SUMMARY

2019/51 Stand-by time from home is paid working time (RO)

Stand-by time from home represents working time of medical personnel even for the periods when no medical activity was actually performed (no attendance at the hospital was required), the salary rights for such period being determined as a percentage of the hourly rate for the basic salary and the number of hours when stand-by time from home was performed.

Legal background

According to the Romanian Labour Code, work performed outside the normal duration of the weekly working time provided for by the law (8 hours per day, 40 hours per week) is considered overtime. Article 111 of the Labour Code defines working time as:

"any period during which the employee performs work, is at the employer's disposal and performs his or her tasks and duties, in accordance with the provisions of the employment contract, the applicable collective contract and/or the legislation in force."

According to Article 48(2) of the Annex to Order no. 870/2004 on approving the Regulation on working time, the organization and on-call service in public units in the health sector (the 'Regulation'), only those hours effectively performed in the public unit are considered hours actually worked.
However, Article 38(5)–(8) of the Regulation provides:

(5) Stand-by time from home is organized, on weekdays, between the end time of the schedule set for the current morning activity of the doctors and the start time of the morning programme of the next day.
(6) On weekly rest days, public holidays and other days when, according to legal regulations [those days] are free days, the stand-by time from home starts in the morning and lasts 24

hours.
(7) The doctor who provides stand-by time from home during this period has the obligation to respond to the requests received from the on-call coordinating doctor and to present to the hospital within a maximum of 20 minutes.
(8) During the whole period of stand-by time from home, the physical and mental state of the nominated doctor must allow the adequate provision of the medical services, in emergency situations, according to his professional competences.

Regarding the payment of stand-by time from home, Article 46 of the Regulation provides that:

"The payment of the stand-by time is made according to the hourly rate determined on the basis of the individual basic salary, corresponding to the professional expertise of the personnel is confirmed by order of the Minister of Health."

Article 47 of the Regulation provides that:

"(...) the stand-by time performed to ensure the continuity of the medical assistance during the weekly rest days, public holidays and other days when, according to legal regulations [those days] are free days, is paid with an increase of up to 100% of the hourly rate of the function base."

Article 3(6) of Annex no. III to Law no. 284/2010 regarding the unitary remuneration of personnel paid from public funds provides:

"The doctors who are nominated to provide emergency medical care, through home calls, will be paid for the period in which they provide stand-by time from home with an income of 40% of the hourly rate for the basic salary and the number of hours when stand-by time from home is performed."

Facts

Mr P.T.L. (the 'Claimant') was employed within the Ophthalmology Department at the Vâlcea County Emergency Hospital (the 'Defendant') between 1 November 1984 and 31 March 2016. The employment contract terminated after he resigned.
According to the information provided by the Claimant, the working time of doctors employed in the public health sector was an average of seven hours per day. After seven hours, the medical assistance was performed through stand-by time from home using the 'on-call service'. The 'on-call service' involved a stand-by time from home, whereby the doctor should be present at the hospital within a maximum of 20 minutes from the phone call in the case of

an emergency.
Since April 2009, the Claimant had been providing stand-by time from home. The stand-by time was performed: (i) on weekdays between the end time of the schedule set for the current morning activity of the doctors and the start time of the morning programme of the next day; and (ii) on weekly rest days, public holidays and other days when, according to legal regulations, those days are free days starting in the morning and lasting 24 hours (note that according to recent Romanian legislation, other paid free days may be established by collective labour agreements or by internal regulations, for example, special family events such as marriage, child birth, etc.).
As the Claimant considered that the stand-by time from home represented working time even for the periods when no medical activity was actually performed, the Claimant filed a claim against the Defendant requesting, among other things, the payment of the net amount of LEI 10,000 (provisionally established) as salary entitlements for the stand-by time from home.
The Tribunal dismissed the Claimant's request and held that stand-by time from home did not represent working time and hence should not be paid. According to the provisions of Article 48(2) of the Regulation, working time means the periods when medical activity is actually performed in the unit concerned.
Following the Tribunal's ruling, the Claimant appealed the judgment before the Court of Appeal of Pitești criticising its legality.

