SUMMARY

2021/41 Home-based stand-by time may constitute working time in accordance with EU law, but paid differently by virtue of national law (BE)

Building upon the ECJ case law qualifying stand-by time with significant availability obligations of volunteer firefighters as working time, the Belgian Court of Cassation has upheld a system of compensation by which stand-by time pays less than regular working time.

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Legal background

p style="margin-right:9px">While Directive 2003/88/EC on the organisation of working time provides straightforward definitions of working time ("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")[1] and rest time ("any period which is not working time"),[2] these mutually exclusive definitions encounter difficulties when it comes to qualifying correctly stand-by or on-call periods.

p style="margin-right:9px">In its *Matzak* decision,[3] the Court of Justice of the European

Union (ECJ) had to address the issue of on-call periods for firefighters with significant obligations in terms of availability. Considering that during stand-by periods the firefighters not only had to stay at home but also had to be available there to their employer and be able to reach their workplace within eight minutes, the ECJ concluded that such restrictions were so significantly constraining the possibility to perform other activities that the stand-by periods had to be qualified as working time.

p style="margin-right:9px">Besides, in the same decision, the ECJ made clear that Article 17(3)(c)(iii) of Directive 2003/88 does not allow Member States to derogate from all the obligations arising from the provisions of that Directive, including Article 2 thereof, which defines, in particular, the concepts of 'working time' and 'rest periods'. Only the specific articles mentioned in Article 17 can be derogated from.

p style="margin-right:9px">The ECJ later confirmed this position for these two aspects in its *Offenbach* decision.[4] It reasserted the link between significant restrictions inherent to stand-by periods and their qualification as working time by stating that:

p style="margin-left:48px; margin-right:9px">the concept of 'working time' within the meaning of Directive 2003/88 covers the entirety of periods of stand-by time, including those according to a stand-by system, during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests (para. 38).

p style="margin-right:9px">In both cases, the ECJ made clear that the Working Time Directive does not apply to the remuneration of workers so that it is possible to make a distinction between the periods during which actual work is performed and the periods during which the worker is on stand-by for the purpose of remuneration, even if those periods must be regarded in their entirety as 'working time'. Conversely, periods of stand-by which do not qualify as 'working time' may also give rise to a reimbursement covering the inconvenience that those periods cause for the organisation of the worker's private time.

p style="margin-right:9px">It is against this background that the town of Beaumont in Belgium adopted a municipal regulation of 27 October 2009 aiming at setting out a specific system of compensation for different kinds of work performed by volunteer firefighters, including home-based stand-by time.

Facts

p style="margin-right:9px">The claimant, a volunteer firefighter attached to the municipality

of Beaumont, claimed arrears of remuneration on several grounds including on the basis of his past home-based stand-by time. The municipal regulation provided for the granting of a specific indemnity for home-based stand-by time instead of a full-rate remuneration, which was challenged by the claimant.

p style="margin-right:9px">The home-based stand-by time at hand involved significant restrictions, among which the duty to be able to reach the fire station in a very short period of time (10 minutes).

p style="margin-right:9px">Applying the reasoning of the *Matzak* decision, the first instance jurisdiction, followed in appeal by the Mons Labour Court, considered that such home-based stand-by time indeed qualified as working time. The latter also followed the ECJ by acknowledging the absence of any guidance regarding remuneration in the Directive, from which it inferred that the latter does not prevent the granting of a distinct, lower reward for home-based stand-by time.

p style="margin-right:9px">The Labour Court then turned to the general prohibition of discrimination featuring in Articles 10 and 11 of the Belgian Constitution. On this basis, it considered there was no valid justification to grant a different compensation for different types of workers, i.e. professional firefighters versus volunteer firefighters. The Court therefore stated that the latter should be remunerated at the full rate, on an equal basis with professional firefighters.

p style="margin-right:9px">The Beaumont municipality in turn challenged this decision before the Belgian Court of Cassation on several grounds. It claimed among others that stand-by time was not 'working time' and that volunteer firefighters were not in a situation comparable to professional firefighters so that the former were not being discriminated against the latter, when receiving a specific indemnity.

