Key Issues: **Social Policy - Working Time – Rest Period - Preliminary Ruling**

Case: **XR v Dopravní podnik hl. m. Prahy, akciová společnost**

Reference: **Case C-107/19, CJEU (Tenth Chamber), 9 September 2021**

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

Background

From November 2005 to December 2008, XR was employed as a company firefighter at DPP. XR was subject to a shift working regime, consisting of a day shift covering the period from 6.45 to 19.00 and a night shift covering the period from 18.45 to 7.00. His daily working times included two food and rest breaks of 30 minutes each.

Between 6.30 and 13.30, XR could go to the factory canteen, situated 200 metres from his workstation, provided that he was equipped with a transmitter alerting him, if necessary, that the service vehicle was coming to pick him up, within two minutes, in front of the factory canteen. The depot where XR worked also had an area where meals could be prepared when the staff canteen was closed.

Breaks were included in the calculation of XR's working time only inasmuch as they were interrupted by a call-out. Consequently, uninterrupted breaks were not remunerated. XR challenged that method of calculating his remuneration. Taking the view that breaks – even uninterrupted ones – constituted working time, he claimed a sum of CZK 95 335 together with default interest by way of the remuneration which, in his view, was due to him in respect of the two daily breaks which had not been taken into account in the calculation of his remuneration for the period at issue in the main proceedings.

The judgment of the District Court, Prague was overturned on appeal by the Supreme Court, Czech Republic which then referred the case back to the District Court. In those circumstances, the District Court, Prague decided to stay the proceedings and to refer a number of questions to the Court of Justice of the EU (CJEU) for a preliminary ruling.

Consideration by CJEU

As a preliminary point, the CJEU noted that the dispute in the main proceedings concerns the remuneration to which a worker claims to be entitled in respect of the breaks he receives during his working day. It follows from CJEU case-law, however,

that, save in the special case covered by Article 7(1) of Directive 2003/88 concerning annual paid holidays, that directive is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers, with the result that, in principle, it does not apply to the remuneration of workers (see CJEU judgment of 9 March 2021, *Radiotelevizija Slovenija*, on which we reported in CLfE4-2021).

It should be recalled that Article 2(1) of Directive 2003/88 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 Article 2(2) of that directive, the concept of 'rest period' is defined negatively as any period which is not working time.

The second chapter of Directive 2003/88 is devoted, inter alia, to 'minimum rest periods'. In addition to daily and weekly rest periods, that chapter concerns, in Article 4 of that directive, the 'breaks' to which every worker must be entitled where the daily working time is more than six hours and the details of which (in particular the duration and the terms on which they are granted) are laid down in collective agreements, agreements between the two sides of industry or, failing that, by national legislation.

In this case, it is apparent from the order for reference that, during his breaks, XR was not replaced at his workstation and was equipped with a receiver enabling him to be alerted if his breaks had to be interrupted for an emergency call-out. It follows that the applicant in the main proceedings was subject, during his breaks, to a stand-by system, a term which covers, generically, all of the periods during which the worker remains available to his or her employer in order to ensure that work is provided, at the employer's request.

It must be recalled, in that regard, that the concepts of 'working time' and 'rest period' are mutually exclusive. A worker's stand-by periods must therefore be classified as either 'working time' or a 'rest period' for the purpose of applying Directive 2003/88, the latter not providing for any intermediate category.

Furthermore, the concepts of 'working time' and 'rest period' are concepts of EU law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of Directive 2003/88. Only an autonomous interpretation of that nature is capable of ensuring the full effectiveness of that directive and the uniform application of those concepts in all the Member States.

As regards, more specifically, periods of stand-by time, it is apparent from the case-law of the CJEU that a period during which no actual activity is carried out by the worker for the benefit of his or her employer does not necessarily constitute a 'rest period' for the purposes of the application of Directive 2003/88.

The CJEU held that:

1. Article 2 of Directive 2003/88/EC must be interpreted as meaning that the break granted to a worker during his or her daily working time, during which the worker must be ready to respond to a call-out within a time limit of two minutes if necessary, constitutes 'working time' within the meaning of that provision, where it is apparent from an overall assessment of all the relevant circumstances that the limitations imposed on that worker are such as to affect objectively and very significantly the worker's ability to manage freely the time during which his or her professional services are not required and to devote that time to his or her own interests.

2. The principle of primacy of EU law must be interpreted as precluding a national court, ruling following the setting aside of its judgment by a higher court, from being bound, in accordance with national procedural law, by the legal rulings of that higher court, where those assessments are not compatible with EU law.

Why is this decision important?

A number of factors will be relevant when assessing whether the constraints imposed on a worker during a "rest period" are such as to justify the classification of that period as "working time". Clearly, the shorter the response time required by the worker (in this case, 2 minutes), the more likely the "rest period" will be deemed to be "working time". Employers will need to consider the reasonableness of such response times.

This decision should be considered in light of the case covered by our report in CLfE 4/2021 and also the UK Supreme Court decision dated 19 March 2021 that care workers are not entitled to the UK national minimum wage for sleep-in shifts.

CLfE (5/2021)

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