

Case C-262/20

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

Date lodged:

15 June 2020

Referring court:

Rayonen sad Lukovit (Bulgaria)

Date of the decision to refer:

15 June 2020

Applicant:

VB

Defendant:

Glavna Direktsia 'Pozharna bezopasnost i zaschita na naselenieto' kam Ministerstvo na vatreshnite raboti (Ministry of the Interior General Directorate of Fire Safety and Civil Protection)

Subject matter of the main proceedings

Action brought by a public official against the Directorate, in which he is employed, concerning remuneration for night duty

Subject matter and legal basis of the request

Interpretation of EU law; Article 267 TFEU

Questions referred

(1) For the purposes of effective protection under Article 12(a) of Directive 2003/88/EC, should the normal duration of periods of night duty of police officers and firefighters be shorter than the normal duration of periods of day duty?

(2) For the purposes of the principle of equality set out in Articles 20 and 31 of the Charter of Fundamental Rights of the European Union, must the normal duration of periods of night work laid down in national law for workers in the private sector (7 hours) also apply to public-sector workers, including police officers and firefighters?

(3) Can the objective of limiting the duration of periods of night work mentioned in the eighth recital of Directive 2003/88/EC be effectively attained only if the normal duration of periods of night work, including for public-sector workers, is expressly laid down in national law?

Provisions of EU law and case-law cited

Charter of Fundamental Rights of the European Union: Articles 20, 31 and 47

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 of 18.11.2003, p. 9): recitals 2, 4, 7, 8 and 10 and Article 12(a)

Provisions of national law cited

Konstitutsia na Republika Balgaria (Constitution of the Republic of Bulgaria): Articles 16, 48(5) and 116(1)

Kodeks na truda (Bulgarian Labour Code): Article 140(1) and (2)

Zakon za Ministerstvoto na vatreshnite raboti (Bulgarian Law on the Ministry of the Interior, ‘the ZMVR’): Articles 142(1) and (5), 187(1), (3) and (9) and 188(2)

Naredbi na ministara na vatreshnite raboti za reda i organizatsiata i razpredelyaneto na rabotното време, za negovoto otchitane, za kompensiraneto na rabotata izvan redovното rabotno време, rezhima na dezhurstvo, vremeto za odih i pochivkite na darzhavnite sluzhiteli v Ministerstvoto na vatreshnite raboti (Regulations of the Ministry of the Interior on the arrangement, organisation, allocation and reporting of time on duty, compensation for work outside the normal duration of a period of duty, and timetabling on-call duty, time off and rest periods of officials of the Ministry of the Interior of 2014 (repealed by the following regulation, ‘the 2014 Ministry of the Interior Regulation’), 2015 (repealed by judgment of the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) of 11 July 2016) and 2016 (repealed by judgment of the Supreme Administrative Court of 10 December 2019, ‘the 2016 Ministry of the Interior Regulation’))

Naredba za strukturata i organizatsiyata na rabotnata zaplata ot 2007 g., prieta s postanovlenie na Ministerski süvet

(Regulation on the structure and organisation of wages of 2007, adopted by decree of the Council of Ministers): Article 9(2)

Brief summary of the facts and procedure

- 1 The applicant, VB, is employed by the Ministry of the Interior General Directorate of Fire Safety and Civil Protection as a 'shift foreman' at the Rayonnata sluzhba v grad Lukovit (Regional Office of the Town of Lukovit, Bulgaria).
- 2 In the period concerned - from 3 October 2016 to 3 October 2019 -, the applicant completed periods of on-call duty of 24 hours' duration, which were aggregated and accounted for every three months.
- 3 All overtime worked outside normal periods of duty in each quarter was accounted for and paid to the applicant for the respective period.
- 4 Up to 25 May 2015, periods of night duty worked by the applicant were multiplied by a factor of [1].143 and the resulting figure was added to the total number of hours worked in the accounting period, such that 7 hours' night duty worked was accounted for as 8 hours' duty, as provided for in the 2014 Ministry of the Interior Regulation.
- 5 That rule was discontinued in the follow-on regulation adopted in 2015. Thus, as of 25 May 2015, the Directorate ceased to apply the rule for converting periods of night duty to periods of day duty for the purpose of accounting for the duty worked; hence it was not applied at all in the period concerned.
- 6 VB brought an action before the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria), by which he requested that the Directorate be ordered to pay him BGN 1 683.74 as remuneration for unpaid overtime worked, plus statutory late payment interest.
- 7 He contends that he worked a total of 1 784 hours' night duty in the period from 2 October 2016 to 2 October 2019, which the Directorate should have converted to day duty by a factor of 1.143, with the result that he was owed payment for 2 039.112 hours worked in that period, and that the Directorate should, for that purpose, have applied Article 9(2) of the Regulation on the structure and organisation of wages, which states that, when working time is aggregated and accounted for, periods of night work are converted to day working time by a factor that expresses night work as a function of the normal working time in the day for the corresponding job.

