Anonymised version

Case C-107/19

Request for a preliminary ruling

Date lodged:

12 February 2019

Referring court:

Obvodní soud pro Prahu 9 (Czech Republic)

Date of the decision to refer:

3 January 2019

Applicant:

XR

Defendant:

Dopravní podnik hl. m. Prahy, akciová společnost

(Omissis)

ORDER

The Obvodní soud pro Prahu 9 (District Court, Prague 9) (Czech Republic) has decided … in the case of

the applicant: **XR,** born on 8 February 1945,

resident at … Prague …

v

the defendant: **Dopravní podnik hl. m. Prahy, a public limited company**, …

with its seat at … Prague …

concerning payment of wages owed of CZK 95 335 plus interest and charges,

as follows:

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the Obvodní soud pro Prahu 9 (District Court, Prague 9) hereby respectfully requests the Court of Justice of the European Union for a preliminary ruling on the following questions:

1) Is a break period in which an employee must be available to his employer within two minutes, in case there is an emergency call out, to be considered 'working time' within the meaning of Article 2 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?

2) Is the assessment to be made in relation to the question above influenced by the fact that such interruption [of the break] in the event of an emergency call out occurs only at random and unpredictably or, as the case may be, by how often such interruption occurs ?

3) Can a court of first instance, ruling after its decision has been set aside by a higher court and the case referred back to it for further proceedings, fail to comply with a legal opinion pronounced by the higher court and which is binding on the court of first instance, if that opinion conflicts with EU law ?

Grounds:

1. By application of 6 November 2007, the applicant claims from the defendant payment of the sum of CZK 95 335, together with the associated default interest, in respect of an unpaid part of his wages for the period from November 2005 to December 2008. The applicant justifies his claim on the basis that he was employed by the defendant as a firefighter (head of the squad), and later as a firefighter, these posts requiring him in practice to be part of the provision of a continuous service. However, in every shift worked, the employer did not pay wages for two half-hour food and rest breaks. The applicant claims that even when taking those breaks he had to be available to his employer within two minutes in case there was an emergency call out.

2. The determination of whether, in such circumstances, the period covered by the break at issue is to be counted as working time is key for the decision in the case. The referring court also raises the issue of the consequences of a possible conflict between the decision of the Nejvyšší soud (Supreme Court) (Czech Republic) and EU law with regard to whether the legal opinion pronounced in that decision in appeal proceedings in cassation is binding on lower courts in the same proceedings.

National legislation

3. The subject-matter of the proceedings are the applicant's claims for the payment of part of his wages for the period from November 2005 to December 2008. For the purposes of the present case the material legislation is thus, first, that contained in Zákon **[OR. 2]** č. 65/1965 Sb zákoník práce (Law No 65/1965, the Labour Code) ('the Former Labour Code') and, secondly, that contained in Zákon č. 262/2006 Sb., zákoník práce (Law No 262/2006, the Labour Code) ('the Labour Code').

4. Paragraph 89(1) of the Former Labour Code provides as follows: *'an employer shall offer his employees, after no longer than six hours of continuous work,* ***a food and rest break*** *of at least 30 minutes; a person aged under 18 shall be offered such a break after no longer than four and a half hours of continuous work. If the work concerned cannot be interrupted, the employee shall be ensured* ***an adequate period to rest and eat****, albeit without interruption of the service or work; a person aged under 18 shall always be offered a food and rest break in accordance with the first sentence'*(emphasis added by the Obvodní soud pro Prahu 9 (District Court, Prague 9). Paragraph 89(5) of the Former Labour Code provides that *'the food and rest breaks offered shall not in general be counted as working time'*.

5. Subsequently, this was replaced by legislative provisions which were substantively entirely identical, namely Paragraphs 88(1) and 88(4) of Law No 262/2006, the Labour Code, which took effect from 1 January 2007. In their decision-making practice, the courts interpret that legislation identically to the preceding legislation and have taken the view that the former case-law is fully applicable also to the new legislation.