Judgment

The Court of Appeal admitted the appeal, partially overturned the decision pronounced by the Tribunal and admitted the Claimant's request regarding the payment of stand-by time from home.
In substantiating its judgment, the Court of Appeal referred to the decision of the ECJ in case C-518/15 (*Matzak*).
The Court of Appeal considered that there were similarities between the Claimant's case and the ECJ's ruling. The ECJ's ruling concerned the situation of a volunteer firefighter (Mr Rudy Matzak) who performed stand-by time at the fire station. The Belgian legal provisions were similar to those provided by Article 38(7) of the Regulation, namely:

"During periods of stand-by duty, every member of the volunteer fire service serving in the Nivelles fire station must: (...) remain at all times within a distance of the fire station such that the period necessary to reach it when traffic is running normally does not exceed a maximum of eight minutes."

In the above case, the ECJ interpreted several provisions of Directive 2003/88/EC concerning certain aspects of the organisation of working time (the 'Directive'). Thereby, Article 15 of the

Directive:
"must be interpreted as not permitting Member States to maintain or adopt a less restrictive definition of the concept of 'working time' than that laid down in Article 2 of that Directive. (...) Article 2 of the Directive must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within eight minutes, very significantly restricting the opportunities for other activities, must be regarded as 'working time'."
As the Court of Appeal considered that the judge must interpret national law as closely as possible to the text and purpose of the Directive, in order to achieve the set objective, the judge decided to interpret the national law in the light of ECJ case law as well.
Analysing the facts of the Claimant's case, the Court of Appeal identified:
- the obligation to respond within a maximum of 20 minutes from the phone call in the case of an emergency;
- the impossibility of organising other activities assimilated to leisure time during the stand-by time from home; and
- the obligation of the Claimant to be in a physical and mental condition enabling him to provide adequate medical services in emergency situations.

Consequently, stand-by time from home represents in fact working time even for the periods when no activity was actually performed (i.e. no attendance at the hospital was required) and, by applying Article 3(6) of Annex no. III to Law no. 284/2010, the Court decided that for such periods the Defendant was obliged to pay to the Claimant their salary rights, namely 40% of the hourly rate for the basic salary multiplied by the number of hours when stand-by time from home was performed.

Commentary

Last year, we featured a similar case (EELC 2018/34 – Stand-by time must be interpreted in the light of ECJ case law). In that case, the claimant was employed as an electrician by the defendant for eight hours per day and for the remaining 16 hours the electrician was on stand-by duty in a specially designed space for rest and was required to work when necessary.
The final decision pronounced by the Court of Appeal of Craiova was in the claimant's favour as well, stating that for the periods when the activity was actually performed the payment was granted as overtime and for the periods when no activity was actually performed the payment was granted in accordance with the collective bargaining agreement or the individual employment contract.
Comparing previous decisions pronounced by Romanian courts which often do not refer to the provisions of EU law, we may observe that the interest of identifying and applying these provisions in Romanian judgments has considerably increased lately. The rulings presented

above are important because both Courts applied EU legislation ensuring the objective of a unitary jurisprudence with respect to the 'working time' definition is met.
On what concerns the payment of such period, we may assume that this issue has not been solved yet because the Supreme Court did not provide a firm answer on this point.
Being requested to pronounce a preliminary ruling on how the Romanian Courts have to apply the Directive and the interpretation given by the ECJ with respect to the payment of stand-by time when no activity is performed, the Supreme Court ruled that it is at the discretion of the competent court entrusted with the case to assess whether periods of stand-by time represent working time and is to be paid as such. In doing so, the court should apply Romanian law as interpreted in the light of ECJ case law.
Such interpretation still offers the possibility for Romanian courts to apply one of two distinct trends identified in practice: (i) the majority opinion which established that stand-by time does not constitute 'working time' even if such stand-by time was compensated by a salary supplement agreed through the collective employment contract; (ii) the minority opinion which established that stand-by time during which the employee is at the employer's disposal does represent 'working time' so the employee is therefore entitled to the salary supplements stipulated in the Labour Code and collective employment contract.
After the Supreme Court's ruling, both Romanian Courts pronounced judgments adhering to the minority opinion. Therefore, we may observe that, lately, Romanian courts tend to grant to employees the right of being paid during the stand-by time performed even when no activity has actually been performed.
However, it remains to be seen whether other national courts will agree on such an interpretation.

