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Qualification of on-call duty as actual working time (LU)

CONTRIBUTOR Michel Molitor*

Summary

In its decision rendered on 28 February 2019, the Luxembourg Court of Appeal (*Cour d'appel de Luxembourg*) examined under which circumstances on-call duty performed at the workplace qualifies as actual working time.
The issue raised was whether the time spent at night by an employee (i.e. the presence of an employee at the workplace) performing the work of a live-in carer was to be considered as 'actual working time'.
The Court expressly referred to EU case law and decided that the concept of actual working time is defined by two criteria, namely (i) whether the employee during such a period must be at the employer's disposal, and (ii) the interference with the employee's freedom to choose their activities.
In view of the working hours provided for in the employment contract and in the absence of evidence proving that the employee would not have been at the employer's home during her working hours, the Court found that the employee stayed at the employer's home at night and at the employer's request. It was irrelevant in this respect whether it was for convenience or not. It was further established that the employee could not leave during the night and return to her home and go about her personal business, so that the hours she worked at night were to be considered as actual working time.
Given that the employee's objections regarding her salary were justified (as the conditions of her remuneration violated statutory provisions), the Court decided that the dismissal was unfair.

* Michel Molitor is the managing partner of MOLITOR Avocats à la Cour SARL in Luxembourg, www.molitorlegal.lu.

Facts

An employment contract was signed on 1 September 2015 pursuant to which the claimant (the 'employee') was hired by the defendant (the 'employer') as a live-in carer for the employer's wife for a gross monthly salary of EUR 2,000.
The employment contract provided for a two-month probationary period and set out the working hours as follows:

– All nights of the week, from Monday to Sunday: from 17.00 to 9.00.
– Saturdays and Sundays: during the day.

These hours are subject to change based on the needs of the service.

According to the employer, the employee's work consisted of taking care of the employer's wife after the day-time carer left at 5 p.m. until she went to bed at around 6:30 p.m. Once this task was completed, the employee did not have to take care of his wife until the next day at around 7:00 a.m. Between 7.00 a.m. and 9.00 a.m., the employee would only have to wait for the arrival of the other carer.
The employee stayed at the employer's home at night, in the same room as the patient and slept in a twin bed with her.
By letter dated 2 October 2015, the employer terminated the employment contract in the following terms: "In view of the fact that you do not agree with the salary paid to you, we are terminating the probationary contract dated 1 September 2015, subject to the statutory notice period".
The employee subsequently filed a lawsuit against the employer and claimed damages for unfair dismissal and for violation of multiple statutory provisions, namely in regards to working hours. According to the employee, all her working hours qualified as actual working time and should as such have been compensated accordingly.
Multiple claims were made by the employee, notably:

– Compensation and remuneration premium for overtime worked.
– Remuneration premium for Sunday work as well as a compensatory rest day.
– Damages for violation of statutory provisions on working hours.
– Damages for violation of legislation regarding health and safety at work (i.e. failure to register the employee with the Luxembourg Social Security and

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failure to request the performance of a statutory medical examination before hiring).
- Compensation for non-material damages caused to the employee as a consequence of these statutory violations.
- Material and non-material damages for unfair dismissal.

The employee alleged that her former employer had not adhered to the statutory provisions regarding working hours, as shown by the work schedules agreed in the employment contract. Having worked every night of the week from 5:00 p.m. to 9:00 a.m., as well as Saturdays and Sundays during the day, the employee supposedly worked 526 hours of unpaid overtime (on top of 288 regular working hours) for the period from 1 September 2015 to 18 October 2015. Her employer also allegedly failed to pay for Sunday work and to comply with the legal provisions on weekly rest.
On 22 December 2017, the Labour Tribunal of Luxembourg (*Tribunal du travail de Luxembourg*) granted the payment of some unpaid salaries but rejected all damages claims made by the employee on the grounds of unfair dismissal and violation of statutory provisions. The employee lodged an appeal with the Luxembourg Court of Appeal against the Labour Tribunal's decision.

