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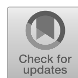
EDITORIAL



Working time: recent case law of the Court of Justice of the European Union

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The Court of Justice of the European Union has had the opportunity to interpret the scope of the provisions of the Working Time Directive on numerous occasions.

The purpose of Directive 2003/88/EC[1] on working time is to protect the health and safety of workers. It establishes a maximum average working week of 48 hours for all EU workers and it also regulates paid annual leave, minimum weekly and daily rest periods, rest breaks during the working day, and limits on the length of night work.

Two broad areas of case law have emerged:

- cases on the calculation of the length of working hours, notably cases involving "on-call work";
- cases concerning the interpretation of the right to annual paid leave.

Although obviously not in all cases, the Court is generally quite progressive in the interpretation of this Directive, through a broad understanding of what is "working time" as well as the fundamental character of the right to annual paid leave.

The five cases presented hereafter were decided in the period between October 2021 and January 2022, adding to the extensive existing case law. Two of them fall within the first category, dealing with the meaning of "working time" under Article 2 of the Directive, whereas the other three fall within the second category, on the interpretation of the right to annual paid leave under Article 7 of the Directive.

[1] 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 L 299, 18/11/2003 p. 9–19.

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1 Working time v. rest periods

Article 2 of Directive 2003/88 defines working time 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"*. In its second paragraph, Article 2 defines 'rest period' as "*any period which is not working time*". As the Court has clarified in previous case-law, these two concepts are mutually exclusive and there is no scope for intermediate categories.

1.1 Training time

In a Romanian case rendered on 28 October 2021,[2] the CJEU had to answer the question whether training time, mandatory vocational training, requested by the employer, constitutes working time within the meaning of Article 2 of Directive 2003/88.

A full-time firefighter employed by a Romanian municipality was instructed to take 160 hours of vocational training. The training took place with a vocational training provider at the premises of that training provider. 124 hours took place outside the normal working hours of the employee, who then claimed the municipality to pay those hours as overtime.

According to previous case-law, a decisive factor for the concept of 'working time' is the fact that the worker is required to be physically present at the place determined by the employer (either worker's usual place of work or other) and to remain available to the employer in order to be able, if necessary, to provide his or her services immediately. The Court considered that during the periods of vocational training, that worker was indeed at the employer's disposal within the meaning of Article 2(1) of the Directive.

It found irrelevant the fact that it took place outside normal working hours or that the obligation of vocational training arose from national legislation. Also, the fact that the activity carried out by a worker during periods of vocational training differed from that which he/she carried out in the course of his/her normal duties, did not change the fact that those periods are to be considered working time, provided that the vocational training is done at the employer's and the worker is subject to the employer's instructions.

1.2 Stand-by periods

The specific cases of 'on-call' and 'standby' time have been occupying the European Court of Justice for quite some time. The Court has basically differentiated:

- If the on-call workers are required to be present at the workplace – the time is to be regarded in its entirety as working time.
- If the workers must be reachable at all times but are not required to remain at a place determined by the employer – in this case, only the time linked to the actual provision of services must be regarded as working time since the workers may manage their time with fewer constraints and pursue their own interests.

[2]Case C-909/19 – Unitatea Administrativ Teritorială D. Judgment of the Court (Tenth Chamber) of 28 October 2021. ECLI:EU:C:2021:893.

On 11 November 2021, the Court decided on a case[3] dealing with the calculation of the hours worked during periods of stand-by time. It concerned again a firefighter, who was employed part-time as an on-call or retained firefighter by the Dublin City Council.

As an on-call firefighter, the employee was required to participate in 75% of the brigade's interventions but could refuse the remaining 25%. The period of stand-by time was 7 days per week and 24 hours per day (except for leave periods or periods notified and agreed in advance). During these periods of stand-by, he must arrive at the fire station within 10 minutes after receiving an emergency call. He received a basic monthly salary to remunerate the stand-by time and an additional remuneration for each intervention. He was permitted to carry out a professional activity as a taxi driver outside his working hours, provided it does not exceed 48 hours per week.

The firefighter claimed that the hours of stand-by should be considered working time since it prevented him from freely devoting himself to his family, to social activities as well as to his professional activity as a taxi driver.

The Court first recalled that on-call duty periods are working time, when the *"constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests"*. But if he can manage his /her own time, and to pursue own interests, only the time of actual work is 'working time'. In order to assess if there are major constraints impacting on the management of the time by the worker, the Court considered having regard to the time limit to return to work (as well as the impact of such a time limit) and the average frequency of the actual activities called upon to do.

For the Court, the possibility afforded to carry out another professional activity while on duty was an important indication that the stand-by system does not place that worker under such major constraints. Also, the fact that he is not obliged to participate in the entirety of the interventions, could constitute and objective factor from which it may be concluded that he is in a position to develop that other professional activity.

The Court concluded that the national court needs to assess whether the average frequency of emergency calls and the average duration of interventions prevent the effective exercise of another professional activity capable of being combined with the post of retained firefighter.

This judgment follows other recent rulings rendered by the Court of Justice in the cases of *Offenbach am Main*,[4] also concerning firefighters and *Radiotelevizija Slovenija*,[5] concerning a specialist technician, which set out the main criteria for assessing whether stand-by time is to be considered as 'working time'.

[3] Case C-214/20 - Dublin City Council. Judgment of the Court (Fifth Chamber) of 11 November 2021. ECLI:EU:C:2021:909.

[4] Case C-580/19 - Stadt Offenbach am Main. Judgment of the Court (Grand Chamber) of 9 March 2021. ECLI:EU:C:2021:183.

