SUMMARY

2010/87: Standby periods do not qualify as (paid) “work” (BE)

<p>During stand-by periods, when an employee is simply asked to be available by phone in order to answer urgent calls, only the effectively performed hours of work are to be considered working time.</p>

Summary

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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 as well as payment for work performed during the stand-by periods.

After his dismissal, B claimed overtime pay (150 to 200% of his base salary) as compensation for the stand-by periods during which he did not actually perform work, basing his claim on the Belgian Working Time Act. He deducted from this claim the standby allowance and the compensation for actual standby work that he had been paid.

The Labour Court rejected his claim, reasoning that the hours during which he did not effectively work failed to qualify as “working time” in the meaning of the Working Time Act. B

appealed.

Judgment

The Court of Appeal confirmed the Labour Court's decision. The Court came to this conclusion by examining the notion of "working time", first in the light of "Working Time Directive" 93/104/EC, which aims at improving the level of protection of workers' safety and health, then in the light of the Belgian Working Time Act.

Article 2(1) of the Directive describes working time as "*any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice*". According to ECJ case law, the main criterion to determine whether a stand-by period is to be considered working time is the employee's physical presence at a certain place, as determined by the employer, where he is at the latter's disposal to immediately carry out duties if necessary (See Vorel (C-437/05), paragraph 28). The stand-by periods in the case at hand are, according to the Court, not working time under Community law.

The Belgian Working Time Act of 16 March 1971 defines working time as "*the time during which personnel are at the disposal of the employer*". This means that Belgian law also does not see stand-by periods as working time, given that the employee is not "at the disposal" of the employer.

Neither the Directive nor the Belgian Working Time Act regulate, or even attempt to regulate the level of compensation for stand-by periods. The Court of Appeal referred to the ECJ's rulings in Vorel (C-437/05, paragraph 32) and Dellas (C-14/04, paragraph 38), where the ECJ held that "the directive is limited to regulating certain aspects of the organisation of working time so that, generally, it does not apply to the remuneration of workers". It is perfectly legal to provide for arrangements that compensate stand-by periods during which no work is actually performed differently from effectively performed hours of work. The Court argued that if such arrangements are allowed for stand-by periods that are considered to be working time (e.g. a doctor who is on call in a hospital), a difference in compensation is a fortiori allowed in the present situation.

Consequently, the Court approved the compensation arrangement and rejected B's claim.

Commentary

In this judgment, the Labour Court presents a clear overview of the key principles according to

which stand-by periods may qualify as working time. Based upon a scrutiny of Belgian as well as EC law and case law, one criterion applies to all, namely: physical constraint on the freedom of an employee. Being at the disposal of the employer is to be interpreted strictly, so that being available by phone to answer urgent calls is not enough for the stand-by period to qualify fully as working time. Only the hours actually worked as the result of calls received, are working time. This principle is widely accepted in Belgian case law.

The Court also emphasised the independence between the definition of working time and any compensation for this time. The fact that stand-by periods are not considered to be working time does not imply that compensation is not permitted. On the other hand, compensation for stand-by periods does not mean they qualify as working time. As a result, an employee cannot claim compensation for stand-by periods at the rate paid for hours actually worked.

Comments from other jurisdictions

Austria (Martin E. Risak): Both the Austrian Working Time Act (Arbeitszeitgesetz) and the Hours of Rest Act (*Arbeitsruhegesetz*) include provisions for stand-by periods which these acts do not consider to be working time. Under s20(a) of the Working Time Act stand-by periods may only be agreed upon for ten days per month (or, if a collective agreement permits, for 30 days within a three-month period). If an employee does actually perform work during the stand-by period the daily working time may be increased to up to 12 hours (normally 10 hours), provided this is compensated by time off work within two weeks. In addition, the daily rest period may be interrupted by this work, provided that one part of it lasts at least eight hours and that another daily rest period within two weeks is extended by an additional four hours.

Despite this rather extensive and complicated treatment of stand-by time, the Working Time Act remains silent on its definition and on the issue of compensation. The courts consider stand-by periods as periods during which the employee must be available to the employer to take up work within an agreed timeframe. The employee must be able to move freely and to decide himself how to spend his time, though certain restrictions may apply (e.g. no consumption of alcohol, limited areas of movement if the employee has to come to his workplace within 30 minutes). If compensation is not provided for in a collective or individual agreement and the lack of compensation has not been agreed explicitly, “fair and appropriate remuneration” must be paid for stand-by periods as provided in s1152 General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). In deciding what is fair and appropriate, the courts usually apply provisions in similar but non-applicable collective agreements as guidelines and grant amounts that are significantly lower than the compensation for effectively performed

"normal" work.

Czech Republic (Nataša Randlova): The Czech Labour Code expressly regulates the difference between working time and being on call. **Working time** includes (i) the time during which an employee is *obliged* to perform work for the employer and (ii) the time during which an employee is physically present in the workplace and *prepared* to perform work according to the employer's instructions. On the other hand, being **on call** is when an employee is prepared for potential performance of work beyond the scope of his work shifts and in a location that is different from one of the employer«s workplaces.

Moreover, the Czech Labour Code regulates the remuneration for being on call, according to which the employee is entitled to remuneration of at least 10% of his average earnings (higher remuneration may be agreed in an individual or collective agreement or in internal regulations). If work is performed during on-call time, the employee is entitled to his or her normal wage plus appropriate extra pay (for overtime work, night work, and work on Saturday and Sunday) where applicable.

Ireland (Georgina Kabemba): In 2006 there was a similar case before the Labour Court pursuant to the Organisation of Working Time Act 1997 *HSE Mid-west Area – v – Gerard Byrnes DWT068/2006*. The Claimant was employed as a consultant surgeon under the terms and conditions set out in a "consultants common contract". He had been rostered to provide an on-call service for patients at a regional hospital on St. Patrick's Day which is a public holiday in Ireland. Mr Byrnes attended the hospital to deal with an emergency and remained there for one hour. The Claimant contended that by attending for work on a public holiday he was entitled to an extra full day's pay or a full day off irrespective of the number of hours worked. It was submitted that his working time should be measured from the time he received the call requiring his attendance rather than the time he commenced work at the hospital.

The Health Authority contended that the Claimant was adequately compensated under the terms of his contract in that he was paid a duty allowance fee in respect of patients seen by him and the appropriate travel allowance as well as a full day's salary for the day. The Labour Court, in its determination on appeal from the Rights Commissioner, found that the Claimant was not entitled to an additional day's pay or an additional day off and that the on-call

arrangements for consultant was adequate for the purposes of the Act. The Court concluded that the package of benefits available to the Claimant in respect of attendance at work during a public holiday on which he was on call adequately met the requirements of the Act. The Court was of the view that the legislator could never have intended that a person who attends work for one hour in a day is entitled to an additional full day's pay or an additional full day off in lieu of the time worked.

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