



Key Issues: **Organisation of Working Time – Stand-By Time - Preliminary Ruling**

Case: **D.J. v Radiotelevizija Slovenija**

Reference: **Case C-344/19, CJEU (Grand Chamber), 9 March 2021**

Legislation: **Directive 2003/88/EEC**

Background

From 1 August 2008 to 31 January 2015, D. J. worked as a specialist technician in the transmission centres of Pohorje (Slovenia), then of Krvavec (Slovenia). The nature of the work, the distance between the centres and his home and the occasional difficulty in accessing the centres where the work was to be carried out made it necessary for him to stay in the vicinity of the sites concerned. One of the two sites was moreover so far from D. J.'s home that it would have been impossible for him to travel there on a daily basis, even in the most favourable weather conditions. In the buildings of the two transmission centres, D. J.'s employer made accommodation arrangements for him and another technician, both of whom were simultaneously present in each of those transmission centres. After carrying out their professional duties, the two technicians were able to rest in the living room or pursue leisure activities in the vicinity.

The two technicians carried out their work in shifts, one from 6am to 6pm, the other from 12pm to midnight, D. J. having mostly worked the latter shift. The work done on that shift was 'normal work' which required the worker's presence at the workplace.

D. J.'s employer calculated his salary on the basis of those twelve hours of 'normal work', without remunerating the rest period, which generally ran from midnight to 6am in the morning, whereas the six remaining hours were regarded as a period of stand-by time according to a stand-by system.

During that period, the employee could leave the transmission centre concerned. However, the worker had to be contactable if called and, if necessary, had to respond and to return to his place of work within a time limit of one hour. Only urgent tasks had to be carried out immediately, other tasks could be carried out the next day. In respect of that period of stand-by time according to a stand-by system, D. J.'s employer paid the claimant in the main proceedings compensation corresponding to 20% of his basic salary. However, if during that period D.J. was called upon to work, the time required for that work was counted and paid as normal work.

D. J. lodged an action claiming the same rate of pay for the hours during which he was on stand-by time according to a stand-by system as for overtime work, irrespective of

whether he had carried out any specific work during the period of stand-by time. He based his claim on the fact that he lived on the site where he carried out his work and that he was therefore, as a matter of fact, present at his workplace 24 hours a day. Taking into account the nature of his work and the fact that he was accommodated in the transmission centres, D. J. considered that he was not able freely to dispose of his time because, in particular, during those periods of stand-by time according to a stand-by system he was required to respond to calls, if necessary, and to be able to return to his workplace within a time limit of one hour. Having regard to the fact that there were not many opportunities for leisure activities on the transmission centres' sites, he spent the vast majority of the remainder of the time within the transmission centre.

D. J.'s action was dismissed both at first and second instance. D. J. brought an appeal on a point of law before the referring court in which he submitted that his employer had misinterpreted the concept of 'actual working time'. According to D. J., that concept covers not only the time during which the worker actually provides his or her services, but also all the time during which he or she is present at the workplace where the employer requires him or her to be. His employer however required periods of service of several days and abused recourse to periods of stand-by time according to a stand-by system.

In those circumstances, the Vrhovno sodišče (Supreme Court, Slovenia) decided to stay the proceedings and to refer a number of questions to the Court of Justice of the EU for a preliminary ruling.

Consideration by CJEU

The referring court is asking the Court of Justice, in essence, whether Article 2 of Directive 2003/88 must be interpreted as meaning that a period of stand-by time, during which a worker must be contactable by telephone and able to attend his or her workplace, if necessary, within a time limit of one hour, constitutes 'working time' within the meaning of that article; and whether the placing of service accommodation at that worker's disposal because of the difficulty in accessing his or her workplace and the limited nature of the opportunities to pursue leisure activities within the immediate vicinity of that workplace are to be taken into consideration in that classification.

It is clear to the Court of Justice, more specifically, from the order for reference and the case file available to the Court of Justice that the applicant in the main proceedings is a specialist technician who is responsible, together with a colleague, for ensuring the operation over several consecutive days of a transmission centre situated on a mountain summit. D. J. was on a period of stand-by time for six hours each day. That stand-by time was undertaken according to a stand-by system, which meant that, during that period, and unlike a period on stand-by which included the obligation of being physically present at the workplace, the person concerned was required only to be contactable at any time and to be able to attend the transmission centre concerned within a time limit of one hour, if necessary.

As a preliminary observation, it should be recalled that, in the context of a preliminary ruling procedure under Article 267 TFEU, the Court of Justice has no jurisdiction to assess the facts in the main proceedings or to apply the rules of EU law which it has been asked to interpret to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court. However, the Court of Justice may give the referring court an answer that enables it to adjudicate on the case before it by providing that court with all the elements of interpretation of EU law which may be of assistance to that end.

Thus, while it is ultimately for the referring court to examine whether the periods of stand-by time according to a stand-by system at issue in the main proceedings must be classified as 'working time' for the purposes of applying Directive 2003/88, it remains the case that it is for the Court of Justice to provide it with guidance as to the criteria to be taken into account in that examination.

The CJEU held that:

Article 2(1) of Directive 2003/88/EC must be interpreted as meaning that a period of stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there, does NOT constitute, in its entirety, "working time" within the meaning of that provision, unless an overall assessment of all the facts of the case, including the consequences of that time limit and, if appropriate, the average frequency of activity during that period, establishes that the constraints imposed on that worker during that period are such as to affect, objectively and very significantly, the latter's ability freely to manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interests. The limited nature of the opportunities to pursue leisure activities within the immediate vicinity of the place concerned is irrelevant for the purposes of that assessment.

Why is this decision important?

The Court of Justice of the EU has set out a number of factors that will be relevant when assessing whether the constraints imposed on a worker during standby are such as to justify the classification of that period as "working time". The Court of Justice ruled that it will be relevant to consider the required response time during standby. If the worker is allowed a reasonable time to be back at work, then the standby period may not be 'working time'. Conversely, if the worker is required to be back at work within minutes, the standby period will be 'working time'. Employers will need to consider the number of times a worker is called upon during standby as the greater the number, the less opportunity for the worker to manage his free time.

This decision should be considered in light of the recent UK Supreme Court decision that care workers are not entitled to the UK national minimum wage for sleep-in shifts.

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CLfE (4/2021)

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