Case C–742/19

Request for a preliminary ruling

Date lodged:

10 October 2019

Referring court:

Vrhovno sodišče Republike Slovenije (Slovenia)

Date of the decision to refer:

10 September 2019

Applicant:

B. K.

Defendant:

Republic of Slovenia

VRHOVNO SODIŠČE REPUBLIKE SLOVENIJE

DELOVNO-SOCIALNI ODDELEK

(Supreme Court of the Republic of Slovenia

Social and Employment Law Chamber)

…

REQUEST

FOR A PRELIMINARY RULING

Pending before the Vrhovnim sodiščem Republike Slovenije is an action in employment law, brought by **B. K**. … applicant, against **the Republic of Slovenia (the Ministry of Defence)** … defendant,

in which the applicant seeks **remuneration for overtime worked**.

By order … the Vrhovnim sodiščem Republike Slovenije … has stayed the proceedings and decided to request a preliminary ruling of the Court of Justice of the European Union.

I. The proceedings and the arguments of the parties

1. The applicant has brought an action in which he claims that the defendant should remunerate as overtime the hours of stand-by duty he completed at his place of work. Specifically, he seeks payment of the difference, on a monthly basis, between the allowance he received (20% of the hourly rate of his basic pay) for the hours of stand-by duty he completed and the sum corresponding to those hours of stand-by duty calculated at 130% of the hourly rate of his basic pay (that being the rate paid for overtime) for the period between February 2014 and July 2015. The applicant argues that the defendant should count as working time all the hours of stand-by duty he completed at his place of work (on guard duty) and should consequently pay those hours as ordinary working time or as overtime. In support of his action he points out that he was required to be continuously present at his place of work or at some other designated place (in barracks), at his employer's disposal, away from his place of residence and separated from his family.

2. The defendant disputes the applicant's claim. It asserts that it calculated the applicant's remuneration in accordance with the relevant legal provisions. According to those provisions, stand-by duty at the place of work or at some other designated place does not count as working time and consequently, in respect of periods of stand-by duty, the applicant is solely entitled to a stand-by allowance of 20% of the normal hourly rate of pay.

3. By judgment … of 26 September 2016, the court of first instance dismissed the applicant's claim for the calculation of the time he worked in excess of normal working time during the relevant period, expressed as gross amounts, as set out in the operative part of the judgment, the subtraction therefrom of statutory deductions and the payment of the resulting net amounts together with statutory default interest. The court held that the defendant had calculated the applicant's remuneration correctly and in accordance with the national legislation in the defence sector, pursuant to which stand-by duty at the place of work or at some other designated place (on guard duty) does not count as working time. The applicant was therefore entitled, in respect of such periods, solely to an allowance for stand-by duty of 20% of the hourly rate of pay, which, moreover, he had received.

4. By judgment of 4 May 2017, the court of second instance upheld the judgment of the court of first instance and dismissed the applicant's appeal. It held, inter alia, that the national legislation on stand-by duty in the defence sector did not contravene 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, 'Directive 2003/88/EC'). That directive expressly

provided, in Article 1 thereof, that it was not applicable where characteristics peculiar to certain specific public service activities (such as the armed forces or the police) inevitably conflicted with it. Arrangements for stand-by duty in this particular case, in light of particular requirements of public service, such as employment in the Slovenian armed forces, were therefore not inconsistent with Directive 2003/88/EC, given that Article 2[2] of Directive 89/391/EEC was observed. In his appeal, the applicant was mistaken to refer to the judgment of the Court of Justice of the European Union ('the Court of Justice') of 3 October 2000 (C-303/98, EU:C:2000:528), because that case was not comparable to the present case, having regard to the particular features of work in the armed forces and the fact that a different issue arose in that case (it being a case concerning periods of on-call duty completed by employees of certain social security or health-care bodies and in the provision of emergency health care) and because the organisation of working methods in the armed forces was different from the organisation of working methods in such bodies.

5. The applicant applied for to appeal on a point of law against the judgment. The Vrhovno sodišče (Supreme Court of the Republic of Slovenia) granted that application by order … of 20 September 2017, giving leave for appeal on the issue of whether the defendant was required to include the periods of stand-by duty completed by the applicant at his place of work in the number of hours worked weekly or monthly and whether, on that basis, in respect of the time he worked in excess of ordinary working time, it must remunerate the appropriate number of hours of overtime worked, at the rate of 130% of the hourly rate of his basic pay.