6. In the interpretation and differentiation of the terms 'food and rest break' and 'adequate period to rest and eat', the courts' decision-making practice is consistently based on the judgment of the Nejvyšší soud (Supreme Court) of 3 January 2007, reference 21 Cdo 42/2006, published under number93/2007 Sbírky soudních rozhodnutí a stanovisek, část občanskoprávní a obchodní (Collection of court decisions and opinions, Civil and Commercial law section). In that judgment the Nejvyšší soud stated:

   'Work performed in (dependent) employment by an employee for an employer is characterised by the fact that it is work which is carried out in a hierarchical employer-employee relationship, exclusively by the employee in person for the employer, according to the employer's instructions, in his name, for wages, pay or remuneration, in working time or time otherwise stipulated or agreed upon, at the employer's workplace or at another agreed place, at the costs of the employer and for which he bears the liability. As of the date on which the employment relationship arises, the employer is required to allocate the employee work according to the employment contract, to pay the employee wages for work carried out, to create conditions for the successful fulfilment of the employee's

occupational tasks and to comply with the other conditions of work laid down in legislation or in a collective agreement or employment contract (Paragraph 35(1)(a) of the Former Labour Code and Paragraph 38(1)(a) of the Labour Code), as consideration the employee is required to carry out the work in person, according to the employer's instructions, in accordance with the employment contract and in the working time stipulated, and to observe the work disciplinary rules (Paragraph 35(1)(b) of the former Labour Code and, analogously, Paragraph 38(1)(b) of the Labour Code).

The employer is authorised to require the employee to fulfil those obligations resulting from the employee's dependent position in the hierarchical relationship only in working time. Outside working time, which is understood to mean the time in which the employee is required to carry out work for the employer (compare Paragraph 83(1) of the Former Labour Code and, analogously, Paragraph 78(1)(a) of the Labour Code), the employer does not have any such authority requiring the employee to be at his disposal; if an employee refuses to carry out work outside working time, that is, in a rest period which does not constitute working time (compare Paragraph 83(2) Former Labour Code and, analogously, Paragraph 78(1)(a) of the Labour Code), he acts in accordance with the law and for that reason, since his actions do not constitute a culpable infringement of his employment obligations in course of the performance of his working tasks or in direct connection with them, he also cannot be accused of infringing the work disciplinary rules (his employment obligations). That basic standpoint must be borne in mind in the assessment of the nature of the terms "food and rest break" and "adequate period to eat and rest" and their interrelationship. If an employer offers an employee, without interruption of the service or work, an adequate period to eat and rest, that constitutes working time for which the employee has a right to wages.'

7. All of the decisions so far in the present case have been based on the findings cited above. However, the referring court and the first-instance appellate court concluded in their judgments, on the basis of the facts as determined (see points 8 to 10), that the applicant was provided with an adequate period to rest and eat, since *'it is clear from the nature of the applicant's work that there was no section of the shift in which he would be excluded from having to carry out work unforeseeably'*. On the other hand, the Nejvyšší soud (Supreme Court) concluded that the applicant's case concerned a 'food and rest break' since *'the nature of the applicant's work enabled the daily schedule of the employees of the Firefighting rescue squad, which was based on the "foreseeable" course of a shift, also to provide for a specific time during which the employees were to take their first and second breaks for food and rest, without the performance of their service being thereby in any way affected. While it is admittedly possible that the "unforeseeable performance of work" was not necessarily excluded in the course of the set breaks, those occurrences, by reason of the fact that they took place at random, do not have the quality of systematic work which "cannot be interrupted".'* **[OR. 3]**

Facts of the case as determined and proceedings before the national courts

8. It was established in the proceedings that the applicant was employed by the defendant (Dopravní podnik hl. m. Prahy) (the Prague Transport Company) as a firefighter (head of the squad) until 31 December 2007 and subsequently as a firefighter until 31 December 2008. He performed his work under a shift system organised into day and night shifts, in which the morning shift began at 06.45 and ended at 19.00 and the night shift lasted from 18.45 to 07.00. The company's daily schedule determines the work breaks. The daily schedule of the Firefighting rescue squad employees lays down in detail the time periods and activities carried out in the course of a shift, including the first and second breaks — which are always 30 minutes long and take place from 11.15 to 11.45 and from 23.15 to 23.45 and further from 16.15 to 16.45 and from 04.15 to 04.45.

9. In the Kačerov depot, where the applicant worked, there is a building for the firefighters on the premises where employees have at their disposal a kitchen equipped with a microwave, stove, fridge and freezer and a space in which to prepare food and where they may prepare snacks themselves. In addition, in another building on the premises approximately 200 metres away, there is the staff dining room and canteen which operates a service from 06.30 to 13.30 where meals are cooked for employees. Firefighters may go to the staff canteen during their shift, that is to say, they may leave their building. During this time they are equipped with transmitters in case they need to attend an urgent call out. In such a situation, they must reach the exit within two minutes, and a vehicle calls for them at the building in which the staff canteen is located.

