**Case C-104/20**

**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

27 February 2020

**Referring court:**

Tribunal du travail de Nivelles (Labour Court, Nivelles, Belgium)

**Date of the decision to refer:**

9 January 2020

**Applicant:**

SD

**Defendants:**

Habitations sociales du Roman Païs SCRL

TE, acting as liquidator in the insolvency of Régie des Quartiers de Tubize ASBL



## 1. Subject matter and facts of the dispute

1 SD had worked since 15 October 1995 under a tripartite agreement with the public service housing organisation Habitations sociales du Roman Païs (‘HSRP’) and the non-profit association Régie des Quartiers de Tubize (‘the Régie’).

2 On 11 January 2016 SD’s employment contract was terminated with immediate effect.

3 By an application of 10 January 2017, SD brought proceedings before the tribunal du travail (Labour Court). He claims in essence that the remuneration paid to him during the agreement and, as a result, the payment made to him in lieu of notice, were insufficient, that he was not paid for overtime and night work and that he was unfairly dismissed.

4 The tribunal du travail (Labour Court) has ruled on a number of points of difference between the parties (classification of the employment relationship, the

joint and several liability of HSRP and the Régie, the payment in lieu of notice and the compensation for unfair dismissal) and has ordered a measure of inquiry with a view to determining the final amount of the arrears of remuneration owed to SD.

5 The Régie was declared insolvent on 13 May 2019.

6 Furthermore, in respect of the payment of arrears of remuneration for SD's overtime and night work, the tribunal du travail (Labour Court) is uncertain whether the national legislation on the burden of proof in relation to overtime and night work is in conformity with EU law and now refers a question to the Court of Justice for a preliminary ruling.

## 2. Provisions at issue

### *2.1. EU law*

#### *2.1.1. Charter of Fundamental Rights of the European Union*

7 Article 31(2) of the Charter provides:

'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'

#### *2.1.2. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9)*

8 Article 3, headed 'Daily rest', provides:

'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.'

9 Article 5, headed 'Weekly rest period', provides:

'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.

If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.'

10 Article 6, headed 'Maximum weekly working time', provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

*2.1.3. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1)*

11 Article 4(1) provides:

'Member States shall take the necessary steps to ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for the implementation of this Directive.'

12 Article 11(3) provides:

'Workers' representatives with specific responsibility for the safety and health of workers shall have the right to ask the employer to take appropriate measures and to submit proposals to him to that end to mitigate hazards for workers and/ or to remove sources of danger.'

13 Article 16(3) provides:

'The provisions of this Directive shall apply in full to all the areas covered by the individual Directives, without prejudice to more stringent and/ or specific provisions contained in these individual Directives.'

*2.1.4. Case-law of the Court of Justice*

**Judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402)**

In that judgment, the Court held that '*Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, and Article 4(1), Article 11(3) and Article 16(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured*.'

The Court also specified that '*in that regard it is irrelevant that the maximum weekly working time laid down in the present case [may] be more favourable to the worker than that provided for in Article 6(b) of Directive 2003/88. It remains*

*the case ... that the national provisions adopted in the matter contribute to the transposition into national law of the directive, with which Member States must ensure compliance by adopting the requisite arrangements to that end. In the absence of a system enabling the duration of time worked each day to be measured it remains equally difficult, if not impossible in practice, for a worker to ensure effective compliance with a maximum duration of weekly working time, irrespective of what that maximum duration may be'* (paragraph 51).

Similarly, the Court adds that '*consequently, in order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured*' (paragraph 60).

As regards the role of the national court, the Court held as follows:

'[68] *Finally, it must be recalled that, according to settled case-law, the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty, under Article 4(3) TEU, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, inter alia, judgments of 19 April 2016, DI, C-441/14, EU:C:2016:278, paragraph 30, and of 13 December 2018, Hein, C-385/17, EU:C:2018:1018, paragraph 49).*

[69] *It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of national law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 TFEU (judgment of 19 April 2016, DI, C-441/14, EU:C:2016:278, paragraph 31 and the case-law cited).*

[70] *The requirement to interpret national law in a manner that is consistent with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (judgments of 19 April 2016, DI, C-441/14, EU:C:2016:278, paragraph 33; of 17 April 2018, Egenberger, C-414/16, EU:C:2018:257, paragraph 72; and of 11 September 2018, IR, C-68/17, EU:C:2018:696, paragraph 64)*'

**Judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82)**

The referring court also recalls that the Court of Justice has held that the Member States may not adopt a less restrictive definition of the concept of 'working time' than that laid down in Article 2 of Directive 2003/88 (judgment of 21 February 2018, *Ville de Nivelles* v *Rudy Matzak*, C-518/15, EU:C:2018:82).

### *2.2. National law*

14 Article 1315 of the Belgian Civil Code provides:

‘A party claiming performance of an obligation must prove that the obligation exists.

Conversely, a party who claims to have been released from an obligation must prove that he has made the payment or performed the act whose payment or performance gave rise to the extinction of his obligation.’