Principal arguments of the parties to the main proceedings

- 8 The applicant's legal position is that, as there is no rule for converting night duty worked to day duty in a specific law, namely the ZMVR, or in the specific

secondary regulations adopted pursuant to the law which applied in the period concerned, the provisions of the Regulation on the structure and organisation of wages should be applied *mutatis mutandis*.

- 9 The Directorate contests the claim on the ground that there is no legal basis on which to convert periods of night duty to day duty.
- 10 With regard to the law, it contends that, according to Article 187(1) of the ZMVR, the normal duration of periods of duty of officials of the Ministry of the Interior is 8 hours a day, 5 days a week, giving a 40-hour week irrespective of the time of day or night in which the 8-hour working day falls.
- 11 The Directorate invokes Article 187(3) of the ZMVR, which states that only duty worked on shifts from 22.00 to 6.00 is night duty, and submits that the law applicable to servants of the Ministry of the Interior lays down the same normal duration of 8 hours for periods of both day and night duty.
- 12 The Directorate points out that the secondary regulations adopted by the Ministry of the Interior pursuant to the law regulating the duty time of servants of the Ministry of the Interior do not provide for night duty to be converted to day duty.
- 13 It is of the opinion that the rules set out in the Regulation on the structure and organisation of wages adopted pursuant to the Labour Code, which provided for night work to be converted to day work by a factor of 1.143, do not apply to officials of the Ministry of the Interior.

Brief summary of the basis for the request

- 14 In the light of the interpretation given by the Court of Justice in the order of 14 July 2005, *Personalrat der Feuerwehr Hamburg v Leiter der Feuerwehr Hamburg* (C-52/04, EU:C:2005:467, paragraphs 46 and 54), and in its judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 57), the national court assumes that the activity of the fire brigade ‘in normal conditions’, as in the present case, comes within the scope of Directive 2003/88/EC.
- 15 The applicant, who is a public official under Bulgarian law, is a ‘worker’ within the meaning of Directive 2003/88 for the purposes of the order of the Court of Justice of 7 April 2011, *May* (C-519/09, EU:C:2011:221, paragraphs 25 and 26).
- 16 Under the general labour legislation of the Republic of Bulgaria (the Labour Code), the normal duration of periods of work is 8 hours during the day and 7 hours at night.
- 17 The specific legislation regulating the status of officials of the police force and fire brigade (the ZMVR) does not include any express provision laying down the normal duration of periods of night duty; it simply stipulates the period of time

that qualifies as night, namely from 22.00 to 6.00, which is the same as in the Labour Code.

- 18 In the absence of any provision laying down the normal duration of periods of night duty, the Minister for the Interior stipulates in the regulations setting out the rules for accounting for the duty time of servants of the Ministry of the Interior that the normal duration of periods of day duty and night duty of police officers and firefighters is the same, namely 8 hours.
- 19 However, inasmuch as the protection of health is the reason for the specific regulation of night work, due to the generally acknowledged toll that it takes on the human body, the limitation on the normal duration of such work should be the same for all employees, irrespective of the basis on which their work effort is used.
- 20 In that sense, the referring court has already taken the fundamental view described below in actions brought by police officers and firefighters in identical disputes.
- 21 Unlike employment relationships between persons of equal standing, service relationships are regulated in numerous minimum standards for the protection of workers in line with sovereign principles.
- 22 Given these differences in the subjects of the law and the type of legal regulation, it is impermissible to apply the provisions of general labour law in a subsidiary manner to issues concerning the service relationships of officials which are not regulated in the provisions of a specific law.
- 23 It has to be assumed in cases in which the specific law (the ZMVR) refers expressly to the Labour Code with regard to protection for night work (as in Article 188(2) of the ZMVR, which states that 'officials on duty from 22.00 to 6.00 are entitled to special protection under the Labour Code'), that certain provisions of employment law can be applied directly to service relationships.
- 24 Special protection for night work has to be interpreted in the light of the two primary functions of the legal regulation of working time: 1. the economic function, expressed in the time in which the servant has to discharge his duties; and 2. the protective function, the objective of which is to safeguard health and to preserve people's ability to work.
- 25 The specific regulation of night work serves the protective function. The starting point is the knowledge, based on scientific and medical evidence, of the increased toll that night work takes on the natural biorhythms of the human body and the premature exhaustion which this causes, given that the human body uses the night to rest, recuperate and restore physical and mental strength.
- 26 According to Article 187(1) of the ZMVR, the normal duration of periods of duty of officials of the Ministry of the Interior is 8 hours per day. The absence of a specific provision regulating the normal and maximum permissible periods of

night duty can be explained by the reference in Article 188(2) of that law to the protection provided under the Labour Code, which provides for shorter periods of night work, namely up to 7 hours.

