than the health and care sectors it will probably be possible to deal with the impact of the cases SIMAP and Jaeger by rearranging, but e.g. in the case of continuation schools a substantial amount of additional teachers will have to be recruited. An amount of additional herdsmen will also be in demand.

The health sector

On call (maximum 48 hours a week)

In the health sector recruitment of additional staff is definitely required. With regard to the on call-issue and the 48 hour weekly maximum 60-80 additional doctors, mostly senior doctors, are considered necessary, if the Working Time Directive is not adjusted.

10/13

Compensatory rest

The impact of the cases SIMAP and Jaeger is considered even more severe with regard to compensatory rest, but an estimate of the need for additional staff in that respect has not yet been worked out.

The local agreements between the social partners in the health sector mostly allows for a reduction of rest periods from 11 to 8 hours, but how much rest periods actually are reduced locally in a way not in accordance with the Jaeger ruling is not clear. The reduction of rest periods can be part of a duty roster, but is also very common in case of illness, vacancies etc., and this is not supervised centrally in any way.

The local agreements cover doctors, nurses, midwives etc. and, accordingly, recruitment of additional staff will be necessary with regard to all kinds of personnel within the health sector.

In Denmark some counties estimate that they will be able to solve the issue of compensatory rest by rearranging, while others envisage an urgent need for substantially more manpower in the health sector.

Similar collective agreements apply in the care sector and timing of the compensatory rest in accordance with Jaeger will therefore require recruitment of additional staff.

2.2. If additional staff is required, are the workers available on the national labour market?

In some of the sectors other than the health and care sector the additional workers are not readily available in Denmark. Difficulties recruiting the necessary teachers for continuation schools, the additional herdsmen and fire fighters are for instance envisaged.

In the health sector there is an overall shortage of skilled workers in Denmark, especially with regard to doctors and trained nurses. There is no obvious solution to the shortage of manpower in this field. A possible, but not satisfactory measure could be increased use of those temporary employment agencies that are already today an important factor countering the shortage of mainly trained nurses. Increased use of these agencies will, however, not in any way reflect generally improved health and safety standards in the health sector, because it will mostly be the same nurses and doctors just working for another employer, but not working less or having longer rest periods. If the Working Time Directive is not adjusted with regard to compensatory rest it is envisaged that by increasing the use of temporary employment agencies

the allocation of medical personnel will pass off in a more disorganized and more expensive manner with a notable decrease in the quality of the health service as the inevitable result.

11/13

In the care sector it is also envisaged that the increased use of temporary employment agencies will result in additional costs, worse service and no improvement in relation to rest periods.

3. Financial Impact

3.1. Please specify, as precisely as possible, the additional costs directly attributable to the SIMAP and Jaeger case law, broken down by sectors and professions.

In the health sector the cost of the additional doctors needed to comply with the on call issue is estimated at around 50 million DKK. Since it is not possible to estimate the impact in relation to necessary additional staff in the health sector with regard to compensatory rest, it is not yet possible to estimate the additional costs in this respect. It is for instance not clear exactly how much the use of temporary employment agencies will be necessitated. It is, however, the assumption that the additional costs will be substantial and surpass the above mentioned 50 million DKK.

This is also the case in the care sector.

The additional costs with regard to fire fighters are estimated at around 50 million DKK. Substantial additional costs are also envisaged in relation to animal husbandry, especially with regard to smaller employers.

Exact information concerning additional costs in other sectors is regrettably not available.

4. Miscellaneous.

Unfortunately there is no more firm information available on the impact of the rulings in cases SIMAP and Jaeger. It must be underlined, however, that the shortage of information should not be mistaken for lack of impact. Furthermore, it must be emphasized that the exact scope of the Jaeger ruling

with regard to the impact of Jaeger cannot be forwarded without making a reservation in this respect.

Yours sincerely

12/13

- 13 -

Einar Edelberg
Deputy Permanent Secretary
(+45) 33929959
Eed@bm.dk

(Løbenr. 15228)