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Should the stand-by duty of military personnel be remunerated as an allowance, as regular salary or should it count as overtime work? (SI)

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Summary

The Supreme Court of the Republic of Slovenia has issued a judgment concerning the remuneration for the performance of stand-by duty by a person in the military and the issue of whether it falls within Directive 2003/88/EC concerning certain aspects of the organisation of working time. It was held that the time spent on stand-by duty, during which the plaintiff did not actually work but was required to be on stand-by at a particular place and was then at the employer's disposal, without being able to go home or elsewhere, was to be regarded as working time. The Court found that, notwithstanding national legislation to the contrary, the plaintiff was entitled to the remuneration provided for in their contract of employment for full-time work, that is to 100% of the basic salary.

Facts

The plaintiff claimed that he was entitled to payment for stand-by duty, which was performed while being on guard duty. The defendant granted him payment for eight hours' pay per day for the guard duty, however, it did not perceive the stand-by duty to be working time, and thus only paid him an allowance for that period of 20% of the hourly rate of basic pay, as was provided for in the Collective Agreement for the Public Sector. Official Gazette of the Republic of Slovenia, no. 57/2008. The plaintiff argued that that period of stand-by duty should also count as working time, given that the plaintiff was away from home and at the disposal of the defendant. He requested that the period he performed as stand-by duty should be charged as overtime at the rate of 130% of his basic salary.

Judgment

The court of first instance dismissed his claim, referring to the provision of Article 97e of the Defence Act, according to which stand-by duty does not count towards the number of hours of weekly or monthly work. It also explained that the plaintiff could not be paid for overtime work during the period of stand-by duty. The court of second instance dismissed the plaintiff's appeal and upheld the judgment of the court of first instance, reasoning that stand-by duty and guard duty constituted special working conditions under Articles 96 and 97e of the Defence Act, Official Gazette of the Republic of Slovenia, no. 103/04, which do not count as working time unless the worker is performing work. In the view of the court of second instance, that legislation is not contrary to the Working Time Directive 2003/88/EC, in so far as that Directive does not apply to the activities of the armed forces and the police.
The case then reached the Supreme Court, where the plaintiff claimed that the Slovenian legislation in the Defence Act was contrary to Directive 2003/88 and also contrary to the Constitution of the Republic of Slovenia. The Supreme Court thus dealt with the question of whether the defendant was obliged to count the time spent on stand-by duty as part of the plaintiff's weekly or monthly work commitment and, on that basis, to pay the plaintiff the appropriate amount of overtime for work performed above full-time hours at 130% of the hourly rate of basic salary.
The Supreme Court, before ruling on the dispute, requested the CJEU to interpret the provisions of Directive 2003/88 regarding the stand-by duty hours which were not included in the working time of the plaintiff during his guard duty. In its reference for a preliminary ruling, the Court asked two questions. The first question was whether Article 2 of Directive 2003/88 also applies to workers employed in the field of defence or to military personnel on guard duty during peacetime. The second question dealt with the issue of whether national legislation under which the stand-by

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duty of workers working in the military sector at a place of work and at a fixed location (but not at home) is not to be counted as working time complies with Article 2 of Directive 2003/88.

Regarding the first question, the CJEU answered in its judgment CJEU, C-742/19 of 15 July 2021. that Article 1(3) of Directive 2003/88, read in conjunction with Article 4(2) TEU, must be interpreted as meaning that guard duty performed by a person in the military is excluded from the scope of that Directive (i) where that activity is carried out in the context of that person's initial training, operational drills or a military operation in the strict sense of the term, (ii) where it constitutes an activity so specific that it is not covered by a system of rotation of personnel which is appropriate to ensure compliance with the requirements of that Directive, (iii) where, in the light of all the circumstances relevant to the matter, it is apparent that that activity is being carried out in the context of an emergency the seriousness and scale of which require measures to be taken, which are necessary for the protection of the life, health and safety of the community and the proper conduct of which would be jeopardised if all the rules laid down in that Directive were to be complied with, and (iv) where the application of that Directive to such an activity, by imposing an obligation on the authorities concerned to introduce a system of rotation or rostering of working time, could only be carried out to the detriment of the proper conduct of military operations in the true sense of the word.

The Supreme Court thus concluded that Directive 2003/88 also applied to the guard duty in the present case, since the parties to the present dispute had not alleged any circumstance which would exclude the application of that Directive. That is to say, the guard duty, as performed by the plaintiff, fell within the scope of 'normal service' and thus Directive 2003/88 also applied.

Regarding the second question, the CJEU clarified that a period of stand-by duty ordered to be carried out by a person in the military, which entails their continuous presence at a place of work where the latter does not coincide with their residence, must be regarded as working time within the meaning of Article 2(1) of the Directive. The CJEU further pointed out that the way in which workers are paid for the period of stand-by duty does not fall within the scope of the Directive, and thus the determination of pay is a matter of Member State regulation.

In the circumstances of the present case, the CJEU judgment meant that the time spent on stand-by duty, during which the plaintiff did not actually work but was required to be on stand-by at a particular place and was then at the employer's disposal, without being able to go home or elsewhere, was also to be regarded as working time. Thus, in the present case, it was not possible to apply the provisions of Slovenian national legislation, since that legislation expressly excluded soldiers' stand-by duty during guard duty from their working time.

Regarding the remuneration of stand-by duty, the Slovenian legislation does not provide for the remuneration of stand-by duty which is included in the working time but only provides for payment of 20% of the hourly rate of basic salary for the period of stand-by duty, which is not counted as working time. Therefore, in the specific situation that had arisen, the Supreme Court found that only the general rules on the remuneration to which a worker (public servant) is entitled for their working time can be taken into account. Thus, the Court found that the plaintiff was entitled to the remuneration provided for in his contract of employment for full-time work, that is to 100% of the basic salary, or the difference between 100% and 20% of the basic salary, including for the hours of stand-by duty which count as working time.

Although the Supreme Court's decision resulted in a finding that the plaintiff had worked more hours than their full-time hours, the Court did not decide to award the plaintiff overtime pay. The Court explained that the reason for this was that the circumstances of the present case did not fall under any of the cases in which overtime may be ordered under Articles 144 or 145 of the Employment Relationship Act.

Commentary

The Supreme Court with its judgment has pointed out that relevant provisions of the Slovenian legislation are not in accordance with Directive 2003/88/EC and has enabled personnel in the military to have their stand-by duty count as working time and thus be remunerated for it in the amount of 100% of their basic salary, instead of receiving merely 20%, as was provided for in the Collective Agreement for the Public Sector.

Comment from other jurisdiction

Hungary (Gabriella Ormai, CMS): Hungarian courts would probably have come to a different solution than the Slovenian courts. Please refer to the comment to EELC 2022/25.

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