Decision of the Luxembourg Court of Appeal

After having pointed out that, under Luxembourg law, there is no statutory provision obliging the employer to pay remuneration premium to an employee for overtime work hours, the Court went on to outline in detail how actual working time is to be defined.

No statutory obligation to pay remuneration premium for overtime work hours under Luxembourg law

The Court of Appeal confirmed on this point the decision of the Labour Tribunal and reiterated that, if remuneration premium is provided for by law with regard to hours worked on Sundays and holidays, such is not the case regarding night hours and overtime in general.
As the employment contract signed between the parties did not contain any specific provisions regarding premium pay for overtime and night work, statutory legislation applied. Therefore, no remuneration premium was due to the employee for overtime and night hours.

The qualification of on-call time as actual working time

The Court had to decide which criteria are to be used to assess whether on-call time can be classified as actual working time.
Under Luxembourg law, working time is defined as "the time during which the employee is at the disposal of his employer(s); it excludes rest periods during which the employee is not at the disposal of his employer(s)."
The judges concluded that Luxembourg law offers no further guidance as to what constitutes actual working time. EU law should therefore be referred to, namely to Article 2 of Directive 2003/88/EC concerning certain aspects of the organisation of working time (the 'Working Time Directive').
Article 2 of the Directive 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 legislation and/or practice".
The Court then went on to examine EU, French and Luxembourg case law regarding actual working time and on-call duty. After a comparative and analogical analysis, the Court came to the conclusion that actual working time is defined by two main criteria, namely:
- Whether the employee must be at the employer's disposal.
- The interference with the employee's freedom to choose their activity.

In the case at hand, given the work schedule provided for in the employment contract and in the absence of proof that the employee would not have been at the employer's home during her work schedule, it was established that the employee stayed at the employer's home at night, in the same room as the patient and slept in a twin bed with her. It was therefore irrelevant in this respect whether this was for the employer's convenience or not. Since the employer locked the main door of the home and took the key with him, the employee was unable to leave during the night or return home to pursue her personal activities.
Thus, the Court came to the conclusion that the hours worked by the employee at night were to be considered as actual working time.
Other than the payment of the unpaid salary due, the Court considered that the employee did not further prove if any damages were caused to her resulting from the employer's violations of the statutory obligations regarding working hours.
The claims for damages on the grounds of violation of statutory provisions on working hours and for violation of legislation regarding health and safety at work, as well as compensation for non-material damages caused by these violations, were therefore dismissed by the Court.

Commentary

In its decision the Luxembourg Court of Appeal brought some clarification as to the circumstances under which on-call duty can be classified as actual working time. This issue addressed by the Court has more recently been of keen interest for other European jurisdictions, too.

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The decision of the Court, while explicitly referring to the EU Working Time Directive and the case law arising therefrom, laid out two criteria to be taken into consideration when examining whether on-call time falls within the actual working time. The actual working time is assessed according to (1) whether the employee must be at the employer's disposal, and (2) the interference with the employee's freedom to choose their activity.

Contrary to other similar civil law systems such as the French legal system, Luxembourg legislation contains no specific provisions regarding standby or on-call time. Article L.211-4 paragraph 1 of the Luxembourg Labour Code provides that:

> working time means the time during which the employee is at the disposal of his employer(s), if he has more than one; it excludes rest periods during which the employee is not at the disposal of his employer(s).

Luxembourg legislation hence only differentiates between 'working time' and 'rest period' and does not otherwise regulate whether or not periods of standby duty, on-call duty or availability are to be considered as working time.

While there are no provisions on the matter on a national level, Luxembourg case law commonly refers to the EU Working Time Directive and the case law arising therefrom when examining questions relating to on-call and standby duties.

According to EU case law, the two concepts of working time and rest time are mutually exclusive:

> a worker's time on standby periods must therefore be classified as either 'working time' or 'rest period' for the purpose of applying Directive 2003/88, since the Directive does not provide for any intermediate category.

EU judges further confirmed that the concepts of 'working time' and 'rest period' are autonomous concepts of EU law.

The decision of 28 February 2019 examined in more detail a judgment rendered by the Court of Justice of the European Union (the 'CJEU') on 3 October 2000 in regards to on-call duties. The Luxembourg judges confirmed that, although the EU case dealt with physician on-call services, the principles adopted therein were also applicable to the case at hand.

