SUMMARY

2018/32 When is travelling time working time? (NO)

The Norwegian Supreme Court concludes that time spent on a journey ordered by the employer, to and from a place other than the employee's fixed or habitual place of work, should be considered working time within the meaning of the statutory provisions implementing the Working Time Directive (2003/88/EC). This ruling takes into account the Advisory Opinion of the EFTA Court.

Facts

The case concerned a police officer who was ordered on three assignments where the place of attendance was different from his fixed place of work. The time spent on the journeys to these places was outside his normal working hours. In each case, the officer first stopped at his fixed place of work to pick up the necessary equipment and then stopped by one or two other police stations to pick up colleagues and further equipment. The assignments required carrying weapons, which was out of the ordinary. While driving, the officer was in contact with the Operations Centre, to prepare for the assignment.

The employer (the Norwegian Government) had only accepted as working time the parts of the travelling time in which the officer carried out specific tasks. The dispute concerned the remaining travel time, and the question as to whether that travel time should be classified as working time within the meaning of the provisions of the Working Environment Act, which implement the provisions of the Working Time Directive.

Legal background

Section 10-1 of the Working Environment Act defines 'working time' as "time when the employee is at the disposal of the employer", as opposed to 'off-duty time'. In previous case law, the concept of working time was understood to presuppose that the employee was at the

disposal of the employer "to perform tasks in accordance with the employment contract". The traditional assumption had been that travel time outside of ordinary working hours, did not count as working time.

However, Chapter 10 of the Working Environment Act is mainly an implementation of the Working Time Directive, which builds on an autonomous concept of working time. The ECJ has given that concept a broad interpretation in order to pursue the objective of protecting the health and safety of workers, as illustrated by, *inter alia*, the 2015 decision in *Tyco* (C-266/14). Moreover, the Directive builds on a distinction between 'working time' and 'rest periods', which are in principle mutually exclusive. The ECJ is *not* built on any assumption that travel time does not qualify as working time. Rather, it considers the issue on a case-by-case basis. The ruling in *Tyco* is illustrative, as the Court held in that case that where employees did not have a fixed place of work, travel time between their place of residence and the first and last customer of the day was 'working time' within the meaning of the Directive.

Based on this, the present case raised an important issue: whether ECJ case law required adaptation - and possibly a widening of scope - of the concept of working time in national law. This was the basis for involving the EFTA Court. The Supreme Court referred three questions relating to the interpretation of the definition of working time to the EFTA Court, as follows:

"I. Is time spent on a journey ordered by the employer, to and/or from a place of attendance other than the employee's fixed or habitual place of attendance, when such travel takes place outside normal working hours, to be considered working time within the meaning of Article 2 of Directive 2003/88/EC?

II. Insofar as travel as described in Question I is not by itself sufficient to be classified as working time, what is the legal test and the relevant elements to be considered in the assessment of whether the time spent on travel should nonetheless be deemed to constitute working time? As part of this question, an opinion is requested on whether an intensity assessment should be made of the amount of work performed while travelling.

III. Does the question of how often the employer specifies a place of attendance other than the fixed or habitual one have any bearing on the assessments under Questions I and II?"

The Advisory Opinion of the EFTA Court was that time spent on journeys in the case at hand should be considered working time within the meaning of the Working Time Directive. This was mainly based on the ECJ's reasoning in *Tyco*, notwithstanding the different factual

circumstances of that case. The questions were answered as follows:

"1. The necessary time spent travelling, outside normal working hours, by a worker, such as the appellant, to and/or from a location other than his fixed or habitual place of attendance in order to carry out his activity or duties in that other location, as required by his employer, constitutes "working time" within the meaning of Article 2 of Directive 2003/88/EC.

2. No intensity assessment is required of the amount of work performed while travelling.

3. The frequency of such journeys is immaterial unless the effect is to transfer the worker's place of employment to a new fixed or habitual place of attendance."

In consequence of the Advisory Opinion, the Government accepted that the time in question was working time within the meaning of the Directive and the corresponding provisions of the Working Environment Act. Hence, the Government argued that this part of the case should be dismissed on grounds of absence of legal relevance, inasmuch as that there was no "real need" for clarification by the Supreme Court.

Judgment

The Supreme Court did not accept the submission for dismissal, considering that clarifying whether travel time such as that at issue could be deemed as working time, was a matter of "considerable importance in principle" with regard to the protective provisions of Chapter 10 of the Working Environment Act as far as they implement provisions of the Working Time Directive. However, the Court emphasized that a ruling classifying travel time as working time in the case at hand, would not of itself be *"decisive with regard to what is to be considered working time in other contexts, neither in collective agreements, other parts of the Working Environment Act, nor in legislation otherwise"*.