- 27 Article 187(3) of the ZMVR does not provide for the normal duration of periods of night duty to be 8 hours; it simply stipulates that for shift work, as in this case, night duty is permitted between 22.00 and 6.00 and the number of hours' duty worked must not on average exceed 8 hours in a period of 24 hours.
- 28 It follows from the foregoing legal analysis that the normal duration of periods of night duty worked by servants of the Ministry of the Interior must also be no more than 7 hours,
- 29 If this were not the case, the principles of comprehensive protection for workers enshrined in constitutional law would be infringed. Furthermore, officials, namely police officers and firefighters employed by the Ministry of the Interior would be worse off than servants employed by that Ministry under a contract of employment.
- 30 That would clearly qualify as unequal treatment, as servants of the Ministry of the Interior employed under a contract of employment do not come within the scope of the 2016 Ministry of the Interior Regulation and their night work is covered by the rules set out in Article 9(2) of the Regulation on the structure and organisation of wages, which provide for night work to be converted.
- 31 To exclude police officers and firefighters from the protection for night work achieved by limiting the normal duration of periods of night work to 7 hours would conflict with the objectives of the special status accorded to police officers and firefighters, whose profession always carries a higher risk. That would infringe the individual rights of the officials and harm the public interest, by reducing the efficacy of their duty at night.
- 32 That being so, the provision of Article 9(2) of the Regulation on the structure and organisation of wages has to be applied, as this brings about the same result ensured previously by the 2014 Ministry of the Interior Regulation.
- 33 The foregoing interpretation of national law made by the chamber of the District Court, Lukovit, was rejected by the Okrazhen sad Lovech (Provincial Court, Lovech, Bulgaria), sitting in its appellate capacity and, in view of the value in dispute, as the court of last instance.
- 34 The fundamental view of the appeal court, as expressed in its judgments on identical claims brought by police officers and firefighters, is based on two principal arguments.
- 35 The first consideration is that the absence of a rule providing for periods of night duty to be converted to periods of day duty by a ratio of 7:8 in regulations adopted pursuant to the law following the repeal of the 2014 Ministry of the Interior

Regulation represents a decision on the part of the legislature, not a lacuna in the regulations, and that the ambivalence of that legal solution might motivate the legislature to dispense with or amend it in future, but that that was no argument for the application of the law *mutatis mutandis*.

- 36 The second argument is that Article 188(2) of the ZMVR is not directly applicable, as it refers to special protection under the Labour Code.
- 37 As the relevant Bulgarian case-law is contradictory, interpretation proceedings have been initiated in the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) on the application of the Minister for Justice; however, it has not yet delivered a ruling.
- 38 The referring court has doubts as to whether the objectives laid down by Directive 2003/88 of limiting the duration of periods of night work and the means set out therein to protect night workers require the Member States to stipulate, in addition to the timeframe for night work or night duty, the 'normal duration' of periods of night work or night duty for workers in both the private and public sectors.
- 39 It is also important for the referring court to ascertain whether the objectives of Directive 2003/88 require the normal duration of periods of night work or night duty to necessarily be shorter than the normal duration laid down for periods of day work or day duty.
- 40 A further question that arises is this: if the Member State has stipulated that the normal duration of periods of night work is 7 hours for all private-sector workers, is it permissible, in the light of the need for equal treatment, for the duration of periods of night duty of police officers and firefighters employed in the public sector to be longer, that is 8 hours, which is the same as the normal duration of periods of day duty?
- 41 The answers to these questions will determine the outcome of the dispute in the main proceedings as, if the Court of Justice adopts an interpretation to the effect that the provisions of national law on the protection of police officers and firefighters on night duty are invalid and inconsistent with the need for equality, the national court could order measures to safeguard the Directive's objective of limiting the duration of periods of night duty.
- 42 It is settled case-law of the Court of Justice that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 4(3) TEU and Article 288 TFEU to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 38 and the case-law cited).
- 43 In order to fulfil that obligation, the principle of interpretation in conformity with EU law allows the whole body of domestic law to be taken into consideration and

the interpretative methods recognised by domestic law to be applied with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pursued by it (see, to that effect, judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 117, and of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 37 and the case-law cited)

- 44 The application of the principle of interpretation of domestic law in conformity with EU law in this case would not cause national law to be interpreted *contra legem*, as any lacuna in the ZMVR would be filled using the abovementioned interpretation methods.
- 45 In this case, the referring court has presented the reasons for its interpretation of all the domestic law, but has not considered it in the light of EU law, as the ambiguities identified in the interpretation of Directive 2003/88 prevent the adjudicating court from applying it directly before it has obtained an authentic interpretation from the Court of Justice.

Special request

- 46 The referring court considers that the conditions for an urgent procedure in accordance with Article 107 of the Rules of Procedure of the Court of Justice are met in this case. This particular case is one of thousands of individual cases brought before the Bulgarian courts by police officers and firefighters in recent years. At the same time, the fact that the courts in Bulgaria have taken two opposing views is seriously undermining legal certainty, compounded by the fact that the Supreme Court of Cassation has yet to rule on this question. The circumstances described above substantiate the urgency of the request for a preliminary ruling, which will enable all the courts before which numerous similar disputes have been brought to adopt the Court's interpretation of Directive 2003/88 and to apply the principle of interpretation of domestic law in a manner compliant with EU law.