6. The applicant brought an appeal in cassation against the final judgment of the court of second instance on the grounds of the incorrect application of substantive law and material breach of procedural rules. In particular, he takes issue with the defendant's failure to treat periods of stand-by duty completed at his place of work as working time and with the fact that, in respect of such periods, it merely paid an allowance of 20% of the hourly rate of his basic pay, even though he had to be continuously present at his place of work and at his employer's disposal. That, he argues, is inconsistent with Directive 2003/88/EC and with the case-law of the Court of Justice on the interpretation of the concept of working time. The work done should be counted as working time and, consequently, remunerated as overtime.

II. The facts

7. The applicant was employed as a non-commissioned officer in the Slovenian army and carried out his duties at the barracks of Slovenska Bistrica. One week (seven days) each month he kept guard at the barracks, 24 hours a day, every day of the week, including Saturday and Sunday. While on guard duty he had to be ready for work and to remain at the defendant's premises at all times. In the event that the military police or an inspection or intervention team came (unannounced), he was required to present himself and to carry out the orders of his hierarchical

superiors. In respect of these periods of guard duty, the defendant paid the applicant his ordinary pay for eight hours of work, treating eight hours as ordinary working time. It did not treat the remaining hours as working time, and instead merely paid the applicant a stand-by duty allowance of 20% of his basic pay. It is not alleged or established that, during the period in question, there were any unusual or unforeseen circumstances or exceptional occurrences of any kind.

III. National legislation

8. In the Republic of Slovenia, the practice of stand-by duty is regulated only in part and not in a uniform manner.

The Zakon o delovnih razmerjih (Slovenian law on employment relationships) (*Uradni list RS*, No 21/2013, 'the ZDR'), which, in the Republic of Slovenia, is the framework law on employment relationships, gives no definition of the concept of readiness for work. On the other hand, in so far as concerns working time, it provides, generally, that working time includes actual working time and break periods, in accordance with Article 154 of the law, and the duration of justified absences from work on the basis of the law and collective agreement or general regulation (Article 142(1) of the ZDR). All of the time during which a worker works, which is to be understood as meaning the period during which the worker is at the disposal of the employer and fulfils his employment obligations under his contract of employment, constitutes actual working time (Article 142(2) of the ZDR).

9. The Zakon o sistemu plač v javnem sektorju (Slovenian law on the system of remuneration in the public sector) (*Uradni list RS*, No 56/02, 'the ZSPJS') governs the system of remuneration of civil servants and public servants (a status also enjoyed by employees in the Slovenian army) in the public sector. Article 23 thereof lists the entitlements to compensation of public servants, which include compensation for time worked during less favourable hours.

Article 32(2) (which governs compensation for time worked during less favourable hours) provides that public servants are entitled to compensation for being on stand-by and that the amount thereof is to be established by collective agreement in the public sector (Article 32(5) of the ZSPJS). The ZSPJS does not, however, give any definition of 'on stand-by'.

10. The collective agreement for the public sector in force during the period at issue (*Uradni list RS*, No 57/2008 *et seq.*, 'the KPJS') established, [1] in Article 46 thereof, that public servants were entitled to compensation for being on stand-by at the rate of 20% of the hourly rate of basic pay (paragraph 1) and that, in the case of public servants, such periods were not counted as working time (paragraph 2). The act providing interpretative guidance on the KPJS (*Uradni list*

[1] […]

RS, No 112-4869/2008) stated, in relation to Article 46, as follows: 'Being on stand-by means that the public servant remains contactable so that he can, if necessary, go to work outside his normal working hours. Stand-by arrangements must be made in writing. The compensation payable for time spent on stand-by must be the same, whether the public servant is on stand-by during the day, at night, on a normal working day, on a Sunday, on a public holiday or on a day recognised by law as a holiday'.

11. The Zakon o obrambi (Slovenian law on defence) (*Uradni list RS*, No 92/94 *et seq.*, 'the ZObr'), which governs, inter alia, the rights and obligations of workers in the defence sector, provides, in Article 96 thereof, that workers who carry out an occupational activity in the defence sector [2] are required, following a decision of their hierarchical superior and in order to meet the needs of the service, to perform their duties under special working conditions (paragraph 1). 'Special working conditions', as referred to in paragraph 1, refers to occupational activities that are performed during a period of work that is less favourable for the employee as well as occupational activities performed under working conditions that are less favourable or which entail additional burdens. Included among these, the law also identifies:

– stand-by duties or readiness for work (Article 96(2)(8) of the ZObr), and

– guard duty (Article 96(2)(10) of the ZObr.