10. The defendant did not count the time taken as food and rest breaks as working time for its employees holding posts as firefighters or firefighter (heads of squad) and so did not pay them wages for that period. However, if there was a call out during the time taken as a food and rest break, that period was calculated into the firefighter employee's working time as overtime, and was remunerated as such. In the time taken as food and rest breaks, no substitutability (even partial) of the employees was provided for.

11. On the basis of the facts as thus established, the referring court ruled, by a judgment of 14 September 2016, … that the defendant was to pay the applicant a sum totalling CZK 95 335 together with specific default interest. On an appeal brought by the defendant, the Městský soud v Praze (Prague City Court) (Czech Republic), as the first instance appeal court, confirmed in a judgment of 22 March 2017 the judgment of the first instance court in its entirety …. The defendant then brought an appeal on a point of law, in a special appeal procedure, before the Nejvyšší soud (Supreme Court). That latter court, by judgment of 12 June 2018, reference 21 Cdo 6013/2017 – 448, set aside both judgments of the lower instance courts and referred the case back to the court of first instance for further proceedings, in which the lower instance court is bound by the legal opinion pronounced by the Nejvyšší soud (Supreme Court).

12. The Nejvyšší soud (Supreme Court) dealt only tangentially with the issue of the applicable EU law in that judgment, when it held that:

'it is beyond doubt that an adequate period to eat and rest — as laid down in Paragraph 88(1) of the Labour Code, in the part of the second sentence coming after the semi-colon — is counted as working time, since – irrespective of the fact that Council Directive 93/104/EC concerning certain aspects of the organization of working time, to which the first-instance appeal court refers, was repealed on 1 August 2004 — the situation applicable is still that any of the employee's time in which he is working or is available to the employer, in accordance with national legislation or practice, constitutes working time'.

13. It must be stated in this connection that the national legislation (specifically the cited Paragraph 88(1) of the Labour Code, in the part of the second sentence after the semi-colon) distinguishes 'an adequate period to rest and eat' (rendered 'an adequate period to eat and rest' in the judgment of the Nejvyšší soud (Supreme Court) cited above), which an employer is required to offer an employee carrying out work which may not be interrupted. Such work is typically *'technologically or in terms of the service (functionally) impossible to interrupt, cannot be organised so as to allow breaks in the work to be taken, or is that in which it is impossible to relieve the employee for the duration of the break. In practice, this may, in particular, apply to the following types of cases: 'lone worker' worksites (services), when breaks cannot be offered on any shift, exceptional situations in which the employee cannot take his or her break, although he or she normally can do so'* …. The Nejvyšší soud (Supreme Court) did not consider the break at issue to constitute such a period.

14. **[OR. 4]** On the other hand, the first sentence of Paragraph 88(1) of the Labour Code defines a 'food and rest break', which is not in general counted as working time. The Nejvyšší soud considered the break at issue, during which the employee (firefighter) has to be available to his employer within two minutes, to constitute that very type of break. In its opinion, the lower court had failed to bear in mind that *'the nature of the applicant's work enabled the daily schedule of the employees (the Firefighting rescue squad), which was based on the foreseeable course of a shift, also to provide for a specific time during which the employees were to take their first and second breaks for food and rest, without the performance of their service being thereby in any way affected. While it is admittedly possible that the unforeseeable performance of work was not necessarily excluded in the course of the set breaks, those occurrences, by reason of the fact that they took place at random, do not have the quality of systematic work which cannot be interrupted.'*

15. The Nejvyšší soud (Supreme Court) added in this connection that:

'If it were to be significant for the purposes of the assessment of the nature of the work that in the course of taking a work break it may sometimes unforeseeably be necessary to interrupt the break, that consideration could be applied not only to

cases of the unforeseeable performance of work under the employment contract, but also, for example, to cases concerning fulfilment of the obligation to intervene under Paragraph 249(2) of the Labour Code'.