The question raised before the CJEU was whether the time spent on call by doctors in primary care teams, whether they were required to be present in the health centre or merely contactable, must be considered as working time.

The Court held that the characteristic elements of the concept of working time are present in the periods of on-call duty carried out according to a system of physical presence in the health establishment by holding that during these periods the two conditions of Article 2 of the Directive, namely being at the disposal of the employer and being in the exercise of its activity, were met. Notwithstanding the fact that the activity actually carried out during these periods could vary according to the circumstances, the obligation on these doctors to be present and available at the workplace in order to provide their professional services was to be considered as part of the performance of their duties.

The Court went on to hold that the same does not apply in cases where primary care physicians are on call in a system where they are available at all times but are not required to be present in the health care facility. Even though they are at the disposal of their employer, insofar as they must be reachable, the doctors can manage their time with fewer constraints and devote themselves to their own interests. The Court of Justice held that in this case only the time related to the actual provision of primary care services should be considered as working time within the meaning of Directive 93/104.

The Luxembourg Court of Appeal used this same reasoning by analogy and came to the conclusion that, given that the employee had to be at the employer's disposal at night and that she could not leave freely, her on-call duty had to be considered actual working time.

This case law is also topical on an EU level since the CJEU recently rendered two judgments relating to working time and standby duty in cases where the physical presence of the worker is not required. In two judgments of 9 March 2021, the CJEU considered that a period of standby duty is working time if it significantly affects the employee's ability to manage their free time during which their professional services are not required.

According to the CJEU, one must distinguish between two situations.

If an employee is obliged to remain physically at the place determined by the employer and to remain available to the employer in order to be able, if necessary, to provide their services immediately, this on-call duty must be classified as working time in its entirety.

In cases where an employee is not required to remain at the workplace, standby time can still be considered working time in its entirety if the constraints imposed by the employer affect objectively and very significantly the possibility for the employee to freely manage the time during which their professional services are not required and to pursue their own interests.

The two judgments of the CJEU are of particular interest for Luxembourg case law in regards to two points. The EU judges went further than the Luxembourg decision in that it was held that on-call duty *automatically* classifies as actual working time if the presence of the employee at the workplace is mandatory. The Luxembourg judges, while in the final analysis came to the same conclusion, were more careful in their approach and seemed to conclude that the question must be examined on a case-by-case basis in light of the two criteria set forth, even in cases where the worker's physical presence at the workplace during on-call duty is required.

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It will also be interesting to see what implications the two recent judgments of the CJEU will have on future Luxembourg rulings in cases where the employee is on standby duty but is not compelled to stay at the place of work.

Under current Luxembourg case law, standby periods where the employee is not required to be physically present at the workplace cannot be considered as actual working time and therefore do not have to be compensated in their entirety unless otherwise agreed upon between the parties or provided for by a collective bargaining agreement.

This approach seems contradictory to the principles laid out in the two recent CJEU cases, since Luxembourg case law seems to imply that, in case the worker is not required to be present at their workplace, there is no interference with the employee's freedom to choose their activity and cannot therefore be qualified as working time.

As mentioned above, EU law on the other hand clearly states that, even in cases where the presence of the employee at the workplace is not mandatory, standby time can still be classified as actual working time.

Time will tell how the Luxembourg jurisdictions will incorporate the recent CJEU case law regarding standby duty and working time on a national level.

Comments from other jurisdictions

Germany (Andre Schüttauf and Chantal Käthner, Luther Rechtsanwaltsgesellschaft mbH):
German labour law defines working time as the time from the beginning to the end of work, excluding rest breaks (Section 2 paragraph 1 Working Time Act (*Arbeitszeitgesetz*, 'ArbZG'). In addition, German law recognizes the concepts of standby service work (*Arbeitsbereitschaft*), emergency service work (*Bereitschaftsdienst*) and on-call duty (*Rufbereitschaft*). These terms are mentioned in the ArbZG, but not defined. The question of when standby service work exists in the sense of labour protection law has not been answered satisfactorily by the judiciary and literature to date. The transitions to full work on the one hand and emergency service work on the other are fluid. The concept of standby service work will not be examined in more detail below as – at least as far as the question of working time is concerned – the results are the same as for emergency service work. In the following, we therefore use the term 'emergency service work' for both concepts.

