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Craney, Jörg

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*Prof. Dr. Andreas Hänlein / Jörg Craney**

When, in 2000 the ECJ allowed the claim of Spanish physicians and categorised Spanish on-call duty as hours of work, many German physicians felt encouraged to protest increasingly against their long service hours. At first nothing changed in German industrial law. The Federal government refused to transfer the transfer the judgement to apply to German labour conditions. Change only came after physician Norbert Jaeger, of Kiel, took the matter before the local Industrial Court, (*Arbeitsgericht Kiel*), after 50 of his colleagues at the City Hospital in Kiel protested against the working hours applicable there.[1] The complaint was successful at the local Industrial Court, but the City of Kiel appealed to the Industrial Court of Schleswig-Holstein (*Landesarbeitsgericht* - LAG), which decided to stay the proceedings and referred the matter to the ECJ for a preliminary ruling. In its decision of 9 September 2003[2] the ECJ confirmed that also in Germany, the on-call-duty hours of doctors, should be counted as hours of work. It further also explained some of the characteristics of the allowed variations of the corresponding European Directive.[3] Considering the current working conditions in German hospitals, this results of this dispute will not only affect overworked physicians, but it will also indirectly affect the health care costs, whose repercussions should not be underestimated The background, content and effects of this Luxemburg decision, therefore merit further comment.

1. Regarding the *Landesarbeitsgericht's* decision.

It is noteworthy that there was an ECJ decision on the matter at all. The Court had already decided a few years ago in *Simap*[4], regarding the question of whether on-call duty of hospital physicians counted as hours of work according to Directive 93/104[5] or not. It stated that hours, during which an employee has to be physically present on the premises of the employer, even if the employee is not actively working, must be considered as working hours and not as hours of rest in terms of the directive. However, the *Simap* judgement was met by very opposing attitudes. On the one hand it was considered important for German labour matters[6], on the other hand its direct applicability (to German industrial law), was challenged.[7] Occasionally the possibility of the *Arbeitszeitgesetzes* (law regarding working hours, ArbZG), conforming to European standards was accepted.[8]

In para. 2(1)(1) of the ArbZG, working hours are defined as being: "(…) the time between start and end of work, without rest periods, (…)". This automatically leads to another question: How should the term "work" be defined? Should it include only active working hours or for example also hours of waiting at the workplace, travelling to and from the workplace or preparation work done at home? The German law on working hours is not specific.[9] In consideration of the fact that the ArbZG on the one hand does not give any definition of working hours, but on the other defines in paras 5(3) and 7(2)(1) on-call duty as hours of rest — and not as working hours.[10] With the *Simap* judgement in mind, the Federal Industrial Court (*Bundesarbeitsgericht* - BAG) therefore, in a similar case before here discussed judgement, did not refer the

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* Prof. Dr. Andreas Hänlein is Professor at the University of Kassel (D). Jörg Craney is Assistent to Prof. Dr. Andreas Hänlein.

1 See article in Süddeutsche Zeitung, 9 September 2003, p. 3 – regarding the background to the case and the local everyday life in a clinic.

2 ECJ 9 September 2003 – C-151/02 – *Landeshauptstadt Kiel ./. Norbert Jaeger* = EuLF 2003 (D), 217 *et seqq*.

3 LAG Schleswig-Holstein, NZA 2002, p. 621 *et seqq*.

4 ECJ 3 October 2000 – C-303/98 – *SIMAP*, Slg. 2000, I-7963 = [2000/01] EuLF (E), 280.

5 Council Directive No. 93/104 of 13 December 1993 concerning the organisation of working time (ABl. L 307, at 18).

6 *Heinze*, Gutachten v. 23. 10. 2001 [unveröff.]; *Karthaus*, AuR 2001, p. 485; *Linnenkohl*, AuR 2002, p. 211; LAG Niedersachsen (D) v. 17. 5. 2002, AuR 2003, p. 31; *Buschmann*, AuR 2003, p. 1ff.; *Rixen*, EuZW 2001, S.421 ff.; *Ebener/Schmalz*, DB 2001, p. 813 ff.

