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Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

20 November 2018 (*)

(Reference for a preliminary ruling — Protection of the safety and health of workers — Organisation of working time — Charter of Fundamental Rights of the European Union — Article 31 — Directive 2003/88/EC — Scope — Derogation — Article 1(3) — Directive 89/391/EEC — Article 2(2) — Work performed by foster parents)

In Case C-147/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Constanța (Court of Appeal, Constanța, Romania), made by decision of 8 February 2017, received at the Court on 23 March 2017, in the proceedings

Sindicatul Familia Constanța,

Ustinia Cvas and Others

v

Direcția Generală de Asistență Socială și Protecția Copilului Constanța

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Arabadjiev, T. von Danwitz, C. Toader, C. Lycourgos (Rapporteur), Presidents of Chambers, M. Ilešič, E. Levits, L. Bay Larsen, M. Safjan, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2018

after considering the observations submitted on behalf of:

- the Romanian Government, initially by R.H. Radu, and subsequently by C.-R. Canțăr, O.C. Ichim and L. Lițu, acting as Agents,
 - the German Government, by J. Möller and T. Henze, acting as Agents,
 - the European Commission, by M. van Beek, C. Hödlmayr and A. Biolan, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 28 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 of 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 (OJ 1989 L 183, p. 1), and of Articles 1(3), 2(1), 5, 7 and 17 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The request has been brought in proceedings between, on the one hand, the trade union Sindicatul Familia Constanța and a number of foster parents and, on the other hand, the Direcția Generală de Asistență Socială și Protecția Copilului Constanța (Directorate-General for Social Assistance and the Protection of Minors of Constanța, ‘the Directorate-General’), concerning a request made by those foster parents to receive a 100% increase in their base salary in respect of work performed on weekly rest days and during statutory leave and public holidays, as well as compensation equal to the allowance relating to paid annual leave for the years 2012 to 2015.

Legal context

EU law

Directive 89/391

3 Article 2 of Directive 89/391 provides:

‘1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.’

Directive 2003/88

4 Recitals 1, 2, 4 and 5 of Directive 2003/88 read as follows:

‘(1) Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time, which lays down minimum safety and health requirements for the

organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work, has been significantly amended. In order to clarify matters, a codification of the provisions in question should be drawn up.

(2) Article 137 of the Treaty provides that the Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety. ...

...

(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.'

5 Article 1 of that directive provides:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Articles 14, 17, 18 and 19 of this Directive.

...'

6 Article 2 of that directive states:

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

1. "working time" means 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;

...'

7 Article 5 of the same directive, entitled 'Weekly rest period', provides:

'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.

If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.'

8 Article 7 of Directive 2003/88, which concerns annual leave, provides:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

9 Article 17 of that directive provides:

'1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 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.

...

3. In accordance with paragraph 2 of this article, derogations may be made from Articles 3, 4, 5, 8 and 16:

...

(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

(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, including the activities of doctors in training, residential institutions and prisons;

(ii) dock or airport workers;

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

(iv) gas, water and electricity production, transmission and distribution, household refuse collection and incineration plants;

(v) industries in which work cannot be interrupted on technical grounds;

- (vi) research and development activities;
- (vii) agriculture;
- (viii) workers concerned with the carriage of passengers on regular urban transport services;

...

4. In accordance with paragraph 2 of this Article, derogations may be made from Articles 3 and 5:

...

(b) in the case of activities involving periods of work split up over the day, particularly those of cleaning staff.

...’

Romanian law

10 Article 4 of the *Legea nr. 272/2004 privind protecția și promovarea drepturilor copilului* (Law No 272/2004 on the protection and promotion of the rights of minors) provides that:

‘For the purposes of this law, the following terms and expressions shall have the following meaning: ...

(d) foster family — persons other than those belonging to the extended family, including relatives by marriage up to the fourth degree and foster parents who are legally responsible for the upbringing and care of the child.’

11 Article 116 of that law provides:

‘(1) The existing public service specialised in the protection of minors under the control of the provincial councils and the local councils of the districts of the municipality of Bucharest [Romania], as well as the public service of social assistance at the level of the provinces and districts of the municipality of Bucharest, are hereby reorganised as the Directorate-General for Social Assistance and the Protection of Minors.

(2) The Directorate-General for Social Assistance and the Protection of Minors is a public institution with legal personality, created under the responsibility of the provincial council and the local councils of the districts of the municipality of Bucharest; it shall take over the social assistance functions of the public service at provincial level and also the social assistance functions of the public service at the level of the districts of the municipality of Bucharest.

