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The organisation of working time in a company must not infringe employees' rights to weekly rest (RO)

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Summary

The Iaşi Court of Appeal in Romania has upheld a decision issued by the Vaslui Tribunal which found that an employee cannot be the subject of disciplinary action for the refusal to perform work during their weekly rest notwithstanding that the organisation of working time was based on the applicability of an internal company policy. While the Vaslui Tribunal in the first instance limited its analysis to the local Romanian provisions regulating working time, the Court of Appeal, relying on the provisions of Directive 2003/88/EC, performed an exhaustive analysis of the applicable European legal provisions and jurisprudence in order to give more clarity on this judicial situation.

Legal background

Directive 2003/88/EC concerning certain aspects of the organisation of working time sets out the main EU principles on working time.

The national provisions of the Romanian Labour Code provide that "during periods of reduced activity, the employer may grant paid days off from which overtime to be worked in the following 12 months may be compensated". Other provisions state that a weekly rest period consists of 48 consecutive hours granted as a rule on Saturday and Sunday, but there are also some exceptions (the relevant ones are discussed below).

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Facts

An employee was employed by a public transport company as a bus driver. In organising the work, the employer established the drivers' working time based on a schedule which was communicated to the employees on a weekly basis. Moreover, during periods of reduced work, the employer had the option of granting paid days off from which overtime performed in the following 12 months could be compensated. This compensation of overtime was possible under Romanian labour law, which regulates this option for periods when the employer's activity is reduced.

At the beginning of September 2019, the employee was informed that as of 1 September 2019 he had a total of 44 hours not worked and paid in advance from May to August 2019. By the same communication, he was informed that he was scheduled to perform work for the settlement of prepaid hours on Sundays 8, 15, 22 and Saturday 28 September 2019. The employee refused to perform work on the days scheduled by the employer which coincided with his weekly rest days. As a result of this refusal, the employee was the subject of a disciplinary sanction decision for unjustified absence from work.

The employee instituted proceedings against his employer before the Vaslui Tribunal seeking to have the disciplinary decision annulled. In the first instance, the Vaslui Tribunal annulled the disciplinary decision taken by the employer. The employer filed an appeal before the Iaşi Court of Appeal.

Judgment

By a judgment of 26 May 2021, the Iaşi Court of Appeal rejected the appeal and upheld the decision of the Vaslui Tribunal.

First of all, the Court of Appeal analysed the national legal provisions on overtime and weekly rest. It found that under Article 122(2) of the Romanian Labour Code "during periods of reduced activity, the employer may grant paid days off from which overtime to be worked in the following 12 months may be compensated".

According to Article 137(1) of the Romanian Labour Code the weekly rest period consists of 48 consecutive hours granted as a rule on Saturday and Sunday. Exceptions to this rule are described in paragraphs 2 and 4 of the same Article, but even in these cases the weekly rest period must be observed:

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- Paragraph (2). If rest on Saturdays and Sundays would be detrimental to the public interest or to the normal conduct of business, the weekly rest period may be granted on other days as determined by the applicable collective labour agreement or internal regulations.
- Paragraph (4). In exceptional cases, weekly rest days shall be granted cumulatively, after a period of continuous activity which may not exceed 14 calendar days, with the authorisation of the territorial labour inspectorate and with the agreement of the trade union or, where appropriate, of the employees' representatives.

Further, the Court emphasised the provisions of Directive 2003/88 which states that every worker shall, during a seven-day period, have a minimum uninterrupted rest period of 24 hours plus 11 hours of daily rest (Article 5).
Also, the Court referred to the ECJ judgment in case C-306/16 (*Maio Marques da Rosa*), where the ECJ held that EU law does not require that the minimum weekly rest period be granted at the latest on the day following a period of six consecutive working days but requires that it be granted within each seven-day period. The ECJ first pointed out that the expression 'during a seven-day period' contains no reference to the national law of the Member States and therefore constitutes an autonomous concept of EU law which must be interpreted uniformly.
As regards the wording, the ECJ stated that Member States are obliged to ensure that every worker is granted, during a seven-day period, a minimum uninterrupted rest period of 24 hours (to which the 11 hours of daily rest must be added), without specifying when that minimum period must be granted.
Then, as regards the context in which the expression 'during a seven-day period' is used, the ECJ held that this period could be regarded as a reference period, i.e. a fixed period within which a certain number of consecutive hours of rest must be granted, irrespective of when those hours of rest are granted.
In addition, the ECJ recalled that its purpose is to effectively protect the safety and health of workers. Every worker must therefore be granted adequate rest periods. However, the European legislation allows a certain flexibility in the implementation of its provisions, giving Member States a margin of discretion as to when this minimum period should be granted. This interpretation may be in the worker's favour as it allows more consecutive days of rest to be granted at the end of one reference period and at the beginning of the next.
In conclusion, by reference to the above pieces of legislation and jurisprudence, in the present case, the purpose of the minimum weekly rest period, in the form set out above, is not limited to the safety and health of the employee, but also to the public interest in the field of activity, i.e., to ensure a high level of protection for road traffic. This way of organising working time makes the respondent's non-attendance at work on his weekly rest days not 'unjustified', so that the disciplinary offence established by the employer did not meet the conditions of disciplinary misconduct, according to the provisions of the Romanian Labour Code.

