

## Case Reports

2024/4

# Passive stand-by time restricted by employer requirements considered working time (LT)

## Summary

The Supreme Court of Lithuania has ruled that if an employee's passive stand-by time at home is restricted by employer requirements, preventing them from using this time for their own interests, it should be considered working time. The Court determined that such restrictions align with the definition of 'working time' in Article 2(1) of Directive 2003/88/EC and are covered by Article 118(2) of the Lithuanian Labour Code.

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## Legal background

The following regulations applied in relation to the adoption of the ruling of the Supreme Court:

1. The Working Time Directive 2003/88/EC, according to which 'working time' means any period during which the employee is working, at the employer's disposal and carrying out its activity or duties, in accordance with national laws and/or practice (Article 2(1)); and 'rest period' means any period which is not working time (Article 2(2)).
2. The Labour Code of the Republic of Lithuania, according to which:
  - a. 'Working time' means any time during which the employee is at the disposal of the employer or performs duties according to the employment contract (Article 111(1)).
  - b. When an employee is required to be present at a place specified by the employer and to be ready to perform the assigned functions as necessary (passive stand-by time), the length of the working day/shift may be up to 24 hours, but may not exceed the employee's standard working time over a maximum reference period of two months. In this case, the employee must be given the opportunity to rest and eat at the workplace (Article 118(2)).

- c. The time spent by an employee outside of the workplace in a state of preparedness to perform certain actions or go to the workplace if the need arises during normal rest time (passive stand-by time at home) shall not be considered working time except for the time actually taken for action. This type of passive stand-by time may not last longer than a continuous one-week period over four weeks. Passive stand-by time at home must be agreed upon in the employment contract and the employees must be paid an allowance of at least 20% of their average monthly remuneration for each week of stand-by time outside of the workplace. Actions actually taken shall be paid for as actual time worked ... (Article 118(4)).

## Facts

The employee (R. Ž.) had been working for *Ekskomisarų biuras* as an emergency response team security employee-trainee. The employer and employee agreed on passive stand-by time at home with 20% compensation for a week-long period. This arrangement had continued for over three and a half years. During this passive stand-by time at home, the employee was:

1. required to be at home and was not allowed to change the location without the employer's consent;
2. at the beginning and end of work, required to obtain the employer's permission to change the shift;
3. required to be sober;
4. assigned a car and special equipment;
5. required to be available all 24 hours within the special employer's programme;
6. required to have a uniform;
7. prohibited from sleeping, lying down, engaging in any other extraneous activity not related to the performance of his direct duties, or from losing alertness;
8. required to start driving to the given address immediately, but no later than one and a half minutes after receiving the order from the employer to proceed with a car to the target destination.

## Judgment

The Supreme Court held that the legislator itself essentially assigned passive stand-by time to working time

while passive stand-by time at home was assigned as rest time. This meant that the distinction between passive stand-by time and passive stand-by time at home was primarily based on the criteria for separating work and rest time. The Supreme Court's ruling highlighted that the level of restrictions imposed on an employee dictated whether the time was classified as working time or rest time. Specifically, it determined that passive stand-by time will be treated as working time when the employer-imposed restrictions significantly affect the employee's personal and social life, limiting their ability to freely use their time. This includes situations where the employee must remain at a designated location and prepared to commence work duties immediately if required, indicating that the severity of these constraints renders stand-by time as working time. Passive stand-by time at home is considered such employee stand-by time, when the employee is not assigned to be at the place specified by the employer, the employee is ready to perform certain actions or to come to the workplace, if necessary. Such restrictions should only have a weak effect on the employee's ability to dispose of their free time, accordingly this time does not fall within the definition of working time.

The Supreme Court stated that there were legally significant restrictions regarding the place and time that applied to the employee. This provided a basis for the conclusion that the stand-by time, considering the intensity of the restrictions applied (see Facts (1)–(8), above), should not be classified as rest but as working time. It was noted in the ruling of the Supreme Court that the requirements set by the employer to perform the work function eliminated the employee's opportunity to use the passive stand-by time at home for his own interests and at his own discretion.

## Commentary

In this case, the Supreme Court issued a lawful and accurate decision, considering the established case law of the European Court of Justice ('ECJ'). Only through the correct application of Directive 2003/88/EC and the ECJ's precedents was the Supreme Court of Lithuania able to differentiate between passive stand-by time and passive stand-by time at home, as the Lithuanian Labour Code lacks sufficient detail on this matter. Passive stand-by time at home is permissible and falls within the scope of EU and local regulations. However, to prevent a recurrence of a situation similar to the one described above, employers must exercise sufficient reasonableness and prudence. If employers impose intense restrictions on an employee's rest time, such time may be deemed as working time, necessitating proper remuneration for the employee.

**Subject:** Working time

**Parties:** The employer (private limited company 'Ekskomisaru biuras') – v – the employee (R. Ž.)

**Court:** Lietuvos Aukščiausiasis Teismas (The Supreme Court of Lithuania)

**Date:** 20 December 2023

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