(3) In protecting the rights of minors, the body referred to in paragraph 2 shall perform the tasks laid down in this law and other legislative acts in force.

...’

12 Article 117 of the law provides:

‘In order to protect and promote the rights of minors, the Directorate-General for Social Assistance and the Protection of Minors shall perform the following principal tasks:

(a) coordinate the activities of social assistance and protection of the family and the rights of minors at the level of provinces and districts of the municipality of Bucharest;

...’

13 Article 121 of Law No 272/2004 states:

‘Family services are services provided, within the home of a natural person or family, for the upbringing and care of a minor separated temporarily or permanently from his or her parents, following a measure placing the child in foster care in accordance with the present Law.’

14 Article 122 of that law provides:

(1) Minors may be fostered by families and persons who are at least 18 years of age, have full capacity, are resident in Romania and have the moral qualities and material conditions necessary for the upbringing and care of a minor separated temporarily or permanently from his or her parents.

...

(3) The activity of the person appointed as foster parent, in accordance with the law, shall be performed on the basis of a special contract for the protection of the minor, concluded with the Directorate-General or with an accredited private body, which shall include the following stipulations:

(a) activities for the upbringing, care and education of minors in care shall be performed at home;

(b) the programme of work shall be determined on the basis of the needs of the minors;

(c) free time shall be arranged in accordance with the programme of the family and of the minors in foster care;

(d) the continuity of the work performed shall be guaranteed during the statutory leave period, unless during that period separation from the minor fostered with the family is authorised by the Directorate-General.

(4) The individual employment contract shall be drawn up as of the date of issue of the director’s measure adopting an urgent fostering measure or of the decision of the board for the protection of minors/the court with regard to the fostering measure.

...’

15 Hotărârea Guvernului nr. 679/2003 (Government Decree No 679/2003) concerns the conditions for obtaining authorisation, the certification procedures and the regulations for professional foster parents.

16 Article 1 of that decree provides:

‘A professional foster parent is a natural person authorised in accordance with the present Decree. The foster parent shall provide, by means of activities performed in his or her own home, for the upbringing, care and education necessary for the harmonious development of the minors in his or her foster or other care.’

17 Article 8 of that decree provides:

‘(1) The activities of persons authorised as professional foster parents shall be performed on the basis of a special individual employment contract, specifically intended for the protection of the minor, which shall be concluded with a public service specialising in the protection of minors or with an authorised private body that is under a duty to supervise and support the work performed by professional foster parents.

(2) The individual employment contract shall be concluded for the period of validity of the authorisation.

(3) The performance of the individual employment contract shall begin from the date of receipt of the placement decision or decision to place the child in the care of the professional foster parent.

...’

18 Article 9 of that decree states:

‘(1) For every minor received into foster or other care the professional foster parent shall conclude an agreement annexed to the individual employment contract with the employer.

(2) The agreement shall be concluded with the written consent of the husband or wife of the professional foster parent and shall be notified to the board for the protection of minors that ordered the fostering or other care of the minor.

(3) The agreement shall include the following:

...

(g) specific rights and obligations of the parties.’

19 According to Article 10 of Government Decree No 679/2003:

‘(1) Professional foster parents shall have the following obligations with regard to the minors received into their foster or other care:

(a) provide for the upbringing, care and education of the minors in order to ensure their harmonious physical, mental, intellectual and emotional development;

(b) provide for the integration of the minors into their own family, guaranteeing them equal treatment with the other family members;

(c) provide for the social integration of the minors;

(d) contribute to preparations for the minors’ return to their natural family or their integration into an adoptive family;

(e) permit public service specialists in the protection of minors or the authorised private body to supervise their professional activity and assess the minors' development;

(f) ensure the continuity of their activity during statutory leave, unless separation from the minors in foster or other care is authorised for that period by the employer;

...

(2) Professional foster carers must immediately inform the specialist public service for the protection of minors or the private body which supervises their activity of any change to their personal, family or social situation that is capable of affecting their professional activity.

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 The natural person applicants in the main proceedings are employed as foster parents by the Directorate-General — a public institution whose purpose is to coordinate the activities of social assistance and protection of the family and the rights of minors at the level of provinces and districts of the municipality of Bucharest. They are required to take into their own homes children who have been withdrawn from the custody of their parents permanently or temporarily and to provide for the upbringing and maintenance of those children. Each foster parent entered into an individual employment contract with that Directorate-General and a placement agreement for each child placed in their care.