Decision

p style="margin-right:9px">In a concise decision, the Court of Cassation started from Directive 2003/88/EC and the *Matzak* and *Offenbach* decisions to confirm that the home-based stand-by time performed by the claimant qualified as working time in view of the significant restrictions upon enjoyment of his free time imposed during those periods.

p style="margin-right:9px">The Court then underlined that, as the ECJ itself had stressed in those decisions, the Directive does not provide any rule regarding remuneration and, more specifically, it does not prevent the granting of a different compensation for stand-by time.

p style="margin-right:9px">From there on, the Court departed from the conclusion reached by the first instance and appeal jurisdictions by rejecting the argument based on the principle of non-discrimination and by validating the existence of different sorts of compensation for different sorts of work performed by volunteer firefighters, as established by the municipal regulation at hand, in view of the absence of any EU law or Belgian law obstacles in that respect.

p style="margin-right:9px">In doing so, the Court therefore set aside the decision of the Labour Court requiring the municipality to pay a full-rate remuneration for home-based stand-by time.

Commentary

p style="margin-right:9px">This decision from the Belgian Court of Cassation confirms the integration of the *Matzak* and *Offenbach* case law on the notion of working time into the Belgian legal order. The Court of Cassation refers extensively to those two decisions and upholds a system of differentiated remuneration for home stand-by time by volunteer firefighters.

p style="margin-right:9px">Rightly so, the Court of Cassation considers that this system is fully in line with EU law. Indeed, the Working Time Directive does not regulate remuneration so that working time can be remunerated differently depending on the type of work which is performed.

p style="margin-right:9px">One could still wonder whether the Supreme Court has not been too quick to dismiss the argument based on the principle of non-discrimination. The Court does not clearly set out the reason for doing so, while this principle seemed central in the reasoning of the Labour Court. Is this because volunteer firefighters and professional firefighters are not in a comparable situation? Or because this principle was not decisive in the reasoning of the Labour Court of Appeal?

p style="margin-right:9px">In any case, one might still expect numerous decisions on this type of problematic issue considering that the assessment as to whether stand-by time constitutes working time very much depends on the concrete circumstances of each case. For the Court of Cassation, ten minutes to reach the fire station from home was enough to qualify as working time, while the *Matzak* decision accepted 8 minutes. What will happen if the time limit goes above ten minutes or if the firefighter does not need to be home but still must reach the fire station within 8 or ten minutes?

Comments from other jurisdictions

p style="margin-right:9px">*Finland (Janne Nurminen, Roschier, Attorneys Ltd)*: The Working Hours Act (872/2019, as amended) is the most relevant statute regarding working hours in Finland and it contains also provisions on stand-by time. In addition to the Working Hours Act, collective bargaining agreements (CBAs) usually contain provisions on working time and stand-by time. In Finland, the application of the Working Hours Act is linked to the employee status and therefore the Act applies only to the employees and not necessarily to voluntary work.

p style="margin-right:9px">In Finland, both the Supreme Court and the Labor Court have given judgments regarding the stand-by time of both firefighters and volunteer firefighters. In the Supreme Court's judgment KKO 2015:48 and the Labor Court's judgment TT 2021:34, a requirement to reach the fire station in five minutes was enough to qualify the stand-by time as working time. In its judgment KKO 2015:49, the Supreme Court established that the stand-by time of ambulance drivers was not considered to be working time, when the employees had to be in an ambulance within 15 minutes of the alert. However, there is no established case law concerning the compensation payable for stand-by time.

p style="margin-right:9px">According to the Finnish Working Hours Act, an employer and an employee can agree on stand-by time and the payable compensation. As a starting point, stand-by time is not included in the working hours, but if the employee is required to stay in the workplace or its immediate vicinity, the purported stand-by time can be considered to actually be working time. The restrictions imposed by stand-by on the employee's use of free time must be taken into the consideration in the amount of the compensation. Thus, the more binding and more committed the stand-by time is, the greater the compensation should be. Contrary to legislation in force in Belgium, the Finnish Working Hours Act does not distinguish between home-based stand-by time and other stand-by time.

p style="margin-right:9px">Even though the amount of compensation for stand-by time may be agreed relatively freely, Finnish labor legislation provides several provisions on equality and non-discrimination in workplaces that must be taken into consideration when agreeing on the compensation. According to Finnish labor legislation, e.g. the Employment Contracts Act (55/2001, as amended) the Non-discrimination Act (1325/2014, as amended) and the Act on Equality between Women and Men (609/1986, as amended), the employer is required to treat all employees in the same position and in the same duties equally and non-discriminatingly. The obligation of equal treatment and the prohibition of discrimination prohibit the employer from, e.g. paying different salary to its employees for the same work, without a justified reason. Thus, if the employer would, without a justified reason, pay its employees different amounts of compensation for stand-by time when the employees in practice work in the same conditions and their work-tasks are similar, the employer could be

in breach of the equal treatment obligation.