7 LAG Schleswig-Holstein (1.Kammer) (D) v. 18. 12. 2001; DB 2002, p. 693 ff.; *Litschen*, NZA 2001, p. 1355 ff.; *Breezmann*, NZA 2002, p. 946 ff.

8 LAG Hamburg (D), NZA 2002, S. 507; LAG Niedersachsen (D), AuR 2003, p. 31.

9 Zur Geschichte des Arbeitszeitbegriffs vgl *Schlottfeldt*, ZESAR 2003, p. 144f.; *Buschmann*, AuR 2003, p. 1ff.

10 *Körner*, NJW 2003, p. 3606 (3607).

matter for a preliminary ruling since European Law was in their opinion unclear.[11] It stated that the Community law was clear enough. The BAG had to decide on the validity of a collective bargaining agreement regarding working time on shift work and the planning of service hours of an emergency medical service operated by the *Deutschen Roten Kreuz,* a German ambulance service. According to Article 234(3) EC, courts of last instance are generally bound to refer a matter to the ECJ if during a proceedings an important question of Community law must be decided. The court need not however refer a matter, where the question has already been answered in a similar case by the ECJ and the national court can merely follow the interpretation of the ECJ. The first chamber of the BAG followed the interpretation of the ECJ that defined on-call duty in equal terms with working hours according to Directive 93/104, however it was restricted by its application of the ArbZG that had to be interpreted in keeping with Community law as well. In the BAG's view, a number of provisions of the ArbZG would be inapplicable, if on-call duty were defined as being part of working hours. In this concrete case, a contravention of the Directive, did not interfere with the application of the collective bargaining agreement as the employer involved was not a member of a state body in terms of the ECJ jurisprudence. It is common knowledge that a Directive that has not been duly introduced into national legislation, is only applicable between citizens and their defaulting state, it is not applicable directly between citizens. Lastly the BAG declined from referring the matter to the ECJ.

The *Landesarbeitsgericht* (LAG) Kiel on the contrary, interpreted the relevant provisions of the ArbGZ regarding hours of work and rest in a different way. It argued that according to German law, the hours of on-call duty were not considered to be working hours with the exception of those hours during which the employee actually has to actively work. According to paras 5(3) and 7(2) of ArbGZ, as long as the employee did not work at all, these on-call duties were to be considered as hours of rest. A sleeping employee, does not, in comparison with a full-time employee, render any service, he needs only to be in the vicinity of the workplace. In the case of *Jaeger*, this interpretation had to be applied, since the employee was not, according to the Directive, at the employer's disposal while sleeping.[12]

On the other hand, the LAG Schleswig-Holstein felt itself apparently prevented from making a decision in the matter and felt that it needed further clarification. Firstly due to the opportunity that the employee had to sleep, during the on-call duty and secondly because of the planned compensation agreement in the collective agreement, in terms of Article 17(2) of the Directive. The LAG wanted to get confirmation from the ECJ as to how the Directive was to be interpreted in the view of an existing compensation agreement. For this reason, a direct word from the ECJ was appropriate. Neither the Advocate General[13], nor the ECJ have however further expounded the question of the legitimacy of a preliminary ruling procedure. The reasons put forward by the LAG Schleswig-Holstein, as cause to bring the matter before the ECJ for a preliminary ruling, were apparently plausible enough in the ECJ's view.

2. The Transfer of the *Simap* Judgement to German cases

The ECJ has taken the same view as the Advocate General and has considered on-call duty, where a doctor must be personally present, as working hours, within the meaning of Article 2(1) of the Directive. With regard to the *Simap* judgement, the ECJ's decision in Jaeger, to categorise on-call duty as working hours, is not surprising. The reasons given by the ECJ are in keeping with its jurisprudence in the above mentioned decision. Furthermore, it explained in a few sentences that there are no relevant differences between Spain and Germany. It rejected in a few words the objections of some Member States, regarding the economical and organisational consequences of the judgement (paras 66 and 67).