21 Those foster parents and the Sindicatul Familia Constanța trade union which represents them brought an action before the Tribunalul Constanța (Regional Court, Constanța, Romania) seeking an order against the Directorate-General for additional payments equal to a 100% increase of the base salary for their role in respect of work performed on weekly rest days, public holidays and other non-working days, as well as compensation equivalent to an allowance in lieu of paid annual leave for the years 2012 to 2015. As their action was dismissed, they appealed against that judgment to the referring court.

22 The referring court notes that the activity of a person appointed as a foster parent, in accordance with the law, is performed on the basis of a special contract for the protection of the minor. That contract stipulates, *inter alia*, that, having regard to its purpose, namely the upbringing, care and education of the child placed in the care of the foster parent, at the latter's home, the continuity of that work must be ensured, including during weekly rest days, public holidays and non-working days, with the working hours also being determined on the basis of the needs of the child. In that regard, the employment contracts in question contain clauses on working time and rest, from which it is apparent that, in actual fact, the foster parents perform their duties on a continuous basis with the exception of periods when the child is at school.

23 The referring court notes that the obligation of continuity of the foster parent's activity also applies during periods of annual leave. The length of such leave, which depends on the seniority of the foster parent, is provided for by the employment contracts.

24 However, the referring court notes that the job description in the contract and the placement agreement entered into for each child provide that the continuity of the work performed by foster parents is to be guaranteed during periods of statutory leave, unless the employer authorises separation from the child. It stated that, in practice, among the applicant foster parents in the case

before it, only one had been given authorisation to take leave without their foster child during 2014 and 2015, whereas three of the applicants took leave without their foster children in 2014 and a different three in 2015. The referring court explains, however, in that regard, that the requests for leave made by the applicant foster parents indicate that they knew that it was possible to take leave without their foster child but nevertheless agreed to take it with the child.

25 Furthermore, the referring court states, in the first place, that there are differences between the judicial decisions of the national courts with regard to the right of foster parents to receive additional payments for work performed on weekly rest days during which they are not separated from the foster child. In the second place, as regards the right to compensation for work performed during statutory leave, foster parents cannot receive compensation for not having been separated from the child placed in their care. However, the national case-law is inconsistent on the issue as to whether those foster parents may receive an allowance in the event that the employer does not authorise separation from the child during periods of statutory leave.

26 The referring court expresses doubts as to whether Directive 2003/88 is applicable to the dispute pending before it, on the ground that the activity of foster parenting, which falls within the field of public administration, has, in its view, peculiar characteristics within the meaning of Article 2(2) of Directive 89/391 which inevitably preclude the application of Directive 2003/88. It considers that such activity is comparable to the role of a parent and must be performed on a continuous basis in accordance with the needs of the child. The activities of a foster parent cannot be planned with precision but must be organised in a very general way. As a result, the amount of working time inherent in such activities is difficult to calculate and is not compatible with an obligatory period of rest.

27 The referring court submits that it is possible to derogate from the right to weekly rest provided for in Article 5 of Directive 2003/88. It accordingly takes the view that, in the light of the specific nature of the work performed by foster parents under national legislation, a derogation could be founded on Article 17(1), (3)(b) and (c) or (4) of that directive. In that regard, it notes that the applicant foster parents in the main proceedings perform their work principally at home without a programme requiring their presence at a specific workplace or a specific number of working hours.

28 The referring court is uncertain about the latitude Member States have when transposing the derogations provided for in Article 17 and, in particular, whether the national legislation must include express derogations. It states that, in the present case, Law No 272/2004 does not expressly provide for derogation from the provisions of the national Labour Code, which transposes the provisions on 'working time' and 'maximum weekly working time' in accordance with Articles 2(1) and 6 of Directive 2003/88, or from the provisions of Articles 3 to 6 of that directive. However, it notes that Article 122 of that law provides that individuals may work as a foster parent only after having concluded an individual employment contract containing a set of special rules on the organisation of their working time, which constitute an implicit derogation from those provisions.

29 Regarding the concept of 'working time' defined in Article 2(1) of Directive 2003/88, the referring court notes that foster parents are in a special situation given that they share their home with the child placed with them and, thus, remain at the disposal of the employer to provide a service to that child even during periods when they do not perform their work as a foster parent. The court is uncertain whether additional work, in respect of which additional remuneration must be paid, is performed during rest days or public holidays. As for the right to weekly rest provided for in Article 5 of Directive 2003/88, this is not provided for since Article 122 of Law No 272/2004 in

fact requires continuous activity. However, Article 5 would not be infringed if the work performed by foster parents were to be covered by a derogation set out in Article 17 of Directive 2003/88, although if Article 17(3) or (4) were applicable the question might arise as to the existence of an equivalent compensatory period of rest.

