SUMMARY

2010/85: The fact that an activity is continuous (24/24) does not necessarily mean that a worker who oversees the activity on his own cannot take (unpaid) rest breaks (CZ)

<p>A worker who does not take rest breaks because he mistakenly believes his job does not permit his work to be interrupted cannot claim compensation for the time during which he could have rested.</p>

Summary

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Facts

The plaintiff was an engineer at a local sewerage plant. The operation was determined by the employer to be a continuous (uninterrupted) operation requiring work twenty-four hours a day, seven days a week. There were always two workers present during the day shift; during the night shift there was only one employee (the plaintiff). During the twelve-hour shifts the employer scheduled two thirty-minute rest breaks, which were not considered as working time. Thus, the employees were always paid for only eleven hours per shift.

The plaintiff worked the night shift and claimed that since he was the only employee present on the night shift, he had no replacement and was therefore unable to take his rest breaks. The employee claimed wages for one hour for each night shift that he worked, corresponding to

the two thirty-minute rest breaks which he could not take. His claim was denied by the court of first instance and, on appeal, by the Court of Appeal. The employee considered this denial to constitute a breach of his constitutional right to a fair wage and a violation of his right to a fair trial.[1]

The law

Article 4 of Directive 2003/88/EC requires the Member States to ensure that, where the working day is longer than six hours, every worker is entitled to a "rest break", the details of which, including duration and the terms on which it is granted, shall be laid down at the national level. Article 17(3)(c) allows the Member States to derogate from Article 4 in the case of certain activities involving the need for continuity of service or production. The Czech Labour Code has utilised this right to derogate. Article 88 obligates employers to provide workers with a rest break of 30 minutes after (at most) six hours of uninterrupted work, unless the work cannot be interrupted, in which case the worker must be granted "a necessary period for rest and food". Rest breaks do not qualify as working time and are therefore not paid. A necessary period for rest and food does qualify as working time and is therefore paid. In principle, employees must be granted a rest break, which means that they can, for example, leave the employer's premises and do what they want. Only if a rest break cannot be taken because the operation does not allow this, may employees be provided with a "necessary period for rest and food" instead, during which they may rest but may not leave their place of work unattended.

Judgment

In its judgment the Constitutional Court ruled in favour of the employer and confirmed the decision of the appeal court. According to the Constitutional Court it is the employer's obligation to provide a rest break after six hours of uninterrupted work even in a continuous operation, provided that the particular work allows for it. The provision of a necessary period for rest and food instead of a rest break is the only exemption from this rule, and may only be applied if the work cannot be interrupted. Whether or not the work cannot be interrupted depends on the type of work, not on the type of operation: the mere fact that an operation is continuous is insufficient.

In the given case the employee's job was to check and supervise machines which did not require constant attention or continuous work performance. As such, the employer correctly scheduled rest breaks during the shift. The employee was thus given the possibility to take a

rest break. If he failed to do so it was his fault and he therefore could not require the employer to pay him for such periods.

As regards the alleged breach of the plaintiff's constitutional right to a fair trial, the Constitutional Court found that the circumstances of the given case were different from those of the relevant Supreme Court case.

Commentary

In our view the decision of the Constitutional Court is reasonable, most importantly because it emphasises the importance of the particular type of work rather than the type of operation. Any other conclusion would lead to the situation where employers would automatically not be obliged (or even allowed) to grant employees rest breaks during a continuous operation, even if the particular work allowed for a rest break. In our view such an interpretation would not comply with the intention of the working time regulation of the Labour Code and Directive 2003/88/EC.

Comments from other jurisdictions

Austria (Martin E. Risak): The Austrian Working Time Act (*Arbeitszeitgesetz*) includes a provision that is very similar to the reported one in Czech law: in the case of work that demands continuous attention, employees working in rotating shifts must be granted short breaks of adequate duration instead of the otherwise prescribed daily 30-minute rest break. Whereas the "normal" daily rest break does not constitute working time and is therefore unpaid, the short breaks are deemed to be (paid) working time.

I assume that an Austrian court would have dismissed the employee's claim for payment for the self-prescribed short breaks that he deemed to be necessary, as his subjective appraisal of their necessity is not relevant. Any exception to the rule must be proven on an objective basis, and if the employer who organised the production did not see any need for continuous work but in fact scheduled 30-minute rest breaks, this would indicate, *prima facie*, that these breaks could be observed without any loss of production. The case would look different if the employer had knowingly accepted the employee's work during the scheduled rest breaks or if the employee had informed the employer of the impracticality of the half-hour rest breaks and had worked during those breaks in order to avoid real harm to the employer.

United Kingdom (Richard Lister): Coincidentally, the Employment Appeal Tribunal (EAT) has recently considered the provisions governing rest breaks under the UK's Working Time

Regulations 1998 (WTR). Under regulation 12 of the WTR, workers are entitled to a daily rest break of 20 minutes, during which they can do as they please and are not at the disposal of the employer, if their daily working time exceeds six hours. There are, however, certain "special cases" where the right to a rest break does not apply – e.g. workers engaged in "security and surveillance activities requiring a permanent presence". Where such workers are not given a rest break, regulation 24(a) provides that the employer must if possible allow them to take an equivalent period of "compensatory rest". In exceptional circumstances where it is not possible to grant such a period of rest, the employer must afford "such protection as may be appropriate in order to safeguard the worker's health and safety" (regulation 24(b)).

In *Hughes v Corps of Commissionaires Management Ltd* (EAT/0173/10, 22.11.10, unreported), the EAT interpreted the "compensatory rest" requirements in a way that affords employers a degree of flexibility. It held that, whilst daily rest under regulation 12 must be uninterrupted and workers must know in advance that they are taking their break, the same does not apply to compensatory rest. The employer merely has to provide something as close to that as possible and there are many possible ways of providing compensatory rest, depending on the circumstances.

Footnote

1 The plaintiff argued that his right to a fair trial had been violated because the Court of Appeal failed to apply Supreme Court precedent in respect of rest breaks.

Subject: Working time

Parties: *J.M. – v – Městské vodovody a kanalizace Vrchlabí* (water and sewerage provider of Vrchlab' city)

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