The *Simap* judgement stemmed from a referral for a preliminary ruling from the Court of Appeal of Valencia, for an interpretation of Directives 89/391 EEC[14] and 93/104EC. In that case, Spanish doctors in hospitals carried out their duties in teams, without any time restrictions. According to the duty roster, a normal working day was followed by an on-call duty and again thereafter by another normal working day. According to this then, a 31 hour long shift without a nightly rest period was created. Already at that time a decision regarding the classification of on-call duty as rest period should have been given. According to the definition in Article 2(1) of the Directive, working hours are defined 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 practice." According to the ECJ, the classification as working hours can be accepted either when the employee performs a service for the employer or is situated on the premises of the employer and is at the employer's disposal. A vital point of the latter consideration is that the employee must necessarily be somewhere near his place of work or respectively on the premises of the employer.[15] In this regard it makes no difference whether the employee is allowed to sleep. As experience has shown, that the effectiveness of such a rest period, this being its value as a revival time, is considerably re-

[11] BAG 18. 2. 2003, NZA 2003. p. 742 ff.= DB 2003, S. 1387 ff.; umfassende Besprechung von *Boerner/Boerner* in NZA 2003, S. 883 ff.

[12] For a different view, see Opinion of the Advocate General *Colomer* of 8 April 2003, note.12: "There is no doubt that he is at the employer's disposal, since he is obliged to remain at a place which the latter has designated".

[13] See Opinion of Advocate General *Colomer*, who does not see the LAG's submission as necessary in respect of stand-by duty outside of hospital, he found fault with the connection made. (paras 24 and 56).

[14] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work .(ABl. L 183, at 1).

[15] Critical on this *Schlottfeldt*, ZESAR 2003, p. 144 (146), in who's opinion the ECJ should characterise the on-call duty on the basis of his self-aligned criteria as working hours.

stricted under these circumstances, because the sleeping phase is interrupted in an erratic and incalculable way.[16] For this reason, — as the BAG also accepted on 18 February 2003 – the adverse effects on employees are not seen being inherent in the character of the sojourn, but rather in the choice (or lack thereof) that the employee has over the venue in which he has to be present.

As expected, the ECJ also applied these principles in Jaeger to the German law under consideration and came to the conclusion that German on-call duty was not a rest period but rather working time. The ECJ definitely rejected the various approaches[17] put forward, regarding an interpretation of the German terms that would conform to European Law. This applied expressly to the reference that circumstances could be different in the German health care system. In comparison to the *Simap* case, in which Spanish doctors had to carry out an uninterrupted 31 hour shift, the doctor in the *Jaeger* case a doctor would only be engaged to a maximum of 49% in active professional duty. This does not however, according to the ECJ, justify a different evaluation. Firstly, Spanish doctors were not present and active during the whole shift, and secondly in the German case there was merely a restriction on the average actual demands made (on doctors) during the on-call duty, (which was arranged over a longer time), not a restriction on actual activity in the particular cases, so that the unlimited working hours do not conflict with the respective regulations.[18]

According to the headnote of the ECJ, the concepts of "working time" and "rest period" as used in the Directive 93/104, cannot be interpreted in keeping with the requirements of the provisions of the Member States. Since these are Community Law terms, they are to be interpreted according to the combined regulations and the objectives of Community Law — being the protection of the security and health of employees.[19]

The ECJ also determined that regulations that classify the employee's hours of inactivity during the on-call duty as rest periods, and that provide compensation only for that time in which the employee actually worked, are incompatible with the Directive. The definition of daily rest period in Article 3 and that of maximum weekly working time in Article 6 are also to be considered.[20]

3. The admissibility of Member State's derogation from Directive 93/104

What is new, as compared to the *Simap* decision, is the discussion as to whether the derogation of the German ArbZG with the concept of the Directive is in keeping with the allowed possible derogations in Article 17. Insoweit sind nach zutreffender Auffassung des EuGH die in Art. 17 der Richtlinie 93/104 vorgesehenen Abweichungen als Ausnahmen von der Gemeinschaftsregelung über die Arbeitszeitgestaltung eng auszulegen.[21]

