

Anonymised version

Translation

C-580/19 — 1

Case C-580/19

Request for a preliminary ruling

Date lodged:

30 July 2019

Referring court:

Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany)

Date of the decision to refer:

21 February 2019

Applicant:

RJ

Defendant:

Stadt Offenbach am Main

[...]

**VERWALTUNGSGERICHT DARMSTADT
(ADMINISTRATIVE COURT, DARMSTADT)**

ORDER

In the administrative proceedings

of RJ,

[...] Biebergemünd,

applicant,

[...]

v

Stadt Offenbach am Main (City of Offenbach am Main), [...] Offenbach am Main,
[...] defendant,

concerning stand-by duty/on-call duty remuneration

the Administrative Court, Darmstadt [...]

[...] has made the following order: **[Or. 2]**

Pursuant to Article 267 TFEU, a ruling by the Court of Justice of the European Union is to be obtained on the following questions:

1. Is Article 2 of Directive 2003/88/EC to be interpreted as meaning that periods of stand-by time during which an employee is subject to the obligation to reach the city boundary of his place of employment in uniform with the operational vehicle within twenty minutes are to be regarded as working time, even though the employer has not prescribed a place for the employee to stay, but the employee is nevertheless significantly restricted in his choice of location and in the opportunities to devote himself to his personal and social interests?

2. If the first question referred is answered in the affirmative:

In a situation such as that of the first question referred, is Article 2 of Directive 2003/88/EC to be interpreted as meaning that, when defining the concept of working time, account is also to be taken of whether and to what extent a service call-out is usually to be expected during stand-by duty which is to be spent at a place not prescribed by the employer?

Grounds

I.

- 1 In the main proceedings, the parties are in dispute as to whether periods of stand-by time performed by incident commanders with the Offenbach am Main fire service are to be classified as working time.
- 2 The applicant is a public official and carries out his duty as a firefighter (division commander) with the Offenbach am Main fire service.
- 3 In addition to his regular duty, according to the legislation applicable to the Offenbach fire service, the applicant regularly has to perform what is known as 'incident command' duty ('IC duty'). **[Or. 3]**

- 4 While on IC duty, the applicant must, pursuant to the operational service order of the Offenbach fire service, be constantly reachable, keep his uniform ready and have an operational vehicle provided by the defendant with him. While on duty the applicant must accept calls by which he is informed, as incident commander, of events and on which he has to make decisions. In certain situations, the applicant must go to the incident scene or place of employment. During IC duty the applicant has to choose his whereabouts in such a way that, if he is alerted, he can reach the Offenbach city boundary with the operational vehicle and in uniform within 20 minutes.
- 5 During the week, such IC duty lasts from 5 pm until 7 am the following day. At the weekend, IC duty lasts from 5 pm on Friday until 7 am on Monday. Weekend duty may follow a 42-hour week on day duty. On average, the applicant spends 10 to 15 weekends per year on IC duty. In the period from 1 January 2013 to 31 December 2015, the applicant was on IC duty on a total of 126 occasions, during which there were 20 alerts or operations. Therefore, averaged over three years, there were 6.67 alerts during the IC duty performed per year.
- 6 The applicant requested the recognition of IC duty as working time and the corresponding remuneration. The defendant rejected this by decision of 6 August 2014, as the defendant does not consider IC duty to be working time.
- 7 On 31 July 2015 the applicant brought an action before the referring court.
- 8 The applicant is of the opinion that IC duty is working time. Stand-by time may have to be regarded as working time even if, although the employee's whereabouts are not determined by the employer, the latter sets a very short period within which the employee has to commence work. Even then there is no freedom to choose the location, even without specific determination of the whereabouts. The applicant points out that IC duty constitutes a very significant restriction on his leisure time. In order to comply with the 20-minute time limit, he has to leave his place of residence immediately when alerted, which means that he is unable to pursue any activities that cannot be interrupted. If he leaves his house **[Or. 4]**, he can only pursue activities within close proximity to his vehicle. For example, while on duty, he cannot go jogging or cycling, as he cannot then guarantee complying with the short operational time of 20 minutes. He is also significantly restricted in the choice of leisure activities with his wife and children. For example, trips with the children are not possible, as he would otherwise have to leave them if he were called up on the way. He is therefore severely restricted while on IC duty both as regards the choice of his whereabouts and with regard to the choice of his activity.
- 9 The applicant requests that
 1. the decision of 6 August 2014 in the version of the opposition decision of 2 November 2015 be annulled,