If, during a period of stand-by duty, a worker performs an occupational activity, the actual time spent working is to be regarded as an extension of working time, unless the ZObr otherwise provides (Article 96(3) of the ZObr).

12. Stand-by duty in the army is governed by Article 97e of the ZObr, in accordance with which stand-by duty refers to the period of time during which a worker in the defence sector is required to stand by for work at his place of work or in some other designated place or at home (paragraph 1). Stand-by duty is not counted in the number of hours worked per week or per month. In the event that a worker is required actually to work during a period of stand-by duty, the hours actually worked are to be counted in the number of hours worked per week or per month (paragraph 2). The Ministry is to determine the cases in which, and the manner in which stand-by duty is to take effect at the place of work or in some other designated place or at home. The cases in which, and the manner in which stand-by duty is to take effect in the army are determined by the Chief of the Defence Staff (paragraph 3). Stand-by duty at a designated place is the equivalent of stand-by duty at the place of work (paragraph 4).

[2] Article 5 of the ZObr defines various concepts: an employee for the purposes of this law is a member of military personnel or a civilian who carries on an occupational activity within the armed forces or such other person as performs duties of an administrative or technical nature within the Ministry, such persons being referred to as workers who carry on an occupational activity in the defence sector, workers in the defence sector, or workers (point 14a). A member of military personnel is a person who performs military duties.

13. Also of relevance to the present dispute is the legal regime of guard duty, governed by Article 97c of the ZObr. Article 97c provides that, as a rule, periods of guard duty are to be for 24 hours without interruption (paragraph 1). Military personnel performing guard duty are treated as workers on a split schedule. The hours during which they carry out no actual occupational activity are not counted as working time, but are instead regarded as periods on stand-by at the place of work (paragraph 2). Daily occupational activity on guard duty may not exceed 12 hours. In the event of an emergency, or in order to complete a task already commenced, the working time of military personnel may exceptionally be extended. In such case, however, the hours actually worked in addition to the 12 hours already worked are regarded as hours in excess of ordinary working time (paragraph 3). Guard duty may be performed continuously for up to seven days. Military personnel are entitled to a break period in order to rest at the place in which they perform guard duty, in such a way that 12 hours are regarded as ordinary working time and the remaining 12 hours are regarded as a period on stand-by (paragraph 4).

14. In so far as concerns working time and remuneration, the ZObr thus equates stand-by duty at the place of work or in some other designated place (when the worker must be present at the place of work and put himself at his employer's disposal for work) with standing by at home (when the worker remains at his home on stand-by). The court regards that as inconsistent with Directive 2003/88/EC and the case-law of the Court of Justice. [3]

IV. The application of Directive 2003/88/EC and the first question referred for a preliminary ruling

15. In accordance with Article 1(3) of Directive 2003/88/EC, that directive applies to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Articles 14, 17, 18 and 19 of the directive. The scope of Directive 2003/88/EC is thus partly linked to the scope of Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. Article 2(2) of Directive 89/391/EEC provides that that directive does not apply where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

16. According to the case-law of the Court of Justice, the derogation laid down in the Article 2 of the directive on safety at work was adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases, such as a catastrophe, the gravity and scale of which are exceptional and in which it is not possible to plan the working time of

[3] […]

teams of emergency workers. [4] That is so in the case of natural or technological disasters, attacks, serious accidents or similar events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large. In such cases, the need to preserve the safety and health of the community at large must temporarily prevail over the aim of those directives, which is to guarantee the health and safety of workers.[5]

17. Nor does Article 14 of Directive 2003/88/EC suggest that the directive does not apply to military personnel or workers in the defence sector. Over and above the derogation mentioned above, Chapter 5 of Directive 2003/88/EC (Articles 17 to 19) permit certain derogations from the directive's provisions. However, these derogations may be made only from Article 3 (daily rest), Article 4 (breaks), Article 5 (weekly rest period), Article 8 (length of night work) and Article 16 (reference periods for determining the weekly rest period, the maximum weekly working time and the length of night work). According to the case-law of the Court of Justice, these exceptions do not allow derogation from the definitions of 'working time' and 'rest period' given in Article 2 of the directive.[6]

18. In the present case, the applicant was carrying out his normal work, that is to say performing guard duty in peace time. He did this work regularly (every month) in such a way as to be continuously present at his place of work (his barracks) for periods of one week. His case does not involve exceptional duties or circumstances such as might make it impossible to organise his working time in advance.