In Article 15 of the Directive, a derogation of national laws which are merely more favourable for employees is allowed. However, the Member State or the social partner as per Article 17(1), may only allow derogations from a few enumerated regulations. The ECJ determined at first that Member States are not allowed to derogate from the definition of working hours given in Article 2 of the Directive[22], since Article 17 only allows derogations from Articles 3, 4, 5, 6, 8 and 16. As Article 2 is not included the given definition of working time is binding. Finally due to Article 6 and 17, it is assumed that the exceptions mentioned there are applicable to other activities than doctor's on-call duty in a hospital.[23]

Also the other exception that is provided for by Article 17(2) does not, according to the ECJ, help the interpretation of this matter any further. According to it, derogations from the duration of the daily rest periods are possible, if the employee is given an equivalent time of compensatory rest. The provided for derogations from the community regulations regarding the organisation of working time, must be interpreted in a restricted way, being "their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected."[24] The respective compensatory rest time has to be given directly after the working hours they are intended to compensate, so as to ensure an effective protection of the employee's safety and health. With this in mind, according to the ECJ, the German practice does not conform with Article 17(2), since it does not guarantee that employees can always take the compensatory rest period directly after the working time. A further reduction of the eleven hour rest period is allowed in certain circumstances, but should not lead to the exceeding of the average of more than 48 hour work week, including on-call duty and hours of overtime. In any event, special circumstances could in exceptional cases "afford appropriate protection" for employees, where it is not possible for objective reasons to grant equivalent periods of compensatory rest. The latter was not referred to by the parties in this case.[25]

The classification of working time, on-call duty and standby periods applicable until now in German Law, has become obsolete due to the legal dichotomy of the EC, between working time and rest periods.[26]

4. Reform of the German Law on working hours

16 *Boerner/Boerner*, (*supra* note 11), p. 885.
17 Reference see *Wurmnest*, EuZW 2003, p. 511.
18 *Jaeger* (*supra* note 1), para. 56.
19 *Jaeger* (*supra* note 1), para. 58
20 *Jaeger* (*supra* note 1), para. 75.
21 *Jaeger* (*supra* note 1), para. 89.
22 *Jaeger* (*supra* note 1), para. 81.
23 *Jaeger* (*supra* note 1), para. 83.
24 *Jaeger* (*supra* note 1), para. 89.
25 *Jaeger* (*supra* note 1), paras 90-99.
26 *Wank*, Editorial in NJW 2003 (41).

After the *Simap* judgement, the German government had remained merely observant, this was however not possible once the ECJ's remarks in Jaeger. After that, it did in fact react quickly, by including a chapter regarding the reform of the law on working hours in the „Law on Reforms in the Labour Market"[27] which was still going through the legislative process at the time.[28] As a result of the reference to the Conciliation Committee (Vermittlungsausschuss) from the Federal Council of Germany (Bundesrat) which was completed just before Christmas, this new rule was subject to the deliberations of the conciliation proceedings, and therefore the rules regarding working hours were still amended by this committee.[29] On the 1 January 2004 they were passed into law as Article 4 lit (b) of the "Law on Reforms in the Labour Market".[30]

In para. 5(3)of the ArbZG (as amended), it is now, due to the deletion of the term „on-call duty", that those hours are counted as working hours, with the exception of stand-by duty. Since the 1 January 2004, on-call duty in German Hospitals is not a rest period, but is counted as working time.

At the same time, the authorisation for differing regulations affecting wages or operations was altered. The alteration by means of an internal agreement is as before only admissible, when a special clause in the collective agreement allows it. In this comprehensive body of legislation, those working hours that are not in keeping with the regulation regarding maximum working hours (regarding rest periods and maximum weekly hours), can be extended with the application of para. 7(1) ArbGZ (as amended), "if the working hours consist regularly and in considerable amount of on-call duty." It was also clarified that the 48 hour working week, cannot be exceeded, when calculated on average over a 12 month period (para. 7(7)(1) ArbZG (as amended)).

