2018/34

Stand-by time must be interpreted in the light of ECJ case law (RO)

CONTRIBUTOR Andreea Suciu*

Summary

The Supreme Court has ruled that it is at the discretion of the competent national court to assess whether periods of stand-by time are working time. In doing so, the court should apply Romanian law as interpreted in the light of ECJ case law.

Facts

Background

The claimant, Mujescu Constantin, was employed as an electrician by the defendant, Distributie Energie Oltenia SA, between 1 January 2012 and 31 December 2014.

Constantin was assigned to the operating of certain electrical installations. These installations were manned by three electricians who worked in 24-hour shifts. Within these shifts, each electrician worked for eight hours in the facilities. For the remaining 16 hours each electrician was on stand-by duty in a specially designed space for rest and was required to work when necessary. After a 24-hour shift, each electrician had a 48-hour rest period.

According to the collective agreement concluded at company level, the stand-by periods were not regarded as 'working time'. Only time linked to the actual provision of services was regarded as 'working time'. Stand-by times were therefore merely paid for with a salary supplement of 25% of the base salary agreed in the collective agreement.

Article 2 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, the 'Working Time Directive', defines working time as follows:

> "*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.*"

Article 111 of the Romanian Labour Code defined working time as representing:

> "*any period during which the employee performs work, is at the employer's disposal and performs his or her tasks and duties, in accordance with the provisions of the individual labour contract, the applicable collective agreement and/or the legislation in force.*"

Proceedings

On 5 January 2015, Constantin filed a claim against his employer before the Tribunal Gorj - Division for Labour Disputes and Social Security. He claimed payment of salary supplements for overtime, as stipulated in the Labour Code and collective agreement, as well as for night work, work performed on weekends, on paid free days or on public holidays during stand-by times. The claim related to time during which he had been on stand-by duty and not actually performing activities.

The Tribunal ruled in the claimant's favour. The Tribunal held that the 16-hour stand-by period should be classified as 'working time' within the meaning of Article 111 of the Labour Code and Article 2 of the Working Time Directive. The Tribunal also stated that it was irrelevant that there were no actual activities performed during the stand-by period, as the employee was at the employer's disposal and had no opportunity to leave the workplace or organise his time as he wished.

Considering the above, the Tribunal ruled that, for the 16-hour stand-by periods, the claimant was entitled to a salary supplement of 100% of the base salary for any overtime that exceeded the 40-hour average weekly limit; 25% of the base salary for night work; 100% of the base salary for hours worked during weekends; and 200% of the base salary for work on public holidays. The Tribunal believed that this was in line with the Labour Code and collective agreement.

The Defendant appealed against the Tribunal's decision before the Court of Appeal of Craiova, Civil Division. The Court of Appeal noted that, in the absence of express legal provisions as to how to regulate stand-by time, the case law on the subject differed. This involved two distinct trends:

* Andreea Suciu is the managing partner of Suciu I The Employment Law Firm.

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In a majority opinion, it was established that stand-by time does not constitute 'working time' within the meaning of Article 2 of the Working Time Directive and Article 111 of the Labour Code (even if such stand-by time was compensated by a salary supplement agreed through the collective agreement).
In a minority opinion, it was noted that stand-by time during which the employee is at the employer's disposal, does represent 'working time'. The employee is therefore entitled to the salary supplements stipulated in the Labour Code and collective agreement for overtime as well as for night work, work performed on weekends, on paid free days and on public holidays.
Because of these differing opinions, the Court of Appeal decided to stay the proceedings and request a preliminary ruling of the Supreme Court.

Judgment Supreme Court

The Supreme Court found that the ECJ had already interpreted the Working Time Directive and set various criteria for defining 'working time' within the meaning of the Directive. The Supreme Court referred, *inter alia,* to the following cases on working time: C-437/05 *Jan Vorel*, C-258/10 *Nicuşor Grigore*, C-429/09 *Gunter Fuss*, C-428/09 *Union syndicale Solidaires Isere*, C-303/98 SIMAP, C-151/02 *Jaeger* as well as its latest judgment - C-518/15, *Ville de Nivelles – v - Rudy Matzak*.