19. However, it is not clear from the existing case-law of the Court of Justice whether, in light of Article 1 of Directive 2003/88/EC (read together with Directive 89/391/EEC), Article 2 of the directive applies to workers who (regard being had to the wording of Slovenian law, namely the ZObr) are employed in the defence sector or to military personnel in peace time.

With regard to this issue, the court therefore refers to the Court of Justice the following question for a preliminary ruling:

'Does Article 2 of Directive 2003/88/EC apply even to workers employed in the defence sector and to military personnel who perform guard duty in peace time?'

4 See the judgment of the Court of Justice of 5 October 2004 (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 50 to 57).

5 See the order of the Court of Justice of 14 July 2005 (C-151/02, EU:C:2005:467, paragraphs 45 to 55)

6 See the judgment of the Court of Justice of 9 September 2003 (C-151/02, EU:C:2003:437, paragraph 91).

V. The concepts of ‘working time’ and ‘on stand-by’ in the existing case-law of the Court of Justice

20. In addition, there arises the issue of working time in connection with the various forms of being on stand-by, which, in the present case, takes the form of being on stand-by duty in a barracks.

21. Directive 2003/88/EC defines, inter alia, in Article 1(2), the concept of ‘working time’ as 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, and, in Article 2(2) ‘rest period’ as any period which is not working time.

22. The question of what working time is has been addressed by the Court of Justice, in particular, in *SIMAP* (C-303/98), *Jaeger* (C-151/02) and *Dellas* (C-14/04). It has held that the time spent by workers on call or on stand-by is to be regarded in its entirety as working time within the meaning of the directive if they are required to be present at the workplace, and that, by contrast, where workers must be reachable at all times but are not required to remain at a place determined by the employer, only the time linked to the actual provision of services must be regarded as working time. [7]

23. In the cases cited, the Court of Justice has pointed out, in particular, that workers who are required to be present at their place of work or at some other place designated by their employer are subject to appreciably greater constraints, since they have to remain apart from their families and social environment and have less freedom to manage the time during which their professional services are not required. Under those conditions an employee who is available at the place determined by the employer cannot be regarded as being at rest during the periods of his stand-by duty when he is not actually carrying on any professional activity. [8] It has also pointed out that to exclude from ‘working time’ time spent on call where physical presence is required would seriously undermine the objective of Directive 93/104/EC, which is to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks. [9] The Court has also held that on-call duty performed by a worker where he is required to be physically present on the employer’s premises must be regarded in its entirety as working time within the meaning of the directive, regardless of the

7 Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (2017/C/165/01) of [24] May 2017.

8 See the judgment of the Court of Justice of 9 September 2003 (C-151/02, EU:C:2003:437, paragraph 65).

9 See the judgment of the Court of Justice of 3 October 2000 (C-303/98, EU:C:2000:528, paragraph 49).

work actually done by the person concerned during that on-call duty. [10] The fact that a room may be made available to workers so that they may rest or sleep during the periods when their services are not required is irrelevant. Such periods of inactivity are inherent in on-call duty, the decisive factor being that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. [11]

24. On the other hand, workers who must be contactable at all times but are not required to remain in a place determined by their employer are able to manage their time with fewer constraints and to pursue their own interests. In such a case, only the time linked to the actual provision of services, including the time spent in getting to the place where those services are provided, must be regarded as working time within the meaning of the directive. [12] The Court has also held, in *Matzak* (C-518/15), that Article 2 of Directive 2003/88 must be interpreted as meaning that stand-by time which a worker (a firefighter) spends at home while under a duty to respond to calls from his employer within eight minutes, which very significantly restricts the opportunity of having other activities, must be regarded as 'working time'.