After another further new regulation, an extension of the working hours without compensation through monetary or operational means, can also be allowed, but under the supplementary condition that any danger to the employees' health is to be avoided through the application of specific provisions (para. 7(2)(a) ArbZG (as amended)). Furthermore such an extension of the working hours depends on the consent of the affected employees (para. 5 (7) ArbZG (as amended)).

From now on, all possibilities of extension, are constrained by the fact that eleven hours of rest period must follow directly from the end of the working hours, if the extension of the daily working hours exceeds 12 hours (para. 7(9) ArbZG (as amended)).

As to the need for the employee's consent, on which the extension of working hours depends, it is further provided that a refusal to consent may not result in discrimination against the employee (para. 7(7)(3) ArbZG (as amended)). Whether this regulation can provide an effective means of employee protection is doubtful. It is feared that the pressure on the individual employee during every-day life in a clinic will make the formation of employee friendly working hours difficult.[31] Especially younger doctors can hardly afford to give their consent without being in fact disadvantaged.

All in all the clinics are now faced with the task of totally re-organising the on-call duty rosters, according to the new regulations now adapted in keeping with the Jaeger judgement. Promising and already successfully started models already exist[32] and allow well founded hope that in the interest of everyone, especially patients, that a compromise which takes all interests and cost implications into account will be reached

In the new regulations, clinics are given a transition time until the end of 2005 to implement the new changes, regarding wages or operational requirements (para. 25 ArbZG (as amended)). Through the use of this regulation, which was slotted in during the Conciliation Committee proceedings, the actual implementation problems that face all sectors with a high need for on-call duty, should be considered.

5. The Cost implications of the *Jaeger* judgement and the Commission's latest reaction

Governing bodies of German hospitals feared dramatic effects for the clinics as consequences of the imminent new regulations on working hours post the *Jaeger* judgement.[33] The estimates of hospital societies and doctors' associations however, did not differ substantially. They calculated with a need for up to 61 000 new jobs for doctors, and the associated costs of three to four billion Euro of additional expenditure. Such a demand cannot in any way be covered by the market.[34]

The foreseeable personnel costs of hospitals were already partly catered for by a regulation of the *Bundespflegesatzverordnung* (para. 6 V BPflV (original)). For the year 2003 there was already an additional amount of 0.2% in hospital budgets included to improve working time conditions. This regulation will be carried forward and adjusted until 2009 (para. 6(5) BPflV (as amended); para. 4(13) KHEntG (as amended)).[35]

In the meantime the problems of clinics are also being taken seriously by the European Commission. The implementation

[27] Draft of the Federal Government from 19 June 1993, BT-Drs. 15/1509.

[28] Concluding recommendations and report of the Committee for Economy and Employment from 24 September 2003, BT-Drs. 15/1587; thereto also *Schunder*, EuZW 2003, p. 663.

[29] Concluding Recommendation of the mediation committee from 16 December 2003, BT-Drs. 15/2245.

[30] Statute for the reforms on the labour market from 24 December 2003, BGBl. I, p. 3002 et seqq.

[31] *Schunder*, EuZW 2003, p. 663; *Körner*, NJW 2003, p. 3608; statement of the chairman of the "Marburger Bund" (Federation of Doctors) in the Süddeutsche Zeitung, 23 September 2003.

[32] Reference see *Preusker*, Gesundheit und Gesellschaft 2003, p. 24 (26), further reference on the homepage of the committee of the federal states for employment protection and security engineering http:/lasi.osha.de/publications/

[33] Frankfurter Allgemeine Zeitung (FAZ) of 11 October 2003, p. 11.

[34] FAZ of 10 September 2003, p. 13.