[5] Case C-344/19 - Radiotelevizija Slovenija. Judgment of the Court (Grand Chamber) of 9 March 2021. ECLI:EU:C:2021:182.

2 Annual paid leave

The remaining three cases discussed here dealt with the right to annual paid leave.

Article 7 of the Working Time Directive, entitled ‘Annual leave’, states:

“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.”

The right to annual paid leave is also recognised as a fundamental right in Article 31(2) of the Charter: *“Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.”*

No derogation to the right to annual paid leave is permitted by the Directive. The Court has determined in its previous case-law that this leave has a dual purpose: to enable the worker both to rest and to enjoy a period of relaxation and leisure. The Court has also ruled consistently that the entitlement to annual leave cannot be interpreted restrictively.

2.1 Allowance in lieu of paid annual leave

A worker must normally be entitled to actual rest, with a view to ensuring effective protection of health and safety. The Directive allows an allowance in lieu of paid annual leave however when the employment relationship has ended and if the worker has not taken all annual leave to which he was entitled to.

Case C-233/20[6] concerned an Austrian employee who terminated his employment relationship early without cause. The employer refused to pay him the untaken paid leave entitlement of 3.33 days in the form of an allowance, since the Austrian law deprives of such right to employees who prematurely terminate their employment without cause.

The Austrian Supreme Court asked to the Court of Justice of the European Union whether such provision is compatible with Article 7(2) of Directive 2003/88, read in the light of Article 31(2) of the Charter.

The Court firstly recalled that the right to paid annual leave is a particularly important principle of EU social law and a fundamental right which may not be interpreted restrictively. That fundamental right also includes the right to an allowance in lieu of annual leave not taken upon termination of the employment relationship. Furthermore, it is clear from the terms of the Directive and its own case-law that Member States must not make the very existence of that right subject to any preconditions whatsoever.

The Court therefore ruled that an allowance in lieu of paid annual leave is due to employees leaving their employer, regardless of the reason of their exit and

[6]Case C-233/20 - WD v job-medium GmbH. Judgment of the Court (Seventh Chamber) of 25 November 2021. ECLI:EU:C:2021:960.

even where they unilaterally terminated the employment relationship early without cause.

2.2 Payment during annual leave

According to settled case law of the Court of Justice, the Directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right, as the aim of the payment during annual leave is to enable the worker actually to take the leave to which he is entitled. As a consequence, the purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work. The Court has also repeatedly ruled that workers must receive their normal remuneration for that period of rest.

The case[7] decided on 9 December 2021 was brought to the CJEU by a Dutch Court deciding on a claim made by an employee who was partially incapacitated for work due to illness. When the worker took annual leave, he/she was paid the reduced salary he/she was entitled to during illness, rather than the full amount.

Basically, the question for the Court of Justice to decide was whether Article 7 of the Working Time Directive precludes national provisions and practices under which the reduction in the amount of remuneration of an incapacitated worker due to illness can be taken into account to determine the amount he/she will receive for paid annual leave.

Recalling its relevant case law on the right to annual leave, the Court held that in certain specific situations in which the worker is incapable of carrying out his or her duties, the right to paid annual leave cannot be made subject by a Member State to a condition that the worker has actually worked. Workers who are absent from work on sick leave during the reference period are to be treated in the same way as those who have actually worked during that period. Incapacity for work due to illness is, as a rule, not foreseeable and beyond the worker's control. Therefore, the Court ruled that the right of a worker to a paid minimum annual leave cannot be restricted on the ground that the worker could not fulfil his or her obligation to work during the reference period due to an illness.

The Court found that a national rule or practice under which the annual leave remuneration is equated to the amount paid during the reference period, without taking into account that during that period it was reduced on account of a situation of incapacity for work due to illness, amounts to making the right to paid annual leave subject to a condition that the worker has worked full time during that period.

Following Advocate General Hogan's Opinion, it also held that to allow for a worker exercising the right to paid annual leave to receive higher or lower remuneration according to whether or not he or she is unfit for work while exercising that right would make the value of that right dependent on when it is exercised.

The Court also ruled that the fact that the cause for the incapacity persists during the annual leave period of the worker cannot affect the right to receive remuneration without a reduction during that leave.

[7] Case C-217/20 – Staassecretaris van Financien. Judgment of the Court (Second Chamber) of 9 December 2021. ECLI:EU:C:2021:987.

2.3 Overtime pay

The question posed to the European Court of Justice in this case[8] was whether a provision in a collective labour agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to the period of paid annual leave taken by the worker are not to be taken into account as hours worked, is compatible with EU law.

The German Federal Labour Court had doubts of the compatibility of this rule with EU law since it could be capable of deterring a worker from exercising his or her right to paid annual leave.

The Court of Justice recalled that any practice or omission by an employer that may potentially deter a worker from taking his or her annual leave is incompatible with the purpose of the right to paid annual leave.

It then confirmed the doubts of the Federal Labour Court considering that such a mechanism for accounting for hours worked, under which taking leave is liable to entail a reduction in the worker's remuneration, can indeed deter the worker from exercising his or her right to paid annual leave during the month in which he or she worked overtime.

Such mechanism for accounting for hours worked is therefore not compatible with the right to paid annual leave provided for in Article 7(1) of Directive 2003/88.

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[8] Case C-514/20 - DS v Koch Personaldienstleistungen GmbH. Judgment of the Court (Seventh Chamber) of 13 January 2022. ECLI:EU:C:2022:19.