30 Furthermore, the referring court notes that, in the present case, the foster parents cannot effectively enjoy annual leave as provided for in Article 7 of Directive 2003/88. It notes that while Article 122(3)(d) of Law No 272/2004 recognises the right to annual leave, it nevertheless obliges foster parents to guarantee continuity of service during leave periods, unless separation from the foster child is authorised by the Directorate-General. Moreover, the national legislation provides that such authorisation from the employer to take leave without the foster child constitutes an exception to the obligation to guarantee continuity of activity. In so far as Article 146(3) of the National Labour Code, transposing Article 7(2) of Directive 2003/88, expressly prohibits any equivalent allowance in lieu of annual leave except where the employment relationship is terminated, the referring court notes that the applicant foster parents in the main proceedings claim to have suffered harm as a result of being unable to benefit from either paid annual leave or equivalent compensation.

31 In that regard, the referring court takes the view that it is necessary to establish whether a possible ‘allowance in lieu’ could include any form of compensation, including damages for the harm caused by not being able to take annual leave, or whether such compensation is limited to the right to wages for annual leave not taken upon termination of the employment contract. In that context, the referring court wonders whether the meaning of the term ‘allowance in lieu’ is different where characteristics of the work performed by foster parents, in actual fact, prevent the applicant foster parents in the main proceedings from taking annual leave, irrespective of the interests of the employer.

32 Lastly, in the event that Article 7 of Directive 2003/88 precludes national legislation such as that at issue in the main proceedings, which allows the employer, at his discretion, to award foster parents the right to take leave without their foster child, the referring court wishes to know whether that breach should be attributed, in the context of a claim for compensation, to the Member State or to the employer.

33 In those circumstances, the Curtea de Apel Constanța (Court of Appeal, Constanța, Romania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 1(3) of Directive 2003/88 in conjunction with Article 2 of Directive 89/391 be interpreted as excluding from the ambit of the directive activity such as the activity of foster parents performed by the applicants?’

(2) If the answer to the first question is in the negative, must Article 17 of Directive 2003/88 be interpreted to the effect that an activity such as the activity of foster parents performed by the applicants, may be the object of a derogation from the provisions of Article 5 of the directive in accordance with paragraphs 1, 3(b) and (c) or 4(b)?

(3) If the answer to the second question is in the affirmative, is Article 17(1) or, if applicable, Article 17(3) or (4) of Directive 2003/88 to be interpreted to the effect that such a derogation must be explicitly laid down, or may it also be implicit as a result of the adoption of special legislation laying down other rules for organising working hours for a particular professional activity? If such a derogation need not be explicit, what are the minimum conditions for it to be considered that

national legislation introduces a derogation, and may such a derogation be expressed in the terms deriving from Law No 272/2004?

(4) If the answer to Questions 1, 2 or 3 is in the negative, must Article 2(1) of Directive 2003/88 be interpreted to the effect that the period spent by a foster parent with the assisted minor, in his own home or in another place of his choice, constitutes working time even if none of the activities described in the individual employment contract is performed?

(5) If the answer to Questions 1, 2 or 3 is in the negative, is Article 5 of Directive 2003/88 to be interpreted as precluding national provisions such as those in Article 122 of Law No 272/2004? And if the answer should confirm that paragraph 3(b) and (c) or paragraph 4(b) of Article 17 of the directive is applicable, must that article be interpreted as precluding that national legislation?

(6) If the answer to Question 1 is in the negative and the answer to Question 4 is in the affirmative, may Article 7(2) of Directive 2003/88 be interpreted to the effect that it does not, however, preclude the award of compensation equal to the allowance that the worker would have received during annual leave, because the nature of the activity performed by foster parents prevents them taking such leave or, even though leave is formally granted, the worker continues in practice to perform that activity if, in the period in question, he is not permitted to leave the assisted minor? If the answer is in the affirmative, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?