[35] Article 14 and 15 of the GKV-Modernisierungsgesetz (modernising-statute) of the 19 November 2003, BGBl. I Nr. 55, p. 2190 ff.; thereto BT-DRs 15/1525, p. 74 and 157 et seqq.

of Directive 93/104 also caused substantial difficulties in other member States. The general problem also exists that the financial stability of the health care systems might be endangered by the potentially increased personnel costs. Alongside one should not forget that the judgement may be applicable not only to hospitals but also t all forms of on-call duty, (e.g. fire brigade). Insofar it would lie within EU interests to propose an amendment to the Directive. This in turn should have been ordered in connection with the judgement, as check of the practical experience in the implementation.[36] The new draft directive announced in December 2003 by EU Commissioner *Diamantopoulou,* which would leave it to each Member State to classify on-call duty themselves, has not yet been presented. The Commission is however interested in a new regulation to avoid individual actions by Member States. Given the fears of medical professional associations of the possibility of an action making the ECJ judgement obsolete, the Commission however has assured that in no way will employee protection be reduced.[37]

[36] FAZ of the 14 November 2003, p. 13

[37] FAZ of the 6 January 2004, p. 9.

ECJ 13 January 2004 — C-440/00 — Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG v Kühne & Nagel AG & Co. KG

Articles 4 and 11 of Directive 94/45/EC[1] — Social policy — European Works Councils — Informing and consulting employees in Community-scale undertakings — Group of undertakings whose central management is not located in a Member State

Articles 4(1) and 11(1) of Council Directive 94/45/EC must be interpreted as meaning that:

- where, in a situation such as that at issue before the national court, the central management of a Community-scale group of undertakings is not located in a Member State, central management's responsibility for providing the employees' representatives with the information essential to the opening of negotiations for the establishment of a European Works Council lies with the deemed central management under the second subparagraph of Article 4(2) of the Directive;

- where central management does not, for the purpose of establishing a European Works Council, make certain information available to the deemed central management under the second subparagraph of Article 4(2) of the Directive, the latter, in order to be able to fulfil its obligation to provide information to the employees' representatives, must request the information essential to the opening of negotiations for the establishment of such a council from the other undertakings belonging to the group which are located in the Member States, and has a right to receive that information from them;

- the management of each of the other undertakings belonging to the group which are located in the Member States is under an obligation to supply the deemed central management under the second subparagraph of Article 4(2) of the Directive with the information concerned where it is in possession of the information or is in a position to obtain it;

- the Member States concerned are to ensure that the management of those other undertakings supplies the information to the deemed central management under the second subparagraph of Article 4(2) of the Directive.

The obligation to provide information deriving from Articles 4(1) and 11(1) of the Directive encompasses information on the average total number of employees and their distribution across the Member States, the establishments of the undertaking and the group undertakings, and on the structure of the undertaking and of the undertakings in the group, as well as the names and addresses of the employee representation which might participate in the setting up of a special negotiating body in accordance with Article 5 of the Directive or in the establishment of a European Works Council, where that information is essential to the opening of negotiations for the establishment of such a council.

Facts: *Kühne & Nagel, an undertaking with its company seat in Germany, belongs to a Community-scale group of undertakings within the meaning of para. 3(2) of the EBRG (the Kühne & Nagel Group). Neither a European Works Council nor any procedure for informing and consulting employees has been established within the Kühne & Nagel Group. Attempts to establish a special negotiating body for this purpose have not been successful.*

The group's parent company, namely the controlling undertaking for the purposes of para. 6 of the EBRG, and thus the central management, is established in Switzerland. Within the Community the Kühne & Nagel Group has no local subordinate management for the undertakings located in the Federal Republic of Germany or in other Member States nor any representative appointed by central management, as provided for in the second sentence of para. 2(2) of the EBRG. Kühne & Nagel employs around 4 500 persons in Germany, distributed across 16 establishments. No information is available about the average number of employees of the Kühne & Nagel Group or about their distribution across the other Member States. However, according to the order for reference, Kühne & Nagel is the undertaking within the Kühne & Na-

[1] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ 1994 L 254, at 64).