SUMMARY

2018/33 Availability periods: working hours or rest periods? (PO)

The Oporto Court of Appeal held that the employee's availability 24 hours per day, 6 days per week, breaches the employee's right to rest. However, such breach does not qualify the availability periods as overtime. The Court also found that the continuous use of a GPS system breached the employee's right to privacy.

Facts

The case concerned an employee who was hired in April 2011 to drive tow trucks and give technical assistance to broken down cars. He worked for eight hours a day, 40 hours a week. He had one weekly rest day, alternately on a Saturday or Sunday. During this time he was not available for work. The employer provided him with a tow truck installed with GPS, a mobile phone and a palmtop computer, all at the employer's cost. The employee could use all the equipment, including the tow truck, for personal purposes.

The employee was obliged to have the GPS and the mobile phone switched on 24 hours a day, six days a week, and was also obliged to be available to give technical assistance if required during that period. During this 'availability period', the employer monitored the employee's location – and the employer was aware of this.

He was only free from his obligations during the weekly rest day and whilst on vacation. The employee could use the availability periods for personal activities and was not bound to be at any particular location, provided he was available to work if necessary.

In March 2012, the parties put the above in writing, in an agreement "for the rendering of work under the special regime of exemption from fixed working hours", under which the employee received a monthly (fixed) payment for submitting to this regime.

Judgment

At some point, the employer terminated the employment contract. The employee contested the decision in court and during the proceedings, claimed that the employer had breached his right to weekly rest periods and that he was entitled to overtime pay for the 'availability periods'. He also claimed that his right to privacy had been breached by the continuous monitoring.

The Court of First Instance granted the employee a small amount of compensation for violation of his right to rest and a considerable amount (EUR 30,000) for violation of his privacy, but it acquitted the employer in relation to all other requests.

The Court of Appeal held that the availability periods qualified as working hours within the meaning of Directive 2003/88 (The Working Time Directive). The Working Time Directive defined 'working hours' as any period in which the employee works or is available to work; and 'rest periods' as any period that cannot be considered 'working hours'.

The fact that the employee was free to decide on his activities during the availability periods and was not bound to a specific location, did not change the fact that the availability periods should be classified as working hours. As the employee had to be available 24 hours a day, six days a week, the Court of Appeal held that the employer had breached all rules on working hours and rest periods.

Despite this, the employee was not found to be entitled to overtime pay for these periods. As Portuguese law defines overtime as work rendered outside the employee's work-schedule or in exceptional cases, beyond normal working hours, the employee needed to be able to prove the exact hours he had worked during the availability periods, which he could not.

The Court of Appeal also found the employer had breached the employee's right to privacy, rest and a humane and healthy life environment through its constant GPS monitoring. Calling it "modern slavery", it awarded moral damages to the employee.

Commentary

Although the definitions of 'working hours' and 'rest periods' in the Portuguese Labour Code are similar to those in the Working Time Directive, most Portuguese courts have traditionally interpreted them in a very restrictive way in terms of availability regimes. This basically meant that availability periods did not qualify as working hours on the basis that they could be used personal purposes. The obligation to be available was not sufficient to make the time 'working

hours.' Therefore, this judgment – and the direct application of concepts from the Working Time Directive – marks a new departure in Portuguese law.

As regards the part of the decision involving GPS monitoring, this may also lead to new developments regarding the use of new technologies – given the very strong stance the Court took about it.

It should be noted also that Portuguese law allows for moral damages only when a plaintiff demonstrates that s/he has suffered actual and serious harm. In this case, the Court of Appeal found the violation of the employee's privacy over such a long period and so seriously (24 hours, 6 days a week) to be sufficient in itself sufficient to justify an award of compensation, notwithstanding that no specific was proved in court.

