EELC 2018/44 Travelling time from home to customers is working time in the absence of a fixed work place (BE)

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Summary

For workers without a fixed workplace, travelling time between their place of residence and the first customer and travelling time between the last customer and the place of residence constitutes working time.

Legal Background

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 sets out the main EU principles on working time.
The Belgian courts are required to interpret the working time provisions in the Labour Act of 16 March 1971, in light of the Directive.

Facts

A couple of cleaners worked in a mobile team (*'vlinderploeg*' or 'butterfly team') for a cleaning company. A team of this kind consists of workers who replace absent or sick workers. After their dismissal, the employees claimed compensation for time spent travelling from home to the first customer and from the last customer back home, as well as for the time spent travelling between different customers (the judgment concerns a female cleaner, on the same date a similar judgment was issued for a male cleaner).

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Judgment

The Antwerp Labour Court (of Appeal) ruled, first, on the question of whether travelling time constitutes working time and, second, if so, whether this working time should be compensated. For the first question, the Labour Court looked at the concept of working time in the Labour Act of 1971, which must be interpreted in accordance with the EU concept of working time in the Working Time Directive 2003/88/EC.
The Labour Court refers to the similar ECJ case of *Tyco* (10 September 2015, C-266/14). That judgment concerned Spanish mobile security system installers, whose employer had closed down their regional offices, meaning that the employees had to travel directly from their homes to their customers. The Court of Justice had decided, on the basis of Article 2(1) of Directive 2003/88/EC, that this travelling time fulfilled the conditions for working time. In particular, workers must: 1. be employed; 2. be at the employer's disposal; 3. be carrying out their activity or duties.
According to the ECJ, the first condition was met because the workplace of workers without a fixed or habitual workplace cannot be limited to the places where they provide their services to customers. The second condition was fulfilled because, during the travelling time, the workers could not organise their time freely and pursue their own interests. The third condition was also met, as the travelling done by the workers was necessary to enable them to work for their customers.
It follows from this, according to the Labour Court, that for workers without a fixed workplace, travelling time between the place of residence and the first costumer and travelling time between the last customer and the place of residence, constitute working time. As regards travelling time between two clients, the Labour Court referred to the case law of the Court of Cassation (Cass. 13 April 1992), which had already held that this constitutes working time.
The Labour Court then turned to the question of remuneration. Neither the Belgian regulations nor Directive 2003/88/EC make any provision in this respect. The cleaning sector has also excluded mobile 'butterfly' teams from fixed compensation for travel time between customers (Article 17 CBA of 30 June 2011). As a result, the Labour Court ruled on the one hand that the same wage must be paid for travelling time as for actual work. On the other hand, it granted the employer's counterclaim for reimbursement of the mobility allowance paid.

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Commentary

The judgment of the Antwerp Labour Court is a good example of how Belgian case law conforms to EU law and the case law of the ECJ. However, the circumstances of this case and the ECJ *Tyco* judgment are not exactly the same. For example, the ECJ in *Tyco* referred to the fact that there had previously been regional offices from which employees had left to see customers, but that the closure of these offices was the employer's decision and did not reflect the will of the employees.

In the case at hand there was never any fixed workplace in the first place, but the Labour Court points out that the ECJ only used this consideration to make it clear that the transfer to and from customers was a necessary part of the activities of the employees. A review of Article 2(1) of Directive 2003/88 showed that the travelling time did indeed constitute working time. From this, the Labour Court rightly concluded that for workers without a fixed workplace – mobile workers – travelling time between home and the first port of call plus travelling time between the last customer and home is working time. Nevertheless, the same reasoning does not apply to employees with a fixed workplace.

In addition, the ECJ in *Tyco* pointed out that Directive 2003/88 does not set the pay for working time. Working time is not automatically paid time under EU law. The Labour Court points out that individual or collective agreements may set different rates for effective working time and travelling time. 'Effective working time' means hours during which employees work for customers (in this case: cleaning). The cleaning sector has a collective labour agreement that includes a fixed travel allowance, but 'butterfly teams' are excluded from this and therefore, no specific provisions applied. It follows from this that the Labour Court equates the compensation for the travelling time with the salary for the actual work. The workers were therefore granted a fairly large sum, given that the travelling took place over a period of four years.

Finally, it is interesting to point out the similarities between this case and the Norwegian case analysed in EELC 2018/32 (*Høyesterett* 4 June 2018, HR-2018-1036-A, case no. 2016/928). The Norwegian Supreme Court also ruled that time spent on a journey ordered by the employer to and from a place other than the employee's fixed or habitual place of work, should be considered working time. The Supreme Court referred in its decision to the Advisory Opinion of the EFTA Court, which also was inspired by the *Tyco* case.

Comments from other jurisdictions

United Kingdom (*Bethan Carney, Lewis Silkin LLP*): It is interesting that the court in this case held that time spent travelling from home to the first assignment (and from the last assignment home again) must be paid at the same rate as working time. In the *Tyco* decision, the ECJ dismissed the UK government's argument that it would lead to an increase in costs for employers and noted that the Working Time Directive (WTD) was about the organisation of working time and had little to say about the level of remuneration. It held that the method of remunerating workers in this type of situation would not be covered by the WTD but by the relevant provisions of national law.

In the UK, the employer remains free to determine the remuneration for time spent travelling between home and the first and last assignment. The National Minimum Wage Regulations 2015 (NMW Regulations) do not generally count travel between the worker's home to "a place where an assignment is carried out" as working time for minimum wage purposes. The NMW Regulations are unaffected by the *Tyco* decision.

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 and (2) compensation.

Working time within the first meaning is subject to European provisions such as Directive 2003/88 and its implementations into national law such as the Belgian Labour Act or the German Working Time Act (*Arbeitszeitgesetz*, the 'ArbZG'). Working time in terms of compensation is not subject European law because the EU lacks the competence to regulate that area (Article 153(5) TFEU). As a result, employers and employees are free to agree mutually on compensation by means of the employment contract, the collective agreement or the works agreement. If these provisions lack express agreement concerning compensation, the labour courts often rely on the definition of working time in the sense of occupational health and safety.

Compared to the most recent German case law on working time, the decision of the Antwerp Labour Court does not seem too surprising. Travel time between business premises and the customer and travel to another customer are already regarded as working time. As the ECJ pointed out in *Tyco*, travel time is needed to enable the employee to do the work.

Travel time between business premises and the place of residence were not traditionally regarded as working time unless travel was a primary duty of the employee (e.g. in the case of sales or service representatives, such as in *Tyco*). But even so, that kind of travel was treated as a private matter. But the Federal Labour Court is increasingly moving away of its traditional way of looking at it to reflect both ECJ case law and also technology-driven changes (e.g. the home office and globalisation). That would have applied to the cleaners' case in Germany as well, given that their employment duties necessarily required travel and they lacked a fixed workplace.

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