Comments from other jurisdictions

Bulgaria (Rusalena Angelova, DGKV): Further to Bulgarian law, stand-by duty from home is defined as 'on-call' duty: a working hours' regime where the employee is obliged to be at the employer's disposal outside of the employer's premises and where the employee should be ready to perform his/her work and appear at the employer's premises, if necessary. The possibility of introducing on-call duty (if the specifics of the work so require) is agreed in the collective bargaining agreement or in the individual employment agreement.
Unlike the Romanian legislation, Bulgarian law explicitly mandates that the time employees are on on-call duty outside of the employer's premises is *not* considered working time. However, for the hours during which the employee was on such on-call duty, an additional remuneration should be paid at the amount of at least BGN 0,10 per hour. In cases where *actual work* is performed during on-call time, such work *is* considered overtime. In such cases, the employer must consider the employee's statutory entitlement to the minimum duration of

daily and weekly rest which is as follows: 12 hours minimum daily rest and 48 hours minimum weekly rest. Further, employees cannot be on on-call duty in two consecutive working days or for more than two rest days in one calendar month.
Evident from the above, the nature of on-call duty outside of the employer's premises and the payments due to the employees while being on-call are strictly regulated under Bulgarian law. Thus, national courts have been consistent in their practice with regards to on-call duty.

Croatia (Dina Vlahov Buhin, Vlahov Buhin i Šourek d.o.o. in coop. with Schoenherr): Pursuant to the provisions of the Croatian Labour Act, working time is any period during which the employee is working, i.e. during which the employee is at the employer's disposal at their workplace or another place determined by the employer, ready to carry out their activities and duties in accordance with the employer's instructions. On the other hand, the Labour Act further provides a definition of a 'stand-by' time, i.e. a period during which the employee, should a need arise, be available at the employer's request to work, yet is neither located at their workplace nor at another place determined by the employer. Stand-by time is, thus, not regarded as working time. During the stand-by period, the employee's obligation to work depends on randomness and there is no continuity, in which case the employee may, though in a limited way, manage their time, since they do not have to be present at the workplace. Evidently, the legislator made a distinction between working time and stand-by time by emphasizing, *inter alia*, the location of the employee at the time of being obliged, i.e. available to work, for the employer. During the stand-by time, the employee can be located at any place chosen by them. If they are, however, called on by the employer, such work they perform at their workplace or any other place determined by them will be regarded as working time. As regards being reimbursed for the stand-by time, this must be governed explicitly either by the employment or a collective agreement in order to apply to the employee.
The Collective Agreement for the Healthcare Sector further elaborates on stand-by time stating that the stand-by employee is obliged to respond to the employer's request without delay and to arrive at the workplace, within one hour at the latest. For the stand-by time the compensation is determined in relation to the employee's basic salary and calculated in percentages (3-5%).
Considering the above-mentioned provisions of the Croatian Labour Act and Collective Agreement, in our opinion the Croatian courts would likely determine that stand-by time should not be regarded as working time and therefore should not be paid as such. On the other hand, it is to be noted that Croatian law and specifically the Collective Agreement provides for a somewhat longer responding period for medical practitioners (one hour in comparison to 20 minutes under Romanian law) and therefore being slightly less restrictive with respect to the employee's opportunities for other activities. Therefore, in our opinion the courts would decide that the stand-by periods when the activity was actually performed would be

considered as working time and paid as overtime, while the stand-by periods when no activity was actually performed would not be considered as working time and would likely be paid in line with specific provisions of the employment contract or collective agreement regulating stand-by.

