SUMMARY

2011/48 Inactive stand-by periods can be compensated differently from active working hours (BE)

<p>Remuneration for stand-by periods, during which an employee is simply asked to be available by phone in order to answer urgent calls, without the obligation to be at a specific location or to perform his habitual tasks, need not be equivalent to the remuneration for active working hours.</p>

Summary

Remuneration for stand-by periods, during which an employee is simply asked to be available by phone in order to answer urgent calls, without the obligation to be at a specific location or to perform his habitual tasks, need not be equivalent to the remuneration for active working hours.

Facts

B. worked as a Senior Field Engineer for Storage Technology Belgium plc, a company active in the computer hardware industry. Stand-by periods during which B. had to be available to answer urgent calls were part of the job. During these stand-by periods, B. was free to go wherever he wanted, as long as he could be reached by (mobile) phone so that, if necessary, he could react within two hours after the call. As compensation for the stand-by periods, he received a fixed standby allowance on top of his monthly wage. For work performed during the stand-by periods, he also received payment.

After his dismissal, B. claimed overtime pay (150 to 200% of his normal salary) as compensation for the stand-by periods during which he did not actually perform work. He based his claim on the Belgian Act on Working Time. He deducted from his claim the standby

allowance and the compensation for actual standby work that had already been paid.

The Labour Court rejected his claim, stating that the hours during which he did not effectively work were not considered working time. B. appealed, but the Labour Court of Appeal confirmed the Labour Court's decision[1]. B. subsequently appealed the judgment to the Belgian Supreme Court (Cour de Cassation).

As a preliminary remark, the reader should note that the Supreme Court does not judge the facts of the case, but merely the legality of the Court of Appeal's judgment. In other words, the role of the Supreme Court was to verify whether the final judgment breached the law. If the Supreme Court established that the Court of Appeal was in breach, it would nullify the judgment and refer the case to another Court of Appeal. That court must then judge afresh on the facts of the case.

Judgment

B. asserted that the Labour Court of Appeal had violated Article 6 of Directive 93/104 concerning certain aspects of working time[2] and Article 19(2) of the Belgian Working Time Act of 16 March 1971. He argued (i) that both provisions define working time as the time during which the employee is at the employer's disposal and (ii) that stand-by periods during which the employee has to be available for the employer's calls, even if he or she need not be at a specific location and his labour performance is not 'intense', qualify as periods during which the employee is 'at the employer's disposal' within the meaning of said provisions. Consequently the Labour Court of Appeal should have held that B.'s stand-by periods (a) qualified as working time and (b) had to be remunerated at the normal rate of salary.

The Supreme Court rejected B.'s appeal in a three-step reasoning.

Firstly, the Supreme Court specified that Article 6 of the Directive obligates the Member States to ensure that the period of weekly working time is limited by law and that the average working time for each seven-day period, including overtime, does not exceed 48 hours.

Secondly, the Supreme Court quoted the definition of working time as expressed in Article 19(2) of the Working Time Act, namely 'the time during which the member of staff is at the disposal of the employer'.

Finally, the Supreme Court concluded that it results neither from Article 6 of the Directive nor

from Article 19(2) of the Working Time Act that the remuneration of inactive stand-by periods, during which the employee has to be available for the employer's calls without the obligation to be at a specific location or to perform his or her habitual labour tasks, must be equivalent to remuneration for active working hours.

Commentary

The Supreme Court's rejection of B.'s appeal does not come as a surprise. Based on a strict interpretation of the principle 'being at the disposal of the employer' in Belgian and European jurisprudence (See Vorel (C-437/05) and Grigore (C-258/10)), it was not to be expected that the Court would accept standby-periods during which the employee must be available for the employers' calls without needing to be at a specific location or to perform his or her habitual labour tasks, as working time.