25. According to the case-law of the Court of Justice, therefore, in determining whether stand-by duty must be included as working time, it is essential to establish, first and foremost, whether the employee is standing by at his place or work or at some other place designated by his employer (in which case it will be included as working time) or whether, by contrast, the employee is standing by at home, in which case it will not be included as working time, except in exceptional circumstances.

26. In the present case, during the period of his guard duty (which his employer classified as stand-by duty), the applicant remained physically present at his place of work (the barracks) and at his employer's disposal for work. However, the time he thus spent was not treated as working time. Thus, the question arises of whether such an arrangement is consistent with Directive 2003/88/EC.

27. In particular, the following provisions appear to be inconsistent: Article 97c(2) of the ZObr (in accordance with which time spent on guard duty but during which workers carry out no actual occupational activity are not counted as working time and are instead regarded as periods on stand-by at the place of work), Article 97c(4) of the ZObr (in accordance with which military personnel are

[10] See the judgment of the Court of Justice of 1 December 2005 (C-14/04, EU:C:2005:728, paragraphs 46 and 47).

[11] See the judgment of the Court of Justice of 9 September 2003 (C-151/02, EU:C:2003:437, paragraphs 60 to 64).

[12] See the judgment of the Court of Justice of 3 October 2000 (C-303/98, EU:C:2000:528, paragraph 50).

entitled to a break period in order to rest at the place in which they perform guard duty, in such a way that 12 hours are regarded as ordinary working time and the remaining 12 hours are regarded as a period on stand-by), Article 97e(1) of the ZObr (in accordance with which standing by at home is the equivalent of standing by at the place of work or in some other designated place), read in conjunction with Article 97e(2) of the ZObr (in accordance with which stand-by duty is not counted in the number of hours worked per week or per month).

VI. The reasons for the referral of the second question for a preliminary ruling

28. The issue of the rules governing the arrangements for stand-by duty in the armed forces of the Republic of Slovenia (and also in the police force and for public servants) has already been examined by the European Commission. That is clear, for example, from its Report to the European Parliament, the Council and the European Economic and Social Committee of the European Union of 21 December 2010 and from its Detailed Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time of 26 April 2017. [13]

29. The direct application of Directive 2003/88/EC is not possible in this particular case. In principle, the provisions of a directive take effect for the benefit of individuals pursuant to implementing acts adopted by the Member States. However, that does not rule out the possibility that individuals may rely, as against the State, on obligations imposed on the State by a directive, albeit such obligations must, from a substantive point of view, be unconditional and sufficiently precise to give rise to specific rights which the individual may invoke against the State. The provisions of Article 2 of Directive 2003/88/EC cannot be regarded, from a substantive point of view, as being unconditional and sufficiently clear to confer specific rights on the applicant, since they merely contain a general definition of working time. This court therefore considers that it cannot apply Article 2 directly.

30. In view of the matters described, there is, in the army (and the police force and the public sector, given the provisions of the KPJS) in the Republic of Slovenia, systemic difficulty in the interpretation and application of Directive 2003/88/EC and the concept of ‘working time’, in particular with regard to time spent on stand-by. This court therefore finds itself unable to apply the Slovenian legislation, regarding it as inconsistent with EU law (Directive 2003/88/EC). At the same time, however, in the opinion of this court, Article 2 of the directive does not have direct effect. In any event, in giving its ruling in this particular case (and there are many other similar disputes), this court would wish to apply EU law, that is to say Directive 2003/88/EC, and for that reason it requests the interpretative

13 https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:52017SC0204. See Chapter III [C], On-call time.

guidance of the Court of Justice, referring to it the following question for a preliminary ruling:

‘Do the provisions of Article 2 of Directive 2003/88/EC preclude national legislation pursuant to which time spent by workers in the defence sector at their place of work or at some other designated place (but not at home) on stand-by, and time during which military personnel in the defence sector performing guard duty are physically present in barracks but not actually working, is not counted as “working time”?’

The court therefore requests the Court of Justice to give a preliminary ruling on the following questions:

Does Article 2 of Directive 2003/88/EC apply even to workers employed in the defence sector and to military personnel who perform guard duty in peace time?

Do the provisions of Article 2 of Directive 2003/88/EC preclude national legislation pursuant to which time spent by workers in the defence sector at their place of work or at some other designated place (but not at home) on stand-by, and time during which military personnel in the defence sector performing guard duty are physically present in barracks but not actually working, is not counted as ‘working time’?

…