2. it be found that the stand-by duty performed by the applicant as incident commander (IC duty) with the Offenbach fire service is to be regarded as working time and compensated in full,
 3. the defendant be ordered to pay the applicant EUR 27 878.16 gross for the incident commander services performed in the period from 11 October 2013 to 31 December 2015,
 4. it be declared necessary to consult an authorised representative in the preliminary proceedings.
- 10 The defendant requests that
- the action be dismissed.
- 11 The defendant is of the opinion that IC duty does not constitute working time. The applicant is not obliged to be on stand-by at a place determined by the defendant outside the private domain. The time limit of twenty minutes set for reaching the city boundary gives the applicant a reasonable radius within which to move freely, in particular on account of the fact that an operational vehicle is granted special rights when using alarm signals in road traffic. A planning official can be expected to carry out only those activities during on-call duty which can be interrupted without consequences in the event of an operation. There is also a lack of the [Or. 5] regularity of deployment demanded by the Bundesverwaltungsgericht (Federal Administrative Court) for classification as working time.

II.

- 12 The dispute was [...] to be stayed by order of 21 February 2019. A preliminary ruling by the Court of Justice of the European Union is to be obtained pursuant to Article 267 TFEU on the questions set out in the operative part of the order.
- 13 Those questions concern the interpretation of Article 2(1) 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 (OJ 2003 L 299, p. 9).
- 14 The questions referred concerning the interpretation of the directive are relevant to the decision and require clarification by the Court of Justice. [...]

1. Legal context

a) EU law

- 15 Article 2 ('Definitions') of Directive 2003/88 states in points 1 and 2: 'For the purposes of this Directive, the following definitions shall apply:

1. “working time” means 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;
2. “rest period” means any period which is not working time’.

b) German law

- 16 Terminologically, a distinction is made in German law between the concept of stand-by duty, which constitutes working time, and the concept of on-call duty, which does not constitute working time. The term ‘stand-by *time*’ is used below as a neutral term, if no statement is to be implied regarding classification as working time. **[Or. 6]**
- 17 [...].
- 18 [...] [reference to lack of statutory regulation]
- 19 According to the case-law of the Federal Administrative Court, stand-by duty is to be regarded as working time if an official has to be on stand-by at a place determined by the employer outside the private domain for immediate deployment at any time, and experience shows that a service call-out is to be expected [...].
- 20 The [...] Regulation on the organisation, minimum strength and equipment of public fire services of 17 December 2013 [...] specifies in its annex *inter alia*:
- 21 ‘The equipment of level 2 including the necessary personnel is generally to be deployed at the site of operation within 20 minutes of the alert [...]’
- 22 According to a communication by the defendant, the equipment and personnel of level 2 are usually to be alerted first, in order to counter the risk potential of the city of Offenbach.
- 23 The incident command service of the Offenbach fire service is regulated in the Operational Service Order Part 103 of the Offenbach fire service (version of 18 June 2018). This was ordered by the director of the Offenbach fire service [...] in implementation of the content of the **[Or. 7]** time specification of the aforementioned Regulation on the organisation, minimum strength and equipment of public fire services. The Operational Service Order stipulates that, when the incident command service officer is alerted, the officer shall immediately go to the incident scene, exercising special rights and rights of way.
- 24 With regard to the obligations of the incident command service officer while on IC duty, the Operational Service Order states the following details on page 6:
- 25 ‘The incident command service officer shall carry out his duty as an on-call service and has to choose his whereabouts while performing the duty so as to comply with the response time of 20 minutes. This rule shall be deemed to have

been complied with if he observes a travel time of 20 minutes from his whereabouts to the Offenbach am Main city boundary, exercising special rights and rights of way. This time shall apply in the case of average traffic density and normal road and weather conditions.’

2. Admissibility of the request for a preliminary ruling

26 [...]

27 The Court of Justice has already found that activities carried out by the operational crews of a public fire service fall within the scope of Directive 2003/88 (order of 14 July 2005, *Personalrat der Feuerwehr Hamburg*, C-52/04, EU:C:2005:467, paragraph 52).