Whereas the Labour Court of Appeal came to the conclusion that the standby-periods did not qualify as 'working time', neither in the light of the Directive, nor in the light of the Working Time Act, the Supreme Court, however, refrained from judging whether or not the standby-periods qualify as working time, merely holding that the Labour Court of Appeal had not violated either Article 6 of Directive 93/104 or Article 19(2) of the Belgian Working Time Act. This is partly due to the fact that B. erroneously invoked Article 6 of the Directive on which to base his appeal. Article 6 of the Directive does not define working time (as Article 2 does), but merely obliges Member States to limit weekly working time.

The Court also left unanswered whether the stand-by periods qualify as working time under Article 19(2) of the Working Time Act. It focused on whether the remuneration for inactive stand-by periods (whether or not qualifying as working time) must be equivalent to remuneration for active working hours. The answer to this question was a clear no, as the Court could not identify such an obligation either from Article 6 of the Directive or Article 19(2) of the Working Time Act.

On the one hand, it is a pity that the Court did not give a clear confirmation of the Brussels' Court of Appeal's definition of working time, as this has left some margin for interpretation. Indeed, some Belgian authors have interpreted the judgment of the Supreme Court as confirmation that even inactive stand-by periods are to be considered as working time. In our view, this is erroneous.

On the other hand, there is no longer room for discussion about remuneration for inactive stand-by periods, irrespective of whether or not they qualify as working time, being inferior to remuneration for effective working hours. This is entirely in line with the case law of the ECJ,

which has accepted arrangements that compensate stand-by periods and effectively performed hours of work differently (see Vorel (C-437/05), paragraphs 35 and 36).

However, the question of whether stand-by periods qualify as working time has not become irrelevant under Belgian law. If a stand-by period is considered to be working time, the compensation for stand-by periods will need to be in line with the applicable minimum wage. If it does not qualify as working time, the compensation need only comply with collective bargaining agreements concluded at sector level with regard to compensation for stand-by periods. If no such collective bargaining agreement exists, as is very often the case, the employer and employee may freely agree on a compensation arrangement for stand-by periods.

In this context, it is also important to note that the European Commission is currently reviewing Directive 2003/88/EC (the successor to Directive 93/104), by means of a two-stage consultation of the social partners at EU level and a detailed impact assessment. In December 2010, the Commission adopted a second-stage consultation paper asking workers' and employers' representatives for their views on possible changes to the Directive. In this paper, special attention was given to the topic of stand-by periods.

The Commission suggested a codification of the principles on stand-by periods established in the rulings of the ECJ:

Stand-by periods where the worker is required to be available to the employer at the workplace in order to provide his or her services in case of need, are working time (See SIMAP (C-303/98); Jaeger (C-151/02)).

However, a derogation is proposed for sectors where continuity of service is required (notably in public services such as healthcare), which would allow periods of stand-by to be counted only partially as hours of work for the purpose of calculating the worker's total working time. The social partners would be given flexibility to find solutions at local or sectoral level and identify the most appropriate method for counting stand-by periods.

For stand-by periods away from the workplace, only periods spent actually responding to a call would be counted as working time, although waiting time at home could be treated more favourably under national laws or collective agreements (See Vorel (C-437/05)).

It is, however, unclear if and when the Commission's suggestions will be incorporated in a revised Directive. This is due to the fact that the social partners and co-legislators are divided

as to whether to maintain the opt-out that is currently being used by a large number of Member States in connection with stand-by periods. The UK in particular is ill-disposed towards a review of the Directive and the abolition of the curtailment of the opt-out. The UK is concerned that a tougher Directive could increase the bill for public services and business, just at the moment it needs to cut costs to ensure economic growth. No doubt the debate will continue.

Footnotes

1 Labour Court of Appeal of Brussels, 27 October 2009. This judgment was reported and commented on in EELC 2010/87.

2 At the time the facts occurred, this Directive had not yet been replaced by Directive 2003/88.

Subject: Working time

Parties: B - v - Sun Microsystems Belgium plc

Court: Supreme Court

Date: 6 June 2011

Case number: C.10.0070.F

Publication: http://www.cass.be > jurisprudence > cour de cassation F-20110606-4

Creator: Cour de cassation (Belgian Supreme Court)
Verdict at: 2011-06-06
Case number: C.10.0070.F