16. Paragraph 249(2) of the Labour Code governs the general obligation on an employee, where an employer is at risk of incurring damage, to avert that damage:

'Where the employer is at risk of incurring damage and it is necessary to intervene without delay in order to avert that damage, the employee shall do so; he shall not be obliged to take such action where he is prevented from doing so by an important factor or if by doing so he would expose himself, other employees or nearby persons, to serious risk.'

17. It is thus clearly key for the Nejvyšší soud's (Supreme Court's) legal opinion that emergency call outs resulting in the interruption of food and rest breaks occur only at random and unpredictably, as the case may be only rarely, and therefore they may not be characterised as frequently forming part of the performance of the employment obligations. The break at issue therefore may not, in the Nejvyšší soud's (Supreme Court's) opinion, be treated as working time.

18. The legal opinion pronounced by the Nejvyšší soud (Supreme Court) is binding on the referring court under Paragraph 243g(1) of the Občanský soudní řád (Czech Code of Civil Procedure).

19. However, in the further course of the proceedings (after the Nejvyšší soud (Supreme Court) had referred this case back to the court of first instance), the applicant argued that, for the assessment of the case, regard must also be had to the wording 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 and the connected case-law of the Court of Justice, and proposed that the Court make use of the procedure under Article 267 TFEU.

20. In this connection the referring court notes that it is aware not only of the Court of Justice's judgment of 3 October 2000 in *Simap*, C 303/98 (EU:C:2000:528), relied upon by the applicant in his response to the appeal on a point of law before the Nejvyšší soud (Supreme Court), but also of a series of other judgments, in particular that of 21 February 2018 in *Matzak*, C 518/15 (EU:C:2018:82). In that case the Court of Justice assessed whether *'stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities to have other activities, must be regarded as "working time".* The Court of Justice held in that judgment, inter alia, that *'it is apparent from the case-law of the Court that the determining factor for the classification of "working time", within the meaning of Directive 2003/88, is the requirement that the worker be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need. In fact, those obligations, which make it impossible for the workers concerned to choose the place where they stay*

during stand-by periods, must be regarded as coming within the ambit of the performance of their duties' (paragraph 59).

21. The Court of Justice thus inferred that:

'Article 2 of Directive 2003/88 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 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as "working time" (paragraph 66).' **[OR. 5]**

Resumption of proceedings

22. As stated above, in the present case the employee firefighters must be available to their employer within two minutes in case there is an emergency call out. In the view of the referring court, that completely prevents them from choosing the place in which they spend such breaks, and which seems to indicate that such a period must be considered to be working time within the meaning of Article 2 of Directive 2003/88 — in conflict with the binding legal opinion of the Nejvyšší soud (Supreme Court).

23. For the sake of completeness, the referring court points out that the subject of the questions it has referred is not in any sense the determination of the rate of remuneration in respect of the break at issue. First, the referring court is aware that the issue of the rate of remuneration in that sense is not dealt with in the abovementioned Directive or in EU law. Secondly, national law clearly determines the way in which the remuneration for the break at issue is to be determined, in the event that that period is counted as working time.

24. The referring court is aware that it cannot disregard its obligations stemming first and foremost from the principle of the binding nature of decisions in cassation given by a court hearing an appeal on a point of law (Paragraph 243g(1) of the Czech Code of Civil Procedure). On the other hand, it is nevertheless aware of the obligations imposed on it by Article 36 of the Charter of Fundamental Rights and Freedoms (Ústavní zákon č. 2/1993 Sb. (Czech Constitutional Law No 2/1993)), governing the right to a fair trial. It observes in that connection that the applicant has been asserting his claim since 2007, that he retired on 1 January 2009 and that he is currently aged 73.

25. The referring court was also required to take into consideration the case-law of the Court of Justice, according to which

'European Union law precludes a national court which is called upon to decide a case referred back to it by a higher court hearing an appeal from being bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with European Union law' (judgment of 5 October 2010, Elchinov, C-173/09, EU:C:2010:581, paragraph 32).

26. In those circumstances, and complying in full with the legal opinion pronounced by the Nejvyšší soud (Supreme Court), the referring court has decided to stay the proceedings under Paragraph 109(1)(d) of the Czech Code of Civil Procedure by order of 29 November 2018 … and has referred the questions set out in the operative part of this order to the Court of Justice of the European Union for a preliminary ruling, since it regarded that approach as best safeguarding the constitutionally-protected rights of the parties to the proceedings and the rights afforded to them under EU law.

[Formalities and steps in the procedure] (Omissis)