Comments from other jurisdictions

Belgium (Gautier Busschaert, Van Olmen & Wynant): The Belgian Supreme Court (Cour de Cassation) decided in 2014 that the time during which a worker needs to be available for his or her employer does not fall within the concept of working time provided for in the Belgian labour law of 1971 (see Cass. 10 March 2014) if the location of the worker is not restricted by the employer. The law of 1971 uses a rather broad definition: *"the time during which the employee makes himself available for the employer."* Nonetheless, the Supreme Court has followed the case law of the ECJ, which looks at the stricter EU concept in Directive 2003/88. As recently confirmed by the ECJ in the *Matzak* case (C-518/15) of 21 February 2018, the ECJ distinguishes between a duty to be on standby and an availability service. In the case of a duty to be on standby, the location of the worker is restricted and therefore it is considered as working time. The Portuguese example is a mere availability service and thus would not have been seen as working time. However, the requirement to work with an active GPS 24 hours per day would be considered a disproportionate infringement of the privacy of the worker under Belgian privacy law and, indeed, the GDPR.

Finland (Janne Nurminen, Roschier Attorneys Ltd.): According to the Finnish Working Hours Act of 1996, an employer and employee can agree that the employee must remain at home or otherwise make themselves available to be called in to work when necessary. This stand-by time is not included in working hours. The length and frequency of stand-by time must not excessively disrupt the employee's free time. Upon agreeing on stand-by, the employer and employee must also agree on payment for it.

These provisions have been in effect in their current form since the Act entered into force in 1996, but similar provisions existed even before that. According to the earlier legislation, the

employee had to remain at home during a stand-by period and already at that time, stand-by time was not counted as working time.

As the Act defines the status of stand-by time as expressly not working time and, in addition, sets an obligation to pay the employee for it, the definition has not been a source for dispute. A similar claim would therefore probably not have been made in Finland.

Germany (Stefan Steeger, Luther Rechtsanwaltsgesellschaft mbH): Working time within the meaning of §2 of the German Working Time Act (*Arbeitszeitgesetz* – ArbZG) is defined as the time from the beginning to the end of work, without rest breaks. In Germany, this includes full-time work, attendance at work and stand-by duty, but not usually on-call time.

By German law, the current case would be regarded as on-call duty and therefore not working time in the sense given in the ArbZG. On-call duty obliges the employee to take up work on call – as in this case. The employee may stay wherever s/he likes, but the employer must be able to reach them at all times and they must be able to commence work. However, if an employee is on on-call duty, only the time actually spent working is regarded as working time. Therefore, a breach of the ArbZG is only possible if the employee actually works.

If the employer insists the employee reaches the workplace within a very short time, this could mean the employee's choice of location is restricted. If so, the employee will be considered to be on stand-by duty - which is regarded as working time even if the employee does not actually work.

This was recently confirmed by the ECJ in the case of *Ville de Nivelles / Rudy Matzak* (C-518/15). In that case, the employee had to be at his workplace within eight minutes after call. The German Federal Labour Court (*Bundesarbeitsgericht*, the BAG) has ruled that even an obligation to take up work within 20 minutes means that an employee is on stand-by duty and not on-call duty (BAG, decision dated 31 January 2002, 6 AZR 214/00).

If the employee actually performs work during on-call duty, working time/overtime is given. The compensation for overtime is subject to agreement between the parties, works agreements and/or collective agreements. However, the burden of proof regarding the performance of overtime instructed by the employer lies with the employee.

Nevertheless, the ArbZG tends to reflect the previous era, in which an employee tended only to work at the workplace. It does not yet reflect how employees today need to be constantly available on smartphones and laptops. Even short replies via smartphone constitute work.

Therefore, it is becoming tricky for employers to meet the provisions of the ArbZG (especially the legal resting time of eleven hours between ending work and starting it again the next day). We will have to await adjustments to the law to address these changes to the means of communication.

GPS monitoring of employees may be permitted under German law if, for example, the employee gives prior agreement to this measure or if operational requirements make it necessary. However, even so, the interests of the employee (the protection of privacy) must be weighed against those of the employer. Even if allowed by law, the monitoring of employees is only permitted during working hours. If a company car is available to the employee for private use, consideration must be given to this and adequate steps taken to address it. The employer must ensure that GPS monitoring is not carried out during an employee's time off.

If the employer monitors its employees beyond the legal limits and outside of working hours, they can claim damages and compensation as well. In addition, there is the risk of a high fine under the German Federal Data Protection Act (*Bundesdatenschutzgesetz*).

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