Germany (Ines Gutt, Luther Rechtsanwaltsgesellschaft mbH): In Germany there are generally three different less intensive forms of work: 1. so-called '*Arbeitsbereitschaft*', 2. so-called '*Bereitschaftsdienst*' and 3. so-called '*Rufbereitschaft*'. Arbeitsbereitschaft is the case when the employee does not have to perform full activity during their regular working hours. It is described by the Federal Labour Court (*Bundesarbeitsgericht*) as time of alert attention in a state of relaxation. Bereitschaftsdienst is carried out by an employee who has to be at a place determined by the employer within or outside their regular working hours in order to start work immediately on demand. Rufbereitschaft differs from Bereitschaftsdienst in that the employee is free to choose their place of stay if they can guarantee that they can be contacted at all times by the employer.
In the present case, a court would probably assume Bereitschaftsdienst or Rufbereitschaft. In general, both forms of work have to be paid by the employer. But the remuneration may be lower than the 'normal' remuneration.
Moreover, Rufbereitschaft is not part of working time as defined by the Working Time Protection Act (*Arbeitszeitgesetz* – ArbZG). It is rest time. Only the time that the employee is asked to perform their work during the time of Rufbereitschaft is working time within the meaning of the ArbZG. Nevertheless, this does not affect the general obligation to pay remuneration.
In contrast, the legal classification of Bereitschaftsdienst was controversial for a long time. Only as a result of the ECJ ruling on working time as defined in Article 2 of the Working Time Directive (93/194/EC) in the context of on-call services by hospital doctors did the legislature amend the ArbZG. From there on, the Bereitschaftsdienst counted as working time and is therefore also added to the maximum working time provided in Secion 3 ArbZG.
In summary, it can be stated that the present case cannot be transferred directly to the German jurisdiction. Nonetheless, the result of the legal dispute would probably be the same: in Germany, too, the time spent on call would have to be remunerated – regardless of whether Rufbereitschaft or Bereitschaftsdienst is given.

United Kingdom (Richard Lister, Lewis Silkin LLP): Similar issues in relation to the status of time spent on stand-by often arise in the UK. The ECJ case law is clear that even stand-by time spent at home can constitute working time where the geographical and temporal constraints imposed by the employer objectively limit the worker's opportunities to pursue personal and social interests. The *Matzak* judgment, in particular, establishes that the emphasis should be

on the restrictive effect of the obligations placed on the worker as regards his/her freedom to engage in other (non-work) activities, rather than on the specific location concerned.
In one UK case arising in Northern Ireland, a worker was employed to provide maintenance and repair services to buildings and plant at the employer's premises. He worked under a rota requiring him to be on call for a continuous period of seven days once every six weeks, for which he received a fixed payment together with a separate payment for the actual time he spent on call-outs. Although he was not required to be either at the employer's premises or at home while on call and was free to spend his time on non-work activities, he had to be available at all times during such periods and be ready to deal promptly with maintenance or repair enquiries as they came through. He had discretion to respond to such enquiries in various ways – attending the site himself, sending a tradesman, or deciding not to take any action at all. The Northern Ireland Court of Appeal overturned a tribunal's decision that the whole of the on-call periods comprised working time. While the Court accepted that there were constraints on the claimant's freedom of action while on call, these were not absolute: his situation could be described as 'being contactable', without any obligation to be present and available at the workplace or other location designated by the employer. The Court concluded that he was to be treated as working only when he was called on actually to provide services during the period of stand-by (*Blakley – v – South Eastern Health and Social Services Trust* [2009] NICA 62).
Significantly, litigation on issues of this nature is occurring in the UK not just under the Working Time Regulations 1998 (which implement the EU Working Time Directive), but also under our national minimum wage legislation. The ongoing case of *Royal Mencap Society – v – Tomlinson-Blake* [2018] EWCA Civ 1641, for example, is of major significance for employers in the UK's care sector. The Court of Appeal decided that care workers carrying out 'sleep-in' shifts were not entitled to the minimum wage for the whole shift, but only when they were required to be awake and working. The trade union supporting the claimants' case has appealed to the Supreme Court (the UK's highest court), with the hearing scheduled to take place in February 2020.

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