But in fact, in its judgment, the Supreme Court confined itself to repeating the relevant parts of the EFTA Court's Advisory Opinion, without discussing how to understand its reasoning more generally and the possible implications beyond the case at hand. The justice delivering the leading opinion merely concluded, in keeping with what the parties had already agreed on, that the travel time in the case was working time within the meaning of the Directive. Given that the provisions in Chapter 10 of the Working Environment Act were presupposed to be in accordance with the Directive, the Act's provisions needed to be interpreted accordingly. This conclusion was narrowly construed and, as noted above, was explicitly restricted to the relevant provisions of Chapter 10 of the Working Environment Act.

It is therefore necessary to turn to the EFTA Court opinion for further guidance. In its Advisory Opinion, the EFTA Court relied on ECJ case law, reaffirming that the concepts of 'working time' and 'rest periods' are mutually exclusive, and that the classification must be made on a case-by-case assessment. The EFTA Court explicitly rejected the notion that only active work should be regarded as working time. In keeping with ECJ case law, the Court focused on the three key elements of the concept of working time, as follows:

The *first element* is that the worker must be carrying out his or her duties "in the context of the worker's employment relationship." Thus, *"the journeys of a worker, such as the appellant, taken in order to perform tasks specified by his employer at a location away from his fixed or habitual place of attendance, are requisite and essential for the worker to dutifully undertake those tasks."* This implies that if an employer imposes a place of attendance that is different from the usual one, the first element of the concept of working time is present. Hence, in such situations, the *starting point* seems to be that necessary travel time is working time. The Court's further reasoning, however, provides some important nuances.

The *second element* is that the worker must be at the disposal of the employer. The worker *"must be placed in a situation in which he is legally obliged to obey the instructions of his employer and carry out his activity for that employer."* Here, the EFTA Court turned to the distinction between working time and rest periods, first in general terms and then in light of the specific circumstances of the case. The Court seems to have been implying that time spent travelling to another place of attendance, as imposed by the employer, may not be working time, depending on a closer assessment of the circumstances. In this assessment, the Court looked at whether the worker would be able to rest effectively during his travelling time. The Court referred to several restrictions. He travelled in a police car, armed, carrying both his employer's and his own private mobile phone, with the vehicle's location being monitored by GPS by the Operations Centre. He was therefore, according to the EFTA Court, *"unable to use his time freely and pursue his own interests"*, and thus remained at his employer's disposal.

The *third element* is that the worker must be working during the period in question. The Court commented that workers who are required to undertake assignments away from their fixed place of attendance do not have the choice to decide how far they have to commute and so travelling to and from the place they are required to attend *"must be considered an intrinsic aspect of [the] work"* - unless they were required to travel to a different place of attendance so often that the effect was to transfer the employee's place of employment to a new place.

Commentary

As noted above, the Supreme Court's decision is narrowly construed, and its references to the Advisory Opinion of the EFTA Court are scanty and simplified. Both the Advisory Opinion and Supreme Court's judgment have attracted considerable attention in Norway and the Supreme Court's restrained approach has opened up debate, both in terms of its scope and implications - and views differ significantly. However, what can be said is that the Supreme Court explicitly stated that there was no reason to deviate from the EFTA Court's opinion on the interpretation of the Directive and this suggests that it is there that we should look for guidance.

To focus on the EFTA Court's Advisory Opinion, in our view this represents an important legal development, both from an EU/EEA law and a domestic law perspective. The Court indicates that where an employer imposes a particular place of attendance on a worker, travel time to that destination should be classified as working time unless, on the facts, the worker had sufficient freedom to pursue his or her own interests so that the journey amounted to an effective rest period. Compared to the traditional view in Norway, this constitutes a legal development of significant practical importance.

The Supreme Court's judgment also illustrates just how differently concepts of 'working time' are used in different legal instruments, both nationally and internationally and how this results in a complex interaction between statute law and collective agreements, and also sometimes a tension between traditional national concepts and EU law.

Comments from other jurisdictions

Belgium (Pieter Pecinovsky, Van Olmen & Wynant): The labour court of Antwerp recently handled a case (17 April 2018, AR 2017/AA/141) concerning workers in the cleaning sector who did not have a fixed workplace but had to travel from their home to the different clients. The employer reimbursed their transportation costs but did not recognise their travelling time as working time. However, the court judged that the time spent daily by workers without a fixed or usual workplace on the journey between their place of residence and the location of the customer designated by the employer was working time within the meaning of the Working Time Directive. This was the first Belgian application of the case law of the ECJ in *Tyco* (C-266/14).

Denmark (Christian K. Clasen, Norrbom Vinding): The question about whether travelling time should be classified as 'working time' or a 'rest period' within the meaning of the Working Time Directive (2003/88/EC) is also highly relevant to the Danish labour market.