The purpose of the Working Time Directive can only be adduced by interpreting national law in accordance with the interpretation given by the ECJ in those judgments. This follows the principle of uniform interpretation of EU law, which requires national law to be interpreted in line with the Directive. The ECJ is the court charged with interpreting the Directive by virtue of Article 267 TFEU, and its judgments must then be taken into account by the national courts. If there is already sufficient clarity via existing ECJ case law, there is no longer a controversial matter requiring a preliminary ruling.
In consequence, on 5 March 2018 the Supreme Court ruled that the Court of Appeal of Craiova should dispose of the case at hand by applying relevant national law, interpreted in light of ECJ case law and dismissed its request for a preliminary ruling.

Commentary

Following the Supreme Court's ruling, the Court of Appeal of Craiova will resume the proceedings. It has not yet ruled on the case. The next hearing is scheduled for 23 October 2018. In a previous similar case the Court of Appeal of Craiova ruled against the claimant.
The case law of the ECJ clarifies the concepts of 'working time' and 'rest periods' in relation to employees on stand-by duty to some extent. This is true for the latest case C-518/15, *Ville de Nivelles – v – Rudy Matzak*, in which the ECJ ruled on the one hand that (i) Member States are not permitted to maintain or adopt a less restrictive definition of the concept of 'working time' than that laid down in Article 2 of the Working Time Directive, but on the other that the (ii) directive does not require Member States to determine the remuneration of periods of stand-by time according to the prior classification of those periods as 'working time' or 'rest period'. Having said that, the lack of express national legal provisions to determine the remuneration of those on stand-by duty will, in my opinion, still give room for both of the interpretations made by the national courts: that which says that stand-by time is 'working time' and the employee should be given salary supplements for overtime, night work, etc., whether or not the employee actually has to work or not, and that which says that the employee should only be given these supplementary payments if he or she performs actual work during stand-by periods.
I therefore consider that the Supreme Court was wrong to dismiss the request by the Court of Appeal for a preliminary ruling, particularly as the ECJ expressly ruled in the *Matzak* case that:

> "*it must be observed that, save in the special case envisaged by Article 7(1) of Directive 2003/88 concerning annual paid holidays, [the] 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 (judgment of 26 July 2017, Hälvä and Others, C-175/16, EU:C:2017:617, paragraph 25 and the case law cited).*"

To avoid similar confusion over this issue in future, it would be helpful if the remuneration of employees on stand-by duty could be expressly regulated in the Labour Code.

Comments from other jurisdictions:

Belgium (Pieter Pecinovsky, Van Olmen & Wynant): The Belgian Supreme Court (*Cour de Cassation*) decided in 2014 that the time during which a worker needs to be available for his employer does not fall within the concept of working time provided for in the Belgian labour law of 1971 if the location of the worker is not restricted by the employer (see Cass. 10 March 2014). The Supreme Court therefore also followed the distinction, made by the ECJ (e.g. in *Simap* (C-303-98), *Jaeger* (C-151/02) and, recently, *Matzak* (C-518/15)) between availability services (not working time) and standby duties (working time).

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Germany (David Meyer, Luther Rechtsanwaltsgesellschaft mbH): German employment law makes a distinction between 'working time' with the meaning of (1) health and safety protection for employees; (2) compensation; and (3) co-determination by the works council. The meaning of working time in (3) is not relevant to the case.

As the health and safety protection provisions originate from European law (Directive 2003/88) the definition of 'working time' in Germany is broadly similar to the definition in Romania. The directive was transposed into German law by means of the Working Hours Act (ArbZG). But Germany uses a different definition of 'working time' in cases of compensation ((2) above) because the EU lacks the competence to regulate this area of law. Compensation can either be mutually agreed on by the parties to the employment contract or the collective bargaining agreement. The agreement made may deal with regular or shift work and on-call duty times within the business premises or elsewhere. It is possible to agree on pay for the whole of the time a person is on-call, or alternatively, flat-rate payments (e.g. 25%, as in the Romanian case), or payment only for times of active performance. If there is no such agreement, the court must determine what is the usual rate of pay in the business sector concerned, and 'working time' will often be used in the way meant for health and safety protection.

The German labour court would not have requested a preliminary ruling by the ECJ because Mr. Constantin's case is purely about compensation. It would refer to the collective agreement as the legal basis for the claim and check its compliance with national statutory provisions (e.g. the minimum wage). The decision of the ECJ in the case of *Matzak* would not change that, because, as mentioned, it has no competence to regulate compensation (Article 153 TFEU). Neither Directive 2003/88 nor the German Working Hours Act (ArbZG) contain provisions about compensation.

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