(7) If the answer to Question 1 is in the negative, the answer to Question 4 is in the affirmative and the answer to Question 6 is in the negative, does Article 7(1) of Directive 2003/88 preclude a provision such as that contained in Article 122(3)(d) of Law No 272/2004 in a situation in which that law gives the employer discretion to decide whether to authorise separation from the minor during leave and, if so, is the inability de facto to take leave as a result of the application of that provision of the law an infringement of EU law that meets the conditions for the worker to be entitled to compensation? If so, must such compensation be paid by the State for infringement of Article 7 of that directive or by the public body, as employer, which has not provided for separation from the assisted minor during the period of leave? In that situation, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?

Consideration of the questions referred

Preliminary observations

34 In the first place, the German Government questions the relevance of the questions referred on the ground that the dispute in the main proceedings concerns the payment of sums of money claimed by the foster parents as remuneration.

35 In that regard, it should be noted that, save in the special case envisaged by Article 7(1) of Directive 2003/88 concerning annual paid holidays, that directive is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers so that, in principle, it does not apply to the remuneration of workers (judgments of 26 July 2017, *Hälvä and Others*, C-175/16, EU:C:2017:617, paragraph 25, and of 21 February 2018, *Matzak*, C-518/15, EU:C:2018:82, paragraph 24).

36 However, that finding does not mean that there is no need to reply to the questions referred in this case.

37 Indeed, the referring court takes the view that the interpretation of several provisions of Directive 2003/88 is necessary in order to be able to rule on the dispute pending before it. More specifically, as the Advocate General noted, in essence, in points 40 and 41 of his Opinion, the referring court wishes to know whether foster parents such as the individual applicants in the main proceedings have the right, under EU law, to the periods of rest, public holidays and leave on the basis of which they are claiming additional pay and compensation, and whether Law No 272/2004, which provides for the continuity of the care of children placed with foster parents, is compatible with the provisions of Directive 2003/88, those questions being preliminary in nature to the question as to the existence of a right to payment of additional salary and compensation, which the national court must resolve.

38 In such circumstances there is a clear link between the questions referred for a preliminary ruling and the facts of the case pending before the referring court.

39 In the second place, it should be noted that it is clear both from Article 137 EC (now Article 153 TFEU), which is the legal basis of Directive 2003/88, and from recitals 1, 2, 4 and 5 thereof as well as the wording of Article 1(1) of that directive, that its purpose 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 (see, to that effect, judgment of 12 October 2004, *Wippel*, C-313/02, EU:C:2004:607, paragraph 46).

40 Since Directive 2003/88 is, therefore, applicable only to workers, it must be established whether the applicants in the main proceedings can be considered to be ‘workers’ within the meaning of that directive.

41 For the purpose of applying Directive 2003/88, the concept of ‘worker’ may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (judgment of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 28 and the case-law cited).

42 It follows that an employment relationship implies the existence of a hierarchical relationship between the worker and his employer. Whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties (judgment of 10 September 2015, *Holterman Ferho Exploitatie and Others*, C-47/14, EU:C:2015:574, paragraph 46).

43 In the present case, it is clear from the order for reference that the foster parents in question in the main proceedings must provide, in principle on a continuous basis, for the care and education of the children placed with them by a public authority, and in return for that work they receive remuneration. In addition, the foster parents must not merely be approved, but must also, in accordance with Article 8(1) of Government Decree No 679/2003, conclude a ‘special employment contract’ with the relevant specialist service for the protection of minors. That contract applies for the period of validity of the authorisation and its performance begins when the placement decision is made. It may be suspended or terminated according to national employment rules. The foster parents also appear to have a right to social security and to professional training.

44 Moreover, according to the national legislation at issue in the main proceedings, the foster parents must allow the specialist service for the protection of minors, with which they concluded a contract, to supervise their professional activity and to assess the development of the child placed with them.

45 It follows from all of these factors that the individual applicants in the main proceedings are, with respect to the public service to which they are contractually linked, in a hierarchical relationship, evidenced by permanent supervision and assessment of their activity by that service in relation to the requirements and criteria set out in the contract, for the purpose of fulfilling the task of protecting the minor, which is conferred on that service by law.

46 Such an assessment is not called into question by the fact that foster parents, such as the individual applicants in the main proceedings, have broad discretion as to the daily performance of their duties or that the task conferred on them is a ‘task of trust’ or a task of public interest (see, to that effect, judgments of 10 September 2014, *Haralambidis*, C-270/13, EU:C:2014:2185, paragraphs 39 to 41, and of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455, paragraph 41).

47 In addition, the fact that the work performed by foster parents is largely comparable to the responsibilities taken on by parents with regard to their own children is not, in the light of what was noted in paragraphs 43 to 45 above, sufficient to prevent those foster parents from being qualified as ‘workers’ within the meaning of Directive 2003/88.