Commentary

The judgment of the Iaşi Court of Appeal is a good example of how Romanian case law conforms to EU law and the case law of the ECJ.
This decision also illustrates the risk for an employer in sanctioning an employee for the refusal to perform work during their weekly rest – if such refusal is considered justified as per the provisions of the employment labour legislation. More specifically, employers must ensure that employees do not work excessive hours and that their rest periods are properly observed. This is a mandatory obligation imposed under working time legislation (both at a European and a national level). Fundamentally, it is a health and safety measure.
In any case, this decision serves as an important reminder to employers that working time and rest periods are sensitive topics which must be properly addressed and to take active steps to curtail any action which may infringe employees' rights to rest periods. It is also a good reminder for employers, when determining the organisation of the working schedule, not to limit their analysis to the national legal provisions, but to go a step further and also analyse the European legal norms which are applicable to the case at hand.

Comments from other jurisdictions

Austria (Jana Eichmeyer and Franziska Egger, E+H Rechtsanwälte GmbH): The weekly rest period was implemented in Section 3 *et seq.* of the Austrian Working Rest Act.
In Austria, the observance of working time and rest periods is also of significant importance. Specifically, the employer is, in general, responsible for compliance with the rest and working time provisions. If the employee was entitled by law to refuse to work during their usual weekly rest period, Austrian courts would have treated this case in the same way and would have seen the sanctions of the employer as unjustified. If work is legally performed in Austria during the weekly rest period (in general, weekend rest), substitute rest must be granted in the following week. Since the substitute rest is to be counted towards the weekly working time, the working time of the following week is reduced by it and may also not be worked in or after. The fact that the substitute rest is to be counted towards the weekly working time clearly shows, in our opinion, that interference with the weekly rest is not desired by the Austrian legislator.

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The legal rest periods and working time provisions also apply without restriction to work from home. If the employee performs their work outside the office, it is difficult to verify compliance with the regulations on rest periods and working time. Therefore, the Austrian legislator has opted for a relaxation of the recording obligations: if employees work predominantly at home, records must be kept only of the duration of the daily working time, but not of its beginning and end (Section 26(3) of the Austrian Working Hours Act). Since the European Court of Justice holds that Member States must require employers, as part of the implementation of Directive 89/391/EEC and 2003/88/EC, to "introduce an objective, reliable and accessible system" to effectively measure the daily working time of employees [ECJ 14 May 2019, C-55/18 (*CCOO*)], the conformity of this provision with Union law is questionable and is predominantly rejected. It therefore remains to be seen how the Austrian courts will decide on the conformity of Section 26(3) of the Austrian Working Hours Act in the future.

Germany (Frank Schmaus and Tolga Topuz, Luther Rechtsanwaltsgesellschaft mbH): If a German court had decided on the case at hand it would have come to a similar finding as far as the instructed Saturday and Sunday work would have fallen into the bus driver's rest periods. In such a case, any instruction given by the employer, for example in a duty roster, is unlawful, must not be followed and can therefore be successfully challenged in court. Consequently, any employer's disciplinary measure, such as a 'warning', in response to the employee's legitimate refusal lacks validity.
Specifically, bus drivers can, in principle, be instructed to work on Saturday and Sunday as well. Saturday work is, in principle, not restricted under German law. It is deemed to be a regular working day. In contrast, Sunday work is, generally, prohibited but not for employees of transport companies (Section 10(1) no. 10 of the German Working Time Act (*Arbeitszeitgesetz*, 'ArbZG')).
But the employer's instruction in the case at hand would fail to be valid in any case if the instructed working time coincided with the bus driver's weekly rest days which are laid down in Article 8(1), (6) and Article 4 lit.h) of Regulation (EC) No. 561/2006 in combination with Section 1(4) of the German Driving Personnel Ordinance (*Verordnung zur Durchführung des Fahrpersonalgesetzes*, 'FpersV'). Hereinafter, in principle, the regular weekly rest period is at least 45 hours. In principle, the weekly rest period begins at the end of six 24-hour periods after the end of the preceding weekly rest period. However, bus drivers are not obliged to take a weekly rest period after a maximum of six 24-hour periods, but may spread the weekly rest period over a two-week period.

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