28 Questions regarding remuneration for stand-by duty are not covered by the scope of Directive 2003/88 (judgment of 21 February 2018, *Matzak*, C-518/15, ECLI:EU:C:2018:82, paragraph 24 with further references).

29 The classification of IC duty as working time within the meaning of Directive 2003/88 is a preliminary question of relevance to the decision for resolving the dispute pending at the referring court. Ordering the defendant to remunerate IC duty, as requested by the applicant with his action, [Or. 8] requires, under national law, that the applicant, in breach of the maximum weekly working time admissible under Directive 2003/88, has performed activities which are to be classified as working time [...]. In that case the applicant would be entitled to time off in lieu or remuneration on the basis of the right to compensation under national civil-service law and possibly also on the basis of a State liability claim under EU law. Therefore, clarification of the question of whether stand-by time is to be regarded as working time is a preliminary question of relevance to the decision in the dispute.

30 Furthermore, the applicant’s further request for a finding that IC duty is working time does not concern possible remuneration, but is aimed at no longer being called into service in excess of the maximum admissible working time under EU law in the future.

3. First question referred

31 By the first question referred, the referring court would like to bring about clarification of the question of whether stand-by time is only to be qualified as working time within the meaning of Directive 2003/88 if the employee has to be present at a place specified by the employer during that time, or whether working time may also exist without such a geographical specification on account of the restriction of the free choice of location or on account of *qualitative* restrictions in respect of the employee’s leisure activities.

- 32 This question has not yet been ruled on by the Court of Justice in its judgments on the interpretation of Article 2 of Directive 2003/88.
- 33 The Court of Justice hitherto took the view that the existence of working time requires that the employee has to be present at a place specified by the employer.
- 34 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 for the worker to be physically present at the place determined by the employer and to be available to the employer in order [Or. 9] to be able to provide the appropriate services immediately in case of need. Those obligations, which make it impossible for the workers concerned to choose the place where they stay during periods of stand-by time, must be regarded as coming within the ambit of the performance of their duties (*Matzak* judgment, *loc. cit.*, paragraph 59 with further references).
- 35 In contrast, according to the case-law of the Court of Justice, a rest period is where the worker performs a stand-by duty according to a stand-by system which requires that the worker be permanently accessible without being required to be present at the place of work. Even if he is at the disposal of his employer, since it must be possible to contact him, in that situation, the worker may manage his time with fewer constraints and pursue his own interests (*Matzak* judgment, *loc. cit.*, paragraph 60).
- 36 With the *Matzak* case (*loc. cit.*), the Court of Justice was called upon for the first time to answer the question of whether stand-by time which an employee spends at home is also to be regarded as working time. The Court of Justice answered that question in the affirmative for a situation in which the employee was subject to the obligation to respond to calls from his employer within eight minutes, which significantly restricts the possibility of pursuing other activities.
- 37 In the present case, the question arises as to whether stand-by time may be regarded as working time even if, although the employee does not have to be present at a place precisely determined by the employer, the employee is significantly restricted in his choice of location and in the opportunities to devote himself to his personal and social interests on account of the other temporal and content-related conditions imposed by the employer.
- 38 In its judgment in the *Matzak* case, the Court of Justice based the classification of stand-by duty as working time on two aspects: firstly on the fact that the employee is obliged to remain present at a place determined by the employer (in that case: at home), and secondly on the constraints on the employee’s opportunities to devote himself to his personal and social interests, resulting from the requirement to reach his place of work within eight minutes (*Matzak* judgment, *loc. cit.*, paragraph 63). [Or. 10]
- 39 The referring court is of the view that the statements made by the Court of Justice in the *Matzak* case do not rule out that stand-by time in which, although the

employer does not stipulate a precise place for the employee to stay, the employee's free choice of location and leisure activities are significantly restricted is also to be regarded as working time in a situation such as the present one.