48 It follows that the foster parents in question in the main proceedings must be regarded as ‘workers’ within the meaning of Directive 2003/88.

The first question

49 By its first question, the referring court asks, in essence, whether Article 1(3) of Directive 2003/88, read in conjunction with Article 2(2) of Directive 89/391, must be interpreted as meaning that the work of a foster parent, which consists, in the context of an employment contract with a public authority, in receiving and integrating a child into their home and providing, on a continuous basis, for the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88.

50 In that regard, it must be borne in mind that Article 1(3) of Directive 2003/88 defines the scope of that directive by reference to Article 2 of Directive 89/391.

51 According to Article 2(1) of Directive 89/391, the latter applies to ‘all sectors of activity, both public and private’, including ‘service activities’.

52 However, as is clear from the first subparagraph of Article 2(2) of Directive 89/391, that directive is not applicable where characteristics peculiar to certain specific public service activities, inter alia the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with it. The second subparagraph of that provision states, however, that in such a case the safety and health of the workers must be ensured as far as possible in the light of the objectives of that directive.

53 In that regard, it should be noted, in the first place, that the exception under the first subparagraph of Article 2(2) of Directive 89/391 must be interpreted in such a way that its scope is restricted to what is strictly necessary in order to safeguard the interests which it allows the Member

States to protect (see, to that effect, judgment of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 54).

54 Regarding, in the second place, the concept of ‘public service’ for the purpose of the first subparagraph of Article 2(2) of Directive 89/391, it must be noted that that provision contains no definition of that concept and makes no reference to national law as regards the meaning to be given to it. According to settled case-law, the need for the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the laws of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (see judgments of 14 February 2012, *Flachglas Torgau*, C-204/09, EU:C:2012:71, paragraph 37 and the case-law cited, and of 7 September 2017, *Schottelius*, C-247/16, EU:C:2017:638, paragraph 32 and the case-law cited).

55 In that regard, it should be noted that the criterion used in the first subparagraph of Article 2(2) of Directive 89/391 to exclude certain activities from the scope of that directive and, indirectly, from that of Directive 2003/88, is based not on the fact that workers belong to one of the sectors of the public service referred to in that provision, taken as a whole, but exclusively on the specific nature of certain particular tasks performed by workers in the sectors referred to in that provision, which justify an exception to the rule on the protection of the safety and health of workers, on account of the absolute necessity to guarantee effective protection of the community at large (see, to that effect, judgment of 12 January 2006, *Commission v Spain*, C-132/04, not published, EU:C:2006:18, paragraph 24).

56 It follows from the functional nature of such a criterion that the expression ‘public service’ within the meaning of the first subparagraph of Article 2(2) of Directive 89/391 applies not only to the sectors in which workers are organically attached to the State or to a public authority, but also to sectors in which workers carry out their work for a private person who performs, under the control of the public authorities, a task in the public interest which forms part of the essential functions of the State.

57 In that regard, it should be noted that the first subparagraph of Article 2(2) of Directive 89/391 refers to the activities of the armed forces, the police and civil protection services only by way of examples.

58 Having regard to the differences that could exist between Member States in the practical organisation of tasks in the public interest that form part of the essential functions of the State, such a functional interpretation of the term ‘public service’ is, moreover, justified by the need to ensure a uniform application of Directive 89/391 in those States (see, to that effect, judgment of 18 July 2013, *Deutsche Umwelthilfe*, C-515/11, EU:C:2013:523, paragraph 24).

59 The exception provided for in the first subparagraph of Article 2(2) of Directive 89/391 is thus applicable, in the same way, to workers who perform specific activities identical to the services of a public authority, whether their employer is a public authority or a private person charged with a task in the public interest that forms part of the essential functions of the State.

60 It is clear from the documents submitted to the Court that, in Romania, foster parents may be employed either by a public authority in charge, inter alia, of the protection of minors, or by a private body acting under its control. In the present case, the applicant foster parents in the main proceedings are all employed by a public authority. In the context of that employment relationship,

they are tasked with ensuring the harmonious development of the minors placed with them, ensuring their integration into their own family and preparing them for reintegration into their original family or integration into an adoptive family.

61 Their work therefore contributes to the protection of minors, which is a task in the public interest forming part of the essential functions of the State.

62 In addition, the specific nature of that activity compared to other child-protection-related activities results from the fact that it aims to integrate the foster child on a continuous and long-term basis, into the home and family of his or her foster parent.