p style="margin-right:9px">To conclude, Finnish case-law merely defines whether stand-by time is considered to be working time or not and there is no established case law concerning the payable compensation. Therefore, as in Belgium, the amount of compensation for stand-by-time may be agreed relatively freely, subject however, to the applicable CBA (if any) and the obligation to equal treatment and the prohibition of discrimination.

p style="margin-right:9px">*Hungary (Zsofia Olah, OPL, Orbán and Perlaki Law Firm)*: It is indeed crucial that employers be able to correctly qualify stand-by periods, and proper guidelines coming from ECJ and national cases are highly welcome by them. Due to the difficulties that employers encounter when assessing in individual cases whether stand-by time constitutes working time, we also expect numerous ECJ and national cases in this regard.

p style="margin-right:9px">Hungarian courts also follow the ECJ's interpretation that the decisive factor in qualifying whether home-based stand-by time that the employee performs qualifies as working time is the extent to which the response time required by the employer limits the employee from dealing with his or her private affairs. Also, the courts must take into account how regularly the employee needs to perform actual work during the stand-by time, the regularity of the calls to work.

p style="margin-right:9px">Situations in which employers require employees to be available immediately (for example, to communicate with foreign customers/clients, provide quick guidance on a maintenance issue) in a certain timeframe beyond their officially scheduled working hours, may be of particular interest. Such informal or implied instructions or requests are not uncommon in certain businesses. In these situations, it is not impossible that the employee could successfully claim in the event of a certain regularity of calls or e-mails that the whole duration of such "informal" stand-by times qualify as working time due to the significant restrictions upon the enjoyment of his/her free time. In a case from 2015, the Hungarian Supreme Court held that the qualification of stand-by time does not require written instruction from the employer. As a next step, if the actual regularity of calls or e-mails significantly prevent the employee from freely manage his/her time, such periods can easily qualify as working time.

p style="margin-right:9px">*United Kingdom (Bethan Carney, Lewis Silkin LLP)*: There have been many UK cases on the difficult issues connected with the Working Time Directive arising for workers on standby. In *Fearon and ors v North Cumbria Acute Hospitals NHS Trust ET case no. 2504917/08* an employment tribunal referred to the various ECJ decisions to draw a distinction between two sets of hospital nurses based on how much freedom they had when

'on call'. The first set were 'first on call' nurses who assisted surgeons during operations and were required to sleep at the hospital whilst on call, even if they lived near by. The second set were 'second on call' who cared for patients following surgery. The 'second on call' nurses could be at home when on call but had to be within a ten-mile radius of the hospital, able to get in within 20 minutes and could not drink alcohol whilst on call. Both sets of nurses claimed their on call time was working time. The tribunal held that the standby time of the 'first on call' nurses was working time but that of the 'second on call' nurses was not. The tribunal principally had regard to the fact that the 'second on call' nurses could engage in a range of activities, such as watching television, reading books, shopping or socialising whilst on call, even if they did not have complete freedom (for example, to drink alcohol).

p style="margin-right:9px">It is common for UK employees to be paid less whilst on call than whilst doing more intensive work. Legal challenges to this practice have been limited to whether or not the employees are entitled to the national minimum wage (NMW) whilst on call. The test of 'working time' for NMW entitlement is different from that under the Working Time Regulations 1998. A recent Supreme Court decision, *Royal Mencap Society v Tomlinson-Blake (2021) ICR 758,* confirmed that if you are only 'available for work' whilst at home on call but not actually undertaking activities for your employer, you are not entitled to the NMW. You would become entitled to the NMW if you were called upon to undertake activities whilst on call. There have not been any UK claims using arguments similar to the argument based on 'non-discrimination' in this case. Debate has centred around argument on the, purely national, NMW laws.

p style="margin-right:9px">**Subject**: Working Time

p style="margin-right:9px">**Parties**: Mr D.T. – v – Ville de Beaumont

p style="margin-right:9px">**Court**: Belgian Court of Cassation

p style="margin-right:9px">**Date**: 21 June 2021

p style="margin-right:9px">**Case number**: S.19.0071.F

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[1] Article 2, para. 1.

[2] Article 2, para. 2.

[3] CJEU, 21 February 2018, *Ville de Nivelles – v – Rudy Matzak*, C-518/15.

[4] CJEU, 9 March 2021, *R.J. – v – Stadt Offenbach am Main*, C-580/19. See also CJEU, 9 March 2021, *D.J. – v – Radiotelevizija Slovenija*, C|344/19.

Creator: Cour de cassation (Belgian Supreme Court)
Verdict at: 2021-06-21
Case number: S.19.0071.F