Key Issues: **Protection of the Health & Safety of Workers – Working Time - Preliminary Ruling**

Case: **MG V Dublin City Council**

Reference: **Case C-214/20, CJEU (Fifth Chamber), 11 November 2021**

Legislation: **Directive 2003/88/EC**

Background

MG is a retained firefighter employed by Dublin City Council on a part-time basis. He is, by virtue of a system of stand-by time according to a stand-by system, retained by the brigade of the fire station by which he was trained.

MG is required to participate in 75% of that brigade's interventions, with the option of abstaining from the remaining interventions. Without being obliged, during his periods of stand-by time, to be present at a specific place, he must, when he receives an emergency call to participate in an intervention, endeavour to arrive at the fire station within 5 minutes of the call and, in any event, observe a maximum turn-out time of 10 minutes. That period of stand-by time according to a stand-by system is, in principle, 7 days per week and 24 hours per day. It is interrupted only by leave periods, as well as by periods for which MG has notified his unavailability in advance, provided that Dublin City Council agrees to those latter periods.

MG receives a basic salary, paid monthly, which is meant to remunerate his stand-by time according to a stand-by system, as well as additional remuneration for each intervention. He is permitted to carry out a professional activity on his own account or for a second employer, provided that that activity does not exceed 48 hours per week on average. MG, however, is prohibited from carrying out such an activity during his 'working hours' as a retained firefighter, those hours being not only those spent responding to an incident, but also those devoted to other brigade activities, such as training. MG must live and carry out his professional activities at a 'reasonable distance' from the fire station of his brigade, so as to be able to observe the time for turning out at that fire station.

Taking the view that the hours for which he is on stand-by for Dublin City Council must be classified as 'working time' within the meaning of the Organisation of Working Time Act 1997 and Directive 2003/88, MG filed a claim to that effect before the Workplace Relations Commission (Ireland). That claim having been rejected, he lodged an appeal before the Labour Court (Ireland) which decided to stay the proceedings

and to refer questions to the Court of Justice of the EU (CJEU) for a preliminary ruling on the interpretation of Directive 2003/88.

Consideration by CJEU

Article 2(1) of Directive 2003/88 defines the concept of '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. Those two concepts being mutually exclusive, a worker's stand-by periods must 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.

While it is ultimately for the referring court to examine whether the period of stand-by time according to a stand-by system at issue in the main proceedings must be classified as 'working time' or a 'rest period', it remains the case that it is for the CJEU to provide it with guidance as to the criteria to be taken into account in that examination.

In that regard, it must be recalled that the purpose of Directive 2003/88 is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national rules concerning, in particular, the duration of working time. Those requirements constitute rules of EU social law of particular importance from which every worker must benefit. In particular, by establishing the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods, that directive gives specific form to the fundamental right expressly enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union and must, therefore, be interpreted in the light of that Article 31(2). The provisions of that directive may not be interpreted restrictively to the detriment of the rights that workers derive from it.

As regards the classification of periods of on-call duty, the CJEU has held that the concept of 'working time' within the meaning of Directive 2003/88 covers the entirety of periods of stand-by time, including those according to a stand-by system, during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests.

Conversely, where the constraints imposed on a worker during a specific period of stand-by time do not reach such a level of intensity and allow him or her to manage his or her own time, and to pursue his or her own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes 'working time' for the purposes of applying Directive 2003/88.

In order to assess whether stand-by time according to a stand-by system creates, objectively, major constraints having a very significant impact on the management, by the worker concerned, of the time during which his or her professional services are not required, it is necessary, more specifically, to have regard to the time limit for that worker to return to his or her professional activities with the employer for whom he or she is serving that stand-by time starting from the moment at which that employer requests it, coupled, where appropriate, with the average frequency of the activities that the worker is actually called upon to undertake over the course of that period.

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 served by a retained firefighter, during which that worker, with the permission of his or her employer, carries out a professional activity on his or her own account but must, in the event of an emergency call, reach his or her assigned fire station within 10 minutes, does not constitute 'working time' within the meaning of that provision if it follows from an overall assessment of all the facts of the case, in particular from the scope and terms of that ability to carry out another professional activity and from the absence of obligation to participate in the entirety of the interventions effected from that fire station, that the constraints imposed on the said worker during that period are not of such a nature as to constrain objectively and very significantly the ability that he or she has freely to manage, during the said period, the time during which his or her services as a retained firefighter are not required.

Why is this decision important?

Every employer in Northern Ireland, who requires an employee to be on "stand-by", will have to make an assessment as to whether such "stand-by time" is actually "working time" for the purposes of the Working Time Regulations. As can be seen from this judgment, the particular facts applying to each relevant employee will need to be considered. A failure to make the correct assessment could prove costly.

NOTE: The Working Time Regulations (NI) 1998 form part of "Retained Law" for the purposes of the European Union (Withdrawal) Act 2018 ("the Act"). By section 6 of the Act, UK courts and tribunals are not bound by decisions of the CJEU made after "exit day". However, a UK court or tribunal may have regard to any such decision of the CJEU so far as it is relevant to any matter before the court or tribunal.

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