63 It follows that such an activity must be considered to be covered by the specific activities referred to in the first subparagraph of Article 2(2) of Directive 89/391.

64 In the third place, the Court has already held that among the characteristics peculiar to the specific activities which justify, pursuant to the first subparagraph of Article 2(2) of Directive 89/391, an exception to the rules for the protection of the safety and health of workers, is the fact that, by their nature, they do not lend themselves to planning as regards working time (judgment of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 55).

65 The first subparagraph of Article 2(2) of Directive 89/391 thus safeguards the efficiency of specific public service activities which must be continuous in order to ensure the effective performance of essential functions of the State (see, to that effect, order of 14 July 2005, *Personalrat der Feuerwehr Hamburg*, C-52/04, EU:C:2005:467, paragraph 50).

66 That continuity requirement must be assessed by taking into consideration the specific nature of the activity in question.

67 Accordingly, as the Court noted, the continuity requirement of services in the areas of public health, public safety and public order does not prevent the activities of those services, when performed in normal circumstances, from being organised, including as regards the working hours of their employees, with the consequence that the exception provided for in the first subparagraph of Article 2(2) of Directive 89/391 is applicable to such services only in circumstances whose gravity and scale are exceptional (see, inter alia, to that effect, judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 55 and 57, and of 12 January 2006, *Commission v Spain*, C-132/04, not published, EU:C:2006:18, paragraph 26).

68 However, that case-law cannot be interpreted as meaning that it is not possible for certain specific public service activities to have, even when performed in normal circumstances, characteristics which mean that their very nature is absolutely incompatible with the planning of working time in a way that respects the requirements imposed by Directive 2003/88.

69 It is in the light of these considerations that it should be assessed whether the activity of foster parenting, at issue in the main proceedings, has certain inherent particularities that justify application of the exception arising under a combined reading of Article 1(3) of Directive 2003/88 and the first subparagraph of Article 2(2) of Directive 89/391.

70 In that regard, it is clear from the order for reference that, save during periods such as those when the foster child is at school, foster parents perform their activity continuously, pursuant to the national legislation at issue in the main proceedings, including during weekly rest days, public holidays, non-working days and annual leave — unless the Directorate-General authorises their

separation from the foster child during that annual leave. Accordingly, the Romanian authorities have conceived the role of foster parent in such a way that the minor placed with a foster parent is integrated, on a continuous and long-term basis, into the home and family of that foster parent. Such integration is intended to allow the child to develop, for as long as necessary, in a caring and educational environment conducive to harmonious development.

71 The integration, on a continuous and long-term basis, into the home and family of a foster parent, of children who on account of their difficult family situation are particularly vulnerable, constitutes an appropriate measure to safeguard the best interests of the child, as enshrined in Article 24 of the Charter of Fundamental Rights of the European Union.

72 In those circumstances, regularly granting foster parents the right to be separated from their foster child after a certain number of hours of work, or during periods such as weekly or annual rest days, which are generally considered opportune times to develop family life, would go directly against the objective pursued by the Romanian authorities to integrate foster children, on a continuous and long-term basis, into the home and family of the foster parent.

73 In those circumstances, it must again be noted, contrary to the Commission's submissions, that the introduction of a rotation system between foster parents or the use of replacement foster parents with whom the foster children could be placed during their principal foster parents' annual leave would undermine an essential aspect of the foster care system established by the Romanian authorities, namely the maintenance, on a continuous and long-term basis, of a special link between the foster child and the foster parent, characterised by the integration of that child into the home and family of the foster parent.

74 Therefore, limiting the weekly working hours of foster parents in accordance with Article 6 of Directive 2003/88, and requiring the employer to grant those foster parents weekly or annual rest periods in accordance with Articles 5 and 7 of that directive, during which they are relieved from performing their work and, accordingly, from taking care of the child placed with them, would be incompatible with the characteristics peculiar to such an activity, which require the foster parent to welcome the child placed in his or her care into his or her home and family on a continuous and long-term basis.

75 Although it is possible, pursuant to Article 17 of Directive 2003/88, to derogate, under certain conditions, from Article 5 of that directive on weekly rest periods, and from Article 6 of that directive on maximum weekly working time, the same does not apply to the right to annual leave, as set out in Article 7 of that directive.

76 It follows that the characteristics peculiar to the work of foster parents at issue in the main proceedings must be regarded as strictly precluding the application of Directive 2003/88 to such foster parents.