Following the jurisdiction of the ECJ, German law understands emergency service work as the period of time during which the employee, without having to be directly present at the workplace, is required to be at a place designated by the employer, either inside or outside the workplace, for the purposes of the company so that, if necessary, they can immediately or promptly take up their full work activity. Doctors or nurses who are in hospital typically work under this model. Emergency service work counts as working time in its entirety, even if the work is not called off.

On-call duty, on the other hand, does not count as working time (at least not if the employee is not actually called up to perform work). It exists if the employee is obliged to be on call at home or at a freely chosen place so that they can take up work as soon as possible if necessary. According to the German understanding, the freedom of choice of location typical of on-call duty is lacking if the employer does not specify the place of stay but sets a short time limit within which the employee must take up work.

With reference to the decision of the Luxembourg Court, there was recently a very similar case which the Berlin-Brandenburg Regional Labour Court (LAG) had to rule on (judgment of 17 August 2020 – file reference: 21 Sa 1900/19).

An employee worked as a 24-hour carer in a private household and looked after a 90-year-old woman. She was employed on the basis of an employment contract which provided for a working time of 30 hours per week and for which remuneration was fixed. The employee sued for further remuneration, as she had performed significantly more work to be remunerated because she was in the home of the person in need of care all day and also at night. The LAG stated that the employee had performed emergency service work by constantly staying in the flat. During this time she had to be available to take up her duties in the household. Only the time during which the employee had the opportunity to pursue her own interests, such as going for a walk, could not be counted as working time.

According to this court decision, the Luxembourg case (at least as far as the question of working time was concerned) would probably have been judged similarly. During the time the plaintiff in the Luxemburg case spent in the flat, she had no possibility to freely determine how she spent her time and had to be available at all times for the person in need of care. This constant presence of the plaintiff, also during the night, would also be considered as emergency service work and thus as working time under German law.

With regard to the question of entitlement to remuneration, the LAG ruled that the time of emergency service work was to be remunerated at the statutory minimum wage. In other words the work performed beyond the agreed working hours was subject to remuneration.

United Kingdom (Richard Lister, Lewis Silkin LLP):
The issue of when on-call or standby time will count as 'working time' is also of great practical importance in the UK. Michel's commentary helpfully references the most recent ECJ judgments on this issue – *DJ – v – Radiotelevizija Slovenija* (C-344/19) and *RJ – v – Stadt Offenbach am Main* (C-580/19) – both of which postdated the Luxembourg Court of Appeal's decision by more than two years.

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Despite Brexit, these latest ECJ rulings remain relevant for UK employers. While EU Directives are no longer directly applicable in the UK, there is a continuing duty on courts and tribunals to interpret UK legislation that derives from EU law – such as the Working Time Regulations 1998 – in line with the original European law. In doing so, it is very likely that they will continue to be influenced by relevant ECJ decisions.
Many industries in the UK use standby or on-call time. Beneficially for many employers, the practical implications of the ECJ's reasoning are that there are limited circumstances in which standby time should be classified as 'working time' in its entirety. Moreover, the latest ECJ judgments are helpful in clearly stating that only restrictions imposed by national law, collective agreement and the employer are considered relevant. In the UK, collective agreements are rarely binding, and national law does not specifically regulate on-call time. This means that the classification of standby time will generally be within the employer's control, subject to judicial determination if the classification is challenged.
The ECJ has also reminded us that the question of what is 'working time' and how time should be remunerated are separate questions, with the latter being a matter for national law rather than EU regulation. On this topic, the UK Supreme Court recently issued a judgment of huge significance for the care sector, deciding that care workers on 'sleep-in' shifts are not entitled to the UK national minimum wage for periods when they are asleep (*Royal Mencap Society – v – Tomlinson-Blake* [2021] UKSC 8).

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