In Denmark, the concept of working time is construed differently depending on the context in which the concept is used. While the Working Time Directive has been implemented in law,

in Denmark the question of how employees should be paid for working time is resolved in collective agreements. Indeed, some collective agreements include provisions specifically on travelling time. This means that the definition of working time under the Working Time Directive is not necessarily the same as working time under the various collective agreements.

According to Danish law, which implements parts of the Working Time Directive, travelling time to and from a place of work other than the fixed or habitual place of work should not be considered as a rest period to the extent that it exceeds the employees' usual travelling time to the workplace. Thus, if an employer requires an employee to go to a place which is different from his or her fixed or habitual place of work, the additional travelling time should be considered as working time.

Moreover, even though we do have a statutory provision in Denmark which specifically concerns travelling time, the provision does not provide any guidance as to what constitutes travelling time. It can therefore be difficult to determine whether or not a period of travelling time for work actually constitutes travelling time. Nor does the provision on travelling time provide any guidance as to whether that time should be classified as working time or a rest period – apart from in the specific situation regarding additional travelling time mentioned above.

Danish case law regarding disputes on travelling time often concern the question of whether the employee has a right to be paid for travelling time, and not whether the requirements of the Working Time Directive have been met. The assessment of whether a given period of time is travelling time and if so, whether this is working time is made on a case-by-case basis. When determining such disputes, the industrial arbitration tribunals apply and interpret the provisions of the applicable collective agreement. And, as mentioned, the concept of working time in these agreements may be different from the definition in the Working Time Directive and the national courts.

In light of these difficulties, the three key elements of working time set out by the EFTA Court are useful guidance as to how to interpret the Directive.

Finland (Janne Nurminen, Roschier, Attorneys Ltd.): In Finland, the Working Hours Act of 1996 stipulates that time spent on work and the time an employee is required to be present at a place of work at the employer's disposal are considered working hours. Travel time is not included in working hours if it does not constitute work performance.

Finnish case law refers often to an opinion by the Labour Council (which is an organisation

that gives non-binding opinions on the interpretation of the Working Hours Act). According to this opinion, travel during a work shift between places where work is carried out is part of working time if it is an intrinsic and fixed part of performance of the work. This has, for example, been the case in relation to home appliance repairmen and domestic helpers.

In another opinion, the Labour Council has stated that travel time might have some of the attributes of work performance, if an employee has to drive a car and, at the same time, transport other personnel, tools or equipment that are used to perform the work. However, as the Labour Council has stated, every trip must be assessed on its merits, and whether any given case would fulfil the definition of working time is uncertain.

All in all, it seems to me that the approach used to assess the status of travel time under Finnish law is less systematic than in the Norwegian case discussed here.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the question of whether travelling time is working time cannot be answered with certainty. The question is governed in Germany, on the one hand by Directive 2003/88, and on the other by the German Working Time Act (Arbeitszeitgesetz, the 'ArbZG'). However, the ArbZG does not contain any definitive rules about business trips. Section 2 paragraph 1, sentence 1 of the ArbZG only stipulates that working time within the meaning of the ArbZG is the time from the beginning to the end of the work, minus any rest breaks. Therefore, the question of whether travelling time is working time is often determined by case law in Germany.

According to the case law of the Federal Labour Court (BAG), the question of whether travelling time for business purposes counts as working time depends on whether the travelling time is predominantly set by the employer or whether the employee is free to decide how s/he wants to use the time. The business trip itself is not work performance (BAG, resolution of 14 November 2006 - 1 ABR 5/06). However, if the employer requires the employees to perform work during the business trip or to perform some burdensome activity, the travelling time will be regarded as working time. Therefore, an employer`s instructions about how to travel may influence the assessment of travel time.

Thus, if the employee is obliged to use his or her own car or company car to travel for business, the travelling time is regarded as working time. The BAG's justification for this is that the employee is not in a position to determine how his or her free time may be spent (BAG, judgment of 11 July 2006 - 9 AZR 519/05). Therefore, it can be assumed that the business trip described in the present case would also have been regarded as working time in Germany.

If, on the other hand, public transport is used, or if the employee is free to choose how to get there, this is only working time if the employee actually works during the journey (e.g. preparing appointments, answering emails or making phone calls) (BAG, judgment of 11 July 2006 - 9 AZR 519/05).

Transit times, including the time which an employee spends travelling from home to the workplace and back are not considered as working time (BAG, judgment 21 December 2006 - 6 AZR 341/06).

However, one additional question arises: whether employees should be paid for travelling time. Neither the ArbZG nor the EU Directive contain any provisions on pay. If there are no contractual, operational or collectively agreed provisions for the payment of business trips, remuneration for travel times outside working hours will normally depend on whether the employee can expect to be paid in the circumstances, or based on customary business practice.

Subject: Working time

Parties: Torbjørn Selstad Thue (party) and Politiets Fellesforbund (intervener) – v – The State v/Justis- og beredskapsdepartementet (party)

Court: Høyesterett (Supreme Court)

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