77 It should also be noted, in that regard, that the essential characteristic of the work of foster parenting at issue in the case in the main proceedings, which is the obligation of continuous integration of the child into the foster parent's home and family, distinguishes that work from the work of 'relief parents', which was at issue in the case giving rise to the judgment of 26 July 2017, *Hälvä and Others* (C-175/16, EU:C:2017:617). Indeed, those relief parents were not bound by such an obligation and their working time was largely predetermined by the employment contracts that linked them to their employer given that, first, the number of 24-hour periods they had to work annually was fixed by contract and, second, their employer drew up, at regular intervals, advance lists indicating the 24-hour periods during which the relief parents would be responsible for running

a children's home (judgment of 26 July 2017, *Hälvä and Others*, C-175/16, EU:C:2017:617, paragraph 33).

78 In the fourth place, it must be borne in mind that even when, owing to their inherent particularities, certain specific public service activities are excluded from the scope of Directive 2003/88, the second subparagraph of Article 2(2) of Directive 89/391 still requires the competent authorities to ensure the safety and health of workers 'as far as possible' (order of 14 July 2005, *Personalrat der Feuerwehr Hamburg*, C-52/04, EU:C:2005:467, paragraph 56).

79 In that regard, it must be noted that, in accordance with Article 122(3)(c) of Law No 272/2004, the contract concluded between a foster parent and the public authority or authorised private body must allow the foster parent to have 'free time'. It follows that there are periods during which the foster parent is not required to actively look after his or her foster child, for example while the child is at school, which allows him or her to manage those periods without major constraints.

80 Moreover, foster parents are not required to stay at their residence but are free to move about, particularly for leisure purposes, provided, in principle, that their foster children accompany them.

81 In addition, it is clear from Article 122(3)(d) of Law No 272/2004 and Article 10(1)(f) of Government Decree No 679/2003 that foster parents may apply to the competent authority for authorisation to be separated from the child during certain periods of the year. In that regard, it is clear from the file submitted to the Court and the information provided by the Romanian Government during the hearing that such authorisation will be granted as long as the competent authority considers it will not undermine the successful execution of the task entrusted to the foster parents.

82 It follows from the foregoing that the Romanian authorities have ensured, in accordance with the second subparagraph of Article 2(2) of Directive 89/391, as regards the arrangement of their working time, the safety and health of the foster parents as far as is possible.

83 It is also important to add that limitations to the right, accorded to all workers by Article 31(2) of the Charter, to periods of daily and weekly rest as well as a period of paid annual leave, may be provided for in respect of the strict conditions set out in Article 52(1) of the Charter and, in particular, of the essential content of that right (see, to that effect, judgments of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 59, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 54).

84 In the present case, as was noted in paragraph 79 above, Article 122(3)(c) of Law No 272/2004 requires that the contract concluded between the foster parent and his or her employer include provisions relating to the planning of the foster parent's free time. That planning must, however, take account, *inter alia*, of the fostered minor's timetable.

85 Moreover, it is clear from the provisions referred to in paragraph 81 above that the national legislation at issue in the main proceedings grants foster parents a right to paid annual leave, but makes their right to take that leave without their foster child contingent on authorisation from the employer, who must ensure the successful execution of the task of protecting the child concerned.

86 Thus, the statutory limitations placed on those foster parents' right to periods of daily and weekly rest and to paid annual leave respect the essence of that right. In addition, they are necessary

for the achievement of the public service objective, recognised by the Union, namely the protection of the best interests of the child, which is enshrined in Article 24 of the Charter, as that objective has been conceived by the Romanian legislation, and which is met by the obligation placed on the foster parent to ensure, on a continuous basis, the integration of the foster child into his or her home and family as well as the harmonious development and care of that child.

87 As a result, such limitations respect the conditions set out in Article 52(1) of the Charter.

88 In the light of all the foregoing, the answer to the first question is that Article 1(3) of Directive 2003/88, read in conjunction with Article 2(2) of Directive 89/391, must be interpreted as meaning that the work performed by a foster parent under an employment contract with a public authority, which consists in taking in a child, integrating that child into his or her household and ensuring, on a continuous basis, the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88.

Questions 2 to 7

89 In view of the answer given to the first question, there is no need to answer Questions 2 to 7.

Costs

90 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 1(3) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in conjunction with Article 2(2) of 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, must be interpreted as meaning that the work performed by a foster parent under an employment contract with a public authority, which consists in taking in a child, integrating that child into his or her household and ensuring, on a continuous basis, the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88.

[Signatures]

* Language of the case: Romanian.