## 3. Positions of the parties

15 SD believes he is owed arrears of remuneration for overtime and night work. In terms of proof, he relies on the evidence he has submitted and on the provisions of Directive 2003/88 and Article 31(2) of the Charter, both interpreted in the light of the judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402). In the alternative, in the event that no arrears of remuneration are due for overtime and night work, he claims that the defendants should be ordered to recompense him to the extent of the unjust enrichment they enjoyed as a result of the work carried out during overtime and at night.

16 The liquidator in the Régie’s insolvency has stated that it is not defending the action.

17 HSRP relies on the fact that it is a legal person governed by public law and submits that it falls not within the scope of the loi du 16 mars 1971 sur le travail (Law on work of 16 March 1971) but only within the scope of the loi du 14 décembre 2000 fixant certains aspects de l’aménagement du temps de travail dans le secteur public (Law of 14 December 2000 laying down certain aspects of the organisation of working time in the public sector), under which no overtime or differentials are payable.

18 Furthermore, evidence has not been furnished to prove the overtime at issue, and nor can HSRP be criticised for the lack of a system for measuring working time, since one has existed at HSRP for many years.

19 In the alternative, no unjust enrichment has occurred.

## 4. Assessment by the tribunal du travail (Labour Court)

20 Relying on the Court’s case-law (see section 2.1.4 above), the referring court takes the view that HSRP’s argument that the guidance in the judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402) is irrelevant because these proceedings were brought before that judgment does not stand up to examination.

The referring court also rejects the claim that HSRP is not covered by the Law on work of 16 March 1971. Indeed, Article 1 of that law defines its scope *ratione personae*, namely employers and workers — which include HSRP and the applicant respectively — whilst, for certain parts of the law only, Article 3(1)(1) excludes from its scope '*persons employed by the State, provinces, communes, the public institutions of the State, provinces and communes and public interest bodies, unless they are employed by institutions engaged in industrial or commercial activity or by institutions providing healthcare or preventive or sanitary care*'. HSRP does not fall within any of those categories because it is a société coopérative à responsabilité limitée (limited liability cooperative society, SCRL).

In relation to the EU provisions, the referring court notes that directives have only vertical direct effect and therefore cannot be relied upon between individuals. The fact nevertheless remains that, where Member States fail to comply with their obligations — as occurs in the present case since Belgium does not as a general rule *require employers to set up a system enabling the duration of time worked each day by each worker to be measured* — it is for the courts to take the measures — which must be specific because the Belgian court cannot rule by way of general and abstract provisions — that are necessary to achieve the result sought by the directive, including by reversing the case-law.

The Court of Justice has indeed noted particularly that a worker's position of weakness means that the worker '*might be dissuaded from explicitly claiming his rights vis-à-vis his employer where doing so could expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to the worker*' (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 45).

That is particularly true of overtime, in respect of which employers systematically raise the objection, as HSRP does, that it is recorded unilaterally or even that it is not expressly agreed.

Accordingly, '*in the absence of such a system [for individualised daily monitoring of working time], it is not possible to determine objectively and reliably either the number of hours worked by the worker and when that work was done, or the number of hours worked beyond normal working hours, as overtime'* (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 47).

In the present case, the referring court has found that the only way to ensure that the provision is given effect is to reverse the burden of proof where an employer has failed to put in place a reliable system for measuring working time, and that the matter goes beyond merely reversing the case-law since the burden of proof is governed by legislation, specifically by Article 1315 of the Civil Code according to which a party claiming performance of an obligation must prove that the obligation exists.

Admittedly, Article 8(4) of the new Book VII of the Civil Code, which retains that basic rule, allows the court to determine '*by a specifically reasoned judgment and in exceptional circumstances, who bears the burden of proof where it would be manifestly unreasonable to apply the rules set out in the preceding paragraphs' and states that 'the court may only avail itself of that power if it has ordered all the relevant measures of inquiry and ensured that the parties collaborate in the taking of evidence but has nevertheless failed to obtain sufficient evidence*', and Article 8(4) is therefore capable of giving effect to the EU provision. However, that article will only come into force on 1 November 2020.

The referring court therefore believes it is necessary to refer a question to the Court of Justice for a preliminary ruling on whether the provision of domestic law on the burden of proving overtime and night work is compatible with EU law where the Member State has not required employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.

## 5. The question referred

The tribunal du travail du Brabant wallon, division Nivelles (Walloon Brabant Labour Court, Nivelles division, Belgium) refers the following question to the Court for a preliminary ruling:

'Must Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, and Articles 4(1), 11(3) and 16(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, to the extent that they preclude the legislation of a Member State that does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402), be interpreted as precluding national legislation, in the present case Article 1315 of the Belgian Civil Code, which requires a party claiming performance of an obligation to prove that the obligation exists, where that legislation fails to establish that the burden of proof is reversed where workers claim to have exceeded their normal working time and where:

– that national legislation, in the present case the Belgian legislation, does not require employers to set up a reliable system enabling the duration of time worked each day by each worker to be measured; and

– the employer has not spontaneously set up such a system,

– so that it is impossible in practice for a worker to demonstrate that he has exceeded normal working time?'