- 40 The referring court considers its view to be confirmed by the opinion of Advocate General Sharpston in the *Matzak* case (opinion of 26 July 2017, *Matzak*, C-518/15, ECLI:EU:C:2017:619, points 57 and 58). The Advocate General emphasises therein that the statement made by the Court of Justice in its previous case-law that 'a worker's requirement to be present at a place determined by the employer' was the decisive factor for classification as working time should be read with a degree of caution. The quality of the time that a worker enjoys when on stand-by duty as evidenced by his ability to devote himself to his own interests and family was of equal relevance (*Matzak* opinion, point 57). Furthermore, Advocate General Sharpston also appears not to have understood the facts underlying the *Matzak* case to the effect that the firefighter in that case had to stay at home, but that he merely had to guarantee reaching the fire station within eight minutes (see in particular footnote 8 and point 46 of the Opinion).
- 41 The Court of Justice too considers the quality of the time available to the employee not to be irrelevant, when it emphasises in its judgment in the *Matzak* case the importance of the objective constraints on an employee's opportunities to devote himself to his personal and social interests (*Matzak* judgment, *loc. cit.*, paragraph 63; the Court of Justice also takes account of an employee's opportunity to devote himself to his own interests in its order of 4 March 2011, C-258/10, *Grigore*, ECLI:EU:C:2011:122, paragraph 66).
- 42 In the view of the referring court, it is possible, even without an employer specifying that an employee stay at home while on stand-by duty [Or. 11], for working time within the meaning of the Directive to exist if the employer, through a narrow time specification for commencing work, prescribes a geographical presence radius and the employee's opportunities freely to choose his whereabouts and leisure activities are thereby significantly restricted. In a decision, the Bundesarbeitsgericht (Federal Labour Court) assumed that working time is to be assumed in the case of an obligation to commence work within twenty minutes, regardless of the employer's specification of a specific place to stay. It was decisive for the Federal Labour Court that the employee's free choice of place to stay and leisure activities was restricted by the narrow time specification [...].
- 43 In the view of the referring court, it would be unjustified unequal treatment to deny the existence of working time solely on account of the fact that the employer does not specify a precise place to stay, even though, through the obligation to reach a certain place (in this case the Offenbach city boundary) in uniform and with the operational vehicle within twenty minutes, the restrictions on an employee's leisure activities may be of similar intensity as in the case of the specification of a precise place to stay. Mere on-call duty, which does not constitute working time, is, in contrast to working time, characterised by the fact that the employee is free to choose his whereabouts and only has to ensure that he

can start work as soon as possible. If, however, the period within which an employee has to start work is very short, it is no longer possible to speak of a free choice of place to stay even without the employer specifying a precise place to stay. It could also be said that the employer's narrow time specification *indirectly* specifies where the employee stays and the employee is thereby significantly restricted in his individual lifestyle. In that respect, the applicant in the present proceedings described the restrictions set out above under I. with regard to his leisure activities, in particular those with his children.

- 44 The referring court also notes that, for the question of the definition of working time, it is to be taken into consideration that, in view of the digitisation of [Or. 12] work and the possibilities of distance working, the aspect of the employer's specification of a specific place to stay is likely to fade into the background as a characteristic for the definition of working time.

4. Second question referred

- 45 By the second question referred, the referring court would like to know whether, for the classification of periods of stand-by time as working time, the average frequency of call-outs during that time may also play a role.
- 46 In its case-law on the classification of stand-by time as working time, the Federal Administrative Court takes account of the criterion of whether experience shows that a service call-out is to be expected [...]. According thereto, the decisive factor is the frequency of service call-outs during periods of stand-by time that is generally to be expected. If the stand-by time is only interrupted sporadically by operations, this is not working time.
- 47 The criterion of call-out frequency has not as yet played a role in the case-law of the Court of Justice. If the remaining criteria for classification as working time within the meaning of Article 2 of Directive 2003/88 were met, the activity actually performed during stand-by duty was irrelevant (judgment of 3 October 2000, *Simap*, C-303/98, ECLI:EU:2000:528, paragraph 48).
- 48 If the first question referred is answered in the affirmative, the referring court asks the Court of Justice to answer the question of whether and to what extent, for the classification as working time of periods of stand-by time which are to be spent neither at the place of work nor necessarily at home, but which lead to significant restrictions on employees' leisure activities on account of their other aspects, the call-out frequency may play a role in the assessment of the existence of working time, which is not apparent from the previous case-law of the Court of Justice. [Or. 13]

[...]